Award Review 2014

PENALTY RATES

AM2014/305

Submissions

Shop, Distributive and Allied Employees' Association

General Retail Industry Award 2010

Pharmacy Industry Award 2010

Fast Food Industry Award 2010

21 March 2016

CONTENTS

CHAPTER 1: COMMISSION'S STATUTORY FUNCTION – RELEVANT CONSIDERATIONS AND APPROACH

1. In conducting the 4 yearly review of modern awards pursuant to s 156 of the *Fair Work Act 2009* (the **Act**), the Commission must review each modern award[1] against the modern awards objective so as to ensure that modern awards, together with the National Employment Standards (**NES**), "*provide a fair and relevant minimum safety net of terms and conditions*", taking into account the considerations set out in s 134(1)(a)-(h) of the Act.

2. Section 134 (1) of the Act states:

> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
>
> This is the ***modern awards objective***.

3. These criteria are "*broad considerations which the Commission must take into account in considering whether a modern award meets the objective set by s 134(1)*".[2] No particular weight

---

1 Section 156(5) of the Act.

2 *National Retailers Association v Fair Work Commission* (2014) 225 FCR 154, [109] (Collier, Bromberg, Katzman JJ).

should be attached to any one consideration over another; and not all of the matters identified in s 134(1) will necessarily be relevant to a particular proposal to vary a modern award.[3] To the extent there is any tension between some of the considerations in section 134(1), *"the Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions*."[4]

Section 134(1)(da)

4. Section 134(1)(da) was inserted by the *Fair Work Amendment Act 2013* with effect from 1 January 2014.

5. The Explanatory Memorandum to the *Fair Work Amendment Bill 2013* stated, in respect of the addition of subsection 134(1)(da):

> This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.

6. Clearly, by operation of the insertion of s 134(1)(da), Parliament intended that the assessment required by s 134(1) of the Act to ensure that modern awards, together with the NES provide a fair and relevant minimum safety net of terms and conditions, must expressly consider the need to provide for additional remuneration for weekend and public holiday work.

7. As set out above each of the matters in ss 134(1)(a) to (h) must be treated as a matter of significance and must be taken into account. To "take account" of a matter requires it to be evaluated and given due weight having regard to all other relevant factors. This means that the task imposed by s 134(1) now has a new factor to evaluate with *regard to all other relevant factors*. In this way the nature of the s 134(1) task is affected by the need evaluate a new factor. The factors are not considered in isolation.

Section 138 - necessity

8. The employer parties seek to vary the retail group awards to reduce penalty rates. In considering those applications the Commission must be satisfied that the proposed variations are *necessary* to achieve the modern awards objective. The necessity requirement arises from the terms of s 138 of the Act, which states:

> A modern award may include terms that it is permitted to include, and must included terms that it is required to include, ***only to the extent necessary to achieve***

---

3 *Four Yearly Review of Modern Awards – Annual Leave* [2015] FWCFC 3406, [19], [20] (the **Annual Leave decision**).

4 Ibid, [20].

> ***the modern awards objective*** and (to the extent applicable) the minimum wages objective. (emphasis added).

9. The requirement that a modern award term be "necessary" to achieve the modern awards objective requires the Full Bench to form "a value judgment" based on the considerations delineated in s 134(1) of the Act, and having regard to the submissions and evidence directed to those considerations.[5] The Commission should also recognise a distinction between that which is "necessary" and that which is "merely desirable".[6]

General approach

10. A Full Bench of the Commission in [2014] FWCFB 1788 (the **Preliminary Jurisdictional decision**) provided detailed guidance about the conduct of the 4 yearly review and related jurisdictional issues. At [23] the Full Bench stated (emphasis added):[7]

> The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

11. The proposed reductions to penalty rates sought by the employer parties in the Review constitute proposed significant changes in existing minima. As such, they must be underpinned by a cogent merit argument supported by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

Material change in circumstances required

12. A central contention advanced by the SDA in this proceeding which is developed further below is that, in order to enliven its discretion to vary a modern award in the Review, the Commission must first be satisfied that, *since the making of the modern award*, there has been a material change in circumstances relating to the operation or effect of the modern award with the consequence that, having regard to the considerations in s 134(1) of the Act, it is no longer meeting the modern award objective. It follows from this proposition that a sufficient merit

---

5 [2014] FWCFB 1788, [36].

6 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] 205 FCR 227; 219 IR 382.

7 [2014] FWCFB 1788 at [23], [24], [27], footnotes omitted.

argument and supporting probative evidence must be directed at establishing the existence of material change in the period since the making of the modern award.

13. This contention is consistent with the approach articulated by the Full Bench in the Preliminary Jurisdictional decision, more recent Full Bench decisions and the statutory context of the Review. The critical observations by the Full Bench in the Preliminary Jurisdictional decision is at [24] as follows (emphasis added):

> In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the *Workplace Relations Act* 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.

14. After referring to these statements, a Full Bench in the 4 yearly review of the Security Services Industry Award 2010 stated as follows (emphasis added):[8]

> While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.

15. In the 4 yearly review of the Stevedoring Industry Award 2010,[9] the majority referred to the above statements in the Preliminary Jurisdictional decision and the Security Award decision and summarised the following two "*key points which emerge*" from those statements (emphasis added):[10]

---

8 [2015] FWCFB 620 at [8] (Watson VP, Covacic DP and Roe C) (**Security Award decision**).
9 [2015] FWCFB 1729.
10 [2015] FWCFB 1729 at [144] (the **Stevedoring Award decision**).

> (i) the Award achieved the modern award's objective at the time that it was made; and
>
> (ii) the application seeking a significant change to an award will need to be supported by submissions addressing the relevant legislative provisions and by probative evidence which will usually include evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes.

16. In refusing the employer applications to reduce the level of penalty rates in the Stevedoring Industry Award 2010, the majority concluded as follows (emphasis added):[11]

> … However, simply showing that the existing level of penalty rates are above those applying in comparable awards and industries is in our view insufficient, in the absence of probative evidence, to satisfy us that the award needs to be varied to meet the modern award's objective. As discussed earlier, the award achieved the modern award's objective at the time that it was made and the applicants have not established that the award no longer meets that objective.

17. The same point was identified by a Full Bench in the 4 yearly review of transitional provisions relating to accident makeup pay.[12] After referring to the above statements in the Preliminary Jurisdictional decision, the Security Award decision and the majority decision in the Stevedoring Award, the Full Bench identified six particular matters to guide its approach to matter at hand. The first of these was the following:[13]

> - The awards achieved the modern award's objective at the time they were made. At that time most of the awards included a transitional accident pay clause.

18. Further to the above authorities, the statutory context in which the 4 yearly review takes place supports a construction which requires the Commission to be satisfied of some material change in circumstances since the making of a modern award from which it may be satisfied that the award is no longer achieving the modern award's objective. The critical aspect of the statutory context is the legislative acceptance (recognised by the Full Bench in the Preliminary Jurisdictional decision) that, at the time a modern award was made, it was meeting the modern award objectives. In this way, the award is in effect deemed to meet the modern award objective. Once this is understood, it necessarily follows that a material change in circumstances must be established in order to properly justify a proposed variation to a modern award - to do otherwise is to ignore the statutory mandate that modern awards, when made, achieved the modern award's objective. The fact of the making of the modern awards and their legal character as meeting the

---

11 [2015] FWCFB 1729 at [161].
12 [2015] FWCFB 3523 (the **Transitional Provisions decision**).
13 [2015] FWCFB 3523 at [146].

modern award objective forms an essential part of the historical context of the Review recognised by the Full Bench in the Preliminary Jurisdictional decision.

19. The fact that particular minimum entitlements in a modern award might not have been the subject of detailed evidentiary consideration in award modernisation is irrelevant to a proper understanding of the Commission's statutory function in the 4 yearly review. That function is directed at ensuring instruments which, when made 6 years ago met the modern award's objective, continue to meet that objective.

20. Given the character of modern awards as being deemed to have met the modern award objective when made, it must necessarily follow that any variation of their terms requires the making of a finding by the Commission of some material change in the circumstances pertaining to the operation or effect of an award such that it no longer can be said to meet the modern awards objective. That task necessarily directs attention to the existence, or otherwise, of change in relevant circumstances since the making of a modern award.

21. It is acknowledged that this approach was rejected by the majority in the *Restaurants decision.*[14] That decision however concerned particular proceedings in the Interim Review and it is not clear that the argument outlined above was advanced on the appeal. A subsequent majority decision of a Full Bench about particular proceedings arising in the Interim Review does not assist in understanding the approach adopted by a differently constituted five-member Full Bench to legal and jurisdictional issues in the 4 yearly review. In any event, it is submitted that the *Restaurants decision* is wrong and inconsistent with the approach adopted in the Preliminary Jurisdictional decision, the Stevedoring Award decision and the Transitional Provisions decision. As such, it should not be followed.

22. As developed in later parts of this submission, the cases put by the employers in this aspect of the Review are, to a very large extent, fundamentally misdirected in that they are focused on a comparison between contemporary circumstances relating to the awards in question and the circumstances prevailing in 1919 when Sunday penalty rates were first inserted into awards. The employers have not attempted to establish material change in circumstances relating to the awards in question since they were made in 2010.

---

14 [2014] FWCFB 1996 at [91]-[92].

CHAPTER 2: THE GENERAL RETAIL INDUSTRY AWARD 2010

SECTION A: INTRODUCTION

23. Two sets of written submissions have been filed in the 4 yearly review relating to penalty rates in the General Retail Industry Award 2010 (the **Retail Award**) – an *Outline of Submission by the Australian Retailers' Association, Master Grocers' Australia, Retail Council and the National Retail Association* dated 12 February 2016 (the **ARA submissions**)[15] and *Written Closing Submissions filed on behalf of ACCI, NSWBC and ABI* dated 2 February 2015 (the **ABI submissions**).[16]

24. The central claim advanced by both the ARA and the ABI is for Sunday penalty rates prescribed by the Retail Award to be reduced from payment of an additional 100%, to an additional 50%. The ARA also seeks a reduction in Sunday penalty rates applying to casual and permanent employees working shift work on a Sunday. [17] The arguments advanced by the ARA and the ABI parties for reductions in Sunday penalties substantially overlap.

25. Separate to the claims in respect of reductions in Sunday penalties, the ABI also seeks a reduction in the public holiday penalty rate for all full-time and part-time employees from 250% to 200% and from 250% to 125% (including the casual loading) in respect of casual employees.

Summary of Argument

26. As developed in this chapter of the submissions, the SDA's principal contentions in respect of the variations to the Retail Award proposed by the ARA and ABI are as follows:

    (a) The ABI and ARA have not demonstrated that, since the making of the Retail Award, there has been a material change in circumstances relating to the operation or effect of that award such that it is no longer meeting the modern awards objective. Such a case is required to be established for the reasons explained in Chapter 1. The ABI and the ARA have not in fact sought to establish relevant change since the making of the Retail Award.

---

15 For convenience, in these submissions, references to arguments and submissions contained in the ARA submissions will be referred to as arguments and submissions advanced by the ARA. It is acknowledged that those arguments and submissions are also advanced by MGA, the Retail Council and the NRA.

16 For convenience, in these submissions, references to arguments and submissions contained in the ABI submissions will be referred to as arguments and submissions advanced by the ABI. It is acknowledged that those arguments and submissions are also advanced by the ACCI and the NSWBC.

17 The ARA seeks to vary clause 30.3(c) by providing that employees are able to be paid 175% (200% for casuals) of the minimum rate prescribed by the GRIA for shift work on Sunday – this would see a reduction in the penalty of 25% for all employees who start work at or after 6pm on one day and before 5am on the following day.

(b) The authorities establish that the existing standard of double time for ordinary hours worked on a Sunday emerges from and is the product of substantial and numerous assessments by this Commission and its predecessors about the appropriate minimum standard to apply to that work in the modern-day retail industry. The focus of the employers on the insertion of penalty rates provisions early last century is fundamentally misdirected.

(c) Consideration of the process of award modernisation makes clear that, when the Retail Award was made, it achieved the modern awards objective. The fixation of appropriate penalty rates for the retail industry was a major controversy in the proceedings which resulted in the making of the Retail Award. The same issues now agitated by the ARA and ABI were the subject of extensive submissions and argument in award modernisation and were resolved by the Commission through the making of the Retail Award in its existing terms.

(d) Even aside from the contentions identified in subparagraphs (a)-(c):

(i) The variations proposed by the ARA and ABI are not underpinned by cogent merit arguments supported by sufficient probative evidence properly directed to demonstrating the facts upon which the proposed variations are advanced.

(ii) The evidence adduced by the ABI and ARA does not provide a sufficient basis for the Commission to find that the penalty rates provisions of the Retail Award have the negative effects as asserted by the employers, or that the proposed variations will have the positive effects claimed, including in particular that they will lead to increases in employment and hours of work. Properly considered, the expert evidence before the Commission establishes that cutting penalty rates will have no measureable impact on levels of employment.

(iii) The evidence adduced by the unions in the Review establishes that working on weekends and public holidays has a negative effect on the physical and psychological health, and on the social life, of workers and their families. Weekends, particularly Sundays, and public holidays are important and valuable. The current penalty rates appropriately recognise the value that workers and the community, including employers, place on weekends and public holidays.

(e) The variations to the Retail Award proposed by the ABI and the ARA are not necessary for the award to meet the modern awards objective; the award in its existing terms does

meet that objective.

Structure of Chapter 2 of submissions

27. This chapter of the submissions is structured as follows:

Section B: The Retail Industry and Workforce

An overview of the economic profile of the retail industry will be provided in this part of the submissions, followed by an analysis of the key characteristics of the retail industry workforce, including an examination of the extent to which employees are engaged in weekend and Sunday work.

Section C: The Relevant Historical Framework for the Review

Consistent with the guidance provided by the Full Bench in the Preliminary Jurisdiction Decision, the relevant historical context and recent decisions of the Full Bench dealing with penalty rates in the retail industry will be examined.

Section D: Appraisal of the Evidence relied on by Employers

Further to the Full Bench's identification of the need for significant change to be supported by probative evidence, the key expert evidence relied upon by the ARA and the ABI parties will be critically examined and evaluated. The employers' reliance on the evidence given by the following experts will be considered in detail:

(a) Professor Phil Lewis (contra Professor Borland and Professor Quiggin)

(b) Professor John Rose (contra Professor Morris Altman)

(c) Dr Sean Sands

(d) Ms Lynne Pezzullo

(e) The employers' reliance on Dr Fiona Macdonald's evidence

(f) The employers' reliance on Professor Sara Charlesworth's evidence/Australian Work and Life Index (**AWALI**) data

A detailed analysis of the lay evidence from the six retail employers on which the ARA and ABI parties seek to rely will also be undertaken in this section of the submissions. The survey evidence as adduced through Ms Emily Baxter will also be critiqued.

Section E: Evidence relied on by SDA and Proposed Findings

In presenting its case that current Sunday penalty rates prescribed by the GRIA are meeting the modern awards objective and that there is accordingly no justifiable basis for their reduction, the SDA will analyse the evidence of each of the following experts and outline the findings it seeks on the basis of such evidence:

(a) Ms Serena Yu

(b) Professor Sara Charlesworth

(c) Dr Fiona Macdonald

(d) Dr Olav Muurlink

(e) Professor Ian Watson

(f) Professor David Peetz

(g) Mr Kevin Kirchner

A detailed analysis of seven employee lay witnesses is also undertaken in this section of the submissions, including at Appendix 1.

Section F: Response to Employer case for reduction of Sunday penalty rates

Given the substantial overlap in the arguments advanced by the ARA and the ABI, the response to those cases will be advanced principally through the framework of the case articulated by the ARA. The additional or different arguments advanced by the ABI will also be addressed.

Section G: Response to ABI case on Public Holidays

In this section of the submissions, the SDA will respond to the case put by the ABI for reductions in public holiday penalty rates and the evidentiary and other bases for the arguments advanced.

Section H: Consideration of the Modern Awards Objective

In this section of the submissions, the evidence adduced by the employers in respect of the various considerations comprising the modern awards objective is assessed in the context of other evidence adduced by the unions relevant to those considerations.

SECTION B: THE RETAIL INDUSTRY AND WORKFORCE

The Strength of the Retail Industry – Revenue and Employment

28. It is uncontroversial that the retail industry is an important part of the economy, generating both substantial revenue and employment for Australia.[18] According to the *Industry profile – Retail trade* report (**IPR**), the most recent data indicates that the retail industry accounts for:[19]

    (a) around $370 billion of sales and almost 5% of value added to the economy;

    (b) over 10% of employment, around 9% of actual hours worked per week in all jobs and 8% of wages;

    (c) around 17% of all award reliant employees;

    (d) over 6 % of all businesses; and

    (e) around $20 billion in company gross operating profit.

29. The IPR also indicates that the retail industry has experienced strong growth in the sale of goods and services between 2010 and 2015[20] and has enjoyed strong output[21] and profit[22] growth across the same period. The IPR likewise suggests that the retail industry has had strong average annual growth in productivity between 2003-04 to 2014-15.[23]

30. This is consistent with the evidence of Mr Kevin Kirchner about the retail industry's strong economic performance in recent years.[24] His uncontested evidence was that:

    (a) retail sales have continued to grow in real terms over the period 2010-2014/15;[25]

    (b) total profits across the retail industry have remained at a strong level over recent years;[26]

---

18 ABI Final Submissions, [14.1].
19 Material to assist AM2014/305 – Penalty rates case, *Workplace and Economic Research Section, Tribunal Services Branch,* March 2016, p 3.
20 IPR, pp 22-23.
21 IPR, p 22.
22 IPR, pp 23-24.
23 IPR, pp 24-25.
24 Exhibit SDA-32, Exhibit KPK-1.
25 Exhibit SDA-32, Exhibit KPK-1, pp 9 and 12 (Figure ES1 and Table ES1). See also pp 19-22.
26 Exhibit SDA-32, Exhibit KPK-1, pp 10 and 13 (Figures ES2 and ES3). See also, p 27.

(c) since 2012/13, total profits for the retail sector have exceeded the record level reached at the end of the boom period (i.e. around 2008), following almost 15 years of sustained strong growth;[27]

(d) profit margins in the retail industry have remained at strong levels in the period from 2010 until 2015, around historical highs, notwithstanding a slight decline in the average retail profit margin in the past 12 months;[28]

(e) since about 2010, wages in the retail industry have not generally grown at a faster rate than wages growth across the economy as a whole;[29] and

(f) in recent years, the number of persons employed in the retail industry and aggregate hours worked have continued to increase.[30]

Retail Workforce – Age and Weekend Work

31. Much of the evidence before the Commission on the characteristics of the retail workforce, and to which the paragraphs below refer, comes from the uncontested[31] evidence of Professor Ian Watson and Professor David Peetz in their co-authored report, *Characteristics of the Workforce in the National Retail Industry.*[32] This report, which is addressed in further detail in Section E of these submissions, brings the latest available unpublished data[33] from HILDA and ABS sources to bear on a number of questions regarding the age, including student status, and weekend working patterns of the retail workforce in Australia.

32. Although a greater proportion of the retail workforce is aged 24 years or younger than in other industries, about two-thirds of the retail workforce is aged 25 years or older.[34] The number of persons aged 15 to 19 years employed in the retail industry has continued to decline over recent years, even as the number of persons in other age groups employed in the retail industry has picked up;[35] there has been no statistically significant change in the proportion of 15 to 18 year olds in the weekend workforce or in the weekend retail workforce over the last decade.[36]

---

27 Exhibit SDA-32, Exhibit KPK-1, pp 10 and 13 (Figures ES2 and ES3). See also, pp 27-28.
28 Exhibit SDA-32, Exhibit KPK-1, pp 10 and 14 (Figure ES4). See also, pp 27-29.
29 Exhibit SDA-32, Exhibit KPK-1, p 10. See also pp 29-33.
30 Exhibit SDA-32, Exhibit KPK-1, p 10. See also, pp 33-36.
31 PN-22173-PN-22174.
32 Exhibit SDA-36.
33 Exhibit SDA-36, p 1, line 2.
34 IPR, p 38 (Table 5.2) estimates that 33.4% of the retail workforce is aged 24 years or under.
35 Exhibit SDA-32, Exhibit KPK-1, pp 11 and 15 (Figure ES6). See also pp 37-38 (Figure 18). See also Exhibit SDA-36, p 16.
36 Exhibit SDA-36, p 10.

33. Although up to 62%[37] of retail employees perform some work on weekends, this proportion has not changed since the introduction of the Retail Award in 2010 – the percentage of employees who worked weekends in 2008 is broadly similar to that who worked weekends in 2014.[38]

34. It is also significant to note, that although up to 62% of retail employees perform some work on weekends, only about a third work on Sundays.[39]

35. The evidence also establishes that the weekend retail workforce is getting older rather than younger. Between 2004 and 2013, the point estimate of the average age of the weekend employee retail workforce increased from 27.3 years to 29.0 years.[40]

36. It is also important to clarify the proportion of retail employees who are students. The evidence establishes that only 20-22% of retail employees are full-time students under 25 years of age.[41] Between 2004 and 2013, there was no statistically significant change in the proportion of "dependent students" in the weekend employee retail workforce.[42]

---

37 Exhibit SDA-36, p 7.
38 Exhibit SDA-43, [40]. Compare ARA Final Submissions at [32].
39 Exhibit SDA-36, p 7. The estimate is between 31-35% of retail workers work on Sundays.
40 Exhibit SDA-36, p 9-10.
41 Exhibit SDA-36, p 19-20.
42 Exhibit SDA-36, p 12-13. "Dependent students are defined as persons aged 15 to 24, studying full-time, not working full-time and living in a household with their parent(s)."

SECTION C: THE RELEVANT HISTORICAL FRAMEWORK FOR THE REVIEW

Summary of Argument

37. The case advanced by the employers by reference to the history of penalty rates is alluring in its simplicity. It is also misdirected and misleading. The contention is that the current penalty rate for Sunday work in the Retail award is set at the same level as when Sunday penalty rates were introduced in 1919. Because Australian society and working patterns have changed significantly since that time those changes support a reduction in the existing Sunday penalty rate.[43]

38. No issue is taken with the proposition that Australian society and working patterns have changed significantly since 1919. That fact however is irrelevant once it is recognised that the question of the appropriate penalty rate to apply to Sunday work has not been dormant or ignored in recent times. The survey of the authorities below demonstrates that arbitral controversies about the appropriate penalty rate to apply to Sunday work have in fact characterised and substantially defined the zone of controversy over minimum standards in the retail industry over the past 20 years.

