TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1057282

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
COMMISSIONER LEE

AM2017/40

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2017/40)
Hair and Beauty Industry Award 2010

Melbourne

9.33 AM, THURSDAY, 5 SEPTEMBER 2019

Continued from 27/08/2019

PN1401

VICE PRESIDENT CATANZARITI: Any last minute housekeeping before we hear the submissions? Mr Dowling?

PN1402

MR DOWLING: None from me, your Honour. You might recall, at the conclusion of Ms Gedney's evidence we requested that she provide some payslips to us.

PN1403

VICE PRESIDENT CATANZARITI: Yes.

PN1404

MR DOWLING: She did provide those this week. I provided a copy of our learned friends yesterday. Can I hand a copy to the Bench, please? Can I just explain, we've tried to be environmentally friendly and done it double sided, but there are two payslips.

PN1405

You might recall Ms Gedney gave evidence that very shortly before her evidence she had changed from 26.25 hours to 28.25 hours. So what she has provided, on the first page, if the Bench is looking at the page with GO5 Marketown Shopping Centre, on the top left-hand corner, it's her payslip for the period 1 July 2019 to 7 July '19, when she was working 26.25 hours and on the other side of the page the payslip for the period 26 August to 1 September 2019, when she was working 28.25 hours. In my submission it's consistent with the evidence that she gave.

PN1406

Unless there are any questions about that, I seek to tender those two payslips.

PN1407

VICE PRESIDENT CATANZARITI: Yes, that will be exhibit K.

EXHIBIT #K TWO PAYSLIPS PROVIDED BY CARRIE GEDNEY

PN1408

MR DOWLING: Thank you, your Honour, there's no further housekeeping matters from us.

PN1409

VICE PRESIDENT CATANZARITI: Thank you.

PN1410

MR FERGUSON: Just one from myself. Just minutes before the commencement of proceedings we were handed a 65 page document that was described as an outline of closing submissions, but it looks to be just a comprehensive set of written submissions. Obviously in the minutes we've had we've not been able to grapple with the full detail of this. The directions didn't contemplate any filing of further submissions.

PN1411

I won't wish to be unnecessarily obstructive if counsel is just going to speak to this, but the difficulty we're placed in is it may well be that this material now traverses well beyond the arguments canvassed in the written submissions that were on. It certainly includes details of calculations and so forth, but I'm just envisaging we may be struggling to deal with today.

PN1412

VICE PRESIDENT CATANZARITI: I'll give you the opportunity to put in a written report if the - - -

PN1413

MR FERGUSON: If it comes to that.

PN1414

VICE PRESIDENT CATANZARITI: Yes. You let us know, at the end of the hearing, whether that's what you require.

PN1415

MR FERGUSON: Yes, thank you.

PN1416

VICE PRESIDENT CATANZARITI: All right, Mr Ferguson?

PN1417

MR FERGUSON: Thank you. HABA has filed two sets of submissions, in the context of these proceedings. The first submission was dated 14 March 2018 and the second submission, in reply, was dated 18 August 2018.

PN1418

The directions relating to this matter required the filing of comprehensive submissions. Now, consistent with that approach, we've set out our arguments in support for those variations to the award in detail, in our written material.

PN1419

Accordingly, I don't intend today to traverse the full detail of that material, nor do I intend to demur from what we've put in that material that's been filed, in my oral submissions today.

PN1420

What I will do, beyond dealing with any questions that the Bench might have, is, firstly, emphasise some of the key points in our submissions, and I'll do that by reference to the submissions as I go. Then, perhaps more significantly, deal, to a greater extent, with the key elements of the evidentiary cases advanced on behalf of both HABA and the unions. Firstly, I intend to address the proposed variation advanced and the nature of these proceedings, briefly.

PN1421

Now, in terms of the claim, HABA's proposed variations to the Sunday and public holiday penalty rates that are set out at paragraphs 11 of our March submissions, firstly, what we're seeking is to reduce the Sunday penalty rate from 200 per cent

to 150 per cent. Secondly, it's seeking to vary the current public holiday penalty rate from double time and a half to 225 per cent.

PN1422

Now, what it's proposing is that these penalty rates apply uniformly to all types of employees, in the same manner that the current penalty rates regime applies, so there's not a differentiation in relation to casual employees through the addition of the casual loading.

PN1423

Now, in terms of context, the proposed variations are advanced in the context of the four yearly review, as you know, and against the backdrop of the broader penalty rates proceedings.

PN1424

I'm aware that members of this Full Bench were all part of the five member Full Bench that handed down the 2017 penalty rates decision and are also involved in other award review proceedings. Accordingly, members are undoubtedly familiar with decision relating to the nature of the review, I don't intend to traverse all of that ground.

PN1425

I do want to emphasise one point, and that's that the nature of the task before the Commission in this review is distinct and different, we say, from that of the Commission in traditional inter parte proceedings, proceedings that might involve, for example, a party advancing a specific application to vary an award.

PN1426

Now, at paragraph 36 of the 2017 penalty rates decision the Full Bench distinctly described the task before the Commission in this review. Now, I won't take you to the decision, but I'll read that extract. The Commission there said:

PN1427

The Commission's task in the review is to decide whether a particular modern award achieved 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 a modern awards objective.

PN1428

And it references section 138.

PN1429

Now, dealing more specifically with the matters before this Full Bench, we say that the key issue for consideration is whether the current penalty rates provisions, within the Hair and Beauty Industry Award are consistent with the achievements of the modern awards objective, or whether they need to be varied.

PN1430

Now, we say that if the Bench forms the view that they are not consistent with that objective, it needed to consider whether HABA's proposed variation is necessary or whether some other change is warranted.

PN1431

In that regard we accept that the Commission is not bound to only grant a variation to the terms sought, however it's HABA's contention that it's proposed changes are the changes that are necessary, in the sense contemplated by section 138.

PN1432

That then takes me more squarely to the context of the penalty rates decision, the 2017 penalty rates decision, because we're not advancing this case in a (indistinct) vacuum, as it were, rather then changes have been sought in light of that penalty rates decision and, more specifically, the invitation from the Commission to assist it in the conduct of the review by acting as a proponent of a claim.

PN1433

Now, the Full Bench, in the context of that 2017 decision, already observed that the rates in the Hair and Beauty Industry Award appear to require review. That was the catalyst for HABA's re-engagement with these proceedings.

PN1434

In that context I just want to read paragraphs 258 to 262 of that decision and, for convenience, they're set out, in paragraph 96 of the March decision, if the Full Bench has that to hand. I note that's on page 43. We seem to have another paragraph 96 on page 44.

PN1435

The Full Bench there said:

PN1436

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.

PN1437

In correspondence, dated 14 September 2016, ABI stated that it's claim, in respect of this award, was no longer pressed. The weekend penalty rates in the Hair and Beauty Award 2010 are set out below.

PN1438

Now, the decision there sets out, in table form, the current rates and you can see that for both casual and permanent employees the rate for a Sunday are 200 per cent.

PN1439

The Bench then goes on to say:

PN1440

The existing rates appear to raise issues about the level of the Sunday penalty rate and the penalty rates applicable to casual employees. It is appropriate that these rates be reviewed.

PN1441

There would be significant practical impediments to the Commission acting on it's 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 appropriate canvassed and since we seek expressions of interest from employer organisations prepared to take on the proponent role.

PN1442

And I don't need to read further.

PN1443

Now, in light of that invitation, as I say, HABA has sought to assist the Commission to overcome the aforementioned practical impediments by acting as a proponent of a claim. It is, as I'm sure the Commission will appreciate, nonetheless, a significant undertaking for an industry association, such as HABA, to mount a case of the nature advanced in these proceedings.

PN1444

There are, to be blunt, limited resources available to an organisation such as HABA, and that context places limitation on what material can feasibly be bought, in the context of these proceedings.

PN1445

Now, that situation is rendered even more difficult in the context of an industry such as this, which is comprised mainly of small employers, for whom time away from their business and involvement in proceedings such as these, is, inevitably, very daunting.

PN1446

VICE PRESIDENT CATANZARITI: Well, you never put that proposition, that there was a difficulty doing that. I mean the Commission, of course, if you had said, 'We need to sit out of hours et cetera', and that was an impediment to the way you ran your case, would entertain such an application.

PN1447

MR FERGUSON: I'm not saying we were necessarily cognisant of that proposition, but, in truth, the impediment and those involved dealing with employees in these sorts of industry cases, it is difficult because it's not only time before the Commission, it is, inevitably, the time involved in preparing material and so forth.

PN1448

Look, the practical reality is, when you're talking to small businesses, employers working in a salon, often on the tools, as such, who are not involved in these sorts of proceedings it is, inevitably and always, very difficult to try and get people - and they feel passionately about it, of course - - -

PN1449

VICE PRESIDENT CATANZARITI: Yes, but it's small businesses who are seeking a variation to what is for their benefit, on one view, and you then choose how many of those sort of people wish to give evidence. And, as we understand the evidence, HABA has around 900 potential persons, you choose who you wish

to call. There are other employers in the industry who chose not to - other employer groups who chose not to participate. So the Commission is left with whatever evidence is ultimately called by the proponent.

PN1450

MR FERGUSON: Look, it is, and I suppose the difficulty is - it is what it is. In all of these industry cases it is notoriously difficult to get people to act as volunteers. This is not the same as a party/party proceeding, where people willingly stick their head above the parapet it is, of course, we would say, to the benefit of those employers to come forward and assist, we wish they would. But I've been appearing in numerous award review cases, since back to 2012, and it's a perennial problem that people are reluctant to appear in front of these proceedings. At times there are deficiencies in cases that are mounted. I'm not saying that is the case here, and I don't wish to take it further.

PN1451

DEPUTY PRESIDENT ASBURY: Well, going back further, Mr Ferguson, I can remember cases like the termination change and redundancy case, where there were sittings held in Queensland because it was such a burning issue and the NTIA, in those days, was trying to convince small businesses not to march into the hearing room, one of them brandishing a broom, as I recollect. What relevance that had, I don't know. But if this was a burning issue for these small businesses, such that it's going to make a material difference to the operation of their businesses to open on Sundays and they can't, because of the penalty rates, I would have expected they'd be prepared to come and tell us all about it.

PN1452

MR FERGUSON: I can only submit that I assure you people's reluctance to participate in these proceedings is not, in any way, an indication that they're not passionate about the outcome or that it's not important to them. I appreciate what's been put about it on some matters, and I've been involved in some matters where some industry's employers are of that nature. This is an industry that is, by it's nature, small and employers aren't often that familiar with this process.

PN1453

VICE PRESIDENT CATANZARITI: Well, it's not small, it's 22,000-odd businesses, you've got 900 of them.

PN1454

MR FERGUSON: No, I withdraw that. I mean it's typically made up of small employers.

PN1455

Look, it is what it is, in a sense. We say that we have advanced a sufficient case. Of course, we didn't know it would come to this. We advanced, initially, some eight employers and in the course of the proceedings some have withdrawn. It is a frustration. They were passionate about it, but it is difficult. We see this, in other cases, happen on both the employee side and employer side. Lee C would be familiar with another case involving a number of employee witnesses that withdrew because they didn't want to be publically known.

PN1456

Another issue we grapple with here, this is a high profile case, there's been all sorts of media attention to it, protests and so forth, people are reluctant in that context to be publically part of these proceedings. But it is what it is. It's the Commission's review, of course. We've sought to advance as much evidence as we can to assist it.

PN1457

DEPUTY PRESIDENT ASBURY: I didn't think we had a protest. I thought we were going to get one but we didn't have one.

PN1458

MR FERGUSON: I think the rain, from what I'm told, muted it somewhat, but that there were people cutting hair or something and so forth. It is what it is. It was scheduled to go, I'm told. Anyway, it is a high profile case and it is something that caused a bit of concern.

PN1459

Nonetheless, the task is still for the Commission, we say, to look at the rates and decide whether or not they do meet the modern awards objective. We're simply trying to assist in that regard, the Commission having already identified that they appear to require review.

PN1460

As I say, we say HABA has, nonetheless, advanced a robust case. That has three elements. The first it's advanced detailed and well-reasoned submissions, referencing relevant documentary material in support of the claim and that engaged with the statutory framework so as to set out cogent reasons for the changes that we proposed.

PN1461

We also have advanced lay evidence from employers in the industry, and that does provide industry-specific context, which reinforces our contentions, regarding the relevance of key findings in the 2017 penalty rates case, which I'll come to.

PN1462

VICE PRESIDENT CATANZARITI: Just before you do, you say you had trouble with evidence of people you're calling to volunteer, the one document that you did put in was the employer survey, which seemed to suffer from a whole lot of deficiencies. Surely that wouldn't cause people to be embarrassed and even the nature of the questions wasn't specific enough. What's going to be your answer to that. If you look at the main penalty rates case, we had much better material in the survey form.

PN1463

MR FERGUSON: I think in the main penalty rates case, and I can't speak to the nature of all of the surveys that were conducted, some of the surveys are - expert assistance from survey companies and so forth was obtained to conduct that. There are resource constraints, as I've alluded to, which made some of that, from

HABA's perspective, the one, as I understand, the registered employer association representative (indistinct) beyond what could be advanced.

PN1464

Look, it's done what any associations have done, in a multitude of cases that we've seen in this review, it's undertaken a survey of its members and it's asked them what they - - -

PN1465

VICE PRESIDENT CATANZARITI: I wasn't focusing on the fact that it was only a cohort of 900 here, I'm talking about the quality of the questions doesn't actually assist the Bench, and that's an anonymous survey, in one sense. We don't design the surveys. But if you're trying to advance an argument for reduction in penalty rates, it's sadly lacking in the questions that were asked in the survey.

PN1466

MR FERGUSON: I'll come to the survey in a little more detail. But, on that point, part of what we have done there, for example, is to simply open - to indicate - ask an open-ended question about the impacts that employers perceive that the variation would have on their businesses. Now, that's been squarely directed to try to ascertain employer's perceptions around this sort of issue because we will say that that is a very important consideration, in support of our claim.

PN1467

Now, this is the same approach that was taken, for example, in the context of the annual leave cases earlier in this review where, yes, we ask quantitative questions but we also just ask open-ended quantitative questions which - let's really - the views of the membership of employers in the industry be put before the Commission in an unfiltered way, which then gives you a clear picture of what - a clearer picture of what the people in the industry are thinking would be possible to us advancing more individual lay witnesses. It is simply an attempt to assist, as best as HABA can, in this review.

PN1468

Of course, if there is some concern about, and I'll come back to this later, the sufficiency of the survey evidence, in a sense that it leads to an outcome whereby there is an insufficient weight of material for the Commission to make a decision as to whether or not the current regime is satisfactory. Another course of action open to it is the Commission itself to conduct a survey.

PN1469

Now, I don't say that lightly and it's not novel. The President presided over that exact course of action, in relation to a raft of claims advanced by unions, in the SHADs Award, and Lee C was involved in that proceeding.

PN1470

Now there, there was a paucity of material advanced by the parties, an entirely unsatisfactory situation on one view. What the Commission did was require that survey that it constructed, in consultation with the parties, be undertaken for a raft of different organisations who were, in effect, compelled to cooperate with this sort of situation.

PN1471

Now, that course of action is open to this Commission and it's not inappropriate. It is, ultimately, the Commission's review, and I say this with the greatest respect, HABA has done what it can do, it's surveyed its members. Others haven't participated. I don't think, for a second, based on my understanding, that that is because of a lack of support by their membership for the outcome, it is often one of resources. This is not an easy process to undertake for associations representing often small employers with limited resources. But I say that in the sense that that course is available if the evidence doesn't weigh against the client.

PN1472

It would be different if there was an evidentiary case or even an logical case mounted against this proposition we're advancing, but as I'll come to that, it's not really what we're facing. The view is just at it's highest, in some respects, but there's just not enough there. We say that that shouldn't mean that the Commission just lets the existing unsatisfactory award terms continue. I'm digressing beyond the questions at this point.

PN1473

As I said, HABA's advanced detailed, well-reasoned submissions, they engage with the framework carefully and they set out cogent arguments to support the variation, merit based arguments. It's advanced relevant lay evidence from employers in the industry, to the extent that it could feasibly do. That evidence provides industry-specific context, it reinforces our contentions regarding the relevance of particular findings from the 2017 penalty rates case. Then, finally, we've talked about already, it's sought to advance survey evidence to further assist.

PN1474

Now, I'll expand on each of those elements of the case but, firstly, I want to deal with the key arguments we've advanced in our written submissions. As I said, I'll do that by reference to our March - primarily by reference to our March submissions, if the Bench have that to hand.

PN1475

Now, the first five or six pages of that submission we deal primarily with preliminary issues that I won't take you through. Then, at paragraphs 13 to 18, we deal with the Commission's approach to the review and the statutory framework. I don't think that material is contentious so I won't dwell on it further.

PN1476

Then, at paragraphs 20 to 36, we sought to address the prior consideration of penalty rates, the current penalty rates regime contained in the award, from the award modernisation process through to the commencement of the four yearly review. Now, this includes consideration of two previous applications to alter the penalty rates in the award, one advanced under schedule 5 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 and then a subsequent claim, in the two yearly review, that sought to abolish Saturday, Sunday and public holiday rates.

PN1477

There's been some contest with the unions as to our treatment of such decisions so there's further attention paid to that material, in paragraphs 28 to 40 of our reply submissions. Look, the short point is this, we say that none of those previous decisions represent a barrier to the Commission reconsidering and varying the current penalty rates regime in this award.

PN1478

Put simply, all of those previous decisions were issued in the context of different statutory regimes, be it the part 10 award modernisation process, the transitional legislation dealing with the implementation of modern awards, or the two yearly award review.

PN1479

In each instance either the claim or the cases advanced were very different to what is now being advanced. We say that there's never previously been the level of analysis or attention paid to this relevant issue, or the same level of evidence adduced in relation to this issue, as has occurred through the 2017 penalty rates decision, and associated proceedings, or these current proceedings. Now, we say that these represent cogent reasons for not adopting the approach that was taken in any of these previous decisions.

PN1480

Now, it takes me to chapter F, paragraphs 37 to 49 of our submissions, our March submissions. We there identify the key findings and conclusions reached by the Full Bench in the 2017 penalty rates decision that was ay support the proposed variations.

PN1481

I'll refer to these in a moment, further, but the reason we do this is we've made no bones about the fact that in advancing our case we rely heavily on the reasoning and findings of that 2017 decision, in support of the proposed variations.

PN1482

Now, what we've sought to do, through our case, is set out industry-specific context that reinforces the relevance of those findings to the Hair and Beauty Industry and, to some extent, highlights additional justifications for the claim.

PN1483

We contend that this approach appears to be what was contemplated, by the Full Bench, in the previously quoted elements of the 2017 decision and I note, in this regard, the Full Bench made reference to impediments it faced in obtaining lay evidence in those proceedings.

PN1484

It doesn't appear to have expected or contemplated an expectation that proponents of a claim would necessarily need to mount a case involving - deducing fresh expert evidence, in relation to a proposed variation. I say that, in expectation that that criticism will be made against us, that we've not advanced further expert evidence.

PN1485

Nonetheless, that brings me to what we say are the key findings from the 2017 decision that support the proposed changes now. In short, they are as follows. Firstly, that deterrence is no longer a relevant consideration in setting penalty rates.

PN1486

Secondly, that the extent of disutility associated with working on Sundays is much less than in times past.

PN1487

Thirdly, that the disutility associated with working on public holidays has been somewhat ameliorated by introduction of the statutory right to refuse work on reasonable grounds.

PN1488

Fourthly, that there is likely to be some positive employment impacts from reducing penalty rates.

PN1489

Fifthly, that the expectations of consumers to access services in the hospitality, entertainment, retail, restaurants and café industries, which includes the hair and beauty industries as covered by the award, on the weekend is a distinguishing feature which is relevant to the setting of Sunday penalty rates.

PN1490

Sixthly, that the aforementioned consumer expectations have developed over time and, as such, represent a material change. Now, in that regard, we say the point is particularly relevant to employers covered by the Hair and Beauty Award, because such employers often operate in similar trading environments to the retail sector more broadly. This is, of course, for the case of employers operating in shopping centres which, we say, is an increasingly common occurrence in the hair and beauty industry.

PN1491

Seventhly, weekend work is more prevalent amongst employers and employees as a result of points five and six.

PN1492

The eighth finding is that the notion of relative disutility supports a proportionate approach to the fixation of weekend and public holiday penalty rates.

PN1493

What falls from that point, we say, is that if the Commission reduces Sunday penalty rates the public holiday penalty rate should also be reduced to maintain proportionality. Now, that is, in part, the reason that we proposed a variation to pubic holiday penalty rates, under the Hair and Beauty Industry Award, even though the 2017 decision did not go so far as to identify that these rates appear to require review. It is, as I said, in part, something that we say would be a consequently justified variation.

PN1494

The ninth finding is the greater consistency, in short, a uniformity of penalty rates is a relevant consideration. Now, that final point, we'd say, look it would be very anomalous and we'd say unjustifiable if the penalty rates applicable to the broader retail and hospitality sectors were all significantly lower than the rates applicable to the hair and beauty industry, going forward.

PN1495

Now, we, of course, accept that there may be different permutation of award terms, in the context of different awards. They can be said to be necessary in the context of different industries, based on the different characteristics of employers and employees in such sectors, however, there's no legitimate reason for maintaining the penalty rate obligations for the hair and beauty industry employers at a level that exceeds that applicable to other employers operating in different trading environments.

PN1496

I mean the short point is, we just don't see what characteristics there are of the employers or these industries which warrant this different approach being taken. On its face, we say there's merit in addressing the current regime.

PN1497

COMMISSIONER LEE: It's hard to reconcile that submission with what was said previously, which is pointed out by the unions at paragraph 96 of their submissions, that HABA submitted around that time that the hairdressing industry is clearly discrete from the retail industry. Hair and beauty salons should be recognised as one industry and is clearly discrete from the retain industry in generally.

PN1498

MR FERGUSON: I must say, firstly, I don't know that there's any reason why a party can't change their views, in relation to such matters. Obviously there we were dealing with the overarching question of whether there should be a discrete award, as opposed to it just being rolled into the broader award generally. We weren't dealing with the more specific and focused penalty rates issue that we are dealing with now.

PN1499

COMMISSIONER LEE: You can change your view, but it raises the question, on what basis are you changing your view? What's different, other than perhaps the - your opponents, no doubt, would say it suits you to argue the contrary this time.

PN1500

MR FERGUSON: I don't have instructions as to everything that informed the view that was advanced way back then. I'm not sure that the personnel are even the same, in all candour. I think what is perhaps more important than the views of some party, given that these aren't the parties instruments anymore, we're reminded of that often in these proceedings, is that what are the defining characteristics of this industry employees in the sector, that warrant a significantly more expensive penalty rates regime for hairdressers, when they're operating alongside other retail businesses, in the similar sort of shopping centres, that have just got relief? As we say, that are competing, in some ways, at least to some

extent, with those businesses. We just can't see the justification and none of them made out, we would say, by the unions.

