DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

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

Hair and Beauty

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
COMMISSIONER LEE SYDNEY, 7 JANUARY 2020

4 yearly review of modern awards – Hair and Beauty Industry Award 2010 – award specific penalty rates claims.

Introduction

[1] The Fair Work Commission (the Commission) is currently conducting a 4 yearly review of modern awards (the Review) in accordance with s. 156 of the *Fair Work Act 2009* (the Act). As part of the Review, a number of employer bodies made applications to vary penalty rate provisions in several modern awards. During the course of the Review, the Commission determined to deal with the various applications to vary penalty rates together and these matters were assigned to a specially-constituted five member Full Bench for hearing and determination.

[2] The *Hair and Beauty Industry Award 2010* (the Hair and Beauty Award) was the subject of a claim to reduce Sunday penalty rates (made by Australian Business Industrial and the New South Wales Business Chamber (ABI) and Hair and Beauty Australia (HABA)) and that matter was scheduled to be dealt with by the specially-constituted Full Bench.[1] However, in correspondence dated 14 September 2016,[2] ABI and HABA stated that their claims in respect of the Hair and Beauty Award were no longer pressed.

[3] On 23 February 2017 the five member Full Bench issued a decision[3] dealing with the weekend and public holiday penalty rates, and some related matters, in a number of awards in the Hospitality and Retail sectors (the *Penalty Rates Decision*).[4] In that decision, the Full Bench observed that the existing penalty rates in the Hair and Beauty Award appeared to raise issues

about the level of the Sunday penalty rate and the penalty rates applicable to casual employees.[5] The existing weekend penalty rates provided in the *Hair and Beauty* Award are set out below:

Full-time & part-time employees		**Casual employees**	
Saturday	Sunday	Saturday	Sunday
133%	200%	133%	200%

[4] In the *Penalty Rates Decision*, while the Commission considered that it would be appropriate for these rates to be reviewed,[6] it noted that there were significant impediments to the Commission acting on its own motion to obtain relevant lay evidence. The Commission sought a proponent for change (and a contradictor) as a useful means of ensuring all the relevant considerations were appropriately canvassed.[7]

[5] On 22 March 2017,[8] The Australian Industry Group (Ai Group) wrote to the Commission, advising that it acted on behalf of HABA and that it was prepared to take on the proponent role.

[6] On 28 July 2017, Ai Group filed a draft determination on behalf of HABA, setting out the proposed variations to the Hair and Beauty Award sought by HABA.[9]

Claims

[7] HABA seeks to vary the Hair and Beauty Award as follows:

- To reduce the full-time, part-time and casual **Sunday** penalty rate from **"[a] 100% loading"** to "**150%** of the minimum hourly rate"; and

- To reduce the full-time, part-time and casual **public holiday** penalty rate from **"double time and a half"** to "**225%** of the minimum hourly rate".[10]

[8] It is proposed by HABA that these penalty rates apply uniformly to all types of employees (in the same manner that the current penalty rates regime applies), so there is not a differentiation in relation to casual employees through the addition of the casual loading.[11]

[9] Should the Commission be minded to refuse the application set out above, HABA maintains a position in the alternative, that the penalty rates for casual employees:

- Be reduced from "[a] 100% loading" to "175% (inclusive of the casual loading)" for work on a **Sunday**; and

- Be retained at "250% (inclusive of the casual loading)" for work on a **public holiday**.[12]

[10] The claims are opposed by the Shop, Distributive and Allied Employees Association and The Australian Workers' Union (the Unions) as contradictors.

The legislative context

The Review

[11] As outlined above, s. 156 of the FW Act requires the Commission to conduct a 4 yearly review of modern awards. On 12 December 2018, s.156 of the FW Act was repealed by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (the Amending Act) with effect from 1 January 2018. Under the application and transitional provisions of the Amending Act, a review of an award that commenced, but was not completed before 1 January 2018, can continue under the terms of the repealed provisions. The review of the *Hair and Beauty Award* commenced prior to 1 January 2018 and continues under the terms of the repealed provisions.

[12] Subsection 156(2) specifies what must and may be done in the Review:

> "(2) In a 4 yearly review of modern awards, the FWC:
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> (a) must review all modern awards; and
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> (b) may make:
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> (i) one or more determinations varying modern awards; and
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> (ii) one or more modern awards; and
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> (iii) one or more determinations revoking modern awards; and
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> (c) must not review, or make a determination to vary, a default fund term of a modern award.
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> Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).
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> Note 2: For reviews of default fund terms of modern awards, see Division 4A."

[13] Subsection 156(5) requires each modern award to be reviewed 'in its own right'. In *National Retail Association v Fair Work Commission*[13] the Court noted the purpose of the 'in its own right' requirement is to ensure the review is 'conducted by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations'.

[14] The discretion in s.156(2)(b)(i) of the Act to make determinations varying modern awards in a Review is expressed in general terms. There are however a number of provisions of the Act which operate to constrain the discretion. In particular, the Review function is contained in Part 2-3 of the Act and involves the performance or exercise of the Commission's 'modern award powers' (see s.134(2)(a)). As such, the 'modern awards objective' set out in s.134 of the Act applies to the Review.

[15] The scope of the Review was considered in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision*.[14] We adopt and apply that decision, in particular the following propositions:

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

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

The modern awards objective

[17] As detailed above, the Review function is found in Part 2 – 3 of the Act and involves the performance or exercise of the Commission's "modern award powers" (see s.134(2)(a)). It follows that the 'modern awards objective' in s.134 applies to the Review. Section 134 states:

> **"134 The modern awards objective**
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> *What is the modern awards objective?*
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> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
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> (a) relative living standards and the needs of the low paid; and
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> (b) the need to encourage collective bargaining; and
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> (c) the need to promote social inclusion through increased workforce participation; and
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> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2–6, so far as they relate to modern award minimum wages.

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

[18] The modern awards objective is very broadly expressed.[15] Each of these matters, insofar as they are relevant, must be treated as a matter of significance[16] however no particular primacy is attached to any of the above considerations and not all will necessarily be relevant in the context of a particular proposal to vary a modern award.[17]

[19] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[18] Rather, as observed in the *Penalty Rates Decision*, while the Commission 'must take into account the s.134

considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions.'[19]

[20] The Full Court set out the task before us in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (*Penalty Rates Review*):

> 'What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the" Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).'[20]

[21] What is necessary to achieve the modern awards objective in a particular case involves an evaluative judgement taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[21]

[22] The Full Bench in *4 yearly Review of Modern Awards –Penalty Rates (General Retail Industry Award 2010)*[22] set out the following summary of observations made by the Full Bench in the *Penalty Rates Decision* which are relevant to the matters before us:

> "In the *4 Yearly Review of Modern Awards – Penalty Rates (Hospitality and Retail Sectors decision* (the *Penalty Rates Decision*) the Commission made a number of observations about the s.134 considerations, which are apposite to the matters before us:
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> - **s.134(1)(a):** a threshold of two thirds of median (adult) ordinary time earnings provides a suitable benchmark for determining who is 'low paid'. There is, however, no single accepted measure of two-thirds of median (adult) ordinary time earnings. The two main ABS surveys of the distribution of earnings are the *Characteristics of Employment Survey* (the CoE) and the Survey of *Employee Earnings and Hours* (the EEH).
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> - The most recent data for the 'low paid' threshold is set out below:
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> | | |
> |---|---|
> | CoE (August 2017) | $845.33 |
> | EEH (May 2016) | $917.33 |
>
> - The assessment of relative living standards focuses on the comparison between award-reliant workers and other employed workers, especially non-managerial workers.
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> - Award reliance is a measure of the proportion of employees whose pay rate is set according to the relevant award rate specified for the classification of the employee

and not above that rate. 18 Relevantly for present purposes, the most recent data shows that 34.5 per cent of the retail trade industry employees are award reliant, which is as among the most award-reliant industries.

- **s.134(1)(b):** It is likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award.

- **s.134(1)(c):** *obtaining* employment is the focus of s.134(1)(c). The broader notion of promoting social inclusion (in s.134(b)) is also relevant in considering the level of penalty rates in a modern award as they may impact upon an employee's remuneration and hence their capacity to engage in community life and the extent of their social participation. The likely impact of any exercise of modern award powers on 'employment growth' is one of the other matters we are required to take into account (s.134(1)(h)). These considerations (ss.134(1)(c) and (h)) require us to assess the likely impact of any proposed change to penalty rates on employment growth, in terms of jobs and hours worked.

- **s.134(1)(da):** speaks of the *need* to provide *additional* remuneration to employees working in the circumstances identified in paragraphs 134(1)(da)(i)–(iv). This requires a consideration of a range of matters, including:

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

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

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

- Ultimately, however, the issue is whether an award which prescribes a particular penalty rate provides 'a fair and relevant minimum safety net.' A central consideration in this regard is whether a particular penalty rate provides employees with 'fair and relevant' compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.

- Five further points may be made about s.134(1)(da):

  (i) 'additional remuneration' means remuneration in addition to what employees would receive for working what are characterised as 'normal hours', ie reasonably predictable hours worked Monday to Friday within the spread of hours prescribed in the relevant modern award.

(ii) s.134(1)(da) is a relevant consideration not a statutory directive that additional remuneration be provided for working in the identified circumstances.

(iii) s.134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working arrangements fall within the scope of the descriptors in s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.

(iv) s.134(1)(da) identifies a number of circumstances in which we are required to take into account the need to provide additional remuneration (i.e. those in paragraphs 134(1)(da)(i) to (iv)). Working 'unsocial … hours' is one such circumstance (s.134(1)(da)(i)) and working 'on weekends or public holidays' (s.134(1)(da)(iii)) is another. The inclusion of these two, separate, circumstances means that it is not necessary to establish that the hours worked on weekends or public holidays are 'unsocial … hours'. Rather, we are required to take into account the need to provide additional remuneration for working on weekends or public holidays, irrespective of whether working at such times can be characterised as working 'unsocial … hours'.

(v) s.134(1)(da)(ii) the use of the disjunctive 'or' makes it clear that the provision is dealing with separate circumstances: 'unsocial, irregular or unpredictable hours'. Section 134(1)(da)(ii) requires that we take into account the need to provide additional remuneration for employees working in each of these circumstances. The expression 'unsocial … hours' includes working late at night and or early in the morning, given the extent of employee disutility associated with working at these times. 'Irregular or unpredictable hours' is apt to describe casual employment.

- **s.134(1)(f):** is expressed in very broad terms, it requires us to take into account the likely impact of any exercise in modern award powers 'on business *including*' (but not confined to) the specific matters mentioned, i.e. 'productivity, employment costs and regulatory burden'. It is axiomatic that the exercise of modern award powers to vary a modern award to reduce penalty rates is likely to have a positive impact on business, by reducing employment costs for those businesses that require employees to work at times, or on days, which are subject to a penalty rate. Similarly, an increase in penalty rates will have a negative impact on businesses, by *increasing* employment costs for businesses that require employees to work at times which are subject to the increased penalty rate. The impact of a reduction or increase in penalty rates upon productivity is less clear.

- **s.134(1)(h):** the requirement to take into account the likely impact of any exercise of modern award powers on 'the sustainability, performance and competitiveness *of the national economy*' (emphasis added) focuses on the aggregate (as opposed to sectoral) impact of an exercise of modern award powers."[23] (footnotes omitted)

[23] Section 138 of the Act emphasises the importance of the modern awards objective:

> **'138 Achieving the modern awards objective**
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> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[24] The Full Bench in the *Penalty Rates Decision* set out the general propositions which apply to the Commission's task in the Review as follows:

> '1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.
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> 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
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> 3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
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> 4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
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> - the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);
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> - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
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> - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'[24]

[25] We will apply the above principles in this decision.