39. The significant and important implication which follows from this is that, far from being a relic from another time, the existing standard of double time for ordinary hours worked on a Sunday emerges from and is the product of substantial and numerous assessments by this Commission and its predecessors about the appropriate minimum standard to apply to that work in the retail industry. That assessment has not occurred by reference to the circumstances of work and industry prevailing in 1919, but in a contemporary context characterised by, amongst other things, the introduction and spread of deregulated trading hours and a workforce comprised of greater proportions of young people, women and those employed on a casual or part-time basis.

40. Further, the authority made clear there can be no issue that the Sunday penalty rate ever did or now contains any element of deterring the performance of Sunday work. It was originally fixed on a purely compensatory basis, which rationale has explicitly underpinned the Commission's and its predecessor's consideration of the appropriate rate in recent times.

41. The case advanced by the employers is therefore fundamentally misdirected. Given that the current minimum for Sunday work is a product of contemporary reassessments of the appropriate safety net and one which has confined the purpose of Sunday penalties as compensating employees for the disabilities associated with such work, the task for the employers is to establish change in those factors relevant to the fixing of a compensatory Sunday penalty where the

---

[43] See for example ARA Submissions, paras [30]-[46], 12(a).

comparison is not with 1919, but with the previous 10-15 years. The employers have not advanced such a case and the evidence does not support a finding of any material change over that time in factors and circumstances relevant to the fixing of proper compensation for Sunday work.

42. An additional conclusion which emerges from a consideration of the contemporary assessments of the disabilities associated with Sunday work is that the current rate of double time was struck on the basis that Sunday work is non-voluntary (i.e. can be required). This was an important departure from established award arrangements in the retail industry. Although the SDA strongly opposes any reduction in Sunday penalty rates, the direct connection established between the current penalty rate and the non-voluntary nature of Sunday work has the consequence that, if the Commission determines to reduce Sunday penalty rates in this Review, as a necessary corollary to any such change, the Commission should also vary the Retail Award to provide that Sunday work is voluntary.

Preliminary comments – Victoria and New South Wales

43. An underlying feature in any consideration of the arbitral history relating to Sunday penalty rates are the different minimum standards which applied in different States prior to the making of the Retail Award in 2010. Of particular significance is the fact that, prior to 2010, a rate of 50% applied in New South Wales for ordinary and overtime hours worked on Sundays, whereas a penalty of 100% applied for those hours in Victoria. The "reconciliation" of these different minimum standards through the process of award modernisation is dealt with below. Prior to that time, controversies about the applicable minimum rate for Sunday work largely centred on Victoria. Accordingly, the contemporary and repeated assessment of the appropriate rate to apply to ordinary hours worked on Sundays has principally occurred in the Victorian context. The factors dispositive of those controversies have not however been unique or confined to Victoria and as such have a broader significance.

44. The contemporary assessment of appropriate penalty rates to apply to Sunday work is evidenced by the proceedings and authorities discussed below which are considered in chronological order.

Short history of award coverage in Victoria

45. Prior to the making of the modern Retail Award, the only award which applied to the retail industry in Victoria was the Shop, Distributive and Allied Employees' Association – Victorian Shops Interim Award 2000 (the **Interim Award**), made on 16 March 2000. The short history of

award coverage in Victoria prior to that time was summarised as follows by the Full Bench in *Shop, Distributive and Allied Employees' Association v $2 and Under*[44] (**$2 and Under (No 1)**):

> … The origins of the interim award are to be found in three multiple employer awards which were made in 1994. The awards were the Shop, Distributive and Allied Employees Association — Victorian Shops Interim Award 1994, the Shop, Distributive and Allied Employees Association — (Booksellers and Stationers) Interim Award 1994 and the Shop, Distributive and Allied Employees Association (Food and Liquor Stores) Interim Award 1994. These awards, subject to some exceptions, contained terms and conditions derived from awards of the Industrial Relations Commission of Victoria which had expired on 1 March 1993. The circumstances in which the awards were made are set out in a decision made by Lewin C on 22 April 1994. In his decision the Commissioner indicated that he intended to consolidate the three awards. In fact the awards were not consolidated until Hingley C did so as part of the simplification of the three awards (and a large number of others) in 2000. The interim award is the result. (footnotes omitted)

Early provisions

46. As noted by the ARA,[45] the retail industry has a long history of requiring payment of penalty rates for Sunday work. Although it is correct that double time for Sunday work was first introduced in 1922 with the *Determination of the Miscellaneous Shops Board* which in turn was expanded by the making of other determinations in relation to other parts of the Victorian retail industry, [46] until 1950 those provisions were substantially limited to overtime performed on Sundays. This occurred by the insertion into the relevant determinations of spreads of hours which did not include Sundays. Accordingly, although double time for Sundays was incrementally introduced in the Victorian retail industry from 1922, until 1950, that entitlement was an entitlement which applied to overtime and not ordinary hours of work.

1950 - Introduction of double time for Sunday ordinary hours

47. It was not until 1950 that the entitlement to double time for ordinary hours of work was introduced in relation to certain shops in Victoria. Pursuant to the *Labour and Industry Act*, certain categories of shops were permitted to trade extended hours, including Sundays. These shops were identified in the Fifth Schedule of that Act and became known as the "Fifth Schedule Shops". Fifth Schedule Shops were subsequently named "Special Category Shops" within

---

44 (2003) 127 IR 408 at [5].

45 ARA Submissions, para 18.

46 See in particular the *Drapers and Men's Clothing Determination* dated 8 May 1922; *Grocer's Determination* dated 8 November 1938; *Boot Dealers Determination* dated 29 June 1931; *Country Shops Assistance Determination* dated 10 May 1939; *Delicatessen's Determination* dated 1 December 1946; *Furniture Dealers Determination* dated 14 June 1940; *Hardware Determination* dated 12 April 1934.

Victorian awards and later as "Class A Exempt Shops" within the Interim Award and its predecessors.

48. Minimum wages and conditions applicable to Fifth Schedule Shops were determined by the Confectionary, Pastry, Fruit and Vegetable Board. Determinations of this Board were the predecessors to the Victorian Food Shops Award. For many years, these shops were permitted to employ employees for ordinary hours of work on Sundays. On 8 March 1950, the Confectionary, Pastry, Fruit and Vegetable Board inserted a provision in its Determination which provided, for the first time, for payment of double time in respect of ordinary hours of work on a Sunday.

49. It follows from the above that the award entitlement of double time for Sunday ordinary hours of work in retail shops in Victoria finds its genesis in 1950, rather than 1922. Although no rationale was expressly provided for why the entitlement to double time for ordinary hours worked on a Sunday, it can reasonably be understood as being of a wholly compensatory character given that there was no issue of the shops in question trading on Sundays. Any element of deterrence would not serve any purpose. The scope of application of this minimum standard to ordinary hours of work on a Sunday gradually expanded after 1950 by the identification of new types of Fifth Schedule Shops. It was further expanded in 1992 as outlined below.

1992 – Class B Exempt Shops

50. The scope and extent of application of the entitlement to be paid double time for ordinary hours worked on a Sunday in Victoria in retail shops was expanded in 1992 with a decision by the Industrial Relations Commission of Victoria (**IRCV**) to introduce a new category of shops known as "Class B Exempt Shops".[47] It is correct that in this decision the IRCV did indicate that the limited provision made for Sunday trading did not warrant a reassessment of existing rates for Sunday work. However, for present purposes, the particular significance of the decision lies in its effect in substantially expanding the number and types of shops which were obliged to pay their employees double time for ordinary hours of work on a Sunday. Unlike Class A Exempt Shops, Class B Exempt Shops were not limited to shops employing less than 20 employees. As a result, the entitlement to double time for ordinary hours at work on a Sunday had a much wider application than previously applied and also meant that these provisions applied, for the first time, to large employers such as national supermarket chains and hardware stores.

---

47 IRCV Decision 92/0256.

51. Further, it is implicit in the reasons of the IRCV that penalty rates for weekend work including Sundays were regarded as purely compensatory in character. This is apparent from the following statements by the Full Bench in upholding an application to vary Saturday penalty rates:[48]

> We have taken the view that the approach which should be adopted in this matter is to determine a rate to compensate retail workers, according to the particular circumstances of the industry and their employment, for the inconvenience and disabilities associated with working on a Saturday.(Emphasis added.)

52. The IRCV concluded that the new rate for Saturday work would *"adequately compensate for the social disabilities involved for retail employees and working on a Saturday."*[49]

1996 – Deregulation of trading hours

53. For the purposes of this chronology, it is relevant to note that trading hours in Victoria were substantially deregulated in late 1996 with the commencement of the *Shop Trading Reform Act 1996* (Vic).

1999 - Award simplification

54. As noted above, following the abolition of Victorian State Awards in 1993, three Federal awards[50] were made by the AIRC in 1994. Those awards adopted in unaltered terms the provisions for Sunday work contained in the previous Victorian State Retail Awards.

55. As part of the award simplification process, the Retail Traders Association of Victoria made application to vary the above three Federal awards by inserting a provision that hours between 7:00 am and 6:00 pm on Sunday be ordinary hours and be paid at time and a half. In dealing with this application, the AIRC undertook the first modern day assessment of the appropriate minimum arrangements to apply to Sunday work. The Commission rejected the employer application to include Sunday in ordinary hours and to reduce the penalty rate and stated:[51]

> I am not persuaded, on what is before me, that the combination of deregulated shop trading hours and the evolution of new shopping lifestyles and consumer demands, consequentially means that for retail workers an expanded daily spread of hours, late night hours and Saturday and Sunday work, are a sought after lifestyle corollary, diminishing the unsociability of such work schedules. It is a corollary of such changes, should the Commission so determine, that current or future employees with little or no bargaining power may be obliged to work extended evening, Saturday or Sunday hours

---

48 IRCV Decision 92/0256, p 23.

49 IRCV Decision 92/0256, p 25.

50 The *Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 1994,* the *Shop, Distributive and Allied Employees Association – (Booksellers and Stationers) Interim Award 1994* and the *Shop, Distributive and Allied Employees Association (Food and Liquor Stores) Interim Award 1994.*

51 Print Q9229 (refer to section of decision under sub-heading, *6C Hours of Work and Rosters).*

> against their domestic responsibilities or personal convenience as ordinary hours to retain or gain their employment.

The Commission continued:[52]

> While there is clear evidence of social change in respect of increased consumer desire to shop weekends especially Sundays and shopping becoming a part of contemporary leisure lifestyles, for a variety of reasons it does not follow that retail employees should or do acquiesce in jeopardising their preferred lifestyle, indeed the evidence suggests full-time and regular part-time employees want and need protection from the requirement to work extreme or unsociable hours notwithstanding penalty rate entitlements.

56. The Commission concluded in the above terms having received evidence from numerous witnesses about the nature of Sunday work in the retail industry. Substantial cases were marshalled in support of and in opposition to the application. It is striking that, in terms reflective of the employers' cases in this Review, the Commission had regard to the employer submissions and evidence "*in relation to retail market growth, intensive and expanding forms of competition, ongoing deregulation of retail trading hours and inter alia the changing lifestyles in the community impacting in changed shopping patterns and consumer demands*."[53]

2003 - *$2 and Under*

57. The Commission was required to quell a very substantial controversy in respect of Sunday penalty rates in 2003 in the "$2 and under" proceedings. As further outlined below, the Commission was presented with arguments by employers of the same type agitated in award simplification in 1999 and which are substantially the same as many of the arguments now put in the Review.

58. The relevant background to the proceedings was as follows. In *SDAEA v $2 and Under (No 1)*,[54] a Full Bench of the Commission determined to make an award roping-in approximately 17,000 Victorian retail employers into the Interim Award. The context of this decision was that, following the abolition of Victorian State Awards in 1993, the large majority of Victorian retailers were no longer subject to award minima, with the Interim Award and its predecessor Federal awards binding only about 1,300 retailers.

59. In deciding to make a roping-in award and in relation to Sunday work, the Full Bench noted that "*the practice of Sunday training throughout large sections of metropolitan Melbourne and many*

---

52 Print Q9229 (refer to section of decision under sub-heading, *6C Hours of Work and Rosters).*

53 Print Q9229 (refer to section of decision under sub-heading, *Consideration of Submissions on the Nature of the Industry).*

54 *Shop, Distributive and Allied Employers Association v $2 and under* (2003) 135 IR 1 (**$2 and under (No 1)**).

provincial centres is too well known to require formal proof"[55] and concluded that it "*should recognise the reality that retailing is a seven day a week industry in Victoria"*.[56]

60. The Commission determined however to defer the finalisation of the penalty rate to apply for Sunday work.[57] In the later proceeding, the Full Bench by majority fixed a rate of double time for ordinary hours performed on a Sunday and rejected the employer case that time and a half was the appropriate penalty.[58] The decision is of particular significance for four reasons.

61. *First*, the Commission made clear that the penalty rate of double time is wholly directed at compensating employees for the disabilities of Sunday work and is not directed at deterring such work. The majority stated (and the reasons of Giudice J in dissent do not suggest a different view):[59]

> In our view, in the context of the reality that retailing in Victoria is a seven-day a week industry, as noted in the January 2003 decision, the Sunday ordinary time penalty in the roping-in award should be directed to the compensation for the disabilities upon employers and should not be directed to deterring the working of Sunday ordinary time hours.

62. *Secondly*, the majority referred to expert evidence which showed "*a very substantial disability endured by persons working on a Sunday*," which disability would be heightened in the context of "*non-voluntary working of ordinary hours on a Sunday*".[60] Giudice J also accepted that the expert evidence demonstrated "*a significant social disability associated with work on a Sunday*".[61]

63. *Thirdly*, consistent with the submissions set out above, the majority accepted that there had been a long history of double time being the appropriate penalty rate for ordinary hours worked on Sunday in the Victorian retail industry and that the operation of that provision had expanded since 1950 and since the making of the Interim Award in 2000.[62]

64. *Fourthly*, the majority made clear that, having regard to the compensatory object of the Sunday penalty rate, the central question was to assess the disabilities suffered by employees from

---

55 *$2 and under (No 1)*, para 82.
56 *$2 and under (No 1)*, para 88.
57 *$2 and under (No 1)*, para 89.
58 *Shop, Distributive and Allied Employers Association v $2 and under* (2003) 135 IR 1 (***$2 and under (No 2)***) per Watson SDP and Rafaelli C.
59 *$2 and under (No 2)* per Watson SDP and Rafaelli C at para [91]. See also at para [106].
60 *$2 and under (No 2)* per Watson SDP and Rafaelli C at para [95].
61 *$2 and under (No 2)* per Watson SDP and Rafaelli C at para [96]. Giudice J qualified this observation by noting that it also suits some people to work on that day.
62 *$2 and under (No 2)* per Watson SDP and Rafaelli C at para [102].

Sunday work and that that question was unaffected by the extent of Sunday trade. The majority stated (emphasis added):[63]

> . . . Accordingly, we are satisfied that the Sunday rate, which was translated to the interim Federal award, was compensation based and was not directed to deterring ordinary time work on Sundays. The only material change that has occurred since 1992 is the greater incidence of Sunday trading in Victoria. In our view, that factor does not affect the disabilities endured by employees working on Sundays.

65. This is a critical distinction which the Commission in the present matter should steadily bear in mind. In circumstances where across the community as a whole Sunday remains overwhelmingly a day upon which people do not work,[64] the fact that Sunday trade is widespread in one particular industry, says nothing about the disabilities suffered by those required to work on that day.

***$2 and under* - employer arguments**

66. The employers advance a number of submissions apparently designed to cast doubt on the decision in *$2 and under (No 2)* and its relevance to the Review.

(a) Rather curiously it is said that, "*had the minority decision been applied, it is highly likely that the retail award will now provide for a 50% Sunday penalty.*" This assumes that Giudice J in dissent found that a penalty rate of 50% was appropriate: he expressly did not.[65] In any event, no challenge was brought against the lawfulness of the majority's decision and as recently as 2014 it was described by the majority of the Full Bench in the *Restaurants decision* as constituting "*a contemporary general assessment of the disabilities associated with working on Sundays as compared to other days of the week*".[66]

(b) The employers next challenge the description by the Full Bench in the *Restaurants decision* of *$2 and under (No 2)* as being a contemporary assessment of Sunday penalty rates on the basis that that description is at odds with the evidence relied upon. The complaint is that of the data used by one of the expert witnesses in *$2 and under (No 2)* was from 1997 (in the context of a case heard in 2003). No basis is identified for why an assessment of Sunday penalty rates in 2003 cannot aptly be described, in 2014, as "contemporary". This again exposes again the significant evidentiary gap in the employer cases: in what specific respects has there been a change since 2003 in the nature of work in the retail industry such that the disabilities associated with that work are appropriately compensated at a rate of double time?

---

63 *$2 and under (No 2)* per Watson SDP and Rafaelli C at para [106].

64 Victorian Government Submission, 11 March 2016, [3.24]-[3.25] referring to ABS data. The majority of Australians (70%) continue to work a standard Monday to Friday week.

65 *$2 and under (No 2)* per Watson SDP and Rafaelli C at para [28].

66 [2014] FWCFB 1996 at [128].

(c) Lastly, the ARA[67] contend that the approach adopted to fixing the Sunday penalty by the majority in *$2 and under (No 2)* is at odds with the view expressed by the Full Bench in relation to Sunday penalty rates in the Interim Review. The fact that the current Review and the proceedings in *$2 and under* occurred in a different statutory and procedural context does not detract from the central issue, namely, that *$2 and under* can only properly be described as a contemporary assessment of the appropriate compensatory penalties to apply to Sunday work in the retail industry. That characterisation is even clearer when due recognition is had to the nature and scale of the task undertaken by the Commission in that matter. Through the vehicle of a massive roping-in application involving 17,000 employers and which involved the fixing of appropriate penalty rates for Saturday and evening work as well as Sunday work,[68] the proceeding necessarily required the Commission to fix appropriate and fair minima for the large part of the retail industry in Victoria. This is consistent with the majority's understanding of their task as "*assessing a fair minimum standard for the penalty for work in ordinary hours on a Sunday, in the context of living standards generally prevailing in the Australian community*."[69]

Double time penalty – Sunday work no longer voluntary

67. The contemporary assessment of Sunday penalty rates undertaken by the AIRC in the *$2 and under* proceeding also involved the AIRC in altering a previously established condition regulating Sunday work. Consistent with its predecessors applying in Victoria, Sunday work under the Interim Award had been voluntary: Clause 19.2 provided: "*An employer shall not require any employee to work on a Sunday but an employee may elect to work a Sunday*." Provisions to similar effect operated in most other States and were of long-standing.[70]

68. In determining to rope employers into the Interim Award, the Commission explicitly did so on the basis that it was departing from the provisions made by that award in four important respects. Relevantly, two of those were: (a) including a general provision for the working of ordinary hours

---

67 ARA Submissions, paras 27-29.

68 See $2 and Under (No 1), paras 90-94.

69 *$2 and under (No 2)*, para 119.

70 In addition to Victoria, Sunday work was voluntary in Western Australia (per Parts III and IV of *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977*; South Australia (per cl 6.6 of the *Retail Industry (SA) Award;* and in some areas and stores in Queensland (per clause 6.1.3(d) of the *Retail Industry Award – State 2004*. In NSW and the ACT, Sunday work was voluntary to the extent that various savings provisions apply. See for example cl 29.4 of the *Retail and Wholesale Industry – Shop Employees – Australian Capital Territory – Award 2000*. There was no provision for voluntary Sunday work in Tasmania (but Sunday trading was largely not permitted for many years).

on Sundays between 9am and 6pm; and (b) "*the making of work in ordinary hours on Sunday non-voluntary, in respect of both Exempt and Non-Exempt shops*".[71]

69. Critically, the change from voluntary to non-voluntary Sunday work directly formed part of the Commission's assessment of the disability associated with working on that day. In referring to the evidence as showing a "*very substantial disability endured by persons working on a Sunday*, " the majority identified that that disability: [72]

> …would be heightened in the context whereby provision is made in the roping-in award for the non-voluntary working of ordinary hours on a Sunday.

70. The current provision of double time for Sunday under the modern Retail Award is based on the same premise: Sunday work is not voluntary. The only relevant protection provided to employees in respect of Sunday work is an entitlement to have one Sunday off in four.[73] Similar provisions in effect mandating a minimum number of Sundays off are of long standing under previous retail awards.

71. This analysis demonstrates that the contemporary assessment of the disabilities associated with Sunday work undertaken in *$2 and under* was premised in part on the important recognition that Sunday work under the roping-in award would not be voluntary. On that (and other bases) the Commission found double time to be the appropriate and fair payment to compensate employees for the disabilities of working on that Sunday.

72. It follows from the direct connection identified in *$2 and under* between double time for Sunday work and such work being "non-voluntary" that, in the event that the Commission in this Review determines to reduce Sunday penalty rates, it should also vary the Retail Award to provide that the performance of ordinary hours of work on a Sunday be voluntary. The SDA strongly opposes any reduction in Sunday penalty rates for the reasons set out in these submissions but, if those submissions are not accepted and the Commission determines to reduce Sunday penalty rates, the above approach proposed would be consistent with the direct connection identified by the AIRC in *$2 and under* between the level of disability of Sunday work and whether such work can be required or is voluntary.

73. Given the employers' arguments in this Review to the effect that "*retail employees chose to work on Sundays*" and that they "*will continue to do work on Sundays at a 50% penalty,*"[74] the Commission is entitled to proceed on the basis that voluntary Sunday work would not present

---

71 See *$2 and under (No 2)* per Watson SDP and Rafaelli C at para [123].
72 Ibid para [95].
73 Retail Award, clause 28.13.
74 See for example ARA submissions, Parts N and O.

any substantial difficulty for employers. Further and importantly, the treatment of Sunday work as voluntary would also address an important underlying aspect of the disability experienced by many Sunday workers; that Sunday, like the rest of the community, is a non-preferred day of work. The evidence in relation to these matters is considered in detail in Section E of these submissions.