PN1501

My friend's saying it's my job to make it out, well, the point we're advancing is the submission that there is no difference. If someone says there is one, point to it. And absent that, we can't say that the same status quo just can't maintain.

PN1502

Now, the other point I'd make, as I said to you, we're talking about the very specific issue of penalty rates, not the whole issue of whether an entire award should be rolled into the retail sector. There are a whole range of industry-specific clauses in the award that might not be relevant to the hair dressing industry but would be relevant to the retail award.

PN1503

We're dealing with different issues, is the short point. We're dealing with just the narrow point of penalty rates. Back in the award modernisation we were dealing with what single awards should look like.

PN1504

DEPUTY PRESIDENT ASBURY: If we're talking about consistency, then where is the consistency? The skills profile of the workforce is different, the products and services are different. There's - surely it's quite simple to point to the distinctions in this industry sector. The beauty part of it is providing professional services, where you need a diploma, and I think that emerged very strongly from the evidence, 'We don't just let anybody loose on our clients with hot wax or electrical instruments', et cetera. So where is it similar to the retail industry?

PN1505

MR FERGUSON: Well, what we've done, and I'll come to some of that, and we've set out similarities. But we've pointed to certain specific characteristics of the industries that are similar to the other sectors, which reinforce the underlying finding for penalty rates decision, and justified variations. So we talk about, for example, the prominence and the growth of retail trading on Saturdays. The fact that they sit in the same trading environment and they are under competitive pressure to open on a Sunday and that there are likely to be improvements in employment because of that change in context.

PN1506

We pointed to characteristics which are relevant to setting penalty rates, as the criteria that is similar. What we haven't done is just pick some way that we think this industry might be different to the retail sector, with no relevance to any of the underlying arguments.

PN1507

Now, we will come to the point about qualifications, but the short point there is, well, in the other awards that were varied there are raft of trade qualified persons who have had their penalties cut, and I will go through some of them. There is no differentiation, I don't understand why suddenly hairdressers are special and that

their penalty rates can't be reduced, we say modestly, because they're trade qualified.

PN1508

Lots of trade qualified, even degree qualified people in some of the other awards, had their penalty rates reduced, no issue was taken, and rightly so. We just can't see the connection between skills qualifications and penalty rates. No effort has been made to explain that point, the evidence just says they're different. It doesn't say why that matters, and the submissions don't either, and I assume that that's not going to change now.

PN1509

DEPUTY PRESIDENT ASBURY: But if you're talking about the retail environment, we had evidence from those who operate in, for want of a better term, shopping centres, but where was the evidence from those who don't? Those establishments in the sector who don't operate in shopping centres and that they would do anything differently, if there were a reduction in Sunday penalty rates?

PN1510

MR FERGUSON: Under hairdressing industry?

PN1511

DEPUTY PRESIDENT ASBURY: Yes.

PN1512

MR FERGUSON: Yes. And I think, ultimately, as the evidence was advanced, and I can't recall the ones that were obtained were in shopping centres. Now, we don't hide from that, it is part of the reason people were screaming, frankly, about this. I'm answering the question and I have to answer why that evidence was put forward. Those people, we say, were often locked into leases that required them to operate on a Sunday. If not they were subject to, and the evidence bears both of these points out, they were subject to competition from other large numbers of hair and beauty businesses in the shopping centres, which meant they were under pressure to open.

PN1513

Now, the point there is, there's a fairness issues, because these employers can't avoid these rates, it's the reality of the changing nature of the retail sector and of the hair and beauty industry. Sunday trade is now a phenomenon and there's a fairness about exposing people to these rates that were struck at a different time.

PN1514

The point is, you say, is that that may not be the case for everyone. Lots of hairdressers don't open on Sunday, we know that, but the award needs to be fair and relevant to all businesses. It shouldn't be one that suits those that are on the high street, where people aren't trading on a Sunday, but not those that operate in shopping centres. That's partly a reason why there needs to be a relevance safety net. It needs to be relevant to contemporary circumstances, and that includes the growth of hair and beauty services in retail shopping centres. They're just not an island unto themselves, they're like other retail sector businesses.

PN1515

All of the considerations that apply in that sector, or many of the considerations that apply in that sector apply with equal force here. Nothing really, meaningfully, is being put against that. The fact that it's not the whole industry isn't a reason not to vary the award, we would say.

PN1516

That then, perhaps relevantly, takes me to our submissions, in chapter G and H, where we address the scope and nature of the hair and beauty industry. That commences at paragraph 50 and continues to paragraph 95.

PN1517

Now, we there identify the characteristics of the sector and employees within it, which we say justify adopting the proposed variation to the current penalty rates regime. Now, these include, succinctly, the businesses in this industry are typically small, they face significant costs and competitive pressures. Labour represents a high proportion of total revenue. Most of the revenue in the industry comes from individual consumers or households.

PN1518

It is now common for hair and beauty businesses to operate on Sundays and that lease arrangements in major shopping centres often require hair and beauty tenants to open on Sundays and public holidays. Ultimately, we say that the above factors mean that many hair and beauty employers are, effectively, obliged to open on a Sunday, even though at some times it's not profitable.

PN1519

As already put, we consequentially contend, as part of the rationale for the proposed change, that the current very high penalty rates are not fair, from the prospective of employers, as there's no capacity for many to avoid such costs.

PN1520

We also contend with the fact that Sunday trading is now an established element of the industry it means that, for the award to represent an element of the safety net that's relevant to contemporary circumstances, the penalty regime should be modified to accommodate the realities of Sunday trading, to a greater extent.

PN1521

Now, at paragraph 73 to 80 we deal with the similarities and competition with the retail and pharmacy industry. Now, as I said to you and I think I've already alluded to, the relevance of these similarities, we say, is that we say it is quite anomalous to have different penalty rates applying to this sector as to those other sectors. The point I make is that there's just no apparent justification for such a divergent approach.

PN1522

Look, we do say it is unfair for hair and beauty employers to be subject to this higher penalty rate regime when there is, at the very least, a level of competition between hair and beauty employers and traditional retailers, and online retailers.

PN1523

Now, there are to some extent - sorry, do you have a submission?

PN1524

MR DOWLING: Well, my friend seems to be making submissions with complete disregard for the evidence and attempting to give some evidence from the Bar table. We object to that approach. I ask my learned friend to stick to the evidence, as it was before this Commission, rather than seek to lead further evidence, if that's possible, from himself and to make submissions that are wholly inconsistent with the evidence.

PN1525

MR FERGUSON: We will come to the evidence, as I said. I will come to the evidence. But - - -

PN1526

COMMISSIONER LEE: I think what might have peaked Mr Dowling's interest was the reference to competition with online retailers. That's not, I don't recall - where does that come from? Is that going to be something you refer to?

PN1527

MR FERGUSON: Sorry, that may be something taken from our submissions, when we had a previous statement - - -

PN1528

COMMISSIONER LEE: I think he's got a point there, I don't recall that at all.

PN1529

MR FERGUSON: I may be conflating a submission, an element from a witness that was ultimately not - - -

PN1530

COMMISSIONER LEE: Yes, so be careful.

PN1531

MR FERGUSON: I withdraw that. But the proposition, I say, in this place, we can advance submissions about what people might understand to be the realities of the sector. Now, if there's a basis for opposing that, it will be advanced. It might be that one - a union with an understanding of this sector rightly concedes that this is, in truth, the realities of the sector. I mean this Commission would know, from this own members, from its own experience, that, at the very least, there is a level of competition between hairdressers who sell products in their salons and products that are for sale in tradition retailers, at the very least.

PN1532

DEPUTY PRESIDENT ASBURY: Is there evidence of that? I mean anecdotally, yes, there are some hairdressers who look a heck of a lot like a pharmacy. They have a bit part, on one side, with lots of hair and beauty products, but there are equally large numbers of other hairdresser salons who sell salon only products, and that was the evidence. Because I specifically asked a question of one of your witnesses, 'Do you sell products in your establishment that are salon only', and she said, 'Yes, that's what we sell'. But how is that the same

as what's sold in a pharmacy? Those people who sell the products will tell you, 'It bears no resemblance'. And, generally speaking, for my part, people don't go into a hairdressing salon to buy products, they go in to have their hair done and the product is a by-sale, like, 'We used this on your hair, would you like to buy it?', and $100 later you've got a bottle of shampoo and a bottle of conditioner. Whereas if you want to go to Priceline you can get it for $20, but it won't be a salon only product.

PN1533

MR FERGUSON: I think, Commissioner, if we're just talking about the realities of it, and the evidence, there are some hairdressing organisations, Hairhouse Warehouse, people might be familiar with, but it's not in the evidence, that have a range of products for sale.

PN1534

DEPUTY PRESIDENT ASBURY: And that's my point, it's not in the evidence. So should we be making assertions that there's this competition when the evidence actually doesn't support it?

PN1535

MR FERGUSON: I will come to the evidence.

PN1536

DEPUTY PRESIDENT ASBURY: Okay.

PN1537

MR FERGUSON: We put that assertion, in fact, but I think the Commission itself has observed there are, in reality, as the Commissioner knows, there are, in reality, hairdressers that look like that.

PN1538

DEPUTY PRESIDENT ASBURY: But I'm not conducting the case.

PN1539

MR FERGUSON: No, I understand. But I don't know if the evidence was, in any way, that those witnesses would say that the products are completely reconcilable that they - - -

PN1540

DEPUTY PRESIDENT ASBURY: I don't recall a witness saying, 'We're in competition with a pharmacy, and here's the full range of products we sell and here's what the pharmacy sells'. I don't recollect any evidence to that effect. Or, 'We're in competition with Coles or Woolworths'.

PN1541

MR FERGUSON: I know there is competition to that effect. I think the Commission would be blinding itself if it didn't take the view that both - and there was evidence that the products sold included shampoos, and it went on and on. Where we differentiate was when we got down to branding, to some degree, in that they were salon only products.

PN1542

Now, I don't think it can seriously be contested that there is a level of competition over products that might be regarded as a substitutes for one another. One might be regarded as a higher product than the others, but supermarkets do sell shampoos and hair products, as to pharmacies.

PN1543

DEPUTY PRESIDENT ASBURY: If you're going to buy your shampoo from a supermarket, again speaking recently, if you're going to buy your shampoo from a supermarket it's not going to make one skerrick of difference to you whether a hairdressing salon is open on the day, because you're not going to buy your shampoo from a hairdressing salon. If you're going to buy your shampoo from a hairdressing salon, you're going to wait till it's open and you're not going to scoot into Coles and get something off the shelf. That's the - - -

PN1544

MR FERGUSON: I appreciate that, Commissioner. It may well be that individual consumers have different expectations, in relation to their hair needs. I'm not sure. Commissioner, in respect of your own experience, I'm not sure that I would necessarily take the view that I couldn't go to one or the other. There was evidence about, and I'll take it on notice as to where it was, but about some customers returning just to buy things.

PN1545

Look, all the point we make is that sales is a part of these businesses - - -

PN1546

VICE PRESIDENT CATANZARITI: A very small component, on the evidence.

PN1547

MR FERGUSON: It is not the - - -

PN1548

VICE PRESIDENT CATANZARITI: That's across both sides of the evidence.

PN1549

MR FERGUSON: It's not that - they're a hairdressing business, it's not the primary task. It is, on the evidence, it's a narrow range of - - -

PN1550

VICE PRESIDENT CATANZARITI: Only certain consumers will buy the salon only product, it's a different market, speaking from my own experience which, of course, doesn't require any, but I do have three daughters, which does require knowledge, and, clearly, if they're choosing a salon product they're choosing it for a particular reason. It's not because it's a shampoo or a conditioner, they can buy that at Chemist Warehouse. But I'm not sure where that takes us, ultimately.

PN1551

MR FERGUSON: I think we were including it, broadly, under the category of the level of similarity between the different businesses. Yes, it's not the only thing that they service, their primary task is hair services. But clearly the evidence was

that part of the services offered by - some of the requirements of the hairdressers was to sell these sorts of products.

PN1552

VICE PRESIDENT CATANZARITI: I think only one of the witnesses, or maybe more than one, said that their remuneration - they get some benefit by the sales.

PN1553

MR FERGUSON: That's right. It think that was the evidence of Downs, if memory serves, as well - - -

PN1554

VICE PRESIDENT CATANZARITI: I think it was.

PN1555

MR FERGUSON: - - - that talked about - - -

PN1556

VICE PRESIDENT CATANZARITI: They're going to get paid whatever they get paid, irregardless of sales.

PN1557

MR FERGUSON: They get paid, they get paid. But I think it was the evidence of Downs, I don't want to mislead the Commission, I'm doing it from memory, talked about the expectation that people, while they're servicing the hair, would be making recommendations about products and things. Sales is a part of their role, is all I'm saying in that regard. I don't think that's seriously contested.

PN1558

Now, that then takes me to our chapter relating to apprentices, which is chapter I. Look, we deal there, in short, with recent developments relating to apprenticeships within the sector that we contend are relevant considerations by the Full Bench in these proceedings. The union takes some issue with some of our contentions in this regard, so we deal with it again in reply, in paragraphs 71 to 81.

PN1559

A simple point we seek to advance, in relation to this issue is, essentially, there's been some extraordinary increases in the costs of engaging apprentices visited upon employers in this sector, as a consequence of the 2013 apprenticeship decision, handed down in the two yearly review.

PN1560

As memory serves, and it's dealt with in our submissions and the quantum is set out, the costs increased in this award more than in any other. I think some of the increases in costs were up to $400 a week, or just a dollar short of that.

PN1561

Now, all we say is that's occurred alongside the decline in the level of apprenticeship commencements and completions, and our core contention here is that the granting of the proposed penalty rate reductions will, at least for some employers, partly offset some of these additional costs and may, accordingly,

assist to enable some employers to offer additional apprenticeships. We just say that's a further consideration weighing in favour of the claim, and I don't take it any further in my oral submissions.

PN1562

Now, again, just following the structure of our submissions, that would take me to the evidence, but I'll come back to that, in a moment, and deal with that more squarely. Instead, I'll move on to our chapter relating to the modern awards objective, as it pertains to the Sunday penalty rates claim. That's dealt with at paragraphs 107 through to 175. We've also comprehensively addressed the union's submissions, relating to the modern awards objective, in our reply submissions, at paragraph 82 to 130.

PN1563

Any attempt for me to now sort of succinctly deal with that material probably wouldn't do it justice so unless there are questions from the Bench as to any of that material I'm content to rely on my written submissions, in that regard.

PN1564

Moving on then, that then takes me to our submissions, in relation to public holidays, which are dealt with at paragraphs 176 to 208. Again, I'm content to adopt a similar approach in relation to that material, unless there are any questions. We've been comprehensive and careful in our preparation of that and I won't seek to narrow that by pondering through with our submissions, on my feet.

PN1565

The final chapter of our submissions that I want to talk about is our chapter in relation to the approach we've taken regarding casuals and penalty rates. Now, in chapter N we've explained why we contend that there's no variation necessary to require a casual loading to be paid in addition to weekend and public holiday penalty rates, in the manner that was adopted in the 2017 penalty rates decision.

PN1566

Now, in relation to this point we observe no other parties propose a variation to require casual loading be payable for ordinary hours on a weekend, in additional to penalty rate. The other point is, nor has the unions seriously engaged with this proposition. We set out detailed submissions as to why we say there is a cogent rationale for continuing the same approach. That's not been seriously challenged or even engaged with. Given that context, we're content to rely on our written submissions on this point as well. I think, as far as the union goes, is to observe a divergence from the approach in the 2017 decision.

PN1567

Now, that then takes me to the second of those core - what I'm doing today, which is dealing with the evidentiary case, as advanced. I'll start with the lay evidence from employers, advanced by HABA. As I say, we've led evidence from four employers, ultimately, two from the hair side of the industry and two from beauty businesses. We say that the evidence demonstrates the context of the trading and employment environment in which the award operates. Look, we do acknowledge, as I already have this morning, that obviously some half of our

witnesses have withdrawn in the period between us filing it, back in March 2018, and the hearing.

PN1568

But, nonetheless, we say the evidence advanced provides an insight into the role that the current penalty rates regime, particularly the Sunday rates, has on employer perceptions of the feasibility and desirability of trading on Sundays or engaging staff on Sundays, and their consequent practices.

PN1569

Now, the evidence also provides an insight into the current competitive pressures applying in the industry, including in relation to Sunday trade. Further, the evidence reinforces findings in the 2017 penalty rates case, that there's been a growth in retail trade on Sundays.

PN1570

Now, in essence, we're content that the lay evidence supports the following nine key factual propositions that we rely on to advance our claim.

PN1571

The first proposition is that employers covered by the award, or some employers covered by the award do not operate on Sundays, due the employment costs resulting from the Sunday penalty rates prescribed by the award. By way of example, I rely in, particularly, the evidence of Sarkis Akle, and particularly paragraph 18 of his statement, he there says:

PN1572

For a period of 12 to 18 months, during 2012 to 2013, the Parramatta salon opened on Sundays. It ceased trading on Sundays because of the high labour costs that it was incurring on Sundays. I did not consider that operating on Sundays was viable.

PN1573

At paragraph 35 of his statement he goes on, and although he's considered reopening on Sundays in recent times:

PN1574

Because of the current penalty rate I have not felt confident about taking the risk of opening.

PN1575

Then Elke Richter also gives evidence to a similar effect.

PN1576

The second proposition that we say arises is that some employees covered by the award would operate on Sundays if the Sunday penalty rate was reduced to 150 per cent of the hourly rate. The evidence to support this can be found, for example, in the evidence of Sarkis Akle, at paragraph 35 of his statement, and Elke Richter, at paragraphs 39 to 40 of her statement.

PN1577

The third proposition that I advance is that some employers covered by the award would roster additional employees to work on Sundays if the Sunday penalty rate was reduced to 150 per cent of the relevant hourly rate. The evidence that I point to as an example, in support of this, is from Graham Downs, at paragraphs 54 and 55 of his statement and at PN722.

PN1578

The fourth proposition we'd advance is that some employers covered by the award would consider extending their trading hours if the Sunday penalty rate was reduced. Again, the example of evidence to support that can be found in the evidence of Graham Thatcher, at paragraph 29 of his statement, and PN500 and PN509.

PN1579

The fifth proposition I'd advance is that some employers covered by the award perceive that they are compelled to open on Sunday's due to competitive pressures. Now, the examples of that evidence would include Graham Thatcher, at paragraphs 25 to 31 of his statement.

PN1580

The sixth proposition is that some employers covered by the award are compelled to open on Sundays, by virtue of the terms of their leases. Now, the evidence in support of that would include the evidence of Graham Thatcher, at paragraph 51 of his statement. There is also some evidence of that in the survey, in the qualitative responses. Survey respondents 30 and 37 indicate that they open on Sundays but identify that they do so because they're required to as a condition of their lease or contract.

PN1581

PN1585

Now, it is unfortunate we lost half our witnesses, the evidence of Mr Thatcher though, from his own experience in reviewing other leases, was that that is very common, at least in the context of Ella Bache businesses. The survey evidence, again I'm not trying to extrapolate that as indicative of the whole industry, but it is indicative of a phenomenon that does arise, not that everyone is in that boat. I'm not extrapolating that.

PN1586

COMMISSIONER LEE: Did Mr Thatcher's evidence survive that, on cross, though? Didn't he make concessions that he - are you - - -

PN1587

MR FERGUSON: I think, in re-examination, he reaffirmed that.

PN1588

COMMISSIONER LEE: All right.

PN1589

MR FERGUSON: He goes on (indistinct) did survive cross-examination. I know there was some evidence given, in a single question on re-examination, as to leasing practices, if memory serves. That's probably as far as I can take it.

PN1590

COMMISSIONER LEE: I'm specifically talking about whether Mr Thatcher was required to stay open because of a lease.

PN1591

[redacted]

PN1596

[redacted]

PN1597

The seventh proposition is that employers covered by the award face significant costs associated with labour. Now, in that context I rely on the evidence of Graham Downs. His evidence was that in the 2017/2018 financial years wages, including super, represented the following proportions of revenue in the salons he refers to in his statement. For the Coburn salon it was 48 per cent, for the Karrinyup salon it was 50 per cent, for the Booragoon salon it was 52 per cent and for Belmont it was 79 per cent. That evidence was set out at paragraph 628 of the transcript.

PN1598

Now, similarly, the evidence of Graham Thatcher was that wages constitute 40 to 50 per cent of revenue, at his salons, and that's at paragraph 39 of his statement.

PN1599

The evidence of Elke Richter was in the 2016/2017 financial year labour represented 42 and 49 per cent of revenue at her two salons.

PN1600

Now, the eighth proposition I want to advance is that some employers covered by the award perceive that they are unable to recover increases in employment costs by increasing the prices paid by consumers for their services.

PN1601

Examples of that include Graham Thatcher, at paragraphs 55 and 56 of his statement and at paragraph 48 to 50 of his statement. In that second one he talked about the backlash from customers, after implementing a Sunday surcharge of 10 per cent.

PN1602

The ninth proposition is that some employees want to work on Sundays. The example there is the evidence of Graham Thatcher, at paragraph 43 of his statement where he gives evidence that some employees request to work on Sundays because of their caring responsibilities. Elke Richter also gave evidence to support this proposition, at paragraph 1304 and paragraph 1305.

PN1603

That takes me to the survey evidence. We've already dealt with this, in part, but we sought to supplement the lay witness statements through that survey evidence. The reason for that is that it provides a broader perspective on the relevant issues that could feasibly have been depicted through the individual lay witness statements.

PN1604

The evidence was tendered through the witness statement of Patrick Sullivan, an employee of (indistinct) the survey, from an administrative perspective, and that included 145 responses from employers covered by the award who collectively operated 227 salons and employed 1336 employees.

PN1605

Now, at paragraph 99 to 105 of our submissions we set out the quantitative analysis of the survey, which I won't repeat, but, as I said, the survey respondents were also asked open questions about what the impact of the proposed variations would be, and an attachment to the Sullivan statement sets out their complete, and, as I say, unfiltered responses. We say that's useful because it does provide a clear picture, at least, of their perceptions of what the effect would be.

PN1606

We say that on this issue employer perceptions are important because, ultimately, it's the employers that will make the decisions about whether the penalty regime will enable them to take the risk of rostering staff to work on Sundays. So besides all the mathematical equations, it's what they have in their mind as to whether or not the penalty rate regime, as it sits, justifies the risk, if you will, of opening on Sundays. This gives you insight into the thoughts of some employers.

PN1607

Now, as counsel for the union has indicated, in his opening submissions, there's been an agreement about a number of concessions that HABA will make, in relation to the survey. They are as follows.

