IN THE FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

APPLICATION BY HAIR AND BEAUTY AUSTRALIA – *HAIR AND BEAUTY INDUSTRY AWARD 2010*

AM2017/40

REPLY SUBMISSION OF HAIR AND BEAUTY AUSTRALIA

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4 YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES – *HAIR AND BEAUTY INDUSTRY AWARD 2010* (AM2017/40)

REPLY SUBMISSION OF HAIR AND BEAUTY AUSTRALIA

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A. BACKGROUND

1. Ai Group Workplace Lawyers files this reply submission on behalf of Hair and Beauty Australia (**HABA**) in accordance with the amended directions issued by the Fair Work Commission (**Commission**) on 28 June 2018 and the extension of time subsequently granted on 24 July 2018.

2. The submission responds to the material filed by the Shop, Distributive and Allied Employees' Association (**SDA**) and the Australian Workers' Union (**AWU**) (collectively, **Unions**) on 20 June 2018 (**Unions' Submission**). It should be read in conjunction with the submissions and evidence filed by HABA on 14 March 2018 (**March Submission**).

B. THE UNIONS' CASE

3. The case mounted by the Unions relies on the following primary propositions:

a) The onus of advancing a sufficient evidentiary case in support of the variation proposed falls solely on HABA.[1]

b) It is not open to HABA to rely on, or to the Full Bench to apply, the factual findings made by the Commission in the *2017 Penalty Rates Decision*.[2]

c) There are key differences between the hair and beauty industry and the hospitality and retail industries, including their respective labour force profiles and the particular features of businesses. Therefore, the Commission should not follow the *2017 Penalty Rates Decision.*[3]

d) The particular features of the hair and beauty industry do not support the grant of the claim.[4]

e) There are no cogent reasons for departing from prior consideration given to Sunday and public holiday penalty rates in the Award.[5]

f) The Commission should not accept that the grant of the variation sought will potentially increase the number of apprentices in the industry.[6]

g) The variation proposed will have a harmful effect on employees' incomes, household budgets and living expenses.[7]

h) Employees in the hair and beauty industry 'overwhelmingly' oppose the variation proposed.[8]

[1] Unions' submission at [24] – [25].
[2] Unions' submission at [31].
[3] Unions' submission at [64] – [70] and [91] – [105].
[4] Unions' submission at [71] – [90].
[5] Unions' submission at [45] – [63].
[6] Unions' submission at [106] – [114].
[7] Unions' submission at [43].
[8] Unions' submission at [44].

i) Various submissions made by HABA regarding the application of the considerations in s.134(1) of the Act should not be accepted.[9]

j) The variation proposed is not necessary to achieve the modern awards objective.[10]

4. HABA submits that the above contentions should not be accepted. This submission deals with why that is so.

[9] Unions' submission at [115] – [164].
[10] Union submission at [115] – [164].

C. HABA'S RELIANCE ON THE *2017 PENALTY RATES DECISION*

5. HABA's March Submission articulates the findings made and conclusions reached by the Commission in the *2017 Penalty Rates Decision*[11] that are relevant to HABA's claim and are therefore relied upon by it. [12]

6. The Unions argue that it is not open to HABA to rely on any factual findings made by the Commission in the *2017 Penalty Rates Decision*.[13] HABA here addresses the overarching arguments about the veracity of such a contention and identifies specific key propositions that we contend are either supported by factual findings or conclusions reached based on broader considerations, such as the scheme of the Act.

7. In short, HABA contends that adopting such a restrictive approach to the matters that the Commission, as currently constituted, can have regard to is not warranted under the Act and is inconsistent with the approach that has commonly been taken in other proceedings during both the current 4 yearly award review and the two year award review.

8. Moreover, imposing such a restriction on HABA (and indirectly the Commission), appears at odds with what was contemplated by the Full Bench in the *2017 Penalty Rates Decision* and is arguably procedurally unfair to HABA.

9. At paragraph [2058] of the decision, the Full Bench identifies that the Award was the subject to a claim by Australian Business Industrial (**ABI**) to reduce penalty rates but was ultimately not pressed by ABI. *The 2017 Penalty Rates Decision* nonetheless sets out the current weekend penalty rates regime applicable under the instrument and the following conclusions:

> **[2059]** The existing rates appear to raise issues about the level of the Sunday penalty rate and the penalty rates applicable to casual employees.
>
> **[2060]** It is appropriate that these rates be reviewed.[14]

[11] *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001.
[12] March Submission at [37] – [49].
[13] Unions' Submission at [31] and [65].
[14] *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 at [2059] – [2060].

10. The Full Bench then went on to effectively deal with matters associated with the further progress of this review. It stated:

> **[2061]** There would be significant practical impediments to the Commission acting on its own motion to obtain relevant lay evidence. A proponent for change (and a contradictor) would be a useful means of measuring that all of the relevant considerations were appropriately canvassed.
>
> **[2062]** We seek expressions of interest from employer organisations prepared to take on the proponent role. Any such expressions of interest should be filed to amod@fwc.gov.au by **4.00 pm Friday, 24 March 2017**. We assume that the SDA will appear as contradictor in any subsequent proceedings. We will list this matter for mention on **Tuesday, 28 March 2017**.[15]

11. Given the context of paragraph [2061] of the decision, HABA has sought (to the extent that is reasonable, having regard to its resources) to assist the Commission in performing its task in this review by advancing lay evidence and submissions that have canvassed the relevant merit-based consideration associated with the proposed variation to penalty rates. It has nonetheless proceeded on the basis that it is proposing a change against the backdrop of the *2017 Penalty Rates Decision*. Similarly, HABA has made no secret of its intent to rely upon the *2017 Penalty Rates Decision* in support of its proposed variation to the Award. It has been open to the Unions to make submissions as to the weight that ought to be afforded to elements of that Decision.

The Key Factual Propositions

12. Before addressing the issue of *why* it is appropriate for the Full Bench to have regard to factual findings in the *2017 Penalty Rates Decision*, we note that of the nine matters identified at Section F of the HABA's March Submission as the key findings and conclusions of relevance to HABA's claim, the following propositions constitute factual findings:

    a) That the extent of the disutility associated with working on Sundays is much less than times past.[16]

    b) That consumers expect to be able to access services in the 'hospitality, entertainment, retail, restaurants and cafes' industries (which include

[15] *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 at [2061] – [2062].
[16] March Submission at [41].

the hair and beauty industries as covered by the [Award]) on a weekend.[17]

c) That the aforementioned consumer expectations are a 'distinguishing factor'.[18]

d) That the aforementioned consumer expectations have developed over time.[19]

e) That weekend work is more prevalent amongst employers and employees as a result of the matters at (b) – (d) above.[20]

f) That the relevant change in consumer expectations represent a material change in circumstances.[21]

g) That there are likely to be some positive impacts from reducing Sunday penalty rates, consistent with the views expressed in the 2015 Productivity Commission Inquiry Report regarding the workplace relations framework.[22]

(collectively, **Factual Propositions**)

13. The Full Bench, as currently constituted, should have regard to such findings when assessing the merits of HABA's proposal.