2008 - 2010

74. In the 2012 Interim Review the SDA filed extensive submissions detailing how the claims the subject of that Review, including the claim for payment of a Sunday penalty of 50%, were the subject of extensive consideration and decision by Full Benches of the AIRC or FWA in the award modernisation process. Consistent with the submissions put by the SDA, the Full Bench in relation to the Retail Award stated as follows in the Interim Review (emphasis added): [75]

> Although there are a number of penalty rate provisions that are sought to be varied in these applications, the major focus of both the evidence and the submissions has been on the Sunday penalty. There can be no doubt that this issue was expressly raised and determined by the AIRC through the award modernisation process. Indeed, various employer groups sought that the additional Sunday penalty rate in the retail sector be 50% or lower. Such submissions were advanced on a number of occasions including in response to the exposure draft in 2008 and following the revised award modernisation request issued on 2 May 2009.
>
> These submissions were considered by the AIRC and on 29 January 2010 the Full Bench determined to retain the proposed 100% penalty for Sunday work. It indicated that it had done so in line with the general approach adopted in establishing the terms of modern awards by having particular regard to the terms of existing instruments and:
>
> > where there is significant disparity in those terms and conditions we have attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit.
>
> The Full Bench also observed that the modern award rate of "double time" was in line with existing rates in Victoria, the ACT, Queensland non-exempt shops, Western Australia and Tasmania and that accordingly "the critical mass supports the retention of this provision". (footnotes omitted)

75. The ARA submits that the award modernisation proceeding "*was not a contested proceeding, and therefore there were no true contested issues.*"[76] This surprising claim appears to be based on the fact that only limited evidence was received in the award modernisation proceeding.[77] The receipt (or not) of evidence in a proceeding says nothing about whether the proceeding is "contested". The issue of fixing a penalty rate for Sunday work was patently a matter of very

---

75 [2013] FWCFB 1635 at [37]-[39].
76 ARA Submissions, para 7(a).
77 Statutory declarations by employers and roster and costings analysis were filed with the AIRC.

substantial and sustained controversy in award modernisation. By way of illustration, the following may be noted:

(a) Prior to the release in September 2008 of an exposure draft award, the NRA and ANRA submitted that a 150% penalty should apply to new employees with existing conditions protected through transitional provisions.[78] The ARA's primary position[79] was that no penalty should apply for Sunday work in ordinary time,[80] but that if the AIRC was to set a rate, it should be 50%.[81] The NRA advanced oral submissions in support of its position and in opposition to the SDA's submission before Vice President Watson on 7 August 2008.[82] The ARA also advanced oral submissions in support if its position and against the SDA position.[83] After the exposure draft was released, further written submissions were received in which the employers opposed the Sunday rate at 200%.[84] There was further agitation on the exposure draft before the Full Bench in a hearing on 5 November 2008 during which among other matters, consideration was given to detailed roster analysis submitted by the ARA.

(b) After receiving submissions on the exposure draft award, the Full Bench decided to make separate awards for general retailing, fast food, hair and beauty and community pharmacies.[85] The modern General Retail Industry Award 2010 published on 19 December 2008 provided for a penalty payment of an additional 100% loading for all hours worked on a Sunday.[86]

(c) Following the amendment of the award modernisation request on 2 May 2009, the NRA and ANRA submitted that the amendment represented "*a significant shift in the parameters*" relating to the award modernisation process which rendered it appropriate and necessary for the AIRC to review the content of modern awards that had been created.[87] They submitted that the Sunday penalty rate of 200% in the proposed award was one provision which should be amended and made detailed submissions about the cost implications of that provision and the differential penalties for Sunday work provided

---

78 Joint submissions of the NRA and ANRA dated August 2008 in AM 2008/10 at para 58.
79 Also representing the Western Australian Chamber of Commerce and Industry, the Western Australian Retail Traders Association and the National Association of Retail Grocers.
80 Submission of the ARA dated 1 August 2008 in AM 2008/10, p 48.
81 Submission of the ARA dated 1 August 2008 in AM 2008/10, p 50.
82 AM 2008/10, PN 317.
83 AM 2008/10 PN 960, 976, 986 AND 987.
84 See for example, NRA/ANRA October 2008 Submission, pp 7-10; AFEI October 2008 Submission seeking 50% Sunday penalty based on NSW shop rate, pp 10-11.
85 *Award Modernisation Decision* [2008] AIRCFB 1000 at [284].
86 See clause 28.4(c).
87 Award Modernisation, Joint Submissions of the NRA and ANRA dated May 2009, para 6.

for in Queensland and New South Wales.[88] The ARA also made submissions at this time, including that "*suddenly increasing the costs to employers by up to 50% for Sunday work from January 2010 is unacceptable and must be subject to transitional provisions*."[89]

(d) On 2 September 2009, the Full Bench of the AIRC published a decision in relation to award modernisation and transitional provisions to be included in priority and stage 2 modern awards.[90] The AIRC made no change to any of the penalty rates, including the Sunday penalty rate. On 30 September 2009, the NRA made application to vary the GRIA including by reducing the Sunday penalty from 200% to 150%.[91] A variation to the same effect was sought by the ARA on 31 December 2009. [92] The CCIWA and RTAWA also made an application to reduce penalties. These and other applications were considered by a Full Bench on 29 January 2010 and in due course dismissed.[93]

(e) The ARA in a written submission regarding proposed transitional provisions still opposed the modern retail award and were "very disappointed" with the content of the award[94] which they viewed would have a crippling impact on employers[95] as there was an "*absence of reasonable and sustainable terms and conditions of employment within the Modern Retail Award*."[96] They also understood "*that virtually all employer groups involved in this process so far as retail is concerned share the same or similar views. Nonetheless, it appears evidence and submissions provided to the AIRC by employers on this issue have not been given due consideration*."[97]

76. It is also inaccurate to submit[98] that the award modernisation process did not allow for detailed consideration of the appropriateness of the level of Sunday penalty rates. To the contrary, many specific arguments of the type now agitated in this Review were advanced by the employers in award modernisation. They include:

(a) that many employees freely wish to work on Sundays;[99]

---

88 Ibid, paras 8-12.
89 ARA Submissions dated 29 May 2009, [92].
90 [2009] AIRCFB 800.
91 AM 2009/24.
92 AM 2009/210.
93 [2010] FWAFB 305.
94 ARA written submission to AIRC 29 May 2009 para 8.
95 ARA written submission to AIRC 29 May 2009 para 10.
96 ARA written submission to AIRC 29 May 2009 Executive summary.
97 ARA written submission to AIRC 29 May 2009 para 8.
98 ARA Submissions, para 7(b).
99 See for example, submissions of the MGA dated 1 August 2008, p 3; submissions of the SRASA dated 9 October 2008, p 2; and submissions of the CCIWA dated 10 October 2008, p 81-82.

(b) the significance of Sundays has changed in the broader community and to employees and employers so as not to justify a rate of 100%;[100]

(c) payment of 100% for Sunday work is inconsistent with deregulated trading conditions and is unfairly restrictive of seven day trading;[101]

(d) payment of 100% for Sunday work will have major adverse cost consequences for employers and economic effects;[102]

(e) there is no sound reason why the penalty for Sunday work should be different to the penalty for Saturday work;[103]

(f) a rate of 100% for Sunday work unreasonably limits flexibility of employers to roster employees for work;[104] and

(g) an obligation to pay 100% for Sunday work does not properly reflect pre-existing rates for Sunday work across different States.[105]

77. It may be accepted that the award modernisation process required the Commission to undertake something akin to a blending process from pre-existing award minima. However, in discharging its statutory function to undertake the award modernisation process, the Commission cannot be taken to have engaged in a mere mechanical exercise of determining the contents of modern awards merely on the basis of the preponderance of pre-existing award minima in relation to particular entitlements. As the Full Bench stated in relation to the resolution of the controversy about the applicable penalty rate for Sunday work, it attached weight to the critical mass of provisions "*and terms which are clearly supported by arbitrated decisions and industrial merit.*"[106] In respect of fixing a penalty rate for Sunday work having regard to the statutory criteria which was materially the same as the modern award's objective, the Commission had before it extensive argument and submissions on the "*industrial merit"* of the respective claims. As such, the award modernisation process itself is yet another occasion in recent times in which

---

100 See for example submissions of the MGA dated 1 August 2008, p 3.

101 See for example submissions of the AFEI dated 1 August 2008, paras 10-11 and submissions of the CCIWA dated 10 October 2008, p 81.

102 See for example submissions of the ANRA/NRA dated 1 August 2008, para 57; submissions of the ANRA/NRA dated October 2008, paras 20-25; submissions of the ANRA/NRA dated 29 May 2009, paras 10-12; submissions of Business SA dated 9 October 2008, para 4.1.11; submissions of NARGA dated 10 October 2008, p 2; and submissions of Queensland Newsagents dated 29 May 2009, p 8.

103 See for example the submissions of the CCIWA dated 10 October 2008, p 82.

104 See for example the submissions of CCIWA dated 10 October 2008, p 82 and the submissions of NARGA dated 10 October 2008, p 2.

105 See for example the submissions of the NRA dated 5 November 2008, PN 3363 and the submissions of the NRA dated 29 May 2009, paras 11-12.

106 [2010] FWAFB 305 at [3].

the Commission has determined the appropriate rate for ordinary h-ours worked on a Sunday, on this occasion, on a national basis and against criteria which prefigured the modern award's objective.

Interim Review

78. For present purposes, the relevant point of note from the Interim Review was that, in finding that the employers had not made out a case for change to Sunday penalty rates, the Full Bench did so having recognised that the existing provisions was "*in reality a loading which compensated for disabilities*."[107]

[107] [2013] FWCFB 1635 at para 206.

SECTION D: APPRAISAL OF EVIDENCE RELIED ON BY EMPLOYERS

79. In order for the Commission to grant the employer claims, it must be satisfied that the variations proposed to the Retail Award are justified by cogent merit argument(s) underpinned by probative evidence which demonstrates the facts said to support the proposed variations. Before considering in detail the merit arguments put by the employers (see Sections F and G below), it is necessary to clearly identify and examine the key evidence upon which those arguments rest.

80. In this section of the submissions, the expert and lay evidence relied on by the employers is examined. The ARA and ABI submissions proceed on an uncritical acceptance of much of the evidence adduced by them in the proceeding as if that evidence was not the subject of challenge. Contrary to this approach, which is largely confined to narrating the evidence in chief given by various witnesses called by the ARA and ABI, it is essential that that evidence be considered in light of both the evidence given by each witness in cross examination and by reference to other relevant evidence. When considered in this way, it is apparent that the evidence relied on by the employers does not support many of the findings they seek to have the Commission make and accordingly the arguments advanced in support of the proposed variations.

Professor Phil Lewis

81. The employer parties rely on the evidence of labour economist Professor Phil Lewis to state that cutting penalty rates will increase employment.[108] Professor Lewis' position is based on three key propositions:

    (a) Minimum and aggregate wage studies, while not perfect substitutes for penalty rates, provide some guidance as to the relationship between wages and labour demand in Australia, which in turn informs the simulation modelling performed by Professor Lewis.[109]

    (b) Simulation modelling performed by Professor Lewis predicts that there are "significant negative employment effects of penalty rates".[110]

---

108 Report of Professor Phil Lewis (undated), tendered as Exhibit ABI 3 on 1 October 2015 (**Lewis Report**); Report of Professor Phil Lewis in reply to the report of Professor John Quiggin, tendered as Exhibit ABI 4 on 1 October 2015 (**Lewis Reply to Quiggin**); Report of Professor Phil Lewis in reply to the report of Professor Jeff Borland, tendered as Exhibit ABI 5 on 1 October 2015 (**Lewis Reply to Borland**).
Of the retail group employers, the ARA, ABI and AIG but not the PGA rely on the evidence of Professor Lewis.

109 Lewis Report, 22 et seq.

110 Lewis Report, 31.

(c) Based on the report by Professor John Rose,[111] any reduction in penalty rates will not affect labour supply.[112]

82. In reply, the union parties rely on the evidence of Professor Jeff Borland[113] and Professor John Quiggin.[114] Professor Borland challenges the relevance and findings from the minimum and aggregate wage studies reviewed by Professor Lewis, and disputes many of the assumptions underlying the modelling performed by Professor Lewis, as well as his use of the Rose Report. Overall, Professor Borland contends that "the report of Professor Lewis does not provide information that is valid or valuable for assessing the employment effects of penalty rates".[115]

83. The SDA submits that the evidence demonstrates that cutting penalty rates will have no measureable impact on levels of employment. The SDA relies on the expert evidence of Professor Jeff Borland and Professor John Quiggin (in reply to the evidence of Professor Phil Lewis on behalf of the employers) and on the lay evidence tendered on behalf of the employers.

84. This section sets out the basis for the proposition that cuts to penalty rates will not impact on employment, by reference to the key economic principles and issues in dispute between the expert witnesses. Those principles and issues concern:

(a) the relevance of minimum and aggregate wage studies to this case;

(b) the assumptions underpinning Professor Lewis' modelling of the elasticity of labour; and

(c) the correct assessment of any impact of penalty rate cuts on labour supply.

The section then examines those parts of the lay evidence relevant to the analysis of the employment effect and the failure by the employers to produce evidence about certain natural experiments.

---

111 Report of Professor John Rose dated 3 July 2015, tendered as Exhibit ABI-1 on 25 September 2015 (**Rose Report**).

112 Lewis Report, 38–39.

113 Report of Professor Jeff Borland dated 3 September 2015 and tendered as Exhibit UV-25 on 1 October 2015 (**Borland Report**).

114 Report of Professor John Quiggin dated August 2015 and tendered as Exhibit UV-24 on 1 October 2015 (**Quiggin Report**).

115 Borland Report, [7(d)].

Minimum and aggregate wage studies do not assist

85. Studies of the effect of adjustments to minimum and aggregate wages on the demand for labour (**the elasticity of demand**) are not an appropriate proxy for examining the effect of penalty rates on employment, and the studies utilised by Professor Lewis therefore offer no useful guidance to assessing whether penalty rates affect rates of employment, and offer no useful insight into the appropriate elasticities to apply when performing penalty rate elasticity modelling.

86. In his report, Professor Lewis reviews a number of minimum and aggregate wage studies on the basis that they will reveal some insight into the employment effects of penalty rates. He acknowledges that "it is very difficult to estimate the impact of ***minimum wage changes, such as penalty rates***, on labour demand since there are factors operating in the whole economy".[116] He then proceeds to review certain wage studies for the purpose of making what he describes as "broad estimates" of the impact of wage changes on employment in the relevant industries.[117]

87. Professor Quiggin gave evidence that the literature review conducted by Professor Lewis was "selective and misleading", because it presented a view "at variance with the conclusions of mainstream research on labour demand over the past 20 years, both in Australia and internationally", being that "the impact on minimum wages is small, and in some cases, no impact is evident".[118] Most of the studies cited by Professor Lewis finding high elasticities of labour demand were written by him with a variety of co-authors, and failed to acknowledge numerous studies finding "substantially lower" estimates of the elasticity of labour demand.[119]

Minimum and aggregate wages are not comparable to penalty rates

88. Professor Borland criticises Professor Lewis for applying minimum and aggregate wage studies to an analysis of the penalty rate elasticity of labour, principally because of the difference between the two forms of wage. Professor Lewis describes penalty rates as a form of the minimum wage (above), but this statement fails to account for the manifest differences between the two forms of wage payment:

    (a) The minimum wage is paid to all employees who would otherwise earn less than the minimum wage, and is paid for each hour worked during the week;

---

116 Lewis Report, 22 (emphasis added).
117 Lewis Report, 26; 22–28.
118 Quiggin Report, [17].
119 Quiggin Report, [15].

(b) In the same way as minimum wages, aggregate wages are properly described as a wage that is paid to all employees for all of the time that they work, and a wage paid for each hour worked.

(c) Penalty rates are paid only to those employees covered by Awards or agreements that provide for them, who may or may not be paid the minimum wage, and only to those workers who supply their labour on days when penalty rates are paid.

89. That is, while there may be some overlap, the population receiving penalty rates is different to the population receiving the minimum wage, and the wages themselves are payable at different times and days. There is insufficient parallel between the two to make one a useful comparator to the other. For this reason, Professor Borland is critical of Professor Lewis' use of minimum and aggregate wage studies to derive any useful information about the elasticities of both labour demand and labour substitution.[120]

90. When this distinction was put to Professor Lewis in cross-examination, he agreed that "the elasticity of employment with respect to the minimum wage… [is clearly] not relevant to this penalty rate case," but stated that he relies on "the elasticities of substitution, some of which are a byproduct of the minimum wage studies."[121] The elasticities of substitution refer to the substitution of hired labour for capital, or for unpaid labour from owners or operators, or, as Professor Lewis seems to be saying, between employees.[122] In support of this proposition, Professor Lewis points to the non-minimum wage studies he reviewed in his report in addition to the two minimum wage studies, to support the plausibility of his elasticity of substitution estimates.[123]

The wage studies used by Professor Lewis are not reliable

91. Professor Borland reviews those wage studies in Professor Lewis' report at pages 21–31, which inform the simulation modelling performed by Professor Lewis at pages 29 and 30 of the Lewis Report, and identifies difficulties with the methodology and validity of those studies "that make them of limited value for establishing how a change in penalty rates would affect employment".[124]

---

120 Borland Report, [9].

121 Transcript 1 October 2015, PN 10818, 10824. Unless otherwise stated, all transcript references in this section are to 1 October 2015.

122 See PN 10826, where Professor Lewis stated "If there is substitution minimum wages have little effect on total employment because certain workers lose their jobs because they're not employed at the new minimum wage but other workers are employed because they're now better value for money compared to those previous minimum wage workers. So the effect on total employment is small so you must have a low elasticity of the minimum wage if there is high substitution."

123 PN 10826.

124 Borland Report, [10] and [11]–[16].

But even putting that debate to one side, and assuming for the sake of argument that the studies were reliably conducted, Professor Borland's point is that the high elasticities of substitution derived from these studies, and relied on by Professor Lewis, are "not appropriate for the case of penalty rates", because "all of those studies are about wage changes that apply to every day that firms operate, hence the estimated change in employment due to substitution of capital for labour, will be much less than assumed by Professor Lewis."[125] In response, Professor Lewis stated that "you can't share the labour cost out [across seven days] and say "this is the average cost of labour".[126] This is incorrect, and conceptually inconsistent with Professor Lewis' acknowledgment that capital is a fixed cost and therefore properly accounted for over a multi-day period.[127]

92. Professor Lewis concludes that the range of estimates of the elasticity of aggregate demand is between -0.3 to -0.8.[128] That is, studies show that a 10 per cent increase in the aggregate wage will produce a decrease of between 3 and 8 per cent. He fails to acknowledge that the outlier of that range, the elasticity of -0.8, is contained in one study only, conducted by him with MacDonald (2002), and has not been supported by any other study. This point was ignored by ABI in their submissions, who argue that the *elasticities of demand* (erroneously identified in their submission at 27.11 as the *elasticities of substitution*) adopted by Professor Lewis are not excessive because they fall within the range of estimates contained in the Australian literature reviewed by him (which range from -0.3 to -0.8),[129] failing to acknowledge that the range is defined by Professor Lewis alone.

93. The closest approach to the Lewis and MacDonald elasticity of -0.8 identified by Professor Lewis in his report, is in a further paper by Lewis (2005), that identified the minimum wage effect "by comparing percentage changes in average weekly earnings and in employment between industries identified as paying the minimum wage (accommodation, cafes and restaurants, health and community services) and the economy as a whole between 1994 and 2004".[130] From the analysis of this data, Lewis found a real wage elasticity of demand of -0.72. Professor Borland identified major problems with the methodology in this study, which was not subject to peer review, and was also criticised by the Productivity Commission in their draft and final *Workplace Relations* report.[131] In cross-examination, Professor Lewis acknowledged these criticisms but

---

125 Borland Report, [29].
126 PN 10831.
127 See Lewis Reply to Borland 17, 18; and eg, transcript 1 October 2015, PN 10832, 10932, 10928, 10930.
128 Lewis Reply to Borland, 6.
129 ABI submissions, [27.11].
130 Borland Report, [14].
131 Borland Report, [14]; See PC Report, Appendix C, 1058–59; Draft PC Report, 876.

added that he did not think it necessary to revisit his 2005 study for the purposes of his evidence in this case.[132]

94. Two other wage studies were relied on by Professor Lewis. One, by Leigh (2003), found an elasticity of demand in Western Australia of -0.29 resulting from changes to the minimum wage over seven years between 1994 and 2001. This paper has been subject to criticism over the years, and Leigh re-issued the paper in 2004 to correct technical errors in the 2003 paper.[133] Criticisms aside, in his Reply Report to Professor Borland, Professor Lewis limited his reliance on Leigh to stating that the study "indicates that employment is responsive to wages",[134] which does not address Professor Borland's central point that minimum wage studies are not relevant to the assessment of penalty rates.

95. Professor Lewis also relies on a study by Daly et al (1998) which found an elasticity of demand in respect of youth average weekly earnings of between -2.0 and -5.0. Professor Borland noted that "these estimates are substantially larger than estimates used by other studies and in my opinion must be regarded as reflecting shortcomings of the methodology used", including that the measure of average weekly hours used was the total wage bill divided by the hours worked; and that nearly half the workplaces examined by Daly et al employed no young workers.[135] Many of these shortcomings were identified by the authors of the Daly paper themselves; but this was not acknowledged by Professor Lewis.

96. In his Reply Report to Professor Borland, Professor Lewis stated that he was "puzzled" by Professor Borland's criticism of the Daly et al study, and that he knew of "no peer-reviewed journal which has published a substantive criticism of the study".[136] It was put to him in cross-examination that at least one example of a peer-reviewed substantive criticism of the study was published by Junankar, Waite and Belchamber in 2000 in the peer-reviewed *Economic and Labour Relations Review*, and this was referred to in the draft PC Report, from which Professor Lewis quoted in his Reply Report to Professor Borland.[137] Quite aside from the merits or otherwise of the Daly et al study, Professor Lewis does not appear to have incorporated the Daly figures into his range of elasticities, and he has not used the Daly figures of -2.0 to -5.0 to define the outer limit of the wage elasticity of demand in his report.

