

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

OUTLINE OF SUBMISSION OF AUSTRALIAN RETAILERS ASSOCIATION, MASTER
GROCERS AUSTRALIA, RETAIL COUNCIL AND THE NATIONAL RETAIL
ASSOCIATION

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A. INTRODUCTION

1. FCB Group (**FCB**) acts for the Australian Retailers Association, Master Grocers Association, Retail Council and the National Retail Association ("**Retail Associations**"), who seek to vary the *General Retail Industry Award 2010* ("**GRIA**") in the four yearly review of modern awards being conducted by the Fair Work Commission (**FWC**) pursuant to section 156 of the *Fair Work Act 2009* (Cth) (the "**FW Act**").
2. On 13 February 2015, FCB filed a draft determination which sought to:
 - (a) vary clause 29.4(c) of the GRIA, the effect of which would be to reduce the penalty rate applicable to permanent employees working on a Sunday under the GRIA from an additional 100% to an additional 50%;
 - (b) vary clause 29.4(c) of the GRIA, the effect of which would be to reduce the penalty rate applicable to casual employees working on a Sunday under the GRIA from an additional 100% to an additional 50%, inclusive of the casual loading;
 - (c) vary clause 30.3(c) of the GRIA, the effect of which would be to reduce the penalty rate applicable to permanent employees working shiftwork on a Sunday under the GRIA from an additional 100% to an additional 75%; and
 - (d) vary clause 30.3(c) of the GRIA, the effect of which would be to reduce the penalty rate applicable to casual employees working shiftwork on a Sunday under the GRIA from an additional 125% to an additional 100%.
3. We contend that the Sunday penalty rate should be reduced as described in paragraph 2 of these submissions for the following broad reasons:
 - (a) any disability associated with working on Sundays in the retail industry does not equate to a penalty rate of 100% and any disability is not four times the disability of working on Saturdays;
 - (b) there is little difference in terms of work-life interference between working on Saturdays and working on Sundays in the retail industry; and
 - (c) the reduction of the Sunday penalty rate from 100% to 50% is likely to lead to increased employment in the retail industry.

4. The Retail Associations have had the benefit of having read the final submissions of the Australian Industry Group (“**Ai Group Submissions**”) and the Australian Business Industrial and the New South Wales Business Chamber (“**ABI and NSWBC Submissions**”). During the proceedings the President requested that the parties work together and not traverse the same material (for example during cross examination of witnesses). The Retail Associations have adopted this approach in that they do not intend to repeat the same material contentions and analysis of the evidence where they agree with the Ai Group Submissions and/or ABI and NSWBC Submissions.

B. FOUR YEARLY REVIEW SCOPE

5. Division 4 of Part 2-3 of the FW Act provides that the FWC “*must conduct a 4 yearly review of modern awards*”¹. There is little further guidance in Division 4 as to the manner in which the review is to be conducted, or the scope of the review, save that:
- (a) all modern awards must be reviewed;²
 - (b) the FWC may make determinations varying awards, and may make or revoke awards³; and
 - (c) each award is to be reviewed in its own right, but two or more awards may be reviewed at the same time⁴.
6. The FWC has determined, in the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision⁵, that:

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

¹ Section 156(1) of the *Fair Work Act 2009*

² *ibid* at section 156(2)(a)

³ *ibid* at section 156(2)(b)

⁴ *ibid* at section 156(5)

⁵ [2014] FWCFB 1788

7. This determination in relation to the scope of the review, on its face, favours retention of the status quo. While there is a valid question as to whether this is the correct approach, and we refer to and adopt the Ai Group Submissions at paragraphs 17 to 21 in that regard, there is little merit in the FWC having regard to previous decisions, at least to the extent that they would otherwise present a barrier to granting the variations we propose, because:

(a) the “decision” which resulted in the creation of the GRIA was not a contested proceeding, and therefore there were no true contested issues, because:

(i) no witness evidence of any kind was heard by the Australian Industrial Relations Commission (“AIRC”) in relation to the GRIA during the Award Modernisation process;

(ii) no evidence was heard in relation to the disabilities associated with weekend work generally, and Sunday work in particular, in relation to the GRIA during the Award Modernisation process; and

(iii) little assessment was made of the appropriateness of Sunday penalty rates as they related to other penalty rates within the GRIA or other Sunday penalty rates in other industry awards.

(b) the context in which the Award Modernisation process was conducted by the AIRC did not allow for detailed consideration of the appropriateness of the level of Sunday penalty rates. The Award Modernisation process, in relation to the GRIA, was essentially a blending of the many varied instruments which applied across the retail industry at the time, with prominence given to federal industry awards. This much is clear from the decision⁶ of the AIRC in which it said, in relation to the GRIA:

[286] The contents of the four awards we publish with this decision are derived from the existing awards and NAPSAs applying to the different sectors. Although the scope of the awards is obviously reduced, this did not eliminate the variations in terms and conditions within each part of the industry. We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments.....

⁶ [2008] AIRCFB 1000 at paras 283-287

[287] *Many of the submissions made to us from employers expressed concern at additional costs arising from provisions of the Retail industry exposure draft regarding hours of work, overtime, penalty rates, annual leave and allowances. We have revised these provisions having regard to the terms, incidence and application of relevant instruments for each sector. The result is provisions which more closely approximate to existing instruments for the relevant parts of the industry but which adopt different standards from one part to another.....*

- (c) the decision of the FWC on the penalty rates issue in the 2012 Award Review⁷ was handed down in the context of a review which was significantly limited in terms of the making of significant changes⁸; and
- (d) there has been no contemporary assessment of the disabilities associated with Sunday work, and there has been no reasoned analysis of the difference in the disabilities of working on Sundays as against working on Saturdays and evenings.

C. MODERN AWARDS OBJECTIVE

- 8. The GRIA must meet the “*modern award objective*” – to provide a “*fair and relevant minimum safety net of terms and conditions*” (see section 134(1) of the FW Act).
- 9. The Retail Associations refer to and adopt the Ai Group Submissions at Part E – Modern Awards Objective, at paragraphs 28, 29 and 30 in relation to the appropriate definitions of “*fair*”, “*relevant*” and “*modern*”. The FWC ought to consider fairness from the perspective of both employers and employees. The FWC ought to ensure the safety net is contemporary, and reflects contemporary society and the relevant industry. It also necessarily follows that a “modern” award must be current, and reflect the current circumstances of an industry and current expectations of society.

D. BASIS FOR THE VARIATIONS

- 10. The proposed variations to the GRIA are sought on the basis that the GRIA, as presently constructed, does not meet the modern awards objective (“**MAO**”).
- 11. The MAO, as set out in section 134 of the FW Act, compels the FWC to ensure that the GRIA, together with the National Employment Standards (“**NES**”), “*provides a fair*

⁷ [2013] FWCFB 1635

⁸ [2012] FWAFFB 5600 at paragraph [91]

and relevant minimum safety net of terms and conditions". Further, section 138 of the FW Act provides:

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

12. Section 138 of the FW Act creates an important limitation on the content of the GRIA, such that if a term of the GRIA goes further than is necessary to provide a fair and relevant minimum safety net of terms and conditions, that term offends section 138 and must be varied or removed. Clauses 29.4(c) and 30.3(c) of the GRIA, in their current form, are not necessary to achieve the MAO, and as such must be varied. The reasons for this are:

- (a) the clauses provide for Sunday work penalties that are not a relevant minimum safety net of terms and conditions because:
 - (i) the double time Sunday penalty was set in 1919 being a time when society, and the retail industry, was different to current times (see paragraphs 30 to 46 of these submissions);
 - (ii) changes in consumer and societal behaviour mean that Sunday is a day on which consumers seek to access retail businesses in significant and increasing numbers (see paragraph 85 of these submissions);
 - (iii) there is no, or limited, greater disability associated with Sunday work than with Saturday work (see Part S of these submissions);
 - (iv) there is lesser disability associated with Sunday work than with evening/night work (see Australian Work and Life Index 2014 (Exhibit SDA 45), pg 28, figure 13); and
 - (v) they are higher than the penalty rates applicable under the relevant awards in other service sector industries (for example, the *Restaurant Industry Award*, *Fast Food Industry Award*, *Hospitality Industry (General) Award 2010*).
- (b) the clauses provide for Sunday work penalties that are not a fair minimum safety net of terms and conditions because:

- (i) they result in employees being restricted in the number of hours they are offered by their employers on Sundays (see Part I of these submissions);
 - (ii) they inhibit employers in their ability to provide additional hours to employees and employment opportunities to unemployed persons (see Part I of these submissions);
 - (iii) they impact negatively on retail business operations on Sundays, including in relation to trading hours and sales performance (see Part I of these submissions); and
 - (iv) they go beyond what is required to compensate for the disability associated with Sunday work (see Part P of these submissions).
- (c) the clauses impact negatively on the low paid by:
- (i) increasing the workload of retail employees on Sundays, due to lower staff numbers and less skilled staff working on Sundays (see Part T of these submissions); and
 - (ii) limiting the ability of retail employees to earn additional income by working on Sundays, or working additional hours on Sundays as employers are unable to roster additional hours on Sundays (see Part I of these submissions).
- (d) the clauses are a part of a modern award that is not meeting the requirement that it encourage collective bargaining, as the number of agreements approved in the retail industry have reduced significantly since the commencement of the GRIA (see paragraph 141 of these submissions);
- (e) the clauses provide for levels of Sunday work penalties which do not “*promote social inclusion through increased workforce participation*” for the purposes of section 134(c) of the FW Act (see paragraphs 143 to 145 of these submissions);
- (f) the clauses do not promote flexible modern work practices and the efficient and productive performance of work. Retail business are forced by the clauses to operate under inefficient labour structures, and at lower than optimal productivity levels (see paragraphs 146 to 147 of these submissions);

- (g) the clauses provide for levels of Sunday work penalties which go well beyond the provision of “*additional remuneration*” for “*working on weekends*” for the purposes of section 134(da)(iii) of the FW Act (and constitute “*overcompensation*”) (see paragraph 148 of these submissions);
 - (h) the clauses have a negative impact on business, including on productivity and employment costs (see paragraphs 150 to 151 of these submissions); and
 - (i) the clauses have a negative impact on employment in Australia’s second largest employing industry. Varying the clauses as proposed is likely to have a positive impact on employment in Australia’s second largest employing industry as retail businesses are likely to roster more hours and employ more people (see Part K of these submissions), and it follows that this will have a positive impact on the Australian economy.
13. The FWC ought to vary the relevant clauses of the GRIA in line with the Draft Determination filed by FCB.