14. In the current award review, it has not been uncommon for the Commission to rely on factual findings made by the Commission in other award review proceedings. For example, in a recent decision concerning the proposed introduction of a casual conversion clause in the *Stevedoring Industry Award 2010* (**Stevedoring Award**), the Full Bench relied upon factual findings[23] made by a differently constituted Full Bench in the context of other unrelated

[17] March Submission at [44].
[18] March Submission at [44].
[19] March Submission at [45] – [46].
[20] March Submission at [47].
[21] March Submission at [45].
[22] Productivity Commission, *Workplace Relations Framework* (2015).
[23] *4 yearly review of modern awards - Part-time employment and Casual employment* [2018] FWCFB 4695 at [55].

substantive claims to vary the Stevedoring Award, and cited evidence given by a witness in the same proceedings.[24]

15. Indeed, more broadly, the manner in which proceedings have often unfolded in the context of this review is that there have, in various instances, been initial proceedings in which the Commission has received evidentiary material and made relevant factual finding in the context of specific claims to vary particular modern awards and then had regard to such findings, or broader conclusions based in part upon such findings, in the context of subsequent proceedings considering differing proposals to either vary different modern awards to those that were the subject of the initial proceedings, or to vary awards in a manner that is vastly different to that contemplated in the proceedings at first instance.[25]

16. HABA nonetheless accepts that the Full Bench will of course need to give consideration to what significance or weight it attaches, in the context of the current proceedings, to any relevant finding of the Full Bench in the *2017 Penalty Rates Decision*.

17. In response to the Unions' argument that it would somehow be denied procedural fairness, we observe it has been open to the parties to address such matters through the cases they have presented. However, the proposition that it is simply not open to HABA to rely on any factual finding from proceedings should not be accepted.

18. The Unions' contention that the Full Bench must simply not have regard to evidence or factual findings from other proceedings also fails to account for the fact that in the context of conduct of the Review, the Commission is not bound by the rules of evidence and procedure (s.591) and may inform itself in relation to any matter before it in such manner as it considers appropriate (s.590(1)).[26]

19. In relation to the application of s.590(1), Ai Group contends that it is appropriate that the Commission not take an unduly restrictive approach to the manner in

[24] *4 yearly review of modern awards - Part-time employment and Casual employment* [2018] FWCFB 4695 at [56].
[25] We here refer, in particular, to various common issues proceedings conducted as part of the review
[26] *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 at [109].

which it informs itself in the course of the Review given that the imperative is on the Commission (as opposed to interested parties) to ensure that modern award achieves the modern awards objective.

20. The Commission should not simplistically disregard matters of obvious relevance to the task before it on account of technical issues associated with the manner in which the award review proceedings have been structured. It should give due regard to the Factual Propositions referred to above.

The Other Propositions

21. We now turn to the key overarching propositions flowing from the 2017 Decision that HABA contends are relevant in the current context and which do not constitute factual findings. We do not understand the Unions to be raising any objection to reliance being placed upon such findings.

22. Of the nine matters identified at Section F of the March Submission, the following propositions do <u>not</u> constitute factual findings:

    a) That deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates.[27]

    b) That the disutility associated with working on public holidays has been ameliorated somewhat by the introduction of the statutory right to refuse to work on reasonable grounds on such days.[28]

    c) That consumer expectations to be able to access services in the hair and beauty services industry on the weekend is relevant to the setting of Sunday penalty rates.[29]

    d) That the notion of relative disutility supports a proportionate approach to the fixation of weekend and public holiday penalty rates.[30]

[27] March Submission at [39] – [40].
[28] March Submission at [42].
[29] March Submission at [44].
[30] March Submission at [48].

e) That greater consistency (short of uniformity) in Sunday and public holiday penalty rates is a relevant consideration.[31]

(collectively, **Other Propositions**)

23. There is nothing exceptional or inappropriate about HABA's reliance on the Other Propositions. They reflect the conclusions reached by the Commission regarding various matters of logic and merit-based considerations, including previous authorities, the legislative scheme and the evolution of the legislative scheme. They are not of themselves factual findings, nor are they premised on factual findings.

24. The Commission has, on many occasions, accepted that previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[32] In the *2017 Penalty Rates Decision*, the Commission identified the following examples of cogent reasons for not following previous Full Bench decisions:[33]

a) The legislative context which pertained at that time may be materially different from the Act;

b) The extent to which the relevant issue was contested, and in particular, the extent of the evidence and submissions put in the previous proceeding will be relevant to the weight to be accorded to the previous decision; and

c) The extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons may be a factor in considering the weight to be accorded to the decision.

[31] March Submission at [49].
[32] See for example *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [27].
[33] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [255].

25. The *2017 Penalty Rates Decision*:

a) Was made in the same legislative context as the matter here before the Commission;

b) The relevant issues were contested and were the subject of detailed submissions and evidence; and

c) The relevant issues were the subject of detailed consideration by the Commission.

26. Further, we have not identified any other cogent reason for departing from the *2017 Penalty Rates Decision*. We also note that the Unions have not sought to rely on any material that might lead the Commission to conclude that the Other Propositions do not stand in the context of the hair and beauty industry. This is notwithstanding HABA putting the Unions on notice of its reliance on the Other Propositions in the March Submission.

27. Accordingly, the Commission should adopt the Other Propositions.

D. PRIOR CONSIDERATION GIVEN TO SUNDAY AND PUBLIC HOLIDAY PENALTY RATES IN THE AWARD

28. The Unions' oppose HABA's contention that the following three decisions, in which the Commission and its predecessors considered Sunday and public holiday penalty rates in the Award, should not be followed:[34]

    a) *Award Modernisation* [2008] AIRCFB 1000 (**2008 Decision**);

    b) *Re Hair and Beauty Industry Award 2010* [2010] FWAFB 1983 (**2010 Decision**); and

    c) *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 (**2013 Decision**).