---

132 Borland Report, [14]; Transcript 1 October 2015, PN 10835–10843.

133 See PC Report, 1053–56 for a discussion of the criticisms of the Leigh study. The Productivity Commission noted that there are still "unresolved issues" with the Leigh study.

134 Lewis Reply to Borland, 10.

135 See Borland Report, [15]–[16].

136 Lewis Response to Borland, 10; transcript 1 October 2015, PN 10906 (and see discussion at PN 10844–10898).

137 See Lewis Reply to Borland, 19. The Junanker, Waite, and Belchamber criticisms of the Daly study were reported in the draft PC Report at 877, and replicated in the final PC Report from 1070.

97. The relevance of the range of elasticities that Professor Lewis adopts is twofold. First, his simulation modelling was conducted in order to demonstrate that the penalty rate elasticity of demand was within the generalised wage elasticities of demand of between -0.3 and -0.8 found by Professor Lewis. Second, he derives at least one component of his simulation modelling, the elasticity of demand (represented in Tables 4a and 4bn of the Lewis Report by σ), from the wage studies demonstrating an elasticity range of between -0.3 and -0.8.

98. In their submissions, ABI state that Professor Lewis' reliance on minimum wages literature "is simply to establish the principal [sic] that there is substitution between hired labour and other inputs in response to wage rates. He relies on these studies to establish that substitution does occur".[138] In fact, what Professor Lewis stated in his Reply Report to Professor Borland was that he did not rely on the *minimum wage effects*, but rather *the estimates of elasticities from minimum wage studies*.[139] This is an artificial distinction. The key information about minimum wage effects *is* the wage elasticity of labour. Professor Lewis used the elasticities of both demand and substitution derived from minimum wage studies to propose "plausible estimates" of the elasticity of labour in the relevant industries.[140] But, as Professor Borland stated, "wage elasticities are always context dependent",[141] and the context of minimum and aggregate wage studies does not match the context of penalty rates, for the reasons set out above. The evidence of the minimum wage elasticity of labour is not fit for the purpose of informing the penalty rate elasticity of labour which is, after all, the relevant question.

99. Further, the Productivity Commission reviewed the evidence of Professors Lewis, Borland, and Quiggin, and found that "Borland and Quiggin correctly identified several deficiencies in Lewis' evidence for policy change, and so does the Productivity Commission in this chapter".[142] Specifically, the Productivity Commission described Professor Lewis' view, contained in his 2014 paper, that a labour demand elasticity of -3 as "unrealistic".[143]

Small changes to the minimum wage do not affect employment

100. Even assuming that the effects of minimum wage changes are an appropriate proxy for assessing the impact of penalty rates on employment, it does not follow that cuts to minimum wages that are equivalent to the size of the proposed cuts to *weekend* penalty rates will increase employment (no employer party appears to be contending that cuts to *public holiday* penalty rates, which are

138 ABI submissions, [27.10].
139 Lewis Reply to Borland, 4; PN 10813–10817.
140 Lewis Reply to Borland, 5.
141 PN 11599; 11610.
142 PC Report, 490.
143 PC Report, 479 n 160.

limited to a total of about 12 days per year, will have any impact on employment overall or within the relevant industries).[144]

101. In their submissions, ABI claim that both Professor Quiggin and Professor Borland accepted in cross-examination that "there is some negative impact upon employment caused by increases to minimum wages".[145] This statement misrepresents the evidence of both Professor Quiggin and Professor Borland. Within the paragraphs of transcript quoted by ABI, Professor Quiggin said plainly that "the dominant view is of a small impact" and "there's a substantial number of studies finding no impact at all".[146] Professor Quiggin went on to agree that substantial increases to the minimum wage might have an impact on employment but, importantly, emphasised that this was only a 'conceptual' or 'hypothetical' proposition, because "the empirical evidence is based on the *actual setting of the minimum wage",* which is not substantial.[147] ABI make much of the fact that Professor Quiggin accepted under cross-examination that the penalty rates in the relevant Awards are "substantial increases" from the base wage, and if increases of those sizes were made to the minimum wage, there would be a "substantial" impact on employment.[148] Professor Quiggin also accepted that there would be lower employment on Sundays compared to Saturdays. However, ABI failed to quote the last sentence of Professor Quiggin's response, which is emphasised below:

> We'll certainly see substantial lower employment on Sundays which is indeed the intention of the penalty rates to set aside Sunday in particular more than Saturday as a day when people aren't expected to work, ***but merely all of that employment loss would be made up by increased employment on other days of the week.***[149]

102. That is, the net employment effect is zero.

103. ABI acknowledge this aspect of Professor Quiggin's evidence in their submissions, but respond only by challenging Professor Quiggin's evidence about demand-shifting.[150] Demand-shifting is an instance of the operation of the scale effect. There are numerous other economic phenomena that are relevant Professor Quiggin's statement, including the substitution effect, which have not been addressed by ABI.

---

144 See Quiggin Report, [21].
145 ABI submissions [27.13], citing PN 11288–11290 and PN 11675.
146 PN 11289.
147 PN 11293–11295.
148 See ABI submissions, [27.16],
149 PN 11411.
150 In their submissions at [27.17], ABI state that Professor Quiggin's "caveat is dealt with separately at paragraphs 27.23 to 27.26 below". Those paragraphs only deal with demand-shifting.

104. When asked whether he accepted that an increase in the minimum wage has some impact on employment, Professor Borland stated that while "*theory* tells us that when you have an increase in wages there's a negative relationship with employment", the key issue in Australia is that the data is too complex, or does not exist, such as to establish what the impact may be.[151] Clearly, if there is insufficient data to establish the size of any impact, it follows that the range of possible impacts includes the possibility of there being no impact.

105. The impact of minimum wage changes on employment is regularly considered by the Fair Work Commission in its annual wage reviews. In the *Annual Wage Review 2014–2015*, after considering recent research and thinking about the employment effects of increases in minimum wages, the Full Bench of the Commission was of the view that "modest and regular increases in minimum wages have ***a small or even zero impact on employment***".[152] The picture has not changed. The Full Bench acknowledged that there is reasonable debate as to what constitutes a 'modest' increase in the minimum wage.[153] That debate has some relevance to this case.

106. ABI argue that "substantial wage increases could have substantive negative impacts on employment", and state that "this is a view echoed by the OECD", quoting from the *OECD Employment Outlook - 2015* on minimum wages.[154] The point is irrelevant. This case is about penalty rates, not minimum or average wages, and largely about a 25 per cent reduction in some wages on one day of the week out of seven. The proposition put by ABI has no value in this case; the comparison between penalty rates and minimum wages is a comparison between apples and oranges. Professor Quiggin gave evidence that a firm operating seven days a week and paying penalty rates of 150 per cent on Saturdays and 200 per cent on Sundays, would have their average wage bill reduced by just 2.6 per cent if rates are cut 25 per cent on Sundays.[155] This evidence was unchallenged in cross-examination. For comparison purposes, the minimum wage increase in 2015 was 2.5 per cent.[156]

107. Nevertheless, directly in the face of this mismatch, ABI continue to argue that *if* "substantial increases" in minimum wages will negative impact employment, *then* it is "rational" to assume that substantial increases in penalty rates would have a similar effect.[157] Again, this assumes a level of comparability between minimum wages and penalty rates that does not exist; is not

---

151 PN 11675–11676.

152 *Annual Wage Review 2014–2015* [2015] FWCFB 3500 (Ross J, Watson SDP, Harrison SDP, Hampton C, Mr Cole Professor Richardson, Mr Gibbs) (***Annual Wage Review 2014–2015***), [52], [435] and see the discussion preceding that paragraph from [420] (emphasis added).

153 *Annual Wage Review 2014–2015*, [436].

154 ABI submissions, [27.14].

155 Quiggin Report, [21].

156 *Annual Wage Review 2014–2015* [2015] FWCFB 3500.

157 ABI submissions, [27.15].

supported by their own expert; and is strongly criticised and was not disturbed on cross-examination, by Professor Borland.

The simulation modelling performed by Professor Lewis is flawed

108. The modelling exercise conducted by Professor Lewis attempted to demonstrate the change in employment levels created by the *imposition* of penalty rates. Tables 4a and 4b of Professor Lewis's report set out the assumptions made by him in respect of the elasticity of substitution (between paid labour and other inputs) (σ) and price elasticity (elasticity of demand for output) (η). On Professor Borland's calculations, Professor Lewis' findings are that the relevant elasticities of demand for cafes and restaurants on Sundays range between -0.138 and -2.0 in the short run, and between -0.378 and -2.0 in the long run, although in his Reply Report to Professor Borland, Professor Lewis suggested that the lower end of the range -0.13 for the short run and -0.22 for the long run.[158]

109. Professor Lewis concludes, on the basis of the minimum wage studies identified by him, that the elasticity of substitution is between 1 and 3 (he includes 0.5 'for completeness'). Professor Lewis also concludes that the price elasticity of demand is between -0.1 to -3.0. Notably, he does not actually use the upper range of both elasticities (3 and -3.0) in his Tables 4a and 4b. For the reasons set out above the studies identified by Professor Lewis (including his own) should not be relied upon. Indeed, Professor Borland concludes that the elasticity of substitution in the restaurant industry is likely to be lower than the lowest size assumed by Professor Lewis.[159]

110. For the reasons set out above, Professor Lewis' reliance on minimum and aggregate wage studies to derive input elasticities into his formula is, by itself, fatally flawed. Separately, Professor Borland has identified five invalid assumptions made by Professor Lewis in his method of calculating the employment effects of penalty rates (on top of his mistaken assumptions of σ and η), that have the effect of compounding the unreliability of Professor Lewis' modelling.

Five key assumptions

111. Professor Borland identifies five key assumptions that underlie Professor Lewis' modelling. In many respects, Professor Lewis agrees with Professor Borland about the existence of these assumptions. What is disputed is the impact of these assumptions on the reliability of Professor Lewis' ultimate position, based on his modelling, that penalty rates have a negative effect on employment. Professor Lewis concedes that his estimates of elasticity of demand may be biased upwards as a result of certain assumptions, but claims that the difference is merely a question of

---

158 See Lewis Reply to Borland (replicating Borland Report, Table 3), 37–38.

159 Borland Report, [36].

degree – penalty rates still negatively impact on employment, albeit by less than demonstrated in Professor Lewis' report. By contrast, Professor Borland's evidence is that the assumptions underpinning Professor Lewis' modelling are so flawed as to render his modelling unreliable and not demonstrative of any negative effect on employment caused by penalty rates. For the reasons set out below, the evidence of Professor Borland should be preferred.

The first assumption: no form of penalty rates are needed to attract supply of weekend workers

112. Professor Lewis assumes that any reduction in penalty rates will cause an equivalent decrease in the cost of labour. But, as both Professor Borland and Professor Quiggin stated, and Professor Lewis acknowledged, penalty rates are not an entirely regulatory addition to the cost of labour.[160] It is likely that employers would need to pay some additional amount on top of the base wage (i.e. the weekday wage) to attract weekend workers. Therefore, in simulating the effects of imposing penalty rates, and assuming that imposition would increase labour costs by the same amount, Professor Lewis has substantially over-estimated the employment effect.[161] In his reply evidence, Professor Lewis addressed this point by stating that "the high degree of unemployment among unskilled and youth in Australia suggests many would be willing to work for non-penalty rates", and this means his estimates *are* correct.[162] This is an assertion without basis, accepted by Professor Lewis in cross-examination.[163] It is also contradicted by the findings of Professor Rose, which is that current workers in the industry wish to be paid some additional amount to work on weekends and public holidays. There is no explanation for the assumption by Professor Lewis that current and prospective employees have significantly different willingness-to-accept when it comes to weekend work,[164] and given the importance of this assumption to his ultimate conclusion, the omission substantially weakens the value of Professor Lewis' evidence. The evidence is further weakened by Professor Lewis' opinion that while "society" should determine that "some form of minimum wage exists", in his opinion, penalty rates are not something that should be regulated at all.[165]

The second assumption: substitution of labour for capital, and hired labour for owner/operator labour, occurs on a single day

---

160 Borland Report, [22]; Lewis Reply to Borland, 13; Quiggin Report, [20(iii)]; Lewis Reply to Quiggin, 10.
161 Borland Report, [22].
162 Lewis Reply to Borland, 13; Lewis Reply to Quiggin, 10.
163 PN 10921.
164 See PN 11617 (Borland XN).
165 See PN 10699–10700.

113. The **substitution effect** describes the change in use of paid labour as a result of a change in wage. In this context, paid labour can be substituted for capital, such as a bigger oven, and/or for owner/operator labour, which we assume is compensated not by Award wages but by below-Award wages or by a distribution of the profits of the firm. The relative cost of using penalty rate labour on a Sunday will be different if the additional cost (the penalty rate) is considered to be a cost incurred *only* on a Sunday, or if it is properly a cost *apportioned* across the week. Because capital is a cost borne by a firm on every day of the week that the business operates, and owner/operator labour is likely to be a cost spread across the week, the proper way to study the effects of penalty rates is to use a model of the labour market that looks at the total costs on a day when penalty rates are paid, and on a day when they are not – that is, to use a **multi-day model** rather than a **single-day model**.

114. Professor Lewis has used a single-day model for his simulation exercise. His explanation for this is that a firm's operating decisions on a Sunday or public holiday are completely independent of what happened during the rest of the week,[166] and that firms in effect "let bygones be bygones".[167] Professor Lewis denies that a multi-day model is relevant, and that firms might rationally shift their allocation of paid and unpaid labour over the course of the week, but then conceded in cross-examination that a firm might adjust the balance between labour and capital over a period longer than one day.[168]

115. Professor Lewis' position is flawed and has an internal inconsistency that is acknowledged by his acceptance that capital is a cost spread across the week. The flaw carries through to his modelling, because he assumes that a 25 per cent reduction on Sunday – which for example may be $5.00 per hour – will make an additional $5.00 available to the employer to spend on capital, or on substitution for owner/operator labour. But because capital is a cost across the week, in relation to the substitution of capital for labour, the incentive to substitute capital for labour is properly valued at $0.71 ($5.00 divided by 7 days), not $5.00.

116. The same rationale applies when considering the substitution of owner/operator labour for hired labour. If, as a result of a reduction in Sunday penalty rates, a business owner who would normally work Wednesday to Sunday (ie, five days a week) decides to *not* work on Sunday and replace his or her labour with hired labour, it is likely that in order to maintain their work pattern of five days per week, the owner would then work on a Monday or Tuesday, displacing a hired employee on that day and negating or reducing the employment effect. Professor Lewis' evidence is that "reductions in penalty rates would create greater employment opportunities for hired

166 Lewis Reply to Borland, 16.
167 PN 11110.
168 PN 10924; and then at 11097–11116.

labour and reduce the burden on family labour", but his model makes no allowance for this substitution to occur and he does not explain why he has excluded the impact of this substitution from his ultimate findings.[169] Further, where this substitution occurs, there will be an impact on the scale effect described below – the application of funds saved from penalty rate cuts to hired labour means that saving cannot also be passed on to the consumer through lower prices.[170]

117. Considering that owner *and* family member labour (which is a different from just owner/operator labour) in the accommodation and food services sector is only 11.6 per cent, Professor Borland's opinion is that the overall impact of this substitution effect is small.[171] In response, Professor Lewis states that the 11.6 per cent estimate is likely to be an underestimate, but does not cite any evidence in support of his assertion, nor identify any perceived problems with the source of the statistic (the draft Productivity Commission Report).[172] Contradicting his own evidence, Lewis claims that "there is little reason to think that because family labour is employed on Sundays and public holidays such labour is reduced during the week,"[173] but again, without a single source to back up the statement, this is mere assertion and should be afforded little weight. Accordingly, taking the example used above, the substitution value of owner/operator labour for hired labour is not $5.00, but is more likely to be closer to $0.71.

118. In both the labour/capital and owner/hired labour substation effect, the use of a single-day window substantially over-estimates the employment effect calculated by Professor Lewis. The Productivity Commission agrees, citing Professor Borland's evidence filed in this proceeding in support of its statement " 'one day' models that ignore this substitution effect will produce erroneous aggregate employment effects".[174]

119. In contrast to Professor Borland and the Productivity Commission, ABI argue that decisions about whether to open on a single day *are* made in isolation from all other business decisions, citing in support certain lay evidence from retail and restaurant operators. This evidence does not support their case. At least in respect of the retail operators:

    (a) ABI's reliance on Mr Barry Barron's evidence at paragraphs 12-13 is selective and misleading. On a proper analysis, his evidence reveals that when operating a labour

169 Lewis Reply to Quiggin, 13.
170 See Transcript 1 October 2015, PN 11196 (Ross J of Lewis).
171 Borland Report, 15, citing the PC Draft Report at 492.
172 Lewis Reply to Borland, 18–19.
173 Lewis Reply to Borland, 19; but see Lewis Reply to Quiggin, 13.
174 Productivity Commission, *Workplace Relations Framework – Inquiry Report* (**PC Report**), 475.

budget benchmarked as a percentage of sales, his employment decisions are not made on a 'single day' model but rather from day to day, week to week and store to store:[175]

> ...That dollar wage budget is then converted to a percentage and the reason we give a percentage – if I may explain, the reason we give a percentage and they don't have to stick to a dollar wage budget is because our business trading fluctuates from day to day, from week to week, from store to store. So managing the flexibility to staff up when we're exceeding sales budget and thereby give better customer service and similar if the store is underperforming, where possible, we flex down. So by giving her a wage percentage budget she has the ability to staff up knowing that she's still going to get her incentives.

(b) ABI's reliance on the evidence of Ms Daggett to suggest that she adopts a single-day model is misguided. As her evidence (as extracted by the ABI) shows, in order to maintain sales at the required percentage of turnover, *"... we have had to reduce the number of hours rostered on Sunday and we have also had to reduce the number of hours worked across the whole week."*[176]

(c) Mr Goddard gave evidence that contradicts the point made by ABI, stating that his decisions about the use of labour are made (far from on the basis of a single-day model) on the basis of "historical sales data and marketing initiatives which may be taking place at that point in time, the likely sales in each store and budgets a number of hours across the week."[177]

The third assumption: perfect competition

120. The third and fourth assumptions that inflate Professor Lewis' modelling relate to the scale effect. The scale effect in the context of this matter looks at the impact of cutting penalty rates on other measures of business performance, such as production costs, and levels of demand. A simple model of the scale effect is illustrated below:

---

175 PN 15992.
176 Exhibit Retail 7 at [15].
177 Exhibit R-4 at [12].

121. Professor Lewis argues that if wages are reduced, then production costs will in turn decrease, ultimately resulting in lower costs to consumers. There are two flaws with this assumption. In order for a $1 cut in wages to be passed through to the consumer in the form of a $1 reduction in price (ie, at step 3 of the above model), it is necessary for there to be perfect competition in the market for the relevant industries. Professor Lewis conceded in cross-examination that his model was based on perfect competition,[178] and that the markets for hospitality and retail are not perfectly competitive, but rather 'monopolistic' and therefore had a high degree of competition.[179] Professor Lewis did not address the core point, which is that if the market is not perfectly competitive, then the projected decrease in price, and therefore the scale effect, will be less than claimed by him.

The fourth assumption: partial equilibrium

122. Professor Lewis also fails to properly consider the impact of the scale effect on demand for products. He assumes that a reduction in penalty rates will, at some point, be reflected in lower prices of consumer goods and by virtue of this discounting, attract increased demand. This relies on the concept of partial equilibrium, which refers to the industry-specific impact of a particular wage cut. In order to assess the impact on the employment as a whole, it is necessary to consider

178 Transcript 1 October 2015, 11125–26.
179 Lewis Reply to Borland, 21.

general equilibrium, which Professor Lewis conceded,[180] and which Professor Borland described as the standard economic approach.[181] Using restaurants as an example, if a reduction in the price of restaurant meals has the effect that demand increases (assuming, of course, that the product is of sufficient quality) and more people eat out on a Sunday, then it must follow that whatever those people were doing before dining out on a Sunday – such as going to the supermarket and buying food to cook at home – is not happening. General equilibrium says that if demand, and therefore employment, increases in one area, such as restaurants, then it must decrease in another, such as supermarkets. Ironically, both the restaurant and the retail sector were specifically considered by Professor Lewis, but even within the scope of his limited consideration of the relevant industries, he did not appear to consider the impact of an increase in employment in one sector might have on the other.[182]

123. Professor Lewis also fails to account for demand-shifting in his model. Demand shifting describes consumer behaviour as a result of the unavailability of services. In a single-day model, as Professor Lewis has used, if a restaurant is closed on a Sunday (because of penalty rates), then penalty rates has caused that business to be lost once and for all. If it is the case that a high number of restaurants are closed Sundays, then Professor Lewis should have been able to identify evidence of the extent to which restaurants are closed on Sundays, and to explain that penalty rates were the cause of this closure by excluding other factors such as low demand. He has not done this. Applying a multi-day model, as Professor Borland contends is appropriate, introduces the issue of demand-shifting, whereby potential customers who are unable to dine out on a Sunday may dine out on any of the other six days of the week. Lewis criticises Professor Borland for not providing evidence of the extent of demand shifting, but this misses the point entirely.[183] Neither Professor Borland or Professor Lewis have any empirical evidence to present on the extent of demand-shifting, but *only* Professor Lewis relies on a model that assumes demand shifting does not occur at all – despite acknowledging the possibility of demand-shifting by consumers in his Report.[184] The failure by Professor Lewis to account for this selective use of demand-shifting, or explain the contradiction or to make allowances for it in his model has the effect of biasing upward the employment effects presented in his model.

124. Professor Quiggin gave evidence that if there is an increase in the number of establishments opening on Sunday or public holidays, any increase in consumer spending on such days would likely come at the expense of other times.[185] ABI attack Professor Quiggin's evidence, stating

---

180 Lewis Reply to Borland, 25.
181 PN 11642.
182 The employer parties do not address partial or general equilibrium in their submissions.
183 PN 11642.
184 Lewis Report, [28].
185 Quiggin Report, [20(iv)],

that demand-shifting is unlikely to occur because of so-called "entrenched consumer patterns whereby consumption of restaurant and café services is heavily weighted towards Fridays and weekends".[186] But this submission both misses Professor Quiggin's point, and does not assist their case. If more cafes and restaurants are open on Sundays, then the demand must come from somewhere – in fact, it is necessary for the employers' economic case to succeed that there be an increase in demand on those days. On ABI's own argument, that demand is unlikely to come from "entrenched" consumer preference for dining out on Fridays and weekends; therefore, the other sources of demand are the 'unpopular' weekdays. Alternatively, if one restaurant or café is closed on Sundays, consumers may move their expenditure to another restaurant or café that *is* open on Sunday or a public holiday, which is a likely option given the high weekend demand for restaurant services that ABI claim. On either scenario, the overall effect on employment in the sector is zero.