PN1608

HABA does not submit that the results of the survey are representative of its membership. HABA does not submit that the results of the survey are representative of the hair and beauty industry at large. HABA does not assert that the results of the survey are statistically significant. And HABA does not seek to extrapolate the results to the hair and beauty industry generally.

PN1609

Now, we don't seek and I'm not seeking to advance any submissions that demur from these concessions. There are inherent limitations in the survey that flow from the sample size and it's nature, and we accept that.

PN1610

So that then leads us to the question of how should the Commission treat the survey? Now, as I've already put, this kind of survey is similar to material that's been filed in numerous award review proceedings and such material is taken into account in this context.

PN1611

Now, the kinds of limitation on the usefulness of the survey are not an uncommon product of the practical impediments that organisations such as HABA face when they seek to provide a picture of the industry by surveying their membership, for the assistance of the Commission.

PN1612

Now, if we were adopting the approach of the Full Bench in the 2017 penalty rates case to the treatment of the survey evidence, as set out in paragraph 1574 of that decision, we would say that the assessment of the evidence is not a binary task. That is, such evidence should not simply be accepted or rejected. The central issue is the extent to which the surveys limitations impact upon the reliability of the results and the weight to be attributed to those results.

PN1613

Now, in the context of that survey evidence that the Full Bench was there considering, it formed the view that the results should be treated as suggestive or anecdotal rather than definitive. Now, we say that the same approach should be adopted to the treatment of the survey material advanced by HABA.

PN1614

Importantly, it provides anecdotal evidence of the experience and views of a not insignificant number of employers in the sector and is, at the very least, indicative of various matters that we say are at play within the industry and it reinforces some of the other evidence and submissions that we've advanced in these proceedings, as well as the conclusions reached in the penalty rates case of 2017.

PN1615

But, again, if the Commission forms the view that the sufficiency of that material is inadequate, that it doesn't provide a sound basis for reaching a clear view, about whether the award is achieving the modern awards objective or whether there's some variation or the specific variation is proposes is warranted, it is open and appropriate for the Commission to take steps to supplement that. That's a situation we say should be undertaken, if it forms the view that there's insufficient weight to the material, as opposed to evidence, cogent arguments against the propositions that we've advanced.

PN1616

I'm just going to move on to the union's evidence. Firstly, I'd deal with the evidence of Dr O'Brien. Now, his evidence purports to identify the groups of employees who are similar or different to employees in the hair and beauty industry. The central tenant of our case relates to similarities between the hair and beauty industry itself and the retail and pharmaceutical industry. This concerns characteristics of the industry employers, not necessarily the employees and their qualifications and other characteristics.

PN1617

To this extent Dr O'Brien's evidence doesn't really counter the case that we've advanced, in any clear way. It certainly undermine our contentions that the circumstances of employers in the sector warrant a variation to the award or the other broader developments, such as the growth of weekend trading.

PN1618

Now, the other point I want to make about the evidence of Dr O'Brien is, his analysis involves a comparison that he's undertaken, in relation to workers in the hair and beauty industry and workers in the retail industry.

PN1619

Now, for the purposes of his analysis, the retail industry, we understand, means the industry, as defined for the purposes of the ANZSIC codes. This doesn't align with the coverage of the Retail Industry Award 2010. Accordingly, the relevance of his evidence to a case, in part - well, accordingly, the relevance of his evidence to a case, (indistinct) in part, comparative levels of penalty rates in the general Retail Award and the Hair and Beauty Industry Award is not apparent.

PN1620

I'll take the Bench to the document that demonstrates this point. I'll hand that up. This is the definition of what constitutes the industry, for the purposes - the retail industry, for the purposes of the relevant ANZSIC code. I don't want to take you through the entire document but, as you can see, it involves a broad range of retailing activities. Early on the scope, we would say, of what's covered by the general Retail Industry Award. Without taking you through it, it would include, for example, motor vehicle retail, motor vehicle parts retail, vehicle manufacturing, repair service - sorry, which would, we say, be covered by the vehicle manufacture and repair services retail award. It also includes meat, fish and poultry retailing. That's covered the meat industry award. It also includes garden supply retailing, which we would say would likely be covered by the nursery award.

PN1621

It also includes retail and commission-based buying and selling, which would be covered, in our view, by the commercial sales award. The point we're trying to make is that he's not comparing groups of workers that really assist these proceedings. There is a divergence between what he's comparing and who is covered by the relevant awards. I'd seek to tender that document.

PN1622

MR DOWLING: I might be able to assist because my learned friend's removed a page that we say is important and that is the page that proceeds the divisions so I think it might be of more benefit to the Commission if we provide the copy that actually has the definition of retail trade before the schedules that follow and we have copies of that that we can provide and it might be a more complete document.

PN1623

MR FERGUSON: I haven't seen that. I just seek to tender what we have sought to tender. I'm sure my friend can deal with that in his submissions.

PN1624

VICE PRESIDENT CATANZARITI: Are you happy for the tender with the front page?

PN1625

MR FERGUSON: Yes.

PN1626

VICE PRESIDENT CATANZARITI: Exhibit 6.

EXHIBIT #6 AI GROUP DOCUMENT

PN1627

MR FERGUSON: Just moving on, Dr O'Brien concludes that on his analysis hair and beauty workers are most similar to construction and trades-related industries. His analysis is based on the following criteria: level of education, status of employment, i.e. employment, self-employed, owner-managers, hours worked per week, relationship in household and age. However, there is nothing in the

material, submissions or his evidence that sets out the basis - certainly nothing in the submissions that sets out the basis for selecting these criteria. It's not clear to us.

PN1628

MR DOWLING: Ask him.

PN1629

MR FERGUSON: Now, the evidence has been put but there is nothing in the submissions that says why, what relevance falls from that. It might that the analysis could have been different and different criteria were selected; say, days of the week on which work was performed. We don't know. That really begs the question, what relevance is this? It's just an analysis based on some criteria which seem to have been presumably selected by the unions but why? For what reason? There is no connection to the case. That then takes me to the union lay evidence. An agreement was reached between the parties as to the objections to be taken to the various statements. That of course didn't preclude us making submissions as to weight that should be afforded to the relevant evidence.

PN1630

We say that it remains the case that a significant proportion of the evidence as ultimately tendered would have been inadmissible if the rules of evidence applied. We have accordingly prepared a table identifying the elements of the statement that we say would not have been properly admissible and that as such, we say, should be given no weight. Now I would seek to hand that up. I don't intend to read through all of that material. I intend to rely on the written document. I don't envisage that there will be any surprises - my friends will be surprised by it. It's material that has broadly been canvassed with them for the purposes of discussions associated with reaching the aforementioned agreement. But of course they no doubt will be able to respond to it in any event.

PN1631

VICE PRESIDENT CATANZARITI: You seek to tender that document?

PN1632

MR FERGUSON: Yes.

PN1633

VICE PRESIDENT CATANZARITI: Exhibit 7.

EXHIBIT #7 AI GROUP LIST OF OBJECTIONS TO EVIDENCE

PN1634

MR FERGUSON: As I said, it's only to aid the submission as to the weight that should be afforded to it, not to object to the admissibility of the evidence. That then takes me to the evidence of Brandreth, the union witness. That evidence was that the AWU conducted an online petition that was introduced through that witness and Brandreth gave evidence that the petition was promoted by an email to its supporter base. I've got to say, it's unclear who that is. It appears not be limited, necessarily, to members and it was also distributed by the hairstylists

Facebook page. Brandreth indicates that just over 4,000 people signed the petition and identify themselves as working in hair and beauty industry.

PN1635

However, the document we've just handed up, we've set out a number of criticisms to that evidence. I'll just take you to that first page. You can see there we reference the annexure, KB2, to the evidence. It purports to inform responders or potential responders of an application made by business lobby to cut the minimum rates of pay for hairdressers - and that's our emphasis. This constitutes, in our view, a quite misleading and inaccurate characterisation of this claim and to that extent, the relevance of the petition responses is seriously undermined. We're not trying to cut the minimum rates. We're seeking a modification to penalty rates that apply in very specific circumstances.

PN1636

That, in our view, renders the whole thing relatively useful. Clearly people were misled by the material that was calling for the petition. Further, if you read through the responses - and I'm not going to take you through all of the vast array - many don't respond specifically to the proposed reduction of penalty rates. Instead they just write about the plight of hairdressers, as they perceive it, and make other complaints about working in the industry and so forth. It really doesn't bear any relevance to the sorts of issues that are before us. Thirdly, it doesn't appear that the respondents to the petition are limited to employees covered by the award. For example, one of the respondents, Rosalia Scaccia, has provided the following comment:

PN1637

I have been in this industry for 37 years. Yes, I'm self-employed. I rent chairs. So many of us are underpaid. If you've been lucky like I have you've had some great bosses. I don't want my industry to suffer.

PN1638

We don't know if all these petitions are actually from employees. We don't know what proportion of them are from people who might be working as independent contractors, self-employed, what have you. Again, that is fundamentally - undermines the utility of the petition to the extent that it did have any. More broadly, it's difficult to see what relevance the material has to an assessment of whether the current award provisions meet the modern award's objective. It just contains an expression of people's views about what should be done by the Commission. The Commission doesn't, we say, and shouldn't, make a decision as to whether or not to vary an award based on how popular the proposed variations are.

PN1639

It should be through an application of the relevant considerations to assessment of the modern awards objective. It's not a popularity contest. As such, we don't see where a petition against something really takes the union's case. We say it's ultimately of no probative value. That then takes me to the union - lay evidence from specific employees. They have advanced five short statements from witnesses who appear to be covered by the award at the time they made the

statement. Look, I just want to make a small number of propositions in relation to this evidence - five propositions, I want to advance.

PN1640

Firstly, the statements of the witnesses establish, in many instances, that either they work or have worked on Sundays or that their employee did or does operate on a Sunday. We say this just serves to reinforce our proposition that Sunday trade is now an established component of the industry. I also refer the bench to cross-examination of Ms Gedney. You may recall the hairdresser in Newcastle. You recall that she accepted that there was a raft of hair and beauty businesses that were open on Sundays, just in the Newcastle region. Again, we say that reinforces that proposition as well. Secondly, various witnesses have given evidence of their experience as apprentices, the rates of remuneration that they received at the time and the difficulties that they had living on those rates.

PN1641

That evidence is, in our submission, of limited if any relevance to the case about penalty rates that are paid primarily as compensation for the disutility of working on weekends. Further, the Bench will be mindful that the penalty rates for numerous trade or even degree-qualified staff are covered by the pharmacy, retail and hospitality awards were reduced as a product of the 2017 penalty rates cases I've already alluded to. There was in those instances no differentiation as to the way the penalty rates in those awards apply to different classifications of employees. Now, just by way of example from the classification structure, if you look at the pharmacy award, level 3 includes employees that are Cert III in community pharmacy.

PN1642

Level 4 includes an employee that has a Certificate IV in community pharmacy. Level 5 contemplates employees registered as pharmacists pursuant to relevant state and territory law, which inevitably requires that they are degree qualified. If you look at the hospitality award, the food and beverage attendants grade 4 classification is a trade qualification that contemplates somebody who has completed an apprenticeship in waiting. There is a cook tradesperson classification, grade 3 to grade 5. There is also a guest service grade 4, which contemplates someone who has completed an apprenticeship and includes tradesperson in dry cleaning, tailoring or is a butler.

PN1643

There is also covering for a trade qualified gardener at grades 3 and 4. If you look at the retail award, have a look at the level 4 retail employee. The indicative tasks include an employee who is required to utilise the skills of a trade qualification for the majority of the time at work. Indicative job titles include butchers, bakers, pastry cooks, florists and trade qualifications. If you look at the retail employee level 5, indicative job titles include tradesperson in charge of other tradespersons within a section or department and a retail employee level 8 is a person with a diploma qualification. The point we're just making is an obvious one: these awards, penalty rates were reduced for trade qualified, highly skilled people.

PN1644

There is no apparent justification for adopting a different approach just because people are hairdressers. It's completely inconsistent with the approach that the Bench took in the 2017 decision, to entertain that sort of submission. Further, we would say that the utility of the evidence about past employee hardships while undertaking the apprenticeship is particularly lacking in merit, given that the rates for apprentices covered by this award have been dramatically increased since each of the witnesses was an apprentice as a product of that two-year review decision.

PN1645

VICE PRESIDENT CATANZARITI: What do you say to the proposition that the evidence shows that this industry is heavily award reliant as distinct from what might have happened in the penalty rates case where a lot of other people got over award payment, so that any effect is a direct cut?

PN1646

MR FERGUSON: Look, I can't canvas the extent to which the other industries - - -

PN1647

VICE PRESIDENT CATANZARITI: Well, let's focus on this case. The overwhelming evidence appears to be that people are being paid the award rate and nothing more.

PN1648

MR FERGUSON: Regardless of the extent - I'm not sure the evidence is that they get paid that and nothing more. I think there may have been some evidence but I'm not sure at what rate and what didn't as to some incentive schemes and so forth, which there are logical reasons why employers in this sector might do that. But we accept there is a higher degree of award reliance in this industry. I'm not sure that the fact that people rely on the award is a reason why the award wouldn't be varied in the manner that is justified by the consideration of the award modernisation objective. The reality is the consideration of that involves consideration of fairness from both the perspective of employers and employees.

PN1649

That doesn't mean that one particular benefit in an award will never be modified downwards. Circumstances have changed and we say that some of the core underlying justifications for the current penalty regimes have gone. If you just look at board level, the facts in the 2017 decision the Commission formed the view that the disutility of working on a Sunday is not necessarily what it was. The hairdressing industry isn't an island to itself where employees have particular disutility associated with working on a Sunday. We say that there are compelling reasons to modify. The fact that there may be some reduction - and I'll come to this in any event - is a factor that has to be weighed.

PN1650

But the fact that a particular entitlement might not go up, it might actually go down, isn't a reason not to do it. You need to have fairness from both perspectives. Of course, the impact of that, the negative impact of that, might be ameliorated through some sort of transitional arrangement as occurred in the context of the other industries. Now, we're not calling for that because obviously

we would say the employers who are members of those that I represent, have waited a long time for some relief compared to comparable sectors. But the Commission isn't - as I said at the start - isn't bound to remedy in terms we propose. It may want to hear about transitional arrangements.

PN1651

Further, there is - we would say, on the evidence - some possibility that the reduction might be ameliorated through additional hours worked. The unions might put a submission, 'That's not as good as getting a penalty rate', but if you're just concerned about what people are getting in their take-home pay, there is some evidence that this might lead to increased hours for people and some extra opportunity for earning. That is just another factor that is in the mix. But just because a rate goes down on one specific issue isn't a reason to not entertain the variation. That is the nature of it. And the fact that people are applying the award makes it even more important that we grapple with these sorts of issues.

PN1652

The third theme that flows from the witness evidence is that there are a number of witnesses who express their opposition to any reduction. Again, that just amounts to an expression of the employees' own views and opinions and ought to be given no weight for the sort of similar reasons I've already said about the petition. That really doesn't take the case anywhere. Just because people don't agree with it, like it, doesn't mean that it's not a variation that's necessary when you have regard to the modern awards objective. In that regard we'd say it's unsurprising that employees would oppose any form of reduction of entitlements, especially, unsurprisingly, the union actively and very publicly campaigning against it.

PN1653

Undoubtedly that is a relevant consideration too. Fourthly, some of the witnesses give evidence about their own perceived financial circumstances and the financial circumstances of others in the industry and the extent to which the reduction in these rates may cause them or others to reconsider employment in the sector. I want to advance six points about this evidence. One is the sort of issues I just discussed: this kind of evidence assumes that rate reduction will be implemented in full. It may be that there are transitional arrangements that the Bench wants to entertain in relation to this issue, as it did in the other sectors, and that will ameliorate some of these difficulties.

PN1654

Two - to the extent that the evidence is about the circumstances of employees other than the relevant witnesses, it appears to be of a hearsay, speculation or there is simply not a proper basis made out for the evidence and as such we say it should be given no weight. Take, for example, the evidence of Ms Geritz. At paragraph 8 of her statement, she states that she thinks more employees will leave the industry if the penalty rates are cut. Well, it's just her speculation, her opinion. You give that that weight. It doesn't take you anywhere. Three - in some instances the evidence does not bear scrutiny. Take the evidence of Ms Gedney. She is not working full-time. Indeed, she is not seeking full-time work. It may be that that is part of the reasons why or that has bearing on the financial predicament she finds herself in.

PN1655

VICE PRESIDENT CATANZARITI: Yes, but even the penalty rates proper case in which the three members here of the Bench sat on there was certainly evidence of people and the way they did their work. I remember, for example, one grandmother who chose to work on certain days and that is not a factor that the Bench would discount. They don't have to work five days a week. I mean, it's based upon the individuals and how it affects them.

PN1656

MR FERGUSON: No, I understand, and the evidence might be that it has an effect on people.

PN1657

VICE PRESIDENT CATANZARITI: That's the real question; the effect on that individual. It was taken into account by the Full Bench on that occasion, how we looked at each individual circumstance in the overall assessment.

PN1658

MR FERGUSON: Then I can't really - - -

PN1659

VICE PRESIDENT CATANZARITI: You shouldn't be necessarily criticising somebody because they choose to work part-time or - - -

PN1660

MR FERGUSON: No, no - I'm not criticising the employee but what I'm saying is if the thrust of the evidence or the submission that might flow from the evidence is that this will have - visit some difficulty upon these employees, well, I can't say that a reduction - - -j

PN1661

VICE PRESIDENT CATANZARITI: It will have a difficulty (indistinct) changes in the way they work, Mr Ferguson.

PN1662

MR FERGUSON: Yes, that's what I'm saying to you - no, no, I'm saying I can't - - -

PN1663

VICE PRESIDENT CATANZARITI: That's as far as you can put it.

PN1664

MR FERGUSON: I can't say that a reduction in penalty rates won't. But in part, that is because they are electing to workdays that attract this higher premium. It's not evidence that they couldn't work on other days. It is - yes, it is a negative impact. I'm not saying otherwise. But it's not necessarily the case you've got these employees who have no choice but to suddenly flee the industry or do something else. It just - or that they will be on the poverty line, as I think some of the statements said. There are other options available. This is a penalty rate regime. It's not part of the core assessment of what the minimum rates are and we say, as the next point, that the needs of the low paid, we say, are better addressed

through minimum rates in awards and the wage review decisions rather than penalty rates that are primarily directed towards compensating people for the disutility of working on a Sunday.

PN1665

We say that certainly accords with the views of the Full Bench in the 2017 decision but I take your point. I can't cavil with the proposition that people will be worse off if they were working - if everything remained equal and they worked just those hours. But as I said, it may be that they are afforded different additional hours and so forth. We don't know. We're in the realms of speculation at that point. The next point I want to make is that even if it's accepted as a matter of fact reduction in penalty rates may cause some employees to reconsider working in the industry, and we don't accept that that's going to be a widespread phenomenon, that doesn't really take the matter very far either.

PN1666

The reality is, we say, it's not the role of the safety net and of awards to render one sector more attractive to employees than other sectors. That's the role of market rates and arguably to some extent enterprise bargaining. The Commission can't be moved by that sort of submission, which does rear its head regularly. Otherwise, we have unions simply arguing in every single industry where there are labour shortages, 'Well, improve the conditions in the award, it will assist.' That's not the role of the submission and we say not a lien of argument that should be entertained by this Bench. I think I have already dealt with my sixth point, which was that it shouldn't be the role of penalty rates primarily to meet the needs, the financial needs, of award-covered employees.

PN1667

Certainly, that shouldn't be the guiding consideration in relation to what the penalty rates should be. Now, turning again to dealing with the union labourers generally, the fifth observation I want to make is that there is some evidence about the purported difficulties of work being undertaken by hairdressers. Look, take for example the evidence of Donna Maguire. She attests to hairdressers having to be on their feet and having to be a bit like semi-psychologists because customers complain about their lives. That kind of evidence might be relevant and useful to the Commission if it was advancing the context of the work value case about the levels of the base rates in the award but as I say, that's not what we're dealing with here.

PN1668

We say it doesn't provide any assistance to setting penalty rates or considering what the appropriate penalty rates should be. Those are in essence the submissions. We say in summation that we advanced a proper case that provides industry-specific context that would warrant the granting of the claim. In short, we say the material advanced by the unions and so froth doesn't really set out a clear or cogent reason for not granting the claim. That's all I wanted to put unless there are any questions.

PN1669

COMMISSIONER LEE: I just wanted to ask you about paragraph 133 in your submissions.

PN1670

MR FERGUSON: Yes.

PN1671

COMMISSIONER LEE: I'm for myself at a loss as to how a reduction in penalty rates will incentivise employees to engage in collective bargaining.

PN1672

MR FERGUSON: Well - - -

PN1673

COMMISSIONER LEE: I just don't understand it.

PN1674

MR FERGUSON: - - - the only submission - I think we put it no higher than likely we can't - is that on one view - - -

PN1675

COMMISSIONER LEE: But what's the mechanism that brings this about?

PN1676

MR FERGUSON: On one view, the workforce is particularly agitated and concerned about the issue of penalty rates. Maybe look to the petition. I don't want to make more of it than it is, given the criticism I've levelled. But if it is an issue that employees feel very strongly about it is - it may be a catalyst for them seeking to bargain with their employer. Now - - -

PN1677

COMMISSIONER LEE: They'll rise up in response to it?

PN1678

MR FERGUSON: They may.

PN1679

COMMISSIONER LEE: Is that what it is?

PN1680

MR FERGUSON: They may or their representatives may seek majority support determinations. I'm sure they've got very capable representatives in terms of the newly-formed hairstylists of Australia. All we say - and I can't put it more than this - is that it - all you have to consider there is the need to encourage enterprise bargaining. This is a factor that because you are addressing a factor that may be because people want to retain or to improve the penalty rates, it's a factor that would serve to create a motivation for employees and those that represent them to engage in enterprise bargaining. The assessment isn't that you have to increase enterprise bargaining. It's that you have to look at what will encourage enterprise bargaining.

PN1681

When you see the line that is put, that people are strongly opposed to this reduction, that they want their penalty rates, that they're going to fight for it; well, logically the extension is that this could only encourage it from their side. It

doesn't take the employer's argument anyway but the evidence seemed to be that those employers obviously had - to some extent, some of the employers had a limited understanding or awareness of the enterprise bargaining regime. They said, 'We only put that it would incentivise employees.' There are mechanisms in the Act that enable and facilitate people to engage - employees to engage in enterprise bargaining. We say they are meaningful.

PN1682

COMMISSIONER LEE: It's certainly not going to incentivise employers to bargain, is it?