29. HABA set out the bases for its position in relation to the aforementioned Decision in its March Submission at paragraphs 20 – 36. In addition to continuing to rely on those submissions, HABA here responds to the Unions' arguments.

The 2008 Decision

30. The Unions submit that "the appropriate quantum of Sunday and public holiday penalty rates was a contested issue that was extensively debated … and was the subject of conflicting submissions"[35] during the Part 10A Award Modernisation process, which culminated with the making of the Award in the 2008 Decision.

31. HABA disagrees with the Unions' characterisation of the consideration given to Sunday and public holiday penalty rates during the Award Modernisation process. The Unions' submissions do not appear to take into account the process resulting in the making of the Award, which was detailed in HABA's March Submission at paragraphs 24 – 25.

[34] Unions' Submission at [45] – [63].
[35] Unions' Submission at [49].

32. *Firstly*, there was clearly no evidence put before the AIRC concerning Sunday or public holiday penalty rates in the Award. The nature of the award modernisation exercise did not as such contemplate or allow for the calling of evidence. That fact clearly distinguishes those proceedings and the 2008 Decision to the matter now before the Commission, in which it is presented with evidence that goes to various matters including the impact of the current Sunday and public holiday penalty rates on employers covered by the Award and the potential impact of reducing those penalty rates.

33. *Secondly*, some submissions about Sunday and public holidays were made by interested parties at an early stage of the process, whilst the coverage of the *Retail Industry Award 2010* (as it was provisionally titled at the time) was in dispute. Specifically, various submissions were put to the AIRC by employer representatives arguing that the hair and beauty industries should not be covered by the aforementioned proposed award and that instead, they should be covered by a separate, standalone award. Those submissions did not focus on or, in most cases, deal specifically with the hair and beauty industries (save for any submissions made about the coverage of the relevant instruments). In some cases (such as the ARA submission cited by the Unions[36]), it is not in fact clear whether the submissions made about Sunday and public holiday penalty rates concerned the Award or whether they were directed only at the proposed *Retail Industry Award 2010*.

34. The Unions cite[37] the following passage of the 2008 Decision in support of their contention: (our emphasis)

> **[287]** Many of the submissions made to us from employers expressed concern at additional costs arising <u>from provisions of the Retail industry exposure draft</u> regarding hours of work, overtime, penalty rates, annual leave and allowances. <u>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.</u> We have addressed submissions concerning the application of allowances and hours provisions and made other changes consistent with the approach to such matters in the main part of this decision.[38]

[36] Unions' Submission at [49].
[37] Unions' Submission at [49].
[38] *Award Modernisation* [2008] AIRCFB 1000 at [287].

35. The Full Bench's explanation of the approach it had taken to the development of the relevant awards is, respectfully, unexceptional. It is entirely consistent with the approach taken by the AIRC during the Part 10A Award Modernisation Process; to rationalise existing terms and conditions applying in the relevant sector.

36. The above passage does *not* establish that the AIRC had given consideration to the *merits* of specific Sunday and public holiday penalty rates in the Award. The decision cannot be put any higher than establishing that the AIRC had, when making the Award, decided to align its terms and conditions with those that applied at the time such that the resulting provisions were "more closely approximate to existing instruments"[39].

The 2010 Decision

37. The Unions' submissions[40] about the 2010 Decision do not meaningfully engage with the bases upon which HABA submits that the 2010 Decision should not be followed.[41]

The 2013 Decision

38. The Unions' submissions about the 2013 Decision can be dealt with in short shrift.

39. *Firstly,* the Unions submit that "HABA overstates the difference between the transitional review and the four year review"[42]. They go on to submit that in both reviews, the Commission is required to consider "whether the [Award] is meeting the modern awards objective"[43].

40. As HABA has earlier submitted, the 2013 Decision explains the reasons for the Commission's view that the two year review was narrower in scope than the current 4 yearly review.[44] The central point is that the legislative context

[39] *Award Modernisation* [2008] AIRCFB 1000 at [287].
[40] Unions' Submission at [58] – [59].
[41] March Submission at [26] – [31].
[42] Unions' Submission at [61].
[43] Unions' Submission at [61].
[44] Cited in March Submission at [33].

applying to the two year review was materially different to that which here applies. It is on that basis (amongst other bases[45]) that HABA submits that the 2013 Decision should not be followed.

41. *Secondly,* the Unions submit that it is "of little import that the variation sought [in 2013] was in some way different from the variation currently proposed by HABA"[46]. The Unions overlook the obvious proposition that, by virtue of the fact that in the 2013 Decision the Commission was considering a proposal to *abolish* weekend penalty rates (as compared to the *reduction* to Sunday and public holiday penalty rates now sought), the relevance of that decision to the Commission's consideration of HABA's claim in this matter is limited.

[45] March Submission at [36].
[46] Unions' Submission at [62].

E. THE FEATURES OF THE INDUSTRY

42. HABA here responds to the Unions' submissions about the features of the hair and beauty industry.

The Workforce in the Hair and Beauty Industry

43. The Unions rely on the evidence of Dr O'Brien regarding the workforce in the hair and beauty industry. Specifically, the Unions rely on Dr O'Brien's evidence to substantiate the following propositions:

    a) That there are certain "fundamental differences" between the labour force profiles of the hair and beauty industry and the retail and hospitality industries; namely, their 'status in employment', level of education, 'relationship in household' and age.[47]

    b) That "the [hair and beauty] industry shares the most commonalities with trades related industries" including electrical services, automotive, bricklaying, plumbing and carpentry.[48]

44. It is convenient to deal with the second proposition first.

45. We do not propose to deal with Dr O'Brien's report in detail in these submissions. HABA notes however that Dr O'Brien's evidence relates only to characteristics of employees engaged in certain industries. The evidence does not establish any proposition regarding hair and beauty *industry* or any other *industry* at large. At its highest, the evidence makes observations about a confined number of characteristics pertaining to employees engaged in the relevant industries. By extension, the evidence says nothing of the characteristics of businesses operating in the relevant industries, nor any other feature of those industries.

[47] Unions' Submission at [41(a)].
[48] Unions' Submission at [41(a)]. See also [75].

46. As a result, the evidence cannot be relied on to draw comparisons between the hair and beauty *industry* and the other *industries* in general terms, as the Unions purport to do.