125. Finally, Professor Lewis does not dispute that any reduction in penalty rates that passes through to the price of goods may be passed through as lower prices on a single day, or may be passed through proportionately in lower prices over the week.[187] It follows that any employment effect must also be assessed on a multi-day model if it is to be accurate.

The fifth assumption: penalty rates are being imposed

126. It is a striking feature of his model that Professor Lewis assesses the impact of penalty rates on employment by assuming that the whole of the penalty rate is being imposed on employers, as opposed to assessing the impact of the actual proposals for reduction before the Full Bench. By building the model around the assumption that penalty rates are being imposed, Professor Lewis grossly over-inflates the employment effect.[188]

127. One component of the elasticity of employment demand formula is the percentage wage change. This component will differ depending on whether penalty rates are imposed on the base wage, or removed from the base wage. In calculating the percentage wage change, Professor Lewis has assumed that a 50 per cent penalty rate is being imposed on a Sunday base wage of 100 (total 150), and so the percentage change in the wage is 50. But if the equation is approached from the perspective of the *removal* of penalty rates, as is sought in this case, then the change in wage from 150 to 100 is not a 50 per cent change, but a 33.3 per cent change. The same analysis is applicable to Professor Lewis' calculation of the wage change on public holidays; reversing the

---

186 ABI submissions, [27.25].
187 See PN 11206, 11208–11201 (Ross J of Lewis).
188 See Borland Report, [37]–[45].

assumption from the imposition to the removal of penalty rates reduces Professor Lewis' estimate of the wage change from 150 per cent to -60 per cent.[189]

128. In cross-examination, Professor Lewis accepted that:

(a) When considering the imposition of penalty rates, the more accurate method of calculation is to use the mid-point.[190]

(b) Professor Lewis did not use the mid-point in his Report, and has not used the mid-point in previous reports prepared for the Commission.[191]

(c) As a result, his estimates are "probably unduly biased upward".[192]

(d) "In retrospect", it would have been more appropriate to calculate the elasticity based on the *reduction* in penalty rates, as Professor Borland stated, rather than the imposition, as Professor Lewis originally did.[193]

129. The impact of the imposition assumption on the elasticities derived from Professor Lewis' report at Table 4a and Table 4b is considerable. As Professor Borland puts it, "switching from the assumption of imposing penalty rates to removing penalty rates would reduce the size of the estimated employment effect by one-third on Sundays, and by three-fifths on public holidays.[194] That effect by itself is profound; and does not even take into account the compounding effect of the assumption made by Professor Lewis that the whole of the penalty rates are being imposed on Sundays and public holidays, rather than just the portion sought to be removed by the employers, or any of the other deficiencies and assumptions identified in these submissions and in Professor Borland's report.[195]

130. Despite Professor Lewis' evidence in this regard, ABI argue that the upper bound analysis is correct, because "the reality is that penalty rates are presently being imposed on employers as opposed to being removed" and therefore, when assessing the impact on employment caused by penalty rates, "one should be looking at how employers react to the increase to rates of pay".[196] This is both incorrect – penalty rates have always relevantly been part of the weekend wage and so there is no counterfactual of weekend work without penalty rates from which to assess 'how

189 Borland Report, [43].
190 PN 10947.
191 PN 10948, 10952.
192 PN 10945.
193 PN 10957.
194 Borland Report, [42], [43].
195 See, eg, Borland Report, [45].
196 ABI submissions, [27.12].

employers react to increased wages' – and inconsistent with Professor Lewis' evidence that the mid-point and the lower bound are more appropriate methods of calculation. That is, ABI ignore the evidence of their own expert. The 'reality' is that the employers are seeking to remove or reduce penalty rates, and have claimed that doing so will increase employment. Logically, it follows that testing that proposition will be most effective if modelled on the actual proposal in question.

The modelling performed by Professor Lewis is unreliable and does not assist the Full Bench

131. For the reasons outlined above, Professor Lewis' modelling is deeply flawed, predicated on a series of unrealistic and unsupported assumptions, and is inconsistent with standard economic theory and practice. It cannot be relied on to support a finding that penalty rates have any impact on employment. In fact, by virtue of the evidence of Professor Borland and Professor Quiggin, it is the case that weekend and public holiday penalty rates do not have any measurable impact on employment.

132. Similar criticisms of the modelling performed by Professor Lewis were made by the Full Bench of the Fair Work Commission in the transitional review of the *Restaurants Award*.[197] The modelling performed by Professor Lewis for the transitional review was, as in this case, premised on the *imposition* of the complete amount of the penalty rate. In that decision, the Full Bench noted that:

> The Commission and its predecessors have consistently rejected the proposition that labour market modelling of the type engaged in by Professor Lewis in his report based upon specific elasticities for the demand for labour are capable of providing a reliable guide as to the way in which changes to minimum wages and conditions actually affect employment levels in particular industries or the economy generally.[198]

133. This quote was put to Professor Lewis in cross-examination, who said that he had not read the criticism by the Full Bench of his modelling.[199] Professor Lewis then sought to dismiss the criticism by saying that "the point is that if you haven't got a model to suggest what the minimum should be, what changes should be made, everything else is going to be an arbitrary decision."[200] The same logic must apply if the model that is used is a flawed model or a model predicated on arbitrary and unrealistic assumptions.

---

197 [2014] FWCFB 1996 (Hatcher VP, Watson VP, Boulton J, Roberts C and McKenna C) (***Restaurant Award Transitional Review – Full Bench***).

198 *Restaurant Award Transitional Review – Full Bench*, [104] et seq.

199 PN 10710–10716.

200 Transcript 1 October 2015, PN 10717.

134. After the quotation above, the Full Bench in the *Restaurants Decision* then discussed a number of cases determined by the Full Bench between 1999 and 2005, concluding that:

> It may be observed from the decisions from which we have quoted above that the various Full Benches were dealing with contentions concerning negative elasticities in relation to minimum wage increases. Professor Lewis in his report was of course contending for positive elasticities in relation to wage reductions. Noting that distinction, the range of 1 to 3 as the figures calculated represent labour demand elasticity by Professor Lewis in order to model the effects of penalty rates do not appear to bear any relationship in terms of quantum to the numbers advanced in the debate referred to above.[201]

135. Professor Lewis again conceded in cross-examination that he had not read the *Restaurants Decision* and as a result, was not aware of this criticism.[202]

136. In light of these factors, it is clear that Professor Lewis' evidence derived from modelling is unpersuasive, unreliable, and does not assist the employer parties. As Professor Borland stated:

> **[35]** Professor Lewis (p.28) concludes that: "we can reasonably assume that σ, the elasticity of substitution for hired labour, is between 1 and 3; however, for completeness an elasticity of 0.5 is included in the analysis to account for the possibility that there is a lesser degree of substitution than suggested by the above studies; and η, the price elasticity of demand for the relevant industries is between -0.1 and -3."
>
> **[36]** In my opinion, these are not reasonable assumptions to make. By failing to use a multiple-day model of the labour market, where penalty rates apply on a subset of days of the week, and instead using a model that treats penalty rates as applying on every day, Professor Lewis has over-estimated the size of substitution and scale effects on employment due to a change in penalty rates. In my opinion, the elasticity of substitution in the restaurant industry is likely to be lower than the lowest size assumed by Professor Lewis, and the price elasticity of demand is likely to be at the lower end of the values assumed by Professor Lewis. It follows that I regard the entire set of Professor Lewis's simulated predicted effects on employment – generated using higher values of the elasticity of substitution and price elasticity of demand – as unreliable and as a poor guide to what the actual employment effects of changing penalty rates would be.

Labour supply is determined at the margin, not the average

137. Professor Lewis also relies on the report of Professor Rose to state that workers are willing to accept lower wages and therefore the labour supply will not be affected by a reduction in penalty rates. Criticisms of the Rose Report are set out in detail below. In addition to those issues, which

---

201 *Restaurant Award Transitional Review – Full Bench*, [111].

202 Transcript 1 October 2015, PN 10727–28.

render the Rose Report unreliable and uninformative, Professor Lewis' use of the Rose Report takes an approach that is completely at odds with standard economics, and with his own evidence.

138. Professor Lewis relies on the results from the Rose Report to say that while some employees indicate that time on Sundays and public holidays are valued above time on week days, "the current penalty rates are higher than those required to attract employees to work on those days".[203] Professor Rose has only reported the data on the average wage that workers state they need to be paid, and so that is the only data that Professor Lewis can rely on. This means that Professor Lewis is relying on what workers say is the *average wage* they would be willing to work for on Sundays and public holidays.

139. When assessing how much workers are willing to work for on any given day, the correct measure is to look at the marginal wage. In the labour market (and in any theoretical model of the labour market) it is the amount that the marginal (last) worker hired needs to be paid to be willing to work on weekends or public holidays that will determine the wage rate that will be paid at that time. The analysis by Professor Rose, and the interpretation of that analysis by Professor Lewis, are not informative about the wage rate that would be needed to attract the existing workforce to supply their labour on weekends or public holidays.

140. Professor Lewis is familiar with the concept of decision-making at the margins – he frequently relied on it himself during cross-examination. Nevertheless, in this example alone, he appeared to be stating that Professor Rose's estimates "are averages of the marginal rates… not the average rates,"[204] and this is a perfectly acceptable method of assessing labour supply. Professor Lewis is wrong.

Principles of labour economics apply to the analysis of the employment effect in all sectors

141. The employer parties attempted to undermine the relevance of Professor Borland's evidence by arguing that he had failed to consider industry-specific demographic factors, such as the precise degree of competition in respect of certain industries. This line of argument is misconceived. Professor Borland's criticisms of Professor Lewis' evidence are based on general principles of economic theory and practice. By their nature, general principles have general application.[205]

---

203 Lewis Report, 39.
204 PN 10960.
205 See PN 11642, 11780, 11781.

Professor Lewis evidence should be given no weight

142. Professor Lewis' evidence about the likely employment effect from cutting penalty rates is built on a house of cards. Each card represents a fatal error in the structural integrity of his modelling, and ultimately, of his evidence. He proceeds to build his house by starting with the wrong foundation, assuming that penalty rates are being removed rather than reduced. He proceeds with faulty data, deriving elasticities from largely poor-quality minimum and aggregate wage studies, that are not comparable to the nature of penalty rates as single-day payments to limited numbers of employees. Each assumption underlying his model is equally flawed, premised on the existence of a perfectly competitive marketplace with infinite consumer demand, and a ready supply of employees willing to work for less than the current standard. When faced with the inevitable collapse of his model, Professor Lewis attempts to support his findings by arguing that if penalty rates were reduced, the impact would be lessened, but not removed. But this assumes that there is still any basis to argue that there is any employment effect. By reason of the matters set out above, there is no ground left on which to build his argument.

Lay Evidence

<u>The employment effect</u>

143. The employer parties called evidence from six lay witnesses. Their evidence demonstrated that any expectation that employment would increase as a result of cuts to existing wages was based on nothing more than speculation, guesswork, and conjecture. When challenged in cross-examination, half of the retailer witnesses admitted that they had performed no calculations of the money they expected to save if rates were cut, or of the cost of employing additional labour. The employer lay evidence is addressed in more detail below.

<u>Decisions about labour on a single day are not made in isolation</u>

144. Several of the employer lay witnesses gave evidence that they consider profitability on a day-to-day basis, and that Sundays and public holidays are unprofitable days for two reasons: low demand, and high labour costs. While employers can and do assess the profitability of the business on a particular day, it is also the case that decisions about the *overall* profitability of the business are made on a monthly, quarterly, and annual basis. Employer witnesses acknowledged that the accounting and taxation system is structured around quarterly or annual reporting; that a 'bad' Sunday can be offset by a 'good' Friday; and that decisions about capital expenditure and long-term labour engagement are made by looking at the profitability of business across a period of months rather than day-by-day. Impressions are made on a daily basis, but rational decision-making takes place by assessing the long term performance of the businesses.

145. Indeed, the evidence of the lay retailer witnesses went beyond simply considering profitability on a day-to-day basis. Profitability was considered against day-to-day, weekly, annual and historical measures as the evidence of Mr D'Oreli in responding to questions from Commissioner Hampton reveals:[206]

> Yes, Mr D'Oreli, three things. Firstly, as I understand your evidence you say that subject to the comments you've just made that you'll need to assess at the time, you've foreshadowed that three of 13 stores not currently trading on Sundays might be considered to trade. What are the major factors that lead you to the view that you probably wouldn't open in relation to the other 10?---There's a lot of factors. Mostly the cost is the biggest thing. The other ten may not be open because there is no Sunday traffic flow or there's no environment for that Sunday shopping. For instance, some country towns there's no point opening on Sundays because they just - the whole town doesn't open. If that were to change we would most certainly review that.

Natural experiments

146. The employer parties contend that cutting penalty rates will increase employment. There have been a number of occasions in the past two decades where penalty rates, or minimum wages, have been reduced in the accommodation and food services sector (**natural experiments**). Yet despite being aware of these natural experiments, and at least in one case, being criticised by the Fair Work Commission for failing to adduce evidence about natural experiments, no employer party provided any evidence about the employment effect arising from real-world examples. It is open to the Commission to infer from this failure that such evidence would not assist the employers' case.[207]

Failure by employers to adduce evidence of natural experiments identified by the Fair Work Commission

147. In 2012, as part of the transitional review, the RCA sought to remove penalty rates in the *Restaurants Award*, and relied on evidence by Professor Lewis in support of their contention that removing penalty rates would increase employment. In her reasons rejecting the RCA's application, Gooley C said:

> **[235]** It is surprising given that there have been times in Australia when penalty rates were not mandatory that no empirical evidence was able to be called to support the theory put forward by Professor Lewis that if wages costs are reduced employment would increase. In the period March 2006 until 1 January 2010 for new constitutional corporations there were no penalties payable as these business were only required to comply the with Australian Fair Pay and Conditions Standards and since 1 January 2010 they have been transitioning from 0% penalty rates to the full penalty regime in the Award.

---

206 PN 17208.

207 *Jones v Dunkel* (1959) 101 CLR 298.

> **[236]** Further in Victoria, state common rule awards were abolished in 1993 and were not reestablished until 1 January 2005. Employees who were employed by the same employer when the common rule award was abolished had their conditions rolled over but new employees were only entitled to the minimum terms and conditions set out in Schedule 1 of the *Employee Relations Act 1992* (Vic) and then in Schedule 1A of the *Workplace Relations Act 1996*.
>
> **[237]** No empirical evidence was called that showed that during this time Victoria had created additional jobs in the restaurant industry and other industries or contributed to greater economic activity or increased Victoria's GDP.
>
> **[238]** Despite these periods of deregulation no empirical evidence was provided which supports Professor Lewis's proposition that reduced labour costs led to an increase in employment.[208]

148. Commissioner Gooley's decision was overturned by the Full Bench in *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996. However, the Full Bench endorsed Gooley C's comments about the failure of Professor Lewis to supply evidence supporting his theory that reductions to penalty rates will increase employment, and added:

> **[118]** There are clear examples in the history of industrial regulation of the restaurant industry in which weekend penalty rates have been abolished or reduced, but no evidence was forthcoming to demonstrate that this had discernibly positive effects in terms of turnover and employment. The Deputy President, correctly in our view, pointed to the period 2006 to 2010 in Victoria when restaurant operators not bound by the then-applicable federal award were not required to pay any penalty rates at all as providing an opportunity to test empirically what the business and employment effects of a removal of penalty rates would be. However, no evidence was called at first instance from any restaurant operator in Victoria, and the evidence did not otherwise touch upon this period. There was another historical opportunity which we can identify. Prior to the Work Choices period commencing in 2006, restaurants in New South Wales were largely regulated by an award of the Industrial Relations Commission of New South Wales, the *Restaurant &c., Employees (State) Award*. In 1996, the NSW Commission (Marks J) heard and determined various applications, including an application from the Restaurant and Catering Association of NSW and other employers, in respect of that award. The employers' application sought amongst other things a reduction in weekly penalty rates. In the Commission's decision issued on 23 August 1996, it was determined that the Saturday penalty rate should be reduced from 50% to 25% and the Sunday penalty rate reduced from 75% to 50% (with casual employees receiving casual loadings in addition). On the employers' case presented before the Deputy President, that change should have increased turnover and employment in the NSW restaurant industry. But there was no evidence that was actually the case.[209]

---

208 [2013] FWC 7840.

209 [2014] FWCFB 1996 (citations omitted).

149. These quotations were put to Professor Lewis in cross-examination, who denied having read or heard them before.[210] As with his unfamiliarity with the criticisms of his modelling by the Full Bench in the *Restaurants Decision*, this was a surprising omission by an expert witness.

150. In this proceeding, RCA did not directly call evidence from Professor Lewis, who was engaged instead by ABI. It is clear that ABI (and consequently Professor Lewis) were aware of these criticisms by the Commission and the Full Bench. In June 2015, before Professor Lewis' report was filed and served, Luis Izzo of Australian Business Lawyers & Advisors, who were instructing Professor Lewis, wrote to him stating:

> Hi Phil,
>
> Attached is a further penalty rates report in mark-up.
>
> …
>
> Some particular points for your consideration:
>
> …
>
> 2. It might be of help if we could also look at employment consequences that have taken place in those periods where lab our costs have not increased in the past (ie, during the accord, or perhaps during the 1 year in 2008/9 when there was no minimum wage increase, etc). The reason we raise this is that the Fair Work Commission's judgment on penalty rates 2 years ago was critical that we had not provided evidence of circumstances where flat wage periods have had positive impacts on employment, etc."[211]

151. Professor Lewis admitted receiving this email, but denied that it prompted him to go back and read the *Restaurants Decision*. Despite this direct suggestion from his instructors, Professor Lewis did not provide any analysis of any of the numerous natural experiments identified by the Commission. When asked in cross-examination why he did not provide this type of evidence, he said:

> I didn't think it was relevant given that I thought it would be a very difficult research exercise to carry out.[212]

152. It is not clear how the degree of difficulty of an exercise determines the relevance of the task, or how Professor Lewis could make a realistic assessment of the difficulty when he had not, then or in the past, performed the exercise.

153. When pressed to explain this answer, Professor Lewis changed his evidence, saying:

---

210 Transcript 1 October 2015, PN 10753–65; PN 10766–77.

211 Email from Luis Izzo to Prof. Lewis, 4 June 2015, tendered as Exhibit UV-21 on 1 October 2015.

212 PN 10789.

> I think it may have been relevant. Right. But, given the time available, and this is dated June, and I believe the report was in – my final report had to be done within – I can't remember, July, I think. I didn't think there was enough time for us to carry out the detailed experiment that would bring about that information.[213]

154. The criticisms in the *Restaurants Decision*, both at first instance, and on appeal to the Full Bench, were available to Professor Lewis' instructors before Professor Lewis was retained in this matter.

155. Ultimately, Professor Lewis agreed with the proposition that it would have been prudent for him to look at the criticisms by Commissioner Gooley and the Full Bench, and explain why he had failed to do so.[214]

156. Had he reviewed the decisions of the Commission and the Full Bench, Professor Lewis may also have avoided making unsubstantiated assertions in his evidence such as the statement in the Lewis Report that "the reduction in penalty rates arising from [the *Restaurants Award Transitional Review*] decision to reduce penalty rates for some casual employees in the café and restaurant industry ***is estimated to have had significant positive employment effects***".[215] This statement was pure speculation. Neither ABI nor RCI, either directly or through Professor Lewis, produced *any* evidence of *any* employment effect arising from the 2014 cuts to penalty rates arising out of the Transitional Review. In response to a question from Ross J about this statement, Professor Lewis conceded that his words were more properly described as a *prediction* rather than an *estimate*, and his statement about "significant positive employment effects" was not based on any study.[216] Again the evidence of Professor Lewis was found to be speculative, unfounded and not valuable for assessing the employment effects of penalty rate.

Professor Lewis' evidence in relation to Serena Yu's evidence

157. In cross-examination, Professor Lewis was questioned about Ms Yu's natural experiment in testing the employment effects of an increase in Sunday penalty rates on the NSW retail industry (considered in detail in Section E of these submissions). Professor Lewis was informed that the conclusion Ms Yu reached was that there was no systemic evidence of an adverse effect on employment in the NSW retail industry following the transitional increases in the Sunday penalty rate.[217]

---

213 PN 10789.
214 PN 10791.
215 Lewis Report, 31. Emphasis added.
216 PN11189–91.
217 PN 11048 – PN 11050.

158. Professor Lewis gave evidence that, based on his own analysis and evidence in the proceeding, and contrary to Ms Yu's findings, he would have expected the increases in penalty rates in NSW to have reduced employment and hours worked in the retail industry in that state.[218] Professor Lewis accepted that, assuming Ms Yu's analysis was sound and that she had used appropriate measures and controls, the results of her analysis would be contrary to his own analysis of the employment effects of penalty rates.[219]

Professor John Rose

159. The ABI and ARA rely on the evidence of Professor John Rose to support their claims for a reduction in the Sunday and public holiday penalty rates under the Retail Award. Professor Rose's report entitled, "*Value of Time and Value of Work Time during Public Holidays, 3 July 2015*" (**Rose Report**)[220] seeks to examine the importance and value employees covered by the Retail Restaurant Award and the Retail Award place on time including on working 'unsocial hours' and, in particular, on public holidays.[221] The research conducted by Professor Rose took the form of a survey comprised of two discrete "choice experiments" designed to recover the hourly rate for which employees were willing to work during both a normal work week and during a week in which one or more public holidays fell.[222]

160. On the basis of the conclusions in the Rose Report, the employers contend that:

(a) employees do wish to be paid a premium to work Sundays, however the premiums sought by employees are lower than the premiums presently imposed by the Retail award; [223]

(b) retail employees will continue to work on Sundays at a 50% penalty rate; [224]

(c) the disability associated with working on Saturdays is the same or substantially similar to the disability associated with working on Sundays; [225]

(d) employees do wish to be paid a premium to work public holidays, however the premiums sought by employees are lower than the premiums presently imposed by the Retail award;[226] and

---

218 PN 11043.
219 PN 11058.
220 Exhibit ABI-1.
221 Exhibit ABI-1, Executive Summary, p 1.
222 Exhibit ABI-1, Executive Summary, p 1.
223 ABI Final Submissions, [22].
224 ARA Final Submissions, [111].
225 ABI Final Submissions, [20] and specifically [20.9].
226 ABI Final Submissions, [25].