Prior consideration of the contested issues

[26] As set out above, it is appropriate for the Commission to take into account previous decisions relevant to contested issues. HABA submitted that the issue of penalty rates payable under the Hair and Beauty Award have been before the Commission and its predecessors on three occasions, in 2008, 2010 and 2013.

The 2008 Decision

[27] The Hair and Beauty Award was made during the Part 10A Award Modernisation Process. The award modernisation process was initiated by a request signed by the Minister for Employment and Workplace Relations on 28 March 2008 pursuant to s.576C(1) of the *Workplace Relations Act 1996*. In June 2008, the Commission published a decision which, amongst other things, established a list of priority industries and occupations and laid down a timetable for the making of modern awards in relation to those industries and occupations.[25] The 'Retail Industry" was deemed a priority industry and at that time, 'hairdressing services" were not excluded from the scope of a retail industry modern award.[26]

[28] On 12 September 2008, the Commission published an exposure draft titled "Retail Industry Award 2010"[27] which was expressed to cover 'hair and beauty establishments'.

[29] In a decision issued 19 December 2008[28] (the 2008 decision), the Commission indicated that employer groups opposed the inclusion of beauty and hairdressing in the "Retail Industry Award 2010". The Full Bench determined to make a separate award for "hair and beauty" and published concurrently the Hair and Beauty Industry Award 2010. The Full Bench stated that it had "…generally followed the main federal industry awards where possible and had regard to all other applicable instruments".[29]

[30] HABA submitted that the 2008 decision should not be followed because it was made in a legislative context that is materially different to the one that applies here.[30] HABA submitted that there was no evidence or submissions put before the Commission regarding the appropriate Sunday or public holiday rates and submitted that the decision does not reveal any detailed consideration of those particular rates.[31]

[31] The Unions submit that the "…appropriate quantum of Sunday and public holiday rates was a contested issue that was extensively debated…and was the subject of conflicting submissions'.[32] The Unions submit that this is apparent from the 2008 decision where the Full Bench stated:

> "Many of the submissions made to us from employers expressed concern at additional costs arising from provisions of the Retail industry exposure draft regarding hours of work, overtime, penalty rates, annual leave and allowances. We have revised these provisions having regard to the terms, incidence and application of relevant instruments for each sector. The result is provisions which more closely approximate to existing instruments for the relevant parts of the industry but which adopt different standards from one part to another. We have addressed submissions concerning the application of allowances and hours provisions and made other changes consistent with the approach to such matters in the main part of this decision."[33]

[32] The Unions submit that the Commission, in setting the applicable penalties under the Hair and Beauty Award, were required to look at all the underpinning conditions. The Unions submit that in the three states that permitted Sunday work, "200% was the common rate".[34] The Unions submit that in relation to public holiday work, the rate of 250% was applicable in the majority of States and Territories.[35]

[33] HABA disagrees with the Unions submissions and maintains that there was no evidence before the Commission concerning Sunday and public holiday rates. HABA submitted that the 2008 decision is distinguishable from the current proceedings in which evidence has been heard.[36]

The 2010 decision

[34] In 2010, HABA made an application to the Commission to reduce the Sunday penalty rates in the Hair and Beauty Award. The basis for the claim was explained by the Commission as follows:

> "The HBA submitted that prior to the modern award coming into effect, the Sunday penalty rates were either 50% or 100% in different States across Australia. It submitted that the penalty payable under the modern award will lead to increased costs for employers who are required by the terms of their lease within shopping complexes to open salons on Sundays. Those that previously paid a 50% penalty for work performed on Sunday will have an additional cost impost which will not enable them to operate profitably."[37]

[35] The Commission dismissed that application; concluding that

> "The adoption of a single national penalty payment for Sundays will inevitably have an impact on cost or employee entitlements where employees are paid near the modern award level and the variation between state instruments is significant. It would be inconsistent with the general approach in award modernisation to adopt a rate lower than the rate that previously applied in most states. We therefore dismiss this part of the application. The transitional provisions have been developed to ameliorate the impact of such changes on employers."[38]

[36] HABA submitted that no evidence was filed in support of the application and that the application was determined pursuant to item 14 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, which HABA submitted "…gave (the Commission) limited power to make an order varying a modern award if it considered that the variation was necessary to give effect to the award modernisation request as it was in effect immediately before 1 January 2010".[39]

[37] The Unions dispute the submissions of the HABA and submit that the decision "…must be seen in the context of the 2008 decision in which the Commission had determined that the Sunday and public holiday penalty rates were appropriate following a contest on the issues".[40]

The 2013 decision

[38] During the two year review of modern awards, HABA sought the abolition of Saturday and Sunday public holiday rates. The application was dismissed by the Commission[41], concluding that:

> "The second variation seeks to remove the weekend penalties. Despite the fact that such a variation would represent a major change to this award nothing of substance was put to us to justify such a change. No cogent reason has been established for altering the penalty rate provisions determined by the Award Modernisation Full Bench.
>
> There is no basis to vary clause 31 of this award as part of the Transitional Review."[42]

[39] HABA submitted that this decision should not be followed because the variation sought was markedly different to that proposed in this matter and the legislative context applying to the two year review was narrower in scope than the current four yearly review.[43]

[40] The Unions submit that HABA overstates the difference between the two year review and the four yearly review and submitted that both reviews require the Commission to undertake the task of considering whether the Hair and Beauty Award meets the modern awards objective.[44]

[41] The Unions submit that HABA "…fails to appreciate that the Commission was called on to consider whether the existing Sunday penalty rate ought to be varied."[45] The Unions submit that the key matter in that decision is that "…the Commission decided not to vary the existing penalty rate".[46]

The *Penalty Rates Decision*

[42] As discussed above, the specially-constituted five member Full Bench constituted to hear and determine a number of applications to vary penalty rates handed down its *Penalty Rates Decision* in February 2017.[47]

[43] The parties made a number of submissions regarding the relevance of the *Penalty Rates Decision* to the matters before us.

[44] HABA submitted that the *Penalty Rates Decision* "is entitled to have regard to the evidence adduced in those proceedings and the finding and reasoning contained in previous decisions handed down in the context of the "Penalty Rates Common Issues Proceedings"'.[48]

[45] HABA submitted that the *Penalty Rates Decision* made the following key findings relevant to our consideration of their claim as follows:

- First, deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates, rather that Sunday and public holiday rates are to be set having regard to the disutility associated with working on Sunday and public holidays;[49]
- Secondly, the extent of the disutility associated with working on Sundays is "much less than times past";[50]

- Third, the disutility associated with working on a public holiday "has been ameliorated somewhat by the introduction of the statutory right to refuse to work on reasonable grounds on such days;[51]
- Fourth, "consistent with the view expressed in the Productivity Commission Report, there are likely to be some positive employment impacts from reducing Sunday public holiday rates.[52]
- Fifth, the expectation "…of consumers to access services in the 'hospitality, entertainment, retail, restaurants and cafes industries (which includes the hair and beauty industries covered by the [Hair and Beauty Award]) on the weekend is a distinguishing feature which is relevant to the setting of Sunday penalty rates";[53]
- Sixth, consumer expectations have developed over time and as such represent a material change in circumstances;[54]
- Seventh, weekend work is more prevalent amongst employers and employees given the developed consumer expectations;[55]
- Eighth, the notion of relative disutility supports a proportionate approach to the fixation of weekend and public holiday penalty rates (therefore public holiday penalty rates should not be disproportionately higher than Sunday penalty rates);[56]
- Ninth, greater consistency in Sunday and public holiday penalty rates is a relevant consideration.[57]

[46] The Unions submit that it is not open to HABA to rely on any factual findings from the *Penalty Rates Decision*.

[47] The Unions submit that it is not open to HABA to rely on any factual findings from a previous proceeding, submitting that the Full Bench must hear and evaluate the evidence before it and not have regard to evidence from other proceedings. The Unions submit that the *Penalty Rates Decision* depended on a range of different factual findings.

[48] HABA submitted that in the current award review, "...it has not been uncommon for the Commission to rely on factual findings made by the Commission in other award review proceedings".[58] HABA accepts however that this Full Bench will need to give consideration to what significance or weight it attaches to any relevant finding of the Full Bench in the *Penalty Rates Decision*.

Consideration of previous decisions

[49] Consideration of past decisions was discussed in the *4 yearly review of modern awards: Preliminary Jurisdictional Issues Decision*[59] where the Full Bench stated:

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

awards objective in s.134 of the FW Act. 14In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

> "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."

While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (Cetin):

> "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."

These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so."[60]

[50] The Full Bench in the *Penalty Rates Decision* set out the following regarding the particular context of previous decisions;

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

- the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision maybe a factor in considering the weight to be accorded to the decision."[61]

[51] In relation to the 2008, 2010 and 2013 decisions, we agree that those decisions were made in a different legislative context.

[52] As discussed above, the Commission in the 2008 decision determined to make a separate award for "hair and beauty" and published concurrently the Hair and Beauty Industry Award 2010. The Full Bench stated that it had "…generally followed the main federal industry awards where possible and had regard to all other applicable instruments". It does not appear that the Full Bench undertook a detailed review of the penalty rates contained in the Award. Instead, the Full Bench generally followed the existing penalty rates in the identified pre-reform instruments. The absence of detailed reasons for the setting of penalty rates in the 2008 decision weighs against us putting reliance on the conclusions of the Full Bench in that matter.

[53] We agree with the submissions of HABA regarding the reliance to be placed on the 2010 decision. A particular distinguishing feature of the 2010 decision is that the application was not accompanied by filed evidence.

[54] We agree with the submissions of HABA that the 2013 decision dealt with an application which was materially different to the one before us. The 2013 decision sought the abolition of penalty rates for Saturday and Sunday work, a claim the Full Bench determined would be a "...major change to this award".[62]

[55] The *Penalty Rates Decision* was determined in the same legislative context that this application was made. While the decision deals with applicable penalty rates in the retail and hospitality industries, the decision does not provide any detailed consideration of the penalty rates contained in the *Hair and Beauty Award*.

[56] The Full Bench stated the following in relation to our requirements under section 156(5) of the FW Act as follows:

> "As would be clear from our decision, whilst we have grouped the modern awards in the hospitality and retail industries together for convenience, we have considered each of the awards in their own right, consistent with the statutory directive in s.156(5) of the FW Act, and found that there are some differentiating factors that bear upon the current issues. These include the composition of the workforce and the context in which some of the modern awards operate."[63]

The evidence

Mr Sullivan and the Employer Survey

[57] In support of their application, HABA called evidence from Mr Patrick O'Sullivan, Digital Marketing Services Manager at the Australian Industry Group.[64] Mr Sullivan provided evidence of a survey conducted of the HABA membership regarding Sunday and public holiday penalty rates. The survey was open from 20 November 2017 to 25 January 2018.[65]

[58] Mr Sullivan gave evidence that an email was sent to HABA's members informing them of the survey and requesting that they participate.[66] The email indicated that the survey was regarding the potential impact of the proposal to reduce penalty rates payable on Sundays and public holidays under the Hair and Beauty Award.[67] Mr Sullivan gave evidence that reminder emails were sent to members on 4 December 2017 and 15 January 2018.[68]

[59] Mr Sullivan stated that he had received instructions from Ai Group Workplace Lawyers to extract information from the survey.[69] He extracted a full set of all survey responses and a set of complete survey responses from respondents who answered 'yes' to the question 'Is your business covered by the *Hair and Beauty Industry Award 2010?*'.[70] In relation to the latter set, he prepared a report displaying the quantitative and qualitative results of the responses.[71] Copies of the aforementioned extractions and reports were provided as attachments to Mr Sullivan's witness statement.[72]

[60] Mr Sullivan stated that "151 respondents submitted a 'complete response', meaning that they answered all mandatory questions in the survey and clicked 'submit' at the end of the survey".[73] He further stated that there were 102 'incomplete responses', meaning that "102 respondents opened the survey but did not answer all mandatory questions and / or did not click 'submit' at the end of the survey".[74]