47. Further and in any event, little can be made of the propositions articulated by the Unions about the workforce in the hair and beauty industry. Whilst the Unions submit that the Commission "should make findings consistent with the evidence to be given by Dr O'Brien"[49], they do not explain the relevance of those findings to the Commission's consideration of HABA's claim; nor is their relevance otherwise apparent.

48. The case advanced by HABA is based on the characteristics of *businesses* operating in the hair and beauty industry, the employment costs they face, their operational realities, notions of fairness between employers operating in the hair and beauty industry and those operating in the retail industry and other factors to which the Commission must turn its mind by virtue of s.134(1) of the Act. HABA's case does *not* rest on the premise that the workforce engaged in the hair and beauty industry is similar to another industry such as the retail industry in which penalty rates were recently reduced by the Commission.

49. As for the basic statistics set out in HABA's March Submission[50] regarding the workforce in the hair and beauty industry; their purpose is to merely provide context. It is self-evident from the March Submission that such data is not relied upon by HABA for any further purpose.

50. Nevertheless, to the extent that the Unions rely (or intend to rely) on Dr O'Brien's evidence regarding the extent to which employees in the industry are trade qualified as a basis upon which HABA's claim should not be granted, there is little if any logic to such an argument. HABA also observes that awards that were the subject of the *2017 Penalty Rates Decision* included employees who hold trade qualifications.[51] Similarly, employees covered by the *Pharmacy*

[49] Unions' Submission at [76].
[50] March Submission at [55] – [58].
[51] For example, employees classified as food and beverage attendant (tradesperson) grade 4, cook (tradesperson) grade 3, cook (tradesperson) grade 4, cook (tradesperson) grade 5, guest service grade 4, gardener grade 3 (tradesperson), gardener grade 4 (tradesperson) and a casino equipment technician grade 2 under the *Hospitality Industry (General) Award 2010*. See also, employees

Industry Award 2010 include employees who hold a Certificate II – IV in Community Pharmacy and employees who are degree qualified.

51. The Commission did not there consider that the qualifications held by such employees rendered it inappropriate to reduce Sunday and public holiday penalty rates payable to them. By analogy, the qualifications held by employees covered by the Award does not provide a basis for refusing HABA's claim.

The Size of Businesses in the Hair and Beauty Industry

52. The Unions allege that the material referenced by HABA in its March Submission in support of the proposition that businesses in the industry are typically small is unreliable and out of date.[52]

53. HABA does not accept those contentions. In any event, the proposition that the hair and beauty industry is predominantly made up of small businesses is established by the following Australian Bureau of Statistics (**ABS**) data concerning 'Hairdressing and Beauty Services' businesses[53] as at the end of June 2017:[54]

Non-employing[55]	1 – 19 Employees	20 – 199 Employees	200+ Employees	Total
6,517 (29%)	15,615 (70%)	305 (1%)	0 (0%)	22,442

54. Self-evidently, a significant majority of employers in the hair and beauty industry are small businesses, employing less than 20 employees.

classified as retail employee level 4 under the *General Retail Industry Award 2010* including butchers, bakers, florists and pastry cooks.

[52] Unions' Submission at [77] – [78].

[53] ANZSIC Code 9511. See March Submission at [50] – [51] for scope of that ANZSIC Code.

[54] ABS, 8165.0 Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017 (accessed on 25 July 2018).

[55] The ABS defines a non-employing business as "a business without an active Income Tax Withholding (ITW) role or which has not remitted ITW for five consecutive quarters (or three consecutive years for annual remitters)".

The Cost and Competitive Pressures facing Businesses in the Hair and Beauty Industry

55. The Unions' submit that there is insufficient evidence before the Commission to conclude that businesses in the hair and beauty industry "face significant cost and competitive pressures.[56]

56. In addition to the IBISWorld Report relied upon by HABA[57], the proposition that employers in the industry face significant cost and competitive pressures is demonstrated by the following ABS data concerning 'Hairdressing and Beauty Services' businesses[58]:

a) Between 1 July 2016 and 30 June 2017:

i. 3862 businesses entered the industry; and

ii. 3108 businesses exited the industry;

representing an increase of only 3.5% to the number of businesses in the industry and an exit rate of 14.3%.[59]

b) Between 1 July 2016 and 30 June 2017:[60]

Turnover[61]	Zero to less than $50k	$50k to less than $200k	$200k to less than $2m	$2m to less than $5m	$5m to less than $10m	$10m or more	Total
No. of businesses	2,061	11,346	8,742	251	36	4	22,442

[56] Unions' Submission at [79].
[57] March Submissions at [61] – [62].
[58] ANZSIC Code 9511. See March Submission at [50 – [51] for scope of that ANZSIC Code.
[59] ABS, *8165.0 Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017* (accessed 25 July 2018).
[60] ABS, *8165.0 Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017* (accessed 25 July 2018).
[61] 'Turnover' is defined by the ABS as 'the total revenue generated by a business from the provision of goods and/or services for a given accounting period'.

57. As can be seen:

a) 9% of businesses had a turnover of less than $50,000;

b) 60% of businesses had a turnover of less than $200,000; and

c) 99% of business had a turnover of less than $2,000,000.

The Extent to which Businesses in the Hair and Beauty Industry Operate on Sundays

58. The Unions contest HABA's submission that it is very common for businesses in the hair and beauty industry to operate on Sundays and argue that there is insufficient evidence before the Commission to enable it to conclude as such.[62]

59. HABA disagrees with the Unions' submissions. The Commission should conclude that it is very common for businesses in the hair and beauty industry to operate on Sundays based on the following material before it:

a) Each of the six lay witnesses called by the Unions give evidence that they work in the industry on Sundays, have worked in the industry on Sundays and/or that their current and/or past employer operates (or operated) on Sundays.

b) Ms Kate Brandreth's evidence that "thousands" of hairdressers work on Sundays.[63]

c) 25% of respondents (37) to the survey conducted by HABA open one or more salons on Sundays.[64]

d) 179 Just Cuts salons were identified by the Just Cuts website on 8 March 2018 as opening on Sundays.[65]

[62] Unions' Submission at [85] – [87].
[63] Statement of Kate Brandreth dated 20 June 2018 at [10].
[64] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 11.
[65] March Submission at [70].

e) Five of the witnesses called by HABA open one or more salons on Sundays.[66]

60. Further, the fact that it is very common for businesses in the hair and beauty industry to operate on Sundays is a matter of common knowledge, which the Commission can take notice of.

61. HABA notes that the Unions have not called any evidence to contradict the proposition or presented any material that might establish that it is *not* common for employers in the industry to operate on a Sunday. Indeed, as highlighted above, its evidence only serves to demonstrate the extent to which businesses do operate on Sundays.

