



12 October 2016

Our Ref: 20150531

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Dear Sir/Madam

AM 2015/305 - PENALTY RATES CASE

I refer to the Statement issued in these proceedings on 28 September 2016, providing updated statistical data in relation to certain Fair Work Commission Research Papers.

ACCI, NSWBC and ABI have reviewed these new documents and updated their 2 February 2016 submissions to reflect the changes made to the Fair Work Commission's Changing Work Patterns Report.

Specifically, ACCI, NSWBC and ABI have amended the following sections of their submissions:

- paragraphs 13.6, 13.9 and 13.12; and
- footnotes 45 and 124.

We **attach** a revised copy of the 2 February 2016 submissions in markup, identifying the changes made to the ACCI, NSWBC and ABI submissions.

Should you have any questions, please contact Luis Izzo on (02) 9458 7640.

Yours sincerely

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IN THE FAIR WORK COMMISSION

AM 2015/305

FOUR YEARLY REVIEW OF MODERN AWARDS - PENALTY RATES

**WRITTEN CLOSING SUBMISSIONS FILED ON BEHALF OF
ACCI, NSWBC AND ABI**

2 February 2016

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A. INTRODUCTION

1. THE HOSPITALITY PROCEEDINGS CLAIM

1.1 Australian Business Industrial (**ABI**) and the New South Wales Business Chamber (**NSWBC**) have filed claims seeking:

- (a) to reduce the public holiday penalty rate for full-time and part-time employees employed under the *Restaurant Industry Award 2010* (**Restaurant Award**) from 250% to 200%;
- (b) to reduce the public holiday penalty rate for casual employees employed under the Restaurant Award from 250% to 125% (including the casual loading); and
- (c) to vary the relevant pay rates for employees who receive time off in lieu when they work a public holiday pursuant to clause 34.4(c) of the Restaurant Award. Presently, employees who receive time off in lieu are entitled to be paid 150% of their ordinary pay for working the public holiday, whilst also receiving time off in lieu. Under the present claim, the employees would be paid 100% of their ordinary pay for working the public holiday, whilst also receiving time off in lieu.

2. THE RETAIL PROCEEDINGS CLAIM

2.1 ABI and the NSWBC have filed claims seeking:

- (a) to reduce the Sunday penalty rate for all employees employed under the *General Retail Industry Award 2010* (**Retail Award**) from 200% to 150% (inclusive of casual loading for casual employees);
- (b) to reduce the public holiday penalty rate for all full time and part time employees employed under the Retail Award from 250% to 200%; and
- (c) to reduce the public holiday penalty rate for casual employees employed under the Retail Award from 250% to 125% (including the casual loading).

3. THE HAIR AND BEAUTY INDUSTRY CLAIM

3.1 The Hair and Beauty Australia Industry Association, ABI and NSWBC initially also sought to vary penalty rates in relation to the *Hair and Beauty Industry Award 2010*. However, as evidence specific to the *Hair and Beauty Industry Award 2010* was not tendered as part of the hearing of the proceedings, ABI and NSWBC consider it more prudent for penalty rates in the *Hair and Beauty Industry Award 2010* to be reviewed on a subsequent occasion.

4. THE PARTIES SUPPORTING THESE SUBMISSIONS

4.1 Although the above claims have been filed by ABI and NSWBC, this outline of submissions is also supported by the Australian Chamber of Commerce and Industry (**ACCI**), who is represented by Australian Business Lawyers & Advisors in these proceedings.

5. OUTLINE OF SUBMISSIONS

5.1 These submissions outline ABI, NSWBC and ACCI's support for the above claims by addressing the following matters:

- (a) the pre-requisites applicable to varying modern awards as part of the 4 Yearly Review;
- (b) a summary of the historical regulation of penalty rates for weekends and public holidays;
- (c) the factual findings that ABI, NSWBC and ACCI say the Commission should make in relation to the proceedings; and
- (d) an assessment of the employer party claims and factual findings sought against the modern awards objective.

B. THE PRE-REQUISITES APPLICABLE TO VARYING A MODERN AWARD

6. LEGISLATIVE FRAMEWORK APPLICABLE TO 4 YEARLY REVIEW

6.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**).

6.2 Given the publication of the Preliminary Issues Decision, it is unnecessary to outline the legislative framework applicable to the present proceedings in detail. However, for the purposes of these submissions, ACCI, ABI and the NSWBC note three categories of principles that arise from the Preliminary Issues Decision:

Modern awards objective must be considered

6.3 The Preliminary Issues Decision confirms (at [23]) that the Commission remains at all times obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid;
- (b) the need to encourage collective bargaining;
- (c) the need to promote social inclusion through increased workforce participation;
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work;
- (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;
- (e) the principle of equal remuneration for work of equal or comparable value;
- (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).

- 6.4 This means that, when considering any variation, the Commission should be focused upon ensuring that any new version of the minimum safety net is consistent with the modern awards objective.

Merit based evidence required

- 6.5 The discretion to make determinations varying modern awards is expressed in general terms. However, the need for a 'stable' modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation (Preliminary Issues Decision at [60]).

- 6.6 When considering the merit basis to make variations, the Commission held in the Preliminary Issues Decision that:

- (a) there may be cases where the need for an award variation is self evident. In such circumstances, proposed variations can be determined with little formality (at [23] and [60]);
- (b) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation (at [23] and [60]); and
- (c) in conducting the Review, it is appropriate that the Commission take into account previous decisions relevant to any contested issue and the particular context in which those decisions were made (at [27]).

No one set of provisions exclusively meets the modern awards objective

- 6.7 There is no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different permutations and combinations of provisions in relation to the same award may meet the modern awards objective (see Preliminary Issues Decision at [34] and [60]).

- 6.8 Accordingly, section 138 of the FW Act (which is relevant to the review) does not require a party to prove that a variation is necessary for the award to meet the modern award's objective. Rather:

"In the Review, the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective" (at [36]).

C. THE HISTORICAL REGULATION OF PENALTY RATES FOR WEEKENDS AND PUBLIC HOLIDAYS

7. SEMINAL CASES PERTAINING TO WEEKEND PENALTY RATES

Traditional justification for penalty rates

- 7.1 Historically, the industrial justification for weekend penalty rates was two-fold.
- 7.2 Firstly, as the term “penalty” rate would suggest, penalty rates were imposed to penalise employers for requiring employees to work in certain circumstances. This concern was noted in *Variation of the South Australian Railways Interim Award* (1935) 35 CAR 370 at 372, where the Arbitration Court held that penalties were:

“... imposed for the purpose of discouraging employers from employing men under conditions likely to impair their health, or for the purpose of discouraging certain kinds of work, or working under particular conditions.”

- 7.3 This justification, where increased rates were imposed as a “deterrent”¹ on employers, has not been used as a justification for the imposition of penalty rates in recent times.
- 7.4 The second historical justification for penalty rates on weekends, and the justification which has been used to support the imposition of penalty rates in recent industrial jurisprudence, is the view that work on Saturdays and Sundays causes inconvenience and disability in relation to family and other relationships as well as recreational, religious and leisure opportunities and that employees should be compensated for such inconvenience and disability.

Seminal Weekend Penalty Rates Cases

- 7.5 Industrial courts and tribunals have historically accepted that the inconvenience and disability involved with working on weekends must be considered in the current social context.² It is unsurprising then that the imposition and characteristics of weekend penalty rates in Australia have varied by era, location and industry.
- 7.6 The seminal cases that first introduced weekend penalty rates into various industries and industrial instruments reflect this outlook. For instance:
- (a) In *Federated Gas Employees Industrial Union v Geelong Gas Company and Others* (1919) 13 AR 468-469, the Commonwealth Court of Conciliation and Arbitration identified the rationale for penalty rates as follows:

¹ See *Applications by Organizations of Employees for Awards and Variations of Certain Awards* (1947) 58 CAR 610 as per Drake-Brockman ACJ and Sugerman J at 615

² *Retail Industry (South Australia) Award - Variation* [2004] SAIRComm 54 at 201 referred to this proposition as “trite”.

“The true position seems to me to be that the extra rate for all Sunday work is given on quite different grounds from an extra rate for work on the seventh day. The former is given because of the grievance of losing Sunday itself – the day for family and social and religious reunions, the day on which one’s friends are free, the day that is most valuable for rest and amenity under our social habits; the whereas the latter is given because seven days per week are too many.”

- (b) Similarly, in the *Milk Processing and Cheese Etc. Manufacturing Case* (1938-9) 15 SAIR 61, Kelly P, referring to overtime work conducted on the weekend, stated that:

“...a special item of compensation is due with reference to the employee's loss of full participation, with the rest of the community, in the traditional and customary week-end of religious, social and family observances or in the occasional holidays sanctioned as suitable public observance by the Legislature.”

- (c) The historical recognition by industrial tribunals of family, community and religious obligations on weekends has also extended to noting differences between Saturdays and Sundays. In *The Metal Trades Award re Rheem Manufacturing* (1947) 58 CAR 609 at 621 and 627, the Court held that:

“Saturday, it is said, is the great day of recreation, while Sunday is the day of religious observance and family reunion. Saturday is the day on which competitive sports and various forms of organised social activities and public entertainment are held, as well as being the day which by common usage has come to be set aside for individual recreation in outdoor activities...

Before us advocates for the Unions have very properly and with great earnestness laid stress upon the very special position of Sunday in relation to religious and family life in our society.”

- 7.7 In 1972, the Industrial Commission of NSW in Court Session in *Re Shift Workers Case* (1972) 72 AR 633 dealt with the appropriate rate for shift workers on Saturday and Sunday and considered, in the context of 1970’s Australia, the importance attributed by the community in having Saturday and Sunday regarded as standard days of leisure. The Commission in Court Session at page 655 stated as follows:

“As a matter of reality we must give weight to the general trend in awards towards improving the standards of weekend penalty rates and also to the fact that

allowances have been progressively given to day workers who work Saturday morning as ordinary hours, e.g., shop assistants, bank officers (when they worked Saturdays) and cleaners. But apart from this, we think that, having regard to the current value of both Saturday and Sunday as non-working days in the community the time has come to improve the standards laid down in the Shell Case [(1950) AR 260]. The standard days of leisure in the community, Saturdays, Sundays and public holidays, have become increasingly attractive to employees and in particular a rate of time and a quarter for Saturdays is relatively too low now that double time and a half has become standard for many workers on public holidays.”

More Recent Penalty Rate Cases

- 7.8 In 2003, the Australian Industrial Relations Commission was required to determine the penalty rates applying in the *Shop Distributive and Allied Employees’ Association - Victorian Shops Interim (Roping-in No 1) Award 2003*.³
- 7.9 In that case, the majority (Watson SDP and Raffaelli C) accepted that the evidence before the Commission, which included the Australian Bureau of Statistics’ 1997 Time Use Survey⁴, demonstrated a “*significant social disability associated with work on a Sunday*”.⁵
- 7.10 Significantly for the purposes of these proceedings, Giudice J, although comprising the minority, concluded that the evidence demonstrated a significant social disability associated with work on a Sunday “*subject only to the reservation that it suits some people to work on that day.*”⁶
- 7.11 This case was noted in *Retail Industry (South Australia) Award - Variation [2004] SAIRComm 54*, a case where an application to lower penalty rates was made to the South Australian Industrial Relations Commission following the liberalisation of retail trading hours in South Australia. In declining the application, the Commission concluded that the “*evidence generally demonstrates a significant social disability associated with Sunday work.*”⁷ Citing a “*trend toward certain sporting and other leisure activities being available beyond weekends*” the Commission also noted the evolution of both Australian society and penalty rates at [200]-[201]:

“We observe that the Sunday overtime provisions have been in the Award, or its predecessors, since the 1930s when the trading environment was substantially more restrictive than it is today. It is quite possible that the purpose intended to be

³ See *Shop Distributive and Allied Employees Association v \$2 and Under* (2003) 135 IR 1

⁴ See (2003) 135 IR 1 at [53]

⁵ See (2003) 135 IR 1 at [97]

⁶ See (2003) 135 IR 1 at [6]

⁷ See *Retail Industry (South Australia) Award - Variation [2004] SAIRComm 54* at [188]

served by the overtime provision then, has little relevance to contemporary circumstances of the industry and modern industrial standards, but in any event the parties are agreed that, regardless of the basis on which it was established, there should be no element of deterrence in the rate we now determine. It is also probable in our view that the purpose to be served by the Sunday overtime penalty has changed, at least in a de facto sense, throughout that period, given that increasingly, shops have been able to trade at different times as a result of the liberalisation of trading hours restrictions.

...

The level of the additional payment or loading for work performed in ordinary hours on a Sunday requires an assessment of, among other considerations, the level of disability or detriment suffered by those who perform work at this time. Although trite to say, such disability needs to be considered in the current social context. The sorts of detriment identified in the earlier decisions have in some respects decreased and other changes in society have resulted in additional disabilities associated with work on Sundays.” [Footnotes removed]

Penalty Rates under the FW Act

- 7.12 The above cases have now largely been superseded by the Full Bench’s decision in *Modern Awards Review 2012 – Penalty Rates (2013 Penalty Rates Case)*, especially given the entirely different statutory framework of the *Fair Work Act 2009 (FW Act)* and specifically the requirements of s 134 of the FW Act.
- 7.13 In the 2013 Penalty Rates Case, the Full Bench addressed inconvenience and disabilities associated with weekend work as follows:

“For many employees in the community, the performance of work on evenings, nights and weekends does have some adverse effects and consequences for their personal, family and social lives and for the community generally. The adverse effects and consequences will vary depending upon individual circumstances and there is some evidence that for some employees these are most pronounced in relation to late evening and night work (particularly shiftwork) and Sunday work.

Young people are not immune from such adverse effects and consequences associated with the performance of work on evenings, nights and weekends.

However, the availability and preference for work of young people at these times is impacted by personal circumstances and any study commitments.”⁸

7.14 In clarifying the purpose and rationale behind penalty rates, the Full Bench noted at [206]:

“Although described in the modern awards as penalty rates, they are in reality a loading which compensates for disabilities. In the modern award context these loadings must recognise the disabilities of working at unsociable times; be sufficient to induce people with appropriate skills to voluntarily work the relevant hours, and be set having regard to whether employers in the industry concerned normally trade at such times. These factors and the elements of the modern awards objective need to be balanced and weighed accordingly.”

7.15 It is significant that, while not accepting that a sufficient variation case had been made out, the Full Bench in the 2013 Penalty Rates Case foreshadowed the hearing of the current proceedings:

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

The 4 yearly review of these awards is to commence in 2014. That review will be broader in scope than the Transitional Review and will provide an opportunity for the issues raised in these proceedings to be considered in circumstances where the transitional provisions relating to the relevant awards will have been fully implemented. In the event that the claims before us are pressed in the 4 yearly review we would expect them to be supported by cogent evidence. We would be particularly assisted by evidence regarding the matters referred to above and the likely impact upon employment levels, the organisation of work and employee welfare of any change in the penalty rates regimes.”⁹

7.16 The Commission’s treatment of penalty rates under the provisions of the FW Act was further developed in the *Restaurants Case*,¹⁰ proceedings which, like the 2013 Penalty Rates Case, formed part of the 2012 transitional two year review of modern awards.

⁸ See [2013] FWCFB 1635 at [156]-[157]

⁹ See [235]-[236]

¹⁰ Conducted as a part of the 2012 Review: See Decision of Gooley DP of [2013] FWC 7840 and the Decision of the Full Bench [2014] FWCFB 1996

- 7.17 In the Restaurants Case, the Commission initially dismissed¹¹ an application for a variation to the Restaurant Award on the basis that the disabilities associated with working weekends and evenings had not changed since the making of the Award.
- 7.18 On appeal¹², the majority of the Full Bench was satisfied that a sufficient case had been made out to reduce penalty rates for level 1 and level 2 casual workers. In doing so, the Full Bench held that the combination of casual loading and weekend penalty rates was tending to “*overcompensate*” inexperienced and transient employees for working Sundays and was more than what was required to attract them to work that day.¹³
- 7.19 The majority, Hatcher VP, Boulton J and McKenna C referred at [127] to the dissenting judgment of Giudice J in (2003) 135 IR 1, noting that his Honour relied in particular on the need for there to be proper proportionality between the Sunday penalty rates and other penalty rates for Saturdays, weeknights and shift work.
- 7.20 At [132] the majority accepted that there was a “*degree of evidence*” which supported the proposition that the special and peculiar characteristics of the restaurant industry workforce meant that the Sunday penalty rate was excessive. Continuing, the majority noted:

“...the general characteristics of the restaurant industry, the fact that a very large proportion of the workforce consists of young people pursuing full-time studies or women with weekday carers’ responsibilities who work significantly less than full-time hours on a casual basis. The evidence tends to demonstrate that for that proportion of the workforce, weekends will frequently be the time that they are available to and want to work. Their position is distinguishable from “core” or “career” restaurant employees such as, for example, trade-qualified chefs or senior front-of-house staff intending to stay in the industry on a long term basis, who are much more commonly engaged on a full-time or permanent part-time basis, have to accept the loss of Saturdays and Sundays as a permanent feature of their working lives, and depend upon penalty rates as a core component of their take-home pay.”

- 7.21 At [139] the majority made its primary finding:

“The modern awards objective in s.134(1) of the FW Act, which we have earlier set out, requires that modern awards, together with the National Employment Standards, provide a “fair and relevant safety net of terms and conditions”, taking into account a number of specified matters. We have concluded that, in respect of Sunday penalty rates, the Restaurant Award does not meet the modern awards

¹¹ See Decision of Gooley DP of [2013] FWC 7840

¹² [2014] FWCFB 1996

¹³ [2014] FWCFB 1996 at [138]

objective in that they are not “fair and relevant” to the extent that they tend to overcompensate one category of employees as identified in paragraph [138] above.”

7.22 The cases outlined above suggest that:

- (a) historically, Sundays were traditionally highly penalised on the basis that Sundays were the day for family and social and religious reunions;
- (b) even in 2004, an industrial tribunal had concluded that there was some significant disability associated with working on Sunday, as opposed to other days of the week (albeit, having relied upon survey data pertaining to 1997); and
- (c) by 2012/2013, a growing acceptance had begun to develop within differently constituted benches of the Fair Work Commission that the disability associated with working on a Sunday might not be as great as has historically been the case.

7.23 The evidence filed in the present proceedings provides the unique opportunity for the Fair Work Commission to re-evaluate the disability associated with working on a Sunday in Australia’s modern service industries in 2016.

8. SEMINAL CASES PERTAINING TO PUBLIC HOLIDAY PENALTY RATES

8.1 Public holidays are recognised in many jurisdictions around the world as days of commemoration and celebration. Although the term holiday is a compound of ‘holy’ and ‘day’, Australian jurisprudence has long recognised that:

“...there is a clear distinction between the religious or historic event which is celebrated by the public holiday and the public holiday itself.”¹⁴

8.2 While the rationale for the payment of penalty rates may be similar, a considerable practical difference exists between the history of public holiday penalty rates and weekend penalty rates given that the identification and number of public holidays in Australia has varied over time and by jurisdiction.

8.3 While a comprehensive outline of the development of public holidays is beyond the scope of these submissions, it is relevant to note that public holidays in Australia have their genesis in the legislative protection of certain days as ‘bank holidays’ and later as holidays for the public service. As a general trend, these specified days were then progressively adopted into State and Commonwealth awards beyond banking and the public service before being identified by specific legislation as public holidays.

¹⁴ *Confederation of ACT Industry v. ALHOU and The Uniting Church in Australia (ACT) Property Trust* (unreported, per O’Connor, Moore and Madgwick J, FEC No. 1659/98, 22 December 1998)

9. DEFINITION OF PUBLIC HOLIDAYS: STATE AND TERRITORY JURISDICTIONS

- 9.1 The definition of public holidays has been traditionally the responsibility of the State and Territory governments. As such, the definition of public holidays has varied considerably across the State and Territory jurisdictions.
- 9.2 In NSW, an early mechanism for the creation of what were to become public holidays was an *Act to make provision for Bank Holidays and respecting obligations to make payments and do other acts on such Holidays* [14th July, 1875.] 39 Vic No 2¹⁵ (**1875 Act**).
- 9.3 The 1875 Act prevented banks from opening or banking operations being undertaken on 10 ‘special days’ (the 8 days currently identified by s 115 of the FW Act in addition to ‘*The day after Good Friday*’ and ‘*The Anniversary of the Birthday of the Prince of Wales*’). The 1875 Act also made provision for the NSW Government to proclaim other public holidays on which all banking business was prohibited.
- 9.4 Notably, the 1875 Act was confined to prohibiting banking functions and did not specifically contemplate employees working on the prescribed days. The 1875 Act was updated in NSW in 1898¹⁶ which was in turn updated in 1912 in the form of *Banks and Bank Holidays Act 1912* (NSW) (**BBH Act**).
- 9.5 Following the legislative designation of certain ‘Bank Holidays’ by the NSW government, various NSW industrial awards began to adopt ‘Bank Holidays’ as holidays within non-banking industries and attach conditions to the performance of work on such days.
- 9.6 The process of ‘appropriating’ bank holiday legislation into wider industrial instruments was not without issue in NSW. In 1994 the Full Bench of the NSW Industrial Relations Commission noted the difficulties arising from the fact that the BBH Act had “*been put to a use for which it was not originally designed*”.¹⁷
- 9.7 In that case, the Full Bench said:

“The Act was and is designed to regulate firstly and foremostly the operation of banks. For historical reasons which are not clear to us, it appears to have become the vehicle for the regulation of public holidays in this State. That regulation depends on the arcane interaction between various provisions of the statute and executive action from time to time.”