[61] HABA submitted that a total of 145 responses were received from employers covered by the Hair and Beauty Award. HABA submitted that together, those employer respondents operate 227 salons and employed 1,336 employees.[75]

[62] As for salons that operate on Sundays, HABA submitted that the results of the survey indicated that 25% of respondent employers open one or more salons on a Sunday and 81% of those respondent employers are required to be open on a Sunday as a condition of their lease or contract.[76]

[63] HABA submitted that the survey indicated, with respect to salons that operate on public holidays, 27% open one or more salons and 64% are required to be open on a public holiday as a condition of their lease or contract.[77]

[64] HABA submitted that the survey demonstrates that a large proportion of salons that operate on Sundays and public holidays are required to do so by virtue of their lease or contract.[78]

[65] Further, HABA submitted that the survey also demonstrated that wages and employee entitlements comprise a significant proportion of the employer respondents' total operating costs[79] as follows;

- 34.5% of respondents stated that 50% or more of the total costs of their business were comprised of wages and other entitlements to employees;
- 55.18% of respondents stated that 40% or more of the total costs of their business were comprised of wages and other entitlements for employees;
- 82.08% of respondents stated that 30% or more of the total costs of their business were comprised of wages and other entitlements for employees.[80]

[66] Among other things, the survey asked respondents, namely those who operated on Sundays and of those who operated on public holidays, to identify the impact on their business if the Sunday penalty rate and the public holiday penalty rate under the Award were reduced.[81]

[67] The responses are set out at Attachment H of Mr Sullivan's witness statement, however, HABA submitted that common responses included;

- The respondents' employment costs would be lowered;
- The respondents' business may or would no longer be unprofitable on Sundays;
- The respondents' would roster (or, at the very least, would consider rostering) additional staff;
- The respondents' would increase their trading hours (or at the very least, consider doing so);
- The respondents' would roster existing employees for a greater number of hours;
- Service delivery would improve (with respect to Sunday penalties);
- The cost of the business' services could be reduced (with respect to public holiday penalties).[82]

Consideration

[68] The Full Bench in the *Penalty Rates Case* expressed reservations about the weight which can be put on survey material in circumstances where the number of respondents is small and received such material as anecdotal only. In our view the HABA survey suffers from a similar vice. The small number of responses received to the survey undermine the statistical significance of the survey. During the proceedings, HABA confirmed its only reliance in respect of the results of the survey was to the extent that the results are in some way anecdotal.[83]

[69] The Unions submit that in so far as the results are anecdotal, "they cannot meaningfully assist the Commission".[84] We agree. We have not had regard to the results of the survey.

Mr Thatcher

[70] Graham Thatcher runs a business which owns and operates two beauty salons in Queensland which are located in shopping centres[85], and is a former Vice President of HABA.[86] The salons provide beauty services and sell various beauty products.[87]

[71] Mr Thatcher gave evidence that approximately 22 staff are engaged between the two salons[88] and that there is no enterprise agreement applying to the employees. The salons' largest operating costs are wages and rent, with wages representing 40 to 50 percent of the salons' revenue and 60 to 65 percent of their total costs.[89] He also stated that on Sundays, wages constitute a greater proportion of the revenue.[90]

[72] Mr Thatcher gave evidence that the salons operate from 10:00am to 4:00pm on Sundays[91], and the public holidays on which they operate vary from year to year.[92] Mr Thatcher gave evidence that his salons' competitors are generally open on Sundays and public holidays.[93] Mr Thatcher gave evidence that he had seen increase in the demand for services on public holidays and considers that the salons cannot be closed on all public holidays.[94]

[73] Mr Thatcher states that if HABA's proposal was implemented, it would enable the salons to roster staff for longer shifts on a Sunday.[95] Mr Thatcher may also extend the salons Sunday trading hours so that they are consistent with those of the shopping centres', being 10:00am to 5:00pm on Sundays.[96]

[74] In cross-examination Mr Thatcher indicated that well performing employees would be paid at the same rate despite penalty rate reductions.[97] He conceded that at least some employees would suffer a reduction in their earnings on a Sunday[98] and accepted that there is a disutility for working on Sundays and public holidays.[99]

Mr Akle

[75] Sarkis Akle runs a business which operates three salons located in New South Wales[100], and is the former Vice President of HABA.[101] He stated that all employees are covered by the Hair and Beauty Award and that there is no enterprise agreement applying to any of the employees.[102]

[76] Mr Akle gave evidence that the salons do not operate on Sundays or public holidays[103] except for the Parramatta salon which operates on Easter Saturday.[104] The Parramatta salon had operated on Sundays during 2012-2013[105], but had ceased doing so due to the high labour costs incurred.[106]

[77] Mr Akle gave evidence that there would be an opportunity for the Parramatta salon to attract additional customers if it opened on Sundays, due to new residential developments in the area and as well as nearby restaurants and cafes being open on such days.[107] He stated that if the Sunday penalty rate was reduced to 150% he would open the Parramatta salon on Sundays, initially rostering three staff and increasing numbers if business became busier.[108]

[78] Under cross-examination, Mr Akle acknowledged that there were a number of factors that he might consider when deciding whether to open on a Sunday.[109] He accepted that it is fair and reasonable that penalty rates are used to compensate for the disutility of having to work on a Sunday or public holiday but not at the rates as they currently stand.[110]

[79] In his witness statement, Mr Akle expressed concerns with regards to passing on costs to customers, such as by implementing a surcharge on Sundays, or turning away customers due to low staffing levels, noting the competitive nature of the hairdressing industry.[111]

[80] With regards to public holidays, Mr Akle stated that the salons are not open because the current penalty rate renders labour costs too high.[112] However, in cross-examination he acknowledged that if the public holiday penalty is reduced, staff would have to work more hours to make up for the reduced penalty.[113]

Mr Downs

[81] Graham Phillip Downs runs a business which owns and operates four hairdressing salons in Western Australia which are Just Cuts franchises[114], each located in a shopping centre.

[82] Mr Downs gave evidence that customers are serviced on a 'walk-in system' and often must wait before being serviced.[115] Each salon is open Monday to Sunday but is closed on public holidays.[116] He noted that the salons are not required to be open on Sundays and additional rent is paid for Sunday trading.[117] Whilst Mr Downs stated that on Sundays the salons are open from 11:00am to 4:00pm,[118] in cross-examination he stated they may close as early as 3:00pm or remain open after 4:00pm depending on how busy they are. He also confirmed that the opening hours of the shopping centres on Sundays are 11:00am to 5:00pm.[119]

[83] Mr Downs gave evidence that each salon employs approximately six casual employees[120] and there is no enterprise agreement applying to any employee.[121] Two to three employees are rostered to work at each salon on Sundays.[122] He stated that whilst additional employees are regularly rostered to work on weekdays[123] the penalty rate is too high to roster additional employees on Sundays, as employees may not always be productively engaged during their shift.[124]

[84] Mr Downs explained that whilst the salons may reduce the price of their standard cuts for some customers, the salons charge full price on Sundays due to higher labour costs.[125] He gave evidence that the salons have received complaints with regards to these price fluctuations and some service limitations.[126]

[85] Mr Downs gave evidence that if the Sunday penalty rate was reduced to 150%, additional staff would be rostered to work at some salons on busy Sundays and/or trading hours would be extended, with the aim of improving customer service and further developing the businesses. He would also reconsider charging full price for cuts on Sundays.[127]

[86] Mr Downs gave evidence that he does not believe that the hours his staff work are unsociable or are an issue with retaining staff.[128]

Ms Richter

[87] Ms Elke Richter owns and operates two beauty salons, one of which is located in a shopping centre in Western Australia.[129]

[88] Ms Richter gave evidence that the salons are open Monday to Saturday and are closed on Sundays and public holidays.[130] She gave evidence that the majority of the salons' employees are award-covered[131] and that some are paid above the Award.[132]

[89] Ms Richter gave evidence regarding the high competition between salons within the area that her salons are located. Ms Richter stated that the prices of the services offered by the salons are influenced significantly by the prices charged by competitors.133

[90] Ms Richter considers there is sufficient demand for the salons to be open on Sundays, but stated that she is deterred from trading on Sundays due to the penalty rates payable.[134] She gave evidence that she could not implement a Sunday surcharge on Sundays throughout the year for fear of losing customers.[135]

[91] Ms Richter stated that if the Sunday penalty rate was reduced to 150% she would open the salons on Sundays even if initially it was not profitable.[136] Under cross-examination Ms

Richter accepted that if she opened on Sundays for a few hours with limited employees but sufficient revenue was not being made, she would most likely revert opening hours to Monday to Saturday.[137]

[92] Ms Richter conceded under cross-examination that recruiting and retaining highly skilled staff is a challenge and the ability to do so is impacted by wages.[138] She accepted that working late hours and weekends is unattractive to some beauty therapists but also indicated that some staff enjoy working those hours.[139]

Expert evidence – Dr O'Brien

[93] The Unions commissioned Dr Martin O'Brien, a labour economist and Associate Professor at the University of Wollongong, to provide expert evidence to address the following questions:

> "1. Please compare the labour force profile of workers in 2006, 2011 and 2016, in the hairdressing and beauty industry, retail industry, and hospitality industry by reference to the following measures:
>
> (i) Status in employment (ie, employed, self-employed, Owner/managers);
> (ii) Level of education;
> (iii) Hours worked (per week);
> (iv) Relationship in household (ie, married, single, dependent students); and
> (v) Age.
>
> 2. Taking into account your answer to Question 1, what are the industries that most closely match the characteristics of the hairdressing and beauty industry?"

[94] In his report dated 20 June 2018, Dr O'Brien undertook a comprehensive statistical analysis of Australian Bureau of Statistics (ABS) Census data for the years 2006, 2011 and 2016 for the Hairdressing and Beauty, Retail and Hospitality industries.[140] He also compared and analysed the Hairdressing and Beauty industry with all 713 four digit Australia and New Zealand Standard Industry Classification (ANZSIC) industries, in respect to the above five labour market measures.[141]

[95] Dr O'Brien found that the Retail and Hospitality industries shared a similar labour market profile in respect to the five measures. However, there were a number of differences in the labour market profile of the Hairdressing and Beauty industry, compared with the Retail and Hospitality industries.