62. In any event, it is not strictly necessary for HABA to establish the prevalence of businesses operating on Sundays or public holidays in the hair and beauty industry. The evidence before the Commission puts beyond doubt that *some* businesses operate on Sundays and public holidays. The evidence also establishes that some of those businesses are *compelled* to open on Sundays and/or public holidays by virtue of the terms of their lease arrangements.

63. Whether 2% of businesses in the industry open on Sundays and public holidays or 20% of businesses so open is, as such, neither here nor there. The Commission's task is to consider whether the proposed Sunday and public holiday penalty rates are necessary to achieve the modern awards objective. This necessarily involves a consideration of microeconomic considerations pertaining to individual businesses who open on Sundays and public holidays, such as the employment costs that individual employers incur (or would incur if they operated on Sundays and public holidays) by virtue of the current penalty rates set by the Award.

[66] See witness statements of Benny Khoo, Deborah Cook, Graham Downs, Graham Thatcher and Rocco Petrucci.

64. Importantly, the evidence in this regard establishes the following propositions in support of granting HABA's claim:

a) Employers in the hair and beauty industry operating on Sundays and public holidays would face lower employment costs if HABA's claim were granted (s.134(1)(f)).

b) Some employers in the hair and beauty industry, including those who do operate on Sundays and public holidays as well as those who do not operate on Sundays and public holidays, would (or at the very least, would consider) rostering and/or employing additional employees to work on Sundays and/or public holidays (ss. 134(1)(a) and 134(1)(c)).

The Extent to which Lease Arrangements require Businesses in the Hair and Beauty Industry to Remain Open on Sundays and Public Holidays

65. The submissions made directly above are apposite to also respond to the Unions' contention that HABA has not established that "many businesses" in the hair and beauty industry are required to open on Sundays and public holidays.[67]

66. Further, HABA points to the following evidence that establishes that lease arrangements require businesses in the hair and beauty industry to remain open on Sundays and public holidays:

a) 81% of respondents (30) to the survey conducted by HABA who opened one or more salons on Sundays identified that they were *required* to be open on Sundays as a condition of their lease.[68]

b) 64% of respondents (25) to the survey conducted by HABA who opened one or more salons on public holidays identified that they were *required* to be open on public holidays as a condition of their lease.[69]

[67] Unions' Submission at [90].
[68] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, 13.
[69] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, 19.

c) The evidence of Deborah Cook.[70]

d) The evidence of Graham Thatcher.[71]

e) The evidence of Rocco Petrucci.[72]

67. HABA notes that the Unions have not called any evidence to contradict the proposition or presented any material that might establish that employers in the hair and beauty industry are *not* required to open on Sundays and/or public holidays by virtue of the terms of their lease.

The Similarities between the Hair and Beauty Industry, the Retail Industry and the Pharmacy Industry

68. In its March Submission, HABA highlighted specific similarities that exist between businesses in the retail industry and the hair and beauty industry. The propositions there advanced are self-evident and matters that the Commission can take on notice.

69. We repeat the submissions earlier made about the evidence of Dr O'Brien. The Unions' reliance on it is misplaced.[73] That evidence does not establish that *businesses* in the hair and beauty industry and the retail industry are not similar in the manner alleged by HABA. Dr O'Brien's evidence is confined to specific features of the workforce engaged in each industry.

70. The Unions' submission that "the change in position by employers is a further reason to reject the submission now made"[74] is baseless and should be ignored. Firstly, HABA cannot be held to account for a submission made by another employer body (i.e. the Australian Retailers Association) in 2008.[75] Moreover, the earlier submissions of HABA that are cited by the Unions[76] were made in an entirely different context and were directed at a different issue. They concerned the proposed scope of the *General Retail Industry Award 2010*

[70] Witness statement of Deborah Cook dated 12 March 2018 at [18] – [20].
[71] Witness statement of Graham Thatcher dated 23 February 2018 at [51].
[72] Witness statement of Rocco Petrucci dated 28 February 2018 at [22].
[73] Unions' Submission at [92] – [94].
[74] Unions' Submission at [98].
[75] Unions' Submission at [97].
[76] Unions' Submission at [96].

during the Part 10A Award Modernisation Process and whether it was appropriate for that instrument to cover the hair and beauty industries. Therefore, the submissions here advanced by HABA do not reflect any “change in position”.

F. THE POTENTIAL IMPACT OF THE CLAIM ON APPRENTICES

71. HABA's March Submission states:

> The modest adjustments to Sunday and public holiday penalty rates sought by HABA in these proceedings would reduce the negative impacts on businesses of the labour cost increases which resulted from the 2013 Apprentices Decision and would potentially increase the number of apprentices in the industry.[77]

72. The Unions assert at that this claim is misguided.[78] In support of this assertion, they claim that "there is no tenable basis to conclude that any decline in apprenticeships in the hair and beauty industry has been caused by the decision"[79].

73. This claim lacks merit. A number of indicators suggest that the hair and beauty industry is particularly sensitive to labour costs:

- The vast majority of businesses engaged in the industry are small enterprises employing fewer than 20 employees.[80]
- A significant proportion of businesses exit the industry each year.[81]
- Rising wages place stress on profit margins in the hair and beauty industry.[82]
- Labour costs constitute the largest expense for hairdressers and beauty salons. A significant portion of revenue (57% in the 2016/17 financial year) is spent by businesses in the hair and beauty industry to meet their wages obligations. This is a great deal higher than is the case in the wider 'personal services' sector which spent, on average, 32.6% of revenue on wages in the 2016/17 financial year.[83]

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[77] March Submission at [94].
[78] Unions' Submission at [106] – [114].
[79] Unions' Submission at [107].
[80] ABS, *8165.0 Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017* (accessed 25 July 2018).
[81] ABS, *8165.0 Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017* (accessed 25 July 2018).
[82] IBISWorld Report at page 7.
[83] IBISWorld Report at page 20.

- Hairdressing and beauty services rely heavily on labour to provide industry services.[84]

- An increase in labour costs in the hair and beauty industry cannot be effectively mitigated by relying on automation or offshoring.[85] Employers operating in the hair and beauty industry are constrained by the labour market which exists in the area in which the business operates. Employers cannot reduce their reliance on labour by investing in technology.