E. PENALTY RATES – HISTORY AND CURRENT LEVELS

General

14. Penalty rates have a long history in Australia’s industrial relations framework. In *Commonwealth Court of Conciliation and Arbitration (CCCA) 1919, Federated Gas Employees Industrial Union v Geelong Gas Company and Others*⁹ the Court held:
- ... the (extra rate for Sunday work) is given because of the grievance of losing Sunday itself – the day for family and social and religious reunion, the day on which one’s friends are free, the day that is the most valuable for rest and amenity under our social habits ... The norm of work should be six week days and Sundays free, the departure from the norm should be two time-and-a half rates, which is equivalent to one double rate.*
15. In 1947 the Conciliation and Arbitration Commission held that the Sunday penalty rate under the Metal Trades Award should be double time, stating:
- “[i]n one sense the use of the term ‘penalty’ as applied to such additional amounts is a misnomer, there is no question of punishment about the matter. But in another sense it expresses accurately enough the operation of the requirement of additional*

⁹ (1919) 13 CAR 437 at 469 per Higgins J

payment as, inter alia, a deterrent against calling upon employees to work in the circumstances in which the additional payment is required to be made. Most, if not all, of such requirements combine the element of compensation with that of deterrence. In some cases the one element predominates; in other cases the other: while yet in other cases there is no marked predominance of either”.

16. Historically, Sunday penalty rates have been set at a rate higher than the rate which applies to Monday to Friday work for three reasons:
 - (a) to compensate an employee for working at a particular time or on a particular day (see *Re Saturdays and Sundays Rates of Pay* (1947) 58 CAR 610 at 615 per Drake-Brockman ACJ and Sugerman J; *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [196], [197] per Hampton and Bartel DPP, Dangerfield C; *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [206] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC);
 - (b) to deter an employer from rostering employees to work a particular time or on a particular day (see *Re Saturdays and Sundays Rates of Pay* (1947) 58 CAR 610 at 615 per Drake-Brockman ACJ and Sugerman J; see also *Federated Gas Employees’ Industrial Union v Geelong Gas Company* (1919) 13 CAR 437 at 469, 470 per Higgins J; *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at [196], [197] per Hampton and Bartel DPP, Dangerfield C); and
 - (c) to provide an incentive for an employee to work at a particular time or on a particular day (see *Penalty Rates Case* [2013] FWCFB 1635; (2013) 231 IR 361 at [206] per Ross J, Watson SDP, Smith DP, Gooley and Hampton CC).

17. We also refer to and adopt the Ai Group Submissions at Part G, paragraphs 36 to 42, in relation to the traditional purpose of penalty rates including, but not limited to, compensating an employee for working at particular times or on particular days, deterring employers from rostering employees to work at particular times or on particular days and providing an incentive for an employee to work at a particular time or on a particular day.

Retail

18. The retail industry has also had a long history of imposing penalty rates for weekend work, including Sunday work. Payment of double time for work on Sundays commenced in the Victorian retail industry on 1 July 1922 after being introduced by the *Determination of the Shops Board No. 18 (Miscellaneous Shops)*.
19. On 27 September 1991 the Industrial Commission of New South Wales in Court Session¹⁰ held that the pay rate for ordinary time on Sundays, where Sunday trading is lawful, should be time and a half as it had been since 1937¹¹, and that the pay rate “...adequately compensates for the social disabilities involved in working at inconvenient times.”
20. On 18 June 1992 the Industrial Relations Commission of Victoria in Full Session (the “**IRCV**”) issued a decision which considered the question of appropriate rates for Saturday and Sunday work, amongst other matters, in relation to the Clothing and Footwear Shops Award, the Electrical, Furniture and Hardware Shops Award, the Food Shops Award and the General Shops Award¹².
21. A majority of the IRCV determined that the appropriate level of compensation for Saturday work was time and a quarter, as opposed to double time, and that this amount adequately compensated workers for the social disabilities involved in working on a Saturday. In reaching this conclusion, the IRCV had particular regard to the following matters:
 - (a) there had been a widespread acceptance of Saturday afternoon trading;
 - (b) the evidence showed that a significant proportion of sales took place on a Saturday; and
 - (c) shopping is being promoted and accepted as a leisure activity and therefore there is a demand for shops to be open at a time convenient to the community.
22. In the same decision the IRCV was not persuaded that the rate for Sunday work in Victoria should be reduced based on the following considerations:

¹⁰ *Retail Traders Association (NSW) and others re Shop Employees (State) Award and others* [Matter Nos. 1073, 1175 and 1226 of 1989]

¹¹ *Shop Assistants (Metropolitan) Case 1937 AR 456*

¹² IRCV decision D92/0256

- (a) the 1991 extensions to Sunday trading, where some shops were able to trade on up to 10 Sundays each year, did not warrant a reassessment of the Sunday penalty rates and did not demonstrate changed community attitudes or expectations by workers relating to Sunday work in retail. The IRCV said “*Sunday had not become an accepted trading day for shops generally in Victoria and the demand for employees to work on Sunday is not a normal and general expectation in the retail industry*”;
- (b) the circumstances in New South Wales and Victoria were different. In New South Wales, many shops had exceptions which enabled them to trade on Sundays, the rate of time and a half for ordinary hours on Sundays had been in place since 1937 for shops that could lawfully open; and
- (c) double time was then the current rate for Sunday work in retail in most States.
23. It is relevant to note at this point that these decisions confirmed a connection between community expectations and preference, the prevalence of retail trade on weekends and retail workforce expectations, in the setting of weekend penalty rates.
24. In *Shop, Distributive and Allied Employees Association and \$2 and Under and Others – 3 December 2003*¹³ (the “**\$2 and Under Case**”) the AIRC issued a split decision in determining the appropriate Sunday penalty rate for retail workers in Victoria. The majority, Senior Deputy President Watson and Commission Raffaelli, determined the appropriate penalty to be 100% of the ordinary rate, while Giudice J, in the minority, determined that a 100% penalty was “excessive”.
25. This decision is important for a number of reasons. The most significant of these is the influence this decision had on the content of the GRIA. As referred to in paragraph 7(b) above, the AIRC aligned the terms of the GRIA to “*the main federal industry awards*”. It is highly likely that had the minority decision been applied, and the Victorian Award, which was, in effect, the main federal industry award, provided for a 50% Sunday penalty, the GRIA would now provide for a 50% Sunday penalty.
26. It is also important because the majority of the Full Bench in *Restaurant and Catering Association of Victoria* referred to the decision as a “contemporary” assessment of Sunday penalty rates¹⁴. In our submission the view that this was a contemporary assessment of Sunday penalty rates is at odds with the evidence relied upon. The

¹³PR941526

¹⁴ [2014] FWCFB 1996 at paragraph [125]

majority in the \$2 and Under Case relied heavily on evidence from two experts, Bittman and Russell, in assessing the disability of Sunday work. In the case of Bittman, his evidence cannot be considered contemporary because his report relied on ABS Time Use Data from 1997¹⁵, which at the time of the Restaurants decision, was more than 16 years old and is currently 19 years old.

27. The decision is also important in the context of this Review in that the majority declined to undertake an assessment of the Sunday penalty rate in the context of other penalty rates within the award, in particular the Saturday penalty. The majority said¹⁶:

“The rationale of fixing a Sunday penalty rate for ordinary time work on the basis of providing compensation for the disabilities upon employees, applied in an abstract way, would involve the task of seeking to place a value upon the level of compensation required. It seems to us that such an exercise would necessitate a thorough assessment and fixation of a range of related penalties, such as Saturday penalties, having regard to associated disabilities, rather than the fixation of a single penalty rate in isolation. However, an abstract exercise of that type is not appropriate in the context of the present matter. We are required to consider the fixation of a final Sunday penalty rate in the context of the history of the provision, established approaches in relation to the making of a roping-in award and the statutory context. Further, we are now required to determine the single outstanding issue of the appropriate final rate for ordinary time work on a Sunday.”

28. The approach taken by the majority is at odds with the view expressed by the Full Bench in issuing its decision in relation to Sunday penalty rates under the GRIA during the 2012 Award Review, where the Full Bench said¹⁷:

“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.”

29. While the FWC is not being called on to fix a range of penalties, it is appropriate, and was foreshadowed by the Full Bench of the FWC in the 2012 Penalties Case, that the fixation of a Sunday penalty be carried out with reference to other penalties within the GRIA, in particular the Saturday penalty.

¹⁵ PR941526 at paragraph [53]

¹⁶ *ibid*, at paragraph [98]

¹⁷ [2013] FWCFB 1635 at paragraph [235]

Contentions on Penalty History

30. The current GRIA penalty rate for work performed on Sundays is set at the same level as that set in 1919. It ought not be contested that society, community expectations, consumer preferences and retail employment arrangements have shifted significantly since 1919. Sunday is a very different day in 2016 to what it was in 1919, in particular given the decline in religious observance and changed consumer shopping preferences. A modern GRIA should reflect this, and the changes experienced in Australian society in general, and the retail industry in particular, ought to result in a reduction in the Sunday penalty rate applicable under the GRIA from the level that was set in 1919 as the standard for Sunday work, consistent with MAO.