[96] In regards to employment status, the percentage of Retail and Hospitality workers within each category did not differ by more than two percentage points.[142] In all years of analyses, at least 85 per cent of both Retail and Hospitality workers were classified as employees.[143] This percentage had increased marginally over the decade while all other categories remained relatively stable. Only 57 per cent of Hairdressing and Beauty workers were employees in 2016,[144] a decrease of 4 percentage points over the decade.[145] However, the number of sole traders in the Hairdressing and Beauty industry rose by five percentage points over the decade

to 24 per cent in 2016.[146] In contrast, the number of sole traders in Retail and Hospitality was less than 5 per cent in 2016.[147]

[97] Approximately 15 per cent of Retail and Hospitality workers were university graduates in 2016, compared to only 5 per cent in Hairdressing and Beauty.[148] However, 73 per cent of Hairdressing and Beauty workers possessed diploma or certificate 3 and 4 qualifications, compared to 23-25 per cent of Retail and Hospitality workers.[149] At least 10 per cent of Retail and Hospitality workers were full-time students, compared to less than 2 per cent in Hairdressing and Beauty.[150]

[98] A much higher proportion of the Retail and Hospitality workforce (13 per cent in Retail, 19 per cent in Hospitality) were classified as dependent students (under 25 years living with parent(s) and engaged in full-time study) compared to Hairdressing and Beauty (2 per cent).[151]

[99] Retail and Hospitality workers were more likely to work very short (under 15 hours) or very long (over 49 hours) per week[152] compared to Hairdressing and Beauty workers. Hairdressing and Beauty workers were likelier to work standard full-time hours (35-40 hours per week).[153]

[100] The average age of a Hairdressing and Beauty worker in 2016 (35.9 years) was similar to that of Retail (36.2 years) while Hospitality had a younger average age (31.8 years).[154]

[101] Dr O'Brien found that Hairdressing and Beauty was ranked in the top 10 per cent of all ANZSIC industries for its concentration of sole traders, diploma and certificate 3 and 4 graduates, and non-dependent children. It was ranked in the lowest 10 per cent in terms of workers classified as employees and university graduates.[155]

[102] When comparing Hairdressing and Beauty to other industries using the five labour market measures, the industries that most closely matched were the Construction and Trades related industries of Automotive Repair, Bricklaying, Carpentry, Concreting, Plumbing, Electrical Services, Repair and Maintenance and Wooden and Metal Manufacturing related industries.[156]

Ms Gedney

[103] Carrie Gedney works as a part-time hairdresser in Newcastle.[157] She completed her hairdressing apprenticeship in the 1980s and has since worked as a hairdresser on either a full-time or part-time basis.[158]

[104] Ms Gedney stated that her regular hours of work are currently 28.25 hours per week[159], including a seven hour shift on Sundays and she often works on public holidays.[160] Ms Gedney gave evidence that she will lose $47.96 net per week (or $73.78 gross) if the Sunday penalty rate is reduced as proposed, as well as additional amounts for any public holidays worked.[161]

[105] Ms Gedney described the effects of such reductions as follows:

> "A loss of $73.78 per week is massive for me and my family.

> This reduction in my wages would mean cut-backs to family holidays and 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."[162]

[106] Ms Gedney indicated that close to 75% of her income is used to pay for essential household expenses.[163] Ms Gedney gave evidence that she considers that she earns less than cleaners and people working in supermarket delis, despite having a trade qualification.[164]

[107] Ms Gedney said that she does not think she would agree to work on Sundays if the rate was only 150% and would seek to change her days of work because she would be better off spending Sundays with her family.[165]

Ms Brooks

[108] Kelly Brooks is a hairdresser with a Certificate III qualification.[166] She has been working at her current salon in Western Australia, since September 2018.[167] She gave evidence that she works 38 hours per week and that her salon does not open on Sundays or public holidays. She indicated that a small part of her role involves selling or recommending salon exclusive retail products such as shampoos, treatments and styling products.[168]

[109] In her witness statement, Ms Brooks stated she completed her hairdressing apprenticeship between 1997 and 2002.[169] She stated she earnt approximately $6 per hour during her apprenticeship and explained that her apprenticeship years were difficult.[170]

[110] Ms Brooks stated she has worked at around ten different salons since 1997 due to her frustration with working conditions and her pursuit of better opportunities.[171] In cross examination she said she has been paid at award rates at 90% of the salons she worked at and of these salons only one was open on a Sunday.[172]

[111] Ms Brooks gave evidence that she had previously worked at a salon in Broome where she worked a fortnightly roster of 42 hours in one week and 44 hours in the other, including every second Sunday and regular public holidays.[173] She stated she did not think her earnings were fair given the job involved regular physical contact with people whilst using sharp instruments and powerful chemicals.[174]

[112] Amongst other things, Ms Brooks gave oral evidence that despite earning above award rates in her current role, she is still opposed to the proposed penalty rate reductions as she may be required to work on Sundays and public holidays in future roles.[175] She explained the reductions would impact her financially and cause her to consider leaving the hairdressing industry.[176]

Ms Geritz

[113] Chantal Geritz is casual hairdresser at a salon in Emerald, Queensland[177] and works Monday to Thursday during school hours and does not work on weekends or public holidays.[178]

[114] Ms Geritz completed her hairdressing apprenticeship in 2005 and holds a Certificate III in hairdressing.[179] She described her apprentice years as difficult and stressful.[180]

[115] Ms Geritz' gave evidence that she could not recommend hairdressing as a career due to low wages and tough working conditions.[181] Dealing with customers is physically and mentally draining.[182]

[116] Ms Geritz gave evidence that she does not understand the view that hairdressers are the same as retail and hospitality workers and should receive comparable conditions, given hairdressers are trade qualified.[183]

Rachel Pierre-Humbert

[117] Rachel Pierre-Humbert works as a casual hairdresser at a salon in Victoria.[184] She completed a three-year apprenticeship in 2006 and has a Certificate III in hairdressing.[185] She described the period of time during her apprenticeship as challenging.[186]

[118] Ms Pierre-Humbert currently works 32 hours per week, Monday to Friday and Sunday.[187] She gave evidence that on Sundays she works from 10:00am to 3:00pm[188] and that she does not work on public holidays.[189]

[119] Ms Humbert stated that she is opposed to any reduction to the current award penalty rates and that the current conditions should rather be improved.[190]

Ms Maguire

[120] Donna Maguire is currently a self-employed hairdresser[191] operating a salon in Emerald, Queensland[192] which employs a casual hairdresser under the Hair and Beauty Award.[193] The salon operates from Tuesday to Saturday and does not open on Sundays or public holidays.[194]

[121] Ms Maguire gave evidence that she does not believe work should be conducted on Sundays or public holidays and indicated this would not change if penalty rates were reduced.[195]

[122] In her witness statement, Ms Maguire stated she completed a four-year apprenticeship in 1980[196] and that she received financial support from her family and the government which helped her meet living costs.[197]

[123] Ms Maguire considers that hairdressing is a significantly underpaid profession that involves working difficult hours (usually at least one day on the weekend), and working on your feet all day.[198]

[124] Ms Maguire gave evidence that it is not attractive to undertake a hairdressing qualification in today's age and has seen a number of young hairdressers leave the industry because wages are too low.[199]

Ms Brandreth

[125] Ms Kate Brandreth is an employee of the National Tertiary and Education Union.[200] Ms Brandre gave evidence that she was formerly employed by the AWU.

[126] Ms Brandreth gave evidence that in 2017, the Australian Government Department of Jobs and Small Business assessed that there is a skills shortage in relation to hairdressers.[201] A copy of a report by the Department, dated September 2017, was attached to her statement.[202]

[127] Ms Brandreth gave evidence that in March 2017 the AWU launched an online petition which it promoted via email to its supporter base and on a Facebook page.[203] The petition was lodged in response to the Commission's announcement of the review of Sunday and Public holiday rates in the *Hair and Beauty Award*.[204] Ms Brandreth indicated, when signing the petition, individuals were asked to identify whether they were employed in the hair or beauty industry and to list their occupation.[205] She stated that out of 6,649 people who signed the petition, 4,317 identified themselves as being employed in the hair and beauty industry.[206]

Features of the Hair and Beauty Industry

[128] Clause 3.1 of *Hair and Beauty Award* provides the following definition for the 'hair and beauty industry':

> "**hair and beauty industry** means:
>
> > (a) performing and/or carrying out of shaving, haircutting, hairdressing, hair trimming, facial waxing, hair curling or waving, beard trimming, face or head massaging, shampooing, wig-making, hair working, hair dyeing, manicuring, eye-brow waxing or lash tinting, or any process or treatment of the hair, head or face carried on, using or engaged in a hairdressing salon, and includes the sharpening or setting of razors in a hairdressing salon; and/or
> >
> > (b) performing and/or carrying out manicures, pedicures, nail enhancement and nail artistry techniques, waxing, eyebrow arching, lash brow tinting, make-up, analysis of skin, development of treatment plans, facial treatments including massage and other specialised treatments such as lymphatic drainage, high frequency body treatments, including full body massage and other specialised treatments using machinery and other cosmetic applications and techniques, body hair removal, including (but not limited to) waxing chemical methods, electrolysis and laser hair removal, aromatherapy and the application of aromatic plant oils for beauty treatments, using various types of electrical equipment for both body and facial treatments."[207]

[129] The classification structure in the *Hair and Beauty Award* is set out in Schedule B and provides the skill level or levels required to be exercised by the employee in order to carry out the principal functions of employment. The occupations specifically referred to in the structure are hairdressers, beauty therapists, beauticians, nail technicians, make-up artists, cosmetologist, trichologists, receptionists and salon assistants.[208]

[130] HABA submitted that there is some commonality between the industry definition in the *Hair and Beauty Award* and the description of 'Hairdressing and Beauty Services' provided by the Australian and New Zealand Standard Industrial Classification Code 9511[209] (ANZIC Code).[210] According to the ANZIC Code, 'Hairdressing and Beauty Services' "consists of units mainly engaged in providing hairdressing services or in providing beauty services such as nail

care services, facials or applying make-up". Medical skin care services and the provision of medical or surgical hair replacement or transplant services, however, do not fall within this category of services.[211] The ANZIC Code also provides a list of primary activities that are performed as part of the Hairdressing and Beauty Services, which include:

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

The workforce in the hair and beauty industry

[131] HABA submitted that the employment of hairdressers in Australia has been on the decline in recent years, with a total of 54,400 hairdressers employed in 2017, as compared to 62,400 employed in 2016 and 63,700 employed in 2015. [212] Conversely, the employment of beauty therapists has been on the rise, with 35,400 beauty therapists employed in 2017 as compared to 33,900 employed in 2016 and 26,800 employed in 2015.[213]

[132] HABA describes the hairdressing workforce as 'fairly young', with the average age being 33 years, with approximately 3 in 10 hairdressers aged between 15 to 25 years. HABA contend that more than half the hairdressing workforce are employed full-time.[214] Conversely, HABA submitted that part-time employment is very common for beauty therapists. Similar to the hairdressing workforce, HABA submitted that the average age of a beauty therapist is 32 years, with approximately 2 in 10 workers within the 15 to 25 years age group.[215]

[133] The Unions reject HABA's assessment of the hair and beauty industry workforce set out above. The Unions contend that the average age of a worker in the hair and beauty industry is 35.9 years and that workers in the hair and beauty industry appear, on a whole, to be ageing at a quicker rate than workers in the retail and hospitality industries.[216] The Unions rely on the evidence of an expert report of Dr Martin O'Brien (Associate Professor, University of Wollongong) outlined above in support of thier submissions.

Average size of businesses in the hair and beauty industry

[134] HABA submitted that the hair and beauty industry is predominantly made up of small to medium businesses employing less than 20 people. HABA directed the Commission to a 2015 report prepared by the Retail and Personal Services Training Council (a body that includes industry and union representatives), the *RAPS Hairdressing Scan 2015* (the RAPS report). The RAPS report found that at that time, enterprises which employed less than 20 people accounted for an estimated 96.8% of hairdressing businesses, 90% of industry employment and 86% of total revenue.[217]

For a more recent snapshot, HABA provided the Commission with Australian Bureau of Statistics (ABS) data concerning 'Hairdressing and Beauty Services' businesses as at the end of June 2017 (ABS 2017 data) to substantiate their proposition that the hair and beauty industry is predominantly made up of small businesses:[218]

Non-employing	1–19 Employees	20–199 Employees	200+ Employees	Total
6,517 (29%)	15,615 (70%)	305 (1%)	0 (0%)	22,442

[135] The Unions reject this submission by the HABA, citing a lack of probative evidence to support their claim that businesses in the industry are typically small. The Unions submit that the RAPS Report should not be given any weight as it suffers from two deficiencies. Firstly, the report is from a Western Australian-based organisation and cannot be relied on in relation to the national hair and beauty industry. Secondly, the Unions submit that the report is several years out of date.[219]

[136] The Unions submit that the ABS data from 2017 should similarly be excluded as the data only includes businesses which are registered for GST (businesses which have an annual turnover of less than $75,000 do not have to register for GST). The Unions submit that this indicates the data is incomplete.