¹⁵ See http://www5.austlii.edu.au/au/legis/nsw/num_act/bha1875n9157.pdf

¹⁶ See Act No. 9, 1898. : *An Act to consolidate the Laws relating' to Banks and Bank Holidays*. [27th July, 1898.] http://www5.austlii.edu.au/au/legis/nsw/num_act/babha1898n9215.pdf

¹⁷ *Employers' Federation of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Miscellaneous Workers' Division NSW Branch* [1994] NSWIRComm 222

9.8 This tension was also noted in a 2009 Review into the BBH Act¹⁸, where it was noted that:

“[i]t has been recognised for some time now that the New South Wales legislation for proclaiming public holidays is in need of modernisation.... the BBH Act is a relic of former times, where commercial activity revolved around the opening hours of banks and when banking business was conducted over the counter and recorded in pen and ink. Although when first enacted, the BBH Act was primarily concerned with Bank trading hours, it became the means by which workers in New South Wales enjoyed Public Holidays largely because industrial awards (and later enterprise agreements) adopted the ‘bank holidays’ of the BBH Act as days upon which all kinds of workers were entitled to be paid days off, or penalty rates.”

9.9 This position was confirmed in a number of authorities including a decision of the Full Bench of the Industrial Court of New South Wales in *Employers' Federation of New South Wales v Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers' Division, New South Wales Branch* (1994) 87 IR 335 where the Full Bench adopted, with approval, the observations of Cook and Beattie JJ made in a joint judgment in *Re Boarding Houses, &c, Employees (State) Award and Other Awards* [1961] AR (NSW) 383 in which their Honours had said at 393:

“We think that the true position as to the observance of public holidays is to be ascertained by reference to the Banks and Bank Holidays Act. Further, we think that in construing public holidays clauses in awards it should be presumed that the award making tribunals have recognised the notorious fact that a public holiday may be observed in respect of a particular occasion on a day other than the calendar date of the occasion...”

9.10 The BBH Act was ultimately replaced with the *Public Holidays Act 2010* (NSW), which, in addition to the FW Act, now regulates public holidays in NSW.

9.11 The historical position in NSW is broadly reflected in other states, where legislatively defined public or bank holidays have been appropriated into industrial awards.

9.12 In Victoria the legislature followed a similar pattern to NSW by:

- (a) identifying Good Friday and Christmas Day as Bank Holidays in *The Instruments and Securities Statute 1864* (VIC); before
- (b) identifying further Bank and public holidays in the *Bank Holidays Act 1873* (VIC), *Public and Bank Holidays Act 1897* (VIC), the *Public Service Act 1928* (VIC), *Banks and Currency Act 1928* (VIC), *Public Holidays and Bank Holidays Act 1934* (VIC),

¹⁸ *Public Holidays in NSW Review of the Banks and Banks Holiday Act 1912*, Professor Joellen Riley, October 2009, NSW Government

*Public and Bank Holidays Act 1953 (VIC) and Public and Bank Holidays Act 1958 (VIC).*¹⁹

- 9.13 The *Public Holiday Act 1993 (VIC)* is the extant legislation in Victoria identifying public holidays. Such Act defines 11 public holidays while also granting power to the Minister to appoint another one or more days or half-days as public holidays or public half-holidays by notice published in the Government Gazette.²⁰ In 2016, Victorians will experience 13 public holidays including Australia's most recently created public holiday, "Friday before the AFL Grand Final" Public Holiday²¹.
- 9.14 In South Australia, the extant *Holidays Act 1910 (SA)*, repealed the *Bank Holidays Act 1873 (SA)*, *The Bank Holidays Amendment Act 1893 (SA)* and *The Holidays Act 1909 (SA)*.
- 9.15 The *Holidays Act 1910 (SA)* identifies Sundays as nominal public holidays, 9 standalone public holidays, two part-day public holidays and also provides an ability for the Governor to proclaim public holidays throughout the state or within a district or locality within the state.²²
- 9.16 In Western Australia, the *Public and Bank Holidays Act 1972 (WA)* identifies 10 public holidays and provides an ability of the Governor to appoint a special day specified in the proclamation to be a public holiday or bank holiday, or both.²³
- 9.17 In Queensland, the *Holidays Act 1983 (QLD)* identifies 10 public holidays and provides an ability of the Governor to appoint a special day specified in the proclamation to be a public holiday.²⁴
- 9.18 In Tasmania, public holidays are defined by the *Statutory Holidays Act 2000 (TAS)* which also provides the Minister with the power to create new public holidays.²⁵
- 9.19 *The Holidays Act 1958 (ACT)* and the *Public Holidays Act (NT)* are the relevant Public Holiday Acts in the Territories.
- 9.20 Given the disparate sources by which public holidays are defined in Australia, the nature of number of public holidays in Australia has not been static or uniform. By way of example:
- (a) an additional Public Holiday for Boxing Day is only operative in NSW, QLD, VIC and WA;
 - (b) Easter Saturday is not a public Holiday in TAS or WA;

¹⁹ See for example *The Bank Holidays Acts 1904-1906 (QLD)*, *Bank Holidays Act 1958 (Vic)*

²⁰ See *Public Holiday Act 1993 (VIC)* s 7

²¹ See Victoria Government Gazette No. S 229 Wednesday 19 August 2015

²² See *Holidays Act 1910* s 4

²³ See *Public and Bank Holidays Act 1972 (WA)* s 7

²⁴ See *Holidays Act 1983 (QLD)* s 4

²⁵ See *Statutory Holidays Act 2000* s 5

- (c) Easter Sunday is a Public Holiday only in NSW and VIC;
- (d) the following public holidays are only observed in one State:
 - (i) Adelaide Cup (SA);
 - (ii) Canberra Day ((ACT);
 - (iii) Christmas Eve (SA);
 - (iv) Family and Community Day (ACT);
 - (v) Melbourne Cup (VIC);
 - (vi) Recreation Day (TAS);
 - (vii) Royal Hobart Regatta Day (TAS);
 - (viii) Royal Hobart Show Day (TAS);
 - (ix) Royal Queensland Show (QLD);
 - (x) Western Australian Day (WA);
 - (xi) May Day (NT);
 - (xii) Picnic Day (NT); and
 - (xiii) Friday before the Grand Final (VIC).

10. DEFINITION OF PUBLIC HOLIDAYS: FEDERAL JURISDICTION

10.1 The historical position of public holidays in the Federal jurisdiction can be summarised by Piper CJ's statement in the *Tanning Industry Case* (1944) 53 CAR 615 at 621, when his Honour stated:

"This Court does not create such holidays as King's Birthday and the like; they exist either by statute or general custom apart from any Act or prescription by the Court; what the Court d[oes is] .. to select a certain number of already existing and recognised holidays and, on the assumption that, generally speaking, such holidays would be observed as such, apply to them the principle of no loss of pay because of absence if no work were required, and, in addition, in order to protect the employee from any improper loss of the benefit of such holidays, prescribe a deterrent by providing penalty rates for work on such days."

10.2 The Conciliation and Arbitration Court's successor, the Australian Industrial Relations Commission, also accepted that:

"Although the Commission may be able to prescribe leave with pay and require higher payments when employees work at certain times, the Commission's practice

has been to recognise the public holidays determined by the appropriate authorities and, in various ways, to incorporate them in its awards.”²⁶

10.3 Notwithstanding the general prerogative of State Governments to declare public holidays, the Federal jurisdiction has also engaged in the declaration of public holidays for its Commonwealth public servants, in the form of s 76 of the *Commonwealth Public Service Act 1922-1958*, legislation which empowered the Commonwealth to authorise holidays for Commonwealth public servants in addition to days proclaimed by state governments.

The modern era - WorkChoices

10.4 An express entitlement to public holidays was inserted into the Federal industrial legislation by *Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (Work Choices)* Schedule 1B in the form of what would become s 611 of the *Workplace Relations Act 1996 (Cth)*.

10.5 Importantly, Work Choices introduced an entitlement for employees to a day off on the following public holidays: 1 January (New Year's Day); 26 January (Australia Day); Good Friday; Easter Monday; 25 April (Anzac Day); 25 December (Christmas Day); 26 December (Boxing Day); and any day declared as a holiday generally within a State or Territory, or a region of that State or Territory, as a public holiday (except a day declared as a public holiday in substitution for a named day, or a union picnic day). Under Work Choices, an employee could be requested to work on a public holiday²⁷; however such a request could be refused on reasonable grounds.

10.6 The FW Act extended the Work Choices provisions in respect of Public Holidays by identifying an additional public holiday, the Queen's Birthday holiday, while continuing to recognise as public holidays those days which are declared or prescribed under a law of a State or Territory as a public holiday. Importantly, the FW Act preserved an entitlement (under section 114) for an employee to be absent on public holidays. While employers are able to request an employee to work on a public holiday under the FW Act, such request must be reasonable and can be refused on reasonable grounds.²⁸

10.7 In creating Modern Awards, the Australian Industrial Relations Commission declined to increase the number of public holidays from those outlined in the National Employment Standards²⁹.

²⁶ Dec 1352/94 A Print L4534 at 18

²⁷ See *Workplace Relations Act 1996 (Cth)* s 612

²⁸ See Section 114(2) of the FW Act

²⁹ See [2008] AIRCFB 1000

11. ENTITLEMENTS ARISING IN RESPECT OF PUBLIC HOLIDAYS

- 11.1 The historical rationale for “Penalty rates” for working public holidays is similar to the traditional justification used for weekend penalty rates identified at 7.1-7.4 above.
- 11.2 It is important to note that the historical industrial context which initially gave rise to public holiday penalty rates was very different to the position in 2016 - where 4 weeks’ annual leave is a guaranteed right under the National Employment Standards. By way of example, it was not until the enactment of the *Annual Holidays Act 1944* (NSW) that a standard of two weeks annual paid leave was legislatively established in NSW while federal awards generally did not provide for annual leave until the incorporation of annual leave into the *Commercial Printing Award* in 1936.³⁰
- 11.3 The historical transition of public holidays from days on which banking business was prohibited to days on which the wider public could enjoy an absence from work without loss of pay or otherwise receive penalty rates has occurred largely on an industry by industry basis. By at least the late 1970’s the allowance of public holidays without loss of pay (usually ten per year) was a feature of almost all industrial awards.³¹
- 11.4 It is apparent from a review of historical awards that although the adoption of public holidays into industrial awards was almost universal, entitlements arising for employees on such days varied by award.
- 11.5 In respect of penalty rates paid to employees, such rates have historically been characterised as a deterrent or discouragement for employers against improperly forcing employees to work on public holidays³². By way of example, in *Re Steel Works Employees (Broken Hill Proprietary Co. Ltd) Conciliation Committee 1939* AR 193, a public holiday rate of double time was described by Cantor J as a “penal rate”.
- 11.6 The characterisation of public holiday penalties as a deterrent as opposed to an employee benefit was also recognised by Harrison DP in *The Australian Rail, Tram and Bus Industry Union, New South Wales v State Transit Authority* [2007] NSWIRComm 162 at [87] as follows:

“Employees should ordinarily expect to have a day off on a Public Holiday unless there are business needs which require them to work. Public Holiday penalties are not an opportunity for employees to increase their earnings, but a disincentive to employers to require employees to work on a Public Holiday.”

³⁰ See *Commercial Printing Case* (1935) 36 C.A.R. 738

³¹ As noted by Law Book Co’s Industrial Arbitration Service Industrial Reports (1979) at 312

³² See *Tanning Industry Case* (1944) 53 CAR 615 at 621

- 11.7 In respect of quantum, the standard penalty rate for work on public holidays appears to have increased over time.
- 11.8 In the late 1930's, a standard of double time for work performed on a Public Holiday emerged in NSW.³³ Awards around that time also made distinctions for emergency work performed on public holidays as attracting a lower rate.³⁴
- 11.9 In *Re Electricians Etc. (State) Award No.3* [1970] AR (NSW.) 305, the NSW Industrial Commission in Court Session recognised a rate of 250% for public holidays, a rate that is now commonly applied in Modern Awards.
- 11.10 *Re Electricians* appears to depart from the historical characterisation of penalty rates as a deterrent and instead presents a justification for a penalty rate on a public holiday as providing "*compensation for foregoing, whole or in part, the advantage of the holiday*".³⁵ The adjustment of the Public Holiday rate in that case to 250% required the rejection of a Union claim for "*treble time*" on the grounds that such a claim "*in the present circumstances ... might deter work on public holidays to an extent which would be contrary to the public interest.*"³⁶
- 11.11 The historical and legislative context outlined above relevantly suggests that:
- (a) Public holiday protections historically arose in a context where trade and work were actively discouraged on public holidays. This context is particularly removed from the modern circumstances of industries such as retail and restaurants which the public largely expect or desire to trade on public holidays.
 - (b) Public holiday protections have been traditionally developed in a context where an employee was compensated (and an employer penalised) when that employee was required to work on a public holiday. This context is substantially removed from the current operation of the FW Act which entitles all employees to a day off on a public holiday and, subject to a two-fold test for reasonableness (assessing employee and employer needs), makes the performance of work on a public holiday voluntary.
 - (c) The identification of public holidays varies by State and has increased over time alongside increasing employee entitlements to annual leave.
 - (d) Currently, public holidays are not uniform across all Australian jurisdictions.

³³ See *In re Ice Cream Manufacturers (State) Conciliation Committee* 1939 AR 47 at 61, *In re Steel Works Employees (Broken Hill Proprietary Co. Ltd) Conciliation Committee* 1939 AR 193 at 215, *Re Electricians Etc. (State) Award No.3* [1970] AR (NSW.) 305 at 309 and 310

³⁴ See for example *In re Steel Works Employees (Broken Hill Proprietary Co. Ltd) Conciliation Committee* 1939 AR 193

³⁵ See *Re Electricians Etc. (State) Award No.3* [1970] AR (NSW.) 305. at 322.

³⁶ See *Re Electricians Etc. (State) Award No.3* [1970] AR (NSW.) 305. at 322.

11.12 These proceedings provide the Full Bench with the opportunity to review and reframe entitlements arising out of public holidays in the context of the specific operation of the FW Act.

D. FACTUAL FINDINGS

12. INTRODUCTION

12.1 The factual findings that ACCI, ABI and the NSWBC submit should be made by the Fair Work Commission are identified in each of the bold headings that follow. Some ancillary or consequential findings are also identified at the conclusion of each section, where relevant.

13. THE AUSTRALIAN ECONOMY HAS UNDERGONE SIGNIFICANT CHANGE OVER THE PAST FOUR DECADES

13.1 The expert report prepared by Professor Phil Lewis, *Penalty rates and the retail, cafe and restaurant and hairdressing and beauty industries (Primary Lewis Report)* identifies the significant structural change that the Australian economy has been subjected to over the past 4 decades.

Growth of services sector

13.2 Lewis identifies that, between 1970 and 2014:

- (a) 'soft services' (such as health, finance, retail, education and restaurants) have increased their share of all jobs by about 20%;
- (b) the total share of employment held by the manufacturing sector has halved; and
- (c) there have been reductions in the share of jobs held by other industrial services such as construction, communications, electricity, gas and water.³⁷

13.3 In short, employment in the services sector has boomed at the expense of employment in other industries.

13.4 This shift in the source of employment is important because Lewis identifies that demand for labour in the service sector is substantively influenced by the time of the day and the day of the week.³⁸ This stands in contrast to some of the industries that historically employed greater numbers of employees, and which gave rise to the 'standard' working week.

Growth of part-time and casual employment

13.5 The need for flexibility in the services sector has seen a dramatic increase in the need for part-time and casual employees. Lewis identifies that:

- (a) over the period from 1985-2014, casual employment in the labour market has grown from slightly over 15% of total employment to 25% of total employment; and

³⁷ Exhibit ABI-3, pages 3-4

³⁸ Exhibit ABI-3, page 6

(b) the percentage of part-time employees in the labour market has increased.

13.6 Lewis' data is supported by the Fair Work Commission's own research, with the Commission's Workplace and Economic Research Section *Changing Work Patterns Report (FWC Changing Work Patterns Report)* identifying that between ~~November 1990~~August 1991 and ~~November 2015~~August 2016 full time employment decreased from ~~778.7%~~ of total employment to 68.39% of total employment.³⁹

13.7 Whilst Lewis does not state that the increase in part time and casual employment is only attributable to the shift of employment to the services sector, he does identify a clear connection between the unique demands of the services sector and the increase in casual and part time work.⁴⁰

Increased female participation

13.8 Another major change to the labour market relates to the increased participation of women. The labour-force participation rate for women has steadily risen from below 45% in 1978 to approximately 60% in 2014.⁴¹ In the same period, the percentage of males working in the labour force has declined from approximately 80% in 1978 almost continuously up until the boom of the early to mid 2000s before falling again following the Global Financial Crisis to currently stand at 70%.⁴²

13.9 Lewis' data is supported by:

(a) the *Productivity Commission Inquiry Report November 2015 - Workplace Relations Framework (Final Productivity Commission Report)*, which notes a steep increase in female participation over the past decades, particularly for married females⁴³; and

(b) the FWC Changing Work Patterns Report which identifies that, between ~~November August 1991~~ and ~~November August 2016~~:

(i) the participation rate for males decreased from ~~75.5~~74.3% to 70.5~~4%~~%; and

(ii) the participation rate for females increases from ~~52.2~~51.8% to 59.3~~59.4%~~.

Increased weekend work

13.10 The days upon which work is conducted have also changed considerably over time.

13.11 Lewis identifies the following growth trend in weekend work based on ABS data:

³⁹ FWC Changing Work Patterns Report, page 3

⁴⁰ Exhibit ABI-3, page 6

⁴¹ Exhibit ABI-3, page 76 and Figure 5

⁴² Exhibit ABI-3, page 76 and Figure 5

⁴³ Productivity Commission Final Report, page 430-431

- (a) the number of male employees working weekends increased from 16% in 1995 to 33% in 2012; and
- (b) the number of female employees working weekends increased from 14% in 1995 to 27% in 2012.⁴⁴

13.12 The FWC Changing Work Patterns Report utilises HILDA data to analyse whether patterns of weekend work have changed. Unfortunately, the FWC Changing Work Patterns report only assesses changes between 2006⁸ and 2015⁴, a much briefer period than that covered in Lewis' ABS data. The changes in the occurrence of weekend work do not appear to have differed markedly between 2006⁸ and 2015⁴, at least according to the HILDA data.⁴⁵

Regulatory restrictions on weekend and public holiday trading

13.13 Although regulatory restrictions on weekend and Public Holiday trading are the responsibility of separate State and Territory governments, a universal trend toward deregulation of trading hours has occurred across all jurisdictions.⁴⁶ While deregulation has occurred at different rates in different jurisdictions, all jurisdictions have now departed considerably from a traditional model in which trading was prohibited on Sundays and public holidays.

13.14 Currently, there are no restrictions on Sunday trading in any Australian jurisdiction save for

- (a) Queensland, in which Sunday trading is allowable from 9am to 6pm;
- (b) South Australia, in which Sunday trading is allowable from 11am to 5pm, except partially exempt shops which can open from 9am to 5pm; and
- (c) Western Australia, in which general retail shops can open between 11 am and 5 pm.

13.15 As at the date of these submissions, in the ACT, the Northern Territory, New South Wales⁴⁷, Victoria⁴⁸ and Tasmania⁴⁹ shop trading hours are either entirely or almost entirely unrestricted on all days. In each of these jurisdictions restrictions on Public Holiday trading is limited to Christmas Day and Good Friday, ANZAC Day (until 1pm), and in Tasmania and NSW on Easter Sunday.

⁴⁴ Exhibit AB1-3, page 35

⁴⁵ FWC Changing Work Patterns Report pages 9-11f. This finding is also made in relation to the HILDA data by Professor Peetz and Dr Watson - See Exhibit SDA-36, page 22 (lines 6-8).

⁴⁶ See *Shop Trading Hours in Western Australia: A Research Report A legal, social and economic analysis of the regulation of shop trading hours in Western Australia*, Tracey Atkins, Assistant Professor, Law School The University of Western Australia 1 November 2011

⁴⁷ *Retail Trading Act 2008* (NSW).

⁴⁸ *Shop Trading Reform Act 1996* (VIC).

⁴⁹ *Shop Trading Hours Act 1984* (TAS)

- 13.16 While shopping hours in Queensland⁵⁰, Western Australia⁵¹ and South Australia⁵² remain the subject of regulation, a historical trend of relaxation has also occurred.
- 13.17 By way of example, despite the complexity of the South Australian shop trading regime, a 2007 independent legislative review noted that approximately eighty per cent (80%) of all shops are exempt shops (and therefore not subject to the Act).²⁴⁴
- 13.18 The most recent and considerable variation in the de-regulation of Sunday trading occurred in August 2012 with Western Australia commencing Sunday trading as a result of the *Retail Trading Hours Amendment Act 2012 (WA)*.

Conclusion regarding economic and regulatory changes

- 13.19 The conclusions that naturally arise from the Lewis' evidence (as well as the FWC Changing Work Patterns Report and the Productivity Commission Final Report) is that the Australian economy and working patterns have changed significantly since the 1970s.
- 13.20 It should be noted that none of the evidence provided by Lewis in relation to the above matters was contested under cross examination. His conclusions regarding the changes to the Australian economy and working patterns were entirely unchallenged.
- 13.21 Coupled with the Lewis' findings is a trend of weekend and public holiday de-regulation which is indicative of legislative view that:
- (a) Sundays and at least some public holidays no longer retain the solemn, sacred or cultural importance as may have historically been the case; and
 - (b) the importance of trade and availability of services on Sundays and some public holidays outweighs any policy considerations that business should not be conducted on those days.
- 13.22 All of the above findings should have a bearing on the Commission's approach when it comes to determine whether the rationales that once existed for the creation and setting of penalty rates remain relevant to today's society.