Australian society and working patterns have changed significantly since Sunday penalty rates were fixed at double time, and these changes support a reduction in the GRIA Sunday penalty

The norm of work is no longer “six week days and Sundays free”

31. The number of employees working the “typical” hours of Monday to Friday has significantly reduced in Australia – from 79% in 1971 to 59.1% in 2003 (see Muurlink Wellbeing Report (Exhibit UV 26), pg 40, par 64; see also Workplace and Economic Research Section of Fair Work Commission, Changing Work Patterns, (December 2015), table 3.1, table 3.2) and Lewis Report (Exhibit ABI 3) at pg 35 where Professor Lewis identified the proportion of male employees undertaking weekend work increased from 16% to 33%, and for females 14% to 28%, between 1995 and 2012).
32. This shift from the “norm” is more pronounced for the retail industry. Between 62% (see Watson & Peetz Report “*Characteristics of the Workforce in the National Retail Industry*” (Exhibit SDA 36) pg 18, par 3.2.5) and 69% (see Charlesworth & Macdonald Report “*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*” (Exhibit SDA 43) at para 40) of retail workers work on weekends, with between 31% and 35% (see Watson & Peetz report “*Characteristics of the Workforce in the National Retail Industry*” (Exhibit SDA 36), pg 18, par 3.2.4), 46.1% (see Charlesworth & Macdonald Report (Exhibit SDA 43), Appendix 1, Table 2 combining those who “Sometimes,” “Often” or “Almost Always” work on Sundays) and 50% (see Sands Report (Exhibit Retail 2), pg 58, par 2.3.1) working on Sundays.

33. The Sands Report on the percentage of retail employees working within the general retail industry who work on Sundays ought to be preferred to the Watson & Peetz Report because it dealt only with employees working within retail stores, and therefore covered by the GRIA (see Sands Report (Exhibit Retail 2) Appendix F Q4). The Watson and Peetz Report was based on an analysis of HILDA data under Division G of ANZSIC (see Exhibit SDA 36 at part 2.2), which includes industries other than the general retail industry, including motor vehicle and motor parts retailing, fuel retailing and non-store retailing and retail commission-based buying and selling, which are not covered within the GRIA.

Sunday can no longer be considered the day for religious reunion

34. From 1950 to 2007, the proportion of the Australian population that attended church at least monthly declined from 44.0% in 1950 to 17.0% in 2007 (see National Church Life Survey, pg 1, pg 2 (AiG Tender Bundle, Document 4, p331, p332) and Lewis Report (Exhibit ABI 3), pg 34).
35. The significant reduction in religious attendance is such that for the vast majority of Australians, Sunday has no significance in terms of religious reunion.
36. The Pezzullo Weekend Work Report (Exhibit PG 34 at Charts 4.4 and 4.5, pgs 27 and 28 (*marked pgs 46 and 47*)) found that “interference with religious observance” was the least common difficulty with Sunday work identified by survey participants, with less than 19% identifying it as a difficulty, and less than 9% identifying the level of that difficulty as “quite” or “very”.
37. Only one of the employees quoted in the Macdonald Interview Notes (Exhibit Retail 11, pg 22) identified Sunday as a day for religious reunion or observance.
38. The Sands Report (Exhibit Retail 2 at Figure 52, pg 74) identifies, that only 5% of retail industry employees who do not work on Sundays cite religious reasons as the reason they do not work.
39. None of the retail employees who participated in the focus groups as part of the Sands Report (Exhibit Retail 2) identified Sunday as a day for religious reunion or religious observance.

Sunday is not different to other days, including Saturdays, for family and social reunion

40. The evidence before the FWC is that there is no special emphasis placed on Sundays in relation to family and social reunion.
41. A number of retail employees consider that working Sundays does not often interfere with family responsibilities or events (see Macdonald Interview Notes (Exhibit Retail 11), pg 8, pg 28, pg 63, pg 94), and that family events can be and are arranged around Sunday work (see Macdonald Interview Notes (Exhibit Retail 11), pg 16, pg 17, pg 43; Witness 17 Cross Examination, 20 October 2015, PN18281 – PN18282; Sands Report (Exhibit Retail 2), pg 66, par 2.3.3).
42. Many employees consider that working Sundays does not often, if at all, interfere with social interactions (see Macdonald Interview Notes (Exhibit Retail 11), pg 9, pg 28, pg 43, pg 63, pg 94), and that social interactions can be and are arranged around Sunday work (see Macdonald Interview Notes (Exhibit Retail 11), pg 16, pg 17, pg 95, pg 125 and Sands Report (Exhibit Retail 2), pg 66, par 2.3.3). Further, when working on Sunday did interfere with social interactions it was said to be “*not such a big deal*” (see Macdonald Interview Notes (Exhibit Retail 11), pg 94).
43. The Pezzullo Weekend Work Report (Exhibit PG 34 at Charts 4.4 and 4.5, pgs 27 and 28 (*marked pgs 46 and 47*)) identifies very little difference between Saturday and Sunday in relation to the extent to which work on those days interferes with socialising or spending time with friends and family. In relation to Saturday work, 144 respondents considered the interference with socialising or spending time with family or friends as “*quite*” difficult and 142 respondents considered it “*very*” difficult (from a sample size of 498). In relation to Sunday work, 130 respondents considered it “*quite*” difficult and 146 respondents considered it “*very*” difficult (from a sample size of 507).

Sunday can no longer be considered the only day on which one’s friends are free

44. This factor is of diminished relevance to the consideration of the appropriate Sunday penalty rate because:
 - (a) the issue of one’s friends being free is less relevant as society changes in terms of the way people interact with each other, in particular through social media (see Deasy Amended First Affidavit (Exhibit AIG 11), pg 70, Table 33);

- (b) the matters set out in paragraph 43 above identify that Sundays present no more difficulty in terms of the ability to spend time with friends than Saturdays;
- (c) the increasing number of employees who work on Sundays logically means significantly fewer “friends” are free on Sundays; and
- (d) we refer to and adopt the ABI and NSWBC Submissions at paragraph 20.36(b)(ii)A in relation to the contention that the loss of leisure time with friends as a result of work is more acute on Saturdays (than Sundays).

Sunday can no longer be considered, for retail employees, the day that is the most valuable for rest and amenity under our social habits

- 45. The evidence before the FWC is that there is no difference in the value placed on Sundays as opposed to other days, in particular Saturdays, in relation to rest and amenity. The Pezzullo Weekend Work Report (Exhibit PG 34 at Charts 4.4 and 4.5, pgs 27 and 28 (*marked pgs 46 and 47*)) identifies very little difference between Saturday and Sunday in relation to difficulty maintaining a work life balance. The number of weekend workers listing the difficulty in maintaining a work life balance as “quite” and “very” are almost identical for Saturdays and Sundays (117 and 144 respectively for Saturdays (from a sample size of 459) and 123 and 142 respectively for Sundays (from a sample size of 466)). The Pezzullo Weekend Work Report also identifies little difference between Saturday and Sunday in terms of impact on responsibilities or activities outside of work (e.g. sport).
- 46. There is evidence before the FWC that:
 - (a) employees consider that Sunday does not often interfere with recreational activities, such as playing or watching sport (see Macdonald Interview Notes (Exhibit Retail 11), pg 8, pg 43, pg 94) and where there is interference, employees consider that they are able to arrange work around the activities as the work is flexible (see Macdonald Interview Notes (Exhibit Retail 11), pg 8, pg 70, pg 134);
 - (b) employees consider that Sunday does not often interfere with community activities (see Macdonald Interview Notes (Exhibit Retail 11), pg 9, pg 28, pg 43, pg 94); and

- (c) employees are able to use other days of the week on which they do not work to rest and relax (see Macdonald Interview Notes (Exhibit Retail 11), pg 28, pg 118).

Of the three reasons identified historically for the imposition of penalty rates, only one has any application

47. Given that changes in social patterns and retail trading hours mean that Sunday is a day on which the community expects to be able to access retail businesses (see paragraph 85 of these submissions), it is not fair to deter an employer from rostering retail employees on a weekend by imposing an additional 100% loading.
48. Further, the willingness and preference of retail employees to work on Sundays (see Part N of these submissions) means there are sufficient employees willing to work on Sundays. Therefore, there is no need to offer an incentive to those employees to work on a Sunday.
49. This leaves the question of compensation as the only critical matter for the FWC to consider. Given retail employees are willing and have a preference to work Sundays (see Part N of these submissions) and there are limited disabilities associated with Sunday work (see Part P of these submissions), the level of compensation required for Sunday work in the retail industry is low.

There has been no comprehensive assessment of the appropriateness of a double time Sunday penalty in the retail industry

50. It is our contention that any analysis of the appropriate penalty rate for Sunday work under the GRIA requires consideration of:
- (a) the disabilities associated with working specifically in the general retail industry on Sundays in modern times;
 - (b) relativities between different penalty rates under the GRIA with regard to the disabilities with working at those different times;
 - (c) the balancing of any loss experienced by employees against any positive impact on business and employment; and
 - (d) changes in community expectations in relation to access to retail businesses on Sundays.

51. There has been no decision that has considered all of these factors. Critically, as set out in paragraph 27 above, the majority in the Victorian case declined to undertake such an assessment.
52. The Full Bench in the 2012 Award Review¹⁸ commented that the following considerations were directly relevant to the modern awards objective: whether the level of penalty for work on Sundays in the GRIA is disproportionate to the disability suffered by employees, whether the level of penalty is having an impact on the manner in which employers are conducting their business and in turn impacting employment opportunities and whether “double time” is required as an incentive for employees to work Sundays.

F. APPROACH TO ASSESSING THE EVIDENCE BEFORE THE FAIR WORK COMMISSION

53. It is difficult to demonstrate by direct evidence the employment effects of a proposed award variation, and this has been accepted by the FWC (see Re SDA [2011] FWAFB 6251; (2011) 211 IR 462 at [24] per Lawler VP, Watson SDP, Hampton C).
54. It is contended that there are consistent themes throughout the expert evidence, survey evidence and lay evidence that constitutes reliable evidence, namely:
- (a) expert evidence that identifies that increasing, or high, Sunday penalty rates has a negative impact on employment in the retail industry (see Part H of these submissions);
 - (b) survey evidence that identifies that retail businesses operating under the GRIA trade for fewer hours on Sundays, and roster fewer employees on Sundays, because of labour costs (see paragraph 84(b) and (d) of these submissions); and
 - (c) lay retail witness evidence that identifies that they trade for fewer hours on Sundays, restrict labour hours on Sundays and restrict operational activities on Sundays because of labour costs (see paragraph 84 of these submissions).