Businesses in the industry face significant cost and competitive pressures

[137] HABA submitted that businesses in the hair and beauty industry face very significant cost and competitive pressures. HABA cited the following extract from the *IBISWorld Hairdressing and Beauty Services – January 2017 Report* (the IBISWorld Report) :[220]

> "The industry is highly competitive, with a large number of small operators and high entry and exit rates. The battle for customers has put downward pressure on prices, forcing the exit of many inefficient operators. External competition has also increased over the past five years, with day spas, hotels and airports now offering a range of hair and beauty services.
>
> …
>
> Profitability and innovation
>
> Intense competition in the Hairdressing and Beauty Services industry has caused many operators to lower prices to retain their market share. Some operators have also introduced specials to attract customers, offering deals with substantially lower prices through websites such as Groupon. This high price-based competition has caused industry profit margins to fall over the players enter the industry annually, this trend is typically offset by the high failure rate. Despite this, the number of industry enterprises is expected to rise over the five years through 2016-17.
>
> Early in the period, the industry benefited from the move beyond traditional hairdressing towards higher value services. These include laser hair removal,

microdermabrasion, chemical past five years. To offset this decline, peels and dermal fillers. Salons have some hairdressers and beauty therapists have focused on promoting higher margin services and products. The introduction of new services has caused the number of industry operators to increase, which has further intensified competition and downward pricing pressure. Although a large number of been able to generate growth by developing relationships with local plastic surgeons and, to a lesser extent, general practitioners and dermatologists. However, more salons are following this trend, causing price-based competition to increase and revenue growth to slow."

[138] HABA further directed us to the RAPS Report which provides the following summary of the cost and competitive pressure facing businesses in the hairdressing industry:[221]

> "a) There has been an increase in the number of customers opting to purchase hair and beauty products online. This trend is largely attributed to the consumer's desire to save money. Online stores, free from salon overheads, are able to offer lower priced products, which impact upon in-store salon sales.
>
> b) Demand for hairdressing salon industry services is sensitive to changes in household disposable income, fashion and social mores.
>
> c) The industry tends to operate with a fair degree of price-based competition, resulting in a high rate of salon closure.
>
> d) Competition in this industry is high and is increasing. The main basis of competition between hairdressers is price, and therefore profit margins are very low.
>
> e) External competition comes from mobile hairdressers who perform their services in a home (as opposed to a salon), as well as from the DIY sector, as some people do their own hair treatments using off-the-shelf products."

[139] The Unions submit that there is insufficient evidence before the Commission to conclude that businesses in the hair and beauty industry face "significant cost and competitive pressures" for the same reasons outlined above in relation to the RAPS Report.[222]

[140] In reply HABA cited ABS 2017 data which reported that between 1 July 2016 and 30 June 2017, 3862 businesses entered the industry and 3108 businesses exited the industry. HABA submitted that this represents an increase of only 3.5% to the number of businesses in the industry and an exit rate of 14.3%.[223] HABA submitted that the ABS 2017 data also indicates that between 1 July 2016 and 30 June 2017, 9% of businesses had a turnover of less than $50,000; 60% of businesses had a turnover of less than $200,000; and 99% of business had a turnover of less than $2,000,000. [224]

The percentage of labour costs against total turnover

[141] HABA submitted that labour costs represent a high proportion of total turnover for the hair and beauty industry citing ATO Benchmarking for 2014-2015 in support of this claim.

HABA submitted that it can be logically inferred that the level of penalty rates will have a larger impact on hair and beauty businesses than the impact on businesses which operate in an environment where labour costs represent a smaller proportion of total turnover.[225] HABA submitted that this supports the need for Sunday and weekend penalty rates to be adjusted in the manner sought.

[142] The Unions submit that this inference cannot be drawn in the absence of detailed evidence about the frequency and extent of work performed on Sundays and public holidays in the hair and beauty industry.[226]

Claim that it is common for businesses in the industry to operate on Sundays

[143] HABA submitted that it is very common for businesses in the hair and beauty industry to operate on Sundays. HABA notes that the hair and beauty industry provides services to *consumers*, rather than businesses and, accordingly, most of the revenue in the industry comes from households. Further, HABA submitted that consumers of hair and beauty services who participate in the workforce are not usually able to access hair and beauty services during working hours.[227] HABA submitted that it is common for lease arrangements in major indoor shopping malls to require tenants, including hair and beauty businesses, to be open on Sundays and on public holidays on which the shopping centre is open.

[144] In support of these submissions, HABA cited the following material to demonstrate that it is very common for businesses in the hair and beauty industry to operate on Sunday:[228]

- six lay witnesses called by the Unions who gave evidence
- Ms Kate Brandreth's evidence that "thousands" of hairdressers work on Sundays
- 25% of respondents (37) to the survey conducted by HABA open one or more salons on Sundays
- 179 Just Cuts salons were identified by the Just Cuts website on 8 March 2018 as opening on Sundays
- Five of the witnesses called by HABA open one or more salons on Sundays

[145] The Unions reject the submissions advanced by HABA and submit that there is insufficient evidence before the Commission to conclude that it is very common for businesses in the hair and beauty industry to operate on Sundays.[229] Further, in relation to the proposition that lease arrangements often require businesses in the hair and beauty industry to open on Sundays and public holidays, the Unions note that no leases were tendered into evidence to support this.[230]

[146] By contrast, HABA noted that the Unions did not call any evidence to contradict the proposition or presented any material that might establish that it is not common for employers in the industry to operate on a Sunday.

Claim the hair and beauty industry is similar to the retail and pharmacy industries and competes with the retail and pharmacy industries

[147] HABA submitted that there is some commonality between businesses in the retail and pharmacy industries and those in the hair and beauty industry, including:

- Businesses in these industries predominately sell to consumers;
- A large range of hair and beauty products are sold by businesses in these industries;
- Businesses in these industries operate from similar locations, e.g. shopping strips and shopping malls;
- The opening hours of businesses in these industries are often similar; and
- Lease arrangements for businesses in these industries are similar.[231]

[148] HABA further submitted that businesses in the hair and beauty industry compete with businesses in the retail and pharmacy industries in respect of the sale of hair and beauty products. As such, HABA contends that unless the penalty rates in the Hair and Beauty Award are reduced, hair and beauty industry businesses will be at a competitive disadvantage, in respect of the sale of hair and beauty products, to businesses in the retail and pharmacy industries.

[149] HABA references the *Penalty Rates Decision*, which reduced Sunday and public holiday penalty rates in the *General Retail Industry Award 2010* to a level substantially below the penalty rates in the *Hair and Beauty Award*. HABA submitted that many of the reasons why penalty rates were reduced in the retail industry are equally relevant to the hair and beauty industry.

[150] The Unions dispute that there are 'obvious similarities' between the industries. They note that the criteria listed above relating to consumers, location and hours are so general as to not create any meaningful similarity.[232] The Unions further submit that the Commission should conclude that there are fundamental differences between the hair and beauty industry and the retail and hospitality industries. The unions rely on the expert evidence of Dr O'Brien and cite the following passage from his tendered report:

> "(a) there are fundamental differences between the labour force profiles of the HB industry and the retail and hospitality industries including:
>
> (i) status in employment (i.e. employed, self-employed, owner/managers);
> (ii) level of education;
> (iii) relationship in household (i.e. married, single, dependent students); and
> (iv) Age."[233]

[151] The Unions submit that according to Dr O'Brien's evidence, the hair and beauty industry shares the most commonalities with trades related industries which for example include:

(i) electrical services;
(ii) (ii) automotive;
(iii) (iii) bricklaying
(iv) (iv) plumbing; and

(v) (v) carpentry.[234]

[152] The Unions submit that that employer organisations representing the hair and beauty industry (including HABA) have previously argued before the Commission in the award modernisation process that the hair and beauty industry is distinct from the retail industry and should be subject to different industrial conditions.[235]

[153] The Unions submit that Ai Group/HABA has not adduced any probative evidence which is capable of establishing the degree or extent of competition between the industries, or whether the sale of hair and beauty products is anything more than a supplementary and minor part of the business activities in the hair and beauty industry. The unions also referred to a myriad of witness evidence to demonstrate that the vast majority of time is spent by employees cutting hair and hair-related services, not selling products.[236] They further submit that HABA has not provided any basis to conclude that a reduction in Sunday and public holiday penalty rates will ameliorate competition between employers in the hair and beauty industry and those in the retail and pharmacy industries. Additionally, the Commission should not accept that any possible reduction in competition is relevant to the exercise of the Commission's modern award powers as it is not a consideration under the modern awards objective.[237]

Apprenticeship developments

[154] HABA submitted that there has been a significant decline in the number of apprenticeships commenced in the hair and beauty industry since the implementation of the Commission's *Modern Awards Review 2012 – Apprentices Decision* (2012 Apprentices Decision),[238] which HABA submitted increased the wage rates for first and second year apprentices in the hair and beauty industry by up to $400 per week. [239]

[155] The new rates were phased-in through two annual increments on 1 January 2014 and 1 January 2015. HABA submit that given the magnitude of the increases, the phasing arrangements did little to offset the negative impacts for hair and beauty industry employers, and the consequent substantial reduction in the number of apprenticeships offered by employers in the industry.[240] HABA further submit that the labour cost increases for hair and beauty industry businesses which resulted from the 2012 Apprentices Decision were exacerbated by the weekend penalty rates that are payable under the Hair and Beauty Award because the penalty rates are loaded on top of the higher minimum wage rates.[241]

[156] The Unions submit that there is no tenable basis to conclude that any decline in apprenticeships in the hair and beauty industry has been caused by the 2012 Apprentices Decision. The Unions submit this is particularly so when it is appreciated that there has been an overall decline in apprenticeships across all industries from at least 2010.[242] Further, the Unions cite data published in 2018 from the National Centre for Vocational Education Research (NCVER) that in 2017 hairdressing apprenticeships commencements have increased from 3,762 in 2016 to 3,900 in 2017 (an increase of 4%). The Unions submit this increase is to be contrasted with a continuing decline in apprenticeships commencements for all types of apprentices from 2016 to 2017 across all industries.[243] The Unions submit that the data from NCVER indicates that between 2017 and 2018 hairdressing apprenticeships commencements have almost remained static (a decrease of 0.4%).[244]

[157] In HABA's submission in reply, they contend that it is misleading to place such an emphasis on 138 new apprenticeships commenced nation-wide in one year as provided by the NCVER's data.[245] HABA submitted that an increase of 138 apprenticeship commencements in 2017 (a 4% increase) does not reverse the declining trend going back to at least 2010. In 2010 there were 5,871 new apprenticeship commencements. HABA submitted that there remains an 18% decline in apprenticeship commencements from 2013 to 2017 with a clear decrease in apprenticeship commencements between these years despite the minor increase from 2016 to 2017.[246]

[158] HABA notes that the contract attrition rate for hairdressing apprentices was projected by the NCVER to rise from 64.7% in 2016 to 68.6% in 2017 and that the completion rate has been predicted to fall from 33% in 2016 to 28.1% in 2017. [247] A 2014 review by the NCVER investigated the reasons for non-completion of apprenticeships. HABA submitted that the review found that one of the most common reasons cited for not completing an apprenticeship was loss of job due to redundancy. Given the continuing increase in the non-completion rates of hairdressing apprenticeships, redundancy is likely to form a substantial part of these.[248]

Consideration

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

[160] HABA submitted that the variations that it is seeking to the Hair and Beauty Award are aimed at ensuring that the award remains relevant to the hair and beauty industry. HABA refers to the *Penalty Rates Decision*, in which the Full Bench determined that the word "relevant" is intended to convey that an award should be suited to contemporary circumstances:

> "[120] Second, the word 'relevant' is defined in the Macquarie Dictionary (6th Edition) to mean 'bearing upon or connected with the matter in hand; to the purpose; pertinent'. In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:
>
> > '527 … the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net that accords with community standards and expectations.'"
>
> (emphasis added)

[161] HABA submitted that the finding in the *Penalty Rates Decision* that there has also been a reduction in the disutility associated with working on a Sunday for many workers is relevant in the context of the hair and beauty industry.[249] Consequently, HABA contends that the current level of penalty rates is not proportional to the disutility of working on a Sunday, in contemporary circumstances.