⁵⁰ *Trading (Allowable Hours) Act 1990 (QLD)* and the *Trading (Allowable Hours) Regulations 2004 (QLD)*

⁵¹ *Retail Trading Hours Act 1987*

⁵² *Shop Trading Hours Act 1977 (SA)* and the *Shop Trading Hours Regulations 2003 (SA)*.

²⁴⁴ Alan Moss, *Report of the 2006/2007 Review of the Shop Trading Hours Act 1977* at http://ncp.ncc.gov.au/docs/SA%20shop_trading_report%202006-07%20review.pdf

14. THE RETAIL INDUSTRY IS AN IMPORTANT PART OF THE AUSTRALIAN ECONOMY, GENERATING SUBSTANTIAL EMPLOYMENT AND REVENUE

14.1 The proposition that the retail industry is an important part of the Australian economy, generating substantial employment and revenue, is unlikely to be the subject of dispute in these proceedings.

14.2 As noted by the Primary Lewis Report and the Dr Sands' Retail Award Research Report (**the Sands Report**)⁵³:

- (a) the retail industry generates \$380 billion per year in revenue⁵⁴ and almost 5% of valued added to the economy;⁵⁵
- (b) the retail industry generates over \$40 billion in wages and 5% of Gross Domestic Product value added;⁵⁶
- (c) as at June 2015, the retail trade industry accounted for around 2 per cent of investment;⁵⁷ and
- (d) as at September 2015, the retail industry accounted for around \$20 billion in company gross operating profit⁵⁸.

14.3 On any measure, these characteristics make the retail industry an important part of the Australian economy in terms of revenue generated.

14.4 In respect of the employment generated by the retail industry, the evidence before the Full Bench has demonstrated that:

- (a) the total number of retail employees has increased over the past 20 years at a higher rate than all other industries;⁵⁹
- (b) the retail industry employs almost 1.3 million people, about 11% of Australian total employment and 15% of all service sector employment;⁶⁰
- (c) as at September 2015, the retail industry accounted around 9% of actual hours worked per week in all jobs and 8% of wages.⁶¹ These employees include a large proportion of younger workers and students with 36% of the retail industry

⁵³ Exhibit Retail-2

⁵⁴ Exhibit ABI-3, page 12

⁵⁵ See Exhibit Retail-2, Annexure SS2 – Retail Award Research Report – dated 25 June 2015 at page 3

⁵⁶ See Exhibit ABI-3, page 12

⁵⁷ See Exhibit Retail-2, Annexure SS2 – Retail Award Research Report – dated 25 June 2015 at page 3

⁵⁸ See Exhibit Retail-2, Annexure SS2 – Retail Award Research Report – dated 25 June 2015 at page 3

⁵⁹ Exhibit Retail-2, page 95

⁶⁰ Exhibit ABI-3, page 12

⁶¹ See Exhibit Retail-2, Annexure SS2 – Retail Award Research Report – dated 25 June 2015 at page 3

workforce being under 25 years of age (half of which are teenagers) and students making up over 45% of those employed in the Australian retail industry;⁶² and

(d) as at May 2014, the retail industry accounted for around 17 per cent of all award-reliant employees.⁶³

14.5 Again, on any measure, these characteristics make the retail industry an important part of the Australian economy in terms of employment.

15. THE RESTAURANT INDUSTRY IS AN IMPORTANT PART OF THE AUSTRALIAN ECONOMY, GENERATING SUBSTANTIAL EMPLOYMENT AND REVENUE

15.1 Similarly, the proposition that the restaurant industry is an important part of the Australian economy, generating substantial employment and revenue, is unlikely to be contested.

15.2 The Full Bench has heard evidence, in the form of the Primary Lewis Report and the Sands Report, to the effect that:

(a) in 2014-15 the restaurant industry generated over \$16 billion in revenue with an average profit margin of 8.6%;⁶⁴

(b) in 2014-15 the Restaurant industry comprised over 15,000 separate businesses employing almost 155,000 people. Wages accounted for 28% of total expenses;⁶⁵

(c) the restaurant industry employed a high proportion of young and part-time workers with:

(i) a majority (approximately 57%) of employees are employed part-time with 65% of females employed part-time and 40% of males employed part-time;⁶⁶

(ii) over 40% of workers being under 25 years of age, half of whom are teenagers;⁶⁷ and

(iii) students make up 60% of those employed in the restaurant industry.⁶⁸

15.3 On the basis of this evidence, the Full Bench should make a finding that the restaurant industry is an important part of the Australian economy, generating substantial employment and revenue.

⁶² See Exhibit ABI-3, page 18

⁶³ See Exhibit Retail-2, Annexure SS2 – Retail Award Research Report – dated 25 June 2015 at page 3

⁶⁴ See Exhibit ABI-3, page 16

⁶⁵ See Exhibit ABI-3, page 16

⁶⁶ See Exhibit ABI-3, page 19

⁶⁷ See Exhibit ABI-3, page 19

⁶⁸ See Exhibit ABI-3, page 19

16. SUNDAY TRADING GENERATES AN IMPORTANT PROPORTION OF REVENUE IN THE RETAIL INDUSTRY

16.1 Sunday trading represents a critical period of trade for the Retail Industry.

16.2 As noted by the materials annexed to the Sands Report, from a consumer perspective, a range of factors, including the need to balance competing work-life pressures and a desire to connect with family members by spending time together shopping, drives demand for Sunday trading, which also offers consumers a convenient and flexible time to shop.⁶⁹

16.3 As a result of this demand, as a proportion of weekly trading, Sunday trading has become the shopping day of choice for many consumers, accounting for between 10% and 25% of retailers’ weekly trade.⁷⁰ This is a matter identified in the Productivity Commission Final Report, which:

- (a) refers to and graphs a marked increase in Sunday trading;
- (b) identifies that foot traffic growth for Sundays is far stronger than any other day; and
- (c) notes that Sunday is increasingly becoming “*the new Saturday*” for trips to the supermarket.⁷¹

16.4 The prevalence and importance of Sunday trading was reflected in the retail industry operator statements filed in these proceedings, key aspects of which are outlined below:

Deponent	Effect of evidence
Chris Antonieff (Foodworks Oxley)	Sunday trading accounts for approximately 17.31% of weekly trading. On a sales by hour basis Sunday is our second best trading day, behind only Saturday. ⁷²
Barry Barron (Sussan Group)	<i>“Sunday has over the past 10 years become an increasingly important trading day for the business. This is despite the fact that sales per hour significantly higher than other days, and with this ratio growing.”⁷³</i> <i>“Sunday trading accounts for approximately 10.5% and 11.75% respectively of Sussan and Sportsgirl weekly trading, taking only stores which trade Sundays into account. These percentages are distorted as we restrict trading hours on Sundays due to the high labour cost. With the</i>

⁶⁹ See Exhibit Retail-2 Annexure SS2 at page 12

⁷⁰ See Exhibit Retail-2 Annexure SS2 at page 12

⁷¹ Productivity Commission Final Report, pages 424-425

⁷² See T:19/10/2015 PN 16747 and Exhibit Retail-6 at [11]

⁷³ See Exhibit Retail-3 at [14]

	<i>average Sunday turnover per labour hour of \$254 and \$291 as compared to average weekly turnover excluding Sunday of \$167 and \$184 per labour hour for Sussan and Sportsgirl respectively, we would expect to operate extended trading hours on Sunday, if it were not for the disproportionately high labour costs.”⁷⁴</i>
Belinda Daggett (Bakers Delight Lavington)	<i>“Sunday has over the past 10 years become an increasingly important trading day for the business. In my time at Bakers Delight Lavington, I have noticed that Sundays have become busier. Sunday trading currently accounts for approximately 12% per cent of Bakers Delight Lavington's weekly trading.”⁷⁵</i>
Heath Goddard (Pillow Talk)	Sunday Trading represents 16% of total weekly sales (the second largest day) ⁷⁶ Sunday Trading results in the highest sales per hour, a result approximately double the sales per hour rate of Monday, Tuesday, Wednesday or Thursday. ⁷⁷
Jorge-Daniel d’Oreli (Jeanswest)	<i>“Sunday has over the past 5 years, become an increasingly important trading day for Jeanswest. In 2009, Sunday trading accounted for 10.5% of the week's sales compared with 12.4% in 2014.”⁷⁸</i>

17. THERE IS SOME DISABILITY ASSOCIATED WITH WORKING ON SATURDAYS & SUNDAYS, HOWEVER, THIS DISABILITY DOES NOT APPLY TO ALL SEGMENTS OF THE WORKFORCE. INDEED, SOME EMPLOYEES WISH TO WORK SATURDAYS AND SUNDAYS

17.1 It must be accepted that for some workers, working on Saturdays and Sundays can involve a degree of disadvantage or disability.

17.2 As the evidence before the Full Bench has disclosed, a decision to work on the traditional weekend of Saturday and Sunday will (self-evidently) prevent a person from engaging in personal or leisure activities which are occurring at the same time. As such, for those persons who engage in traditional weekend activities such as family activities, organised sport or religious observance on weekends, working on the traditional weekend has the potential to pose some degree of disadvantage or inconvenience.

⁷⁴ See Exhibit Retail-3 at [15]

⁷⁵ See Exhibit Retail-7 at [12] and [13]

⁷⁶ See Exhibit Retail-4 at [19]

⁷⁷ See Exhibit Retail-4 at [21]

⁷⁸ See Exhibit Retail-8 at [13]

- 17.3 Such a position accords with the historical situation identified in 1947 which held Saturday as “*the great day of recreation*” and Sunday as “*the day of religious observance and family reunion.*”⁷⁹
- 17.4 In these proceedings, however, the evidence before the Full Bench demonstrates that for the majority of workers, the scenario of working on a Saturday and/or Sunday in Australia in 2016 is very different.
- 17.5 This evidence, discussed below, demonstrates that the disability arising from working Saturdays and Sundays does not apply uniformly and the specific affect on a worker will depend on the specific characteristics of that worker, including their individual preferences, industry, age, recreational interests and responsibilities and obligations as a parent, carer or student.

The Primary Pezzullo Report

- 17.6 In the report prepared by Ms Lynne Pezzullo: *The modern face of weekend work: survey results and analysis* dated 25 June 2015 (**Primary Pezzullo Report**), Ms Pezzullo identifies that:
- (a) work practices and preferences vary considerably between individuals;⁸⁰
 - (b) employees may wish to work traditionally atypical hours for a range of reasons,⁸¹ and
 - (c) a decision to work on weekends is likely to relate to or be influenced by the characteristics of the particular worker, with weekend workers being demographically different from the population as a whole and often ‘opt in’ to weekend work as a result of demands in other areas of life.⁸²
- 17.7 Ms Pezzullo identifies that, “*non-standard hours*” can contribute directly to the motivation and choice of job, either because of the specific attraction of non-standard hours or because of the demands of non-work activity.⁸³
- 17.8 Dr Pezzullo ultimately found that most weekend workers have no major objection to working weekends⁸⁴ with a majority of workers who work Saturday having no, or only minor problems with working Saturday and a majority of workers who work Sunday having no, or only minor problems with working Sunday.⁸⁵

⁷⁹ See (1947) 58 CAR 609 at 621 and 627

⁸⁰ See Exhibit PG-34 at page 16

⁸¹ See Exhibit PG-34 at page 42

⁸² See Exhibit PG-34 at page 15

⁸³ See Exhibit PG-34 at page 35

⁸⁴ See Exhibit PG-34 at page 17

⁸⁵ See Exhibit PG-34 at page 48

The Sands Report

- 17.9 The Sands Report identified certain classes of individuals who benefit from weekend work. For instance, Dr Sands found that shopfloor employees aged 24 years and under working Sundays are less concerned about the impact on ability to spend time with family/friends than other workers working Sundays.⁸⁶ Although the research conducted by Dr Sands was qualitative in nature, it is noteworthy that a statistically significant difference existed between the younger employees surveyed and older employees, when it came to the imposition of weekend work on time spent with family and friends.
- 17.10 The Sands Report also identifies a variety of advantages that arise from working Sundays in the Retail Industry.⁸⁷ These advantages, which no doubt apply to certain classes of workers, include:
- (a) flexibility around life commitments (e.g. study, family);
 - (b) faster pace and increased sales opportunities of weekend trade;
 - (c) easier parking; and
 - (d) having a weekday off.⁸⁸
- 17.11 The Sands Report also identifies that significant proportions of employees surveyed chose a non-financial benefit as the key benefit of working Sundays (23% identified having a weekday off and 19% identified flexibility around life commitments).
- 17.12 While the disability of working on the traditional weekend are well-identified by the materials referenced by Dr Sands⁸⁹, it is significant that only a minority of respondents to the relevant survey could “*see no real benefit in working on a Sunday*” (17%).⁹⁰
- 17.13 While the research included in Dr Sands’ Report identifies that 65% of shopfloor employees identify “*higher pay*” as the key benefit of working Sundays⁹¹, the results included in Dr Pezzullo’s report identify that only relatively small percentage (25.8% for Saturday and 27.1% for Sunday) of workers in the retail, restaurant, fast food and pharmacy industries identify higher hourly pay on weekends as a reason for weekend work.⁹² On either reading of these results, it is apparent that penalty rates are not the sole motivator for people undertaking weekend work and that weekend work may present material non-financial

⁸⁶ See Exhibit Retail-2, Annexure SS2 at page 65

⁸⁷ See Exhibit Retail-2, Annexure SS2 at page 63

⁸⁸ See Exhibit Retail-2, Annexure SS2 at page 63

⁸⁹ See Exhibit Retail-2, Annexure SS2 at page 64

⁹⁰ See Exhibit Retail-2, Annexure SS2 at page 63

⁹¹ See Exhibit Retail 2, Annexure SS2 at page 63

⁹² See Exhibit PG-34 at page 59

advantages for some types of employees, including those in the retail and restaurant industries.

Productivity Commission Final Report

17.14 The evidence of Pezzullo and Sands is echoed in the Productivity Commission Final Report, which dedicates a section of its report to Box 12.2 - "*What holds for many does not hold for all*".⁹³

17.15 Box 12.2 of the Productivity Commission Final Report identifies that, whilst many people prefer weekends for leisure, some people do not find weekend work as problematic as others. The Productivity Commission identifies subgroups such as young people and singles with no children as being disproportionately represented in weekend work and infers that this outcome derives from personal circumstances unique to these sub-groups which makes the sub-groups more likely to choose weekend work.

Individual employee evidence

17.16 The expert and academic evidence referred to above was broadly consistent with the individual witness evidence given in these proceedings.

17.17 This individual witness evidence can be relied upon to demonstrate that:

- (a) employers in the retail industry experience few challenges in engaging weekend workers; and
- (b) a considerable proportion of employees in the retail industry have a preference to, and in fact do, work weekends.

17.18 A summary of the relevant evidence from employers is outlined overleaf:'

⁹³ Productivity Commission Final Report, page 440

Witness	Summary of evidence given
Chris Antonieff (Foodworks Oxley)	<i>"Our business never had difficulties finding workers willing to work on the weekend."⁹⁴</i>
Barry Barron (Sussan Group)	<p><i>"We have experienced very few challenges in finding sufficient employees to staff our stores on Sunday. Students in particular are eager for additional hours outside their study schedules which mainly take place on weekdays. We have employees who are on parental leave, that are also looking for casual work over the weekends."⁹⁵</i></p> <p><i>"Over the past 12 months, we have had 37 written requests from team members to work every Sunday. The GRIA currently allows team members to work three in four Sundays, unless the employee requests in writing and the employer agrees to work every Sunday."⁹⁶</i></p>
Belinda Daggett (Bakers Delight Lavington)	<i>"I've got senior staff wanting to work Saturdays and Sundays so that they can be home with their children during the week, instead of paying for childcare but I just can't offer them the Sunday work because it's too expensive to put them on."⁹⁷</i>
Graeme Gough (SPAR Ballina)	<i>"In the four years I have been operating the business I have not had any difficulty in finding sufficient employees willing to work on Sundays, including when the penalty rate for Sundays was substantially lower as the GRIA penalty rate was phased in."⁹⁸</i>
Jorge-Daniel d'Oreli (Jeanswest)	<i>"Jeanswest has not experienced any difficulty finding sufficient employees to work on Sundays. 69% of employees working on Sundays are aged 30 and under, 18% between 31 and 40 and 12% are over 40."⁹⁹</i>

⁹⁴ Exhibit Retail-6 at [20]

⁹⁵ Exhibit Retail-3 at [29]

⁹⁶ Exhibit Retail-3 at [30]

⁹⁷ See T:19/10/2015 PN17040

⁹⁸ See Exhibit Retail-5 at [22]

⁹⁹ See Exhibit Retail-8 at [22]

18. THERE IS NO EVIDENCE THAT ADVERSE HEALTH CONSEQUENCES ARISE FROM WORKING ON A SATURDAY, SUNDAY OR A PUBLIC HOLIDAY

18.1 An argument that is sometimes advanced in support of penalty rates is that work on weekend and public holidays gives rise to adverse health consequences.

18.2 In this case, union parties have argued that weekend work gives rise to adverse health consequences, although no similar argument has thus far been advanced in relation to public holidays. The primary evidence relied upon to advance this argument is the expert report of Dr Muurlink, *The impact of weekend work: consecutivity, overload, uncontrollability, unpredictability, asynchronicity and arrhythmia (Muurlink Report)*.¹⁰⁰ The Muurlink Report has as its focus weekend work only, as opposed to public holiday work.

18.3 However, for the reasons that follow, it is apparent that the findings of the Muurlink Report are entirely unreliable.

Deficiencies with the Muurlink Report

18.4 Dr Muurlink's primary thesis was that weekend work was associated with six factors that cause adverse health consequences: consecutivity, overload, uncontrollability, unpredictability, asynchronicity and arrhythmia.

18.5 Although he made findings about the impact of weekend work on employees in the industries that are subject of the proceedings, Dr Muurlink received no instructions and considered no data relating to the age of workers in the industries he studied, the gender status of employees, the marital status of employees, the nature of shifts performed, the number of consecutive shifts worked, the number of rest days worked, the days of the week that employees worked, and so forth.¹⁰¹ In short, he did not consider the particular circumstances of the employees in the industries concerned.

18.6 Dr Muurlink also relied almost exclusively upon international studies in making his findings. However, Dr Muurlink accepted under cross examination that labour laws in the countries where the studies emerged may be different to Australia, cultural or societal values may differ, regulation of standard working hours may differ, wage rates may differ, social welfare systems may differ, occupational health and safety laws may differ, and so forth.¹⁰²

18.7 Dr Muurlink accepted that these factors which differ between Australia and the overseas origins of the international studies would be relevant in determining the influence of work on employee health.¹⁰³ The reality is that, unless these factors are considered and

¹⁰⁰ Exhibit UV-26

¹⁰¹ T:4/11/2015 - PN 20777 to PN2082.

¹⁰² T:4/11/2015 - PN20843 - PN20859

¹⁰³ T:4/11/2015 - PN20860

controlled for, the applicability of the international studies to the Australian workforce is minimal.

18.8 A case by case analysis of the studies Dr Muurlink relied upon also reveals their limited utility in demonstrating adverse health consequences associated with Saturday or Sunday work:

(a) In relation to the higher injury rates associated with working on Sundays, Dr Muurlink relied exclusively upon a study by Brogmus.¹⁰⁴ Under cross examination, Dr Muurlink accepted that:

- (i) the Brogmus Study related to a United States dataset;¹⁰⁵
- (ii) the Brogmus Study did not distinguish between employees injured who worked Sundays as part of their normal hours and employees injured working additional hours;¹⁰⁶
- (iii) the Brogmus Study identified that 45% of the workers surveyed worked overtime hours on Sundays;¹⁰⁷
- (iv) the Brogmus Study identified that there was a dramatically higher proportion of people surveyed who worked Sundays as a second job as compared to Mondays to Fridays;¹⁰⁸ and
- (v) ultimately, the prevalence of overtime work on Sunday and the working of second jobs in the Brogmus Study was “*without a doubt*” going to give rise to consecutivity and overload issues that contribute to adverse health consequences.¹⁰⁹

(b) In relation to the Wirtz and Kopps Studies, upon which Dr Muurlink relies at paragraphs 186 and 189 of the Muurlink Report, Dr Muurlink accepted that neither Studies distinguished between employees who work weekends in addition to their ordinary working week and those who work weekends only.¹¹⁰ Furthermore, the Study did not distinguish between the proportion of employees working weekends as second jobs.¹¹¹ By not distinguishing between those who work ordinary hours on weekends and those who work ‘additional’ hours on weekends, the study results were likely to be affected by the consecutivity and overload issues that Dr Muurlink

¹⁰⁴ Exhibit UV-26, page 93

¹⁰⁵ T:4/11/2015 - PN21003

¹⁰⁶ T:4/11/2015 - PN21009

¹⁰⁷ T:4/11/2015 - PN21012

¹⁰⁸ T:4/11/2015 - PN21021

¹⁰⁹ T: 4/11/2015 - PN21024

¹¹⁰ Kopp: see T:4/11/2015 - PN21030 - PN21031; Wirtz: see T:4/11/2015 PN 21062 - PN 21064

¹¹¹ Kopp: see T:4/11/2015 - PN 2103; Wirtz: see T:4/11/2015 PN 21062 - PN 21064

confirms contribute to adverse health consequences. Any adverse health consequences found in the Studies may not have been caused by the weekend work, but rather by the fact that an employee had been working numerous consecutive days or extensive hours.