PN1683

MR FERGUSON: No, it's not going to incentivise employers to bargain. I'm not sure that they're bargaining now in the sector. I think it is, as I've already said, I think from my knowledge it is very award-reliant in the sense that enterprise bargaining had not proliferated at the moment through the system. But logically, it could only encourage bargaining from employees' perspective. I take your point, Commissioner.

PN1684

VICE PRESIDENT CATANZARITI: Thank you, we'll take a short adjournment.

SHORT ADJOURNMENT **[11.12 AM]**

RESUMED **[11.46 AM]**

PN1685

VICE PRESIDENT CATANZARITI: Mr Dowling, before you start, Mr Ferguson raised some issue about the SCHADS Award and the survey.

PN1686

MR DOWLING: Yes.

PN1687

VICE PRESIDENT CATANZARITI: We thought it was appropriate that we provide you, parties, what was the survey in the SCHADS Award so we'll just make that available to the parties.

PN1688

MR DOWLING: Great.

PN1689

VICE PRESIDENT CATANZARITI: It may be that in your reply, Mr Ferguson, you might want to pick that up.

PN1690

COMMISSIONER LEE: This is the survey that Mr Ferguson referred to in respect of the proceedings in which I'm involved and that this is a survey that the Commission itself conducted but I think, given it was mentioned a couple of times, it was worthwhile parties know what it is that's being spoken of.

PN1691

MR DOWLING: Yes, appreciate that, Commissioner. I've read that decision but I had not seen the survey. I'm grateful.

PN1692

VICE PRESIDENT CATANZARITI: Thank you, Mr Dowling.

PN1693

MR DOWLING: Thank you, your Honour. Can I start by summarising, as we see it, however described the application is in reality a claim that says the pharmacy and retail industry received a reduction in penalty rates and therefore the hair and beauty should as well. It says that because it alleges, it being HABA, alleges that the hair and beauty industry is similar to or in competition with the pharmacy and retail sectors. As to the first proposition that because those two sectors received it this one should, that is against established principle, in our submission.

PN1694

Each award must be reviewed in its own right and evidence and heard and assessed with respect to that award. Further, it's against established principle, we say, because alleged competition between different employers covered by different awards, in our submission, is not a basis for the reduction that is being sought. The second proposition that the hair and beauty industry is similar to or in competition with the pharmacy and retail sectors, in our submission, is simply not made out on the evidence and is not correct.

PN1695

Can I say one third matter by way of summary, there seems some suggestion, by the way my learned friend put his submissions this morning, that if we can't show those industries are different then the reduction in respect of the hair and beauty industry should be granted. It should perhaps go without saying but in our submission that inverts the test quite substantially. The applicant is the proponent of change. It has to demonstrate that the reduction is necessary to achieve the modern award's objectives.

PN1696

It does not meet the test to say we don't understand how it is the union says the industries are different and therefore as consistency, the award penalty rates should be reduced. That is not the proper approach and, in fact, in our submission, inverts the proper approach. Despite the application perhaps being able to be reduced in that way, we have endeavoured, in some written submissions which I'll hand now, to address each aspect of the application and each failing of the application. That bundle looks a bit ominous. There is three documents for each of you.

PN1697

The first document on top, which is bound, are the closing submissions of the two unions. The two documents beneath it, one is the Club's revocation decision and the other is the preliminary jurisdiction. We anticipate the Bench will be familiar with both but out of completeness we've provided them to you. The structure adopted by the submissions will be broadly consistent with my oral submissions

and can I identify the following 10 matters in the following order that I will address in the oral submission.

PN1698

Firstly, albeit briefly, the scheme and principles because there is, in our submission, not much contest between us and not much controversy about those principles save the second item which is three matters that we say - on which we say HABA has mistaken the proper approach to the principles. That is the second item. We will then summarise HABA's arguments as we understand them. Nextly(sic), summarise the unions' evidence then HABA's evidence then make some brief submissions about how it is we say HABA is not representative of the industry, which is important for other matters we will raise in respect of the application, and then address the considerations in section 134(1) the modern award's objectives.

PN1699

That leaves two last items. The one is then dealing discreetly and particularly with the application insofar as public holidays are concerned because we want to direct the Bench to the paucity of evidence, particularly with respect to that topic. We say the evidence doesn't get anywhere with respect to Sunday but in respect of public holiday there's a particular paucity that we want to direct the Bench's attention to, and then lastly, can we deal with what's described in HABA's submissions as its alternative claim that deals with the way that casuals should be dealt with. They are - that is the structure of the submissions and as I say, they follow the written submissions.

PN1700

VICE PRESIDENT CATANZARITI: Mr Dowling, on the point that HABA's issue is not representative of the industry, you'll turn to that in some detail, but assuming that you're right about that and that they represent a small component, doesn't that put the Commission in a difficulty that given that we, ourselves, have informed ourselves, unlike an adversarial traditional matter, that if we form that view it would mean that we would just invite further submissions from - it's a difficult position to be in.

PN1701

MR DOWLING: We appreciate that it is a difficult position. Of course, the unions are also in a difficult position. This is the second application they have faced in respect of the Hair and Beauty Industry Award. The first was made by a different party then withdrawn. The second made by my learned friend's client and the prospect of facing a third one is not a very enticing prospect for the unions but, of course, it is open to the Commission to say we have to be satisfied there's a proponent of change, albeit on our invitation, but there is a proponent of change and that proponent has not made out that the changes are necessary to achieve the modern award's objective and the submissions they have made are undermined by the fact that they represent only a very small proportion of the industry.

PN1702

It might be the Commission could take its own steps. That's not one we urge in circumstances where, as I say, two applications have been made and the unions would be forced to face a third. Rather, the way the Commission should approach

it is to say this applicant was on notice of everything that was required to satisfy the Commission. There was a template, if you like. All three members here today sat on the penalty rates decision and saw the extensive evidence and submissions that were made in that case.

PN1703

It was a clear what was required to satisfy the Commission that a change was necessary. There were 143 witnesses in that case including experts. There was detailed documentary evidence. There were 39 days of hearing. That was the template for this organisation to satisfy the Commission of what was required. It's not enough to come here and say 'I'm sorry, we're under-resourced. We didn't do a very good job'. That's not enough. This organisation has to satisfy the Commission. It does put the Commission in a very difficult position but save commencing its own inquiry, it can only act on the evidence that is before it.

PN1704

VICE PRESIDENT CATANZARITI: Yes, but I suppose what I'm really saying is that there's some risk in putting that submission, and whether it is actually necessary to put the submission in paragraph (g) for what is the case in front of us. (Indistinct) whether you actually need to actually put that submission in because it then opens up something which really might cause another round of - - -

PN1705

MR DOWLING: I appreciate - I'm sorry, I misunderstood the import of the question. I understand. Yes, perhaps my best answer is you can only act on the case you have before you and your Honour is saying 'Well, if you are indicating it's not representative, we might look elsewhere', I understand. Perhaps I'll deal with that as I come to it. Perhaps I should say - I touched on, by way of introductory remarks, I touched on the notion of the proponent for change having received an invitation.

PN1706

Can I say two things about that and this is partly in response to your Honour's question. Firstly, the invitation was put in those paragraphs of the penalty rates decision from 2058 to 2062. It might be said, partly in response to what your Honour has asked, that you would expect all of the industry bodies that are desirous of a change would come forward and co-ordinate a response or an application in response to that invitation, so it might a fair assumption to say the other industry bodies, and indeed the industry body that commenced the application the first time, was not desirous of the change and it's membership was not desirous of the change. That is one way to approach the fact that all you have here is HABA, a small section of the market.

PN1707

VICE PRESIDENT CATANZARITI: And that inference is strengthened when one was actually in and withdrew.

PN1708

MR DOWLING: That's right. You could safely assume that the one that withdrew and then didn't re-commence or didn't join the application that was commenced, that they do not want to be part of it.

PN1709

VICE PRESIDENT CATANZARITI: Yes, all right.

PN1710

MR DOWLING: The second thing that I should say about that invitation is it should not and could not be said that by operation of that invitation there's some presumption of the need for a change. That is the Commission saying well perhaps these need to be reviewed and there should be no sense in which this Bench approaches that from the perspective of well there's some preliminary evaluation that a change is required.

PN1711

Something similar was put in the Clubs revocation case because, again, in that case an invitation was issued and ultimately the task of the Commission there and the task here is to assess the evidence before you and make a determination whether the change is necessary. The invitation does not affect that process at all, in our submission. It's clear the reduction being Sunday from 200 to 150 and the public holiday from 250 to 225. As I said, I want to return to the discreet topic of public holidays because, in our submission, there was no evidence at all that any of the employers that gave evidence would do anything differently in respect of public holidays if there was a reduction from 250 to 225, so what there is in respect of Sundays does not hold true in respect of public holidays.

PN1712

I also indicated that I would return to the alternative claim and I should identify that, as we understand is, in respect of the Sunday penalty rates for casuals, the alternative position is 175 per cent meaning that would be 150 plus the 25 per cent casual loading and 250 per cent for the casuals on public holidays, being 225 plus the 25 per cent casual loading. For reasons that I'll come to, this award does not apply the casual loading of 25 per cent on a Sunday.

PN1713

In fact, the proposition that sometimes accepted as a sound industrial principle that casuals should always, at any time, receive 25 per cent more than non-casuals does not apply in respect of a Sunday for this award and I'll come to that in dealing with that alternative claim which is what we understand to be the reason that it's advanced. Can I then deal with the first topic that I identified which is the legislative scheme and applicable principles. We've set out the legislative scheme at paragraphs 4 through to seven of our written submission and extracted as part of those submissions section 134 and we are content to rely on the written submissions in respect of that scheme.

PN1714

We have then set out what we say are the relevant principles at paragraphs 8 through to 15 firstly, save one other matter, of the written submissions and I won't traverse each of those save can I raise three points. Firstly, we've provided to you this morning the Clubs revocation decision, (2019) FWCFB 349. Can I just direct

the Commission's attention to paragraph 40 of that decision which picks up the Alpine Resorts Award (2018) FWCFB 4984 at paragraph 52 as another and perhaps more recent explanation of the relevant principles.

PN1715

That's the first point. The second, which is the proposition we set out at paragraphs 8 and nine, is that the 134(1) considerations are broad considerations which the Commission must take into account when considering whether or not an award meets the objective and the Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.

PN1716

Not a controversial proposition but one that bears repeating, we say, and the third matter that I raise arising from those paragraphs 8 through to 15 is that set out and footnoted by paragraph 13 which is the emphasis on the importance of the Commission distinguishing between what is desirable or merely desirable and what is necessary, necessary being the relevant threshold. Can I address then the only last matter in terms of principles and that is identified in our written submissions from paragraph 16 which is the need for a merit argument supported by probative evidence by reference to the preliminary jurisdiction decision.

PN1717

I'm aware that the Bench will have seen this on many occasions because, as we say in paragraph 17, it has been routinely applied but, again, we say it bears repeating because it identifies the requirement and what we say should properly be construed as the onus. Reading from the fourth line of the extraction, '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.

PN1718

The extent of such an argument will depend on the circumstances', skipping over the next two lines, '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'. That's the threshold for our learned friends and that's the threshold that we say clearly is not met.

PN1719

They don't get to say 'Oh well, unless we hear from the unions about some difference in the industries, we should get it'. It's simply not consistent with principle and would be erroneous. We've set out at paragraph 18, though we expect there should be no doubt about it, that the changes sought clearly meet the threshold of significant changes. It almost must follow because our friends seek to rely on the penalty rates decision and in that case, the changes sought there were significant changes.

PN1720

That, save relying on our written submissions, is as much as we want to say about the principles save I want to address three matters where we say the applicant has

conducted or has taken a mistaken approach to the principles. The first is with respect to onus. It says the onus does not fall solely on HABA. I'm not clear what that means, does not fall solely on HABA, but in our submission the extract from the preliminary jurisdictional decision to which we've already taken you makes it clear that it's the proponent of the variation that must advance the cogent merit argument that is supported by the evidence.

PN1721

They've taken it up. It is for them to satisfy the Commission that its proposed variation should be granted. To suggest otherwise, again, we say would be erroneous. Can I then nextly(sic) deal with what to do with the factual findings and the evidence in the hospitality retail and penalty rates decisions. I'll address this in a little more detail when I come to the question of the employment effect and what's sought to be made of that decision in that context but can we first make clear something that this Bench, of course, will be familiar with and that is that none of the evidence in that case was directed to the hair and beauty industry.

PN1722

I know that seems obvious and self-evident but it needs to be said, perhaps our learned friends need to hear it, because the various experts, starting with the various experts that gave evidence, were either, particularly with respect to say Mr Sans(?) in the pharmacy industry or the - sorry, Mr Sans was retail, or particular evidence with respect to pharmacy or particular evidence with respect to hospitality, it was either one or the other or each of - or all of those but it was not, and no one gave evidence, about the hair and beauty industry.

PN1723

That is the starting point. To say from there that we can simply extract findings made in respect of different industries and different awards to the present circumstances is simply, again, inconsistent with principle. On top of that, of course, there's a detailed exchange which I'll come to when it is that HABA said 'Well we want to rely on the penalty rates decisions, findings and evidence'. Not surprisingly my client said 'Well which particular findings do you rely on and which particular pieces of evidence do you rely upon because unless you tell us that we will be denied procedural fairness. Unless you say to us we'd like to rely on the expert evidence of Professor Borland, unless you tell us that, we will be denied procedural fairness' and for reasons I will come to we have never received an answer to that proposition.

PN1724

The closest we got today was nine general propositions to be taken from the penalty rates decision but we were never told 'We want to rely on Professor Lewis' or 'We want to rely on Professor Borland. We were never told those things and that must inevitably be a denial of procedural fairness in the same way that your Honour said we now don't want Associate Professor O'Brien's reports going in because our learned friends might have done something different. Same applies equally to us. If we'd been told 'The evidence that we want is Professor Borland' we would have done something different.

PN1725

We might have called Professor Borland. We might have called someone else but we were never told with any specificity which particular pieces of evidence and which particular findings were sought to be relied on from the penalty rates decision. Of course, the first problem I mentioned is the bigger one, all of the evidence was not directed at this industry but if our friends wanted to extrapolate in some way and say 'Oh well, although it was retail' or 'although it was pharmacy, it applies equally here'. We should have been told. We should have been told quite precisely what findings and what evidence were sought to be relied upon.

PN1726

VICE PRESIDENT CATANZARITI: But isn't he really saying that, not that it may follow logically, but he was saying because a lot of hair and beauty salons are in a shopping centre the rest should flow? They may not follow but that's, in one sense, what is being put because it doesn't help the people who don't have hair and beauty salons who are not in shopping centres.

PN1727

MR DOWLING: That's not far off the submission as we understand it, your Honour. It seems to be when our learned friends describe the similarities in the industry they say 'Well they might be in similar places, they might have similar hours and they might deal with consumers and because of those three things, it's the same and we should get the penalty rate cut too'.

PN1728

VICE PRESIDENT CATANZARITI: Of course, the difficulty with that is that it's not just the retailers in the shopping centres and the hair and beauty people but there are other industries, like doctor's surgeries, for example, that open on a Sundays, that sit in certain shopping complexes. They're a whole lot of other - - -

PN1729

MR DOWLING: Of course.

PN1730

VICE PRESIDENT CATANZARITI: - - - entity so it's a bit simplistic but that may be the way it's being put. I think that seems to be the link back to the penalty rates decision.

PN1731

MR DOWLING: Yes, and you'll see in our submissions in a point that I'll come to, we say well if the indicators of similarity are hours, dealing with consumers and location, the entire CBD, in fact, that deals with consumers might be said to be in the same sector. We're all largely in the CBD, let's take Melbourne, operating similar hours in a similar location and all of those that deal with consumers, on those criteria and those criteria only, might be said to be in the same industry.

PN1732

It is, in our submission, way too simplistic to say by those measures, the industries are similar and therefore the penalty rates reduction from the retail sector and the pharmacy sector should flow to the hair and beauty industry. To be fair to our

learned friends, they rely on those three but they rely on two others, the least requirements and the selling of products. We'll deal with those separately but they are just not made out on the evidence. They are completely undermined by the evidence, in our submission, so you're left with the other three and if the Bench was to act on those other three, it would be a mistake, in our submission.

PN1733

Can I say three other things about the penalty rates decision and, as I say, I'll return to it in a little more detail. The second thing that's said about the penalty rates decision is that it was dealt with as the penalty rates as part of those sectors, hospital and retail, was dealt with as a common issue and therefore it might have some application here. We've set out in our written submissions at paragraph 25 and elsewhere that it's, in fact, not the case that it was dealt with as a common issue, so insofar as that is sought to be relied upon, it's mistaken.

PN1734

The second issue, and perhaps I've dealt with this in what I've said already, but the idea that this Full Bench could simply adopt factual findings of a different Full Bench in respect of different evidence simply cannot stand. We have the rather peculiar position here that three members of this Bench were part of the five in the penalty rates decision but thinking about it as a matter of principle and logic, no court could say there were other decision makers sitting in respect of another matter and we are simply going to adopt their factual findings without ourselves having heard the evidence in that matter.

PN1735

That is really the essence of what our learned friends say, 'We want to adopt the factual findings and the evidence in another matter' and that simply can't stand. It might be said the rules of evidence don't apply. For completeness, we've set out at paragraphs 27 and 28 why it is - - -

PN1736

DEPUTY PRESIDENT ASBURY: What about the consideration that it's a review? It's not a party and party proceeding as - I accept it would be if it was a contested party and party proceeding even though a Full Bench was exactly the same Full Bench in both matters, that what we were saying would be correct but in a review proceeding, is it different?

PN1737

MR DOWLING: In our submission, it's not. We accept there are different parameters and different considerations with respect to a review but what isn't different is that the Bench conducting the review still has to evaluate the evidence before it. It doesn't get to say 'Someone else looked at. We'll just adopt that finding'. Whether it's a review or not, your task is still to act on the evidence and assess the evidence before you not to adopt evidence from other cases.

PN1738

VICE PRESIDENT CATANZARITI: But presumably if there were factual findings from the penalty rates decision, they would have been articulated so that you would be - the Bench would say well these are the factual findings we're

relying upon, you'd have an opportunity to address or Mr Ferguson would have articulated which are the factual findings.

PN1739

MR DOWLING: Yes.

PN1740

VICE PRESIDENT CATANZARITI: Yes.

PN1741

DEPUTY PRESIDENT ASBURY: Which was your earlier submission.

PN1742

VICE PRESIDENT CATANZARITI: Yes.

PN1743

MR DOWLING: That's right.

PN1744

DEPUTY PRESIDENT ASBURY: If that was what the case to be, we should have been told this is the evidence and parts of it that we are relying on and we say operates in respect of this case.

PN1745

MR DOWLING: That's right.

PN1746

DEPUTY PRESIDENT ASBURY: Yes, I understand.

PN1747

MR DOWLING: There are two problems. You can't transfer the facts but even if you were going to try to, you'd have to tell us which ones, which facts, and then we could meet it. We could say 'Well that fact doesn't apply and here's some evidence from an expert to tell you how it is that fact doesn't apply in respect of hair and beauty'.

PN1748

COMMISSIONER LEE: Well, just on that general proposition that you can't transfer the facts, I mean for myself, I mean I would have thought that the chapter 6 in the penalty rates decision, which just dealt with weekend work, in a general - well from my recollection, in the generality about work preferences and so on. It would be - I don't know if it'd be a satisfactory situation that the Bench would be unable to have recourse to that type of material as part of the context for considering what we did in this matter.

PN1749

MR DOWLING: Well, in our submission that would be very dangerous because a lot of that was conclusions reached by the expert. You'll remember the evidence - - -

PN1750

COMMISSIONER LEE: It does. It's Lewis and Borland and Rose and - yes.

PN1751

MR DOWLING: Yes, and there's no doubt, in our submission, that Borland, Lewis, Quiggin, Rose, each of them directed their reports to retail and hospitality. The conclusions that are reached in respect of those preferences, Rose, the behavioural economist, particularly dealt with preferences and, in our submission, it would be dangerous to say all of that material about preferences can simply be applied over here. I mean one significant difference that we will come to is, in our submission, it is simply not common for hair and beauty establishments to open on a Sunday and, in fact, a Monday consistent with some of the evidence.

PN1752

The whole issue of consumer preferences is immediately skewed because the way the industry operates is different but even if the Bench is not satisfied that we're right about that, and we'll try and urge you we are, we still think it will be dangerous to simply adopt over all of the material about preferences given the particular context of the evidence.

PN1753

COMMISSIONER LEE: Well, we can deal with that in the way the Deputy President was alluding to that if we were to take a view that we wanted to have some reliance on it, your position would be we would need to canvas that, well put it to you, provide you an opportunity to say something about that?

PN1754

MR DOWLING: Yes.

PN1755

COMMISSIONER LEE: Yes. All right.

PN1756

MR DOWLING: To be fair and frank, that might not only lead to us saying we want to have something to say about it. It might lead to us saying we want to lead some evidence about it. If, for example, speaking hypothetically only, but the Bench was to say 'Well we want to take account of what it is that Professor Rose had to say in terms of preferences', we might want to call a behavioural economist to say well the preferences operate differently in this sector and this is why. It might not just be a matter of simply responding to the proposition that you want to take account of it. It might create the need for further evidence.

PN1757

COMMISSIONER LEE: Okay.

PN1758

MR DOWLING: That's why we were so determined to hear from our opponents about which particular bits of evidence and which particular factual findings they were talking about.

PN1759

COMMISSIONER LEE: Yes.

PN1760

VICE PRESIDENT CATANZARITI: Another one of the factual evidence that you've alluded to is that it is true, at least anecdotally, that a lot of hairdressing salons, even in major shopping centres, do not open on a Monday.

PN1761

MR DOWLING: Yes.

PN1762

VICE PRESIDENT CATANZARITI: Or they have reduced staff on Mondays because of the trade but a lot of them don't even open on a Sunday and this is actually a change to the position by saying well we will open on a Sunday because the lease may permit us to open on a Sunday but we're not required to be on a lease but none of that has been factored into the preferences discussion in the experts as to there's now a shift.

PN1763

MR DOWLING: That's right, that's right. The fact that they don't and might is something that might be very important. What does it do with demand? Does it really mean people will now start getting their hair cuts on a Sunday or is it so ingrained that they don't open on a Sunday that it might not change demand at all by way of preferences. The businesses then won't choose to open because, of course, all of the witnesses said demand is a key factor here.

PN1764

VICE PRESIDENT CATANZARITI: I'm sure my colleague will go on a Sunday.

PN1765

COMMISSIONER LEE: Yes, first thing I think about on a Sunday morning.

PN1766

MR DOWLING: Might have to put her in the box. Sorry, I didn't hear what Lee C said in there.

PN1767

COMMISSIONER LEE: I said getting a hair cut's certainly the first thing I think about on a Sunday.

PN1768

VICE PRESIDENT CATANZARITI: But he does have hair.