[162] The Unions, however, submit that HABA's submission is misguided and must be rejected. They contend that it is not open to HABA to rely on any factual findings from a prior proceeding. Rather, this Full Bench must hear and evaluate the evidence before it and not have

regard to evidence from other proceedings.[250] If it was to do otherwise the Unions would be, amongst other problems, denied procedural fairness. This issue has been dealt with above in relation to the applicability of the *Penalty Rates Decision.*

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

Sections 134(1)(a)

[164] Section 134(1)(a) requires that we take into account the 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a).

[165] It is not in dispute that the employees covered by the Hair and Beauty Award are low paid within the meaning of the provision.[251] It has been accepted that the needs of the low paid are relevant to the consideration of the appropriate level of penalty rates.

[166] Witness evidence tendered by the Unions demonstrates that the needs of the low paid will not be met by if the proposed variation is granted. The Unions submit that a reduction in Sunday and public holiday penalty rates will have an adverse impact on the earnings of employees covered by the Hair and Beauty Award. The Unions submit that it is likely to reduce the earnings of those employees, who are already low paid, and to have a negative effect on their relative living standards and on their capacity to meet their needs. [252]

[167] HABA submitted that any negative impacts in relative living standards "… may be ameliorated through additional hours being provided to employees on a Sunday or Public Holiday, as a consequence of the reduced disincentive to engage employees on these days." [253] The Unions submit that HABA has failed to establish an evidentiary basis to support the proposition that additional hours would be offered to employees on a Sunday or a public holiday.[254] The Unions submit further that it is improbable that existing employees' hours would rise sufficiently to offset the reduction in income caused by the penalty rate cuts [255] and that even if it was accepted that in some workplaces additional hours were offered, this would do little to mitigate the adverse impacts on employees.[256]

[168] We agree with the submissions of the Unions and the evidence provided by the Unions' witnesses. The needs of the low paid is a consideration which weighs strongly against granting the proposed variations in the context of the hair and beauty industry and the particular characteristics of its workforce as outlined in the evidence of Dr O'Brien whose analysis we accept.

s.134(1)(b)

[169] Section 134(1)(b) requires that we take into account 'the need to encourage collective bargaining'. The Unions submit that this consideration weighs in favour of refusing the proposed variations. The status quo is that any employers that wish to have alternative arrangements applicable to work performed on Sundays and public holidays are incentivised to engage in collective bargaining.[257]

[170] HABA submitted that a reduction in penalty rates is likely to incentivise employees covered by the Hair and Beauty Award, and any union that represents them, to engage in collective bargaining. [258]

[171] A reduction in Sunday and public holiday penalty rates may increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award.

[172] Unlike in other large industries considered by the Commission, the evidence before us supports the fact that there is heavy reliance on the award system in the hair and beauty industry.[259] Therefore, alterations to the Hair and Beauty Award have a great effect on employers and employees within the industry. In this landscape, it is difficult to suggest that reducing penalty rates would have any effect on collective bargaining.

[173] Section 134(1)(b) speaks of 'the need to *encourage* collective bargaining'. We are not persuaded that a reduction in penalty rates would '*encourage* collective bargaining', it follows that this consideration does not provide any support for a reduction to Sunday or public holiday penalty rates.

s.134(1)(c)

[174] Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c).[260]

[175] HABA contends that a consideration of the matters referred to in s.134(1)(c) lends support to granting of the claim. HABA made reference to what they refer to as the 'common evidence' in the *Penalty Rates Decision* and submitted that the Full Bench concluded that a reduction in penalty rates was likely to result in some positive employment effects. [261] HABA submitted that their lay evidence in this matter is consistent with this general proposition. [262]

[176] HABA further submitted that the current penalty rate regime under the Hair and Beauty Award operates to discourage employers from engaging employees to work on a Sunday. HABA submitted that some have elected not to trade at all on Sundays as a result of Sunday penalty rates, or at the very least as a result of factors including Sunday penalty rates. Moreover, they submitted that it appears that some employers intend to respond to the proposed reduction in such rates, if granted, by expanding their engagement of labour on a Sunday.

[177] The Unions submitted that there is no evidentiary basis to conclude that a reduction in penalty rates will produce 'some positive employment effects'. On the material before the Commission, the Unions submit that the Commission should not be satisfied that this consideration weighs in favour of the proposed variations.

[178] The Unions note that the objective in s. 134(1)(c) is relevantly the same as s. 284(1)(b) of the Minimum Wages Objective in Part 2-6, Division 2 of the FW Act. When considering the application of s. 284(1)(b) of the FW Act, the Expert Panel "must form a view on the

employment impacts of an increase in the national minimum wage and modern award minimum wages of the size that we have in mind and in the economic circumstances that we face".[263] It is submitted by the Unions that the Full Bench should undertake the same exercise when considering the impacts of the proposed variations. [264]

[179] HABA's lay witnesses provide some support for the proposition that a lower penalty Sunday and public holiday rate would increase the level and range of services offered on a Sunday. This consideration lends support to a reduction in the Sunday and public holiday penalty rates.

s.134(1)(d)

[180] Section 134(1)(d) requires the Commission to take into account "the need to promote flexible modern work practices and the efficient and productive performance of work". The Unions submitted that this is a neutral consideration in this context as the proposed variations, which are proposed cuts in penalty rates, naturally do not involve any "flexible modern work practices" or a proposal which could have any impact on the "efficient and productive performance of work."[265]

[181] Contrary to the Unions' submissions, HABA submitted that there is a connection between penalty rates and work practices within employers covered by the awards. HABA submitted that to the extent that a reduction in penalty rates removes a barrier to the engagement of additional staff and/or the simultaneously engagement of additional staff within a salon, it can be said to promote flexible modern work practices. HABA contends that it also likely to facilitate the efficient and productive performance of work.[266] In terms of broader benefits for businesses in this industry, the proposed variation will, by removing or reducing the barrier to engaging additional staff on a Sunday, enable businesses to take greater advantage of 'walk in' customers by ensuring they are better able to meet such variable demand and will afford businesses a greater opportunity to recover their fixed costs by facilitating an expansion in their level of Sunday trading. [267]

[182] The Unions submitted that HABA's submission is untenable and must be rejected. [268] The matters relied on don't engage the provision, and in any event there is insufficient evidence to support the contention.

[183] There was no evidence before us that a reduction in Sunday and public holiday penalty rates would result in the more efficient and productive performance of work. We agree with the submissions of the Unions and consider this a neutral consideration.

s.134(1)(da)

[184] Section 134(1)(da) requires that we take into account the 'need to provide additional remuneration' for, relevantly, 'employees working on weekends or public holidays'. An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified in paragraphs 134(1)(da)(i)–(iv) requires a consideration of a range of matters, including:

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

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

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

[185] The Unions rely on lay evidence to establish that working on Sundays and public holidays has a detrimental effect on the social, community and family lives of employees and their families.[269] The Unions submit the s. 134(1)(da) consideration will not be met if the proposed variations are granted.[270]

[186] HABA concedes that 'the minimum rates in the Hair and Beauty Award do not already compensate employees working on weekends'.[271] HABA submitted that however, it "is relevant to observe that there are terms of the Award which operate to minimise the incidence of Sunday work".[272] Terms referred to by HABA include what they submit is a shorter span of hours on Sundays and relatively restrictive rostering provisions (including consecutive days off). HABA submitted that "… it is very common in industry for employee preferences regarding the working of Sunday to be taken into consideration in the setting of roster arrangement." [273]

[187] HABA also submitted that some businesses in the hair and beauty industry are required by the terms of the hair and beauty industry to trade on public holidays. [274] The Unions submit that there is no evidence to support either of these contentions. In any event, it is not relevant to the consideration called for by s 134(da).

[188] HABA sought to rely on the factual finding regarding the disutility of Sunday work in the *Penalty Rates Decision* in support of this consideration. [275] The Unions oppose this, and submit that HABA's reliance on the fact that even if Sunday and public holiday penalty rates were reduced employees working on a Sundays would still receive some additional remuneration is misguided.[276]

[189] HABA claims that if Sunday penalty rates were reduced this would be a factor supporting the proportionate reduction of public holiday penalty rates. [277] The Unions contend that this submission falls outside of the matters that fall for consideration under s 134(da) and in any event should be rejected. [278]

[190] In relation to s.134(1)(da)(ii) as HABA has conceded, the Hair and Beauty Award does not already compensate employees for working on weekends. In relation to matter (iii), we have insufficient evidence before us to conclude that weekend work is "a feature of the industry". Of HABAs lay witnesses, two operated businesses which opened on Sundays[279] however two operated businesses which did not trade on Sundays or public holidays.[280] As indicated above, the survey conducted of HABA membership is too small a sample size to be statistically relevant.

[191] In relation to s.134(1)(da)(i), there was limited evidence before us regarding the disutility of working on a Sunday. The Unions lay witnesses did not generally give detailed evidence regarding the impact of working on Sundays or public holidays.

[192] We conclude that this is a neutral consideration.

s.134(1)(e)

[193] Subsection 134(1)(e) requires that the Full Bench take into account the principle of equal remuneration for men and women 'for work of equal or comparable value'. Any reduction in Sunday or public holiday penalty rates would apply equally to men and women workers. Section 134(1)(e) is neutral to our consideration of the claim before us.[281]

s.134(1)(f)

[194] Subsection 134(1)(f) requires the Commission to take into account the likely impact of the exercise of modern award powers on business, including productivity and employment costs.

[195] HABA submitted that granting the proposed variations will reduce employer costs.[282] The Unions accept the proposition that reducing a rate of pay which is otherwise payable will mean that the costs that an employer would otherwise incur are reduced. The Unions, however, submit that HABA has failed to adduce sufficient evidence to support its contentions about the extent and prevalence of Sunday and public holiday work in the hair and beauty industry. They therefore contend that there is an insufficient evidentiary basis for the Commission to conclude that this impact on business arising from reduced Sunday and public holiday penalty rates would be of any significance.[283]

[196] The Unions submit that there is no evidence to support the proposition that businesses in the hair and beauty industry are suffering productivity problems or high employment costs at all, let alone that they are attributable to higher Sunday and public holiday penalty rates.

[197] The Unions submit that granting the proposed variations could exacerbate the skills shortage that the Australian government has recognised in the labour market for hairdressers[284] by making the occupation even less attractive to employees. This would be a detrimental impact on business and thus ought to be taken into account. [285]

[198] As discussed above, we have found there to be insufficient evidence before us as to the prevalence of Sunday and public holiday work. However, as conceded by the Unions, it is self-evident that if the Sunday and public holiday penalty rates were reduced then employment costs would reduce. This consideration lends support to a reduction in the Sunday and public holiday penalty rates albeit that the impact of a reduction would appear to be minimal on the basis that Sunday and public holiday work is not prevalent.

s.134(1)(g)

[199] Subsection 134(1)(g) requires that the Full Bench take into account the need to provide a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards. This is a neutral consideration.[286]

s.134(1)(h)

[200] Subsection 134(1)(h) requires that the Full Bench take into account the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy. HABA submitted that the proposed variation would have a positive impact on employment.[287]

[201] The Unions submit that HABA has not called, or sought to rely upon, any expert evidence (from a labour economist, economist or any other expert) or any academic reports, publications or journal articles, to support its assertion that a reduction in penalty rates will have 'some positive employment effects'. [288]

[202] We agree that there is no probative evidence before us regarding this consideration. This is a neutral consideration.

[203] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in paragraphs 134(1)(a)–(h). We have taken into account those considerations insofar as they are relevant to the matter before us and while there are some s.134 considerations which lend support to the application, we find there to be insufficient evidence before us to support the granting of the claim. Accordingly, we refuse the claim and dismiss the application.

Alternative position – Casual employees

[204] In the *Penalty Rates decision*, the Full Bench found that the existing penalty rates applicable to casual employees required review.[289]

[205] HABA's claim to reduce Sunday and public holidays penalty rates has been dismissed. However we are still required to review the penalty rates applicable to casual employees.

[206] Under the current terms of the Hair and Beauty Award, full-time and part-time employees receive the same penalty rate for work on Saturdays (133%), Sundays (200%) and Public Holidays (250%) as casual employees.

[207] HABA submits that there is cogent rationale and significant merit based arguments that support its proposal to maintain an approach which sees all employees in the same classification receive the same rates for working on weekends and public holidays, regardless of whether they have been engaged as casual or permanent employees. HABA submits that this approach is warranted "…for reasons including the structure of the [Hair and Beauty Award's] treatment of penalty rates, the unique nature of the industry, and certain restrictions contained within the Award regarding rostering".[290]

[208] Clause 13 of the Hair and Beauty Award provides as follows:

"13. Casual employment

13.1 A casual employee is an employee engaged as such.

13.2 For all work between 7.00 am and 9.00 pm Monday to Friday, a casual will be paid both the hourly rate for a full-time employee and an additional 25% of the ordinary hourly rate.

13.3 For all work performed outside the hours in clause 28.2, except Sundays, a casual employee will be paid the hourly rate for a full-time employee in this award plus 50%. For Sundays, the additional loading will be 100%."

[209] Subclause 31.2 sets out the overtime and penalty rates that apply to casual employees. These include rates of pay that apply to Saturday and Sunday work.

"31.2 Overtime and penalty rates

(a) Overtime hours worked in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Hours worked by casual employees:

(i) in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle;
(ii) in excess of 10 ½ hours per day;

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

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

(d) Sunday work

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

[210] Subclause 35.4 sets the penalty rate for work on a public holiday as:

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

[211] HABA notes that there is currently some potential ambiguity in relation to the rates of pay for casual employees who work overtime on a Saturday, Sunday or public holiday. For example, under clause 31.2(b) a casual working overtime on a Saturday would receive a rate of 175% of the first three hours and 225% thereafter, as opposed to the regular rate of 133% for working on a Saturday. However, for those working overtime on a Sunday, casual employees would be paid under clause 31.2(b) a rate of 175% for the first three hours and 225% thereafter, less in the first three hours than the regularly applicable Sunday penalty rate of 200%.

[212] HABA proposes that work performed by a casual employee on a Sunday that meets the criteria for overtime should be paid at 175% for the first three hours and 225% thereafter.

[213] In our view, HABA has not made out a case for any change to the current provisions for casual employees. The terms of clause 32.1(d) are clear that a 100% loading will apply *for all hours of work* for *full-time, part-time and casual employees* on a Sunday. It appears clear from those words that all employees are to receive 200% for work on a Sunday. We do not believe there is ambiguity between these clauses.

[214] Clause 35.3 regarding public holiday penalty rates is not as clear as to whether it applies to ordinary and overtime hours, however we believe it is apparent that "work on a public holiday" to be a reference to both ordinary and overtime hours. It appears clear that the rate of pay for a casual employee working ordinary or overtime hours on a public holiday will receive a rate of 250%.

[215] While we have determined to make no change to the present provisions of the Award, we note that the Full Bench in the *Penalty Rates Decision stated that*

> "Casual loadings and weekend penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed…
>
> In our view, the casual loading should be *added* to the Sunday penalty rate when calculating the Sunday rate for casual employees."[291]

[216] The present Hair and Beauty Award provisions are not consistent with the views of the Full Bench. However there is insufficient material before us to establish a case for change. If the parties wish to provide further materials in relation to the Saturday and Sunday penalty rates applicable to casual employees covered by the Hair and Beauty Award, the parties should contact the Commission within the next fourteen days and the matter may then be listed for further directions.

VICE PRESIDENT

Appearances:

B Ferguson and *R Bhatt* of The Australian Industry Group for Hair and Beauty Australia.

C. Dowling SC of Counsel and *Y. Bakri* of Counsel for The Australian Workers' Union and the Shop, Distributive and Allied Employees Association.

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Final written submissions:

The Australian Workers' Union and the Shop, Distributive and Allied Employees Association, 10 September 2019.

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[1] [2014] FWC 9175.

[2] ABI, Correspondence, 14 September 2016.

[3] [2017] FWCFB 1001.

[4] [2017] FWCFB 1001.

[5] [2017] FWCFB 1001, [2059].

[6] [2017] FWCFB 1001, [2060].

[7] [2017] FWCFB 1001, [2061].

[8] Ai Group, Correspondence, 22 March 2017.

[9] Ai Group, Draft Determination, 28 July 2017.

[10] Submission, Hair and Beauty Australia, 14 March 2018, page 6 and Draft Determination, Hair and Beauty Australia, 28 July 2017.

[11] Transcript 5 September 2019, PN1422.

[12] Submission, Hair and Beauty Australia, 14 March 2018, page 87.

[13] (2014) 225 FCR 154 at [85].

[14] [2014] FWCFB 1788 at [19]–[24] (the *Preliminary Jurisdictional Issues Decision*).

[15] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35].

[16] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]–[84]; National Retail Association v Fair Work Commission (2014) 225 FCR 154 at [56].

17 [2017] FWCFFB 1001, [115].

18 National Retail Association v Fair Work Commission (2014) 225 FCR 154 at [105]-[106].

19 [2017] FWCFB 1001, [116].

20 Shop, Distributive and Allied Employees Association v The Australian Industry Group [2017] FCAFC 161.

21 See generally: Shop, Distributive and Allied Employees Association v National Retail Association (No.2) (2012) 205 FCR 227.

[22] [2018] FWCFB 5897.

[23] [2018] FWCFB 5897, [14].

[24] [2017] FWCFFB 1001, [269].

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[28] [2008] AIRCFB 1000.

[29] [2008] AIRCFB 1000, [286].

[30] Submission, HABA, 14 March 2018 at [25].

[31] Submission, HABA, 14 March 2018 at [25].

[32] Submission, SDA and AWU, 20 June 2018, at [49].

[33] [2008] AIRCFB 1000, [287].

[34] Submission, SDA and AWU, 20 June 2018, at [52].

[35] Submission, SDA and AWU, 20 June 2018, at [53].

[36] Submission in reply, HABA,21 August 2019, at [32].

[37] [2010] FWAFB 1983, [16].

[38] [2010] FWAFB 1983, [18].

[39] Submission, HABA, 14 March 2018 at [27].

[40] Submission, SDA and AWU, 20 June 2018, at [49].

[41] [2013] FWCFB 1635.

[42] [2013] FWCFB 1635, [318] –[319].

[43] Submission, HABA, 14 March 2018, [36].

[44] Submission, SDA and AWU, 20 June 2018, [158].

[45] Submission, SDA and AWU, 20 June 2018, [159].

[46] Submission, SDA and AWU, 20 June 2018, [159].

[47] [2017] FWCFB 1001.

[48] Submission, HABA, 14 March 2018, [97].

[49] Submission, HABA, 14 March 2018, [39].

[50] Submission, HABA, 14 March 2018, [41].

[51] Submission, HABA, 14 March 2018, [42].

[52] Submission, HABA, 14 March 2018, [43].

[53] Submission, HABA, 14 March 2018, [44].

[54] Submission, HABA, 14 March 2018, [45].

[55] Submission, HABA, 14 March 2018, [47].

[56] Submission, HABA, 14 March 2018, [48].

[57] Submission, HABA, 14 March 2018, [49].

[58] HABA, Submissions in Reply, 21 August 2019, [14].

[59] [2014] FWCFB 1788.

[60] [2014] FWCFB 1788, [24]-[27].

[61] [2017] FWCFB 1001, [255].

[62] [2013] FWCFB 1635, [318].

[63] [2017] FWCFB 1001, [348].

[64] Witness Statement of Patrick Sullivan, 16 February 2018, [1].

[65] Witness Statement of Patrick Sullivan, 16 February 2018, [6] and [8].

[66] Witness Statement of Patrick Sullivan, 16 February 2018, [6] and Attachment A.

[67] Witness Statement of Patrick Sullivan, 16 February 2018, Attachment A.

[68] Witness Statement of Patrick Sullivan, 16 February 2018, [7] and Attachments B and C.

[69] Witness Statement of Patrick Sullivan, 16 February 2018, [9].

[70] Witness Statement of Patrick Sullivan, 16 February 2018, [10].

[71] Witness Statement of Patrick Sullivan, 16 February 2018, [10].

[72] Witness Statement of Patrick Sullivan, 16 February 2018, Attachments F. G and H.

[73] Witness Statement of Patrick Sullivan, 16 February 2018, [11].

[74] Witness Statement of Patrick Sullivan, 16 February 2018, [11].

[75] HABA, Submission, 14 March 2018, [100].

[76] HABA, Submission, 14 March 2018, [101].

[77] HABA, Submission, 14 March 2018, [101].

[78] HABA, Submission, 14 March 2018, [102].

[79] HABA, Submission, 14 March 2018, [103].

[80] HABA, Submission, 14 March 2018, [103].

[81] HABA , 14 March 2018, para. 104-105.

[82] HABA, Submission, 14 March 2018, [104]-[105].

[83] Transcript 5 September 2019, PN1613.

[84] SDA and AWU submission, 10 September 2019 at para.[129].

[85] Witness Statement of Graham Thatcher, 23 February 2018, [1] – [2] and [10].

[86] Transcript of proceedings, 26 August 2019, PN304-306.

[87] Witness Statement of Graham Thatcher, 23 February 2018, [8] and [9].

[88] Transcript of proceedings, 26 August 2019, PN326 and PN344.

[89] Witness Statement of Graham Thatcher, 23 February 2018, [39].

[90] Witness Statement of Graham Thatcher, 23 February 2018, [40].

[91] Witness Statement of Graham Thatcher, 23 February 2018, [13] and [18].

[92] Witness Statement of Graham Thatcher, 23 February 2018, [14] and [19].

[93] Witness Statement of Graham Thatcher, 23 February 2018, [27].

[94] Witness Statement of Graham Thatcher, 23 February 2018, [36] and [37].

[95] Witness Statement of Graham Thatcher, 23 February 2018, [59] – [60].

[96] Transcript of proceedings, 26 August 2019, PN514-518.

[97] Transcript of proceedings, 26 August 2019, PN482.

[98] Transcript of proceedings, 26 August 2019, PN482-483.

[99] Transcript of proceedings, 26 August 2019, PN549-550.

[100] Witness Statement of Sarkis Akle, 9 March 2018, [4].

[101] Transcript of proceedings, 26 August 2019, PN84-87.

[102] Witness Statement of Sarkis Akle, 9 March 2018, [15].

[103] Witness Statement of Sarkis Akle, 9 March 2018, [7] – [13].

[104] Transcript of proceedings, 26 August 2019, PN64-66.

[105] Witness Statement of Sarkis Akle, 9 March 2018, [18].

[106] Witness Statement of Sarkis Akle, 9 March 2018, [18].

[107] Witness Statement of Sarkis Akle, 9 March 2018, [31] – [34] and [36].

[108] Witness Statement of Sarkis Akle, 9 March 2018, [37].

[109] Transcript of proceedings, 26 August 2019, PN245-247.

[110] Transcript of proceedings, 26 August 2019, PN261-262.

[111] Witness Statement of Sarkis Akle, 9 March 2018, [22], [25] and [29].