- (c) In relation to the Finnish Study referred to at paragraph 189 of the Muurlink Report, Dr Muurlink accepted that the Study did not control for consecutivity.¹¹²
- (d) In relation to whether the 2 days of rest that Dr Muurlink argued are ordinarily required for healthy recuperation need to be Saturday and Sunday (as opposed to other days of the week), Dr Muurlink conceded that he could find only 1 study which identified health benefits associated with 2 consecutive rest days on Saturday and Sunday.¹¹³ This Study derived from a survey of nurses located in 2 hospitals in Israel.¹¹⁴ Not only does this Study not relate to Australian employees or the industries that are the subject of the proceedings, but the Study derives from a country which has a weekend that ordinarily falls on Friday and Saturday, as opposed to Saturday and Sunday. These substantial differences render the Study entirely irrelevant to the present proceedings.

18.9 Most importantly, however, Dr Muurlink accepted under cross examination that the negative health consequences he associated with weekend and Sunday work were not derived by virtue of the fact that an employee had worked on a Saturday or a Sunday. Rather, it was the other factors that occasionally accompany weekend work that generate adverse health consequences - namely:

- (a) that weekend workers might have irregularity of rostering;
- (b) that weekend workers are often working overtime on weekends;
- (c) that weekend workers are shift workers; and
- (d) that weekend workers may be working 6 or 7 days consecutively.¹¹⁵

18.10 Dr Muurlink's thesis is accordingly not that Saturday or Sunday work is bad from a health perspective. It is that:

- (a) consecutivity, overload, uncontrollability, unpredictability, asynchronicity and arrhythmia cause adverse health consequences;¹¹⁶ and

¹¹² T:4/11/2015 - PN 21043, PN21058

¹¹³ T:4/11/2015 - PN 20964, PN 20970

¹¹⁴ T:4/11/2015 - PN 20967 - PN 20968

¹¹⁵ T:4/11/2015 - PN 20976 - PN 20979

¹¹⁶ T:4/11/2015 - PN 20955 - PN 20963

- (b) people who work weekends may be subject to some of these factors as part of their entire working week. However, the factors would affect all of their days of work, as opposed to just weekend days.

18.11 This position was summarised by Dr Muurlink himself under cross examination:

“Yes, to be quite clear weekends and public holidays do not magically cause negative effects. The body does not somehow sniff that it's Saturday. These things are empirically associated with but not - Saturday doesn't have to be associated with anything; it just is associated with these things. Public holidays tend to be staffed by people who have unpredictable schedules, et cetera, et cetera. So it's a correlation, not a causation; not a necessary causation.”¹¹⁷

18.12 Dr Muurlink's thesis outlined above does not justify imposing penalties for all employees who work weekends. This is because a blanket penalty rate for weekends would apply regardless of the number of hours the employees work, whether they work shift or not, and whether they have fixed or variable hours. The penalty would not directly address the matters that Dr Muurlink has identified as problematic.

Other evidence

18.13 Little other evidence has been filed regarding the adverse health consequences associated with working on weekends. However, it is noteworthy that:

- (a) The Final Productivity Commission Report analysed a substantial body of evidence relating to the adverse health consequences associated with work and concluded that:
- (i) the most compelling evidence of adverse health consequences relates to *“rotating shift work, night work and long hours, regardless of the day of the week [that is worked]...”¹¹⁸*; and
 - (ii) Australian evidence on the health effects of weekend work is *“practically non-existent”*.¹¹⁹
- (b) The Sands Report¹²⁰ involved focus group discussions and surveys with employees regarding whether they believed Sunday working hours negatively impacted upon their health. Although the research was qualitative in nature, it is noteworthy that

¹¹⁷ T:4/11/2015 - PN 20979

¹¹⁸ Final Productivity Commission Report, pages 443-4

¹¹⁹ Final Productivity Commission Report, page 445

¹²⁰ Exhibit Retail-2, Annexure SS2

a large number (81%) surveyed believed that there was no adverse impact on their health caused by Sunday work.¹²¹

Conclusion

18.14 Given the multitude of factors that render the Muurlink Report unreliable and the Productivity Commission's contrary findings, there is no basis to conclude that there are negative health consequences that arise from weekend work itself or public holiday work itself.

18.15 Furthermore, even if one was to accept:

- (a) Dr Muurlink's thesis that there are negative health consequences associated with consecutive work, overtime, shift work and irregularity of rostering; and
- (b) a union party argument that the penalties compensating for such disabilities are insufficient,

then the union parties should be seeking to review overtime, shift work and other penalties. However, such matters are unrelated to the question regarding whether the penalties applicable to weekend and public holiday work are appropriate.

19. SUNDAY'S IMPORTANCE AS A DAY OF RELIGIOUS OBSERVANCE HAS DRAMATICALLY REDUCED

19.1 Although Sunday was historically considered as the day for "*religious reunions*"¹²², it should be uncontroversial that Sunday's status as a day of religious observance has dramatically reduced over time.

19.2 Lewis provided uncontested evidence derived from the National Church Life Survey in relation to religious affiliation and church attendance which identified that:

- (a) the number of persons who consider themselves to be Christians has fallen from 96% in 1911 to 60% in 2010; and
- (b) the number of persons regularly attending church has fallen from 44% of the population in 1950 to 17% in 2007.¹²³

19.3 Lewis' evidence is also supported by:

- (a) the HILDA data reviewed by the FWC Changing Work Patterns Report, which identifies that, by 2014:
 - (i) 71.4% of Australians attended church as rarely as once a year or less; and

¹²¹ Exhibit Retail-2, Annexure SS2 page 69

¹²² See paragraph 7.6(a) above

¹²³ Exhibit ABI-3, page 34

- (ii) only 18.1% of Australians attended church once a month or more frequently¹²⁴; and
- (b) the Primary Pezzullo Report, in which Ms Pezzullo identifies that:
 - (i) 13.3% of employees surveyed by Ms Pezzullo identified Saturday work as interfering with religious observance (when prompted specifically about this issue); and
 - (ii) 18.7% of employees surveyed by Ms Pezzullo identified Sunday work as interfering with religious observance (when prompted specifically about this issue).¹²⁵

19.4 Each of the above reports all point towards the same trend. The only conclusion that can be drawn from this combination of statistical evidence is that, for the majority of Australians, weekend work does not have any impact upon religious observance activities.

20. THE DISABILITY ASSOCIATED WITH WORKING ON SATURDAYS IS THE SAME OR SUBSTANTIALLY SIMILAR TO THE DISABILITY ASSOCIATED WITH WORKING ON SUNDAYS

20.1 The seminal cases cited at section 7 above identify that Sunday holds a position of unique importance in the week and that the disability associated with working on a Sunday is different to that associated with working on a Saturday. Sunday was said to be a day that holds a “*very special position*”.

20.2 However, the overwhelming majority of evidence adduced in these proceedings suggests that such a view of Sundays is outdated.

20.3 We have already demonstrated at section 19 above that Sunday’s importance as a day of religious observance has dramatically decreased. In addition to the decline in weekend religious observance, the majority of the evidence filed in the proceedings demonstrates that employees no longer view Sunday as the most important or most common day for engaging in family and leisure activities. The various types of evidence touching upon this matter are addressed separately below:

Primary Pezzullo Report

20.4 The Primary Pezzullo Report outlines survey responses relating to the relative importance of Sunday. Notably:

- (a) 69% of employees surveyed found Saturday to be either equally important to Sunday or more important than Sunday; and

¹²⁴ FWC Changing Work Patterns Report page 234

¹²⁵ Exhibit PG-34, page 46

- (b) only 31% of employees nominated Sunday as being a more important day than Saturday.¹²⁶

20.5 The decline in Sunday's importance was particularly marked for those under the age of 35 years, where:

- (a) 81% of employees surveyed found Saturday to be either equally important to Sunday or more important than Sunday; and
- (b) a mere 19% of employees nominated Sunday as being a more important day than Saturday.¹²⁷

Rose Report

20.6 The expert report of Professor John Rose dated 3 July 2015 (**Rose Report**) assesses the value of employees' time across days of the week.¹²⁸ This assessment was done by asking employees to firstly identify the activities they perform on each day of the week and to then rate the importance of these activities with a numerical value.

20.7 It was suggested during cross examination that Professor Rose's approach was unsound because it incorrectly conflated the importance of an activity with the importance of a particular period of time.¹²⁹

20.8 However, such criticism is unfounded. The reality is that the value of a particular time to a person is substantially influenced by what the person can or is doing at this time. By way of example:

- (a) for those very few Retail and Restaurant Award covered witnesses who did indicate that Sunday had a special importance to them, the witnesses confirmed that it was not Sunday itself that was important, but the activities they shared with family and friends at this time that made Sundays important. If they could perform these activities at other times, then Sunday would lose its importance;¹³⁰
- (b) the seminal cases which discuss the importance of Saturdays and Sundays do not identify these days as being inherently important in and of themselves. Rather, the seminal cases identify that it is the activities conducted during these days that makes the days important (and that distinguished Saturday from Sunday)¹³¹; and

¹²⁶ Exhibit PG-34, page 49

¹²⁷ Ibid

¹²⁸ See Exhibit ABI-1

¹²⁹ T:25/9/2015 - PN 9111

¹³⁰ See for example, evidence given by SDA Witness 20, T:21/10/2015, PN 18254, Mr William King T:22/9/2015, PN 8411, PN 8414

¹³¹ By way of example, see paragraph 7.6 above

- (c) finally, simple hypothetical examples demonstrate that it is the activities that one conducts that influences the value of a particular day. For instance:
- (i) for a person heavily interested in sports, the weekends are likely to be important times as most sporting activities are played on Saturdays and Sundays, with many professional sporting events held on Saturday and Sunday nights;
 - (ii) for a person heavily interested in 'reality television', weeknights are likely to be important times as these are the times many reality television shows air; and
 - (iii) for a person heavily interested in theatre, the times that plays or other dramatic productions are conducted are likely to be important times.

20.9 The Primary Rose Report outlines its findings regarding the importance of particular days/times at pages 22 to 24 of the Report. In particular, Professor Rose found that:

- (a) The importance of times did not vary greatly across the days. Rather, the importance of times varied mainly within each day. That is, the time of the day at which activities were undertaken varied greatly in importance, as opposed to the day on which the activity occurred:
 - (i) the period between 6:00pm to 10:00pm broadly represented the most important times for employees (regardless of the day); and
 - (ii) the period between 6:00am and 9:00am broadly represented the least important times for employees (regardless of the day).¹³²
- (b) On an aggregate basis, Friday was rated as the most important day.¹³³
- (c) Sunday and Saturday were, on an aggregate basis, rated as the 2nd and 3rd most important days respectively. However, the Sunday average rating was not substantially higher than that of Saturday. Indeed, the difference between the aggregate rating for Friday and Sunday was greater than the difference between Sunday and Saturday.¹³⁴
- (d) In the restaurant industry, Saturday was rated as a more important day than Sunday on an aggregate basis.¹³⁵

¹³² Exhibit ABI-1, page 22

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ Exhibit ABI-1, page 24

20.10 It is worth noting that employees surveyed by Professor Rose did indicate, on average, that they wished to be paid higher rates of pay on Sundays than those payable on Saturdays. For instance, the projected rate of pay sought by employees:

- (a) covered by the Restaurant Award was 135% of the weekday rate for Saturdays as compared to 146% of the weekday rate for Sundays; and
- (b) covered by the Retail Award was 112% of the weekday rate for Saturdays as compared to 157% of the weekday rate for Sundays.¹³⁶

20.11 Accordingly, employees did, on average, wish to be paid a greater amount for Sunday work than Saturday work, notwithstanding that the numerical value they attributed to activities performed during these times was similar. There are two points worth noting about these results:

- (a) Firstly, these results have likely been influenced by the fact that employees brought their existing 'context' with them when completing the survey. Professor Rose gave evidence that the survey respondents likely knew their own existing rates of pay for Sundays (which are subject to a higher penalty than the Saturday penalty) when completing the survey.¹³⁷ Accordingly, the responses regarding the rate of pay which the employees wished to receive would likely have been influenced by the knowledge that they currently receive higher penalty rates for Sunday work. As the survey was designed for employees to answer the questions about the rates of pay desired by bringing their "own context" to answering the questions, it is not surprising that employees sought a higher rate of pay for Sunday.¹³⁸
- (b) Secondly, notwithstanding the "context" brought by the employees, it is noteworthy that the employees sought weekday and Saturday rates of pay that were similar to their existing penalty rates, but Sunday rates of pay that were approximately 50% less than the existing Sunday penalty rates. The fact that employee pay expectations deviated substantially only in relation to Sunday tends to suggest that employees do consider the disabilities associated with Sunday work to be less than that currently compensated for in the relevant Awards.

Academic papers relied upon by union experts

20.12 Academic literature referred to by various experts called by the unions in these proceedings also identifies a great level of similarity in relation to activities conducted on Saturdays and Sundays.

¹³⁶ Exhibit ABI-1, page vii

¹³⁷ T:25/9/2015, PN 9518 - 9520

¹³⁸ T:25/9/2015, PN 9239

20.13 Professor Markey’s Expert Report, *The continuing importance of penalty rates for weekend work: a review of the evidence* dated 2 September 2015 (**The Markey Report**)¹³⁹ referenced work conducted by Michael Bittman in a 2005 paper. Bittman’s analysis of time allocated to various activities and social contact by days of the week¹⁴⁰ demonstrated that that the time spent on various leisure and social activities were broadly equivalent between Saturdays and Sundays. Bittman’s findings are outlined in the table below.

20.14 Each of the findings presented in the right column of the table overleaf were endorsed by Professor Markey under cross examination¹⁴¹:

Activity engaged in	Time spent on Sat & Sun substantively higher than weekdays?	More time spent on Saturday or Sunday?
Eating with family	Only slightly higher	Sunday slightly higher
Leisure with friends, colleagues and neighbours	Yes	Saturday slightly higher
Leisure with kids	Yes	Sunday slightly higher
Family leisure time	Yes	Sunday slightly higher
Education	No	Equivalent
Social and community interaction	Yes	Equivalent
Voluntary activities and care activities	Yes	Equivalent
Recreation and leisure	Yes	Equivalent
Personal care activities	Yes	Sunday slightly higher

20.15 In summarising the above findings, Professor Markey agreed under cross examination that:

- (a) where there was a difference between time spent on an activity between Saturday and Sunday, the difference was “*slight*”; and
- (b) where there was a gap between time spent on activities on Saturdays and Sundays, such a gap was markedly different to the gap between the amount of time spent on these activities on the weekdays compared to the weekends.¹⁴²

¹³⁹ Exhibit ACTU-2

¹⁴⁰ Exhibit ABI-11

¹⁴¹ See T:28/10/2015 - PN20389 - PN20421

¹⁴² T.28/10/2015 - PN 20411

- 20.16 A 2014 study by Craig and Brown, *Weekend Work and Leisure Time with Family and Friends: Who Misses Out?*¹⁴³, was referred to in both the Markey Report and the Muurlink Report.
- 20.17 In their study, Craig and Brown analysed the shared leisure activities displaced by weekend work in three different types of households:
- (a) couples without children;
 - (b) couples with children; and
 - (c) singles with no children.
- 20.18 Craig and Brown found that there was no significant difference between the leisure time displaced by Saturday work and Sunday work for two of the three categories studied. That is, respondents in couples with children and singles with no children had their leisure time equally displaced, regardless of whether the weekend day worked was a Saturday or a Sunday.¹⁴⁴
- 20.19 Furthermore, Sunday was associated with less leisure times with friends across all three household types.¹⁴⁵
- 20.20 For only one household type, couples with children, Craig and Brown found that Sunday work displaced shared leisure time more than Saturday work.
- 20.21 Under cross examination, Professor Markey agreed that an accurate representation of Craig and Brown's findings would be that:
- (a) the loss of leisure time with friends as a result of working is more acute on Saturdays (than Sundays); and
 - (b) the loss of leisure time with family is more acute on Sundays for (only) one of the three subgroups that were the subject of the Craig and Brown study.¹⁴⁶
- 20.22 Dr Muurlink also agreed that, in terms of the "*time budget*" spent on weekends, a higher proportion of a family's time budget was only spent on Sundays for one subgroup of the three subgroups studied by Craig and Brown.¹⁴⁷

Productivity Commission Final Report

- 20.23 The Productivity Commission Final Report also analysed the questions of "*What do people do with their time?*" and "*Who do people spend their time with?*" in relation to weekday and weekend work.

¹⁴³ Exhibit ABI-12

¹⁴⁴ Exhibit ABI-12, page 717, paragraph 2

¹⁴⁵ Exhibit ABI-12, page 717, paragraph 3

¹⁴⁶ T:28/10/2015 - PN 20479

¹⁴⁷ T:4/11/2015 - PN21000

20.24 The Productivity Commission unsurprisingly identified that persons spent significantly more time with friends and family on both Saturdays and Sundays when compared to weekdays. Time spent with friends deviated most from weekdays on Saturdays, whereas time spent with family deviated most from weekdays on Sundays.¹⁴⁸

20.25 In relation to what people do with their time, the Productivity Commission found that:

“...there is very little difference in the degree to which people engage in social activities between Saturdays and Sundays (compared with weekdays). There is some difference in the types of engagements, but the largest deviation in social activities between weekends and weekdays - ‘social and community interaction’ - is actually higher on Saturdays.”¹⁴⁹

20.26 The Productivity Commission ultimately summarised the evidence considered by identifying that the difference between working on a Saturday and a Sunday was “*minimal*”¹⁵⁰.

Individual employee evidence

20.27 The expert and academic evidence referred to above was broadly consistent with the individual witness evidence given by individual employees engaged under the Restaurant Award and Retail Award.

20.28 This individual witness evidence indicated that, although some employees might consider Sunday to be of greater importance for social or family leisure activities, this view is not universally or majorly held.

20.29 Indeed, of the 10 employees who gave evidence across the Restaurant and Retail industries in relation to this topic, the majority (6) indicated that the level of social interference caused by working on a Saturday was either the same as or greater than the level of social interference caused by working on a Sunday.

Restaurant Award employees

20.30 Of the 4 employees called by the United Voice who were covered by the Restaurant Award, all 4 gave evidence that referred to a disability associated with working on the weekends.

20.31 A summary of the relevant evidence given under cross examination and re-examination is outlined overleaf. The summary identifies that, for these employees, as a general rule, Sunday was not the day upon which more interference was caused to the employee’s social and family life if the employee was required to work:

¹⁴⁸ Productivity Commission Final Report, page 436, Figure 12.1

¹⁴⁹ Productivity Commission Final Report, page 437

¹⁵⁰ Productivity Commission Final Report, page 437, page 441

Witness	Summary of evidence given	Outcome: Does Saturday or Sunday cause <u>more interference</u> into social/family life of the employee?
William King	<p>Mr King initially did not draw a distinction between Saturdays and Sundays in terms of the level of intrusion working made into his social life.¹⁵¹</p> <p>In re-examination, Mr King stated that, if anything, he had slightly more family events on Saturdays. He also stated that his social engagements were greater on Saturdays than Sundays.¹⁵²</p>	Saturday
RCI Witness 21	<p>RCI Witness 21 stated that there is no difference in the social intrusion caused by working a Saturday as compared to a Sunday. He did note that, in terms of evenings, he had more social commitments on a Saturday night than a Sunday night.¹⁵³</p>	Equivalent during the day Saturday at night
Jennifer Miller	<p>Intrusion caused on Sunday is worse, as Ms Miller has family commitments on Sundays.¹⁵⁴</p>	Sunday
Alexandra Kindness	<p>Ms Kindness initially stated that the level of social intrusion caused by working a Saturday or Sunday are the same.¹⁵⁵</p> <p>However, in re-examination Ms Kindness stated that the level of family intrusion and social caused by working a Saturday was greater than the level of family intrusion and social caused by working a Sunday.¹⁵⁶</p>	Saturday

¹⁵¹ T:22/9/2015, PN 8411, PN8413, PN8416-8417

¹⁵² T:22/9/2015, PN 8468, PN 8470

¹⁵³ T:22/9/2015, PN8664-PN8669

¹⁵⁴ T:22/9/2015, PN 8784

¹⁵⁵ T:22/9/2015, PN8667

¹⁵⁶ T:22/9/2015, PN866

Retail Award employees

20.32 Of the 7 employees called by the SDA who were covered by the Retail Award, 6 gave evidence that referred to a disability associated with working on the weekends.¹⁵⁷

20.33 A summary of the relevant evidence given by these 6 witnesses under cross examination and re-examination is outlined below. The summary identifies that, for at least half of these employees, the level of intrusion caused to the employees' social lives by working on Saturday was the same as the level of intrusion caused by working on a Sunday.