PN1769

MR DOWLING: Very good hair. Can I deal with one last matter of principle and this is addressed at paragraphs 30 and 31 of our written submission and this really deals with the employment effect which I'll deal a little later in some greater detail but it seems to be suggested that because it is inherently difficult to demonstrate and quantify such an employment effect that that, in some way, excuses HABA from either addressing it at all or from addressing it in any detailed way. In our submission, again we say that's not consistent with principle.

PN1770

It does not mean, that difficulty does not mean, or lead to the conclusion that the proponent of change is excused from calling evidence that is feasible and tellingly, for reasons we'll come to in a little more detail, no evidence is called at all about the employment effect. What we have then nextly(sic) done is simply summarise the five propositions as we understand them. Firstly, the Commission should not follow the three prior decisions. They are the decisions of 2008, 2010 and 2013.

PN1771

Secondly, it should follow the penalty rates decision. Thirdly, there are particular features of the industry that support the variation. Fourthly, that hair and beauty businesses are similar to or in competition with businesses in the retail or the pharmacy industry and lastly, granting the variations would potentially increase the number of apprentices. We will come to each of those propositions. I identify them now simply to summarise the case that we face as we understand it.

PN1772

Can I then deal with - before I come to those propositions, I want to identify what we say are the salient parts of the evidence in respect of both parties and we firstly identify the evidence of Associate Professor O'Brien and we do that from paragraph 36 onwards. The task that he was undertaking was to give expert evidence about how the labour force profile in the hair and beauty industry compares to the labour force profiles of the retail/hospitality industries and to give expert evidence as to whether he considers that there are other industries to which the labour force profile most closely matches the characteristics of the labour force profile of the hair and beauty industry.

PN1773

It's obvious at this point that his evidence is uncontested. He was not cross-examined. There was no evidence called in response to his evidence. In our submission, where that leaves the Commission is the only probative evidence before the Commission which compares the hair and beauty industry and the retail and hospitality industries is that of Associate Professor O'Brien. He undertook that comparison by reference to five considerations and we set those out at paragraph 40, status in employment, level of education, relationship in household, age and hours of work.

PN1774

There seemed to be this morning some criticism about the appropriateness of those considerations. Can we say this in response, firstly, this Bench will recall that in respect of those that undertook a demographic process or inquiry in the penalty rates decision, these factors were either some of the factors or the factors used so as a measure it seemed to be an appropriate mechanism. Secondly, our opponents never asked Associate Professor O'Brien why it was that he chose those considerations or never put to him that any of them were inappropriate.

PN1775

If the submission being made now is that somehow those considerations are inappropriate, that submission cannot be made and should be withdrawn because it should have been put to Associate Professor O'Brien they are not the right ones, they are not the appropriate ones. He should have been given the opportunity to

answer that criticism. If that is the criticism that is being made, that they are somehow inappropriate, it should have been put. It was not put. The opportunity was there for it to be put.

PN1776

We were told he was to be cross-examined right up to the night before he was about to give his evidence. For whatever reason, the applicant made a forensic decision not to cross-examine him. They cannot now direct any criticism at him for that selection of those criteria and more importantly should withdraw it, in our submission. We then deal with each of those criteria. In respect of status in employment, we set the submissions out at paragraphs 42 through to 45. He draws the distinction between the percentage of employees in retail and hospitality being between 85 and 88 and in the hair and beauty industry lower and decreasing, from 61 to 57, and he sets out the prevalence of sole traders at less than 5 per cent in retail and hospitality and relatively high and increasing from 19 to 24 in respect of the hair and beauty industry.

PN1777

We then nextly(sic) deal with perhaps the consideration that has attracted the most attention, for good reason, and that is the significant differences between the hair and beauty industry and the hospitality and retail industry in respect of the measure being the level of education and we've summarised Associate Professor O'Brien's evidence at paragraphs 47 and 48 and we have focussed our attention, those two paragraphs list university qualifications, diploma level qualifications, certificate III or IV qualifications, we have focussed our attention on sub-paragraphs (b) and (c) for this reason, they are, in our submission, the equivalent to being trade qualified.

PN1778

The summary of those two paragraphs is that 73 per cent of employees in the hair and beauty industry are trade qualified whereas only 20 per cent of employees in the retail and hospitality industry hold trade level qualifications. I'll come back to that.

PN1779

VICE PRESIDENT CATANZARITI: Is that number correct or a typo? Because I add up to 78, just going by what Dr O'Brien's original report said.

PN1780

MR DOWLING: You're referring to the percentage, your Honour, of trade qualified in the hair and beauty industry?

PN1781

VICE PRESIDENT CATANZARITI: Yes.

PN1782

MR DOWLING: The combination of 19 and 54.

PN1783

VICE PRESIDENT CATANZARITI: He doesn't include the universities as being a trade?

PN1784

MR DOWLING: No, he doesn't.

PN1785

VICE PRESIDENT CATANZARITI: All right, yes. If 78 per cent of people are qualified compared to 40 per cent in the retail?

PN1786

MR DOWLING: That's right.

PN1787

VICE PRESIDENT CATANZARITI: Yes.

PN1788

MR DOWLING: That's right, as I said our focus is on trade qualification and that's why we directed attention to (b) and (c), so if you're looking at trade qualified, and that seemed to be where all the evidence was, Asbury DP this morning identified that fundamental difference between the amount of people trade qualified in the industry, in the hair and beauty industry, that's why we've joined those two numbers together in terms of trade qualifications, putting to one side the university qualifications because that has some peculiarity when it comes to students, those two figures are 25 and 73.

PN1789

The question in respect of full-time students is dealt with at paragraph 50 and you see there retail and hospitality industries, 17 per cent of retail and 29 per cent of hospitality are full-time students in stark contrast with 4 per cent in the hair and beauty industry. We then identify for you the question of hours of work. There are - relatively similar ultimately is the conclusion but there's a significant difference that we identify in respect of 15 hours or less.

PN1790

We then identify his relevant evidence in respect of relationship in household and age which, for reasons, we'll return to, are inconsistent with what is put in support of the application. Where all of that then returns, that is the standalone contrast between the hair and beauty industry and the retail and hospitality industry, starkly different, in our submission. That's the first task. Then the second task is by way of a cluster analysis, what industries do - those in the hair and beauty industry properly compare with and, again by the same measures, status of employment, level of education, weekly hours worked, relationship in household and age, so by the process of a cluster analysis the key conclusions are set out at paragraph 58.

PN1791

The ranking analysis showed that hairdressing and beauty occupies a relatively extreme position in the labour market being in the top 10 per cent of industries in terms of concentration of sole traders, diploma graduates, certificate III and IV graduates and non-dependent children but being in the lowest decile, 10 per cent of workers classified as employees and university students. Other industries with a low concentration of employees and high prevalence for sole traders included many construction and trades related industries such as plumbing, carpentry,

landscaping, bricklaying, roofing, electrical, auto electrical industries as well as agricultural, entertainment related industries.

PN1792

Other industries with a high concentration of certificate III and IV graduates included the same set of constructions and trades related industries in addition to wooden and metal manufacturing. Before I come to what's said against Associate Professor O'Brien, where you get to is the labour force profile of the hair and beauty industry is materially different to the labour force profiles of the retail and hospitality industry and secondly, the labour force profile of the hair and beauty industry shares the most commonalities with other trades related industries.

PN1793

All of that might not be surprising to the Bench knowing the four year apprenticeship process as opposed to what the Bench saw in respect of retail or hospitality workers but it is borne out in the uncontested evidence of Associate Professor O'Brien. There seems to be two criticisms made in respect of Associate Professor O'Brien. In our submission, they really don't meet his evidence. The first in respect of trade qualifications, the way our friends respond to that is to say well there were employees with trade qualifications in the retail and hospitality sector and they suffered a cut therefore what it is that Associate Professor O'Brien has to say isn't relevant.

PN1794

In our submission, that entirely misses the point. What Associate Professor O'Brien is doing is comparing the level of trade qualified to get and obtain an assessment of whether there is genuinely a similarity and one has 73 per cent trade qualified, one has 25 per cent trade qualified. That demonstrates that on that measure, and it's a significant one, there is no similarity. It doesn't answer that to say yes, but look there's some, there's 25. That's not an answer, that's missing the point.

PN1795

The point is in the difference between the two. The second criticism, as we understand it, is that, in the words of our friends, the evidence does not establish any proposition regarding hair and beauty industry or any other industry at large. It's not entirely clear to us what that means but insofar as it seeks to suggest that Dr O'Brien, Associate Professor O'Brien, was trying to determine characteristics of industries at large, again it misses the point. What he was doing is comparing two particular industries, retail and hospitality with the hair and beauty industry and additionally saying okay, in respect of hair and beauty, if it's not like that, what else is it like?

PN1796

He wasn't making an assessment more broadly about how other industry categories apply. He was performing that assessment. I'll come back to the - when I - - -

PN1797

VICE PRESIDENT CATANZARITI: When Dr O'Brien's referring to 25 per cent in retail holding trade qualifications, of course he's not in a position to say why

there were trade qualifications whereas in hair and beauty they need trade qualifications.

PN1798

MR DOWLING: Yes.

PN1799

VICE PRESIDENT CATANZARITI: For example, if you go to a Bunnings store a lot of the people in Bunnings have got trade qualifications because Bunnings recruits people that have simply retired from their trade so it's a distorted fact to rely in that as being a requirement of the retail industry.

PN1800

MR DOWLING: Yes, yes, that's right and, in our submission, that would distort the position even more, of course. That would enhance the dissimilarity, not sure if dissimilarity's a word - - -

PN1801

VICE PRESIDENT CATANZARITI: It would - - -

PN1802

MR DOWLING: - - - but it would enhance the difference between the two of them because if you were measuring that, and that would be a very - I imagine it would be a more difficult exercise because I'm not sure ABS would be able to tell you that, that is of people employed in Bunnings which of them had a trade qualification but weren't required to, but if you could measure that I think that would inevitably be the case that there'd be an even greater disparity and you might be down to five or 10 per cent but I appreciate I'm making a submission about a speculation about those that require it in retail as opposed to those that require it in - - -

PN1803

VICE PRESIDENT CATANZARITI: I mean the real point is that the difference in trade qualifications is exponentially greater by the nature of the work in hair and beauty than in retail.

PN1804

MR DOWLING: Correct.

PN1805

VICE PRESIDENT CATANZARITI: All I'm suggesting is 25 per cent might, in fact, be over-stating because of the fact that it's not a requirement of the job.

PN1806

MR DOWLING: Yes, we accept that. I should say that's reinforced by at least the classification structure within the Hair and Beauty Industry Award as opposed to the classification structure in the say retail and hospitality which won't surprise - you've heard evidence about it already, at level three you are trade qualified and you are required to be trade qualified so supported by, what your Honour says is supported by, that classification structure.

PN1807

I will return to Associate Professor O'Brien to take the Bench to the ANZSIC classifications in a little detail but not a lot but before I do that, and where that becomes relevant, can I deal with the balance of the evidence relied upon by the unions and we've set each person out separately and I'll just point to the salient aspects only. Ms Gedney is the first of the people we set out. She gave evidence about the harmful impact the penalty rates reduction will have on her family.

PN1808

Tellingly, and the Bench will recall I identified this in opening, she did her apprenticeship, attained her qualifications, her cert III qualifications, in 1989 meaning she's trade qualified, and has worked in the industry for 34 years since that time, is receiving the award wage and currently, I think as of only this week or last week, is on the 28.25 hours consistent with the payslips that you've been provided, and we've set out there those calculations that we identify at paragraph 66 are based on the payslips that we have provided to you.

PN1809

We've also set out, as you've heard, that she's 50 years old, a single mother with two children, the sole breadwinner, the income she receives from her employment is supplemented by child support and welfare payments and that she spends 75 per cent of her current income on household expenses and the amounts that she would lose, $73.78 gross per week or $47.96 net per week, what we submit is a 14 per cent reduction in her salary. She set out that that means 'Cut backs to family holidays, activities for my children. I would have to work more hours to offset the loss which would mean more childcare. I think we would be on the brink of the poverty line'.

PN1810

In our submission, it can't be contested that a reduction in the penalty rates would cause a significant financial loss for someone in Ms Gedney's position. Our friend today, in respect of Ms Gedney and others, relied upon a document which sought to undermine some of the evidence that they give and in respect of Ms Gedney, what they say should not be given any weight, is Ms Gedney's evidence set out in that extract at paragraph 69, that 'I think we would be on the brink of the poverty line', and your Honour will find that on page 2 of the document under Carrie Gedney in the table, the first of the items, paragraph 11.

PN1811

Undoubtedly, in our submission, that's relevant evidence. It's relevant to assessing whether a reduction in the penalty rates would cause significant financial hardship. Ms Gedney was not cross-examined about it. If it's now suggested that in some way it is not true and doesn't have a proper basis, that should have been put to Ms Gedney. It was not put. If it's suggested it doesn't have a proper basis, that should be withdrawn because it was not put. We do not understand how it could be said that it should not be taken into account.

PN1812

As respect to the other matters dealing with Ms Gedney, the balance of those matters on that page, my learned friend cross-examined about those matters, received answers as to how it was Ms Gedney came to that view and can't now

say, having cross-examined on it, having received answers, having had it confirmed, that in some way it shouldn't be given any weight.

PN1813

VICE PRESIDENT CATANZARITI: I think in relation to the first objection, the issue of the poverty line, is a term of art and it was not actually put to her as to her understanding what she meant by the poverty line. It's a bit difficult to run as an objection by Mr Ferguson in final submissions.

PN1814

MR DOWLING: Well - - -

PN1815

VICE PRESIDENT CATANZARITI: Because that's really about - the others obviously goes to weight but the first one it's a bit difficult, speaking for myself, to see how that can actually be taken as a point now when it was not put in those terms.

PN1816

MR DOWLING: Your Honour is, in our submission, being kind to describe it as difficult. We would say completely inappropriate for it to be taken as a point now.

PN1817

VICE PRESIDENT CATANZARITI: Yes.

PN1818

MR DOWLING: But we do understand too that there was, as my learned friend said, a process by which objections were agreed. None of these were agreed as objections so these are not put as objections. They're put somehow as to weight but even as to weight, the first item, don't see how it could be submitted as a question of weight when the witness was not given the opportunity to answer the criticism that's now made. Can we say last one thing about Ms Gedney and this was a recurring theme in respect of witnesses on both sides, in terms of the amount of time spent selling hair products and her evidence was approximately 15 minutes out of an eight and a half hour shift.

PN1819

It's relevant for a reason that we'll come to and the ANZSIC classification in terms of describing retail operations describes those mainly engaged in the selling or on-selling of products. On no measure could these establishments come within the retail classification and on no measure could it be said that they are mainly engaged in the selling or on-selling of retail products. We've set out Ms Brooks at paragraph 72 to 75. She has held her trade qualification for approximately 15 years.

PN1820

Tellingly and inconsistent with what my friend said in his submissions this morning, we set this out at paragraph 74, she explained to the Commission that during her career as a hairdresser she has worked at 10 different salons across Western Australia but only one of those 10 salons was open on a Sunday. In

terms of that and the various other measures we will come to about whether Sunday trading is common, that was in stark - - -

PN1821

VICE PRESIDENT CATANZARITI: But doesn't Western Australia, Mr Dowling, have a problem with Sundays still at the present time?

PN1822

MR DOWLING: Yes, it does have - - -

PN1823

VICE PRESIDENT CATANZARITI: Having just sat in Western Australia in the last couple of weeks.

PN1824

MR DOWLING: It does have a peculiar regularity regime about being able to require businesses to open on a Sunday but that's not addressed at all by our learned friend and that is the state of their evidence. There is other and more compelling evidence from which we say the Bench could draw the safe conclusion that not only is Sunday trading not common, it is, in fact, uncommon. Again, Ms Brooks gave evidence about the extent of her day selling products and the Bench will see there at paragraph 75, 95 per cent of her day was spent performing cutting and styling as opposed to selling products where recommendations are given.

PN1825

We then set out Ms Geritz. Again, trade qualified, completed her apprenticeship 13 years ago. I won't repeat her evidence, and Rachel Pierre-Humbert, again, trade qualified in excess of 13 years. Again, in her case, someone that works on a Sunday, is opposed to the reduction in penalty rates and we say, again, it can safely be concluded that there would be a significant financial loss in respect of her working on a Sunday after the reductions that are sought by the applicant. We then set out Ms Maguire and Ms Maguire was in an important position in our respect because - in our respectful - - -

PN1826

VICE PRESIDENT CATANZARITI: You're skipping over Ms Humbert, are you? I'm just following their written submissions?

PN1827

MR DOWLING: Yes, we're content to rely on our written submissions in respect of Ms Humbert, Pierre-Humbert. I did identify though, your Honour, paragraph 79 of her evidence that she did work on Sunday 10.00 until 3.00 and we draw attention to that to say a reduction in penalty rates for her would lead to, in our submission, significant financial loss. Ms Maguire, whilst called by the unions, was not only an employee but an employer and is relevantly now an employer and the Bench will recall she's operating a salon known as Donna Magees in Emerald in Queensland and employs a hairdresser under the Hair and Beauty Industry Award.

PN1828

She expressed her strong opposition to the cut and said 'Because I care about the industry and am concerned about their impact on an already low paid workforce'. She explained to the Commission that she doesn't open her salon on Sundays or public holidays because it is her view that people shouldn't work on these days because they are family time. Tellingly also, she told the Commission that even if the penalty rates were changed in accordance with this application, that would not change that position.

PN1829

The Commission only has five employers before it and one of them is actively saying 'Even if you make the change, I will not open on a Sunday and I will not open on a public holiday'. She was asked about products and made it clear that the products that she sells cannot be bought from such retail outlets as department stores or Price Attack as was put to her, and I'll return to her when we deal with the question of Sundays.

PN1830

We lastly identify Ms Brandreth who was another witness not cross-examined. She provided evidence about skills shortage in the labour market across Australia for hairdressers and the persistent nature of that shortage which we say is supportive of a proposition that penalty rates could not positively affect - a reduction in penalty rates could not be said to positively affect that shortage. As to the petition, we don't put it any more highly than this.

PN1831

Her evidence establishes that 6639 persons added their name to the petition and of those, 4317 persons identified themselves as being employed in the hair and beauty industry. The Commission can take from that, at least, that there is widespread opposition to the proposed cuts to penalty rates in the industry. That might be self-evident too in the sense that one would expect it would be unlikely for an employee to support the proposition but if, as our learned friends would have it, these employees should consider themselves lucky because they might be going to get more hours and, in fact, be in a better position, it doesn't follow that some of them might not, in fact, support it but you can at least take from that petition that there is widespread opposition.

PN1832

I can deal with the next part relatively quickly. The Bench will remember we provided a folder of documents, the last three of which we were not permitted to rely upon so we have not - of course, we have not addressed those last three but we have identified each of the other documents. We've addressed, or endeavoured to address, why each is relevant and what parts of each of them are relevant. I'll just return to, whilst we're dealing with documents, can I just return to the ANZSIC document you were given this morning and you have an additional ANZSIC document behind tab 1 of the folder.

PN1833

Could I firstly - in respect of the document that was tendered this morning as exhibit 6, this is division G and the Bench will probably be frighteningly familiar with the way the structures work, division then sub-division then group then class. This is division G, so retail has its own division, and as I indicated earlier,

the first page of exhibit 6 identifies 'The retail trade division includes units mainly engaged in the purchase and on-selling, commission based buying and commission based selling of goods without significant transformation to the general public'.

PN1834

That's the description of the retail trade. In our submission, by no measure, on any of the evidence that's before this Commission, could it be said that any of the businesses that we have heard from or any of the businesses in the hair and beauty industry come within the description of mainly engaged in the purchase and on-selling of goods. The hair and beauty industry and the services it provides are found within division S and that is the document behind - that is included in the document behind tab 1 and perhaps the easiest reference point is the very last page of that document, which is numbered page 367 in the bottom right hand corner, and what I hope will be relevant from that page is that the relevant division for hair and beauty services is division S.

PN1835

It's sub-division is personal and other services. It's group is 951, personal care services, and it's class is 9511, hairdressing and beauty services, and 9511 is there described as 'This class consists of units mainly engaged in providing hairdressing services or in providing beauty services such as nail care services, facials or applying makeup'. Putting aside any odd irregularities, that, we say, describes the hair and beauty services and the relevant industry that this award covers in contrary distinction to what we saw from the retail classification, those mainly engaged in the selling or on-selling of products.

PN1836

VICE PRESIDENT CATANZARITI: We might take the adjournment now.

PN1837

MR DOWLING: Thank you.

LUNCHEON ADJOURNMENT **[12.55 PM]**

RESUMED **[2.09 PM]**

PN1838

VICE PRESIDENT CATANZARITI: Thank you, Mr Dowling.

PN1839

MR DOWLING: Thank you, your Honour.

PN1840

I was at that part of my submissions, your Honour, where we describe the Union's further documentary materials which commence on page 21 of the written submissions. And we there list the further documentary materials and from page 23, we set out how and why each of those parts are relevant and which parts we intend to rely upon. There are some other parts that are cross-referenced elsewhere but we're content to rely on our written submissions insofar as they deal with each of those documents.

PN1841

Before the break I spent some time with item 1, taking you to division S and division G. I don't need to trouble the Bench with that anymore. Can I just identify one matter in respect of the balance of the documents and that is referred to at paragraph 15 where we there refer to the IBIS reports and we make reference to JustCuts. Something was made in the written submissions of our friends about the place that JustCuts hold in the market. The most recent of the IBIS reports puts their percentage of the industry between 0.1 and 1.0 and I'll return to that but that is one of the reasons that we rely on the IBIS documents that are referred to at paragraph 94.

PN1842

Can I then deal with the salient aspects of the evidence adduced by HABA and this starts, part F on page 24 of the written submissions. I already reminded the Full Bench that of course, in penalty rates we had 143 witnesses, including lay and expert witnesses. Here, by contrast, we were presented with four employer witnesses, five if you include Ms Maguire. The first thing that can be said in respect of the HABA evidence, and this goes for the evidence more generally and was a point your Honour picked up on earlier today, and that is the overwhelming evidence is that those employees and employers that you heard from demonstrate that the participants are award reliant. That includes those that have had 30 years' experience. They're still paid by award reliant, we mean paid at the award rate.

PN1843

If I can deal with Mr Thatcher, in summary. He ran two beauty salons in Queensland, which are both located in shopping centres. [redacted] In respect of the time spent providing services as opposed to selling products, his evidence was that the vast majority of his employees' time was spent actually providing the services and he described the sale of products as an 'add-on'. And that, I our submission, is an appropriate description. It is an add-on. It is not their business. The vast majority of the business is providing the services, consistent with what we saw in division S.