74. HABA maintains its position that the significant reliance on labour in the hair and beauty industry, including the labour of apprentices, combined with the large proportion of revenue which is spent on wages, places employers in the industry in a precarious position in the event of any wage increase. Higher costs of employing apprentices directly limits the hours employers can spend training new entrants to the industry.

75. The Unions claim that statistical evidence demonstrates that HABA's initial statements concerning a continuing trend of decreasing commencements in hairdressing apprenticeships constitutes a false premise.[86] They refer to 2017 data from the National Centre for Vocational Education and Research (**NCVER**) which reveals a slight increase in commencements of hairdressing apprenticeships in 2017.

76. The NVCER's data for 2017 reports an increase from 3,762 to 3,900.[87] It is misleading to place such an emphasis on 138 new apprenticeships nation-wide in one year. An increase of 138 apprenticeship commencements in 2017 (a 4% increase) does not reverse the declining trend going back to at least 2010.

77. In 2010 there were 5,871 new apprenticeship commencements. There remains an 18% decline in apprenticeship commencements from 2013 to 2017. A clear

[84] IbisWorld Report at page 24.
[85] Lordan G (2017), Minimum wage and the propensity to automate or offshore, London School of Economics, a report for the Low Pay Commission, October, 6, 16, 47, 49, 55.
[86] Unions' Submission at [108] – [110].
[87] National Centre for Vocational Education Research, '*Historical time series of apprenticeships and traineeships in Australia from 1963 to 2017'* <https://www.ncver.edu.au/data/data/all-data/historical-time-series-tables>.

decrease in apprenticeship commencements can be seen between these years despite the minor increase from 2016 to 2017.

78. Moreover, HABA notes that the contract attrition rate for hairdressing apprentices has been projected by the NCVER to rise from 64.7% in 2016 to 68.6% in 2017.[88] The completion rate has been predicted to fall from 33% in 2016 to 28.1% in 2017.[89]

79. A 2014 review by the NCVER investigated the reasons for non-completion of apprenticeships.[90] The review found that one of the most common reasons cited for not completing an apprenticeship was loss of job due to redundancy. Given the continuing increase in the non-completion rates of hairdressing apprenticeships, redundancy is likely to form a substantial part of these.

80. The continuing decline in apprentice completions will further add to the existing shortage in qualified hairdressers. Given the significant rise in minimum rates of pay in this sector, it is unsurprising that hairdressers remain on the list of professions for which there is a national shortage. Hairdressers are also listed on the 'Skills Shortage List' published by the Commonwealth Government for each State and Territory. The List contains the following commentary:

> Shortages are evident for trade qualified and experienced hairdressers. Employers generally consider those who hold fast-tracked qualifications to be unsuitable. [91]

81. HABA submits that the Unions have failed to effectively demonstrate that the HABA's submissions regarding apprenticeships in its March Submission should be rejected.

[88] National Centre for Vocational Education Research, *Completion and attrition rates for apprentices and trainees 2017: state and territory data tables*.
[89] National Centre for Vocational Education Research, *Completion and attrition rates for apprentices and trainees 2017: state and territory data tables*.
[90] National Centre for Vocational Education Research, 'Understanding the non-completion of apprentices' (Occasional Paper, 2014) at page 3.
[91] Department of Jobs and Small Business, *Skills Shortage List* (13 June 2018)

G. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

82. HABA's response to the Unions' submissions[92] about the application of the considerations in section 134(1) is set out below. HABA refutes the proposition that the proposed variations are not necessary to achieve the modern awards objective[93] for the reasons set out in its March Submission and throughout this submission.

A Fair Safety Net

83. The Unions' Submission[94] seeks to discredit HABA's arguments that a factor weighing in favour of the proposed variation is the increasing pressure on operators in the hair and beauty industry to trade on Sundays and competition from entities that do not pay penalty rates for working on weekends. They do so primarily by asserting that there is either a deficiency in the evidentiary case advanced (or referenced) and that non-compliance with an industrial instrument is not a relevant consideration.

84. In response, HABA refers to the submissions made above regarding the extent to which businesses in the hair and beauty industry are required to open on Sundays and public holidays as a term of their lease arrangements. For the reasons articulated earlier, it is not necessary for HABA to establish the prevalence of employers who are so required to open on Sundays and public holidays. The Unions' submission[95] in this regard should therefore be rejected.

85. The Unions do not appear to go so far as to contest the proposition that there are employers in the industry who feel pressure to trade on Sundays out of fear that they will lose clients to competitors who now trade on Sundays. HABA doubts that the Unions are seriously asserting that there has not been an increasing prevalence of Sunday trade in the hair and beauty industry.

[92] Unions' Submission at [116] – [163].
[93] Unions' Submission at [164].
[94] Unions' Submission at [116] – [120].
[95] Unions' Submission at [116].

86. HABA also again refers to the Commission's finding in the *2017 Penalty Rates Decision* relating to the development of consumer expectation to access services of sectors that include the hair and beauty industry.[96]

87. The Unions further contend that there is no merit in asking the Commission to grant the variation on the basis that some businesses do not employ staff.[97] They do not however provide any reasoning for the assertion.

88. In response, we firstly observe that it should not be contentious that there are a significant number of non-employing businesses operating in the sector. Relevant ABS Data indicates that at end of June 2017, of the 22,442 businesses operating in Hairdressing and Beauty Industry, 6,517 were non-employing entities.[98] Further, contrary to the Unions' assertions, it is entirely appropriate that the Full Bench have regard to broader characteristics of the industry and any resulting competitive pressures. This obviously goes to a consideration of what constitutes a fair minimum safety net from the perspective of employers in the industry.

89. Even having regard to the interests of employees, there is little merit in maintaining penalty rates at a level where they contribute to the flow of work to those entities by undermining the competitive position of those that are required to pay such rates. Logically, such an outcome can only serve to put downward pressure on award covered employment opportunities.

90. The Unions also take issue with HABA's argument that the prevalence of award non-compliance within the sector further supports employers being granted some relief through a reduction to the current penalty rates regime.

91. In response to the Unions' contention that such non-compliance is merely speculative, we observe that the sector has been subject of numerous Fair Work Ombudsman (**FWO**) compliance campaigns. The relevant reports flowing

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[96] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [58], [76] – [77], [505], [1589], Chart 57 and Chart 58.
[97] Unions' Submission at [119].
[98] ABS, 8165.0 Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017 (accessed on 25 July 2018).

from such campaign reinforce HABA's concerns over award compliance.[99] Indeed, the FWO is currently completing a campaign focussing on compliance with matters including penalty rates by businesses in the retail and hair and beauty industries.[100]

92. HABA does not condone non-compliance with award obligations. Nor does it suggest that this factor alone warrants a recalibration of the current penalty rates regime. However, the apparent extent and sustained nature of the problems does weigh in favour of the Full Bench acting to modestly modify the current penalty rates regime so as to reduce the competitive disadvantage faced by award-compliant employers in circumstances where there are other cogent reasons for affording employers some modest relief from the current penalty rates regime.