Witness	Summary of evidence given	Outcome: Does Saturday or Sunday cause <u>more interference</u> into social life of the employee?
SDA Witness 17	SDA Witness 17 confirmed that the level of intrusion caused by working on a Saturday as opposed to working on a Sunday is " <i>about the same</i> ". ¹⁵⁸	Equivalent
SDA Witness 18	SDA Witness 18 confirmed that, in relation to the weeks on his roster when he works weekends, the level of intrusion caused into his social life is the same on both Saturday and Sunday. ¹⁵⁹ SDA Witness 18 noted that, in terms of night times, he has more social commitments on Saturday nights than Sunday nights. ¹⁶⁰	Equivalent
SDA Witness 19	SDA Witness 19 stated that that the level of intrusion caused to her social life is about the same between Saturday and Sunday. ¹⁶¹	Equivalent

¹⁵⁷ One witness, SDA Witness 22 gave no evidence regarding any disability associated with working on a weekend. See Exhibit SDA-22

¹⁵⁸ T:20/10/2015, PN18037-18038

¹⁵⁹ T:20/10/2015, PN18087

¹⁶⁰ T:20/10/2015, PN 18088

¹⁶¹ T:21/10/2015, PN 18191 - 18193

SDA Witness 20	SDA Witness 20 stated that both Saturday and Sunday work intrude into her social life. ¹⁶² However, the level of intrusion was greater on a Sunday. ¹⁶³	Sunday
SDA Witness 16	SDA Witness 16 does not presently work on Saturdays. ¹⁶⁴ SDA Witness 16 was accordingly not asked whether Saturday or Sunday work intruded most into his social life. However, his evidence indicated that his “big social occasions” are on Sundays. ¹⁶⁵	Possibly Sunday*
SDA Witness 21	SDA Witness 21 was not asked whether Saturday or Sunday work intruded most into her social life. However, SDA Witness 21 does mention that Sundays are when her family and friends most often get together for social functions. ¹⁶⁶	Possibly Sunday*

* SDA Witness 16 and SDA Witness 21 were not directly asked whether Saturday work or Sunday work caused greater intrusion into their social lives. However, ABI/NSWBC/ACCI are willing to acknowledge that, based on their witness statements, their responses would possibly have indicated that the employees had greater existing social commitments on Sundays as opposed to Saturdays.

The Markey Report

20.34 The ACTU commissioned the Markey Report to obtain evidence regarding the continuing importance of the weekend to employees.

20.35 Markey asserts that Sundays continue to be more important than Saturdays in spite of claims to the contrary. This assertion is based upon three separate arguments raised by Markey:¹⁶⁷

- (a) Workers place a significant wage premium on Sunday work.
- (b) Workers are more likely to take issue with Sunday than Saturday work.
- (c) Sundays are more associated with work/life interference than Saturdays.

¹⁶² T:21/10/2015, PN 18251

¹⁶³ T:21/10/2015, PN 18252

¹⁶⁴ See Exhibit SDA-16 at [6]

¹⁶⁵ Exhibit SDA-16 at [14]

¹⁶⁶ Exhibit SDA-21 at [11]

¹⁶⁷ Exhibit ACTU-2, page vii

20.36 However, the basis underlying Markey's arguments are relatively unsound. For instance:

(a) Markey's argument regarding wage premiums sought by employees relies upon the findings of the Primary Rose Report.¹⁶⁸ However, the Markey Report does not take into account the phenomenon explained at paragraphs 20.10 to 20.11 above, namely, that the higher wage premiums sought for Sundays are likely influenced by the survey participants' knowledge that existing Sunday rates are considerably higher than rates for Saturday work. The fact that the survey participants sought Sunday rates of pay that were lower than the relevant Award Sunday penalties, even though they did not seek lower rates of pay for weekday and Saturday work, tends to suggest that the participants place a lower premium on the importance of Sunday than presently assumed in the award safety net.

(b) Markey's second and third arguments outlined at paragraphs 20.35(b) and 20.35(c) above appear to rely upon the work of Bittman, Craig and Brown and Skinner and Pocock. However:

(i) In relation to Bittman, we have already demonstrated at paragraphs 20.13 to 20.15 above that the Bittman does not identify a substantive difference in the interference caused between Saturday and Sunday work. As previously identified, Professor Markey agreed under cross examination that the Bittman research showed:

A where there was a difference between time spent on an activity between Saturday and Sunday, the difference was "*slight*"; and

B where there was a gap between time spent on activities on Saturdays and Sundays, such a gap was markedly different to the gap between the amount of time spent on these activities on the weekdays compared to the weekends.¹⁶⁹

(ii) In relation to Craig and Brown, Professor Markey agreed that an accurate representation of Craig and Brown's findings would be that:

A the loss of leisure time with friends as a result of working is more acute on Saturdays (than Sundays); and

¹⁶⁸ See Exhibit ACTU-2, page 17

¹⁶⁹ T.28/10/2015 - PN 20411

B the loss of leisure time with family is more acute on Sundays for (only) one of the three subgroups that were the subject of the Craig and Brown study.¹⁷⁰

(iii) In relation to the Skinner and Pocock research, Professor Markey acknowledges that, although Skinner and Pocock did identify greater work/life interference for those who worked “Sundays only” compared to those who worked “Saturdays only”, both groups had higher work life interference than those who worked no weekends.¹⁷¹ Skinner and Pocock were also not called as witnesses (and hence not the subject of any cross examination in the proceedings), thus preventing any proper opportunity to test the findings outlined in their report.

20.37 In addition to the above concerns, evidence contained within Exhibit AiG-12 suggests that the Markey Report was prepared with a relatively partisan approach in mind. This is evident from the Exhibit AiG-12 because the Exhibit, containing comments of Professor Markey’s research fellow, Dr McIvor, suggests that Dr McIvor and Professor Markey saw their role in preparing the report as one of being required to “refute” the employer case, as opposed to providing an independent review of the literature.

20.38 In any event, taking into account all the arguments and material referred to by Markey, although one might possibly be able to conclude that there is some difference in the interference caused between Saturday work and Sunday work, the difference is not “particularly acute” (as Markey suggests). The material identified above tends to suggest that any difference between the two days is only slight.

The Muurlink Report

20.39 The Muurlink Report also identifies “*particular consequences for working on Sunday*”.

20.40 Muurlink’s view that Sunday is “*different*” to other days was derived from three principal arguments. These were that:¹⁷²

- (a) Sunday is traditionally reserved to rest and for family activities and Sunday work most aggressively eats away at time spent on household activities.
- (b) Sunday is associated with the highest injury rates of any day of the week.
- (c) Sunday work is associated with an increase in health impairments.

¹⁷⁰ T:28/10/2015 - PN 20479

¹⁷¹ Exhibit ACTU-2, page 17 (footnote 4), see also Exhibit SDA 45, page 28 (Figure 13)

¹⁷² Exhibit UV-26, page 22

20.41 However, the evidence underlying much of Muurlink's arguments was either unsound, inapplicable to Australian society or influenced by factors that are unrelated to the day on which work is performed. For instance:

- (a) Muurlink's argument that Sunday is traditionally reserved to rest and for family activities and aggressively eats away at time spent on household activities is derived from the Bittman, Craig and Brown and Skinner and Pocock studies already discussed earlier above:
 - (i) In relation to Bittman, we repeat the submissions at paragraph 20.36(b)(i) above.
 - (ii) In relation to Craig and Brown, we repeat the submissions at paragraph 20.36(b)(ii) above and further note that Dr Muurlink agreed under cross examination that, in terms of the "*time budget*" spent on weekends, a higher proportion of a family's time budget was only spent on Sundays for one subgroup of the three subgroups studied by Craig and Brown.¹⁷³ For the other two subgroups studied, Dr Muurlink agreed that there was "*no difference*" between Saturday and Sunday.¹⁷⁴
 - (iii) In relation to Skinner and Pocock, we repeat the submissions outlined at paragraph 20.36(b)(iii) above.
- (b) Muurlink's arguments that Sunday is associated with the highest injury rates of any day of the week exclusively relied upon a study by Brogmus.¹⁷⁵ This Study cannot be relied upon to establish that working Sunday itself causes higher injuries for the reasons already identified at paragraph 18.8(a) above.
- (c) Muurlink's findings that Sunday work is associated with an increase in health impairments have already been extensively discussed at paragraphs 18.5 to 18.8 above and, for the reasons identified, these findings are inherently unreliable.

20.42 As previously sated, Dr Muurlink's thesis is not that Sunday work is bad from a health perspective. It is that:

- (a) consecutivity, overload, uncontrollability, unpredictability, asynchronicity and arrhythmia cause adverse health consequences;¹⁷⁶ and

¹⁷³ T:4/11/2015 - PN21000

¹⁷⁴ T:4/11/2015 - PN21000

¹⁷⁵ Exhibit UV-26, page 93

¹⁷⁶ T:4/11/2015 - PN 20955 - PN 20963

- (b) people who work Sundays may be subject to some of these factors as part of their entire working week. However, the factors would affect all of their days of work, as opposed to just Sundays.

The Charlesworth & MacDonald Report

20.43 The Report prepared by Professor Sara Charlesworth and Dr Fiona Macdonald dated 31 August 2015 relating to AWALI survey data¹⁷⁷ (**Charlesworth/McDonald Report**) also purports to identify substantive differences relating to the impact of Saturday work versus Sunday work. The Report is separated into two parts:

- (a) Part A provides an analysis of the 2014 AWALI Survey; and
- (b) Part B provides qualitative analysis of the 2014 AWALI Survey results.

20.44 For the sake of completeness, it is noted that the AWALI survey measured the impact of work on respondents' time available and capacity to engage in non-working activities by reference to five indicators of work-life interaction. The greater the level of interference, the higher the 'AWALI score' a respondent receives.¹⁷⁸

Part A: Professor Charlesworth

20.45 Professor Charlesworth authored Part A of the Charlesworth/McDonald Report. Her findings included that sometimes/often/almost always working Sundays alone or in combination with Saturdays was associated with statistically significant higher AWALI scores than sometimes/often/almost always working Saturdays alone.¹⁷⁹

20.46 There are, however, numerous issues with this finding and the AWALI data upon which it is based:

- (a) Firstly, there is no information regarding the non-work activities which have been interfered with. There is no information regarding the importance of these activities to the employees surveyed.¹⁸⁰ This is to be contrasted with the work of Professor Rose, who asked survey respondents to value their time by reference to the activities they perform during a particular period - giving context to the answers.
- (b) Secondly, no information is provided regarding whether the employees who worked weekends also worked during the week.¹⁸¹ No indication is given in the results regarding whether the activities interfered with by work were different for

¹⁷⁷ Exhibit SDA-43

¹⁷⁸ Exhibit SDA-43, page 5

¹⁷⁹ Exhibit SDA-43, page 8

¹⁸⁰ T:15/12/2015 - PN23710

¹⁸¹ T:15/12/2015 - PN 23711 - 23712

those who worked weekends as part of ordinary hours and those who worked weekends as part of overtime. These are important factors which would no doubt influence the extent to which work interferes with non-work activities.

- (c) Thirdly, no indication is given about how much non-working time is interfered with. Employees simply indicated whether work sometimes/often/almost always found that weekend work interfered with non-work activities. Data about the quantum and value of the time interfered with is not collected or represented in the Report.¹⁸²
- (d) Fourthly, the AWALI survey collects no data in relation to positive aspects associated with working.¹⁸³ It simply directs attention towards negative outcomes associated with work. The results would be more balanced if data relating to the positive and negative aspects of working on weekends was gathered together and the results considered cumulatively.
- (e) Fifthly, the CATI methodology used to collect the survey data relies on respondents having landline phones. This tends to bias survey results against young people.¹⁸⁴ Although the responses were ultimately weighted by reference to respondent age, no employees under the age of 18 participated in the survey. This means that no input from young employees (aged below 18) is represented in the survey results.¹⁸⁵

20.47 In addition to the above concerns, the results reported by Professor Charlesworth relate to *all employees*. Professor Charlesworth did not assess whether there was a statistically significant difference in the retail industry responses between the AWALI scores associated with working on Saturday compared directly with the AWALI scores associated with working on Sunday. Professor Charlesworth was unable to conduct this analysis (and unable to indicate whether there is any statistical difference) due to the small cell size of the results relating to the retail industry.¹⁸⁶

20.48 What we do know about the retail industry, based on the Charlesworth/McDonald Report is that:¹⁸⁷

- (a) employees who worked on Saturdays were more than three times as likely as those who do not to report that their work almost always or often interfered with ability to develop connections and friendships in their community; and

¹⁸² T:15/12/2015 - PN23719

¹⁸³ T:15/12/2015 - PN 23775 - PN 23782

¹⁸⁴ T:15/12/2015 - PN 23830

¹⁸⁵ T:15/12/2015 - PN 23644

¹⁸⁶ T:15/12/2015 - PN 23953 - PN 23965

¹⁸⁷ Exhibit SDA-43, page 8 at [19]-[20]

- (b) employees who worked on Sundays were around three times as likely as those who do not to report that their work almost always or often interfered with ability to develop connections and friendships in their community.

20.49 Even if the Commission was to rely upon the findings in the Charlesworth/McDonald Report to conclude that, for all employees, there was some statistical difference between the interference caused on Sunday and Saturday work, the reality is that both Saturday and Sunday work were found to be individually significantly more likely to create interference with non-work activities than weekday work.¹⁸⁸ The fact that there may be some difference between Saturday and Sunday does not detract from the argument that, as a whole, Saturday and Sunday together stand out above weekday work in terms of the interference caused to personal lives.

Part B: Dr Macdonald

20.50 Dr Macdonald conducted a qualitative analysis to investigate the nature of work-life interference for retail employees working on weekends and Sundays in particular.

20.51 Dr Macdonald formed a conclusion that the view that Sunday was “*different and not a regular work day*” was held by almost all employees interviewed.

20.52 However, this finding is rendered unreliable for numerous reasons:

- (a) Firstly, by conducting a qualitative analysis, the findings presented cannot be said to be representative of the population as a whole. The survey sample is very small (25 employees), there is no analysis conducted in order to determine whether the respondents are representative of the total population in relation to any key demographics (such as age, geographic location, employment status, seniority, etc) and the responses have not been weighted in any way. All that can be concluded from the findings is that the issues reported are the types of issues that are affecting employees working in the retail industry.

- (b) Secondly, the questions asked by Dr Macdonald’s team of the employees were leading. Questions asked of employees included the following:

“And so do you regard working on Sundays as different from working on another day?”¹⁸⁹

“Does/did working on Sundays interfere with you responsibilities or activities outside work at all?”¹⁹⁰

¹⁸⁸ See Exhibit SDA-43, page 8 at [17]-[20], pages 9-10 at [24] - [27], page 11 at [33]-[34]

¹⁸⁹ Exhibit SDA-43, page 21 at [44]

¹⁹⁰ Exhibit SDA-43, page 51

“Does/did working on Sundays affect your involvement in:

(i) household and family responsibilities (spending time with family/food shopping, children’s activities);

(ii) sporting activities/(playing, watching, keeping fit);

(iii) social activities (catching up with friends);

(iv) community activities/responsibilities (church, voluntary work, children’s school);

(v) relaxing/time for yourself (personal admin)”¹⁹¹

“Is it important to you that you get a higher hourly rate for Sundays? Why? Why not?”¹⁹²

Questions were not asked in these terms about Saturdays. On the contrary, fewer and different questions were asked about the interference involved in working Saturdays. Indeed, there were 10 questions asked specifically in relation to the interference associated with Sunday work compared to only 3 questions asked about the interference associated with Saturday work.¹⁹³ By way of example, matters such as whether employees wished to receive higher pay on Saturday and whether they regarded Saturday as being different from other working days were completely ignored in questioning about Saturdays.

- (c) Thirdly, the interview transcripts from which Part B of the Charlesworth/McDonald Report is derived¹⁹⁴ actually demonstrate that, for many of the interviewees, there was not a difference between the disability associated with Saturday and Sunday work. The relevant parts of the interviews that demonstrate this fact are annexed at Schedule 1 to these submissions.
- (d) Fourthly, it became apparent from the cross examination of Dr Macdonald that comments in which Saturdays and Sundays were viewed as similar or equivalent were not reported upon by Dr Macdonald. All comments made during the interviews relating to Sunday and Saturday having a similar level of interference were omitted from Dr Macdonald’s report. This is demonstrated in the cross examination from transcript of 15 December 2015 from PN24206 to PN24418.

20.53 In light of these matters, the findings of Dr Macdonald in relation to the differences between Saturday and Sunday work are simply unreliable.

¹⁹¹ Exhibit SDA-43, page 51

¹⁹² Exhibit SDA-43, page 52

¹⁹³ Exhibit SDA-43, pages 51-52

¹⁹⁴ Exhibit Retail-11

Conclusions regarding the evidence presented

20.54 The analysis of all of the above evidence presented by individual employees, surveys commissioned, expert reports and academic literature demonstrates that there is positive and reliable evidence to suggest that, in respect of employees engaged in the retail and restaurant industries:

- (a) The disability associated with working on a Saturday is generally equivalent to the disability associated with working on a Sunday.
- (b) It is only sometimes (and for some employees) that the disability associated with working on a Sunday is greater than the disability associated with working on a Saturday.
- (c) Even where the disability associated with working on a Sunday is greater than the disability associated with working on a Saturday, the difference between the two days is very slight.

20.55 There is no credible or reliable evidence to suggest that the disability associated with working on a Sunday is substantively greater than the disability associated with working on a Saturday for employees working in the retail or restaurant industries.

20.56 The evidence certainly does not establish, and indeed contradicts, a conclusion that Sunday work causes 50% or 75% more interference with employee non-work activities than Saturday work.

21. IN SOME INDUSTRIES, PARTICULARLY RETAIL, EMPLOYEES KNOW AND ACCEPT THAT WORKING IN THE INDUSTRY NECESSARILY INVOLVES WEEKEND WORK

21.1 The evidence before the Full Bench in these proceedings discloses that working weekends is common practice within the retail industry with nearly three quarters (72%) of shopfloor employees working weekends.¹⁹⁵

21.2 The prevalence of weekend work in this industry means that in entering the retail workforce, it is reasonable to expect that an employee will understand that weekend work is an ordinary component of their job. Prospective employees in the retail industry also will likely have familiarity with the weekend activities of retail outlets as consumers themselves.

21.3 The proposition that retail employees have an understanding that they will be required to perform weekend work in entering the industry was supported by the retail industry employees who gave evidence in these proceedings. The effect of this evidence was as follows:

¹⁹⁵ See Exhibit Retail-2, Annexure SS2 at page 63

DEPONENT	EFFECT OF EVIDENCE
SDA Witness 17 ¹⁹⁶	<p>When applying for her job SDA Witness 17 understood that the business was a retail business that was open on the weekends, that she would be required to work on weekends and that it was <i>“expected of you”</i> to work on weekends.</p> <p>SDA Witness 17 <i>“did not know of any retail jobs”</i> that don't require you to work on weekends.</p>
SDA Witness 18 ¹⁹⁷	<p>When applying for his job he understood he would be working Sundays and agreed to take the job on that basis.</p>
SDA Witness 19 ¹⁹⁸	<p>When applying for her job she understood that the business was a retail business that was open on the weekends and that by the nature of the business that you would be working on the weekends including Sunday.</p>
SDA Witness 20 ¹⁹⁹	<p>When applying for her job she understood that the business was a retail business that was open seven days a week.</p> <p>She volunteered to work weekends.</p> <p>When she moved from casual to part-time she accepted that she was going to work Saturdays and Sundays.</p>
SDA Witness 21 ²⁰⁰	<p>That when applying for her job she understood that the business was a retail business that was open seven days a week.</p> <p>By accepting the job she were going to work on the weekends.</p>
SDA Witness 22 ²⁰¹	<p>When applying for her job she understood that the business was a retail business that was open seven days a week.</p> <p>When accepting employment, she was aware and accepted work on Saturdays and Sundays.</p>

¹⁹⁶ See T:20/10/2015 PN17991-PN17995

¹⁹⁷ See T:20/10/2015 PN18065 - PN18068

¹⁹⁸ See T:21/10/2015 PN18148 - PN18152

¹⁹⁹ See T:21/10/2015 PN18229- PN18232

²⁰⁰ See T:21/10/2015 PN18275- PN18278

²⁰¹ See T:21/10/2015 PN18337- PN18339

21.4 In the Restaurant Industry, a similar prevalence of weekend work exists. As noted in the Jetty Research Survey identified in the statement of James Parker,²⁰² 90% of respondents opened on Sunday or Public Holiday.²⁰³

21.5 This was reflected in the evidence of the employee witnesses called in relation to the Restaurant Award with one particular witness, William King, providing an appropriate summary of the prevalence of weekend work in the restaurant industry when he accepted that working mostly weekends and evenings and public holidays went “*hand in hand*” with the industry.²⁰⁴

22. EMPLOYEES DO WISH TO BE PAID A PREMIUM TO WORK SUNDAYS HOWEVER, THE PREMIUMS SOUGHT BY EMPLOYEES IN ORDER TO WORK ARE LOWER THAN THE PREMIUMS PRESENTLY IMPOSED BY THE RETAIL AWARD

22.1 The Primary Rose Report sought to assess the value employees place on time by assessing the rate of pay a random sample population in the restaurant and retail industries would require in order to be willing to accept shifts at particular times of the week.

22.2 Although primarily focused on public holidays, the Primary Rose Report also collected data relating to Saturday and Sunday work.

22.3 The key findings of the Primary Rose Report are identified at page vii of the Report. They demonstrate that, on average, employees sought to be paid as follows:

Restaurant Industry:

(a) On average, Restaurant Award employees were willing to accept work for \$21.50 per hour during a normal working week.²⁰⁵ This amount sits towards the higher end of the rates of pay in the Restaurant Award. However, this result is not surprising, given that many of the employees surveyed were paid above award rates.²⁰⁶ Indeed, the average rate of pay reported by respondents was \$21.92. This means that the average amount sought for work during the normal working week was 97.93% of the amount presently paid the relevant employees.