(e) there is some disability associated with working on public holidays, however that disability varies markedly depending upon the particular holiday that is worked. [227]

161. These contentions rest on the following conclusions in the Rose Report:[228]

> Examination of the threshold pay rates for weekend work shows a threshold hourly pay rate value to work on a non-public holiday Saturday of 112.22 of the current reported hourly weekday pay rate if the Saturday occurs during a week during which no public holiday falls, or 106.62 percent of the reported hourly weekday pay rate if a public holiday does occur during that same week.
>
> …
>
> Based on the model results, to work on a Sunday, the threshold value of pay is 156.93 percent of the average reported hourly weekday pay rate for the sample if the Sunday does not occur during a week with a public holiday or 165.14 percent if a public holiday falls on another day during the same week.

Likewise, in relation to public holidays, the employers' contentions rest on the following conclusion in the Rose Report:[229]

> In terms of working on a public holiday, the average threshold value for employees covered by the General Retail Industry Award 2010 at which they would accept to work was found to be 164.68 percent the existing reported average normal hourly weekday pay rate for the sample, increasing slightly to 165.92 percent if the public holiday falls on a Saturday and to 224.44 percent if the public holiday occurs on a Sunday.
>
> Further, results of an unprompted recall task revealed that sampled respondents are more familiar with national public holidays, and hence more likely to value them than they are state based public holidays.

162. The SDA submits that, properly examined, the conclusions reached by Professor Rose do not provide reliable grounds for the Commission to reduce penalty rates on Sundays or public holidays and do not support the above contentions advanced by the employers. This submission is supported by the opinion expressed by Professor Altman,[230] a leading international expert in the field of behavioural economics. There are five principal reasons why the Rose Report does not provide a reliable basis for the Commission to reduce penalty rates, each of which are considered in detail below:

---

227 ABI Final Submissions, [27].

228 Exhibit ABI-1, Executive Summary, p 7.

229 Exhibit ABI-1, Executive Summary, p 7.

230 In his report "*Response to the 'Rose Report' Value of Time and Value of Work Time during Public Holidays, prepared by Professor John Rose*" dated 1 September 2015, Exhibit SDA-31 at paras [9] and [38].

(a) The Commission cannot be satisfied that the data generated by the survey results is representative of the relevant workforce, or that it provides an accurate expression of the preferences of survey participants.

(b) A number of critical aspects of the survey design underpinning the Rose Report bias the estimated "willingness to accept" (**WTA**) downwards in favour of a reduction in penalty rates.

(c) The existence of various other limitations inherent to the surveys reported in the Rose Report.

(d) In the context of conventional labour economics, the measure generated by Professor Rose from the survey results, the average WTA, is an inappropriate measure to determine labour supply implications of reductions in penalty rates.

(e) Even if all of the above criticisms are erroneous, orthodox economic principles suggest that the results reported in the Rose Report support the retention of the existing penalty rates for Sundays and public holidays.

Deficient Data

163. The surveys were conducted through about 47 sessions at locations around the country, each attended by 10 survey[231] participants. Most or all of these sessions were conducted at the offices of ABI and the New South Wales Chamber.[232] Neither Professor Rose, nor any of his staff from the Institute for Choice attended any of these sessions.[233] They were instead facilitated by staff from the ABI and the New South Wales Chamber.[234] The role of facilitators included answering questions from survey respondents and providing assistance where required to enable respondents to complete the questionnaires.[235]

164. Professor Rose agreed that it was critical that survey respondents not be exposed to any influences which might potentially unduly influence their responses.[236] Because neither he nor his staff attended any of the sessions, he was not in a position to say whether any representative of the New South Wales Chamber or ABI had any influence on the responses given by respondents in

231 PN 9013.
232 PN 9021- PN 9022.
233 PN 9040.
234 PN 9032.
235 PN 9019-PN 9020.
236 PN 8997.

the survey.[237] He "*perhaps*" accepted that these arrangements whereby the supervision of the survey was left to his clients was not good practice.[238]

165. In light of the above matters, there is no evidence before the Commission which would enable it to be satisfied that the survey respondents were not exposed to influences which might have unduly influenced their responses to the survey, being a matter which Professor Rose accepted was critical to the conduct of the surveys. The possibility of such influences, whether intentional or merely inadvertent, cannot be lightly disregarded in circumstances involving the conduct of a technical survey exercise by staff from parties to this proceeding at their very offices, particularly where those surveys were being undertaken for the purpose of producing a report for use in this proceeding.[239]

166. There are two other problems with the data generated from the surveys in the Rose Report. First, although Professor Rose gave evidence that the selection of samples of respondents from different states was undertaken to ensure that the results were representative,[240] it is clear that the survey results were not representative of the relative population of States, because equal quotas set for New South Wales, Victoria, Western Australia, South Australia and Queensland.[241] Secondly, these quota allocations were not in fact achieved.[242] The end result was that, amongst other things, 17% of respondents from the survey were from Western Australia, but only 13% of respondents were from Victoria.[243] Professor Rose accepted that the results of the survey were not representative of the national spread of the population.[244]

Biases in the survey results

167. As Professor Rose accepted, the quality of data upon which conclusions are drawn is only as good as the experiment from which the data is derived.[245] For the reasons which follow, the experiment undertaken by Professor Rose was seriously flawed in that it did not properly reflect critical aspects of the context of the population being sampled. Further, key features of its design necessarily had the effect of biasing the WTA estimate downwards in favour of reducing penalty rates.

---

237 PN 9041.
238 PN 9043.
239 PN 9044.
240 PN 9047.
241 PN 9051.
242 PN 9054-PN 9061.
243 PN 9058- PN 9059.
244 PN 9061.
245 PN 9145.

168. Professor Rose accepted that *"reference points or anchoring, framing and loss aversion*"[246] were "*critical in the current context, and failure to incorporate mechanisms to account for such behaviour are likely to result in systematic biases in the survey results*".[247]

Referencing, anchoring and loss aversion

169. Professor Rose agreed that stated choice experiments could be made "*more realistic by accounting for referencing, anchoring and framing [and] can reduce any hypothetical bias that might be present*".[248] Professor Rose also accepted that it is good practice in survey and experiment design to take account of the phenomenon of "*loss aversion*" which, in simple terms, means that people value losses more than they value gains.[249] Significantly, Professor Rose also agreed with the following propositions advanced by Professor Altman in his evidence:[250]

    (a) That there is a large and influential literature which suggests that individual's responses in surveys are heavily influenced by the reference points contained in a survey and how questions are structured and framed.

    (b) That responses to survey questions can change depending upon how a question is framed and the context in which it is placed.

    (c) The reference points used in a survey question and how a survey question is anchored to posited facts is critical to ensuring that one can have confidence that the survey results represent the true preferences of the population being surveyed.

    (d) If one seeks meaningful insights about a population, it is important that the contextual constraints and reference points in a survey reflect those in the population.

170. Professor Rose's evidence was that the context provided to survey participants when they undertook the experiment was comprised of two things: the presence at hand of individual participant's activity diaries for the previous seven days; and the fact that participants were presented with alternative work choices which pivoted around hourly rates of pay below and above the applicable award rate of pay.[251] His evidence was that in this way, the survey questions were properly framed around the previous week's activities and the actual award rate was incorporated as a reference point.

---

246 Exhibit ABI-2, para 1.
247 Exhibit ABI-2, para 2.
248 Exhibit ABI-2, para 45.
249 PN 9167-PN 9173.
250 PN 9173-PN 9179.
251 Exhibit ABI-2, para 6.

171. It may be accepted that the availability of a survey participant's activity diary for the previous seven days provides *some* framing and referencing for their responses. However, the question is whether that framing is appropriate and adapted to the context and task at hand. That context was clearly understood by Professor Rose who stated that the experiment *"was to examine penalty rates and the value of time that people place on penalty rates*".[252] In fact he understood that his report was to be used in proceedings seeking reductions in penalty rates.[253]

172. Despite this, the survey was not framed at elucidating participants' preferences in the face of a cut in the hourly rate paid to them, being the subject matter at which the survey was directed. The Rose Report does not reference Sunday pay, inclusive of the penalty rate, as a reference point or anchor and instead uses as a reference point the normal wage during the regular weekday.[254] Most significantly, Professor Rose accepted that, if participants had been presented with a question of whether they would be prepared to work for a rate X% less than the award rate, the experiment "*would have definitely generated different results*".[255] The fact that the response to such a question might have biased the results in the direction of the award rate, as accepted by Professor Altman,[256] is irrelevant. As Professor Altman noted, there will inevitably be biases no matter what question is asked and it is for that reason that good survey design calls for the formulation of different sets of questions to minimise such bias.[257] That course was not adopted here; the results of the survey were inevitably in one direction because of its design and the absence of adequate reference points and the framing of questions. On its face, this evidence alone should lead the Commission not to place any weight on the Rose Report. Aside from the focus of the Rose Report, the question for the Commission respectfully is whether that evidence is probative of any matter relevant to the proposed reductions in penalty rates. Professor Rose has himself accepted that the results of his work would have been different if the survey questions had been directed at that, the relevant, question.

173. The fact that the experimental design involved pivoting the hourly pay rates around the current hourly pay rates including penalty rates where appropriate was an inadequate means of ensuring that existing award minima were the reference point for participants' responses. This is because of the various assumptions made by Professor Rose. He assumed, not only that participants knew what their current hourly rate was, but also that they knew the applicable award rates for Monday to Friday work and work on Saturdays, Sundays and public holidays.[258] In circumstances where

---

252 PN 9116.
253 PN 9044-PN 9045.
254 Exhibit SDA-31, paras 30-31.
255 PN 9185.
256 PN 19525.
257 PN 19526.
258 PN 9286; and PN 9272 – PN 9283.

most of the participants in the survey were paid over award rates,[259] the basis for making the second and third of these assumptions is unfounded. It falls well short of clearly posing to participants choices to be made by reference to express and clear assumptions.

174. A further critical feature of the survey design which biased the results downwards is the treatment of Sundays in the survey questions as being perfectly substitutable and equivalent to any other day of the week. Professor Rose agreed that the survey was designed on an assumption that Sunday was no more or less important than any day of the week. The Rose Report states that:[260]

> … One can no longer assume that Sunday is a day for family gatherings and deemed the least desirable day to work, particularly amongst segments of society who may prefer to socialise on weekdays or weeknights.

In proceeding on this basis, Professor Rose has produced a report on the basis of a particular view about a highly contestable and controversial matter central to the Review and one which self-evidently supports the employer case.

175. It was open to Professor Rose to have contextualised the questions asked of participants in relation to Sundays in a different way. This course was adopted in that part of the survey where participants were specifically told in relation to certain choices that particular days were public holidays. He accepted that there was no impediment to him designing a survey question which identified a day as being of special significance and asking the respondents to make choices accordingly.[261] It would have at least been open to Professor Rose to conduct the survey by posing questions of a mixed type, including for example, treating Sunday as of equivalent significance to any other day and other questions seeking responses where particular Sundays were identified as days of particular personal or social significance.

The choice to work versus the requirement to work

176. The highly theoretical nature of the Rose Report and the inability of the choice experiments undertaken to reflect the real context of the labour market was highlighted by the inability of the survey methodology which was used to deal with the reality that for many workers work at particular times or on particular days is not a purely voluntary choice but a requirement imposed by their employer (i.e. in the language used by behavioural economists, "coerced").

177. Professor Rose understood from the pilot survey that was conducted that the issue of coercion was squarely and expressly raised by a number of participants.[262] Notwithstanding this, he agreed

---

259 Exhibit ABI-1, p 42.
260 Exhibit ABI-1, p 2.
261 PN 9250.
262 PN 9213-PN 9215, PN 9229.

that there was no aspect of the survey which he conducted "*which incorporated the contextual element, in the population of hospitality and retail workers, of there being an element of coercion or a requirement to work*."[263] Professor Rose's attempt to diminish the absence of this contextual element by comparing it to not controlling the further possibility that "*at a particular hour a very good looking male or female entered the store and so a person prefers to work a particular time because they are going to see that person*"[264] speaks to the lack of any genuine commitment to ensuring, as much as possible, that the experiment reflected the real context of the broader population being sampled.

178. The real reason no provision was made for coercion in the labour market was identified by Professor Rose in his Reply to Professor Altman's report in which he stated that the identification of a WTA for working coerced hours was "*incompatible with choice modelling.*"[265] Thus, as a result, the analytical paradigm which underpins the Rose Report is simply unable to incorporate and reflect the reality that at least for some workers some of the time, work is a requirement and not a freely made choice. In substance, because of this inherent limitation in the Rose Report, the notion of coercion was assumed away under the guise of an abstract and artificial choice experiment predicated on workers having perfect choice conditions in deciding whether or not to provide their labour. Evidence based on a perfectly competitive and informed labour market is divorced from reality and of little assistance to the Commission.

179. Moreover, in terms of the consequences of the perfect choice conditions assumed by Professor Rose, Professor Altman's unchallenged evidence is that, by assuming that work scheduling is voluntary when it is not, the WTA is biased downward.[266] This is because:[267]

> When individuals are forced to work on Sunday (or Saturday), for example, they would typically value this time more highly, hoping for a higher wage to compensate for the displeasure of working during a non-preferred day or time. Framing the value of market time in terms of Sunday work (or Saturday for that matter) the scheduling of which is arbitrarily determined by the employer, frames the Sunday work as non-normal and as (a loss aversion). Sunday work that is voluntarily chosen (not subject to coercion) can be expected to generate a lower WTA than Sunday work that is coerced.
>
> Some employees might prefer to work on Sunday or some other non-normal day. But this typically involves a trade off that generates a high level of utility to the employer. For example, if an employee chooses to work on Sunday this would require a higher wage and often not working during some particular day during the working week (often referred to as flexible time) (Altman 1999; Altman and Golden 2005, 2007). When "choices" are coerced and framed as such, the WTA can be expected to be much higher than when choices are voluntary. It is important, therefore, to reiterate that survey

263 PN 9235, PN 9237.
264 PN 9236.
265 Exhibit ABI-2, para 37.
266 Exhibit SDA-31, para 36.
267 Exhibit SDA-31, para 36.

> questions need to be framed to reflect as best as is possible the reality of the labour market and then reframed to determine how alternative labour market scenarios (coerced versus voluntary or negotiated work schedules) will affect the WTA and, more generally how employees value market time.

Other limitations inherent to the surveys

180. The Rose Report reported on "*time importance by day and time of day.*"[268] It concluded that very little variation exists between days of the week in terms of their relative importance.

181. The methodology which underpinned this aspect of the Rose Report is fundamentally flawed. The identification of the relative importance of time was derived from respondents recording how important an *activity* was, where importance was defined as an ability or desire to change that activity, should a conflicting event arise at the time of the activity. In other words and as Professor Rose accepted, participants were asked to rank an activity's importance.[269] Professor Rose accepted that participants were not asked how important a particular *time* of the day was to them.[270] He accepted that his analysis assumed that the importance a person attributed to an activity was a meaningful proxy of the importance of time.[271]

182. This assumption is flawed as a matter of logic. As suggested to Professor Rose in cross-examination,[272] merely because a person indicates that they could easily reschedule walking the dog between 3:00 pm and 4:00 pm on a Sunday afternoon, says nothing about the importance to them of that hour on a Sunday afternoon. The highest that Professor Rose could put it was that person's ranking of the capacity to reschedule an activity "*indirectly infers the importance of that hour of time*". No analytical basis for such a conclusion was given by Professor Rose; it is merely an assertion which obscures the conflation between the value of an activity and the value of time in a specific point in a day.

Average WTA an inappropriate measure

183. As noted by Professor Rose, the Rose Report "*concentrated on the average WTA*".[273] The Rose Report provides an estimate of the average of the WTA and the range of averages. Thus, as Professor Rose states in relation to Sundays, he concluded that "*on average*" respondents value working on Sundays somewhere between 126% and 165% of the average current normal hourly

---

268 Exhibit ABI-1, Table 7, p 21-22.
269 PN 9099.
270 PN 9102.
271 PN 9109.
272 PN 9106-PN 9108.
273 Exhibit ABI-2, para 28.

pay rate.[274] This range of values is not the actual range of values of work time across the sample population, but rather the range of highly likely "*averages*" across the sample population.[275]

184. The underlying difficulty in this approach is that, as Professor Altman identified, *"the average WTA is an interesting measure, but not one that is analytical pertinent to the determination of the supply of labour to an employer*".[276] This is because, in accordance with conventional economic theory it is the marginal WTA which determines how much employers must pay to attract the desired number of employees.[277] This evidence was given by Professors Altman and Borland.[278] Professor Rose too ultimately accepted that, in order to determine how much employers must pay to attract the required level of labour supply, the relevant question is to identify the marginal rate of substitution for labour or the marginal WTA.[279] The underlying difficulty for the employers is that the Rose Report does not report the marginal WTA for the survey respondents, even though such information could have been supplied within the framework of the experiment.

Rose Report supports retention of existing penalty rates

185. Further to the above submissions, the relevant focus of inquiry should be on identifying the marginal WTA. As noted above, Professor Rose identified that the range of average WTA estimates in respect of Sunday work was between 126% and 165% of the normal rate of pay. The unchallenged evidence by Professor Altman was that, given these results, the marginal WTA would most likely be much greater than the range of average WTA estimates of between 126% and 165% of the normal rate of pay, such that the marginal WTA would most likely at least equal to the current normal wage plus penalty rate.[280] Professor Altman continued that, in those circumstances a reduction in penalty rates would be expected to have a negative effect on labour supply.[281]

---

274 Exhibit ABI-1, p 45.
275 Exhibit SDA-31, para 8. No issue was taken with this proposition by Professor Rose in his Reply Report, Exhibit ABI-2.
276 Exhibit SDA-31, para 14.
277 As accepted by Professor Rose the marginal WTA in economic terms is the marginal rate of substitution - see PN 9310.
278 Exhibit SDA-31, para 14; Exhibit UV-25, paras 7(c) and 52.
279 PN 9330-PN 9335, PN 9368-PN 9370.
280 Exhibit SDA-31, para 38.
281 Exhibit SDA-31, para 38.

Dr Sean Sands

186. The ARA and ABI rely on the report of Dr Sean Sands entitled Retail Award Research,[282] 26 June 2015 (**Sands Report**) in support of their applications to reduce the Sunday penalty rate under the Retail Award.

187. The Sands Report is comprised of three parts. The first, which consists of an analysis of the state of the retail industry, was not received as evidence in the proceeding.[283] The second part involved research with shopfloor employees aimed at ascertaining their preferences, attitudes and behaviour related to working on Sundays as well as their view of customers' shopping preferences. This part of the research was undertaken by way of focus groups and an online survey.[284] The third part of the Sands Report focused on retailers and took the form of interviews and an analysis of proprietary data designed to gain an understanding of the impact of shopfloor labour (including Sunday penalty rates) on business costs and performance.[285]

188. The SDA's primary submission is that the design and conduct of the Sands Report was deeply flawed such that it does not permit reliable conclusions to be drawn on the basis of its "findings". However, if any weight is to be given to it, the Commission must also give weight to the conclusions which emerge from the employee survey which undermine the employer's case and support the SDA's case in the Review. The underlying weaknesses in the Sands Report, many of which were acknowledged by Dr Sands in evidence, are set out below.

189. *First*, there is no evidence of the response rate to the survey. An adequate response rate is an essential condition in order for reliable conclusions to be drawn from a survey.[286] In the absence of knowing the response rate to the employee survey, the Commission should not give any weight to its results.

190. *Secondly*, the Commission should note that the employee focus groups as well as the retailer interviews and analysis of proprietary data consist of qualitative research and as such, and as acknowledged by Dr Sands, they are not statistically generalisable or representative.[287]

191. *Thirdly*, the unreliable character of the Sands Report is confirmed by that fact that the findings of the employee online survey, contain substantial over-estimates when compared to analysis of

---

282 Exhibit Retail-2.
283 Exhibit Retail-2, Part 1 (and corresponding sections in the Executive Summary and Research Summary).
284 Exhibit Retail-2, p 16.
285 Exhibit Retail-2, pp 16-17.
286 Exhibit SDA-33, [26]. See also at [32]-[33].
287 PN 9887-PN 9892.

the same issues in the larger Household Income and Labour Dynamics in Australia Survey (**HILDA**) data set: [288]

(a) according to Dr Watson's unchallenged evidence based on the HILDA data,[289] 62% of the total retail workforce usually work on either one or both of the weekend days (as compared to the 72% estimate provided by Dr Sands);[290] and

(b) according to Dr Ian Watson's unchallenged evidence based on the HILDA data,[291] 35% of the total retail workforce work on Sundays (as compared to the 50% estimate provided by Dr Sands).[292]

192. The ACRS compromised the representativeness of the sample used for the retailer interviews by sourcing interviewees through the agency of FCB Lawyers and the retail employer organisations[293] and by including in the email invitation template the following statement:[294]

> The research will be used by FCB Group in seeking a reduction in the Sunday penalty rate under the General Retail Industry Award 2010 as part of the Award Review 2014.