PN1844

Two last things about Mr Thatcher, (1) in respect of what might come of any reduction in penalty rates, he accepted – sorry, withdraw that. His evidence was, initially you will recall, that even if there was a reduction in penalty rates, he was going to maintain it for his employees. Now, you might recall, under some further cross-examination, he resiled from that and started to suggest, well, 'Not all our existing employees, but only those we consider to be good performers'. But whichever way you look at it, in our submission, it undermines what might be said to be any positive impact from a reduction in penalty rates in respect of Mr Thatcher's business. If it is that he can and will continue to pay the existing rates, how is it that he says that he can do those things in terms of opening hours and potential, additional employment that he submits?

PN1845

Ultimately, of course, though in respect of extended hours, his evidence was that it was just a possibility because he would have to do the analysis. You might

recall I put to him whether he had assessed the value of penalty rates, under the current regime, and the value under the application, as it's put. He hadn't done that analysis and in those circumstances, had to accept that it was just a possibility, at the moment, as to what might happen.

PN1846

Lastly, can we say, and this is a recurring theme, that Mr Thatcher did not give any evidence that if the proposed reduction in public holiday penalty rates was granted, his business would do anything different in respect of public holidays. And I'll return to that when I deal with public holidays as a separate matter.

PN1847

Mr Akle, we've summarised next. He is not open on Sundays. He accepted that his employees, at least in respect of their qualifications, were vastly different from retail employees. He accepted and conceded that he had not worked out the labour cost attributable to penalty rates, under the existing regime, or under the proposed application. Accepted that a significant factor in determining whether to open on Sunday was the level of demand and gave evidence that he had not had discussions with his employees about a reduction in rates on public holidays because to do so would be premature because he hadn't made the decision to open on Sundays, yet.

PN1848

He didn't give any evidence about selling products, nor did he give any evidence that his lease requires him to open on a Sunday or public holidays and again, he didn't give any evidence that if there was a reduction in respect of public holidays, that his business would operate any differently.

PN1849

We set out Mr Downs, who operated four hairdressing salons in Western Australia, under the JustCuts franchise. [redacted] and that the decision about actual opening hours was determined by customer demand, on any given day. His evidence in respect of the demarcation between retail and providing services was that the core business of the salons is the provision of hair cutting and other related services and that most of the revenue came from hair cutting and related services. He, like Mr Thatcher and Mr Downs, also did not give any evidence that if the proposed reduction in public holiday penalty rates was granted, his business would do anything different in respect of public holidays.

PN1850

That leaves Ms Richter who operated a beauty salon in Western Australia in Mosman Park. Her salon did not open on Sundays or public holidays. [redacted] and she accepted that the decision to increase trading hours was affected by the significant factor of demand and that any decision to increase trade on Sundays was not yet a definite decision. Like the other three witnesses called by the applicant, Ms Richter did not give any evidence that if the proposed reduction in public holiday penalty rates was granted, her business would do anything different in respect of public holidays.

PN1851

Now, we then deal with Mr Sullivan and a survey and we repeat that the applicant, HABA, does not submit the results of the survey are representative of its members, or that the results of the survey are representative of the Hair and Beauty Industry, at large. It does not assert that the results of the survey are statistically significant and does not seek to extrapolate the results to the Hair and Beauty Industry, generally.

PN1852

Now, with those concessions, in our submission, we're not really sure what can be made of it, at all. My learned friend seemed to try and extrapolate the results but it seems to us that to do so, would be contrary to that agreement. But insofar as it suggested that the results of the survey are in some way anecdotal, and therefore, something should be made of them, we just make three points.

PN1853

Firstly, as has already been alluded to, there are something close to 900 members. I think we put 864. There were 151 complete responses and 102 incomplete responses. That means, doing the simple maths, that 80 per cent of HABA's members did not complete a complete response and 70 per cent did not complete a response, at all. Now, that is not indicative, even amongst the HABA members, of a desire for change.

PN1854

The second thing that must be noted about the survey is, nowhere in the survey is a recipient asked whether he or she supports a cut in penalty rates. Now, my learned friend was at pains to complain that any deficiency in the survey might be one attributable to resourcing. This is not a resourcing issue. Drafting the survey questions was carried out by someone, those resources were used, and nevertheless, there was a decision not to ask anybody whether they supported or didn't support. And the survey cannot be used, in any way, even if anecdotal, in support of a proposition that there is support amongst the HABA members.

PN1855

Lastly, can we deal with two propositions that are put about Sunday trading hours and about an obligation to trade on those days. If anything is to be taken from the survey, and we have cross-referenced where this appears, attachment H to the statement of Mr Sullivan, of the 108 recipients that answered the question whether any of their salons were open on Sundays, only 37, or 25 per cent, answered, 'Yes'. Now, that in our submission, is patently and obviously, inconsistent with HABA's assertion that it is very common for hair and beauty businesses to operate on Sundays. Seventy-five per cent of those that answered the survey said they did not operate on Sundays. Tellingly, they were not asked about Monday. Monday's been raised in questions this morning about how Monday might affect Sunday, there were no questions about Monday.

PN1856

Together with that answer by that 108, they were also asked whether they were required, by their lease, to open on Sundays. Only 30 of the 108, or 20 per cent, 20.69, answered, 'Yes'. Again, wholly inconsistent with the submission that lease arrangements often require hair and beauty business to open on Sundays. Not so

of the HABA membership that answered the survey. In respect of those that were asked whether they opened on a public holiday, it was 26 per cent. So again, approximately three-quarters do not open on a public holiday. Of that, those recipients that answered that question, they were also asked whether they were required by their lease to open on a public holiday, and only 17 per cent answered, 'Yes'. Again, wholly inconsistent with the proposition that lease arrangements often require hair and beauty businesses to open on public holidays.

PN1857

So really, in our submission, nothing can be made of the survey, but if our learned friends try and rely on its anecdotal value, its anecdotal value is at odds with the submissions that it makes.

PN1858

Can I say one last thing, while we're dealing with surveys? And we were helpfully given a copy of the survey in the Social Community, Home Care and Disability Services Industry Award. Can I say this, relevant to this matter, can I go back a number of steps? And I identified this earlier but firstly, what is clear from the penalty rates decision is that ABI and the New South Wales Business Chamber, as well as, Hair and Beauty Australia Industry Association, commenced an application to withdraw – sorry, to reduce the penalty rates in the Hair and Beauty Industry.

PN1859

That was withdrawn on 14 September 2016 and the Bench will see that at paragraph 10 and paragraph 2,058 of the Penalty Rates Decision. In the decision, itself, as we've already seen, there was an open offer, or an open invitation, for anyone to take up the issue of reviewing the Hair and Beauty Industry Award. And that's described in paragraph 2,062. So it's 14 September, the original of '16, that the application's withdrawn then the decision comes down on 23 February and there's an open offer. Then on 4 October 2017, directions are made in respect of this application.

PN1860

And those directions include that HABA and any party, that supports the variations to the Hair and Beauty Industry Award, proposed by HABA, file written submissions in evidence by February 2018. Now, we say in respect of all of that, the Bench can safely conclude that no one else was interested. In response – there's a group that made an application then withdrew it and they don't reappear. Safe assumption that they are not interested. They're clearly cognisant of the issue, they don't return. There's an open offer. The only group that appears is HABA, despite a second offer that anyone who supports the application can file its submission.

PN1861

That, we say, leads to the safe inference that no one else is willing to make the application. It would not, in our submission, be fair, just or equitable for the unions to face a third application if that is the result of the Commission conducting its own survey. But can we say two other things about the Union conducting its own – sorry, the Commission conducting its own survey? My apologise.

PN1862

As we understand the SCHADS survey, if I can call it that, paragraph 29 of the decision identifies that that was a survey of the members of the parties to the proceeding, and that's at paragraph 29 that it's described in that way. That would not necessarily overcome the problem that your Honour, the Vice President, identified if we were to say, HABA is not representative, yet the Commission were to conduct a survey of HABA's members, we may still be in the same problem, that the rest of the industry doesn't say anything.

PN1863

I think the decision went on, at paragraph 30, to say, the survey – sorry, it is paragraph 29, the balance of what I was saying about the nature of the survey, the Bench went on to say:

PN1864

The survey was not designed to be representative of all enterprises employing workers covered by the SCHADS Award.

PN1865

Now, if a survey of the same type was conducted here, it wouldn't advance the unfortunate predicament that the Commission is in because all we would have is some views of HABA's members, which again, would not extend to the industry, more broadly.

PN1866

One last thing, of course, and that is whilst HABA, through their representatives, in its closing submission makes some complaint about resourcing issues and what the Commission could or couldn't do, at no stage did it seek the Commission's assistance. At no stage, did it come to the Commission and said, 'We're a little under resourced in respect of any survey that we can conduct, can we have your assistance?' It used its resources to carry out its own completely inadequate survey, in our submission, and it now is inappropriate if it's come along and say, 'Whilst we could have done this earlier, we want to do it now', and put the Union parties to the time and expense of a third application. That would not be consistent with the principles of fairness and equity provided for by the Act, in our submission.

PN1867

Now, that perhaps, leads to what it is we say at part G about HABA being not representative of the industry. We maintain the submission that's set out there, at paragraphs 136 to 141, and we appreciate the issue raised by your Honour, the Vice President, that that might lead to particular avenues. We can only repeat what we've just said and that is, you can be confident you don't need to go down those avenues, given the circumstances as they unfolded, in respect of the invitations to provide submissions and or evidence, in support of this present application.

PN1868

Now, can we then turn to what is – commences at page 32 and our response to the merit arguments, as we describe them, put by HABA. The first of those deals with the three assessments performed by the Commission of the level of penalty

rates in respect of this Modern Award or its predecessor. And they were in 2008, 2010 and 2013. We address the significant difference between the parties, can I say in summary is, really what happened in 2008 and the degree to which the issue was canvassed and discussed and as to whether there was a debate about it.

PN1869

For our part, we say the issue was live, there were submissions about it and there were conclusions reached. And we set that out from paragraph 145. We are content to rely on our written submissions in respect of what we say about those three decisions, but for the reasons there set out, we say that the issue was considered and assessed in 2008 and by extension, 2010, and certainly, again in 2013, and there is nothing material, for present purposes, that changes the task the Commission was undertaking in 2013.

PN1870

Now, that leads to proposition 2 and we've addressed it, save a couple of matter that I'll return to when we're dealing with the question of the employment effect, as alleged, but this is the proposition the Commission should not follow, in our submission, or follow in theirs, the Hospitality and Penalty Rates Decision. I repeat the submissions I've already made by reference to paragraphs 26 to 34, 291 and 306 of these submissions, and in terms of what can be made of those findings and that evidence, specially in circumstances where detail was sought.

PN1871

I emphasise what we say at paragraph 165, which is the Full Bench stressing in the Hospitality and Retail Decision, about the importance of considering each award, in its own right, due to the difference between industries. And otherwise, content to rely on what we have already said, what we say in that part of the submission, and one matter that I'll return to when I deal with the employment effect.

PN1872

We then respond to, commencing on page 37, what is said to be the particular features of the industry that are said to support the granting of the variations. Now, none of these, in our submission, come close to justifying the reductions that are sought but can we deal with them separately, or at least the most important parts of each. In respect of the workforce, the most that seems to be put is that they're fairly young and for the reasons that we've set out, the uncontested evidence of Associate Professor O'Brien is that they're 35.9 and that is not something that, of itself, could be said to, in any way, support the granting of the variations.

PN1873

That is, it seems to be, the feature of the industry that's relied upon in this part of the HABA submissions and they are, as we say in our written submissions, unhelpfully silent on any other features of the labour force profile that they say justifies the reductions. They then say the other feature is the size of the businesses or that they are typically small, and they do that by reference to what's colloquially called the RAPS Report or the Counts of Australian Business. For the reasons we say there, those documents are not relevantly reliable, the RAPS Report is a Western Australian publication put out by a Western Australian

organisation four years ago, which really is in the nature of submission and we do not see how it can be applied to the national industry.

PN1874

The Counts of Australian Businesses, tellingly, only includes businesses that register for GST and therefore, the data is incomplete. So that, of itself, or together, with the other features of the business cannot in any way justify the application. It's then said that businesses face very significant costs and competitive pressures. There is simply, no evidence of what these significant costs and competitive pressures are. We refer to the IBIS Report and the increase in revenue of JustCuts, which HABA points to as its flagship. But we cannot see how the Commission could reliably conclude, on what is before it, that there are significant costs and competitive pressures, such to justify the variation.

PN1875

I'll return to the question of competition in respect of where it's said the Hair and Beauty Industry businesses compete with retail and pharmacy.

PN1876

As to what's then said as a particular feature is the labour cost represents a high proportion of total turnover. There is firstly, no evidence of the proportion in other industries by which to make a relative assessment. We're not told, 'Well, it's much higher in this industry, as a relative portion, than it is in others and therefore, that is particularly important in assessing whether there should be a reduction'. So we simply cannot say whether it's right by way of a relative assessment whether it has a high proportion of turnover, but secondly, we're not told, on the evidence before us, we can't reliably conclude what to do with it.

PN1877

Now, we say that because for reasons I'll come to in respect of Sundays, without detailed evidence about the frequency and extent of work being performed on a Sunday or on a public holiday, the Commission cannot reliably conclude what reduction there might be in labour costs. If all businesses said we're all open for 10 hours on a Sunday and we've all got an average number of employees of five, there could be some assessment of what might be saved. But we simply don't know. The evidence, as it is, we say, does not support that it is common to trade on a Sunday. But we do not know the extent of Sunday trading and without it, you can't perform any assessment of what reduction in labour costs there might be.

PN1878

Now, can be deal with – there's another factor said to be the revenue in the industry comes from households. We don't understand how that supports the proposed variation but it's said to be particular to this industry and we're not told how. What we then next deal with is what's said to be a particular feature of this industry and that is the businesses, it is very common for them to trade on – or to operate on Sundays. In the written submission, the only material that seems to be relied upon to support this proposition, is a list of JustCuts stores and the hours and whether they open on a Sunday or not.

PN1879

Now, firstly, in respect of that list, there is no evidence to support it and there was no one called who was able to say whether this in fact, represents the true evidentiary position in respect of whether JustCuts stores are open on a Sunday. We had one franchisee from JustCuts but of course, he was only able to say in respect of his store. There is no evidence to substantiate the list, as it is, about whether these stores open on a Sunday, or not. That's the first proposition.

PN1880

The second is JustCuts, as we understand it, is said to be either in some way representative or indicative, and therefore, if you were to reach the conclusion about JustCuts, you could reach the conclusion about the industry. Now, as I said by reference to the IBIS report, the most recent IBIS report, JustCuts share of the market is somewhere between 0.1 and 1. So all we know is that an operator with somewhere between 0.1 and 1 percent of the market, is alleged, without any evidence, to be open on a Sunday, more often than not.

PN1881

Now, that, in our submission, is simply not reliable to found a submission that it is very common for businesses in the Hair and Beauty Industry to operate on a Sunday.

PN1882

VICE PRESIDENT CATANZARITI: Well, what we do know is that JustCuts is providing a different service to a traditional hair and beauty business.

PN1883

MR DOWLING: Yes. Yes, we do. We do.

PN1884

We know all of its employees are casual, I think, well, that's certainly what the franchisee told us. They don't offer apprenticeships for one of the reasons your Honour described and sorry, the other reason they don't offer the apprenticeships is because they don't offer the full range of treatments, Mr Bakri reminds me. So it's got a small share of the market, there's no evidence about its opening hours and it's peculiar, as your Honour identifies, to other participants in the market. And on the basis of that, we're said to conclude – we're asked to conclude that it's very common for businesses to operate on a Sunday.

PN1885

The other thing of course, that we know is that of the five employer witnesses who gave evidence, and I'm including in that five, Ms Maguire, because although she was called by the Union, she's an employer. Only two of them opened on a Sunday. So not even amongst the witnesses who were called was there a majority that operated on the Sunday. Three of the five did not operate on a Sunday.

PN1886

And remember again, the anecdotal, such as it is, survey evidence that only 25 per cent of HABA's members who responded to the survey, or to that question, are opened on a Sunday. So you've got the situation of JustCuts, for what it's worth, you've got three of the five not opening on Sunday and you've got

75 per cent of HABA's respondent members, by respondent, I mean responding to the survey, who say they're not open on a Sunday.

PN1887

Now, not only does that mean that the assertion cannot be made out but this situation and the result of the evidence, is vital in undermining the application made by HABA. Because it wants to convince the Commission that it is necessary to reduce the penalty rates and how can be necessary or how can it make a meaningful – how can it have a meaningful impact upon the trading of these businesses in this industry, if they don't operate on that day, as it is?

PN1888

They're not going to make a saving, at all. Seventy-five per cent of them, of those that responded to the survey, are not going to make a saving, at all. Because they don't operate on that day, as it is. Now, that, in our submission, completely undermines the need or the necessity for the making of the application.

PN1889

Now, what might be said against us is, 'Well, the fact that 75 per cent of them don't open on a Sunday, doesn't that mean more would if the penalty rates were reduced?' Well, all you have in respect of the three that do not open on a Sunday, is two, Ms Richter and Mr Akle, who might. And one, Ms Maguire, who said she won't. Now, that, in our submission, is just not a reliable basis upon which to conclude. If we are right and that the vast majority did not open on a Sunday, all of a sudden, that position will change. The Commission could not safely do that on the evidence of three people, two of whom said they might, and one of whom said they won't.

PN1890

So in that respect the issue of Sunday trading is, in our submission, fatal to the application .

PN1891

Now, the last – I'm still in proposition 3, which is the particular features of the business of the Hair and Beauty Industry support the granting of the variations. And the last of the particular features, as we read it, is the lease arrangements that often, in our friend's words, required businesses in the Hair and Beauty Industry to open on Sundays and public holidays. The submission is that lease arrangements in major shopping malls often require tenants, including hair and beauty businesses, to be open on Sundays and public holidays on which the shopping centre is open.

PN1892

Now, there is, in our submission, no evidence to support that submission.

[redacted]

PN1893

Secondly, despite having its 800 or 900-odd members, we don't have in evidence one lease that requires an employer to open on a Sunday. The applicant could not produce one lease to support its assertion. Nowhere in the evidence will you find a lease that requires it. So it cannot safely be assumed or be found that lease arrangements often require businesses, in the Hair and Beauty Industry, to open on Sundays and public holidays.

PN1894

Now, that leads me to proposition 4, which is that hair and beauty businesses are similar to or in competition with the retail or pharmacy industry and therefore, that is a reason to grant the application. Now, can I divide this up into two parts. Firstly, deal with what's said to be the similarities and then secondly, deal with what's said to be the competition.

PN1895

Dealing first with the similarities. At paragraph 202 we repeat the evidence of Associate Professor O'Brien as to the differences. His uncontested expert evidence. We then, and this was referred to by Commissioner Lee in this morning's discussions, we then set out the submissions made under the Award Modernisation process for the establishment of the separate award for the Hair and Beauty Industry. There, HABA, the applicant to this proceeding said:

PN1896

The hairdressing industry is clearly discrete from the retail industry, in general, and that hair and beauty salons should be recognised as one industry and that such an industry is clearly discrete from the retail industry, in general.

PN1897

The Australian Retailers Association said they viewed those submissions and noted in particular:

PN1898

The vast majority of employees in hairdressing services are employed as qualified hairdressers, apprentice hairdressers and receptionists, salon assistants. Hairdressers must be trade qualified or be completing a recognised apprenticeship and the requirement for hairdressers to be trade qualified clearly distinguishes hairdressing services from the retail industry.

PN1899

Further to this, the skills and occupational health and safety challenge of particular, the hairdressing services, such as the use of toxic chemicals, set this sector apart from the retail industry.

PN1900

Now, all our friend could say, in submissions this morning, is people changed their mind and their might have been a different context in which those things were said. But there's no explanation provided as to how any of those circumstances might have materially changed, such that, that situation is any different.

PN1901

And tellingly, it is no part of this application that the Hair and Beauty Industry Award be revoked and that those covered by it be covered by the Retail Industry Award. I'll come to a couple of extracts from the Clubs Award that we want to take the Bench to. But that case was not dissimilar in the sense that those representing Clubs Australia said, 'We are the same as hospitality. Hospitality got a cut, we want one too'. But they took a step further, which is not taken by the applicant here, and said, 'We can revoke the Clubs Award and we'll all roll into the Hospitality Award because the Clubs Award is not required anymore because we're all part of the one industry'.

PN1902

HABA was not able to, or not willing to, stand by its conviction and say, 'Okay, if we're all the same as retail, we'll all go in the Retail Award'. Presumably, it and its members still say that there is a need for a separate Hair and Beauty Industry Award and that the particular classifications and entitlements, that are peculiar to that industry, should continue to apply. Undermining the proposition that it's all the same as retail.

PN1903

Now, apart from those submissions, there are five bases upon which our opponents say that there are obvious similarities. And we set those out at paragraph 209. The industries predominantly sell to consumers, a large range of hair and beauty products are sold by businesses in both industries, businesses in both industries operate from similar locations, the opening hours of businesses in both industries are similar, often similar, and lease arrangements for businesses in both industries are similar.

PN1904

Now, I said this morning, and I won't go into the same detail, that in respect of the first, third and fourth of those, that is, they sell to consumers, similar locations and opening hours, they cannot be a meaningful criteria because if they are the criteria adopted to assess a similar industry, we have got an enormous range of industries that might be said to be similar. So those criteria are meaningless, in our submission.

PN1905

That leaves two. And that is, the second of which, a large range of hair and beauty products are sold by businesses in both industries, and we from there – we from, paragraph 213, set out why that is not a conclusion that can be reached. Mr Thatcher, 'Vast majority providing services and the products being and add-on and the vast majority of income from services'. Mr Downs, 'Vast majority of time providing services, not selling products. Vast majority of revenue from services'. Mr Akle, that his 'Employees were vastly different because of their qualification'. Ms Maguire that, 'The level of retail of work was five per cent'. Ms Brooks, that 'The level of retail work was', again, 'five per cent', and added to that, in terms of selling similar products, the question raised by Deputy President, in terms of the nature of the products and the salon exclusive brands also undermines that they are selling similar products.

PN1906

So for those reasons we say, it simply cannot be made out that a relevant similarity is the range of hair and beauty products sold by both businesses. At paragraphs 219 to 220, we undertake a task that I've already taken the Bench to and that is the comparison between Division S and Division G, and I won't repeat that. Other than to say, in respect of paragraph 20, there's a typographical error at the end of the first sentence – sorry, at the end of – yes, the end of the first sentence. It says there, reading from the quotes:

PN1907

The retail trade division includes units mainly engaged in the purchase in or on selling –

PN1908

- really, with some ellipses, perhaps, it should say, 'of goods'. It doesn't go on to say of goods. So I won't take the Bench back to those ANZSIC divisions.