(b) On average, employees sought a higher amount to be paid to them on Sundays, representing a 146.21% loading on their pay expectations for normal weekday work.

²⁰² See Exhibit RCI-18 at [15(a)]

²⁰³ Exhibit RCI-18 at [15(a)]

²⁰⁴ See T:22/09/2015 PN8374

²⁰⁵ Exhibit ABI-1, page 42

²⁰⁶ Exhibit ABI-1, page 20

Retail Industry:

- (c) On average, Retail Award employees were willing to accept work for \$24.60 per hour during a normal working week. This amount sits slightly above the rates of pay in the Retail Award. However, this result is not surprising, given that many of the employees surveyed were paid above award rates.²⁰⁷ Indeed, the average rate of pay reported by respondents was \$21.95. This means that the average amount sought for work during the normal working week was 112% of the amount presently paid the relevant employees.
- (d) On average, employees sought a higher amount to be paid to them on Sundays, representing a 156.93% loading on their pay expectations for normal weekday work.

22.4 The inference that arises from the above analysis is that employees do wish to be paid a premium for working on Sundays as compared to their weekday pay. However, the value of the premium sought by employees is substantially less than the premium presently applicable under the Retail Award, where the penalty loading for Sunday work amounts to 200% of the normal weekly rate of pay.

22.5 This finding is reinforced by Figure 55 of the Sands Report, which demonstrated that employee willingness to work a Sunday increases substantially when a penalty is applied from between 0% and 50%. However, the willingness to work Sunday increases only at an incremental rate as the penalty increases from between a 50% loading to a 100% loading.²⁰⁸

22.6 Whatever the disability that is associated with Sunday work, it is apparent employees consider that the amount required to compensate for the disability is lower than what has traditionally been granted under the Retail Award.

23. THE HISTORICAL RATIONALE FOR THE IMPOSITION OF A HIGHER SUNDAY RATE IS NO LONGER APPLICABLE TO TODAY'S SOCIETY

23.1 The effect of the findings identified at sections 19 and 20 above is that the traditional rationales that applied to imposing higher Sunday penalties are no longer applicable:

- (a) Sunday is no longer the day of religious observance for the vast majority of Australians;
- (b) Sunday is no longer the principal day associated with family reunion;
- (c) Sport is now played on both Saturdays and Sundays;

²⁰⁷ Exhibit ABI-1, page 20

²⁰⁸ Exhibit Retail-2 at page 77

- (d) Sunday is no longer clearly the day that is most valuable for rest and amenity; and
- (e) Sunday no longer holds a “very special position” within Australian society.

23.2 Rather, Sunday shares all of the above characteristics, save for that relating to Christian religious observance (which is no longer applicable to any day for the majority of Australians), with Saturdays. Generally, the weekend days are equivalent.

23.3 Taking the union case at its absolute highest, the Commission might conclude that Sunday is slightly more important for some members of the community. However, the analysis identified at section 21 above identifies that the premium the Retail Award presently applies for Sunday works far exceeds the premium employees themselves consider should be applied to rates of pay for these days.

23.4 Given the unique importance of weekend trading to the Retail Industry, it is respectfully submitted that the continuing practice of penalising Sunday work in this industry at a far higher rate than that of other days is anachronistic.

24. THERE IS SOME DISABILITY ASSOCIATED WITH WORKING ON PUBLIC HOLIDAYS, HOWEVER, THE DISABILITY ASSOCIATED WITH WORKING ON PUBLIC HOLIDAYS VARIES MARKEDLY DEPENDING UPON THE PARTICULAR HOLIDAY THAT IS WORKED

24.1 The Primary Rose Report analysed the level of knowledge about and importance of public holidays for employees, before analysing the value of time on public holidays.

Knowledge of public holidays

24.2 Employee knowledge of the existence of public holidays varied greatly depending on the particular public holiday.²⁰⁹ By way of example, Easter²¹⁰, Christmas Day, Anzac Day and Australia Day were all recalled by more than half of the respondents to Rose’s survey. On the other hand, some of the State based public holidays were not recalled by many employees, with less than 7% of employees recalling State based holidays such as the Melbourne Cup, Adelaide Cup, Hobart Show day, etc.

Different importance placed on public holidays

24.3 When it came to rating public holidays by importance, employees were asked to apportion a value to each public holiday (out of a total of 100 points) and clear distinctions emerged:

²⁰⁹ Exhibit ABI-1 at page 25

²¹⁰ Easter refers to the grouping of Easter public holidays together (Good Friday, Easter Monday, etc)

Most important days

Public holiday	Value attributed²¹¹
Christmas Day	27.2
New Years Day	14.9

Important days

Boxing Day	9.42
Australia Day	9.2
Anzac Day	7.34
Good Friday	7.69

Least important days

Easter Monday	5.14
State based public holidays (8 hour day/show days/cup days)	3.44
Labour Day	2.61
Queen's Birthday	2.65

24.4 What emerges from the above analysis is that not all public holidays are the same. Employee views on the importance of public holidays vary greatly depending upon the identity of the particular public holiday.

24.5 In the submissions that follow at section 27.60 below, it will become apparent that those days which are of more importance to employees are also the days upon which:

- (a) employers are more likely to close their businesses; and
- (b) wage costs have a lower influence on the decision made by employers regarding whether to open or close their business.

24.6 What this demonstrates is that certain public holidays appear to have a universal importance. This is, however, a feature that is not shared by all public holidays. The disability associated with working public holidays accordingly varies, depending upon the identity of the public holiday being worked.

²¹¹ Value is derived from the average across all States

25. EMPLOYEES DO WISH TO BE PAID A PREMIUM TO WORK PUBLIC HOLIDAYS, HOWEVER, THE PREMIUMS SOUGHT BY EMPLOYEES ARE LOWER THAN THE PREMIUMS PRESENTLY IMPOSED BY THE RELEVANT AWARDS

25.1 The key findings of the Primary Rose Report have been discussed at section 22 above. In relation to public holidays the Rose Report demonstrates as follows:

Restaurant Industry:

- (a) On average, the amount sought for work during the normal working week was 97.93% of the amount presently paid to the relevant employees.
- (b) On average, employees sought a higher amount to be paid to them on public holidays, ranging from an average penalty loading of 124% for a weekday public holiday to an average penalty loading of 155% for a Sunday public holiday loading.

Retail Industry:

- (c) On average, the amount sought for work during the normal working week was 112% of the amount presently paid to the relevant employees.
- (d) On average, employees sought a higher amount to be paid to them on public holidays, ranging from an average penalty loading of 164% for weekday public holidays to an average penalty loading of 224% for Sunday public holidays.

25.2 The inference that arises from the above analysis is that employees do wish to be paid a premium for working on public holidays. This premium is greater than the premium employees sought to work Saturdays or Sundays.

25.3 However, the premium sought by employees is substantially less than the premium presently applicable under both the Restaurant and Retail Awards, where the penalty loading for all public holiday work amounts to 250% of the normal weekly rate of pay.

25.4 Whatever the disability that is associated with public holiday work, it is apparent employees consider that the amount required to compensate for the disability is lower than what has traditionally been granted under the Retail and Restaurant Awards.

26. THE REGULATION OF WORK ON PUBLIC HOLIDAYS HAS CHANGED, WARRANTING A NEW APPROACH TO THE ENGAGEMENT AND REMUNERATION OF EMPLOYEES ON PUBLIC HOLIDAYS

26.1 It is apparent from the materials outlined above that the legislative, industrial and social context in which work is performed on public holidays has been fundamentally transformed.

- 26.2 The traditional position of public holidays as a limited number of sacrosanct days on which work was prohibited, not possible or actively discouraged simply no longer exists.
- 26.3 As identified at paragraphs 13.13 to 13.21 above, shop trading in Australia has been liberalised in respect of a number of public holidays, allowing trading on those days. As identified at section 24 above, employee knowledge and recall of public holidays is also comparatively low, demonstrating a declining social significance (particularly in respect of the Queen's Birthday, State public holidays, Labour Day and Easter). Further, with the recent example of the "*Friday before the AFL Grand Final*" Public Holiday, the prevalence of public holidays has increased over time.
- 26.4 As noted previously, the traditional Public Holiday rate of 250% developed in a context where employees were compelled to perform work and were compensated accordingly. Such conditions no longer apply.
- 26.5 Section 114(1) of the FW Act entitles all employees to a day off on a public holiday. Where an employer requests the employee to work, the employee is protected by a requirement that such a request is reasonable and further by the fact that the employee can reasonably refuse the request.
- 26.6 It is in this context where work on a public holiday is for all intents and purposes voluntary that the rationale behind ABI and NSWBC's claims to reduce the public holiday rates in the Restaurant and Retail Award is particularly clear.
- 26.7 In the submission of ABI and NSWBC, on a public holiday on which their work is reasonably requested, a full-time or part-time employee is offered a choice. He or she can refuse the request on reasonable grounds and receive, as is his or her entitlement, one ordinary day's pay. Where an employee voluntarily chooses to work however, the employee should receive, in addition to their entitlement to one day's ordinary pay, an additional day's pay for their worked performed (thereby making a pay rate of 200%). In circumstances where the performance of work is voluntary, and in the context of the evidentiary case outlined above, there does not appear to be a basis for compensating employees beyond a rate of 200%.
- 26.8 In respect of casual employment, as a matter of law, casuals are not obligated to accept any particular shift and are not contractually guaranteed, nor required to undertake, ongoing work. Casuals are further protected by the terms of s 114(1) of the FW Act which entitles a casual employee a day off on a public holiday. In the submission of ACCI, ABI and NSWBC, this means that under the FW Act, the decision to work on a public holiday for a casual employee is a voluntary one, and not one which requires compensation beyond that which the employee would be entitled to for their work. For those casual employees with no

entitlement to payment when not working, this means that performance of work on a public holiday should, in the submission of ACCI, ABI and NSWBC, be paid out at 125%.

27. THE IMPOSITION OF PENALTY RATES ON SATURDAYS, SUNDAYS AND PUBLIC HOLIDAYS DOES NEGATIVELY IMPACT ON EMPLOYMENT LEVELS ON THESE DAYS

27.1 There has been a substantial contest in these proceedings regarding the extent to which penalty rates adversely impact upon the decision by employers to employ staff.

27.2 We analyse the expert evidence, survey evidence, individual operator evidence and certain employee evidence given in the proceedings in the paragraphs that follow to demonstrate that, when considered on an overall basis, the evidence does establish that penalty rates adversely affect employment levels.

Expert Evidence - Professor Lewis

27.3 The Lewis Report addresses the impact of penalty rates on employment from both the demand and supply side.

27.4 In relation to the demand side, Professor Lewis reasons that the impact of wage increases in a particular industry can be predicted by the elasticity of demand for labour and the price elasticity of demand for the services of the industry.²¹² Based upon a number of empirical studies, Professor Lewis calculated a formula reflecting the elasticities for the demand for services as against the elasticity for the demand of labour in the restaurant and retail industries.²¹³

27.5 Although Professor Lewis' preferred estimates identify significant reductions in employment arising from the imposition of both Sunday and public holiday penalty rates across both casual and permanent employment²¹⁴, all of the estimates outlined in Professor Lewis's calculations (including those he does not prefer) identify some reductions in employment arising from the imposition of penalty rates. Depending upon the assumptions used, Professor Lewis' calculations indicate that:

- (a) In the retail industry:
 - (i) penalty rates for work on Sundays by permanent employees are projected to reduced demand for labour between 16% and 78% in the long run and 24% and 87% in the short run, compared to what employment would be without penalty rates;²¹⁵

²¹² Exhibit ABI-3, page 24

²¹³ Exhibit ABI-3, pages 24- 26

²¹⁴ Exhibit ABI-3, pages 29- 30

²¹⁵ Exhibit ABI-3, page 29

- (ii) penalty rates for work on Sundays by casual employees are projected to reduce demand for labour by between 40% and 86% in the long run and 40% and 92% in the short run, compared to what employment would be without penalty rates;²¹⁶
 - (iii) penalty rates for working public holidays by permanent employees would reduce demand for labour by 2% to 66% in the long run and 11% to 80% in the short run of what employment would be without penalty rates; and²¹⁷
 - (iv) penalty rates for working public holidays by casual employees would reduce demand for labour by 21% to 73% in the long run and 29% to 84% in the short run of what employment would be without penalty rates.²¹⁸
- (b) In the restaurant industry:
- (i) penalty rates for work on Sundays by permanent employees are projected to reduced demand for labour between 16% and 75% in the long run and 24% and 75% in the short run, compared to what employment would be without penalty rates;²¹⁹
 - (ii) penalty rates for work on Sundays by casual employees are projected to reduce demand for labour by between 60% and 95% in the long run and 60% and 97% in the short run, compared to what employment would be without penalty rates;²²⁰
 - (iii) penalty rates for working public holidays by permanent employees would reduce demand for labour by 2% to 25% in the long run and 11% to 25% in the short run of what employment would be without penalty rates,²²¹ and
 - (iv) penalty rates for working public holidays by casual employees would reduce demand for labour by 34% to 77% in the long run and 23% to 86% in the short run of what employment would be without penalty rates.²²²

27.6 Professor Lewis concludes that employment in the industries is much less than would be the case if there were no penalty rates. He notes that businesses will likely react to penalty rates in a variety of ways:

²¹⁶ Exhibit ABI-3, page 30

²¹⁷ Exhibit ABI-3, page 29

²¹⁸ Exhibit ABI-3, page 30

²¹⁹ Exhibit ABI-3, page 29

²²⁰ Exhibit ABI-3, page 30

²²¹ Exhibit ABI-3, page 29

²²² Exhibit ABI-3, page 29

*“Several possibilities suggest themselves. Businesses will close on these days, make greater use of owner and family labour, or may choose to hire the absolute minimum amount of hired labour if they think it important to remain open as part of their business strategy; or are contractually obliged to open in, for instance, shopping malls.”*²²³

Expert Evidence - Professors Quiggin, Borland and Markey

27.7 The union parties to the proceedings filed the following reports in response to the Lewis Report:

- (a) a report titled *Effects of penalty rates in the restaurant sector* by Professor John Quiggin dated August 2015²²⁴ (**Quiggin Report**);
- (b) a report titled *Report by Professor Jeff Borland* dated 3 September 2015²²⁵ (**Borland Report**); and
- (c) the Markey Report.

27.8 Key criticisms that were raised of the Lewis Report include that:

- (a) Lewis’s review of the literature was misleading and overstated the correlation between minimum wages and employment levels.
- (b) The elasticity of demand adopted by Lewis is higher than that adopted in other literature.
- (c) By assuming penalty rates are being ‘imposed’ rather than ‘removed’ the outcome of Lewis’ findings represents an upper bound of the impact of penalty rates.
- (d) Lewis assumes business operators only assess the viability of their businesses on a ‘single-day’ model as opposed to a ‘multiple days’ model.
- (e) Lewis ignored the fact that, if there is a reduction in demand caused by penalty rates applying at certain time, this demand would simply shift to other days of the week - thus resulting in a zero impact on employment.

27.9 There are legitimate responses that either negate or reduce the impact of each of these criticisms.

²²³ Exhibit ABI-3, page 42

²²⁴ Exhibit UV-24

²²⁵ Exhibit UV-25

Criticisms (a) to (c) - Literature review/overstatement of applicable elasticity/
representation of upper bound of impact

- 27.10 Lewis is firstly criticised for referring to literature applicable to the studies of minimum wages, as opposed to literature relating to the impact of penalty rates (of which there is very little). He is also criticised for not referring to literature that yielded lower impacts regarding the impact of wages on employment.²²⁶ However, Lewis responds to this criticism by identifying that his literature review does not rely upon on establishing the impact of penalty rates simply by adopting the findings about the impact of minimum wages. Rather, Professor Lewis's reliance upon minimum wages literature is to simply establish the principal that there is substitution between hired labour and other inputs in response to wage rates. He relies on these studies to establish that substitution of hired labour does occur.²²⁷
- 27.11 Secondly, in relation to the elasticities of substitution adopted by the Lewis Report, both the Borland and Quiggin Reports criticise the Primary Lewis Report for adopting excessively high elasticities. However, Professor Lewis contends that the elasticities he adopted (-0.6 to -0.8) fall within the range of estimates contained in the Australian literature (which range from -0.3 to -0.8).²²⁸
- 27.12 Thirdly, Professor Borland identifies that, by assuming penalty rates are being *imposed* as opposed to being *removed*, the impact of penalty rates has been magnified by Professor Lewis. This is because the quantum of the penalty rate as a proportion of an employee's wage is higher if the normal weekly wage is being increased, as opposed to if the penalty rate payment is decreased to the normal weekly wage.²²⁹ Professor Lewis accepts this phenomenon in the Professor Lewis Reply Report to Professor Borland (**Lewis Reply to Borland**)²³⁰ and accepted that alternative approaches (including using the so called "*mid-point formula*") could have generated different outcomes. Importantly, however:
- (a) the reality is that penalty rates are presently being imposed on employers as opposed to being removed. Employers ordinarily pay a normal weekly rate of pay to employees and it is this weekly rate that is increased on weekends and public holidays. Therefore, when one assesses the impact upon employment caused by penalty rates, one should be looking at how employers react to the increase to rates of pay on Sundays and public holidays; and

²²⁶ Exhibit UV-25, pages 5-6

²²⁷ Professor Lewis Reply Report to Professor Quiggin (**Lewis Reply to Quiggin**), Exhibit ABI-4, page 6

²²⁸ Exhibit ABI-4, page 7

²²⁹ Exhibit UV25, page 18

²³⁰ Exhibit ABI-5, page 27

(b) even if one was to adopt the midpoint formula, Professor Lewis still identifies a 20% reduction in employment levels on Sundays in the Restaurant Industry.²³¹

27.13 Notwithstanding the criticisms outlined above, and whilst there may be significant debate about the size of the actual impact of wage rates on employment, both Professor Quiggin and Professor Borland accepted under cross examination that there is some negative impact upon employment caused by increases to minimum wages.²³² What is disputed is the size of the impact.

27.14 Furthermore, when it comes to the imposition of substantial wage increases, Professors Quiggin, Borland and Markey all agreed that substantial wage increases could have substantive negative impacts on employment.²³³ This is a view that is echoed by the OECD, which identifies variously that:

(a) minimum wages should not be set too high, otherwise they can lead to job losses;²³⁴ and

(b) substantial job losses are unlikely to arise provided that minimum wages are kept to “reasonable levels” and that increases to the minimum wage are kept “moderate”.²³⁵

27.15 Although the above views derive from increases to the minimum wage, it is rational to assume that if substantial increases to the minimum wage would result in job losses, substantial increases to certain wage rates that fall within the minimum safety net (such as penalty rates) would have a similar affect.

27.16 Professors Quiggin and Markey both accepted under cross examination that the types of increases imposed by penalty rates in the Restaurant and Retail Award were “substantial”.²³⁶ Applying the minimum wage literature to the imposition of penalty rates on Sundays and public holidays, Professor Quiggin further accepted that these penalty rates were sufficiently high to have a substantial dis-employment effect, stating:

“We’ll certainly see substantial lower employment on Sundays which is indeed the intention of the penalty rates to set aside Sunday in particular more than Saturday as a day when people aren’t expected to work...”²³⁷

²³¹ Exhibit ABI-5, pages 25-26

²³² T:1/10/2015 - PN 11288 - PN11290, PN11675

²³³ T:1/10/2015 - PN 11294 - PN11295, PN 11691 - PN 11693 ; T:28/10/2015 - PN 20499

²³⁴ Exhibit ABI-12, page 17

²³⁵ Exhibit ABI-12, page 21

²³⁶ T: 1/10/2015 - PN 11406 - 11411; T: 28/10/2015 - PN 20504 - PN 20519. Although Professor Quiggin was not explicitly asked about public holiday penalties, his acceptance that the increases from the weekday rate to the Saturday/Sunday penalty rate were substantial naturally results in a conclusion that the increase to the public holiday penalty rate is also substantial, given that the public holiday penalty rate is higher than the Saturday/Sunday penalty rate.

²³⁷ T: 1/10/2015 - PN 11411

27.17 In fairness to Professor Quiggin, it should be noted that the Professor qualified the above view by stating that the dis-employment effect he predicted on Sundays would be offset by increased employment at other times of the week. However, this caveat is dealt with separately at paragraphs 27.23 to 27.26 below.

Criticism (d) Lewis assumes operators adopt a ‘single-day’ model

27.18 The Borland Report contends that businesses open on more days than those that attract penalty rates and, accordingly, one needs to adopt a model that takes into account the impact of penalty rates over the whole period in which the business is open.²³⁸

27.19 The Quiggin Report echoes this criticism and notes that, if the impact of penalty rates is aggregated across an entire working week, the Sunday penalty rate reductions proposed by employer parties would amount to a wage cut of 2.6% and an overall reduction in operating expenditure of 0.8%.²³⁹

27.20 The Quiggin and Borland Reports rely upon an assumption that operators do not consider the profitability of trading on a particular day, but simply consider profit as something which is generated on a weekly or monthly basis.

27.21 Their approach is flawed. As Professor Lewis points out, business decisions are made “*at the margin*”. In order to determine whether a business should open on a Sunday or public holiday, a business would ordinarily simply consider whether the extra revenue it receives on the Sunday or public holiday exceeds the extra cost associated with operating on that day.²⁴⁰ It is the additional cost of hired labour on this day which is going to play a pivotal role in determining whether or not the business opens.