193. As accepted by Dr Sands in cross-examination, he potentially jeopardised the representativeness of the sample by including this sentence in the invitation to retailers because it was more likely that those with strong feelings in favour of a reduction of Sunday penalty rates would participate in the interview.[295] The Full Bench dealt with a similar issue in *$2 and Under (No 1)* in dealing with survey evidence adduced by the Commonwealth which was distributed under cover of a letter indicating that the Commonwealth was opposing a large scale roping in application. The Full Bench did not accept that the survey results provided a reliable basis for determining the extent of likely employment effects caused by the proposed roping in for reasons including the following:[296]

> The maximum response rate to the survey was 39% and the actual response rate was between 20 and 39%. Having regard to Dr Gordon's evidence we think this response rate is too low. This gives rise to a second concern — the possibility of non-respondent bias. The non-respondents to the Commonwealth survey are self-selected, being those employers who chose not to respond. Non-respondent bias might occur through self-interest affecting response rates. Given the context of the survey and the advice in the covering letter that the Commonwealth was opposing the application, it is probable that those who would be affected by the proposed award would be more likely to respond

---

288 PN 9915-PN 9916.
289 PN-22173-PN-22174.
290 PN 9917-PN 9921.
291 PN-22173-PN-22174.
292 PN 9923-PN 9924.
293 PN 10103. See also Exhibits SDA-4, SDA-5, SDA-6 and SDA-7.
294 PN 10135. See also Exhibit SDA-5, p 1 (Retailer Interview Guide).
295 PN 10143.
296 *$2 and under (No 1)* at [72]-[73].

> than those who would not. Whilst some examination of non-respondents was carried out by reference to employment patterns, no comparison was made between respondents and non-respondents to test the extent to which the employers in each group afforded their employees conditions in excess of those prescribed in Sch 1A.
>
> The survey responses reflect perceived effects reported by respondents, not actual effects. Significant variation may occur between expected and actual outcomes.
>
> (footnotes excluded)

194. If the Commission is to give weight to the results of the employee survey as proposed by the ARA and the ABI in their submissions, weight should also be given to the following survey results which undermine the employer case and support the SDA's case in the Review:

(a) A number of the findings arising from the employee survey support a conclusion that the Sunday penalty rate should be retained at its current rate:

(i) Contrary to the employer submissions, 80% of Sunday employees have observed either no real change (47%) or an increase (33%) in the availability of Sunday hours over the last five years;[297]

(ii) The vast majority of non-Sunday employees state that there is nothing that would motivate them to work on the shop floor on a Sunday.[298]

(iii) The main difficulty with Sunday work among shopfloor employees is impact on the ability to spend time with family/friends (54%).[299] 67% of Sunday employees are hardly ever (52%) or never (15%) able to make up that time spent with family and friends during the week.[300]

(iv) 86% of Sunday employees are hardly ever (58%) or never (28%) able to make up that time to attend community, sporting or cultural events during the week.[301]

(v) 29% of Sunday employees who have children believe that Sunday work has an adverse impact on the health and development of their children.[302]

195. Dr Sands misrepresents the results of the employee survey in stating that they "*...indicate that shopfloor employees aged 24 years and under (the majority of weekend employees) are significantly less concerned with their ability to spend time with family/friends being impacted*

---

297 PN 9959 referring to Exhibit Retail-2, p 62.
298 PN 10031-PN10033 referring to Exhibit Retail-2, p 75.
299 PN 9962 referring to Exhibit Retail-2, p 65.
300 PN 1004 referring to Exhibit Retail-2, p 68.
301 PN 9993 referring to Exhibit Retail-2, p 66.
302 PN 10010 referring to Exhibit Retail-2, pp 69-70.

by working Sundays."[303] The bar graph that appears below this conclusion in fact represents that 42% of those aged under 24 identified impact on the ability to spend time with family/friends as one of the main difficulties in working on a Sunday.[304] The survey results say nothing about those below the age of 24 being less concerned with this issue.[305]

196. The employee survey failed to ask participants who worked on Sunday whether this was because of a requirement to do so imposed by their employer or roster.[306] The survey therefore failed to reflect the reality of their being a requirement on many retail employees to work on Sunday. Based on Professor Altman's evidence considered elsewhere in these submissions about the importance of engaging with the reality that work may be coerced, the survey, by assuming that work scheduling is voluntary when it is not, may have caused gaps or distortions to emerge in the data collected.[307]

197. The employee survey also neglected to take account of the possibility of loss aversion when asking respondents to undertake a choice task nominating their willingness to accept Sunday work at varying penalty rates. Again, as supported by the evidence of Professor Altman, by failing to ask respondents how they would react to a reduction in penalty rates, the survey presents a measure of willingness to accept which is biased downward. [308]

198. A number of the conclusions drawn from the qualitative employee focus group research are unreliable as they are made on the basis of selective reporting of verbatim quotes and themes arising from the participants who attended.[309] Further, Dr Sands conceded that not all of the quotes or summaries of particular issues presented in his report were sourced from answers to questions concerning those issues.[310]

Ms Lynne Pezzullo

199. In support of their applications to reduce Sunday penalty rates under the Retail Award, the ARA and ABI rely on the report by Ms Lynne Pezzullo entitled "*The Modern Face of Weekend Work: Survey Results and Analysis*" dated 25 June 2015 (**Pezzullo Weekend Work Report**).[311] The Report is comprised of a literature review and the results of two surveys. From those sources, Ms

---

303 Exhibit Retail-2, p 65.
304 Exhibit Retail-2, p 65.
305 PN 9967-PN 9969.
306 PN 10034-PN 10035.
307 Exhibit SDA-31, [36] (p 20).
308 Exhibit SDA-31, [35] (p 20).
309 PN 9940, PN 9947, PN 9952.
310 PN 9945, PN 9948-PN 9951.
311 Exhibit PG-34. (In these submissions, references to page numbers in this exhibit are references to the page numbers as marked in large font)

Pezzullo draws various conclusions and expresses opinions about matters including time use patterns, preferences, characteristics and consumer behaviour of weekend and non-weekend workers.

200. Ms Pezzullo is the Lead Partner, Health Economics and Social Policy with Deloitte Access Economics (**Deloittes**). Deloittes was engaged by the PGA to produce the Pezzullo Weekend Work Report for use in this proceeding. Although she was responsible for leading the team responsible for preparing the Pezzullo Weekend Work Report, Ms Pezzullo was not involved in the initial drafting of the report;[312] she did not undertake the literature review;[313] or read the papers referred to in the literature review beyond their abstracts;[314] and she did not design the surveys[315] or analyse their results.[316] Ms Pezzullo's role was instead to provide "*quality control and oversight of deliverables*"[317] in respect of the report. In layman's terms, this meant that her task was to make sure that Deloittes delivered to its client what Deloittes had been engaged to provide.[318]

201. Despite the breadth of the Pezzullo Weekend Work Report and the time devoted to hearing evidence in respect of it, the employers' reliance upon it in submissions is confined and limited. In particular, the ABI and the ARA rely principally upon the results of one of the surveys reported in the Pezzullo Weekend Work Report.[319] The following submissions are accordingly focused on that aspect of the Pezzullo Weekend Work Report. Insofar as the employers rely on other aspects of the Report, those arguments and the evidence are considered in Section F.

The Weekend Worker Survey

202. Deloittes designed and arranged for a third party to conduct two online surveys. The first was a survey of 1,000 persons described as "weekend workers" (the **weekend worker survey**). It sought responses from participants about their time use patterns, the frequency and duration of their weekend work and their attitudes to working on weekends.[320] The second survey was described as being a survey of 1,100 "non-weekend workers." It sought responses from participants "*as consumers, about their time use and their use of business staffed by relevant*

---

312 PN 25282-PN 25284.
313 PN 25285.
314 PN 25287, 25326, 25353, 25373.
315 PN 25288.
316 PN 25289.
317 PN 25290. See also Exhibit PG-1, p 3.
318 PN 25291.
319 See in particular: ARA Submissions: paras 36, 43, 45, 84(b), (d), 96(c), 102, 104, 110, 113, 127 and 131. See ABI Submissions: paras 17.6-17.8, 19.3(b) and 20.4.
320 Exhibit PG-34, pg 15.

award workers and their preferred times for using those facilities."[321] A subset (500 persons) of the "weekend worker" sample population was also asked questions from the non-weekend worker survey. The ABI and the ARA rely extensively on the weekend worker survey; no reliance however is placed on the survey of non-weekend workers.

203. The SDA's contention in respect of the weekend worker survey is twofold. First, the survey is characterised by a number of limitations and weaknesses which collectively mean that the Commission cannot be confident that reliable conclusions can be drawn from it. Secondly, even if the survey is treated as being able to produce reliable conclusions, Ms Pezzullo's own evidence indicates that it does not provide a proper basis for the Commission to make findings of fact which relate to weekend work in the retail industry and retail workers' attitudes and experience of weekend work. The same conclusion follows in relation to the hospitality, fast food, restaurants and pharmacy industries and workers employed in those industries. We deal with each of these contentions separately below.

Survey results unreliable

204. Ms Helen Bartley is an accredited Statistician with the Statistical Society of Australia and a qualified practising Market Researcher with the Australian Market and Social Research Society. She has more than 25 years of experience in the design, conduct and management of quantitative market and social research including in particular, research design, data management and statistical analysis, survey sampling and data collection methodologies. In her expert opinion in evidence given to the Commission, due to a number of limitations in the research comprised of the weekend worker survey, Ms Bartley could not be confident that reliable conclusions could be drawn from the survey about the composition, working hours, attitudes and experiences of weekend (and non-weekend) workers.[322]

205. On the evidence before the Commission, the weekend worker survey can be said to suffer from the following limitations identified by Ms Bartley and not adequately addressed by Ms Pezzullo in her evidence:

(a) The response rate of 29% gives rise to implications of a significant non-response bias.[323] Referring to the average i-Link survey response rate, Ms Bartley said:

> I consider this response rate to be low. An average response rate of 20-35% means that 65-80% of those individuals invited to participate in the survey did not respond. Their answers could potentially be different to the answers provided by the survey participants. Even if some of the survey non-

321 Exhibit PG-34, pg 16.
322 Exhibit SDA-33
323 PN 21728.

> respondents had responded with different answers, this could lead to different survey results.[324]

On the basis of the low response rate, Ms Bartley could not be confident that the survey was a representative sample.[325] Despite Ms Pezzullo's claims to the contrary, there is no evidence before the Commission that i-Link drew the sample to represent the Australian population in terms of gender, age and geography based on ABS data - as outlined above, there is in fact evidence to the contrary.

(b) The online panel approach excludes a subset of the population that is not online and could lead to biased results (particularly in circumstances where there is such a high non-response rate).[326]

(c) The survey's "convenience sample" means that a further source of bias (sampling bias) could affect the reliability of the survey's results as it is made up of people who are easy to access and readily available to participate in the survey.[327]

(d) The process of removing individuals from the survey described as "speeders", "flat liners" and "bad verbatims" is subjective and could bias the results.[328] Ms Bartley did not accept Ms Pezzullo's assessment that, *"If these respondents do not answer open ended questions legitimately the rest of their answers are less likely to be reliable."*[329] According to Ms Bartley, *"I disagree with it, and in fact in my extensive experience, which includes running a number of online surveys…commonly people do not respond to open-ended questions in online surveys because they require more work, they're more burdensome to answer and they can't be answered quickly, but I don't believe that it invalidates the remaining data in any survey."*[330]

(e) Ms Bartley also gave evidence that she was *"startled"*[331] by the fact that Ms Pezzullo had discarded 975 survey responses as part of this cleansing process, her concern being that, *"…if you were trying to demonstrate that the results of a survey were reliable, and you wanted to report them with a degree of statistical accuracy and confidence, why would you actually remove 975 responses and reduce your effective sample size, thus increasing the margin of error of your results, assuming the sample was representative."*[332]

---

324 Exhibit SDA-33, [26].
325 PN 21741.
326 PN 21731- PN 21735. Exhibit SDA-33, [24].
327 PN 21738. See also Exhibit SDA-33, [25].
328 Exhibit SDA-33, [27].
329 Exhibit PG-36, [3.2.1], p 16.
330 PN 21745.
331 PN 21748.
332 PN 21748.

206. As an experienced expert in the field of survey design and implementation, Ms Bartley's evidence in relation to the above matters should be preferred to Ms Pezzullo's. Collectively, the above deficiencies significantly undermine the weekend worker survey's design, implementation and analysis and give rise to the conclusion that its results are unable to be treated as reliable.

No basis for making findings in relation to retail workers

207. Deloittes was engaged by the PGA to undertake an "*analysis of working atypical hours in the services sector*."[333] Deloittes' proposal and ultimate engagement referred to the provision of an analysis of working atypical/unsociable hours across "*a number of services industries in Australia*".[334] The "services sector" was defined as "*retail, hospitality, fast food, restaurants and pharmacy*".[335]

208. This is reflected in the Pezzullo Weekend Work Report itself which describes the survey methodology as having "*a particular focus on the retail, hotel and accommodation, fast food and pharmacy industries*".[336] Those were the industries within the "*scope*".[337] Chapter 2 of the Report provided an overview of each of those industries and the awards applying in each of them.

209. Consistent with the above evidence, Ms Pezzullo initially accepted that the "*relevant award workers*" referred to in the Report (and in the proposal and engagement documents) were those employed under awards in the retail, hospitality, fast food, restaurants and pharmacy industries (the **relevant industries**).[338] When asked whether the "*target population*" of the weekend worker survey was employees in the relevant industries, she responded: "*Exactly*".[339]

210. Notwithstanding the clear focus of the weekend worker survey and the Pezzullo Weekend Work Report itself, it is readily apparent that the design of the survey meant that it was not representative of any or all of the relevant industries and is incapable of providing a foundation from which reliable conclusions may be drawn about the views and experiences of weekend workers in any or all of those industries. In particular:

    (a) The Pezzullo Weekend Work Report records and Ms Pezzullo accepted in her evidence that, of the 1,000 so-called weekend workers who participated in the weekend worker survey, only 357 (35.7%) were from either the hotels, cafés, fast food, retail or pharmacy

---

333 Exhibit SDA-50. In the proposal dated 22 April 2014, Exhibit SDA-50, the subject matter was described as being "unsociable hours".
334 Exhibit SDA-50, p 1; Exhibit SDA-52, p 1.
335 Exhibit SDA-50, p 2; Exhibit SDA-52, p 2.
336 Exhibit PG-34, p 15.
337 Exhibit PG-34, p 22.
338 PN 25497.
339 PN 25524.

industries.[340] Only 23% or 230 of survey participants were from the retail industry.[341] As Ms Pezzullo ultimately accepted, one would have "*no idea*" of the industry in which 64% of the weekend work survey respondents worked, or their occupation.[342]

(b) Ms Pezzullo also accepted that the population from which the weekend worker survey was drawn "*was not drawn from a population comprised of workers in the target population.*"[343] It was instead drawn from a large online population of 282,000 people.[344] The uncontroverted evidence before the Commission is that, in order for inferences to be drawn from a survey that can lead to the making of reliable conclusions or inferences about the population, "*members of the sample need to be randomly selected from the target population, to avoid any bias towards a particular result*".[345] This reflects a basal principle for the good conduct and design of surveys.

211. In the face of this fatal discontinuity between the target population of the weekend worker survey and the population which was in fact surveyed, Ms Pezzullo changed her evidence. Having given the evidence referred to above, she then asserted that the target population was in fact weekend workers, comprised of only representatives from the relevant industries.[346] Two observations may be made about this change in Ms Pezzullo's evidence:

(a) It highlights the fundamentally flawed nature of the weekend worker survey and the confused purposes for which it was proposed and commissioned. Deloittes' task was apparently to produce an analysis relating to atypical hours of work in the relevant industries. If one was genuinely interested in understanding the experiences of weekend workers in those identified industries, that population of workers should have been the subject of the survey. However, for reasons which remain unexplained, the survey actually undertaken was overwhelmingly comprised of participants from industries *other than* the relevant industries.

(b) Ms Pezzullo's revision of her evidence reflects poorly on her grasp of and involvement in the preparation of the Pezzullo Weekend Work Report. It reveals a confused understanding of a fundamental design aspect of the weekend worker survey. Her erroneous understanding of this essential design feature of the survey can be readily

340 Exhibit PG-34, Chart 4.2, p 44; PN 25538.
341 Exhibit PG-34, Chart 4.2, p 44.
342 PN 25562, 25562.
343 PN 25528.
344 PN 25527.
345 Evidence of Ms Helen Bartley, Exhibit SDA-37, paras 42, 43.2.2 and 43.5.1.
346 PN 24531.

contrasted with the overly confident and argumentative manner in which she gave evidence and her general unwillingness to make concessions, other than when necessary.

212. More fundamentally however, Ms Pezzullo's revised evidence that the target population was in fact weekend workers has the consequence that reliable conclusions cannot be drawn about the views and experiences of workers in the retail industry (or in any of the relevant industries). So much follows from Ms Pezzullo's own evidence.

(a) Her evidence was that the intention behind the weekend worker survey was to make it "*statistically representative in relation to weekend workers, not every sub-segments [sic]*"[347] (being the relevant industries). Deloittes "*didn't do any segment analysis*" in relation to the relevant industries.[348]

(b) Ms Pezzullo initially qualified her evidence referred to in the previous sub-paragraph by stating that "*wherever the sample size is greater than 20*" in relation to particular industries of the relevant industries, the results would be representative.[349] This evidence is inconsistent with the Pezzullo Weekend Work Report itself which states that "*care should be taken not to over-interpret results for much smaller sample groups than the 1,000 person overall weekend worker sample*".[350] Ms Pezzullo only accepted this proposition after it was pointed out to her that it was drawn from the very report for which she was responsible.[351]

(c) Most critically however, Ms Pezzullo ultimately accepted that, because her survey and analysis "*was never intended to provide stratification by industry*"[352], it was correct that:[353]

> If the Commission wanted to undertake a stratification process and work out whether this hypothesis held for particular industries, your hypothesis is not reliable for the purpose of any industry-specific process . . .

The hypothesis referred to in this evidence was the claim that, in relation to those respondents who reported fewer staff on Sundays, 27.1% reported lower workload, 23.4% reported more and 49.5% reported a similar workload.[354]

---

347 PN 25579.
348 PN 25582.
349 PN 25579, 25581.
350 Exhibit PG-34, p 42.
351 PN 25785-25788.
352 PN 25786.
353 PN 25796.
354 Exhibit PG-34, p 56, PN 25794-25795.

(d) Ms Pezzullo likewise accepted the same limitation applied to the hypotheses referred to in Table 4.7 of the Pezzullo Weekend Work Report concerning staffing levels.[355] She accepted that it "*would not be reliable*"[356] to assume that the results of the survey in relation to those questions were identical for the café and restaurant sector.

213. The end result of the above analysis is that, on the basis of Ms Pezzullo's own evidence, the contents of the Pezzullo Weekend Work Report drawn from the weekend worker survey is unable to provide reliable conclusions or inferences about matters relating to weekend work in any of the relevant industries including the retail industry. As recognised by Ms Pezzullo, the weekend worker survey simply was not designed to produce any such insights.

214. The Commission also should not accept Ms Pezzullo's evidence that the weekend worker survey was representative of people that worked weekend hours across *any* of the relevant industries.[357]

(a) As noted above, this is a survey in which 64% of respondents *did not* work in any of the relevant industries. On its face it cannot be accepted to be representative in any way of weekend workers across any or all of those industries.

(b) The significance of the fact that some two-thirds of the survey respondents to the weekend worker survey were not from any of the relevant industries was illustrated in cross-examination. In relation to that part of the Pezzullo Weekend Work Report dealing with staffing levels and workloads on weekends, the report found "*strong support*" for the hypothesis that clear majorities of workers who report higher staffing levels on Saturdays and Sundays than on weekdays also reported that they have higher workloads on weekends.[358] When cross-examined on the actual numbers underlying these conclusions, Ms Pezzullo agreed that these claims in the Report were based on 42 respondents out of 1,000 survey respondents who reported more staff on a Sunday and more work on that day.[359] As Ms Pezzullo agreed, this was only 4.2% of the sample in circumstances where 332 people did not answer the question at all.[360] Significantly, she accepted that it was possible that those 332 persons who did not respond to the question may have included all of those in the survey employed in the hotel and accommodation services sector.[361]

---

355 Exhibit PG-34, p 55.
356 PN 25790.
357 PN 25678.
358 Exhibit PG-34, p 56.
359 PN 25778.
360 PN 25779 -PN 25780.
361 PN 25781.

The same conclusion must follow in relation to the retail sector for whom there were 230 respondents.[362]

(c) The weekend worker survey was seriously skewed towards older persons. Ms Pezzullo accepted the mean age of respondents to the weekend worker survey was 45.2 compared to the relevant HILDA data indicating the age of the relevant cohort of workers as 30.8.[363] The unorthodox aggregation of "younger workers" into cohorts of 16-18 years, 18-21 years and 22-35 years (as opposed to the usual 15-19 years and 20-24 years) obscured the unrepresentative nature of the survey in relation to young people.[364] Ms Pezzullo accepted that conclusions specific to the 15-18 year old age group cannot be drawn from the weekend worker.[365] It is incapable of doing so given the disproportionately low number of survey participants in that age bracket.[366] The sub-group analysis of under 35 year olds undertaken in an effort to "*pick up the effects that may be specific to younger workers*" cannot be said to adequately represent the views of young people given the very few who participated in the survey.[367]

(d) Despite the manifestly unrepresentative nature of the weekend worker survey by age, Ms Pezzullo continued to assert that the "*sampling was designed to reflect the view of the Australian working age and older population on weekend work, time, use and access to service*".[368] Despite being asked repeatedly how the survey was designed to achieve this end, Ms Pezzullo was unable to point to any design aspects of the survey.[369] In the end, all her evidence amounted to was an *expectation* that the survey would be relevantly representative because of the use of a random sampling method on a population of 282,000 people.[370] No steps were taken, for example, to weight the survey results to ensure that they were representative according to characteristics of the relevant population.[371]

(e) The weekend worker survey also did not capture information about the level of education and occupation of participants. The absence of information about important demographic

---

362 Exhibit PG-34, p 44.
363 PN 25672.
364 Ibid. See also PN 25683-PN 25685.
365 Exhibit PG-36, [2.1.2], p 9.
366 Exhibit PG-34, Table 4.1, p 23. Compare to Exhibit SDA-36, Table 14, p 10. See also Exhibit UV-27, p 5 and PN 25673-PN 25682.
367 Exhibit UV-27, p 5.
368 PN 25700.
369 PN 25702-PN 25711.
370 PN 25709- PN 25711.
371 PN 25716.

and employment characteristics of survey participants means that it is not possible to draw conclusions about representativeness of the survey in these important respects.[372]

(f) It is also notable that the self-selected "weekend workers" in the survey included the self-employed as well as employees.[373] The self-employed are more likely than employees to have control over their working hours and are thus likely to respond differently to survey questions about the interaction of work and non-work activities.[374]

(g) A fundamental limitation on the weekend worker survey also should not be overlooked. There is evidence from Professor Charlesworth before the Commission that on-line surveys of the type here utilised are likely to be less representative than random population samples.[375] This reflects the fact that participants are a self-selected group of internet users.[376] Further, as described by both Ms Helen Bartley[377] and Dr Muurlink[378] and as acknowledged by Ms Pezzullo,[379] the weekend worker survey involved the taking of a "convenience sample" whereby respondents were paid for participating. A "convenience sample" introduces the potential for bias, which in turn risks the reliability of the conclusions drawn from the survey's results.[380] Professor Sara Charlesworth gave similar evidence noting that "*…if the online sample pool is drawn from a pre-recruited pool, as the i-Link panel appears to be, 'conditioning' or 'time-in-sample bias' may be an issue. This is because long-term panel participants may respond differently to surveys than first-time participants.*"[381]

Pezzullo evidence about employee preferences

215. The ABI relies on Ms Pezzullo's report to state that the majority of Sunday workers reported no or minor problems with Sunday work.[382] That proposed finding is however based on the irreparably flawed weekend worker survey. In relation to the specific findings relied on by the ABI, that 53 per cent of Sunday workers reported no or minor problems with Sunday work, and 50 per cent of casual workers reported no problems with Sunday work, the numbers behind the percentages reveal the uselessness of those "findings". To reiterate:

---

372 Exhibit SDA-44, [7](ii).
373 Exhibit PG-36, p 14.
374 Exhibit SDA-44, [7](iv).
375 Exhibit SDA-44, [7](i).
376 Ibid.
377 Exhibit SDA-33, [25].
378 Exhibit UV-27, p 4.
379 Exhibit PG-36, [2.1.2], p 8.
380 Op cit, fn 137.
381 Op cit, fn 135.
382 See AHA Submissions, [202]; ABI Submissions, [17.8].