PN1909

The last of the five factors, discounting the first three and having dealt with the question of products, is the lease arrangements for both business – sorry, for businesses in both industries, are said to be similar. The first and most telling deficiency is, we don't have in evidence, any evidence of the lease arrangements in retail. So the Bench can't reliably conclude that the lease arrangements in retail are the same as the lease arrangements in hair and beauty. We don't have anything to compare with, it's just an assertion that they are similar.

PN1910

We of course, don't have in evidence either, any leases in respect of hair and beauty but insofar as it's said they're similar because they require businesses to open on a Sunday, I repeat the submissions I've already made and say, that is not made out on the evidence. So for all of those reasons, we say the similarities alleged, are simply not made out.

PN1911

Now, can we deal with the second half of the proposition then, which is the Hair and Beauty Industry businesses are in competition with retail and pharmacy businesses. The first thing that is obvious to the Bench is that there really is no evidence of what that competition is. The extent of it, how it operates, there simply is no evidence about the competition between those two industries. It would have been easy, well, it would have been easy to try and produce an economist or a labour economist to come along and say that, 'This is how these two industries operate and this is how they compete'. But we have nothing at all. We simply cannot safely conclude that the two are in competition, on the state of the evidence, as it is.

PN1912

Now, my friend, in submissions this morning, dealt with that by saying, 'Well, you'd expect some level of competition'. But that is just as meaningless, in our submission, because it's not whether you would expect some level of competition, it is, what is the level of competition? Not just there might be some. Now, there might be some, we don't know, on the state of the evidence, but there might be some. But that does not assist the Commission. What the Commission would

need to know is, 'What is that competition? What is the extent of it?' it does not answer the problem by saying, 'Of course there might be some'.

PN1913

VICE PRESIDENT CATANZARITI: Well, he could have run a different case and said, 'Rather than compete, they complement, by being the shopping centres'. And as a consequence of that, there would be utilisation of employment. But that case wasn't actually put.

PN1914

MR DOWLING: No.

PN1915

VICE PRESIDENT CATANZARITI: So by being the shopping centres, with all the other shops, they might get the trade that passes through it.

PN1916

MR DOWLING: Yes.

PN1917

VICE PRESIDENT CATANZARITI: It's a different case we've dealt with.

PN1918

MR DOWLING: Yes.

PN1919

VICE PRESIDENT CATANZARITI: Because I think, because of the competition, it seems to be limited to the products component of it.

PN1920

MR DOWLING: Yes. And for reasons I've already come to, it really, it just doesn't get there. But that's right, I won't answer the case that could have been put, but it is right to say - -

PN1921

VICE PRESIDENT CATANZARITI: No. Well, the case has not been put but - - -

PN1922

MR DOWLING: Yes.

PN1923

So there's nothing put in respect of competition but in respect of the products of course, we've already said how what might be said to be some evidence about the selling of products doesn't really come to the threshold of competition. Again, my learned friend said, 'Well, part of their role is selling products', but again, the part of doesn't tell you anything. You need to know which part. And what we do know is that it is a very small part and what we know in Mr Thatcher's words is, 'It is and add-on'. And as an add-on it can't sensibly be said that that creates the level of competition that would justify the making of the application.

PN1924

Now, the second half of the question of competition, even if, and we say our friends haven't, but even if they'd established there was some level of competition, they would need to do an important and second step and that is, satisfy the Commission as to how the reduction in penalty rates would ameliorate that competition. Because it's not enough to say, 'There's competition'. They have to say the reduction in penalty rates would deal with it and it would ameliorate it and it would have some effect such that it is necessary. And again, that is a step that has not been undertaken. There is no evidence, not even any submissions, in our view, about how it is that a reduction in penalty rates would ameliorate any alleged competition between the Hair and Beauty Industry and the retail and pharmacy industries.

PN1925

The last thing we want to say about this question of competition is, even if our friends had got over the first two hurdles, we do not accept and we say it is against the approach undertaken in these reviews, that competition of that sort is something that would justify the reduction in the penalty rates. Now, can we do that – can we make good that point by reference to the Clubs Decision that we provided this morning, keeping in mind that the application in that case had at least, some similarities, those similarities being that Clubs Australia came along to say, 'We compete with hospitality, and they got the cut. And given we compete with them and we're effectively, in the same industry, we should have the cut, too, and the rates should be consistent'.

PN1926

By reference to the Penalty Rates Decision, at paragraph 6, the Bench there, Vice President Hatcher and Commissioners Hampton and Bissett, referred to paragraph 998 of the Penalty Rates Decision and paragraph 998, for reference, is that part where clubs were invited to have another round. And commencing on the third line of paragraph 6, the Bench there, by reference to the Penalty Rates Decision say:

PN1927

The Full Bench did not attempt to achieve uniformity of penalty rates in the awards, in that sector -

PN1928

- being hospitality and retail:

PN1929

- nor did it regard competition between employers, covered by different awards in the sector, as a matter supporting either uniformity or greater consistency in penalty rates.

PN1930

Now, in a slightly different context, that's the same sound logic that we urge upon this Bench. You can't say competition between – even if there is competition, which we say has not been proven, but even if there was, that of itself, competition between employers covered by different awards, does not support either uniformity or greater consistency in penalty rates.

PN1931

Now, if I can jump ahead to paragraph 99 of the Clubs Decision where comment is made on the approach of Clubs Australia and the way they conducted their competition case, which we say are equally apt in this case. There, the Bench say:

PN1932

CI's case did not endeavour, in any meaningful way, to relate the issue of relative penalty rates with its proposition concerning competition between the Clubs sector and the broader hospitality sector. It disavowed any attempt to engage in a financial analysis in the cost of penalty rates as a proportion of the overall costs of Clubs business expenses, let alone a comparison of the position in that respect, for venues operating under the Hospitality Award.

PN1933

Skipping over the next two lines:

PN1934

The evidence showed that a range of factors affect the competitive balance between Clubs and hospitality venues, including taxation rates in the various State Regulatory Raised Schemes concerning EGMs –

PN1935

- being electronic gaming machines –

PN1936

- but there was no evidence that penalty rates had any particular role to play.

PN1937

Now, of course, that's a different context, I'm not asking the Commission to pick up factual findings. What we're just saying is, a matter of approach, we're left in the same position here. There was no meaningful attempt to relate the issue of relative penalty rates with its propositions concerning competition, even if it could be established.

PN1938

At paragraph 100 in the second dot point, on the following page, you see there that the Bench say:

PN1939

To the extent that Clubs to compete with hospitality venues, there is no evidence that penalty rates, prescribed by Clubs Award, place Clubs at a competitive disadvantage or that they have any significance in such competition.

PN1940

Same applies here. We've not proved competition, but even if there was some level of competition, we don't have any evidence as to how the penalty rates that are applying to the Hair and Beauty Industry place them at a competitive disadvantage. Our friends want to say, 'Well, of course, it must be so'. But they need to produce evidence.

PN1941

And then lastly, paragraph 118, the Bench there, recap their findings in respect of the application and the third dot point, which deals with competition, they there set out:

PN1942

There was no evidence that the penalty rates, currently existing in the Club sector, caused Clubs to be at any identifiable disadvantage, in any competition, with hospitality venues or that such penalty rates have any significance, in that context.

PN1943

In our submission, we're in precisely the same situation. We simply don't have any evidence, firstly of competition, but even if we did, as to how the penalty rates, as they are, place the hair and beauty businesses at a disadvantage as a result of that, those penalty rates, and how the amelioration would – how any reduction would ameliorate it.

PN1944

So for all of those reasons, we say it can't safely be concluded that there is competition, at all, between the Hair and Beauty Industry and the retail and pharmacy industry businesses, and if there is, how it might be ameliorated or how the penalty rate reduction affects that competition.

PN1945

That leads us to proposition 5 which asks the Commission to conclude that the granting of the variations would increase the number of apprenticeships, in the industry, because of a decline. We are content to rely on our written submissions in response to this proposition but the most telling response to it is that in 2017 it was not a decline, at all. In fact, it was an increase in apprenticeship numbers and a very small decline, thereafter. So the premise for the proposition doesn't hold, based on the data that we have there set out between paragraphs 233 and 242.

PN1946

That leads us to the Modern Awards objectives and the relevant considerations provided by section 134. The first of those that HABA says supports its application is that the industry, it says, 'Does not have any capacity to avoid trading on a Sunday and the consequent exposure to costs of such trading'. We'll repeat what we have already said in support of the submission, that there is insufficient evidence before the Commission to make any findings as to the extent businesses are required to open on Sundays. To the extent that there is evidence, it is against the proposition.

PN1947

Nextly, in support of the Fair Safety Net, HABA asserts that market conditions are such that many employers must now trade on Sundays, in circumstances where it is not financially sensible to do so. Again, there is no evidence to support this submission. Nextly, and lastly, in respect of the Fair Safety Net, it's said that the relevant consideration is the significant competition from employers that do not pay penalty rates. Firstly, of course, we repeat what we say about competition. There's no evidence of any significant competition. Secondly, we

don't understand what's said, as to who these employers are who do not pay penalty rates, whether that means they are not required to or they are required to but choose not to, but whichever of those it is, it is not a proper basis to make out the reductions that are sought.

PN1948

Can we then move to the question of the Safety Net. This is dependent upon HABA's submission, and we set this out at paragraph 249, and the paragraphs that follow. Dependent upon HABA's submission that Sunday trading has become an increasingly prominent feature of the industry. And we repeat what we've already said, to establish that that is not made good on the evidence and therefore, the submission that is dependent upon it, falls over.

PN1949

Now, we move to the subparagraphs, and 134(1)(a), the relative living standards and the needs of the low paid. It's the submission of the Unions that the relative employees, especially given the evidence of award dependency, are low paid. It is accepted, at least, that a portion of employees, covered by the award, would fall within the scope of this benchmark. We take that from the submissions of HABA. It doesn't say what it says that portion is but it does, at least, accept a portion is low paid. Accepting that, accepting that they either are all low paid or there is a portion that are, in our submission, a reduction would have a significant financial impact upon these employees, those employees covered, and would be against, a consideration against, the granting of the application.

PN1950

Returning for a moment to the Clubs Decision, by way of example, at paragraph 75 of that decision, the Bench there, concluded:

PN1951

We find therefore, that the grant of CII's application would cause significant financial loss to the large majority of full-time and part-time employees in the Clubs Industry, who work on weekends and public holidays. Some of these employees are already low paid and the proposed penalty rate cuts may push many employees who are not currently low paid, because they receive weekend penalty rates below the benchmark for low-paid employees.

PN1952

Now, in our submission, on the evidence you've heard, you could safely draw the same conclusion, but perhaps to a greater degree, because in respect of the Clubs application it did not affect casual employees, and that's why the Bench there, said:

PN1953

The large majority of full-time and part-time employees.

PN1954

Whereas in this application, the primary application, is directed at the penalty rates applying to all, so that would affect the full-time, part-time and casual employees. And you can, in our submission, safely conclude that they will be caused significant financial loss.

PN1955

Now, what's said against that is this might be ameliorated by additional hours being provided to employees, on a Sunday or a public holiday. The Bench, on the evidence as it is, cannot be satisfied that those additional hours will be offered, or if they are, that they will be such as to ameliorate any loss. We know, of course, as a matter of logic, that employees would have to work additional hours to earn the same, but we can't be confident that they would be offered those hours and have that opportunity to work more hours to earn the same.

PN1956

Of course, if the additional hours, such as they are, were offered to other employees, then the employee that's lost is not going to get the opportunity to recoup what they've lost by the reduction in penalty rates.

PN1957

The last thing that we draw the Commission's attention to, in respect of what's said by HABA, under this consideration is what we've set out at paragraph 263. And that is:

PN1958

There is no distinguishing characteristic of employees in the Hair and Beauty Industry which would warrant any greater weight being afforded to such factors so as to justify divergent outcome. A consistent approach should be adopted across the relevantly similar sectors.

PN1959

Now, for the reasons we've already alluded to or we've already identified, sorry, we say the sectors aren't the same. Even if there were some similarity, that takes us back to paragraph 6 of the Clubs Award where it's clear, the Bench did not attempt to achieve uniformity of penalty rates, in the awards, in that sector. Nor did it regard competition between employers covered by different awards in the sector, as a matter supporting either uniformity or greater consistency in penalty rates. The Penalty Rates Decision, and the way in which it's picked up in the Clubs Decision, are directly at odds with the proposition that HABA puts.

PN1960

Can we then deal with section 134(1)(b), which is the need to encourage collective bargaining? Our friends, in their submissions, say that reduction in penalty rates would encourage collective bargaining, I think, in the nature of a revolution and therefore, employees would rush to negotiate. Now, that is not a sound proposition. For our part, we've put the opposite proposition and that is that if there's a status quo, the employers, themselves, may wish to commence enterprise bargaining because as is clear, they would be able to negotiate an Enterprise Agreement that reduced penalty rates, provided the employers were better off, over all.

PN1961

But in fairness, in our submission - - -

PN1962

DEPUTY PRESIDENT ASBURY: If cost is their issue though, that's not really going to get them anywhere, is it, though, Mr Dowling?

PN1963

MR DOWLING: No, no. That's right.

PN1964

DEPUTY PRESIDENT ASBURY: So - - -

PN1965

MR DOWLING: Well, it might depend what the other benefits are as in terms of better off, overall. You might reduce a penalty rate but provide some other benefit.

PN1966

DEPUTY PRESIDENT ASBURY: That would be - and that would have to be an equivalent cost.

PN1967

MR DOWLING: Well, it wouldn't necessarily have to be an equivalent cost but it would certainly, have to be an equivalent benefit. But I accept what you say, Deputy President, and I think the point – the place I was leading to, I think it is fairer, in respect of this consideration to - - -

PN1968

DEPUTY PRESIDENT ASBURY: It's neutral.

PN1969

MR DOWLING: - - - to say it's neutral, yes.

PN1970

For reference, you will find in paragraph 125 of the Clubs Decision, the Bench coming to the conclusion that this was a neutral consideration. And you will find in paragraph 1,931 of the Penalty Rates Decision, a finding - - -

PN1971

DEPUTY PRESIDENT ASBURY: Really? There's a paragraph 1,931?

PN1972

MR DOWLING: There are more than 2,000.

PN1973

You will find there, the conclusion that the reduction in penalty rates did not encourage collective bargaining. So that's against our friends' proposition but Clubs really puts it in the category of neutral and we think that is a fairer approach, despite what we say in our written submissions, we think it would be fairer to say this is a neutral consideration.

PN1974

134(1)(c) is the need to promote social inclusion through increased workplace participation. I would turn to this when we deal with 134(1)(h) because they both cover what we say is the employment affect, if there is one, and otherwise rely on

our written submission. At 134(1)(d) we set out at paragraph 269, we say that's a neutral consideration and we are content to rely on our written submissions. 134(1)(d)(a), the need to provide additional remuneration for prescribed matters, including working on weekends and public holidays, we say of course, is a relevant consideration and our friends say, 'Well, you're getting additional, it's just a question of how much'.

PN1975

We say of course, it needs to be such that it is fair, an additional remuneration that is fair, in the circumstances, and to make the reductions in the way sought be our learned friends, would not be providing additional remuneration for such work as is fair and reasonable and so we say that is a strong factor that counts against our learned friends' application. I'll return to it, briefly, when I deal with the question of the casuals.

PN1976

134(1)(e) is the question of equal remuneration. I think both sides accept that that is a neutral consideration. 134(1)(f), the impact on business, including on employment costs and the regulatory requirements of business, can we summarise what we say at paragraphs 283 to 287, by saying that there really is no evidence to support the proposition that businesses in the industry are suffering productivity problems or high employment costs, at all, let alone that are attributable to higher Sunday and public holiday penalty rates. It's simply not made out on the evidence.

PN1977

134(1)(g), simple and easy to understand Modern Award system, we identify this – that consideration as neutral. That leads me to 134(1)(h) and the impact on employment growth. And what I say in respect of this consideration, as I said, we apply equally to 134(1)(c), social inclusion through increased workplace participation. Now, what we say that – sorry, let me go back one step. The proposition put against us is this. That a reduction in penalty rates will have some positive employment effects.

PN1978

Now, there is, in our submission, no evidence that could found that submission. HABA has not called or sought to rely on any expert from a labour economist, economist, a behavioural economist, to support its assertion that a reduction in penalty rates will have some positive employment effects. It hasn't even sought to pick up what it was that Professor Lewis had to say, but for our part, we say it was undermined. It hasn't sought to pick up what was said by the Productivity Commission Report. What is not in evidence is any report, in this case, or any report relied upon in the Penalty Rates Decision.

PN1979

And this goes back to the complaint I made at the start of our submissions about when we asked the applicant, what findings and evidence from the Penalty Rates Decision do you rely upon? Had they said, 'Well, we rely on Professor Lewis', or 'We rely on the Productivity Commission Report', or 'We rely on Professor Borland', we would have had the opportunity to deal with it. It didn't do that. It

has not called any evidence, in this case, and it has not called up any evidence from the Penalty Rates case.

PN1980

Not only has it not called up the findings in relation to the economists, but it has not called up any journal articles, any reports, any other documents. And I mentioned the Productivity Commission Report and in our submission, the Bench will remember that one of the bases upon which the Bench came to a rather circumspect conclusion, but nevertheless, a conclusion that a reduction in penalty rates might have some positive employment effect. One of the bases upon which it came to that conclusion was because of the Productivity Commission Report.

PN1981

DEPUTY PRESIDENT ASBURY: Well, it wasn't surprising it was circumspect given the issue that was taken with the Productivity Commission Report being tendered at all. Probably, mercifully, it wasn't in these proceedings so we wouldn't have to deal with that again.

PN1982

MR DOWLING: Yes. Yes. Well, but that – yes.

PN1983

That is my point. It's not here. It's not before you. You had Professor Lewis, in that case, you had the Productivity Commission Report, in our submission didn't have much else, but you had at least that. You don't even have that here. You can see I'm still raw about the employment effect.

PN1984

DEPUTY PRESIDENT ASBURY: I can see that, yes. Noted.

PN1985

MR DOWLING: But the important point for today is that the Productivity Commission Report is not in evidence before you and neither is or nor is any of the evidence that was in the Penalty Rates case.

PN1986

Now, we've spent a bit of time then, and I won't go through it in detail, we rely on our written submissions, I'm conscious of the time, setting out why it is we say it should be understood that all of that was a conscious and deliberate decision. There was a detailed exchange between the parties and we've extracted it, and I think to be fair to our learned friends, we should, save any objections, we should set out – provide to the Bench the correspondence that is referred to and extracted, to give the Bench the full context.

PN1987

That is, this is the exchange of 29 March, 21 March – sorry, 29 March, 21 May and 23 May and 28 May. We've extracted what we say are the relevant parts. We provide that for completeness so there can be no complaint that it's not fully provided, that the full context is not before you. But what we say, as the result of all of that, is the applicant was clearly on notice. We wanted to know. If you – we disputed they were entitled to rely on a factual finding or evidence, in another

case, but if they wanted to do it, we wanted them to tell us exactly which bits they relied upon.

PN1988

And not only did they refuse to do it but as one of my clients said, in the last piece of correspondence, they exacerbated the problem by then saying, 'HABA reserves its right to rely on any additional findings and or reasoning if such matters become relevant in the proceedings'. We were left in a very unenviable position of not knowing what evidence or what findings were sought to be relied upon from the Penalty Rates Decision. Of course, all of that does not overcome the problem, even if we were told, 'You simply can't transfer across the findings and the evidence'. I think - - -

PN1989

VICE PRESIDENT CATANZARITI: Do you want that document tendered?

PN1990

MR DOWLING: Yes, please.

PN1991

VICE PRESIDENT CATANZARITI: Any objection to those?

PN1992

MR FERGUSON: Sorry, your Honour?

PN1993

VICE PRESIDENT CATANZARITI: Is there any objection to that?

PN1994

MR FERGUSON: No, your Honour.

PN1995

VICE PRESIDENT CATANZARITI: The - - -

PN1996

MR DOWLING: I think we're up to L, your Honour.

PN1997

VICE PRESIDENT CATANZARITI: L, yes. Thank you.

EXHIBIT #L PRODUCTIVITY COMMISSION REPORT EXTRACT, CORRESPONDENCE EXCHANGE 29 MARCH, 21 MAY AND 23 MAY AND 28 MAY

PN1998

MR DOWLING: Now, we got, today, a series of key findings, 1 through to 9, but what we didn't get was what particular evidence was said to be relied upon and what particular specific findings make good those nine propositions. We're still left in the position of not understanding the evidence that's relied upon, even if you were able to do so. To take an example, the fifth of my learned friend's propositions was access to consumers on weekends. Now, for reasons that we've

already spoken about, there was a detailed evidence, in terms of hospitality, retail and pharmacy, about how consumers worked on the weekend.

PN1999

You can't simply translate that evidence to this industry that we say - - -

PN2000

COMMISSIONER LEE: Consumers worked on the weekends? I'm not quite sure, I think you've mis-spoke there. What did you mean?

PN2001

MR DOWLING: Sorry.

PN2002

COMMISSIONER LEE: You said the evidence about how consumers worked on the weekends?

PN2003

MR DOWLING: I didn't mean work.

PN2004

COMMISSIONER LEE: No, I'm sure you didn't, so - - -

PN2005

MR DOWLING: Thank you. I appreciate that.

PN2006

How consumers behave - - -

PN2007

COMMISSIONER LEE: Behave.

PN2008

MR DOWLING: - - - behave on the weekend. You can't translate the detailed evidence in respect of retail, hospitality and pharmacy to the Hair and Beauty Industry, without anything else, knowing that there was a detailed evidence about those particular industries in the way consumers behave in those particular industries. We raise that simply as an example. And even if our friends were more specific than they have been, they are still inadequately lacking in specificity, but even if they were more specific, today is too late, by a long way.

PN2009

Now, keeping in mind that – I'm still dealing with the question of employment growth. I've identified what evidence wasn't called and I've identified how that was a conscious decision and how that can't be overcome. What we then sought to do is address the lay evidence that it's – as an answer to this proposition that there might be some employment effect. There's no expert evidence, there's nothing come over from the Penalty Rates Decision. All that's left is the lay evidence. And we address that from paragraph 303 onwards.

PN2010

The starting point is HABA's concession that employer's perceptions or intentions, of its witnesses, may inevitably be somewhat speculative. That's the starting point of our friends' case. And from there, it is all downhill, in our submission. We've set out the evidence in respect of Mr Akle and the fact that a decision had not yet been made and therefore, confirming the speculative nature of the conclusion that's sought to be drawn. We add of course, given we're talking about employment, even if you got over several hurdles and you were prepared to accept, against what we say, that there might be some additional hours, it doesn't follow that there would be additional employment.