27.22 Professor Lewis’ theory is supported by the operator evidence actually presented in this case, which identified that operators viewed the profitability of Sunday trading in a stand-alone way:

Statement	Effect of Evidence
Barry Barron (Sussan) ²⁴¹	<i>“Approximately 81% of Sussan and 95% of Sportsgirl stores trade on Sundays. The stores that do not trade on Sundays are closed because operating would result in a Sunday trading loss. These losses would primarily be as a result of higher Sunday labour costs due to penalties. ...Taking into account the higher Sunday labour costs, Sunday employees engage entirely in selling activities and operating hours are restricted to</i>

²³⁸ Exhibit UV-25, page 14

²³⁹ Exhibit UV-24, pages 7-8

²⁴⁰ Exhibit ABI-4, pages 10-11

²⁴¹ Exhibit Retail-3 at [12]-[13]

	<p><i>busy periods to ensure turnover can cover the additional labour costs. ... If Sunday penalties were reduced to an additional 50% most of the stores we close could become viable.....</i></p> <p><i>Reduced Sunday penalty rates would allow us to open additional stores and provide more hours of work on Sundays, while engaging employees to work beyond purely selling activities."</i></p>
Statement of RCI Witness 13 ²⁴²	<p><i>"We do not currently trade on Sundays, however, if the current penalty rate was reduced to the Saturday rate for all staff we would consider opening the business for Sunday trading."*</i></p> <p><i>*While the witness attempted to "re-phrase" or "re-evaluate" this evidence under cross-examination²⁴³, it was not in contest that the witness made an assessment of Sunday trading in isolation from other days.</i></p>
RCI Witness 17 ²⁴⁴	<p><i>"Weekend penalty rates increase the ratio of wages to sales to approximately 60% of for those days, if we employ adult employees, making it necessary to staff weekends with a high proportion of junior staff.</i></p> <p><i>....</i></p> <p><i>We currently reduce trading hours on weekends because of the ratio of wages to sales, we are usually unable to open on public holidays because we are unable to operate profitably after paying penalty rates."</i></p>
Belinda Daggett (Bakers Delight) ²⁴⁵	<p><i>"We structure our use of labour on the basis that, in order for the business to maintain the level of profitability we require, direct labour costs (excluding superannuation and on costs) are required to be limited to a maximum of 35% of retail sales</i></p> <p><i>.....</i></p> <p><i>With the increase in labour costs on Sundays the business has needed to respond in order to maintain labour costs at the required percentage of turnover. In order to achieve this, we have had to reduce the number of hours of work rostered on Sunday and we have also had to reduce the number of hours worked across the whole week."</i></p>

²⁴² Exhibit RCI-13 at [12]

²⁴³ T:14/09/2015 PN4124 - PN4141

²⁴⁴ Exhibit RCI-17 at [10] and [12]

²⁴⁵ Exhibit Retail-7 at [9] and [15]

<p>Heath Goddard (Pillow Talk)²⁴⁶</p>	<p><i>“Pillow Talk trades across all seven days of the week in the majority of our retail stores with the exception of only 1 store which does not trade on Sunday due to, in part, cost of wages not being commensurate with turnover on that particular day.</i></p> <p><i>In the event that Sunday penalty rates were reduced, being the single most significant cost factor impacting on Sunday trade, I would re-evaluate the trading hours of this particular store to determine the viability of trading on Sunday’s so as to meet the service expectations of our customer base.”</i></p>
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Criticism (e) Failure to account for shift in demand to other days of the week

27.23 The final key criticism of the Primary Lewis Report is that Professor Lewis has not taken into consideration that, if businesses were to close or reduce trading hours on particular days, the demand for the business would shift to other days of the week.

27.24 This is a view championed by Professor Quiggin who states as follows in relation to the restaurant industry:

“The primary avenue by which employment in the industry might be increased [by reducing penalty rates] is an increase in the number of establishments opening on Sundays and public holidays. However, any increase in consumer expenditure on such days would be likely to come at the expense of expenditure at other times.”²⁴⁷

27.25 However, Professor Quiggin’s view that demand will simply shift to other days of the week ignores entrenched consumer patterns, whereby consumption of restaurant and cafe services is heavily weighted towards Fridays and weekends. This point is illustrated by Professor Quiggin’s own observations that *“many establishments close on Mondays”* and that such closures are not influenced by *“rates of pay”*.²⁴⁸ The very fact that restaurants are closing on Mondays -when labour costs are low - strongly suggests that it is less profitable to trade on these days because people choose not to dine on these days.

27.26 A similar argument applies to the retail sector, although perhaps to a lesser degree. For the large body of Australian workers who work Monday to Friday 9:00am to 5:00pm, weekends may represent the principal period to spend a substantive period of time shopping. If weekend trading hours are limited, it will not be the case that all workers can simply shift their shopping habits to the weekdays, given the requirement to also work at these times.

²⁴⁶ Exhibit Retail-4 at [13]-[14]

²⁴⁷ Exhibit UV-24, page 7, paragraph 20(iv)

²⁴⁸ Exhibit UV-24, page 7, paragraph 20(iv)

Expert evidence - Dr Yu

- 27.27 In order to counter expert evidence suggesting penalty rates have a dis-employment effect, the SDA filed an expert report from Dr Serena Yu titled *Evaluating the Impact of Sunday Penalty Rates in the NSW Retail Industry (Primary Yu Report)*.²⁴⁹
- 27.28 Dr Yu analysed changes in employment between New South Wales and Victoria between 1991 and 2014. Having analysed this data, Dr Yu concluded that Victoria was a natural 'control group' for New South Wales. That is, the trends and nature of employment growth in Victoria were analogous to that in New South Wales.
- 27.29 Dr Yu proceeded to analyse any differences between employment trends in Victoria and New South Wales after 2010. Given that penalty rates increased in New South Wales after 2010, but not in Victoria, Dr Yu assumed that, if penalty rate increases do have a dis-employment affect, this should be evident from a difference between Victorian and New South Wales employment growth trends after 2010.
- 27.30 However, the premise upon which Dr Yu's report was based - namely that Victorian retail employment is a suitable control group for New South Wales retail employment - is fundamentally flawed. This is for two reasons:
- (a) Firstly, Dr Yu's own analysis demonstrated marked differences between New South Wales and Victorian employment trends before 2010; and
 - (b) Secondly, after 2010, there were numerous events which would likely have promoted employment in New South Wales, which did not occur in Victoria and which were not controlled for.

Differences between New South Wales and Victorian employment pre-2010

- 27.31 Figure 3 of the Primary Yu Report identifies New South Wales and Victorian employment trends from 1991 to 2010.²⁵⁰ Although there are some similarities, as the groups approached 2010, differences emerged. Specifically:
- (a) Figure 2 of the Primary Yu Report identifies that total retail employment was in sharp decline between 2006 and 2007 in New South Wales whereas total retail employment was increasing in Victoria during this time.
 - (b) Figure 3 of the Primary Yu Report identifies:
 - (i) a sharp decline in New South Wales full time hours in 2006 was not mirrored in Victoria. Instead, Victorian full time hours were growing between 2006 and 2007 before flattening out and growing again; and

²⁴⁹ Exhibit SDA-39

²⁵⁰ Exhibit SDA-39, page 12

- (ii) that full time hours in New South Wales were declining in 2009, whereas full time hours in Victoria were slightly increasing.
- (c) Figure 4 of the Primary Yu Report identifies that:
- (i) aggregate retail part time hours were in sharp decline in New South Wales between 2006 and 2007, whereas they were steady or on the increase in Victoria during the same period; and
 - (ii) aggregate retail part time hours were increasing in New South Wales in 2009, just before the beginning of the period being studied by Dr Yu whereas they were declining in Victoria during the same period.

27.32 The differences between retail employment across New South Wales and Victoria are highlighted in the Supplementary Pezzullo Report dated 2 November 2015 (**Pezzullo Reply to Yu Report**).²⁵¹ At Figures 3.1 and 3.2²⁵² of the Pezzullo Reply to Yu Report, Pezzullo identifies how employment trends were heading in opposite directions between the States before 2010 commenced and into early 2010.

27.33 This difference in trends between the two States for at least the sub-period between February 2009 to May 2010 was conceded by Dr Yu under cross examination²⁵³ as was the fact that the two States had very different employment concentration across regional and rural areas.²⁵⁴

Events following 2010

27.34 Even if one accepts that the pre-2010 figures demonstrate that New South Wales and Victoria had similar employment trends in the Retail Industry before 2010, there are a multitude of post-2010 factors that would need to be controlled for if the comparison between the two groups is to be reliable for the purposes of assessing the impact of penalty rates.

27.35 Dr Yu conceded that factors which might differ between States and which might affect employment trends, but for which she did not control, included:

- (a) sales margins and operating profits between employers;²⁵⁵
- (b) workcover premiums and payroll tax;²⁵⁶
- (c) business confidence;²⁵⁷

²⁵¹ Exhibit Retail-12

²⁵² Page 8

²⁵³ T: 5/11/2015 - PN22663

²⁵⁴ T: 5/11/2015 - PN22687 - PN 22692

²⁵⁵ T: 5/11/2015 - PN22695 -PN 22697

²⁵⁶ T: 5/11/2015 - PN22701

- (d) changes in energy costs;²⁵⁸ and
- (e) changes in any other costs associated with running a business.²⁵⁹

27.36 Evidence has been filed in these proceedings to demonstrate that substantial changes were made to workers compensation premiums in New South Wales between 2012 and 2013. The changes were identified by the New South Wales Government as having affected 200,000 employers across 376 industries.²⁶⁰ The changes gave rise to:

- (a) total average workers compensation premium reductions of 12.5%; and
- (b) savings of more than \$330 million per year.²⁶¹

27.37 Exhibits ABI-18 and ABI-19 identify that the New South Wales retail industry was a beneficiary of these changes.

27.38 Similar changes did not take place in Victoria during the same period (as evidenced by Exhibits ABI-15 and ABI-16). Although there may have been some minimal movements between industry rates in Victoria from year to year in the same period, the percentage changes are dwarfed by the decreases applied in New South Wales in the same period.

27.39 Whilst Dr Yu accepted that workers compensation premium reductions could have an impact on employment, no attempt was made to control for these significant changes in New South Wales.

27.40 Similarly, New South Wales was the beneficiary of significant reductions in payroll tax between 1 January 2010 and 1 January 2011. The reductions are identified in the relevant legislation, *Payroll Tax Act 2007* (NSW) - which applies a formula for determining payroll tax (see section 5 of the Act)²⁶². The formula requires a dollar amount to be multiplied by a specified percentage referred to in the legislation as "R". The value of "R" declined progressively from 6% in January 2009 to 5.45% in January 2011²⁶³ - thus reducing employer payroll tax liability throughout the period.

27.41 Whilst Exhibit ABI-20 identifies some reduction in Victorian payroll tax over the same period, the Victorian reductions following 2010 were 1/10th of the size of the reductions that took place in New South Wales.

27.42 In light of all of these differences between the economic conditions prevailing in New South Wales and Victoria, the conclusions adopted in the Primary Yu Report are inherently

²⁵⁷ T: 5/11/2015 - PN22811 - PN22817

²⁵⁸ T: 5/11/2015 - PN22852 - PN856

²⁵⁹ Ibid

²⁶⁰ Exhibit ABI-14

²⁶¹ Exhibit ABI-14

²⁶² Exhibit ABI-19, page 3

²⁶³ See section 1, Exhibit ABI-19, page 1

unreliable. Any number of factors could have influenced employment in New South Wales post-2010 and countered some of the dis-employment affect associated with the increasing penalty rates during the same period.

Retail Survey

- 27.43 A survey conducted of employers in the retail industry also reveals the significant dis-employment effects caused by penalty rates.
- 27.44 The Further and Final Consolidated Sworn Statement of Emily Baxter dated 17 December 2015 (**Baxter Statement**)²⁶⁴ refers to a survey conducted of 8,700 members in the retail industry. The Survey was distributed by retail employer organisations to their membership lists, together with a covering email in neutral terms requesting employers to complete the survey.²⁶⁵
- 27.45 690 responses to the survey were received, out of a total retail employer population of 135,000.²⁶⁶
- 27.46 The survey was broadly representative of employment across the country, with the response for employers in each State and Territory broadly reflective of the population of employers in each State and Territory:

State /Territory	Rank of employee population across retail industry and % (largest to smallest) ²⁶⁷		Survey response rate rank and % (largest to smallest)	
New South Wales	1 st	30%	1 st	37.11%
Victoria	2 nd	27%	2 nd	26.31%
Queensland	3 rd	20%	3 rd	28.75%%
Western Australia	4 th	12%	4 th	15.33%
South Australia	5 th	7%	5 th	15.33%
Tasmania	6 th	2%	6 th	12%
Australian Capital Territory	7 th	2%	7 th	7.7%
Northern Territory	8 th	1%	8 th	3%

²⁶⁴ Exhibit ABI-9

²⁶⁵ See paragraphs 7-9 of Exhibit ABI-9

²⁶⁶ See Exhibit ABI-3, page 12 for total retailer population. The precise employment figure is 135,597 - See Australian Bureau of Statistics (2014) Counts of Australian Businesses, including Entries and Exits , Jun 2009 to Jun 2013 Cat No. 8165.0

²⁶⁷ Based on most recent data sourced from Table 5, 86220DO001_201213 *Retail and Wholesale Industries, Australia, 2012-13*, using data from subgroups "41 Food Retailing" and "42 Other Store Based Retailing"

- 27.47 Given the large response rate to the survey when compared to the number of employers in the industry, it is submitted that the survey's is a reliable source of information regarding employers in the industry generally.
- 27.48 The Retail Survey serves to identify the individual views of a large number of operators.
- 27.49 The Retail Survey responses have been segregated in the Baxter Statement so that only those responses filed by employers covered by the Retail Award have been collated in the Baxter Statement and Exhibit EB-2 of the Baxter Statement. Employers covered by an enterprise agreement have been excluded from the survey results.²⁶⁸
- 27.50 In total, 485 employers who were covered by the Retail Award responded to the Survey.
- 27.51 The Baxter Survey asked employers to outline their usual weekday trading hours and then sought information about weekend and public holiday trading hours.
- 27.52 The results of the Survey demonstrate just how markedly weekend and public holiday trading hours differ from weekday trading hours and that the principal cause of this difference is labour costs:

Sundays:

- 27.53 Of the 470 respondents who provided weekday trading hours and employment figures:
- (a) 88.3% had trading hours on Sunday that were lower than weekdays²⁶⁹; and
 - (b) 88.9% rostered fewer employees on a Sunday than on a weekday.
- 27.54 When asked to explain why their trading hours differed on Sundays, 55.18% cited wages, penalty rates or "costs" as the reason for the lower Sunday trade. All of the free texts responses are contained at Tab 4 of Exhibit EB-2 of the Baxter Statement and the responses quite clearly indicate the impact of penalty rates. Indicative responses include:

"I have to pay double rates on Sunday"

"penalty payment"

"wage rates too high on weekends"

"wages loading"

"too expensive with penalties. We would love to trade longer (and we can set out own hours as we are not in a restricted zone) as Sunday is the busiest trade per hour of any day of the week."

"wage cost to open"

²⁶⁸ See Exhibit ABI-9, paragraphs 22-27

²⁶⁹ Exhibit ABI-9, paragraph 29

“wages to [sic] high to employ staff”

“to reduce wages as much as possible on Sundays”

27.55 Without doubt, the Survey evidence indicates that Sunday penalty rates are acting as a disincentive to trading and hence employment.

Public holidays

27.56 The results regarding public holidays are little more complex.

27.57 Of the 470 respondents who provided weekday trading hours and employment figures:

(a) Between 83.4% and 98.1% had trading hours on a public holiday that were lower than weekdays (the percentages varied between 83.4% and 98.1% depending on the public holiday); and

(b) 90.5% rostered fewer employees on a public holiday than on a weekday.²⁷⁰

27.58 However, the reasons for employers trading less on public holidays were significantly influenced by the identity of the particular public holiday. The responses indicate that wage costs were a significant factor dis-incentivising trade for about half the public holidays, but not the other half:

Low wages influence

Public holiday	% of retailers who open on this day	% of retailers who cited wage costs as reason business shut on this day
Christmas Day	10.6%	28.53%
Good Friday	30.73%	25.93%
New Years Day	61.46%	40.89%
Boxing Day	71.6%	39.38%
ANZAC Day	75%	34.62%

²⁷⁰ Exhibit ABI-9, paragraph 35

High wages influence

Australia Day	83.3%	49.18%
State based public holidays (e.g. 8 Hours Day/Show Days/Cup Days)	81.25%	58.85%
Labour Day	86.2%	54.9%
Queens' Birthday	87.5%	55.24%
Easter Monday	87.76%	53.27%

27.59 The results indicate that wages are a strong dis-incentive for employment for approximately half of the public holidays.

27.60 When the above employer responses are compared to the employee ratings of public holiday importance from the Rose Report, a clear trend emerges:

- (a) the days which are considered important by employees are the days when wages do not have a strong influence on trading hours;
- (b) the days which are considered less important by employees are the days when wages do have a strong influence on trading hours.

27.61 This is evidenced by the table overleaf, which combines the Retail Survey responses with the findings of the Rose Report outlined at paragraph 24.3 above:

High employee importance/low wages influence:

Public holiday	% of retailers who open on this day	% of retailers who cited wage costs as reason business shut on this day	Employee importance rating
Christmas Day	10.6%	28.53%	27.2
Good Friday	30.73%	25.93%	7.69
New Years Day	61.46%	40.89%	14.9
Boxing Day	71.6%	39.38%	9.42
ANZAC Day	75%	34.62%	7.34

Intermediate Day

Australia Day	83.3%	49.18%	9.2
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Low employee importance/high wages influence:

State based public holidays (e.g. 8 Hours Day/Show Days/Cup Days)	81.25%	58.85%	3.44
Labour Day	86.2%	54.9%	2.61
Queens' Birthday	87.5%	55.24%	2.65
Easter Monday	87.76%	53.27%	5.14

Individual operator evidence

27.62 The individual operators who gave evidence in the proceedings also identified the direct impact of penalty rates on their employment practices.

27.63 By way of example, the following exhibits all identify penalty rates as causing an employer to lessen trading hours or rostering in the restaurant or retail industries:

- (a) Exhibits RCI-8²⁷¹, RCI-11²⁷², RCI-13²⁷³, RCI-15²⁷⁴, RCI-17²⁷⁵,

²⁷¹ Paragraphs 9, 11, 12

²⁷² Paragraph 7

(b) Exhibits Retail 3²⁷⁶, Retail 4²⁷⁷, Retail 5²⁷⁸, Retail 6²⁷⁹, Retail 7²⁸⁰, Retail 8.²⁸¹

Employee evidence

27.64 The employees interviewed as part of the qualitative analysis conducted by Dr Sands also gave evidence about steps taken by operators to address Sunday wage costs. Employees referred to changes in Sunday availability over time and noted:

- (a) rostering of casual, younger and “*therefore cheaper*” employees;
- (b) reducing Sunday labour budgets;
- (c) the dedication of Sunday to service delivery only (i.e. no stock resupply activities conducted, etc.);
- (d) the implementation of shorter shifts; and
- (e) a decrease in rostering of management staff on Sundays.²⁸²

Conclusion

27.65 In light of the above analysis, it is submitted that:

- (a) in relation to Sundays, the overwhelming majority of the evidence supports a conclusion that penalty rates do negatively affect employment in a substantive way; and
- (b) in relation to public holidays:
 - (i) the overwhelming majority of the evidence supports a conclusion that penalty rates do negatively affect employment in a substantive way; but
 - (ii) the impact of penalty rates on employment differs depending on the identity of the specific public holiday; and
- (c) in relation to both Sundays and public holidays, businesses wish to employ employees on these days, but are instead closing or reducing their operating hours due to the impact of penalty rates.

²⁷³ Paragraphs 9, 10, 12

²⁷⁴ Paragraphs 6, 7

²⁷⁵ Paragraphs 10, 12, 13

²⁷⁶ Paragraphs 12, 13, 18, 28

²⁷⁷ Paragraphs 13, 14, 26-31

²⁷⁸ Paragraphs 17-21

²⁷⁹ Paragraph 18

²⁸⁰ Paragraphs 16-21

²⁸¹ Paragraphs 14, 18, 19

²⁸² Exhibit Retail-2, page 60

28. A REDUCTION IN PENALTY RATES ON SUNDAYS/PUBLIC HOLIDAYS WILL INCREASE THE HOURS OFFERED TO EMPLOYEES ON THESE DAYS

28.1 In light of the findings proposed at paragraph 27.65 above, it naturally follows that decreasing penalty rates will increase employment, increasing the hours offered to employees on the days that the penalty rates apply.

28.2 It accordingly comes as no surprise that, when 411 operators in the Retail Industry were asked about the impact of reducing the penalty rate in the Award for Sundays from 100% to 50%, 65.45% of respondents indicated they would allocated more hours to employees on Sundays.²⁸³

²⁸³ Exhibit ABI-9, Tab 3, Page 26

E. APPLYING THE MODERN AWARDS OBJECTIVE TO THE PRESENT CLAIM

29. INTRODUCTION

29.1 In exercising its modern award powers, the Fair Work Commission must ensure that modern awards provide “*a fair and relevant minimum safety net*”, taking into account each limb of sections 134(1)(a) to 134(1)(h) of the FW Act.