Given the above, it is contended that the current Sunday penalty rate has a negative impact on employment for retail businesses covered by the GRIA.

¹⁸ [2013] FWCFB 1635 at [219] and [220]

55. It is also contended that there are consistent themes throughout the expert evidence and lay evidence that constitutes reliable evidence. These themes, and the evidence that supports them, are set out in detail in the submissions below.

G. CHARACTERISTICS OF THE RETAIL INDUSTRY

56. The retail industry exhibits the following characteristics which differentiate it from industry generally:
- (a) lower profit margins (see paragraph 58 to 59 of these submissions);
 - (b) lower average operating profits (see paragraph 58 to 59 of these submissions);
 - (c) high product costs (see paragraph 60 of these submissions); and
 - (d) labour costs represent a high proportion of non-product costs (see paragraph 61 of these submissions).
57. These characteristics mean that the retail industry is particularly sensitive, and therefore responsive, to changes in labour costs

Retail businesses operate under lower profit margins and average operating profits, and high product costs, when compared to industry generally

The retail industry operates on lower profit margins, and has lower operating profits before tax, than industry generally

58. Retail industry profit margins are lower than for all industries. Figure 4.8 of the FWC's research paper "Industry Profile – Retail Trade" ("IPR") identifies that total retail trade profit margins are less than half that of total selected industries.
59. Table 4.7 of the IPR identifies that average retail trade operating profits were, for 2013/14, substantially lower (\$150,500 compared to \$172,900, a difference of approximately 13%) when compared with total selected industries. This difference becomes more pronounced when those businesses who clearly do not operate under the GRIA (motor vehicle and fuel retailing) are removed. Removing these two non-GRIA categories reduces average retail profits to \$140,784, increasing the gap to total selected industries to more than 18.5%.

The retail industry operates under high fixed costs, and labour costs are the largest variable cost for retailers

60. Part 4.2.2 of the IPR identifies that purchase costs in the retail industry represent “around three quarters of total expenses”.
61. Figure 4.7 of the IPR identifies that wages and salaries, and other labour costs, represent almost 50% of retail business costs, excluding purchase costs, and are the highest expense for retail businesses, excluding purchase costs.

Retail businesses are responsive to changes in labour costs

Retail businesses fix labour budgets to a proportion of sales, and changes in the cost of labour lead to changes in labour hours

62. Retail businesses generally limit their use of labour to a particular percentage of retail sales, so that specific profitability levels can be maintained (see Barron Statement (Exhibit Retail 3) para 10; Goddard Statement (Exhibit Retail 4) para 11 and 12; Gough Statement (Exhibit Retail 5) para 11; Antonieff Statement (Exhibit Retail 6) para 9; Daggett Statement (Exhibit Retail 7) para 9; LeRoy D’Oreli Statement (Exhibit Retail 8) para 8).
63. Changes in the cost of labour can cause retail businesses to change the amount of labour rostered in order to achieve the labour cost percentages that are set (see Barron Statement (Exhibit Retail 3) para 11).

Retail businesses will reduce labour hours offered, both short term and long term, in response to substantial increases in labour costs

64. Tables 7.4, 7.5 and 7.6 of the IPR, drawing on data from the FWC’s *Australian Workplace Relations Study 2014*, identify that 72.7% of award-reliant retail enterprises will implement strategies to manage or reduce their wage bill in the face of a substantial increase in labour costs.
65. At Table 7.5 of the IPR those 72.7% of retail businesses who would manage or reduce their wage bill identified short and long term wage bill management strategies.
66. The most common short term strategies identified, as set out in Table 7.5, were:
 - (a) reduce casual hours (76.4%);

- (b) more hours worked by proprietors/owners (68.2%);
- (c) reduce the number of employees by attrition (67.4%);
- (d) reduce the number or length of shifts (59.8%); and
- (e) reduce overtime (58.2%).

67. The most common long term response to a substantial increase in labour costs identified by retail trade businesses, as set out in Table 7.6, was “reduce workforce/hours”.

68. The Pezzullo Weekend Work Report ((Exhibit PG 34), pg 20 (*marked pg 39*) section 3.2.8) stated:

“Economic theory suggests that a statutory wage set above the market rate would lead to lower employment because of lower demand for labour by employers. The magnitude of the employment loss is determined by the magnitude of the wage rise and the wage elasticity of labour demand and supply. This general principle also applies to employment at particular times when higher statutory wage rates apply....

...While the evidence clearly suggests that penalty rates reduce overall employment by some amount, it is not robust enough to allow the calculation of a specific estimate of the amount of employment forgone.”

69. At page 31 of the Lewis Report (Exhibit ABI 3), Professor Lewis refers to Table 4a and 4b and says:

“Table 4a indicates that in all cases employment of permanent employees is less with penalty rates than would be the case if standard rates of pay were to be paid...The estimated employment effects in table 4b for casual employees show similar negative effects on employment to those for permanent employees.”

We refer to and adopt the ABI and NSWBC Submissions at paragraphs 27.7 to 27.26 in relation to Professor Quiggin, Professor Borland and Professor Markey’s criticisms of the Lewis Report.

H. IMPACT OF INCREASED SUNDAY PENALTY RATES UPON RETAIL EMPLOYER BEHAVIOUR AND PRACTICE

70. The FWC has been presented with evidence of the impact of increased Sunday penalty rates on employment and labour hours (see Part I of these submissions). The conclusion that the Retail Associations contend should be drawn is as follows:

“Increased Sunday penalty rates in New South Wales since 2010 has had a sustained negative impact on employment and labour hours in the retail industry”

71. In New South Wales the Sunday penalty increased from an additional 50% prior to July 2010 to its current level of an additional 100% in July 2014. The FWC has before it expert evidence from Ms Serena Yu and Ms Lynne Pezzullo in relation to this impact, and that evidence conflicts in a number of areas. The two critical distinctions are whether:

- (a) there was a structural break in trends between New South Wales and Victoria which rendered Yu’s difference in difference (DID) model invalid; and
- (b) the increased Sunday penalty in New South Wales had a negative impact on retail industry employment in New South Wales.

Is Yu’s DID model invalid?

72. The Yu model assumes the trends for Victoria and New South Wales are the same (see Pezzullo Reply Report dated 2 December 2015 (Exhibit Retail 13) at para 3.3(b)) but does not test this in her initial report. Ms Pezzullo does test this and concludes the results of this testing *“strongly suggest that there is a break in the trend, at around the end of 2007”* (see Pezzullo Reply Report dated 2 December 2015 (Exhibit Retail 13) at para 3.3(i), pg 10).
73. We refer to and adopt the ABI and NSWBC Submissions at paragraphs 27.31 to 27.33 in relation to the differences between New South Wales and Victoria pre 2010.
74. Yu accepts it is critical to have an identical control group in order for her DID model to be valid (see Yu Cross Examination, 6 November 2015, PN22634). The Pezzullo analysis identifies that the control group is not identical, and that the trend in New South Wales *“is really made up of two distinct trends and the linear trend assumption is thus not valid”* (see Pezzullo Reply Report dated 2 December 2015 (Exhibit Retail

13) at para 3.3(i), pg 10). It is contended that this renders Yu's DID model invalid and Pezzullo's analysis of the employment effects of the increase in Sunday penalty rates in New South Wales should be preferred.

Was there a negative impact on employment in New South Wales?

75. The Yu Reports (Exhibits SDA 39 and 40) analyse the impact of the Sunday penalty increase at five data points, coinciding with the transitional phasing in of the increased Sunday penalty rate. Yu concludes that the five increases *"did not have a systematic effect on aggregate employment outcomes in the NSW retail industry"* (see Exhibit SDA 55 at para 4b and Exhibit SDA 39 at pg 28).
76. Ms Pezzullo asserts that there has been a statistically significant and enduring reduction in both employment and hours worked resulting from the increase in Sunday penalty rates in New South Wales (see Pezzullo Reply Report dated 2 December 2015 (Exhibit Retail 13) para 2.1(a) pg 6); Pezzullo Examination in Chief, 21 December 2015, PN25835). Pezzullo criticises the methodology in the Yu Report, in particular that by comparing each year with the previous, the methodology *"dilutes the total impact and makes it less likely to be able to statistically show impact overall"*. This is critical, and Pezzullo's Second Report (see Pezzullo Reply Report dated 2 December 2015 (Exhibit Retail 13) at para 2.1(a)) concludes that, with correct modelling, the data *"reveals a statistically significant and enduring reduction in both employment and hours worked resulting from the Award changes"*.
77. Further, Ms Pezzullo asserts that there were increases in retail sales which translated into smaller increases in employment in New South Wales (see Pezzullo Reply Report dated 2 December 2015 (Exhibit Retail 13) pg 20, par 4.21(c); Pezzullo Examination in Chief, 21 December 2015, PN25838) and which were not accounted for in the Yu Reports.

Support for Pezzullo's conclusions

78. Lay witness evidence in these proceedings accords with Ms Pezzullo's conclusion that the increased Sunday penalty rate in New South Wales has caused a decrease in employment in New South Wales. This is evident from the following:
- (a) Sussan Group experienced a decrease in average Sunday hours in New South Wales between 2010/2011 and 2014/2015, of 6.6% for Sussan stores

and 11.7% for Sportsgirl stores (see Barron Statement (Exhibit Retail 3), para 20);

- (b) Pillow Talk did not reduce the hours rostered on Sundays in New South Wales, however did reduce its overall rostered hours by 4,061 hours between 2009 and 2015 and this largely arose because of the significant increase in staffing and operational costs (see Goddard Statement (Exhibit Retail 4), para 25); and
- (c) Bakers Delight Lavington decreased its rostered hours both overall and on Sundays between June 2009 and June 2015 because of the increase in labour costs on Sundays, amounting to a decrease of 11.6% hours overall and 31% for hours worked on Sundays (see Daggett Statement (Exhibit Retail 7), para 15 and 18).