Section 134(1)(a) – Relative Living Standards and the Needs of the Low Paid

93. The Unions wrongly assert that it is not in dispute that the employees covered by the Award are low paid, as contemplated by s.134(1)(a).[101] More accurately, HABA has accepted that a proportion of the employees covered by the Award would fall within the scope of this benchmark.[102]

94. The Unions fail to grapple with the Full Bench's observation in the 2017 Penalty Rates Case that, "…*it needs to be borne in mind that the purpose of Sunday penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid…"* and that "*The needs of the low paid are best addressed by the setting and adjustment of the modern award minimum rates or pay (independent of penalty rates)*."[103]

95. Even if the Full Bench accepts that a consideration of the matters identified in s.134(1)(a) is a factor that weighs against the proposed claim, the significance

[99] See for example Fair Work Ombudsman, *National Hair and Beauty Campaign 2012-13; Final Report* (July 2013).
[100] Fair Work Ombudsman, *East Coast Retail, Hair and Beauty Campaign*.
[101] Unions' Submission at [124].
[102] March Submissions at [135].
[103] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [823].

of such a consideration must be limited in circumstances where a significant proportion of the industry does not work on Sundays or public holidays and as such could not be said to be reliant upon such penalty rates.

96. The Unions have filed evidentiary material that they contend supports various factual propositions advanced in support of their position. HABA does not propose to comprehensively address such material, or the associated submissions, until the relevant evidence has been received and potentially tested though cross-examination.

97. The Unions' Submission also makes a range of speculative assertions around the impact that the proposed variation may have on the earning and hours of work of employees. This includes propositions that:

- It is improbable that any additional hours offered would mitigate the adverse impacts upon employees.[104]

- Any additional hours will presumably be offered at peak trading times when employees are more than likely already working.[105]

98. They do not however to refer to any evidentiary basis for such contentions.

99. The Unions' nonetheless criticise HABA for failing to establish an evidentiary basis for to support the proposition that additional hours would be offered.[106] In response, HABA notes that multiple witnesses called by it[107] and survey respondents[108] have indicated, in effect, that they anticipate that the change would lead them to offer staff additional hours.

100. Ultimately, the Full Bench should accept that it is not feasible for parties to advance evidence establishing the precise effect of the proposed change on employers' employment practices. Any consideration of such matters will

[104] Unions' Submission at [130].
[105] Unions' Submission at [133].
[106] Unions' Submission at [129].
[107] For example, witness statement of Deborah Cook dated 12 March 2018 at [45] and [49] – [50]; witness statement of Graham Downs (undated) at [54]; witness statement of Graham Thatcher dated 23 February 2018 at [60] and witness statement of Rocco Petrucci dated 28 February 2018 at [33].
[108] Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16. See in particular response ID 61, 97, 108, 148 and 239; and page 21, response ID 108.

inevitably entail a degree of speculation. HABA nonetheless contends that it is likely that the proposed changes will encourage some employers to offer existing staff additional hours on a Sunday and that this likelihood tempers the extent to which s.134(1)(a) weighs against granting the claim.

101. The Unions also identify HABA's observation that transitional arrangements could be implemented if the Commission is concerned about the impact of any of the proposed variations upon employees but argue that, "…*transitional arrangements can merely ameliorate the impacts (by delaying the impacts) of the immediate implementation of variations rather than remove the impact*."[109]

102. Ultimately, the effect will depend upon the transitional arrangement implemented and other variables. For example, if the Sunday and public holiday penalty rates are reduced incrementally such that the reductions coincide with increases to minimum award wages, or other beneficial changes (such as the recent decision to extend the circumstances in which overtime rates apply to casual employees), this may negate or at least reduce the extent to which employees receive any reduction in their take-home pay.

103. For completeness, we reiterate that HABA is not calling for the implementation of extended transitional arrangements. It nonetheless acknowledges that in the context of these proceeding Full Bench is not bound to grant an award variation in the terms proposed.

Section 134(1)(b) – The Need to Encourage Collective Bargaining

104. The Unions' submit that the "status quo" creates an incentive to bargain and therefore, this consideration "weighs in favour of refusing the proposed variations"[110]. There is, however, no evidence before the Commission to support the proposition that that the current Sunday and public holiday penalty rates in the Award are incentivising employers to engage in collective bargaining.

[109] Unions' Submission at [136].
[110] Unions' Submission at [137].

Section 134(1)(c) – The Need to Promote Social Inclusion through Increased Workforce Participation

105. The Unions assert that HABA has "failed to provide a sufficient evidentiary basis to support the suggestion that granting the variations will increase employment in the [hair and beauty] industry"[111].

106. There is of course no requisite *number* of witness statements that must be presented by the proponent of a claim in order for the Commission to be able to conclude that the grant of the claim will have a positive impact on employment. Section 134(1)(c) requires the Commission to make a value judgement, based on the material before it.

107. Various lay witnesses called by HABA and respondents to the survey conducted by HABA lend support to the proposition that the grant of HABA's claim would result in increased workforce participation and, by extension, the promotion of social inclusion. That evidence was characterised by HABA in its March Submission.[112]

108. As HABA submitted in its March Submission[113], the evidence relied upon by HABA will enable the Commission to conclude, just as it did in the *2017 Penalty Rates Decision* in respect of certain other industries, that a reduction in penalty rates will result in some positive employment effects.

Section 134(1)(d) – The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work

109. The Unions contend that a reduction in penalty rates naturally does not involve any "flexible modern work practices" or a proposal which could have any impact on the "efficient and productive performance of work".[114]

[111] Unions' Submission at [139].
[112] March Submission at [137] – [138].
[113] March Submission at [135].
[114] Unions' Submission at [141].