29.2 Given the analysis already presented in support of the factual findings sought by ABI, NSWBC and ACCI, we do not propose to regurgitate all the above evidence to demonstrate how the ABI and NSWBC claims create a fair and relevant minimum safety net. Rather, in the sections that follow, we identify how the factual findings already established in section D above establish that the proposed claims will provide a “*fair and relevant minimum safety net*”, taking into account each limb of the modern awards objective.

30. CREATING A FAIR AND RELEVANT MINIMUM SAFETY NET

30.1 It is submitted that:

- (a) the Restaurant and Retail Awards presently do not provide a fair and relevant minimum safety net; but
- (b) the Restaurant and Retail Awards will provide a fair and relevant minimum safety once varied in accordance with the ABI and NSWBC claims.

30.2 This is primarily because:

- (a) The Awards presently confer a minimum safety net which penalises businesses for opening on Sundays and public holidays in a manner disproportionate to the disability associated with working on such days.
- (b) This disproportionate penalisation of penalty rates means that the Awards currently do not create a “*minimum safety net*”, but instead create a safety net that over-compensates employees and creates excessive financial windfalls for working certain days of the week.
- (c) Furthermore, the current safety net is not “*relevant*”, as the existing Award penalty rate provisions derive from historical case law that is substantially removed from today’s legislative framework (particularly in the case of public holidays) and social context.
- (d) The NSWBC and ABI claims remedy each of the concerns identified above, thus eliminating the barriers to the creation of a fair and relevant minimum safety net. Furthermore, in the sections that follow, we explain how the NSWBC and ABI claims further all of the relevant ‘limbs’ of the modern awards objective.

31. RELATIVE LIVING STANDARDS AND NEEDS OF THE LOW PAID

Relevant findings:

- In relation to Sundays, the overwhelming majority of the evidence supports a conclusion that penalty rates do negatively affect employment in a substantive way
- In relation to public holidays, the overwhelming majority of the evidence supports a conclusion that penalty rates do negatively affect employment in a substantive way, but the impact of penalty rates on employment differ depending on the identity of the specific public holiday
- A reduction in penalty rates on Sundays/public holidays will increase hours offered to employees on these days

31.1 It is an obvious consequence of the employer claim that the wages paid to particular employees on Sundays and public holidays may decrease on those days. Indeed it is the reduction of wages on those days that, in the employer submission, will facilitate the considerable trading, profitability and ensuing economic benefits outlined in these submissions.

31.2 Despite this, a decrease in the wages payable on a particular day does not mean that low paid employees will be financially worse off on an overall basis. On the contrary, the findings outlined above demonstrate that the proposed changes will:

- (a) increase employment hours for those presently working on days that attract penalty rates; and
- (b) create employment on Sundays and public holidays where none presently exists.

31.3 Such an outcome will benefit all employees, including the low paid.

32. THE NEED TO ENCOURAGE COLLECTIVE BARGAINING

32.1 We have not specifically sought to direct evidence to the prevalence of collective bargaining in the relevant industries.

32.2 However, it goes without saying that, if the employer claim is accepted, the minimum rates applicable to the employment of individuals within the relevant industries on Sundays and public holidays will be lowered and that this, in turn, will provide employers with increased opportunities to bargain for rates above the minimum safety net.

32.3 The evidence heard in these proceedings relating to employers' difficulties in paying penalty rates at their current levels indicates that there is likely to be extremely limited scope to bargain in respect of penalty rates currently.

- 32.4 Whilst employers are subject to penalty rates that force their businesses to close on certain days, it is unlikely that substantive flexibility will exist to bargain above the minimum safety net applicable on these days.
- 32.5 For these reasons, although collective bargaining has not been the subject of focused evidence from the NSWBC / ABI, it is submitted that the changes proposed are only likely to increase the prospect of collective bargaining.

33. THE NEED TO PROMOTE SOCIAL INCLUSION THROUGH INCREASED WORKFORCE PARTICIPATION

Relevant findings:

- In relation to Sundays, the overwhelming majority of the evidence supports a conclusion that penalty rates do negatively affect employment in a substantive way
- In relation to public holidays, the overwhelming majority of the evidence supports a conclusion that penalty rates do negatively affect employment in a substantive way, but the impact of penalty rates on employment differ depending on the identity of the specific public holiday
- A reduction in penalty rates on Sundays/public holidays will increase the hours offered to employees on these days
- Employees do wish to be paid a premium to work Sundays, however, the premiums sought by employees in order to work are lower than the premiums presently imposed by the Retail Award
- Employees do wish to be paid a premium to work public holidays, however, the premiums sought by employees are lower than the premiums presently imposed by the Retail and Restaurant Awards

33.1 The findings unambiguously demonstrate that the proposed changes will generate increased employment and therefore workforce participation on both weekends and public holidays.

33.2 Furthermore, given that:

- (a) the premiums imposed by the Restaurant and Retail Awards are presently greater than those required by employees to work the relevant days; and
- (b) a significant proportion of restaurant and retail workers have a preference to work on weekends;

the reduction of the penalty rates in accordance with the changes proposed by ABI and NSWBC is not likely to result in employees declining to work the relevant days.

33.3 Indeed, the Rose Report suggests that the penalty rates proposed by ABI and NSWBC are aligned with employee expectations for obtaining higher rates of pay on Sundays and public holidays.

34. THE NEED TO PROMOTE FLEXIBLE MODERN WORK PRACTICES AND THE EFFICIENT AND PRODUCTIVE PERFORMANCE OF WORK

Relevant findings:

- The Australian economy has undergone significant change over the past four decades
- Sunday trading generates an important proportion of revenue in the Retail Industry
- The historical rationale for the imposition of a higher Sunday penalty rate is no longer applicable to today's society
- The regulation of work on public holidays has changed, warranting a new approach to the engagement and remuneration of employees on public holidays
- Employees do wish to be paid a premium to work Sundays, however, the premiums sought by employees in order to work are lower than the premiums presently imposed by the Retail Award
- Employees do wish to be paid a premium to work public holidays, however, the premiums sought by employees are lower than the premiums presently imposed by the Restaurant and Retail Awards
- There is some disability associated with working on public holidays, however, the disability associated with working on public holidays varies markedly depending upon the particular holiday that is worked
- In relation to both Sundays and public holidays, businesses wish to employ employees on these days, but are instead closing or reducing their operating hours due to the impact of penalty rates

34.1 The findings demonstrate that weekends are now an important source of revenue for employers, who wish to be able to open on weekends to take advantage of these revenue streams. It is likewise apparent from a review of the materials before the Full Bench that the industrial and social context in which penalty rates are payable in 2016 is very different from the era in which such rates were developed. No longer are restaurants and retail shops prevented by regulation from opening on Sundays and public holidays. Further, there remains no industrial justification to seek to deter business from engaging employees on weekends and public holidays.

- 34.2 The evidence discloses however that penalty rates *are* dis-incentivising employers from opening at the times that are likely to be productive and profitable for the employers:
- (a) in relation to the Sunday penalty, the disincentive arises from historical social mores that are no longer applicable to today's society;
 - (b) in relation to the public holiday penalty, the disincentive arises from a historical approach which:
 - (i) derives from a system of regulation that is no longer applicable; and
 - (ii) addresses disabilities associated with public holidays based upon generic assumptions. However, the findings demonstrate that there is no universal disability associated with working every public holiday and that employees are less likely to be adversely affected by working a number of the less significant public holidays such as Labour Day, the Queen's Birthday, State public holidays and Easter Monday.
- 34.3 In the submission of ABI, NSWBC and ACCI, penalty rates are hindering employer flexibility with regard to rostering and opening hours by operating according to historical and no longer relevant principles.
- 34.4 By reducing the quantum of relevant penalty rates, the ABI and NSWBC claims will lessen the impact of penalty rates cited above.

35. THE NEED TO PROVIDE ADDITIONAL REMUNERATION FOR WORKING WEEKENDS OR PUBLIC HOLIDAYS

- Sunday's importance as a day of religious observance has dramatically reduced
- The disability associated with working on Saturdays is the same or substantially similar to the disability associated with working on Sundays
- The historical rationale for the imposition of a higher Sunday penalty rate is no longer applicable to today's society
- The regulation of work on public holidays has changed, warranting a new approach to the engagement and remuneration of employees on public holidays
- There is some disability associated with working on public holidays, however, the disability associated with working on public holidays varies markedly depending upon the particular holiday that is worked
- Employees do wish to be paid a premium to work Sundays, however, the premiums sought by employees in order to work are lower than the premiums presently imposed by the Retail Award

o Employees do wish to be paid a premium to work public holidays, however, the premiums sought by employees are lower than the premiums presently imposed by the Restaurant and Retail Awards

- 35.1 The employer claims seek to maintain additional remuneration for all employees working weekends and for full-time and part-time employees working public holidays.
- 35.2 In respect of Sundays, the disproportionate penalty imposed for Sunday work in the retail industry does not align with the modern awards objective, in circumstances where the disability associated with Sunday work is the same or substantially similar to the disability associated with working on Saturdays. As the evidence has demonstrated in these proceedings, employees largely place an equal value on the disability associated with working Sundays as they do Saturdays.
- 35.3 Currently in the Retail Award, full-time and part-time employees receive a pay rate of 125% for working Saturdays and a pay rate of 200% for working Sundays. For casuals working Saturdays between 7am and 6pm the relevant rate is 135% and for Sunday work, 200%.
- 35.4 The evidence before the Full Bench provides a persuasive rationale to question the proportionality of these rates. As the Full Bench has heard, employees largely consider that the disabilities associated with Saturday work are at least equal to Sunday work and further that Sunday no longer maintains its traditional importance for many Australian employees in 2016.
- 35.5 It is noteworthy that the FW Act does not prescribe that Sundays are to receive an increased loading. Instead, section 134(1)(da)(iii) accords Saturdays and Sundays equal treatment by referring to both days as the “weekend”.
- 35.6 Unless there is an evidentiary basis that justifies providing employees working Sundays with increased remuneration, employees working weekends should all be treated in the same manner. There is nothing contained within the modern awards objective that would suggest a different approach.
- 35.7 In respect of public holidays in the retail and restaurant industries, the employer claim effectively provides full time and part-time employees with double time (either through a 200% pay rate or an ordinary pay rate in addition to a day off in lieu). This provision is in clear satisfaction of the modern awards objective to provide additional remuneration for working such days.

36. THE PRINCIPLE OF EQUAL REMUNERATION FOR WORK OF EQUAL OR COMPARABLE VALUE

- 36.1 This objective does not relate to the present claim.

37. THE LIKELY IMPACT OF ANY EXERCISE OF MODERN AWARD POWERS ON BUSINESS, INCLUDING ON PRODUCTIVITY, EMPLOYMENT COSTS AND THE REGULATORY BURDEN

Relevant findings:

- The Australian economy has undergone significant change over the past four decades
- Sunday trading generates an important proportion of revenue in the Retail Industry
- The historical rationale for the imposition of a higher Sunday penalty rate is no longer applicable to today's society
- The regulation of work on public holidays has changed, warranting a new approach to the engagement and remuneration of employees on public holidays
- In relation to both Sundays and public holidays, businesses wish to employ employees on these days, but are instead closing or reducing their operating hours due to the impact of penalty rates
- In relation to both Sundays and public holidays, businesses wish to employ employees on these days, but are instead closing or reducing their operating hours due to the impact of penalty rates
- Employees do wish to be paid a premium to work Sundays, however, the premiums sought by employees in order to work are lower than the premiums presently imposed by the Retail Award
- Employees do wish to be paid a premium to work public holidays, however, the premiums sought by employees are lower than the premiums presently imposed by the Restaurant and Retail Awards

37.1 As has already been stated, the findings demonstrate that weekends are now an important source of revenue for employers, who wish to be able to open on weekends to take advantage of these revenue streams.

37.2 However, penalty rates are dis-incentivising employers from opening at the times that are likely to be productive and profitable for the employers:

- (a) in relation to the Sunday penalty, the disincentive arises from historical social mores that are no longer applicable to today's society; and
- (b) in relation to the public holiday penalty, the disincentive arises from a historical approach which:
 - (i) derives from a system of regulation that is no longer applicable; and

- (ii) addresses disabilities associated with public holidays based upon generic assumptions. However, the findings demonstrate that there is no universal disability associated with working every public holiday and that employees are less likely to be adversely affected by working a number of the less significant public holidays such as Labour Day, the Queen's Birthday, State public holidays and Easter Monday.

37.3 The evidence before the Full Bench demonstrates that a decision to grant the employer claims will materially benefit business by reducing employment costs and the regulatory burden on business. The evidence discloses that, at their current levels, penalty rates in the Retail and Restaurant Industries are serving in some cases to reduce employment hours, employee numbers, trading hours and trading days.

37.4 Should the NSWBC and ABI claim be granted, it is apparent on the evidence before the Full Bench that business in the restaurant and retail industries will:

- (a) trade for increased hours on an increased amount of trading days; and
- (b) engage employees for longer hours in line with the above increased operations.

38. THE NEED TO ENSURE A SIMPLE, EASY TO UNDERSTAND, STABLE AND SUSTAINABLE MODERN AWARD SYSTEM FOR AUSTRALIA THAT AVOIDS UNNECESSARY OVERLAP OF MODERN AWARDS

38.1 This objective does not directly relate to the present claim.

38.2 It is worth briefly noting, however, that the business and societal benefits associated with the NSWBC and ABI claims (which have been addressed in the other limbs of the modern awards objective) will indirectly lead to a sustainable modern award system in the longer term.

39. THE LIKELY IMPACT OF ANY EXERCISE OF MODERN AWARD POWERS ON EMPLOYMENT GROWTH, INFLATION AND THE SUSTAINABILITY, PERFORMANCE AND COMPETITIVENESS OF THE NATIONAL ECONOMY

- The Australian economy has undergone significant change over the past four decades
- Sunday trading generates an important proportion of revenue in the Retail Industry
- The Restaurant Industry is an important part of the Australian economy, generating substantial employment and revenue
- The Retail Industry is an important part of the Australian economy, generating substantial employment and revenue

- The historical rationale for the imposition of a higher Sunday penalty rate is no longer applicable to today's society
- The regulation of work on public holidays has changed, warranting a new approach to the engagement and remuneration of employees on public holidays
- In relation to Sundays, the overwhelming majority of the evidence supports a conclusion that penalty rates do negatively affect employment in a substantive way
- In relation to public holidays, the overwhelming majority of the evidence supports a conclusion that penalty rates do negatively affect employment in a substantive way, but the impact of penalty rates on employment differ depending on the identity of the specific public holiday
- In relation to both Sundays and public holidays, businesses wish to employ employees on these days, but are instead closing or reducing their operating hours due to the impact of penalty rates
- A reduction in penalty rates on Sundays/public holidays will increase the hours offered to employees on these days
- Employees do wish to be paid a premium to work Sundays, however, the premiums sought by employees in order to work are lower than the premiums presently imposed by the Retail Award
- Employees do wish to be paid a premium to work public holidays, however, the premiums sought by employees are lower than the premiums presently imposed by the Restaurant and Retail Awards

39.1 The restaurant and retail industries form a vital part of Australia's services industry, whilst the importance of the services industry to Australia's economy has grown dramatically in the past four decades. Further, the nature of the Australian economy has transformed from a 9-5 week day economy to a system in which Australians expect the economy, in particular service industries like restaurants and retail stores, to operate 7 days per week.

39.2 Australia's economic performance is substantively influenced by a healthy, appropriately regulated Restaurant and Retail Industry.

39.3 Clearly, the interests of the Australian economy will be served if variations are made to allow the restaurant and retail industries to provide:

- (a) longer opening hours;
- (b) more trading days;
- (c) more working hours.

39.4 By decreasing penalty provisions that no longer conform with modern society and the modern regulatory framework, there will be significant improvements in trading hours in the relevant industries, which in turn will generate greater revenue and employment. The Fair Work Commission will accordingly be boosting Australian employment and Australia's performance, competitiveness and long term economic sustainability.

F. SUPPORT FOR OTHER EMPLOYER PARTY SUBMISSIONS

40. ABI AND NSWBC CLAIM

- 40.1 As previously noted, ABI and the NSWBC have filed claims seeking reductions in the Sunday and public holiday penalty rates under the Retail Award and the public holiday rate under the Restaurant Award.
- 40.2 ACCI supports the ABI and NSWBC claims and relies upon the above submissions in support of these claims.

41. SUPPORT FOR ALL EMPLOYER PARTY SUBMISSIONS

- 41.1 It is apparent that the above submissions also address common issues that pertain to the other employer party claims, including the claims of Restaurant and Catering Industrial in relation to weekend rates under the Restaurant Award.
- 41.2 ABI, NSWBC and ACCI support the claims of the other employer parties and rely upon the common issues addressed in these submissions (to the extent that they are relevant) in support of the other employer party claims.

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2 February 2016

SCHEDULE 1

MASKED DUE TO CONFIDENTIALITY ORDER

SCHEDULE 2 - GLOSSARY OF TERMS

1875 Act	means	<i>An Act to make provision for Bank Holidays and respecting obligations to make payments and do other acts on such Holidays</i> [14th July, 1875] 39 Vic No 2
2013 Penalty Rates Case	means	<i>Modern Awards Review 2012 – Penalty Rates</i> [2013] FWCFB 1635
ABI	means	Australian Business Industrial
ACCI	means	Australian Chamber of Commerce and Industry
Baxter Statement	means	Further and Final Consolidated Sworn Statement of Emily Baxter dated 17 December 2015 tendered as Exhibit ABI-9
BBH Act	means	<i>Banks and Bank Holidays Act 1912</i> (NSW)
Borland Report	means	Report by Professor Jeff Borland dated 3 September 2015 tendered as Exhibit UV-25
Charlesworth/McDonald Report	means	Expert Report from Professor Sara Charlesworth and Dr Fiona MacDonald to the Shop Distributive and Allied Employees Association for use in the Four Yearly Review of Modern Awards being conducted by Fair Work Australia – Penalty Rates AM2014/305 – dated 26 August 2015 tendered as Exhibit SDA-43
Final Productivity Commission Report	means	<i>Productivity Commission Inquiry Report November 2015 - Workplace Relations Framework</i>
FW Act	means	<i>Fair Work Act 2009</i> (Cth)
FWC Changing Work Patterns Report	means	Fair Work Commission’s Workplace and Economic Research Section <i>Changing Work Patterns</i> Report
Lewis Reply to Borland	means	Report by Prof Lewis, <i>Penalty rates and the retail, café and restaurant; and hairdressing and beauty industries: a reply to a report by Prof Jeff Borland</i> , dated 3 September 2015 tendered as Exhibit ABI-5
Lewis Reply to Quiggin	means	Report by Prof Lewis, A reply to the report <i>Effects of penalty rates in the restaurant sector</i> by Prof John Quiggin, University of Queensland tendered as Exhibit ABI-4
Markey Report	means	Report of Professor Raymond Markey, <i>The continuing importance of penalty rates for weekend work: a review of the evidence</i> , dated 2 September 2015 tendered as Exhibit ACTU-2
Muurlink Report	means	Report to Fair Work Commission , <i>The Impact of weekend work: consecutivity, overload, uncontrollability, unpredictability, asynchronicity and arrhythmia</i> , Dr Olav Muurlink and curriculum vitae of Dr Olav Muurlink tendered as Exhibit UV-26
NSWBC	means	The New South Wales Business Chamber Ltd.
Pezzullo Reply to Yu Report	means	Report titled <i>Four Yearly Review of Modern Awards – Penalty Rates (the Review)</i> , Deloitte Access Economics, Pezzullo, dated 2 November 2015 tendered as Exhibit Retail-12
Preliminary Issues Decision	means	<i>4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues</i> [2014] FWCFB 1788
Primary Lewis Report	means	<i>Penalty rates and the retail, café and restaurant; and hairdressing and beauty industries – a report for Australian Business Lawyers and Advisors</i> by Prof Phil Lewis tendered as Exhibit ABI-3
Primary Pezzullo Report	means	Affidavit of Margaret Lynne Pezzullo dated 26 June 2015, with annexures including Report titled <i>The modern face of weekend work: survey results and analysis</i> (marked copy) – Deloitte Access Economics tendered as Exhibit PG-34
Primary Yu Report	means	<i>Evaluating the Impact of Sunday Penalty Rates in the NSW Retail Industry</i> – a report prepared for the Shop, Distributive and Allied Employees Association (SDA) by Serena Yu, dated 30 October 2015 tendered as Exhibit SDA-39
Restaurants Case	means	Decision of Gooley DP of [2013] FWC 7840 and the Decision of the Full Bench [2014] FWCFB 1996
Quiggin Report	means	Report by Professor John Quiggin, <i>Effects of penalty rates in the restaurant sector</i> , dated August 2015 tendered as Exhibit UV-24
Restaurant Award	means	<i>Restaurant Industry Award 2010</i>
Retail Award	means	<i>General Retail Industry Award 2010</i>
Rose Report	means	Report titled <i>Value of Time and Value of Work Time during Public Holidays</i> by Professor John Rose dated 3 July 2015 tendered as Exhibit ABI-1
Sands Report	means	<i>Statement of Dr Sean Sands, dated 29 June 2015, together with annexures marked SS1 – Curriculum Vitae and SS2 – Retail Award Research Report</i> dated 25 June 2015 tendered as Exhibit Retail-2
Work Choices	means	<i>Workplace Relations Amendment (Work Choices) Act 2005</i> (Cth)