PN2011

You'd have to then be satisfied that new employees would be engaged to perform the additional hours. That has the problem for our learned friends, that if new employees are engaged, it compounds the fact that the existing ones are not getting the additional hours and they're suffering the reduction. So that's Mr Akle, there at paragraph 305(a).

PN2012

Mr Thatcher and the lack of any certainty about his speculation as to what would happen. The same for Mr Downs and Ms Richter and then we repeat what I've just said, at paragraph E, the general proposition that even if you could be satisfied there are some additional hours, you can't be satisfied that's additional employment.

PN2013

We then set out, of course, for completeness, the other employer, Ms Maguire, who made it very clear that if there's a reduction in penalty rates, she wouldn't be opening on a Sunday or a public holiday so the only conclusion in respect of her evidence is, there will not be any employment effect, at all. So it's right to say the evidence, as our friends conceded, is somewhat speculative and it would be right to say, on the state of the evidence, as it is, in terms of what can't be taken from the Penalty Rates Decision, the lack of any expert material and the state of the lay evidence, there is, and can be no conclusion, that there would be a positive employment effect by the reduction in penalty rates, as sought.

PN2014

That just leaves me with two topics. And I think I can finish those, approximately before 3.45, which was the deadline my learned junior imposed upon me.

PN2015

COMMISSIONER LEE: We'll watch to see what happens if you go past that.

PN2016

MR DOWLING: All will be revealed.

PN2017

The first, and I forecast this, the first is the question of evidence dealing particularly with public holiday penalty rates. And I took some time, when I went through the evidence of Mr Thatcher, Akle, Downs and Ms Richter, to identify that none of them gave any evidence that if the proposed reduction in public holiday penalty rates was granted, their business would do anything differently, in

respect of public holidays. They give some evidence, such as it is, about what they might or might not do on a Sunday but what they don't do is say how their business will change on a public holiday.

PN2018

Now, that really leaves the Commission in a very unenviable position, well, perhaps not unenviable, in our submission, because it makes it easy. But in the position that there really is no satisfactory evidence, at all, about how it is the cuts to public holiday rates are necessary on the evidence that's before you. Of course, again, as I've already said, Ms Maguire gave evidence, dealing particularly with her and public holiday rates, in respect of her, it's the case that she positively asserted that her business would not change if there was a reduction in penalty rates. It would not change what she does on a public holiday. She doesn't open now and she won't open, should there be any reduction.

PN2019

Now, that just leaves me with what's said to be HABA's alternative position, in respect of casual employees. And I also made reference to this, this morning. As we understand it, doing the best we can to understand the alternative position, we understand it to come as the result of the operation of the award in this way, and we set it out at paragraph 318:

PN2020

That a casual employee is entitled to receive an additional 25 per cent for working Monday to Friday, between 7 am and 9 pm, but a casual employee working on a Sunday is only entitled to an additional loading of 100 per cent of the ordinary rate.

PN2021

The loading is not paid on top of the penalty, in relation to Sunday. Now, we try and give an example. We don't try, we give an example of a level 3, trade qualified, adult employee, the hourly rate is $22.70. That casual employee working Monday to Friday, 7 am to 9 pm, receives $28.38. So that's the $22.70 plus the 25 per cent. But that employee, working on a Sunday, receives $45.40. So that is not two times 28.38, but rather it is two times $22.70. So the effect of that is they do not get - whilst they get the penalty rate of 100 per cent or 200 per cent, they do not get the casual loading.

PN2022

Now, this has some consequences, we say, for the reduction that's sought. Because what we say the effect of the reduction, as sought, the primary application, is that the difference for a casual employee between Monday to Friday and the Sunday rate becomes significantly smaller. We set out the same level 3 adult, they're working on the Sunday, they receive $45.40. Under the proposed cuts, as part of the primary application, that level 3 employee would receive $34 on a Sunday, one and a half times the $22.70.

PN2023

As it stands, at the moment – sorry, one further step. The result of that is the difference between their Monday to Friday rate and their Sunday rate is just over $5, $5.67, the difference between the 28.38 and the 34, the proposed Sunday rate.

As things presently stand, that same employee, whilst they don't get the casual loading, under the system as it currently operates, they would get two times $22.70, being $45.40. So the difference between their Monday to Friday rate and their Sunday rate is $17. In terms of the additional remuneration provided to that employee for working on a Sunday, they're getting an extra $17 an hour.

PN2024

DEPUTY PRESIDENT ASBURY: So essentially, their casual loading's been - it's all a been to the Sunday payment.

PN2025

MR DOWLING: It has. It has. But what we're pointing to, by reference to 134(1)(d)(a) is that in ensuring that there's a relevant safety net, the Commission needs to be satisfied that you receive additional remuneration for working on weekends. Under the proposal, the additional remuneration, you'll see, for working on a Sunday is $5. Under the award, as it currently stands, the additional remuneration for working on a Sunday is an additional $17 an hour. Now, that shrinking of that margin, in our submission, undermines 134(1)(d)(a).

PN2026

DEPUTY PRESIDENT ASBURY: And it's a greater shrinking than was the case under the awards in the Penalty Rates.

PN2027

MR DOWLING: It is because, and we've done our best to explain – or at least the result of the rather complicated position that applied, at least, in respect of retail - - -

PN2028

DEPUTY PRESIDENT ASBURY: Yes.

PN2029

MR DOWLING: - - - the conclusion that the Penalty Rates Full Bench reached is that the standard industrial approach should apply and that is, casual employees should be getting 25 per cent more, no matter when they're working.

PN2030

DEPUTY PRESIDENT ASBURY: All right.

PN2031

MR DOWLING: And so they reached the position that they would reinstate, I think it's right in respect of retail, reinstate the casual loading on top of the penalty rates for Sunday.

PN2032

DEPUTY PRESIDENT ASBURY: That's not compounded by it. Just putting it back on top.

PN2033

MR DOWLING: Yes.

PN2034

DEPUTY PRESIDENT ASBURY: Yes.

PN2035

MR DOWLING: Yes. That's right. Ms Burnley's nodding for me, it's just helpful. So - - -

PN2036

COMMISSIONER LEE: That was the default approach, urged on us by the Productivity Commission.

PN2037

MR DOWLING: That's right.

PN2038

COMMISSIONER LEE: That report you've pointed out.

PN2039

MR DOWLING: Yes.

PN2040

COMMISSIONER LEE: Which we're not to have regard to.

PN2041

MR DOWLING: Well, you don't need to have regard to the Productivity Commission Report because all the Productivity Commission said, in respect of the default approach was, that is the industrial standard. Now, we say you can have regard to the industrial standard, you don't need the Productivity Commission Report to do that.

PN2042

COMMISSIONER LEE: Okay.

PN2043

MR DOWLING: In fact, the Penalty Rates Decision, effectively, adopts what we say is the industrial standard, but the point of all of this is really, to say this is what we understand the alternative claim to be directed at. Absent the alternative claim, 134(1)(d)(a) looms large for our opponents because you go from an additional remuneration of seven to an additional remuneration of – 17 to an additional remuneration of five. And as we understand it, that's what the problem is direct at. And so we put that submission in to highlight 134(1)(d)(a) and to respond, as best we're able to, the problem created by the primary application which seems to be recognised by the alternative application.

PN2044

DEPUTY PRESIDENT ASBURY: So essentially, you're saying there's an inconsistency of approach because if you adopt the penalty rates approach, then you should also put the 25 per cent back on top.

PN2045

MR DOWLING: Yes.

PN2046

DEPUTY PRESIDENT ASBURY: If you want – if consistency is what you're after.

PN2047

MR DOWLING: Yes.

PN2048

DEPUTY PRESIDENT ASBURY: Not give people the double-whammy of losing double.

PN2049

MR DOWLING: That's right.

PN2050

DEPUTY PRESIDENT ASBURY: Yes. I understand.

PN2051

MR DOWLING: Our friends want it both ways, a bit.

PN2052

DEPUTY PRESIDENT ASBURY: Yes.

PN2053

MR DOWLING: They want to pick up what's done in the penalty rates but they don't want the 25 per cent. I only get to there belatedly and begrudgingly by their alternative claim.

PN2054

They are, unless there are any questions, the submissions of the Unions.

PN2055

VICE PRESIDENT CATANZARITI: Thank you, Mr Dowling.

PN2056

MR DOWLING: Thank you.

PN2057

MR FERGUSON: Sorry, I just seek one indulgence. I'm keen to finish today, if we can. I wonder if the Bench might permit me sort of, 15 minutes or so, to consolidate my thoughts in the hope that that could let us finish by, perhaps, 4.30 or thereabouts.

PN2058

I might still need to come back to you whether we seek to respond to any of the documentary, you know, the written submissions that were filed today, later. But I can do that, likely, tomorrow. And it would probably – some of the issues are detailed. But if the Bench could indulge me, sort of 15 minutes, until 4 o'clock, perhaps, to gather my thoughts, in the hope that we can finish today.

PN2059

VICE PRESIDENT CATANZARITI: So sorry, you want an adjournment till 4 o'clock, while you gather this?

PN2060

MR FERGUSON: Till 4, yes.

PN2061

VICE PRESIDENT CATANZARITI: Yes.

PN2062

MR FERGUSON: Thank you.

PN2063

VICE PRESIDENT CATANZARITI: (Indistinct). We'll adjourn.

SHORT ADJOURNMENT **[3.44 PM]**

RESUMED **[4.10 PM]**

PN2064

VICE PRESIDENT CATANZARITI: Yes, Mr Ferguson.

PN2065

MR FERGUSON: Thank you, Vice President.

PN2066

Before I get into the substance, I think I owe the Deputy President a small apology. I think, in my haste to answer or engage with some of your questions, I repeatedly called you, 'Commissioner'.

PN2067

DEPUTY PRESIDENT ASBURY: That's all right. (Indistinct).

PN2068

COMMISSIONER LEE: And outrageous slur.

PN2069

MR FERGUSON: I – best to correct it.

PN2070

Look, just a small number of matters I intend to respond to today. Now, the first relates to the submissions that were put by my learned friend in relation to what could be made of the absence of involvement by other associations, in these proceedings.

PN2071

Now, from our perspective, we say that you can't safely accept that that gives rise to any sort of inference that they are not supportive of this claim or that they are somehow opposed - - -

PN2072

VICE PRESIDENT CATANZARITI: Why didn't, Mr Ferguson, the organisations that were actually in and pulled out, why did they not put on some supporting statement?

PN2073

MR FERGUSON: So I can't, confidently, say why they elected not to. I could - - -

PN2074

VICE PRESIDENT CATANZARITI: Well, the normal rule is, somebody withdraws from a matter, they are withdrawn.

PN2075

MR FERGUSON: That's right. Now, why they withdrew - - -

PN2076

VICE PRESIDENT CATANZARITI: So - - -

PN2077

MR FERGUSON: - - - I don't know. I mean, I'm assuming we're regarding it as - - -

PN2078

VICE PRESIDENT CATANZARITI: I wouldn't like to spend too much time on this point but I mean, it is open to the Commission to form a view.

PN2079

MR FERGUSON: I see. Well, then I won't spend long with it. All I will say is, there may be a myriad of reasons why those organisations didn't elect to continue.

PN2080

VICE PRESIDENT CATANZARITI: Yes. Well, you can't run a proposition to say they are supporting.

PN2081

MR FERGUSON: No, no.

PN2082

VICE PRESIDENT CATANZARITI: In certain circumstances, so - - -

PN2083

MR FERGUSON: And I'm not running that proposition. I'm just saying that I don't think we can assume that they are against it, in any way. Resources, in the context of this room - - -

PN2084

VICE PRESIDENT CATANZARITI: But they don't have to have done anything. The ABI could have simply put on a letter of – saying support, and said, 'We support the application, we don't wish to call any evidence'.

PN2085

MR FERGUSON: I wish ABI would lots of things, lots of times, but I agree with you.

PN2086

VICE PRESIDENT CATANZARITI: Well, the parties have had lots of time to get this matter correct.

PN2087

MR FERGUSON: Look, all I can say is, we obviously, act for our – the association that we represent and we've – there is supportive of the variation.

PN2088

VICE PRESIDENT CATANZARITI: Yes. Okay. Well, move on.

PN2089

MR FERGUSON: Yes.

PN2090

That then takes me to the submissions in reply to our submissions, around the evidence of Dr O'Brien. And in particular, submissions that were responding to, I think, criticisms we made as to the weight or relevance of that evidence, in light of its reliance on five specific measures, as a way of comparing the Hair and Beauty Industry with other industries.

PN2091

And I think part of that – the criticism was put that, well, we could have cross-examined the professor – the doctor, in relation to that issue. If I take you, very briefly, to the statement of the doctor, or the report, or obviously, the refer to it. There is a covering letter which identifies a report – what the doctor's report was responding to, and it sets out the question that his report was responding to. And that's a piece or correspondence dated 20 June 2018.

PN2092

And question 1 states:

PN2093

Please compare the labour force profile workers of 2006, 20011, 2016 in that hairdressing industry –

PN2094

- but it goes into other industries –

PN2095

- by reference to the following measures.

PN2096

And identifies the five measures. So it appears, from the covering letter, that he was directed to utilise those measures.

PN2097

Now, we weren't intending to criticise the doctor for this proposition. What we were saying is that the Unions haven't explained the significance of these measures or why a comparison, by reference to them, assists their opposition to the Penalty Rate Variations. It just - still today, there is no explanation for that. It just is the proposition that they're different. And that, we say, is not sufficient.

PN2098

VICE PRESIDENT CATANZARITI: Well, there was every opportunity from June 2018 to correspond with the Unions and query the basis upon which they retained the expert.

PN2099

MR FERGUSON: Well, we - - -

PN2100

VICE PRESIDENT CATANZARITI: If you're querying that the criteria they instructed the expert is flawed, it's a bit rich, Mr Ferguson, to be saying that's the problem with the report.

PN2101

MR FERGUSON: But we're saying the report is what it is. It's been done in accordance with that. We're not querying that.

PN2102

VICE PRESIDENT CATANZARITI: Yes, but you're making a submission from the Bar table that the criteria being used is inappropriate .

PN2103

MR FERGUSON: No. We're saying that – sorry, with respect, Vice President. Well, the submission I'm seeking to advance is we still don't know why that is relevant to their opposition to the Penalty Rates case.

PN2104

VICE PRESIDENT CATANZARITI: Well, either way, where's the communication between you and the Unions, seeking clarification, before your submissions?

PN2105

MR FERGUSON: Well, we dealt – well - - -

PN2106

VICE PRESIDENT CATANZARITI: You didn't cross-examine the doctor because you don't need to cross-examine doctor, on what you've just said, because he's instructed a particular way. So you're relying on the instruction letter. If there's a problem with the way an expert is instructed, quite common in the Commission and elsewhere, then you have that debate, about whether the framing of the instruction is problematic.

PN2107

Doing it by way of submissions wouldn't fly in any court or tribunal.

PN2108

MR FERGUSON: Yes. I didn't – we didn't think that there's a problem with the way he was instructed. The point we were making is that there is nothing - - -

PN2109

VICE PRESIDENT CATANZARITI: No. The point you're making is, it goes to the question of whether one can rely upon the report because it's the right premise.

PN2110

MR FERGUSON: It – we can rely on the report. The point I was making, and I apologise, I'm not making myself clear, is that we don't understand the submission that flows from that. Now, it's a report that says, based on these criteria, these workers are different or they align with these industries. But it doesn't seem to be that there's any submission addressing the significance that flows from that.

PN2111

DEPUTY PRESIDENT ASBURY: I thought there's plenty. That the profile of employees in this industry is fundamentally different than the profile of employees in the industries you're trying to compare with by virtue of the fact that you're saying that the same outcome from the Penalty Rates Decision should apply in this – in the present proceedings.

PN2112

MR FERGUSON: And to the extent that that is what arises, I think the point we've made in our submissions, and we made that clear in the submissions - - -

PN2113

VICE PRESIDENT CATANZARITI: Well, that is what arises. And that they say, when you look at the nature of this group, for example, 75 per cent of them or 70 whatever the percentage is, are trades, right?

PN2114

DEPUTY PRESIDENT ASBURY: Trade - - -

PN2115

MR FERGUSON: Yes.

PN2116

VICE PRESIDENT CATANZARITI: It is relevant that he looked at that, I'm afraid.

PN2117

MR FERGUSON: No. And - - -

PN2118

VICE PRESIDENT CATANZARITI: Because it is a distinguishing characteristic.

PN2119

MR FERGUSON: And - - -

PN2120

VICE PRESIDENT CATANZARITI: And that's why they say you can't compare them with the retail workers, amongst other things.

PN2121

MR FERGUSON: Yes.

PN2122

DEPUTY PRESIDENT ASBURY: I don't know how you can complain that you don't know why this report, or the basis of it – what the basis of it is when that's the – it's responsive to a case that says, 'You should treat – the Bench should treat these industry sectors the same'. And it's responsive to that assertion and it basically, says, 'Well, there's no basis for doing that on the profile of employees within the industry', and it was for you to make a case about the profile of the employers in the industry which, it's asserted you haven't done it.

PN2123

MR FERGUSON: I think, Deputy President, that is the heart of the submission I'm trying to advance here.

PN2124

DEPUTY PRESIDENT ASBURY: All right.

PN2125

MR FERGUSON: Is that we say that our case was on the basis of the characteristics of employers and the industry, not the employees. Now, I am not actually cavilling with the instructions that was given to the professor or the report. The point is, we say, that that doesn't assist in responding to the case we've advanced about the characteristics - - -

PN2126

VICE PRESIDENT CATANZARITI: Well, it does, because the cuts are not made to the employer. The cuts and penalty rates are made to employees. And if they are significantly different, it is a relevant factor.

PN2127

MR FERGUSON: It may be. I think the submission we were trying to advance is, why is it relevant? If they are different, and the evidence to some extent - - -

PN2128

VICE PRESIDENT CATANZARITI: Well, it's relevant because you're saying, 'Retail and hair and beauty are the same'. And you want us to rely upon, in one sense, as I said earlier today, because penalty rates were cut in one situation, you can just ride on the backs of them and say, 'We don't have to do much more, they'll just have to be cut, as well'. I think it is a central issue, in this case.

PN2129

MR FERGUSON: I think what I was trying to put is that I don't think – clearly the issue of fact that some are trade qualified, and that that's a difference, that arises squarely and a lot of attention has been focussed on that. I think the leap that isn't made is why that means there shouldn't be a reduction in penalty rates, for example.

PN2130

So that's all I am saying. It is a subtle point, but we have advanced the case around characteristics of the industry. We – undoubtedly, we've tried to do that through lay evidence, which is a point I'll come to, but no one has made clear why, simply because someone is different and trade qualified, that means there shouldn't be a reduction in penalty rates.

PN2131

If he other considerations that we've based our case on were made out, and that is the only point I'm trying to make here. It wasn't a criticism of the doctor, it wasn't a criticism, per se, of the instructions, other than to say, 'Where does it take you?' Yes, they're different. We haven't really cavilled with his analysis, apart from to say, 'Well, it doesn't link, necessarily to the award squarely, it sits different'. And that you're looking at the ANZSIC codes but that's just one point. But that's not the central point I'm trying to emphasise here.

PN2132

Look, the other significant issue is the extent to which we intend to rely upon our findings in the Penalty Rates case. Now, there were, as I recall, some submissions alluding to or making the proposition that this is somehow some sort of surprise and we haven't made it clear what we're relying on. I want to be abundantly clear, in our March submissions, we set out in detail the key findings and propositions that we say, flowed from the Penalty Rates case that we intended to rely upon. In March, and the directions were filed in submissions, in March, we elaborated on that and responded to why we say it was proper for the Commission to have regard to those findings.

PN2133

We set out the fact that some are findings of fact, some are broader findings of principle. We identified all of those. There was no surprises. As I said in my original submissions, we've made no bones about the fact that we rely on the Penalty Rates case, the reasoning and the findings, and we say that's proper. It's unsurprising that we've mounted a case, in part, guided by, as we understood the invitation from the Full Bench in the 2017 case, the Full Bench there referenced exprinsively the practical impediments to obtaining relevant lay witness evidence.

PN2134

Now, what we've sought to do is assist by providing that relevant lay evidence to complement the reasoning and findings of the Penalty Rates Decision and to put, if you will, an industry specific focus, or colour, to that. Now, what we have tried to do is establish the circumstances of the industry, which make good the relevant findings and connects them to this sector and say, 'Well, when you look at the context of this industry, it should be in the same category as those other sectors'. And I can't put it higher than that, but that's the thrust of our case.

PN2135

It is advanced and reliant on the previous decision and we say that that's nothing unusual and of course, it's not, as we've set out there, an entirely uncommon proposition in the context of this review.

PN2136

That's all I was intending to respond to this afternoon, Vice President. Two issues of housekeeping. One issue is in relation to the transcript. I think there may, today, have been some exchanges around information that may be confidential and exchanges around certain lease arrangements and so forth. I would just seek an opportunity to review the transcript, before it's published, to advise Chambers if there is anything in it that is - - -

PN2137

VICE PRESIDENT CATANZARITI: Yes, there's no problem with that.

PN2138

MR FERGUSON: Yes. Thank you.

PN2139

And the other point arises in relation to the written submissions that were handed up today. All I would seek there, is an opportunity to advise Chambers, by close of business tomorrow, as to whether we want an opportunity to respond in writing to any of that but we would advise how long we would seek, respectfully, and should we want that opportunity, after we get some instructions. If that's possible, your Honour.

PN2140

VICE PRESIDENT CATANZARITI: Do you have anything to say, Mr Dowling?

PN2141

MR DOWLING: Only this, your Honour. We would hope and expect that any written reply would only be directed to those matters that my learned friend was not on notice of, prior to today. Our submissions are not new and the way we run our case is not new. We don't want to enter into another round of written submissions. There are only two aspects that we think that our learned friend might say he's not on notice of and that was the calculations for Ms Gedney because he didn't have the payslips until yesterday. And the calculations for the casuals because we put that in the submissions on the alternative claim.

PN2142

But everything else, they're on notice of and none of it's new. So we don't want to start a whole new round of submissions. So if any written reply could be restricted to those matters of which our learned friends weren't on notice.

PN2143

VICE PRESIDENT CATANZARITI: Well, it is a review and I think we need to – no, it's not our intention to restrict the reply and if something has some prejudice, we'll then deal with it.

PN2144

MR DOWLING: Thank you. Well, we might have to reserve our own position.

PN2145

VICE PRESIDENT CATANZARITI: Yes. I follow. But it may be that nothing arises overnight.

PN2146

MR DOWLING: Thank you.

PN2147

MR FERGUSON: Thank you. Those are the submissions. We're otherwise content to rely on the material we've advanced today and previous written submissions in evidence.

PN2148

VICE PRESIDENT CATANZARITI: All right. Thank you. The Commission is adjourned with decision reserved.

ADJOURNED TO A DATE TO BE FIXED [4.24 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs