

From: Luis Izzo [mailto:Luis.Izzo@ablawyers.com.au]
Sent: Monday, 14 December 2015 6:15 PM
To: Chambers - Ross J
Cc: 'Anna Forsyth'; 'djmacken@macken.com.au'; AMOD
Subject: AM2014/305 - Penatly Rates Case - Further and Final Consolidated Baxter Statement

Dear Ms Henry and Award Modernisation Team

On 2 December 2015, our office filed a Consolidated Witness Statement for Ms Emily Baxter on behalf of ABI/NSWBC. Since the filing of that Statement, our office has been involved in discussions with the SDA to determine whether the Statement could be tendered without the need for cross examination.

ABI/NSWBC and the SDA have now reached a consent position, following the amendment of some aspects of the Consolidated Baxter Statement. The consent position is as follows:

1. The **attached** Further and Final Consolidated Witness Statement of Ms Emily Baxter is filed and replaces all previous statements by Ms Baxter.
2. Exhibits EB-1 and EB-2 (previously filed) are to be retained by the Bench as they are both referenced in the Further and Final Consolidated Witness Statement.
3. The SDA does not require Ms Baxter for cross examination.
4. The SDA may make submissions regarding the 2 survey respondents who skipped Question 5 of the Survey (referred to at paragraph 24(c) of the Statement) without any *Browne v Dunn* point being taken by ABI/NSWBC.

We intend to bring these matters to the attention of the Full Bench at the commencement of tomorrow's hearing. We will have copies of the Further and Final Consolidated Witness Statement available for tendering.

Yours faithfully

Luis Izzo

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4 Yearly Review of Modern Awards
Common Issue: Penalty Rates

Applicant: Australian Business Industrial and NSW Business Chamber Ltd
Matter: AM2014/305

FURTHER AND FINAL CONSOLIDATED SWORN STATEMENT OF EMILY BAXTER

I, Emily Baxter, care of 140 Arthur Street, North Sydney in the state of New South Wales, state say on oath as follows:

BACKGROUND

1. I was previously employed by Australian Business Lawyers and Advisors ('**ABLA**') in the position of Lawyer.
2. I was employed in that role from approximately August 2013 until December 2015.
3. The following statements have been filed in this matter on my behalf:
 - (a) Statement of Emily Baxter dated 10 August 2015;
 - (b) Supplementary Statement of Emily Baxter dated 9 October 2015; and
 - (c) Further Supplementary Statement of Emily Baxter dated 2 November 2015 (filed but never tendered).
4. This Consolidated Statement is intended to replace my previous Statements dated 10 August 2015, 9 October 2015 and 2 November 2015 in their entirety.

DISTRIBUTION OF THE SURVEY

5. In July 2015, ABLA developed a survey using the program Survey Monkey, the purpose of which was to collect evidence from employers in the retail industry in relation to the trading and rostering practices of the business ('**Survey**').
6. On or about 21 July 2015, the Survey was sent via email to members of:
 - (a) NSW Business Chamber Ltd;
 - (b) Victorian Chamber of Commerce and Industry;
 - (c) Australian Retailers Association;
 - (d) National Retailers Association;
 - (e) Master Grocers Australia; and
 - (f) Australian Newsagents Federation.(Collectively the '**Organisations**')

Lodged by:	Australian Business Industrial NSW Business Chamber Ltd	Telephone: (02) 9458 7640
Address for Service:	Australian Business Lawyers & Advisors Pty Ltd Lvl 15, 140 Arthur Street, North Sydney NSW 2060	Facsimile: (02) 9954 5029 Email: luis.izzo@ablawyers.com.au



7. Although I did not send the email distributing the Survey to members, I have made enquiries with the representatives of the Organisations that did send the emails out to their membership. Specifically:
- (a) I have been informed by Ms Lindsay Braid, Senior Marketing Executive, NSWBC, that the email was sent to a total of 689 NSWBC members within the retail industry.
 - (b) I have been informed by Ms Helen Hogan, Workplace Relations Helpline Manager, Victorian Chamber of Commerce and Industry, that the email was sent to a total of 416 members who are subscribers to the Victorian Chamber of Commerce and Industry's update service for the General Retail Award 2010.
 - (c) I have been informed by Mr Nick Tindley, Executive Manager HR Consulting & Advisory Services, FCB Group (and representative for the Australian Retailers Association, National Retailers Association, Master Grocers Australia and Australian Newsagents Federation in relation to these proceedings), that the Survey was sent to the following number of members:
 - (i) Australian Retailers Association: 3,474 members;
 - (ii) National Retailers Association: 697 members;
 - (iii) Australian Newsagents Federation: 1,500 members; and
 - (iv) Master Grocers Australia: 1924 members.
8. Based on the above enquiries, I have concluded that the total number of members of the Organisations that were sent the Survey is 8,700.
9. A copy of the template covering email that was sent with the Survey is located behind **Tab 1** in "**Exhibit EB2**".