110. Contrary to the Unions' submissions, there is a connection between penalty rates and work practices within employers covered by the awards. HABA has addressed this matter in its previous submissions.[115]

111. The Unions acknowledge that HABA has sought to adopt the approach of the Full Bench in *the 2017 Penalty Rates Decision* in relation to considering s.134(1)(d). It nonetheless disputes the Unions' contention that "in truth", the Commission in construing the provision concluded that the consideration was a neutral consideration.[116] The paragraph of the 2017 Penalty Rates Decision relied upon by the Union related to Commission's consideration of the claim to vary penalty rates in the *Fast Food Industry Award 2010*.[117] In that context, Ai Group had argued that s.134(1)(d) was not relevant to the Full Bench's consideration of its claim to vary that award. A different case is appropriately advanced in the context of the current proceedings.

112. In the context of the retail industry, the Full Bench held that "*it may be said that a reduction in penalty rates will promote flexible modern work practices. This consideration lends support to a reduction in Sunday penalty rates."*[118] HABA contends that relevantly similar considerations arise in the context of the hair beauty industry and the broader retail industry. Accordingly, a similar conclusion should be reached.

[115] March Submission at [167] – [172].
[116] Unions' Submission at [142].
[117] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [1373].
[118] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [1672].

Section 134(1)(da) – The Need to Provide Additional Remuneration in Prescribed Circumstances

113. The Unions appear to wrongly assert that s.134(1)(da) creates a mandated need to provide additional remuneration that will not be met if the proposed variation are granted.[119] This does dot align with the Full Bench's consideration of s.134(1)(da) in the *2017 Penalty Rates Decision*:

> **[195]** Section 134(1)(da) is a relevant consideration, it is not a statutory directive that additional remuneration be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv).
>
> …
>
> **[196]** Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration.[120]

114. The Unions dispute HABA's contention that working on Sundays is very common in the Industry. In response, HABA refers to our submissions at section E above.

115. The Unions also oppose HABA's reliance on the *2017 Penalty Rates Decision*. We refer to section C above in this regard.

116. There is no persuasive reason why the disutility faced by employees working on a Sunday or public holiday in the hair and beauty industry would be so much more significant so as to justify an entitlement to a significantly higher penalty rate in the award compared to the penalty rates payable by businesses in the broader retail sector. Such an outcome would, on its face, be anomalous.

117. HABA also opposes the Unions' submission that the existence of award terms which operate to minimise the incidence of Sunday work and a statutory right to refuse work on a public holiday are irrelevant considerations for the purposes of s.134(1)(da).[121] No explanation is provided for the Unions' position and it

[119] Unions' Submission at [145].
[120] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [195] – [196].
[121] Unions' Submission at [148].

seems plainly at odds with the Full Bench's consideration of the nature of s.134(1)(da) in the *2017 Penalty Rates Decision*.[122]

118. The Unions' Submission asserts that HABA's reliance on the fact that even if Sunday and public holiday penalty rates were reduced employees working on Sundays would still receive some additional remuneration, is misplaced.[123] It is however unclear why they contend that such a submission is misplaced. The approach adopted by HABA is consistent with that taken by the Full Bench in the context of its review of penalty rates in the retail sector awards.[124]

119. HABA otherwise continues to rely upon our detailed treatment of the relevance of s.134(1)(da) in our previous written submissions.

Section 134(1)(f) – The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

120. HABA concurs with the Unions' observation that this consideration requires the Commission to take into account the likely impact of the modern award powers on business, including on productivity and employment costs.[125] Although, we observe that a consideration of the impact on business is not limited to those two matters.

121. The Unions go on to erroneously argue that there is no evidence to support the proposition that businesses in the hair and beauty industry are suffering productivity problems or high employment costs at all, or that they are attributable to higher Sunday and/or public penalty rates. They also take issue with the perceived lack of certainty as to the extent and prevalence of Sunday and public holiday work in the industry. These factors are said to render s.134(1)(f) a neutral consideration.

[122] See for example *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [1673] – [1676].
[123] Unions' Submission at [153].
[124] See for example *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [1681].
[125] Unions' Submission at [155].

122. The Unions' approach potentially misdirects the Full Bench. Section 134(1)(f) does not necessitate a finding that employers covered by the Award are suffering productivity problems or high employment costs in order for this matter to weigh in favour of granting the claim.

123. To the extent that proposed variation would serve to deliver a positive impact upon the matters identified in s.134(1)(f), they are factors that support the Full Bench making the relevant amendment. We nonetheless accept that the weight to be afforded to such considerations must be assessed within the context of an overarching determination as to what constitutes a fair and relevant minimum safety net of terms and conditions.

124. It cannot seriously be contested that it will give rise to a reduction in employment costs. The Unions do not appear to quibble with this proposition but instead take issue with the extent to which it has been established that this impact is of any significance to industry.

125. In response to the Unions' objections relating to the extent to which Sunday work is undertaken we refer to HABA's submissions at section F above. It is not feasible for HABA to identify or establish the prevalence of Sunday trading with greater precision. This lack of precision does not warrant the Full Bench disregarding the potential benefits that will likely flow to business from the proposed change.

126. Moreover, the Unions' submissions fail to grapple with the reality that there is a connection between the current regime and the extent to which employers are prepared to either trade on Sundays or engage employees to perform such work. The current penalty rates regime creates a disincentive or barrier to trade on Sundays or the engagement of labour which will be reduced by the proposed change. We here refer to paragraphs 170 - 172 of HABA's March Submission which sets out some of the less obvious benefits that will likely consequently flow from the proposed change. The beneficial impact of the proposed variation ought not be narrowly conceived of as a reduction in the costs that they would otherwise incur.

127. The Unions speculate that the proposed variation could exacerbate skills shortage in the labour market for hairdressers.[126] They do not however refer to an evidentiary basis in support of such a contention.

128. It should not be accepted that the proposed reduction to one element of the safety net (i.e. penalty rates for Sundays and public holidays) will give rise to any serious alteration in the labour market for hairdressers. Indeed, it is improbable given the following logical considerations:

- The proposed reductions are modest;
- Employees will still receive a premium for working on the relevant days;
- Not all employees work on Sundays or public holidays;
- Not all employees are opposed to working on Sundays or public holidays; and
- It has not been established that employees covered by the Award will have comparable alternate employment options available to them.

129. Regardless, it is not the role of awards to promote or incentivise employment within one particular industry or occupation over another. This would be an irrelevant consideration for the purposes of s.134(1).

Section 134(1)(h) – The Impact on Employment Growth, Inflation and the National Economy

130. HABA disputes the Unions' contention that the proposed variation could contribute to a skills shortage in the labour market for hairdressers and that this is a relevant consideration for the purposes of determining a fair and relevant minimum safety net of terms and conditions.

[126] Unions' Submission at [159].