79. Pezzullo's conclusions are also supported by the matters set out in the IPR, which are referred to in paragraphs 64 to 67 above.

Conclusion even if Yu's analysis is accepted

- 80. If Yu's methodology, in particular the use of Victoria as a control and her denial of a structural break, are accepted, at the very least her report identifies that the increased penalty rate caused a 7.7% reduction in retail employment and a 7.1% reduction in aggregate hours in New South Wales in 2010/11 (see Yu Report dated 18 December 2015 (Exhibit SDA 55) pg 6, para 13).
- 81. Yu asserts that her Report is a "natural experiment"¹⁹ which identifies the impact of changes to penalty rates on employment. Yu does not suggest that her report provides any reliable conclusions about the impact of decreasing penalty rates on employment (see Yu Cross Examination, 6 November 2015, PN22626 to PN22630), and accepts that the type of research that would be relevant to the question of the impact of reduced penalties would be direct evidence from employers and a survey from a representative sample of retail employers (Yu Cross Examination, 6 November 2015, PN22631 and PN22632).
- 82. It is therefore not possible to accept from Yu's evidence that the impact of reducing penalty rates will substantially align to the impact of increasing penalty rates, albeit in reverse. If this could be assumed, however, the potential impacts are significant.

¹⁹ Transcript at PN22620

83. The IPR, at Table 6.3, identified that 28.5% of retail trade industry employees had their pay set by an award only, and also that there were 1,299,800 persons employed in the retail trade industry (Table 5.2). This would mean there were approximately 370,440 retail trade industry employees who had their pay set by an award. If all these had their pay set by the GRIA a 7.7% reduction in total employment would amount to the loss of 28,524 jobs. If the reverse is true, this would mean a decision by the FWC to grant the variation sought could result in the creation of 28,500 retail jobs.

I. IMPACT OF CURRENT SUNDAY PENALTY ON LABOUR ALLOCATION AND RETAIL OPERATIONS

84. There is evidence that retail businesses respond to a double time Sunday penalty by:
- (a) closing stores on Sundays (see Sands Report (Exhibit Retail 2) pg 85 and pg 86, section 3.2.1 which identifies a retail business that recently ceased trading on Sundays due to high labour costs and the inability to work 7 days a week and reports that *“commonly, stores not located in shopping centres and in more regional state locations are closed on Sundays”* and this is done to avoid higher labour costs; Barron Statement (Retail 3 Exhibit) at para 12 in which Mr Barron identifies that Sussan Group does not operate a number of stores on Sundays because opening would result in a trading loss; Goddard Statement (Exhibit Retail 4) at para 13 where Mr Goddard identifies that Pillow Talk closes one store on Sundays as wages are not commensurate with turnover; D’Oreli Statement (Exhibit Retail 8) at para 12 where Mr D’Oreli says Jeanswest does not operate approximately 13 stores on Sundays because traffic is low or sales generated are insufficient to cover wages);
 - (b) limiting and reducing trading hours on Sundays (see Sands Report (Exhibit Retail 2) pg 86, par 3.2.1; Barron Statement (Exhibit Retail 3) para 12 and 18; Daggett Statement (Exhibit Retail 7) para 19(b); D’Oreli Statement (Exhibit Retail 8) para 18(a); Baxter Statement (Exhibit ABI 9) para 20 where Ms Baxter, analysing the results of the retail survey, identifies that approximately 88.3% of GRIA Respondents indicated that their Sunday trading hours were less than trading hours on weekdays and that 53.18% of the responses indicated that “Wages/Costs” was the reason that Sunday trading hours varied from other days of the week, including Saturdays (see Baxter Statement (Exhibit ABI 9) para 43); Baxter Statement (Exhibit ABI 9) Exhibit EB2, Tab 4

contains data which demonstrates that 75.81% of GRIA Respondents indicated that their Sunday trading hours were less than trading hours on Saturdays; Pezzullo Weekend Work Report (Exhibit PG 34) pg 35/36 (*marked pg 54/55*), par 4.7 which identifies that responses to the survey indicate that average weekday opening hours for services sector businesses are 10.3, Saturdays are 9.2 and Sundays are 9, and that this may imply that penalty rates are reducing profitable opening hours;

- (c) limiting operational activities undertaken on Sundays such that Sundays are dedicated to customer service and selling (see Barron Statement (Exhibit Retail 3) para 12, para 19; Goddard Statement (Exhibit Retail 4) para 27; Gough Statement (Exhibit Retail 5) para 19(b); Antonieff Statement (Exhibit Retail 6) para 18; Daggett Statement (Exhibit Retail 7) para 19(a); D'Oreli Statement (Exhibit Retail 8) para 16). Operational activities which are limited include administration tasks, inventory management, stock replenishment, cleaning, limiting deliveries to days other than Sunday (see Sands Report (Exhibit Retail 2) pg 86, par 3.2.1; Barron Statement (Exhibit Retail 3) para 12, 19 and 24; Gough Statement (Exhibit Retail 5) para 19(b); Antonieff Statement (Exhibit Retail 6) para 18; Daggett Statement (Exhibit Retail 7) para 19(a); D'Oreli Statement (Exhibit Retail 8) para 16). Specifically:
- (i) SPAR Ballina does not operate the deli, prepare hot foods or operate any baking functions (see Gough Statement (Exhibit Retail 5) para 19(c)) because of the labour cost (see Gough Cross Examination, 19 November 2015, PN16677);
 - (ii) Sussan Group does not undertake restocking activities on Sundays when it does on Saturdays and weekdays (see Barron Cross Examination, 19 November 2015, PN16161 to 16169); and
 - (iii) Bakers Delight Lavington does not carry out any baking of goods after 11.00am on Sundays (compared with 4.00pm Monday to Friday and until 2.00pm on Saturdays) because of the labour cost, and does not offer tastings of products to customers on Sundays (which they do on Saturdays and weekdays) because of costs (see Daggett Statement (Exhibit Retail 7) para 19(c) and para 19(d)).

- (d) offering fewer hours to employees on Sundays than on other days, or limiting labour allocations on Sundays (see Sands Report (Exhibit Retail 2) pg 86, par 3.2.1; the matters set out at paragraph 84(a) – (c) of these submissions; Baxter Statement (Exhibit ABI 9) para 35(a) where Ms Baxter identifies that approximately 88.9% of GRIA Respondents roster fewer employees on a Sunday than on a weekday and para 59 where Ms Baxter identifies that 80.77% of the respondents cited cost or wages as the reason for why Sunday rostering differs to other days of the week, including Saturdays; Baxter Statement (Exhibit ABI 9) Exhibit EB2, Tab 4 contains data which demonstrates that 71.17% of GRIA Respondents indicated that they roster fewer employees on a Sunday than on a Saturday; Pezzullo Weekend Work Report (Exhibit PG 34) pg 37 (*marked pg 56*), par 4.7 where Ms Pezzullo found that a majority of workers who reported higher staffing levels on Saturdays and Sundays also reported high workloads, which Ms Pezzullo asserts may evidence that employers employ too few additional staff to balance the additional workload; D'Oreli Cross Examination, 20 October 2015, PN17196 where Mr D'Oreli says that Jeanswest "*are working on the minimal, the absolute minimal*" on Sundays);
- (e) offering fewer hours to employees on days other than Sundays. Some retail businesses are operating at a level of staff just sufficient to operate the store and are unable to reduce Sunday hours any further and therefore they look to reduce hours on other days of the week (see Sands Report (Exhibit Retail 2) pg 86, part 3.2.1). The data collected from retail businesses by Dr Sands shows that average weekly labour hours have trended downwards, whereas average Sunday labour hours have remained relatively constant between 2009 and 2015 (Sands Report (Exhibit Retail 2) pgs 92 and 93, par 3.3.2). This is further evidenced by SPAR Ballina which always limited its Sunday hours and so reduced its rostered hours on other days of the week (see Gough Statement (Exhibit Retail 5) para 17 and 18) as well as Bakers Delight Lavington which reduced hours on Sundays and across the whole week (see Daggett Statement (Exhibit Retail 7) para 15);
- (f) structuring rosters to eliminate breaks and shift crossover (see Sands Report (Exhibit Retail 2) pg 86, par 3.2.1; Goddard Statement (Exhibit Retail 4) para 26; D'Oreli Statement (Exhibit Retail 8) para 18(b)). Employees have also

noted this practice being utilised by retail businesses (see Sands Report (Exhibit Retail 2) pg 61, par 2.3.2);

- (g) operating with less experienced and lower cost junior employees. Retail businesses are rostering younger and less experienced employees on Sundays due to their lower labour cost (see Sands Report (Exhibit Retail 2), pg 86, par 3.2.1; Barron Statement (Exhibit Retail 3) para 26; Gough Statement (Exhibit Retail 5) para 19(a); Antonieff Statement (Exhibit Retail 6) para 18(b); Daggett Statement (Exhibit Retail 7), para 19(e)). This again is a practice that has been noted by retail employees (see Sands Report (Exhibit Retail 2) par 2.3.2 and pg 73, par 2.3.4). The practice of rostering less experienced staff members on Sundays is negatively impacting service delivery (see Sands Report (Exhibit Retail 2), pg 73, par 2.3.4); and
- (h) owners of the retail business and family members work on Sundays instead of rostering employees because of the cost of labour on Sundays (see Sands Report (Exhibit Retail 2) pg 61, part 2.3.2, pg 86, part 3.2.1, pg 89, part 3.2.5; Gough Statement (Exhibit Retail 5) para 19(d); Antonieff Statement (Exhibit Retail 6) para 17; Daggett Statement (Exhibit Retail 7) at paragraph 19(f)).

J. RETAIL BUSINESSES CANNOT AVOID SUNDAY PENALTIES

85. Retail businesses cannot avoid Sunday penalties because:

- (a) consumers demand access to retail businesses on Sundays (see Goddard Statement (Exhibit Retail 4), para 15; Sands Report (Exhibit Retail 2), Table 2, Figure 11, pgs 29 and 30 which identifies foot traffic across a portfolio of stabilised shopping centres experienced a 5.8% increase on Sundays, with the next highest increase on any other day being 2.2%, at pg 87; Sands Report (Exhibit Retail 2) pg 88, par 3.2.3; Barron statement (Exhibit Retail 3) at para 14, 15 and 16; Antonieff Statement (Exhibit Retail 6) para 11; Daggett Statement (Exhibit Retail 7) para 13; Barron Cross Examination, 19 October 2015, PN16250 to PN16253) which identify that Sunday accounts for a significant proportion of weekly sales and is one of the busiest days of the week in terms of sales per hour, and that this is increasing;
- (b) shopping centre leases mandate that tenants open on Sundays (see Sands Report (Exhibit Retail 2), pg 86, par 3.2.1, pg 98, Research Summary; D'Oreli

Statement (Exhibit Retail 8), para 12; Barron Statement (Exhibit Retail 3), para 12);

- (c) retail businesses would lose customers to competitors if they closed stores on Sundays (see Sands Report (Exhibit Retail 2), pg 87, par 3.2.2; Gough Statement (Exhibit Retail 5) para 12).

86. Many retail businesses must open on Sundays due to consumer demand (see paragraph 85 above) and therefore should not be deterred, by way of the current Sunday penalty rate, from rostering employees to work at particular times.

K. IMPACT OF A REDUCTION IN THE SUNDAY PENALTY ON LABOUR ALLOCATION AND OPERATIONS

87. If the Sunday penalty rate is reduced, it is contended that retail businesses are likely to:

- (a) open more stores on Sundays (see paragraph 88 of these submissions);
- (b) increase trading hours on Sundays (see paragraph 89 of these submissions);
- (c) carry out additional operational tasks on Sundays (see paragraph 90 of these submissions);
- (d) reduce the number of hours worked by owners (see paragraph 91 of these submissions); and
- (e) increase overall labour hours worked in retail stores (see paragraph 92 of these submissions).

Retailers likely to open more stores on Sundays

88. Retail businesses are likely to open some stores they currently do not, meaning they would employ staff to work in these stores (see Barron Statement (Exhibit Retail 3), para 12, 13, 28; D'Oreli Statement (Exhibit Retail 8) at para 14).

Retailers likely to increase trading hours on Sundays

89. Retail businesses are likely to extend trading hours (see Barron Statement (Exhibit Retail 3), para 15 and 28; Goddard Statement (Exhibit Retail 4) para 13 and 14;

D'Oreli Statement (Exhibit Retail 8) para 21 and D'Oreli Cross Examination, 20 October 2015, PN17190 to PN17193 and PN17212 to PN17214).

Retailers will carry out additional operational tasks

90. Retail businesses are likely to roster more hours to perform more activities on Sundays, such as restocking (see Sands Report (Exhibit Retail 2) pg 91, par 3.3.2; Barron Statement (Exhibit Retail 3), para 13 and 28), operating parts of the business not currently operating such as a bakery or providing samples, or extending those operations (see Gough Statement (Exhibit Retail 5) para 20; Daggett Statement (Exhibit Retail 7) para 21).

The number of hours worked by owner operators will reduce

91. Retail businesses are likely to reduce the number of hours worked by owner operators, and will reallocate these hours to other employees (see Gough Statement (Exhibit Retail 5) para 20; Antonieff Statement (Exhibit Retail 6) para 19; Daggett Statement (Exhibit Retail 7) para 21).

Retailers will increase overall labour hours worked in retail stores

92. Retail businesses are likely to respond to a reduced Sunday penalty by rostering more hours on Sundays meaning that they would give more hours to current employees (see Sands Report (Exhibit Retail 2), pgs 90 and 91, par 3.3.1; Barron Statement (Exhibit Retail 3), para 13 and 27; Goddard Statement (Exhibit Retail 4), para 31 and 32; D'Oreli Statement (Exhibit Retail 8) para 19) and employ more employees (see Goddard Statement (Exhibit Retail 4), para 31; Barron Statement (Exhibit Retail 3), para 28; D'Oreli Statement (Exhibit Retail 8) para 14; D'Oreli Cross Examination, 20 October 2015, PN 17194 to PN17196; Daggett Cross Examination, 19 October 2015, PN17039). Further, 65.5% of respondents to the survey undertaken by ABI and NSWBC indicated that they would allocate more hours to employees on Sundays if the Sunday penalty rate was reduced from 100% to 50% (see Baxter Statement (Exhibit ABI 9), Tab 3, pg 26).
93. This includes offering more hours of work to managers and experienced staff members (see Sands Report (Exhibit Retail 2), pg 91, par 3.3.2; Gough Statement (Exhibit Retail 5) para 20; Daggett Statement (Exhibit Retail 7) para 21).

Benefits for existing employees and unemployed persons

94. Reducing the Sunday penalty rate is likely to result in:
- (a) additional hours of work being allocated to existing employees in the retail industry (see Sands Report (Exhibit Retail 2), pgs 90 and 91, par 3.3.1; Barron Statement (Exhibit Retail 3), para 13 and 27; Goddard Statement (Exhibit Retail 4), para 31, 32; D'Oreli Statement (Exhibit Retail 8) para 19); and
 - (b) more employees being employed in the retail industry (see Goddard Statement (Exhibit Retail 4), para 31; Barron Statement (Exhibit Retail 3), para 28; D'Oreli Statement (Exhibit Retail 8) para 14; Daggett Cross Examination, 19 October 2015, PN17039).

L. INCREASED STAFF ON SUNDAYS WILL LEAD TO INCREASED RETAIL SALES TURNOVER

95. By increasing labour hours on Sundays in response to a reduced Sunday penalty, retail businesses are likely to expand operational activities (see paragraph 90 above) and improve customer service levels, which is likely to result in an increase in sales (see Daggett Statement (Exhibit Retail 7) para 22; Daggett Cross Examination, 19 October 2015, PN17038; Sands Report (Exhibit Retail 2) pg 81, par 2.4.2, pg 91, par 3.3.2; Gough Statement (Exhibit Retail 5) para 20; D'Oreli Statement (Exhibit Retail 8) para 20).

M. CHARACTERISTICS OF RETAIL INDUSTRY EMPLOYEES

96. When compared to employees generally, retail employees are more likely to:
- (a) be younger – 33.4% (or 36% according to the Lewis Report (Exhibit ABL 1) at pg 18) of the retail workforce is aged 24 years or younger, compared to 15.5% for all industries – see IPR at Table 5.2 and 64% of retail employees that work Sunday are 24 years old or younger (see Sands Report (Exhibit Retail 2) pg 58, par 2.3.1) and a significantly lower proportion of retail employees aged 24 and under work weekdays (see Sands Report (Exhibit Retail 2), pg 58, par 2.3.1);
 - (b) be engaged casually – with 38% of retail employees engaged casually compared to 24.3% for all industries - see IPR at Table 5.6;

- (c) be employed for shorter times – see IPR at Figure 5.1 (see Macdonald Interview Notes (Exhibit Retail 11), pg 96; see Pezzullo Weekend Work Report (Exhibit PG 34) pgs 35 and 35 (*marked 53 and 54*), par 4.6);
 - (d) not hold a non-school qualification – approximately 52% of retail industry employees do not hold a non-school qualification, compared to approximately 32% for all industries (see IPR at Figure 5.2); and
 - (e) identify lower AWALI scores in relation to weekend work (Charlesworth & Macdonald Report (Exhibit SDA 43) at Appendix 1, Tables 4-1a and 4-1b, 4.2a and 4.2b, pg 27).
97. Significantly fewer retail industry employees who sometimes, often or almost always work on Sundays than employees generally who sometimes, often or almost always work on Sundays, report (see Charlesworth Report (Exhibit SDA 43) pgs 29 to 32 and 34 to 37):
- (a) work interferes with activities outside work sometimes, often or almost always (56.8% for retail employees compared to 70% for all employees);
 - (b) work keeps them from spending the amount of time they would like with family and friends sometimes, often or almost always (41.9% for retail employees compared to 69.9% for all employees);
 - (c) work interferes with their ability to develop or maintain friendships in their community sometimes, often or almost always (47.1% compared to 56.9% for all employees); and
 - (d) they feel rushed or pressed for time sometimes, often or almost always (82.3% compared to 85.6% for all employees).
98. Retail employees working on weekends are significantly younger (point estimate 29 years of age) than weekend workers generally (point estimate 34.8 years of age) (see Watson & Peetz Report (Exhibit SDA 36) at Tables 12 & 13, pgs 9 and 10).
99. A significantly higher percentage of persons working on weekends in the retail industry are aged 15 to 18 years (point estimate 22.1%) than for employees generally (point estimate 13.3) (see Watson & Peetz Report (Exhibit SDA 36) at Tables 14 & 15, pgs 10 and 11).

100. A significantly higher percentage of persons working on weekends in the retail industry are students (point estimate 37.7%) than for employees generally (point estimate 18.4) (see Watson & Peetz Report (Exhibit SDA 36) at Tables 18 & 19, pgs 12 and 13).
101. We refer to and adopt the ABI and NSWBC Submissions at paragraphs 17.14 and 17.15 in relation to the *Productivity Commission Inquiry Report November 2015 – Workplace Relations Framework* (the “**Productivity Commission Final Report**”) which identifies that some people do not find weekend work as problematic as others, and that young people and singles with no children are disproportionately represented in weekend work.
102. It is our contention that the retail industry contains a disproportionately high number of young people, students and other sub groups with personal circumstances that makes these sub-groups more likely to choose weekend work (for example, students prefer to work on the weekends rather than during “standard” hours (Pezzullo Weekend Work Report (Exhibit PG 34), pg iii (*marked pg 15*)).

N. RETAIL EMPLOYEES CHOOSE TO WORK ON SUNDAYS

103. It is important to note that many retail employees choose to work on Sundays, either by seeking and/or accepting employment where Sunday work is required, or by seeking or accepting shifts on Sundays in their existing employment. This is evidenced by:
- (a) many retail employees choose to or are happy to work on Sundays (see Sands Report (Exhibit Retail 2), par 2.3.3; Macdonald Interview Notes (Exhibit Retail 11), pg 7, pg 15/16, pg 21, pg 33, pg 41, pg 62 and 64, pg 69, pg 73, pg 87, pg 93, pg 105, pg 117, pg 138, pg 148);
 - (b) many employees knew that they would be working on Sundays when they took their job in retail (Witness 16 Cross Examination, 20 October 2015, PN17865; Witness 17 Cross Examination, 20 October 2015, PN17991 – PN17996; Witness 22 Cross Examination, 21 October 2015, PN18337 – PN18339; Witness 18 Cross Examination, 20 October 2015, PN18065 - PN18070; Witness 19 Cross Examination, 21 October 2015, PN18148 – 18153; Witness 20 Cross Examination, 21 October 2015, PN18229 - PN18232; Witness 21 Cross Examination, 21 October 2015, PN18276 – PN18278);

- (c) Sussan Group has had 37 written requests from team members to work every Sunday in order to set aside clause 28.13 of the GRIA and therefore to work every Sunday (see Barron Statement (Exhibit Retail 3), para 30);
- (d) Sussan Group, SPAR Ballina and Foodworks Oxley have not had any difficulties in finding employees to work on Sundays (see Barron Statement (Exhibit Retail 3), para 29; Gough Statement (Exhibit Retail 5), para 22; Antonieff Statement (Exhibit Retail 6), para 20);
- (e) Bakers Delight Lavington has had senior staff wanting to work Sundays so they can look after their children during the week and not pay for childcare (see Daggett Cross Examination, 19 October 2015, PN15957); and
- (f) the Sands Report (Exhibit Retail 2) Figure 41 at 2.3.2 (pg 60) in which Dr Sands identifies that 46% of retail employees surveyed work every Sunday. Clause 28.13 of the GRIA provides that an employee can only work every Sunday if they make a request to their employer to do so. Therefore, it can be concluded that those who work every Sunday do so by choice having requested to set aside clause 28.13 of the GRIA.

104. Many retail employees choose to work on Sundays because it suits their personal circumstances and allows flexibility in relation to their non-work commitments (see Sands Report (Exhibit Retail 2), pg 63, par 2.3.3; Pezzullo Weekend Work Report (Exhibit PG 34), pg 20 (*marked pg 39*), par 3.2.8 and pg 40 (*marked pg 59*), par 4.9).
105. A significant proportion of weekend retail workers are students (see paragraph 100 above) and are therefore likely to be working Sundays because it suits their availability outside their studies.

O. RETAIL EMPLOYEES WILL CONTINUE TO WORK ON SUNDAYS AT A 50% PENALTY

106. Retail employees will continue to work on Sundays if the Sunday penalty rate is reduced to an additional 50% (see Sands Report (Exhibit Retail 2) pg 76, par 2.3.6 and pg 91, par 3.3.2; Antonieff Statement (Exhibit Retail 6) para 20; Macdonald Interview Notes (Exhibit Retail 11) pg 23/24, pg 65, pg 83; Witness 17 Cross Examination, 20 October 2015, PN17985; Witness 18 Cross Examination, 20 October 2015, PN18057 - PN18061; Witness 19 Cross Examination, 20 October 2015, PN18155 – 18156; Witness 20 Cross Examination, 21 October 2015, PN18233 –

PN18235; Witness 21 Cross Examination, 21 October 2015, PN18279 – PN18280; Witness 22 Cross Examination, 21 October 2015, PN18341 – PN18342).

107. Retail employee willingness to work on Sundays increases substantially from no penalty to a 50% penalty, but increases only incrementally from a 50% to 100% penalty (see Sands Report (Exhibit Retail 2) at Figure 55, pg 77), and employee satisfaction with working on Sundays increases substantially from no penalty to a 50% penalty, but increases only incrementally from a 50% penalty to a 100% penalty (see Sands Report (Exhibit Retail 2) at Figure 56, pg 77 & 78).
108. Many retail employees currently work for a 50% penalty (see Macdonald Interview Notes (Exhibit Retail 11) pg 7, pg 21/24, pg 42, pg 63, pg 69/70, pg 75, pg 87, pg 94, pg 99, pg 106, pg 117).
109. 53% of non-Sunday retail workers would work on Sundays if they could, with the substantial majority of these not requiring increased pay to do so (see Sands Report (Exhibit Retail 2) Figure 54 on pg 75). Factors which are causing these non-Sunday workers not to work on Sundays include not being offered to work (13%) and the store not being open (5%).
110. A significant number of weekend retail workers do not rely on penalty rates to meet their financial needs (see Pezzullo Weekend Work Report (Exhibit PG 34) pg 40/41 (*marked 59/60*), par 4.9; Macdonald Interview Notes (Exhibit Retail 11) pg 44). Ms Pezzullo reported that only 17.2% of weekend workers relied on their weekend work to meet their financial needs.
111. The threshold value of pay required for retail employees to work on Sunday is 156.93% of the average reported hourly weekday rate (see Rose Report (Exhibit ABI 1), pg 44). We refer to and adopt the ABI and NSWBC Submissions at paragraphs 20.6 to 20.8 in relation to the responses to the unions' criticisms of the expert report of Professor John Rose, namely that Professor Rose had "incorrectly conflated the importance of an activity with the importance of a particular period of time".
112. Unemployed youths and mature workers will work for a 50% penalty (Pezzullo Weekend Work Report (Exhibit PG 34) pg 20 (*marked pg 39*)).
113. Only a relatively small percentage of workers cite higher hourly pay as the reason for weekend work (see Pezzullo Weekend Work Report (Exhibit PG 34) pg 40 (*marked 59*), par 4.9).

114. It is contended that because retail employees would continue to work on Sundays for a 50% loading, are generally willing to work and satisfied with 50% loading for working on Sundays and a number of retail employees currently receive a 50% loading for working on Sundays, a loading of 100% on Sundays is not necessary to entice employees to work on a Sunday.

P. LIMITED DISABILITY ASSOCIATED WITH SUNDAY WORK

115. There is very limited evidence of disability associated with Sunday work for retail employees. It is likely the level of disability is low because:
- (a) retail employees identify low levels of interference associated with Sunday work (see paragraph 97 of these submissions); and
 - (b) a high proportion of retail weekend workers (22.1%) are aged 15 to 18 (see paragraph 99 of these submissions), and there is little evidence of any disability associated with Sunday work for persons of that age group.

Q. NO EVIDENCE OF ADVERSE HEALTH CONSEQUENCES FROM WORKING SUNDAYS

116. In Dr Sands' research, 81% of Sunday employees did not believe that working on Sundays had an adverse impact on their health (see Sands report (Exhibit Retail 2), part 2.3.3, pg 69).
117. We refer to and adopt the ABI and NSWBC Submissions at part 18 (paragraphs 18.1 to 18.12) in relation to the contention that there is no evidence that working on Sundays gives rise to adverse health consequences.
118. We also refer to and adopt these sections of the ABI and NSWBC Submissions in relation to the deficiencies with the expert report of Dr Muurlink, *The Impact of weekend work: consecutivity, overload, uncontrollability, unpredictability, asynchronicity and arrhythmia*, in summary that Dr Muurlink's thesis is not that Saturday or Sunday work gives rise to adverse health consequences, but rather that factors that occasionally accompany weekend work generate adverse health consequences. We also refer to and adopt paragraphs 20.39 to 20.42 in relation to the criticisms of Dr Muurlink's report.
119. The ABI and NSWBC Submissions outline that such factors include that weekend workers are often working overtime on weekends (paragraph 18.9(b)) and that

weekend workers may be working 6 or 7 days consecutively (paragraph 18.9(d)). In relation to these factors we note, respectively, that under the GRIA working overtime on Sundays would not be affected by the proposed variation to Sunday penalty rates and that the GRIA does not allow employees to work 7 consecutive days without the payment of overtime (see clause 28.12 of the GRIA).

120. We refer to and adopt the ABI and NSWBC Submissions at paragraph 18.13(a) which contends that the most compelling evidence in relation to adverse health consequences relates to rotating shift work, night work and long hours and that Australian evidence on health effects of weekend work is “practically non-existent”.

R. LIMITED FINANCIAL DISADVANTAGE ASSOCIATED WITH REDUCING THE SUNDAY PENALTY

121. It is contended that there will be limited financial disadvantage experienced by retail employees if the application is granted because:
- (a) the reduction in hourly rate will only have a small impact on wages (see Exhibits SDA 16 through 22, where the average reduction is \$78.68 per fortnight); and
 - (b) any reduction in wages will be predominantly offset by the opportunity to work additional hours offered by retail businesses who are likely to reinvest the labour cost savings back into store labour budgets. Based on the average reduction set out above, at current rates these employees would only need to work an additional 1.38 hours on Sunday each week to offset the reduction in the penalty rate.

S. LIMITED DIFFERENCE BETWEEN SUNDAY AND SATURDAY

122. Saturdays and Sundays are merging in terms of the degree to which they are emotionally attractive and are merging in relation to the activities in which members of the community participate (see Muurlink Report (Exhibit UV 26), para 65; see Muurlink Cross Examination, 4 November 2015, PN20884).
123. We refer to and adopt the ABI and NSWBC Submissions at paragraphs 20.13 to 20.22 in relation to the expert report of Professor Markey, *The continuing importance of penalty rates for weekend work: a review of the evidence* and the studies referenced by him. In summary, the ABI and NSWBC Submissions contend that:

- (a) the Bittman paper, referred to by Professor Markey, demonstrates that time spent on various leisure and social activities were broadly equivalent between Saturday and Sunday; and
- (b) the Craig and Brown study, referred to by Professor Markey, found that there was no significant difference between leisure time displaced by Saturday work and Sunday work for two out of the three types of households analysed. Further, we refer to and adopt the ABI and NSWBC Submissions at paragraph 20.36(b)(ii)A in relation to Professor Markey's agreement that an accurate representation of Craig and Brown's findings would be that the loss of leisure time with friends as a result of working is more acute on Saturdays (than Sundays).

We also refer to and adopt the ABI and NSWBC Submissions at paragraphs 20.34 to 20.38 in relation to the deficiencies of Professor Markey's arguments.

124. The Productivity Commission in its report (the Productivity Commission Final Report at page 437) found that:

"...there is very little difference in the degree to which people engage in social activities between Saturdays and Sundays (compared to 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."

125. Retail employees view Saturdays and Sundays as similar or equal in terms of work/life interference and generally (see Macdonald Interview Notes (Exhibit Retail 11), pg 10/11, pg 22, pg 28, pg 34, pg 44, pg 63, pg 96, pg 105) and that the level of intrusion is about the same (see Witness 17 Cross Examination, 20 October 2015, PN18038; Witness 19 Cross Examination, 21 October 2015, PN18193).

126. A number of retail employees even view Sunday as more relaxed in terms of the work than Saturday (see Macdonald Interview Notes (Exhibit Retail 11), pg 17, pg 23), that the two days should be "on par" (see Macdonald Interview Notes (Exhibit Retail 11), pg 11) and Saturdays have more work/life interference (see Macdonald Interview Notes (Exhibit Retail 11), pg 82; see Witness 18 Cross Examination, 20 October 2015, PN18088).

127. Slightly more than half of employees view Saturday and Sunday as equally important, with 69% of employees under 35 years old viewing both days as equal (see Pezzullo Weekend Work Report (Exhibit PG 34) pg 30 (*marked pg 49*)).
128. The table below compares responses to the AWALI 2014 survey questions for retail Saturday and Sunday work (extracted from Charlesworth and Macdonald Report (Exhibit SDA 43) Appendix 1, based on those who sometimes, often or almost always work on Sundays):

Factor	Saturday work	Sunday work
Interferes with responsibilities or activities outside work	49.3%	56.8%
Interferes with spending amount of time would like with family or friends	51.5%	41.9%
Interferes with ability to develop and maintain friendships	41.9%	47.1%
Person feels rushed or pressed for time	76.5%	82.3%
Satisfied with work/life balance	69.9%	67.6%

129. We refer to and adopt the ABI and NSWBC Submissions at paragraph 20.49 in relation Charlesworth/ Macdonald Report and the contention that Saturday and Sunday together stand out above weekday work in terms of the interference caused to personal lives.
130. In relation to the Charlesworth/ Macdonald Report generally we refer to and adopt the ABI and NSWBC Submissions at paragraphs 20.45 to 20.49 in relation to the criticisms of the expert report prepared by Professor Sara Charlesworth, and paragraphs 20.50 to 20.53 in relation to the criticisms of the expert report prepared by Dr Macdonald.
131. The table below compares the responses from the Pezzullo Weekend Work Report (Exhibit PGA 34) in relation to the difficulties in working Saturdays and Sundays (reporting “Quite” and “Very” responses):

Factor	Saturday work	Sunday work
No real problem	33.5%	28.9%
Interferes with socialising or time with family and friends	28.6%	29.6%
Interferes with outside work responsibilities or activities	21%	21.2%
Hard to maintain work life balance	26.1%	26.5%
Interferes with religious observance	6.6%	8.7%

132. It follows from this that there is no, or very little evidence before the FWC that would indicate the disabilities associated with Sunday work are materially different to, or worse than, those associated with Saturdays. The evidence does not support a finding that the disability of Sunday work is four times the disability of Saturday work.

T. NEGATIVE IMPACT OF CURRENT SUNDAY PENALTY RATE ON EMPLOYEES

133. A common theme in the evidence in this matter is that retail employees experience difficulties in working on Sundays due to the limited number of staff working (see Sands Report (Exhibit Retail 2), pg 59, par 2.3.1, pg 64, par 2.3.3, pg 73/74, par 2.3.3; Macdonald Interview Notes (Exhibit Retail 11), pg 21). Indeed, the second highest answer from retail employees when asked to identify the difficulty with regard to working on Sundays is the limited number of staff on Sundays (see Sands Report (Exhibit Retail 2), pg 65, par 2.3.3).
134. Retail employees find working on Sundays difficult because of the inexperienced staff (see Sands Report (Exhibit Retail 2), pg 64, par 2.3.3) and lack of managerial support (see Sands Report (Exhibit Retail 2), pg 65, par 2.3.3).

U. OTHER FACTORS

135. We refer to and adopt the Ai Group Submissions at Part R “Other Factors”, in relation to the contentions that the FWC has recognised that it is appropriate to consider the historical context of the modern award and relevant decisions and that the South

Australian Commission has recognised that traditional justifications for penalty rates have little relevance now and that substantial deterioration of social life is associated with night shift work and work outside day time hours.

136. Additionally the FWC has recognised it is relevant to give weight to the content of awards in other industries where those industries share characteristics relevant to the matter to be determined (see *Modern Awards Review 2012 – General Retail Industry Award 2010 – Junior Rates*²⁰ where the Full Bench took into account the content of the awards in industries which employ a large number of 20 year olds (as the retail industry does) in deciding to vary the GRIA).

V. SHIFTWORKERS

137. On the basis of all of the evidence led and these submissions the alteration to the GRIA as set out at paragraphs 2(c) and 2(d) of these submissions is appropriate.

W. MODERN AWARDS OBJECTIVE

Relative Living Standards and the Needs of the Low Paid (Section 134(a))

138. It is accepted that reducing the Sunday penalty rate under the GRIA will, on its surface, have a financial impact on retail employees. We note however, as set out in Part P of these submissions, this impact is likely to be substantially offset by these employees being offered additional hours of work.
139. It is also relevant to consider the needs of low paid persons who are not employed, or who are underemployed. The evidence in this matter demonstrates additional employment is likely to flow from making the variation sought. The FWC ought to consider that making the variation is likely to have a positive impact on the relative living standards and needs of low paid non-retail workers who are provided with employment.
140. It is also appropriate for the FWC to consider the relative living standards and needs of the low paid as they relate to non-financial matters. A common evidentiary theme before the FWC in this matter (as set out in Part R above) is that retail employees are facing difficulties in working on Sundays because of low levels of staff on Sundays. Given the evidence before the FWC is that more people are likely to be employed on

²⁰ [2014] FWCFB 1846

Sundays if the variation is granted, this will alleviate this difficulty faced by Sunday retail workers.

Collective Bargaining (Section 134(b))

141. While there is no evidence which directly identifies a link between the current Sunday penalty rate in the GRIA with collective bargaining we note that the IPR references *Trends in Federal Enterprise Bargaining* data. That data reveals a significant reduction in the number of enterprise agreements made in retail trade since the commencement of the GRIA. It is open to the FWC to conclude that the GRIA is not meeting its obligation to promote collective bargaining.
142. The Commission has previously treated this factor as neutral when varying the level of penalty rates (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [139](b) per Hatcher VP, Boulton J and McKenna C; see also SDA Outline of Submissions and Findings dated 5 October 2015, par 7).

Need to Promote Social Inclusion through Increased Workforce Participation (Section 134(c))

143. The evidence before the FWC, as set out in Part J of these submissions, is that if the FWC varies the Sunday penalty rate under the GRIA this is likely to result in increased employment, and increased hours of work for existing workforce participants. This leads to the obvious conclusion that varying the GRIA as sought will promote social inclusion through increased workforce participation.
144. We refer to and adopt the Ai Group Submission at Part V3 in relation to the link between the making of the variation and a positive impact on the level of unemployment in the 15-19 years and 15-24 years age groups.
145. We also refer to and adopt the Ai Group Submission at Part V3 in relation to previous FWC consideration of this factor.

Need to Promote Flexible Modern Work Practices and Efficient and Productive Performance of Work (Section 134(d))

146. We refer to and adopt the Ai Group Submission at Part V4 in relation to this consideration.
147. Further, the evidence suggests that if there is a decrease in the Sunday penalty rate from 100% to 50% retail employers will roster more hours and employ more people

which will in turn drive sales (see Part K of these submissions), meaning for the same cost retail businesses will achieve increased returns.

Need to Provide Additional Remuneration for Working Unsocial Hours or Weekends (Section 134(da))

148. We refer to and adopt the Ai Group Submission at Part V5 in relation to this consideration.

Principle of Equal Remuneration for Equal Work (Section 134(e))

149. We refer to and adopt the Ai Group Submission at Part V6 in relation to this consideration.

Likely Impact on Business, including Productivity, Employment Costs and Regulatory Burden (Section 134(f))

150. We refer to and adopt the Ai Group Submission at Part V7 in relation to this consideration.

151. Clearly employment costs for retail employers will reduce if the Sunday penalty is reduced. Additionally, given retail businesses have (as set out in Part K above) given evidence that increased employee numbers on Sundays will lead to increased sales turnover, it is likely making the variation will impact positively on business through higher revenue and productivity.

Need for a Simple and Sustainable Modern Award System (Section 134(g))

152. We refer to and adopt the Ai Group Submission at Part V8 in relation to this consideration.

Likely Economy Wide Effects (Section 134(h))

153. We refer to and adopt the Ai Group Submission at Part V9 in relation to this consideration.

154. Additionally, we note that the size of the retail industry means that any positive impacts of varying the Sunday penalty rate under the GRIA will have a positive impact on the Australian economy generally. Further, there is evidence before the FWC of negative employment effects where penalty rates were increased, meaning it is likely that if penalty rates are decreased the opposite effect will take place. This is

likely to result in many jobs in the retail industry (see paragraph 80 to 83 of these submissions).

S J Wood QC

P J Wheelahan

12 February 2016