CONTENT OF THE SURVEY

10. The Survey consisted of 25 questions.
11. The following Survey questions (**Multiple Choice Questions**) required respondents to select an answer from a list of preset options:
Questions 1, 2, 3, 4, 5, 6, 7, 12, 13, 23, 24 and 25.
12. The following Survey questions (**Free Text Questions**) allowed respondents to enter free text to answer the question:
Questions 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, and 22.
13. A full copy of the Survey questions is located behind **Tab 2** in "**Exhibit EB2**".
14. The Survey was open for responses between 21 July 2015 and 7 August 2015. During this time, 690 responses were received.
- #### **Question 5 of the Survey**
15. Question 5 asked respondents whether an enterprise agreement applies to their business.
16. Respondents could answer "*Yes*" or "*No*" to the Question.
17. Regardless of the response given, respondents then progressed to Question 6, as Question 6 was on the same webpage as Question 5 in the Survey.



18. However, if a respondent answered “Yes” to Question 5, when the respondent clicked the “Next” button after completing Questions 5 and 6, Survey Monkey was programmed to automatically take the respondent to the end of the Survey as they had indicated that an enterprise agreement applied to their business. This occurred regardless of the respondent’s response to Question 6.

Question 6

19. Question 6 of the Survey asks respondents:

Does a Modern Award apply to your business?

20. Respondents could answer either:

- (a) “Yes, the General Retail Industry Award 2010”;
- (b) “Yes, an award other than the General Retail Industry Award 2010”;
- (c) “No”; or
- (d) “I don’t know”

by selecting the appropriate check box.

21. When the respondents clicked the “Next” button after completing Questions 5 and 6:

- (a) Survey Monkey was programmed to automatically take the respondents to the end of the Survey if they responded “No” to Question 6. This occurred regardless of their answer to Question 5; and
- (b) all other responses to Question 6 progressed through the Survey, unless the respondents had indicated that an enterprise agreement applied to their business (see paragraph 18 above).

EXTRACTION OF THE SURVEY RESULTS

22. 574 respondents selected “Yes, the General Retail Industry Award 2010” in response to Question 6 of the Survey, indicating that the General Retail Industry Award 2010 applied to their business (**the GRIA Respondents**).
23. Using the software of Survey Monkey, I was able to extract those Survey responses provided solely by the GRIA Respondents.
24. Of the 574 GRIA Respondents:
- (a) 87 indicated that an enterprise agreement applies to their business in response to Question 5;
 - (b) 485 indicated that their businesses were not covered by an enterprise agreement in response to Question 5; and
 - (c) 2 skipped Question 5 entirely.
25. A full copy of the Survey results from the GRIA Respondents is contained in “**Exhibit EB2**” as follows:
- (a) Multiple Choice Questions: **Tab 3**
 - (b) Free Text Questions: **Tab 4**.



26. As GRIA Respondents were able to provide more than one answer to each of the Free Text Questions, I have summarised the data in response to the Free Text Questions in paragraphs 28 to 60 below.
27. For the avoidance of any doubt, I confirm that the answers to the questions outlined below:
- (a) do not include answers from the 87 GRIA Respondents who expressly indicated that they were covered by an enterprise agreement, as these respondents were exited from the Survey after Question 6 in accordance with my comments at paragraph 18 above; and
 - (b) do include answers from the 2 people who skipped Question 5 entirely, as these participants were able to complete the remainder of the Survey.

RESPONSES TO SURVEY

Hours and rostering

28. Questions 8, 9 and 10 of the Survey asked:
- 8. *What are your usual weekday trading hours?*
 - 9. *What are your usual Saturday trading hours? (Leave blank if you don't open on Saturday)*
 - 10. *What are your usual Sunday trading hours? (Leave blank if you don't open on Sunday)*
29. Of the 470 GRIA Respondents who answered Question 8 of the Survey, approximately 88.3 per cent indicated that the Sunday trading hours of their business are less than the trading hours of a weekday.
30. I have determined this percentage by undertaking the following calculation:
- (a) Firstly, I obtained the number of GRIA Respondents who answered Question 10 by providing trading hours that were less than the trading hours specified by the respondent in Question 8.
 - (b) I then divided this number by the total number of GRIA Respondents to Question 8.
 - (c) I then multiplied the answer by 100 to obtain a percentage figure.
31. Question 14 of the Survey asked respondents:
- What are the hours you traded on the following public holidays in the past 12 months? (Only enter hours if you traded on these days in the past 12 months)*
- and asked for separate responses in relation to the following public holidays:
- (a) New Years Day;
 - (b) Australia Day;
 - (c) Good Friday;
 - (d) Easter Sunday;
 - (e) Easter Monday;
 - (f) ANZAC Day;



- (g) Queen's Birthday;
- (h) Labour Day;
- (i) Christmas Day;
- (j) Boxing Day; and
- (k) Melbourne Cup/ Show Day.

32. I have compared the hours traded by each GRIA Respondent on the public holidays listed at paragraph 31 above compared with the answer each GRIA Respondent gave to Question 8 of the Survey (usual weekday trading hours). The majority of GRIA Respondents indicated that public holiday trading hours were less than weekday trading hours. Broken up by individual public holiday, the percentage of GRIA Respondents whose public holiday trading hours are less than weekday trading hours is as follows:

- (a) New Years Day: 93.6 per cent;
- (b) Australia Day: 92.1 per cent;
- (c) Good Friday: 95.1 per cent;
- (d) Easter Sunday: 96.2 per cent;
- (e) Easter Monday: 90.9 per cent;
- (f) ANZAC Day: 93.8 per cent;
- (g) Queen's Birthday: 91.1 per cent;
- (h) Labour Day: 90.4 per cent;
- (i) Christmas Day: 98.1per cent;
- (j) Boxing Day: 92.8 per cent; and
- (k) Melbourne Cup/ Show Day: 83.4 per cent.

33. I have determined the above percentages by undertaking the following calculation:

- (a) Firstly, I obtained the number of GRIA Respondents who answered Question 14 by providing trading hours that were less than the trading hours specified by the respondent in Question 8.
- (b) I then divided this number by the total number of GRIA Respondents to Question 8.
- (c) I then multiplied the answer by 100 to obtain a percentage figure.

34. Questions 17, 18, 19, and 20 of the Survey asked respondents:

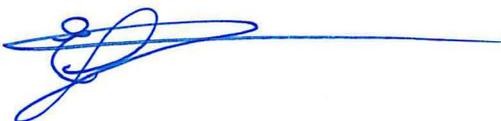
- 17. *How many employees do you ordinarily roster for a weekday?*
- 18. *How many employees do you ordinarily roster for a Saturday (leave blank if you do not open on Saturday)?*
- 19. *How many employees do you ordinarily roster for a Sunday (leave blank if you don't open on Sunday)?*
- 20. *How many employees do you ordinarily roster for a public holiday?*



35. The responses of the GRIA Respondents to the Survey show:
- (a) 88.9 per cent of GRIA Respondents roster fewer employees on a Sunday than on a weekday; and
 - (b) 90.5 per cent of GRIA Respondents roster fewer employees on a public holiday than on a weekday.
36. I have determined the above percentages for Sunday shifts by undertaking the following calculation:
- (a) Firstly, I obtained the number of GRIA Respondents who answered Question 19 by providing employee numbers that were less than the employee numbers specified by the respondent in Question 17.
 - (b) I then divided this number by the total number of GRIA Respondents to Question 17.
 - (c) I then multiplied the answer by 100 to obtain a percentage figure.
37. I have determined the above percentages for public holidays shifts by undertaking the following calculation:
- (a) Firstly, I obtained the number of GRIA Respondents who answered Question 20 by providing employee numbers that were less than the employee numbers specified by the respondent in Question 17.
 - (b) I then divided this number by the total number of GRIA Respondents to Question 17.
 - (c) I then multiplied the answer by 100 to obtain a percentage figure.

Reasons for hours and rostering

38. Questions 11, 15, and 16 of the Survey were directed towards the reason that Sunday and public holiday trading hours differed from weekday trading hours.
39. Upon reviewing the answers to questions 11, 15, and 16, I was able to group the answers in to seven categories:
- (a) responses that cited costs, wages or penalty rates (**Wages/Costs**);
 - (b) responses that cited an anticipated or previously experienced lack of trade/ low traffic (**Trade/Customers**);
 - (c) responses that cited trading was restricted due to legislation, regulations, the terms of a lease, or the opening hours of the centre in which the business was located (**Regulations/Lease**);
 - (d) responses that cited the need for a break or rest from work (**Break/Rest**);
 - (e) responses that cited difficulties in finding staff or that family members worked particular shifts or days (**Staffing issues/Family members work**);
 - (f) responses that cited the public holiday itself or the purpose of the public holiday (**Public Holiday**) (except in relation to question 11); and
 - (g) responses that did not fall within one of the categories identified at paragraphs 39(a) to (f) above (**Other**). Examples of responses that are included in this category might include "directors discretion," "company policy", or "no papers printed."



40. Where more than one answer to the question was provided by a GRIA Respondent, I included the answer in all of the categories identified at paragraph 39 to which the answer related.
41. Some GRIA Respondents answered “ditto” “as above” or “ ” or answers to similar effect. For these respondents I looked at the answers these respondents had provided to the previous question in order to collate the answer into one of the categories identified at paragraph 39 above.
42. Located behind **Tab 5** of “**Exhibit EB2**” is a summary of the categories into which the answers provided by GRIA Respondents to questions 11, 15, and 16 of the Survey fell.
43. In response to Question 11 of the Survey:

If your Sunday trading hours differ from weekday or Saturday trading hours, why is this the case?

- (a) 53.18 per cent of responses cited Wages/Costs as the reason that Sunday trading hours varied from other days of the week;
- (b) 23.75 per cent of responses cited Trade/Customers as the reason; and
- (c) 18.39 per cent of responses cited Regulations/Lease as the reason Sunday trading hours differed.

These were the top three response categories to Question 11.

44. In response to Question 15 of the Survey:

If your public holiday trading hours differ from weekday or weekend trading hours, why is this the case?

- (a) 62.55 per cent of responses cited Wages/Costs as the reason that public holiday trading hours varied from other days;
- (b) 13.09 per cent of responses cited Trade/Customers as the reason; and
- (c) 11.64 per cent of responses cited Regulations/Lease as the reason public holiday trading hours differed.

These were the top three response categories to Question 15.

45. Question 16 of the Survey asked respondents:

For the public holidays on which you did not open, why did you shut the business on those days?

and asked for separate responses in relation to the following public holidays:

- (a) New Years Day;
- (b) Australia Day;
- (c) Good Friday;
- (d) Easter Sunday;
- (e) Easter Monday;
- (f) ANZAC Day;



- (g) Queen's Birthday;
- (h) Labour Day;
- (i) Christmas Day;
- (j) Boxing Day; and
- (k) Melbourne Cup/ Show Day.

46. In relation to New Years Day for Question 16 of the Survey:

- (a) 43.50 per cent of responses cited Wages/Costs as the reason for not opening on that day;
- (b) 16.95 per cent of responses cited Other as the reason; and
- (c) 14.12 per cent of responses cited Trade/Customers as the reason the business was not open on New Years Day.

These were the top three response categories to New Years Day for Question 16.

47. In relation to Australia Day for Question 16 of the Survey:

- (a) 53.85 per cent of responses cited Wages/Costs as the reason for not opening on that day;
- (b) 14.42 per cent of responses cited Other as the reason; and
- (c) 13.46 per cent of responses cited Trade/Customers or Public Holiday as the reason the business was not open on Australia Day.

These were the top three response categories to Australia Day for Question 16.

48. In relation to Good Friday for Question 16 of the Survey:

-
- (a) 25.19 per cent of responses cited Regulations/Lease as the reason for not opening on that day;
 - (b) 24.81 per cent of responses cited Wages/Costs as the reason; and
 - (c) 23.66 per cent of responses cited Public Holiday as the reason the business was not open on Good Friday.

These were the top three response categories to Good Friday for Question 16.

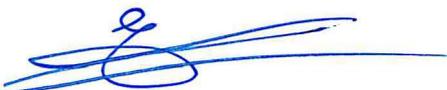
49. In relation to Easter Sunday for Question 16 of the Survey:

- (a) 38.84 per cent of responses cited Wages/Costs as the reason for not opening on that day;
- (b) 23.97 per cent of responses cited Regulations/Lease as the reason; and
- (c) 20.66 per cent of responses cited Public Holiday as the reason the business was not open on Easter Sunday.

These were the top three response categories to Easter Sunday for Question 16.

50. In relation to Easter Monday for Question 16 of the Survey:

- (a) 59.77 per cent of responses cited Wages/Costs as the reason for not opening on that day;



- (b) 14.94 per cent of responses cited Break/Rest as the reason; and
- (c) 13.79 per cent of responses cited Public Holiday as the reason the business was not open on Easter Monday.

These were the top three response categories to Easter Monday for Question 16.