[112] Witness Statement of Sarkis Akle, 9 March 2018, [27].

[113] Transcript of proceedings, 26 August 2019, PN267-268.

[114] Transcript of proceedings, 26 August 2019, PN624.

[115] Witness Statement of Graham Downs, undated, [11] and [30].

[116] Witness Statement of Graham Downs, undated, [13], [19] and [22].

[117] Witness Statement of Graham Downs, undated, [49].

[118] Witness Statement of Graham Downs, undated, [13], [19] and [22].

[119] Transcript of proceedings, 26 August 2019, PN706.

[120] Transcript of proceedings, 26 August 2019, PN652-671.

[121] Transcript of proceedings, 26 August 2019, PN724.

[122] Witness Statement of Graham Downs, undated, [27].

[123] Witness Statement of Graham Downs, undated, [31].

[124] Witness Statement of Graham Downs, undated, [33].

[125] Witness Statement of Graham Downs, undated, [[42] – [44].

[126] Witness Statement of Graham Downs, undated, [44] –[47].

[127] Witness Statement of Graham Downs, undated, [54] – [56].

[128] Transcript of proceedings, 26 August 2019, PN662-664.

[129] Witness Statement of Elke Richter, undated, [1].

[130] Witness Statement of Elke Richter, undated, [4] and [7].

[131] Witness Statement of Elke Richter, undated, [25].

[132] Witness Statement of Elke Richter, undated, [26].

[133] Witness Statement of Elke Richter, undated, [16].

[134] Witness Statement of Elke Richter, undated, [31] and [32].

[135] Witness Statement of Elke Richter, undated, [37].

[136] Witness Statement of Elke Richter, undated, [39] and [40].

[137] Transcript of proceedings, 27 August 2019, PN1062.

[138] Transcript of proceedings, 27 August 2019, PN1023-1026.

[139] Transcript of proceedings, 27 August 2019, PN1027-1029.

[140] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 1.

[141] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 44.

[142] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 21.

[143] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 21.

[144] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 8.

[145] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at Table 1.1.

[146] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 9.

[147] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 9.

[148] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 11.

[149] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 11.

[150] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 12.

[151] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 15.

[152] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 13.

[153] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 13.

[154] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 17.

[155] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at para. 45.

[156] O'Brien M (2018), *Full Report: AM2017/40 Hair and Beauty Industry Award 2010*, University of Wollongong Australia at paras. 46-51.

[157] Transcript of proceedings, 27 August 2019, PN1116.

[158] Witness statement of Carrie Gedney, undated, [1] – [3].

[159] Transcript of proceedings, 27 August 2019, PN1118.

[160] Transcript of proceedings, 27 August 2019, PN1123-1129.

[161] Transcript of proceedings, 27 August 2019, PN1149; Witness statement of Carrie Gedney, undated, [9].

[162] Transcript of proceedings, 27 August 2019, PN1149; Witness statement of Carrie Gedney, undated, [10]-[11].

[163] Transcript of proceedings, 27 August 2019, PN1156.

[164] Witness statement of Carrie Gedney, undated, [15].

[165] Witness statement of Carrie Gedney, undated, [13].

[166] Witness statement of Kelly Brooks, 28 May 2018, [1].

[167] Transcript of proceedings, 26 August 2019, PN856-857.

[168] Transcript of proceedings, 26 August 2019,- PN883, PN894, PN896.

[169] Witness statement of Kelly Brooks, 28 May 2018, [1].

[170] Witness statement of Kelly Brooks, 28 May 2018, [7] and [9].

[171] Witness statement of Kelly Brooks, 28 May 2018, [2] – [3].

[172] Transcript of proceedings, 26 August 2019,- PN887-889.

[173] Witness statement of Kelly Brooks, 28 May 2018, [10] –[11].

[174] Witness statement of Kelly Brooks, 28 May 2018, [14].

[175] Transcript of proceedings, 26 August 2019, PN864.

[176] Transcript of proceedings, 26 August 2019, PN864.

[177] Witness statement of Chantal Geritz, undated, [4].

[178] Witness statement of Chantal Geritz, undated, [5].

[179] Witness statement of Chantal Geritz, undated, [1].

[180] Witness statement of Chantal Geritz, undated, [3].

[181] Witness statement of Chantal Geritz, undated, [11].

[182] Witness statement of Chantal Geritz, undated, [12].

[183] Witness statement of Chantal Geritz, undated, [14].

[184] Witness statement of Rachel Pierre Humbert, undated, [6].

[185] Witness statement of Rachel Pierre Humbert, undated, [1].

[186] Witness statement of Rachel Pierre Humbert, undated, [4].

[187] Witness statement of Rachel Pierre Humbert, undated, [7].

[188] Witness statement of Rachel Pierre Humbert, undated, [7].

[189] Witness statement of Rachel Pierre Humbert, undated, [7].

[190] Witness statement of Rachel Pierre Humbert, undated, [8].

[191] Transcript of proceedings, 26 August 2019,- PN795 and PN814.

[192] Transcript of proceedings, 26 August 2019,- PN796.

[193] Transcript of proceedings, 26 August 2019,- PN802-803.

[194] Transcript of proceedings, 26 August 2019,- PN797.

[195] Transcript of proceedings, 26 August 2019,- PN799, PN801.

[196] Witness statement of Donna Maguire, 20 June 2018, [1].

[197] Witness statement of Donna Maguire, 20 June 2018, [2]-[3].

[198] Witness statement of Donna Maguire, 20 June 2018, [8] and [10].

[199] Witness statement of Donna Maguire, 20 June 2018, [9] and [14].

[200] Transcript of proceedings, 27 August 2019, PN1319.

[201] Witness statement of Kate Brandreth, undated, [5].

[202] Witness statement of Kate Brandreth, undated, Attachment "KB-1".

[203] Witness statement of Kate Brandreth, undated, [12]-[13].

[204] Witness statement of Kate Brandreth, undated, [11] –[12].

[205] Witness statement of Kate Brandreth, undated, [16].

[206] Witness statement of Kate Brandreth, undated , [16].

[207] Hair and Beauty Industry Award 2010 [MA000005].

[208] HABA submission, 14 March 2018 at para. 23.

[209] ANZSIC is the standard classification used in Australia and New Zealand for the collection, compilation and publication of statistics by industry.

[210] HABA submission, 14 March 2018 at p. 22.

[211] These services are included in Class 8512 Specialist Medical Services.

[212] HABA submission, 14 March 2018 at para. 55.

[213] HABA submission, 14 March 2018 at para. 56.

[214] HABA submission, 14 March 2018 at para. 57.

[215] HABA submission, 14 March 2018 at para. 58.

[216] SDA and AWU submission, 20 June 2018 at paras.73-76; SDA and AWU submission, 10 September 2019 at para.173.

[217] HABA submission, 14 March 2018 at paras. 59-60.

[218] HABA submission, 21 August 2018 at paras. 52-54.

[219] SDA and AWU submission, 20 June 2018 at paras.77-78.

[220] IBISWorld's Hairdressing and Beauty Services – January 2017, p.4 and 6.

[221] HABA submission, 14 March 2018 at para. 63.

[222] SDA and AWU submission, 20 June 2018 at paras.79-81.

[223] HABA submission, 21 August 2018 at paras. 52-54.

[224] HABA submission, 21 August 2018 at paras. 56-57.

[225] HABA submission, 14 March 2018 at paras. 65-66.

[226] SDA and AWU submission, 20 June 2018 at paras.82-83; SDA and AWU submission, 10 September 2019 at para.185.

[227] HABA submission, 14 March 2018 at p.29.

[228] HABA submission, 21 August 2018 at paras. 59.

[229] SDA and AWU submission, 20 June 2018 at paras.85-87.

[230] SDA and AWU submission, 10 September 2019 at para.198.

[231] HABA submission, 14 March 2018 at para.73.

[232] SDA and AWU submission, 10 September 2019 at para.211.

[233] SDA and AWU submission, 20 June 2018 at para.94.

[234] SDA and AWU submission, 20 June 2018 at para.41.

[235] See SDA and AWU submission, 20 June 2018 at paras.96-97.

[236] SDA and AWU submission, 10 September 2019 at paras.213-220.

[237] See SDA and AWU submission, 20 June 2018 at paras.100-105.

[238] [2013] FWCFB 5411.

[239] HABA submission, 14 March 2019 at paras. 84-88.

[240] HABA submission, 14 March 2018 at para.91.

[241] HABA submission, 14 March 2018, at para 93

[242] See SDA and AWU submission, 20 June 2018 at para.113.

[243] See SDA and AWU submission, 20 June 2018 at paras.109-112.

[244] SDA and AWU submission, 10 September 2019 at para.238.

[245] HABA submission, 21 August 2018 at para. 76.

[246] HABA submission, 21 August 2018 at para. 77.

[247] HABA submission, 21 August 2018 at para. 77.

[248] HABA submission, 21 August 2018 at para. 79.

[249] HABA submission, 14 March 2018 at para.126

[250] SDA and AWU submission, 20 June 2018 at para.31

[251] SDA and AWU submission, 20 June 2018 at para. 124; Ai Group submission, 14 March 2018 at para.124.

[252] SDA and AWU submission, 20 June 2018 at paras. 125-126.

[253] SDA and AWU submission, 20 June 2018 at para. 128.

[254] SDA and AWU submission, 20 June 2018 at para. 129.

[255] SDA and AWU submission, 20 June 2018 at para. 130.

[256] SDA and AWU submission, 20 June 2018 at para. 131.

[257] SDA and AWU submission, 20 June 2018 at para. 137.

[258] HABA submission, 14 March 2018 at para.133.

[259] See the evidence summarised in paragraphs [70] – [93]; [104] – 126] of this decision.

[260] [2017] FWCFB 1001, [828].

[261] HABA submission, 14 March 2018 at para.135.

[262] HABA submission, 14 March 2018 at para.136.

[263] 2014-2015 Annual Wage Review, [52]; SDA and AWU submission, 20 June 2018 at para. 139.

[264] SDA and AWU submission, 20 June 2018 at para. 139.

[265] SDA and AWU submission, 20 June 2018 at para. 141.

[266] HABA submission, 14 March 2018 at paras.168-171

[267] HABA submission, 14 March 2018 at para.172.

[268] SDA and AWU submission, 10 September 2019 at para. 267.

[269] SDA and AWU submission, 20 June 2018 at para.145.

[270] SDA and AWU submission, 20 June 2018 at para.146.

[271] HABA submission, 14 March 2018 at para.145.

[272] HABA submission, 14 March 2018 at para.145.

[273] HABA submission, 14 March 2018 at para. 154.

[274] HABA submission, 14 March 2018 at para. 194.

[275] HABA submission, 14 March 2018 at para. 159.

[276] SDA and AWU submission, 20 June 2018 at para.151.

[277] HABA submission, 14 March 2018 at para. 186.

[278] SDA and AWU submission, 20 June 2018 at para.153.

[279] See Mr Thatcher and Mr Downs.

[280] See Mr Akle and Ms Richter.

[281] SDA and AWU submission, 20 June 2018 at para.154; Ai Group submission, 14 March 2018 at paras. 161 and 206.

[282] HABA submission, 14 March 2018 at para. 166.

[283] SDA and AWU submission, 20 June 2018 at para.157.

[284] SDA and AWU submission, 20 June 2018 at para.159.

[285] SDA and AWU submission, 20 June 2018 at para.159.

[286] SDA and AWU submission, 20 June 2018 at para.173; Ai Group submission, 14 March 2018 at para.173.

[287] SDA and AWU submission, 20 June 2018 at para.174.

[288] SDA and AWU submission, 10 September 2019 at paras.303-304.

[289] [2017] FWCFB 1001, [2058].

[290] HABA submission, 14 March 2018 at para.216.

[291] [2017] FWCFB 1001, [897].