51. In relation to ANZAC Day for Question 16 of the Survey:

- (a) 34.07 per cent of responses cited Public Holiday as the reason for not opening on that day;
- (b) 33.33 per cent of responses cited Wages/Costs as the reason; and
- (c) 17.78 per cent of responses cited Regulations/Lease as the reason the business was not open on ANZAC Day.

These were the top three response categories to ANZAC Day for Question 16.

52. In relation to the Queen's Birthday for Question 16 of the Survey:

- (a) 59.30 per cent of responses cited Wages/Costs as the reason for not opening on that day;
- (b) 15.12 per cent of responses cited Other as the reason; and
- (c) 11.63 per cent of responses cited Trade/Customers as the reason the business was not open on the Queen's Birthday.

These were the top three response categories to the Queen's Birthday for Question 16.

53. In relation to Labour Day for Question 16 of the Survey:

- (a) 59.52 per cent of responses cited Wages/Costs as the reason for not opening on that day;
- (b) 10.71 per cent of responses cited Public Holiday as the reason; and
- (c) 9.52 per cent of responses cited Other as the reason the business was not open on Labour Day.

These were the top three response categories to Labour Day for Question 16.

54. In relation to Christmas Day for Question 16 of the Survey:

- (a) 25.24 per cent of responses cited Public Holiday as the reason for not opening on that day;
- (b) 21.14 per cent of responses cited Other as the reason; and
- (c) 20.5 per cent of responses cited Wages/Costs as the reason the business was not open on Christmas Day.

These were the top three response categories to Christmas Day for Question 16.

55. In relation to Boxing Day for Question 16 of the Survey:

- (a) 44.03 per cent of responses cited Wages/Costs as the reason for not opening on that day;
- (b) 23.88 per cent of responses cited Rest/Break as the reason; and

- (c) 12.69 per cent of responses cited Regulations/Lease as the reason the business was not open on Boxing Day.

These were the top three response categories to Boxing Day for Question 16.

56. In relation to Melbourne Cup/Show Day for Question 16 of the Survey:

- (a) 60.42 per cent of responses cited Wages/Costs as the reason for not opening on that day;
- (b) 16.67 per cent of responses cited Public Holiday as the reason; and
- (c) 10.42 per cent of responses cited Break/Rest or Other as the reason the business was not open on Melbourne Cup/ Show Day.

These were the top three response categories to Melbourne Cup/ Show Day for Question 16.

57. In calculating the percentages set out in paragraphs 43, 44, and 46 to 56 above, I excluded those respondents who answered along the lines of "N/A" or indicated that they did open on these days.

58. I reviewed the answers provided to Questions 21 and 22 of the Survey.

59. Question 21 of the Survey asks:

If your rostering of employees on Sundays differs to rostering of employees in weekdays or Saturdays, why is this?

80.77 per cent of respondents to Question 21 of the Survey gave an answer that cited cost or wages as the reason Sunday rostering differs to other days of the week.

60. Question 22 of the Survey asks:

If your rostering of employees on public holidays differs to rostering of employees in weekdays or weekends, why is this?

75.68 per cent of respondents to Question 22 of the Survey gave an answer that cited cost or wages as the reason public holiday rostering differs to weekday or weekend rostering.

EXHIBIT EB-1

61. Attached to my Statement and marked "Exhibit EB-1" are the Survey Results, free from the filtering process referred to at paragraphs 22 and 23 above. These results include responses from employers who answered, "Yes, an award other than the General Retail Industry Award 2010" or "I don't know" to Question 6. I note further that:

- (a) **Tab 1** contains a copy of the template covering email that was sent with the Survey;
- (b) **Tab 2** contains a full copy of the Survey questions;
- (c) **Tab 3** contains a full copy of the answers to multiple choice questions in the Survey;
- (d) **Tab 4** contains a full copy of the answers to free text questions in the Survey; and
- (e) **Tab 5** is a summary of the categories into which answers provided to questions 11, 15 and 16 of the Survey fell.

62. Tab 1 and Tab 2 of "Exhibit EB-1" are identical to Tab 1 and Tab 2 respectively of "Exhibit EB-2".



63. Tabs 3, 4, and 5 of "Exhibit EB-1" and "Exhibit EB-2" are not identical, given that the results of the GRIA Respondents only are naturally different to the results of all respondents to the Survey.

SWORN at NORTH SYDNEY

Signature of deponent



Emily Jane Baxter

17-12-15

Name of witness

Luis Izzo

Address of witness

140 Arthur Street North Sydney New South Wales

Capacity of witness

Solicitor of the Supreme Court of NSW

And as a witness, I certify the following matters concerning the person who made this sworn statement (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness



17-12-15