(a) The weekend worker survey comprised 1,000 'weekend workers' (including self-employed workers), of which 213 are casual workers.[383]

(b) Of the 1,000 participants, work in the relevant industries.[384]

(c) Of the 357 industry participants, 230 work in retail.[385]

(d) Accordingly, it is possible that the '53 per cent of Sunday workers' reporting no or minor problems with Sunday work did *not* work in the relevant industries, and it is equally possible that *none* of the responses included in the 53 per cent figure worked in retail.

(e) Equally, it is possible – and given the very small numbers, even probable – that *none* of the 107 casual workers who reported no problems with Sunday work are employed in the relevant industries, or in retail.

Other reliance on Ms Pezzullo's evidence

216. Beyond the Weekend Worker Survey, the reliance by the employers on Ms Pezzullo's evidence is otherwise very limited and is addressed below.[386]

(a) The Pezzullo Weekend Work Report is the sole evidence cited by the ARA for the proposition "*unemployed youths and mature workers will work for a 50% penalty*".[387] Ms Pezzullo's evidence was not to that effect. The highest her evidence rose was the expression of opinion that "*it seems unlikely that reductions in penalty rates will lead to an insufficient supply of labour in the services sector*".[388] The only basis for this assertion was a previous piece of work undertaken by Deloittes. Her statement should be treated as no more than speculative and, as further outlined below, is an illustration of how Ms Pezzullo saw herself as an advocate for her clients' case.

(b) The ARA cite the following statement from the Pezzullo Weekend Work Report in support of the proposition that retail businesses will reduce labour hours in response to substantial increases in labour costs:[389]

> 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

383 Pezzullo Report, 50.
384 Pezzullo Report, Table 4.2, 44.
385 Pezzullo Report, Table 4.2, 44.
386 Ms Pezzullo's evidence in relation to Ms Yu's evidence is dealt with in Section E of these submissions.
387 ARA Submissions, para 112.
388 Exhibit PG-34, page 39.
389 ARA Submissions, para 68.

> 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 foregone.

(c) This evidence should be given no weight for the following reasons. *First*, the Commission has the benefit of detailed evidence from Professors Borland, Quiggin and Lewis in relation to the controversial aspect of labour economics to which Ms Pezzullo refers in only very general terms.

(d) *Secondly*, the statement that "*the evidence clearly suggests that penalty rates reduce overall employment by some amount*" was not even supported on the face of the Pezzullo Weekend Work Report. None of the literature referred to in the Pezzullo Weekend Work Report, save for the Synergies work referred to below, addressed the specific question of the effect, if any, of penalty rates on employment. Despite this, Ms Pezzullo would not accept that none of the literature referred to in her report could be said to clearly suggest that penalty rates reduced overall employment by some amount.[390] Ms Pezzullo's reliance on the work by Price (2005) does not support her claim as that work did not examine the effect of penalty rates on Sunday trading and the composition of the workforce. All that Ms Pezzullo said in answer to that proposition was that the Price article had "*an allusion to penalty rates and then goes on to talk about regulation in exactly the same context*"[391]

(e) *Thirdly*, Ms Pezzullo's unqualified claim that "*the evidence clearly suggests that penalty rates reduce overall employment by some amount*" is at odds with her own evidence about the "*paucity of direct information that investigates relationships between penalties per se and employment*" and that the "*bugbear*" was the absence of research and commentary about the specific effects of penalty rates on employment and hours of work.[392]

(f) *Fourthly* and significantly, her evidence is at odds with what appears to be the only specific research about the relationship between penalty rates and employment and which also happened to be undertaken in a contemporary Australian context with a focus on tourism related industries including accommodation and food. In the work by Synergies

---

390 PN 25393.
391 PN 25401.
392 PN 25403-PN 25405.

Economic Consulting,[393] a reputable Australian based firm which provides specialist economic and finance advisory services,[394] the authors concluded (emphasis added):[395]

> In short, while penalty rates from the demand side clearly don't assist in employment growth or hours worked in tourism related industries, on the basis of the extensive research in this report it would be unrealistic to expect any major increase in employment or hours worked in these industries if wages were lowered by the abolition or reduction in penalty rates.

(g) Strikingly, Ms Pezzullo did not accept that the Synergies research was a substantial and detailed piece of economic analysis, or even that it was highly relevant to the issues she was considering in her report.[396] Although the Deloitte Weekend Report made fleeting reference to the conclusions found in the Synergies work, it was not given any detailed consideration. Its findings, in the context of a paucity of material dealing with the effect of penalty rates on employment, directly undermines Ms Pezzullo's bold claim that the evidence "clearly suggested" that penalty rates reduce overall employment by some amount.

General assessment of Ms Pezzullo's evidence

217. The Commission should treat Ms Pezzullo's evidence in this proceeding with caution. That approach is well justified because, notwithstanding Ms Pezzullo's professional qualifications and experience, it is apparent that she approached her task as a witness in this proceeding as that of an advocate for her clients' case and without the requisite professional detachment the Commission should reasonably expect of expert witnesses. This conclusion is supported by a fair reading of Ms Pezzullo's oral evidence, some of which is referred to above, and her extreme reluctance to make appropriate concessions and her preference to repeatedly argue her point of view. It is also underpinned by the evidence by which Deloittes was engaged to produce the Pezzullo Weekend Report as summarised below.

218. Deloittes' and Ms Pezzullo's conception of their role as advocates for their clients was evident from the commencement of their engagement. Deloittes altered the description of the subject matter of their proposed work as concerning "atypical hours" instead of "unsociable hours" after its client expressed concern "that we don't want that to be starting the conversation" in the language of "unsociable hours".[397] More significantly, in response to further client feedback about "whether we should be attacking Sundays in particular" given "the minority finding in the

---

393 Exhibit SDA-53.
394 PN 25408.
395 Exhibit SDA-53, p 5.
396 PN 25426-PN 25427.
397 Exhibit SDA-50.

Restaurants case," Deloittes altered the design of its survey questions to bring a focus on Sundays.[398] Deloittes also adjusted its lines of enquiry to elicit evidence which might provide a means of diminishing the disadvantage associated with working unsociable hours. [399] This occurred after the following communication from its client:[400]

> In addressing the Modern Award Objective we are always at risk of falling down on the needs of the low paid. The group feels we need to come up with ways of minimising the impact. Would Deloittes be in a position to provide an analysis of broad working patterns and income received and from this identify the actual impact on employees who work these hours? It would be good to cover off on how often people work on weekends. The union experts always talk about the disadvantage of working on weekends from the perspective of those who work every weekend – they bleat about them not getting the chance to interact with family, friends etc. If we can show that in general they are only working, for example, every second Sunday then this immediately "halves" the "disadvantage".

Employer reliance on the evidence of Dr Fiona Macdonald

219. The ARA and ABI rely on the evidence of Dr Fiona Macdonald in support of various propositions said to justify the reduction of Sunday penalty rates under the Retail Award.[401]

220. This reliance is mistaken for two reasons. First, it implicitly treats Dr Macdonald's evidence as providing statistically generalisable conclusions. As explained in Section E below, Dr Macdonald's evidence is qualitative in nature and is not statistically representative. The strength of qualitative research such as that undertaken by Dr Macdonald is to reveal the complex issues underlying attitudes, preferences and behaviours including shedding light on contexts, motivations and explanations concerning certain experiences.[402]

221. Secondly, as outlined in Section E below, in order to accurately report upon the key themes arising from her qualitative research, a rigorous approach to the analysis of the interviews is required. Dr Macdonald used the academically recognised "grounded approach" to such analysis.[403] This exhaustive and detailed approach inherently minimised the risk of selectivity or omission in her reporting of the key themes emerging from the data.[404] The employers have

---

398 PN 25244-PN 25247. See also Exhibit SDA-51, p 2. See, for example, questions 8 and 9 (Appendix A to Exhibit PG-34).

399 PN 25256-PN 25257.

400 PN 25249. See also PN 25250-PN 25258.

401 ARA Final Submissions, [37], [41], [42], [46], [96(e)], [97], [108], [110], [125] and [126]. See also ABI Final Submissions, [20.52 (c) and (d)].

402 Exhibit SDA-43, [1] referring to Flyvbjerg, B (2006), 'Five misunderstandings about case-study research', Qualitative Inquiry, vol 12, no 2, pp 219-45; Yin, R (2003), Case study research: design and methods, 3rd edition, Sage, Thousand Oaks, Calif.

403 Exhibit SDA-43, [15] referring to Strauss, A and Corbin, J (1990) 'Basics of qualitative research: techniques and procedures for developing grounded theory', Sage Publications, Thousand Oaks, Calif.

404 PN-24459.

disregarded the integrity of this approach by "cherry-picking" certain of the telephone interviewees' responses to support particular propositions, often out of context and without the benefit of any background analysis having been undertaken on the data as a whole. The following examples illustrate this selectivity and the employers' inappropriate reliance on Dr Macdonald's evidence:

[redacted]

[redacted]

[redacted]

(e) [redacted]

405 ARA Final Submissions, [41].
406 Exhibit Retail-11, p 10.
407 ARA Final Submissions, [42].
408 Exhibit Retail-11, p 44.
409 ARA Final Submissions, [42].
410 Exhibit Retail-11, p 44.
411 ARA Final Submissions, [42].
412 Exhibit Retail-11, p 125.
413 ARA Final Submissions, [46(c)].

[redacted]

Employer reliance on the evidence of Professor Sara Charlesworth

222. In seeking a reduction in the Sunday penalty rate under the Retail Award, the ARA relies on the evidence of Professor Sara Charlesworth to contend that Australian society and working patterns have changed significantly since Sunday penalty rates were fixed at double time[415] and to argue that retail employees have particular characteristics that reduce the disability associated with working on Sundays.[416]

223. The first of these submissions relies in particular on Professor Charlesworth's evidence that, according to AWALI 2014 survey data, 69% of retail employees work on weekends.[417] However, the ARA fails to refer to Professor Charlesworth's further evidence,that AWALI data also reveals that the percentage of employees who worked weekends in 2008 is broadly similar to that who worked weekends in 2014.[418] The evidence is that there has not been any significant change in the proportion of retail employees working on weekends since 2008.

224. In relation to the submission about the particular characteristics of retail employees, the ARA parties suggest that, when compared to employees generally, they are more likely to identify lower AWALI scores in relation to weekend work.[419] This submission is fundamentally flawed given Professor Charlesworth's evidence that:

> …there was no statistical difference between the degree of work-life interference experienced by retail employees in respect to the relative degree of work-life interference of working Saturdays and/or Sundays when compared to all employees…it is reasonable to assume that retail employees will have similar work-life interference patterns in respect of Sunday and Saturday working to all employees in the survey.[420]

225. Moreover, as Professor Charlesworth notes, examining the individual measures of work-life interference that make up the AWALI index for retail industry employees (as the ARA parties attempt to do[421]) is not reliable because of small cell sizes, which limit any testing for statistical

414 Exhibit Retail-11, pp 118-119.
415 ARA Final Submissions, [32].
416 ARA Final Submissions, [96(e)] and [97].
417 ARA Final Submissions, [32]. See also Exhibit SDA-43, [40].
418 Exhibit SDA-43, [40].
419 ARA Final Submissions, [96(e)] and [97].
420 Exhibit SDA-43, [12]. See also at [7], [15] and [34].
421 ARA Final Submissions, [97].

significance.[422] The most accurate approach to analysing the full impact of weekend work on various dimensions of work-life interference is to use the aggregate measure rather than the individual measures on the AWALI index.[423]

226. The ARA and the ABI also seek to rely on Professor Charlesworth's evidence to support a submission that, although there is some statistical difference between the interference caused by Saturday compared to Sunday work, it is more significant that Saturday and Sunday together stand out above weekday work in terms of work-life interference.[424] This involves a misapplication and interpretation of the AWALI data. First, the 2014 AWALI survey data as presented in Professor Charlesworth's report focuses on the difference between Sunday and Saturday working – no detailed analysis was done of aggregate weekend work as against weekday work.[425] Second, no valid comparison can be made between the raw data about the level of work life interference experienced by those who sometimes, often or almost always work on Saturday and those who sometimes, often or almost always work on Sunday. There are different numbers of employees in each group, leading to different and incomparable percentage outcomes on the AWALI index, and there is overlap between each group, many survey participants falling within both.[426] The source of the data extracted in the ARA submissions is, in any event, unclear and does not appear to come from the data provided in Professor Charlesworth's expert report.[427]

Ms Emily Baxter

227. The ARA and ABI rely on the evidence of Ms Emily Baxter concerning a survey of employers in the retail industry developed by the Australian Business Lawyers and Advisors (**ABLA**) to support their claims for a reduction in both the Sunday and public holiday penalty rates.[428] The evidence is said to support the propositions that penalty rates on Sundays and public holidays negatively impacts on employment on those days[429] and that there would be an increase in labour hours worked if there was a reduction in such penalty rates.[430]

228. The Commission should not give weight to the results of this survey for the reasons set out below.

229. The survey was sent to 8700 employers being members of the NSWBC, Victorian Chamber of Commerce and Industry, ARA, NRA, MGA and the Australian Newsagents Federation. Ms

---

422 Exhibit SDA-43, [31].
423 Exhibit SDA-43, [3]. See also PN 23684.
424 ARA Final Submissions, [129]. See also ABI Final Submissions, [20.49].
425 Exhibit SDA-43, [13].
426 See, for example, Tables 5-14, pp 29-33 and Tables 15-24, pp 34-38.
427 ARA Final Submissions, [128].
428 Exhibit ABI-9.
429 ABI Final Submissions, [27.43]-[27.61]; ARA Final Submissions, [84(b) and (d)].
430 ARA Final Submissions, [92].

Baxter, who has no market research or statistics qualifications or experience,[431] had no direct knowledge of the terms upon which the employer organisations distributed the survey to their members,[432] or the proportion of their total membership who was sent the survey.[433] Responses were received from only 690 employers, being a response rate of 7.9%.[434]

230. Ms Bartley, an independent accredited statistician and qualified practicing market researcher with 25 years experience in the design and conduct of surveys, gave evidence that a response rate in this vicinity is extremely low and gives rise to a significant potential for non-response bias.[435] In *$2 and under (No 1)*, a Full Bench of the AIRC found that a response rate to a survey of retailers of 11.7% "*by itself*" meant that *"reliance on the survey results must be heavily qualified"* such that no findings could be made in relation to the population of employer organisation members being surveyed.[436] The same analysis and conclusion applies to the survey the subject of Ms Baxter's evidence.

231. This conclusion is even starker if one confines an examination of the survey results to those employers bound by the Retail Award. Of the 690 respondents to the survey, only 574 indicated that the Retail Award applied to their business.[437] Of those respondents, 87 indicated that an enterprise agreement applied to their firm; they were accordingly exited from the survey after question 6.[438] Thus, for the purposes of distilling the results from the survey relevant to the Retail Award, the answers of only 487 respondents were relevant.

232. Further, in the *Annual Wage Review 2012-2013 Decision,* the Full Bench stated, in evaluating the extent to which it could rely on an a series of membership surveys: [439]

> There are well-understood rules about the conduct of surveys that need to be followed if the results of a survey of a sample of a particular population are to accurately represent the picture that you would get if you obtained the same information from the entire population. These rules include that the sample size or proportion sampled must be large enough. Most important, the sample for the survey must be selected on a random basis. If a membership base is used as the basis for a survey, then it is essential that those that respond are properly representative of the membership base (e.g. by firm size, form of ownership, industry sector, geographic location). Where this is not the case, then the responses become more like case studies or anecdotes – accounts of the situation of those who did respond, but not to be taken as representative of the survey population (e.g. the membership) as a whole. Even where the survey is representative of the membership, it needs additional evidence to show that it is representative of, for

---

431 PN 17435- PN 17440.
432 PN 17443.
433 PN 17447-PN 17448.
434 Exhibit ABI-9, [8].
435 Exhibit SDA-33, [3], [32].
436 *$2 and under* at [65].
437 Exhibit ABI-9, [22].
438 Exhibit SDA-33, [18] and [27].
439 [2013] FWCFB 400 at [441].

> example, employers more broadly. A valuable step in assessing the representativeness of the respondents is to check the answers against other data that is known to be reliable, such as those from the ABS, where possible.

233. Here, not only is the sample size extremely low, there is no way of ascertaining whether the Baxter survey is representative, either in terms of the employers' membership base or of employers more broadly.

234. Moreover, many respondents did not answer all of the questions in the survey.[440] Ms Baxter conceded that a substantial number of the respondents skipped questions asked of them, including 227 in relation to question 24 and 229 in relation to question 25.[441] These two questions, which related to whether a reduction in penalty rates would impact on an employer's allocation of hours to employees on Sundays and on other days of the week, also failed to provide respondents with a multiple choice option of "I don't know" - respondents were forced to choose from "no impact", "less hours" or "more hours." [442] An analysis of the questions completed by the respondents shows that of the 26 questions, only four questions were completed by all respondents.[443]

235. In reporting upon the reasons why trading hours differed on Sundays and public holidays, Ms Baxter grouped the answers into seven categories.[444] However, Ms Baxter confirmed that those responses which fell into the "Wages/Costs" category included those in which there was no mention of wages.[445] Very little therefore can be concluded from the reported survey results about the role of wages, including penalty rates, in the reasons why employers' trading hours differed on Sundays and public holidays from other times through the week.

236. In any event, it must not be overlooked that the survey results reflect perceived effects reported by respondents within the respondent's firm, not actual effects. As stated by the Full Bench in a similar context in *$2 and under (No 1)*:[446]

> The survey responses reflect perceived effects reported by respondents, not actual effects. Significant variation may occur between expected and actual outcomes.
>
> The employment effects reported are gross effects: that is, the perceived effect on employment within the respondent's firm. These effects might be offset, at least in part, by positive employment effects amongst other employers. As an example, a firm which ceased trading on a Sunday would reduce its employment but this loss in employment might be offset in the broader context by a nearby competitor increasing staff levels to

---

440 PN 17456.
441 PN 17458-PN 17464.
442 PN 17465. See also Exhibit ABI 9, Exhibit EB-2, Tab 2, Qns 24 and 25.
443 Exhibit ABI-9, Exhibit EB-2, Tab 3, Qns 1, 2, 4 and 6.
444 Exhibit ABI-9, [38]-[39].
445 PN 17526 – PN 17529.
446 (2003) 127 IR 408 at [73]-[74].

> accommodate increased trade on Sundays. This is not an unrealistic example since it is clear that many firms do trade on Sundays and pay penalty rates to their employees. The perceptions of the respondent employers may not take the impact of the proposed award on other employers into account. …

Lay Witnesses

237. The employer parties rely on the evidence of six retail employers in support of a number of contentions upon which they invite the Commission to make findings. Set out in Appendix 1 to these submissions is a table which particularises these contentions and which provides a detailed analysis of the evidence upon which the ARA and ABI rely in relation to each of them. This analysis reveals that the retail employers made important concessions on a number of key issues which had the effect of undermining the cogency of the particular contentions sought to be made by the employer parties. Of note is the fact that much of the evidence referred to by the ARA and the ABI is taken from the evidence in chief of the particular retail employer, with little attempt being made to engage with the evidence given in cross-examination.

238. Below, the *primary* contentions made by the employers on the basis of the lay evidence are critically examined and, where relevant, reference is made to the detailed analysis contained in Appendix 1.

A reduction in Sunday penalty rates will positively impact employment through increased labour allocation

239. It is not disputed that the retail employer witnesses gave evidence that they considered themselves restricted in the number of hours which they could offer their employees on Sundays. However, whereas the retail employer witnesses suggested that this was a result of the cost of labour, specifically penalty rates, a proper analysis of the employers' evidence reveals that demand, or anticipated levels of sales, is the primary driver of Sunday labour allocation. Reference is made to Appendix 1, in particular, Proposition 1a) and Proposition 1b).

240. Moreover, there is little evidence to support the proposition that it is Sunday penalty rates in any event which are inhibiting employers in providing employees with additional hours or in providing opportunities to the unemployed; again, demand is the key determinant. Further, most of the retailers gave evidence that they fixed labour costs as a percentage of sales,[447] meaning that any restriction on rostering additional Sunday hours falls away if the Sunday sales justify the cost regardless. In such circumstances, demand, not the quantum of the wages bill, determines Sunday employment levels. Reference is made to Appendix 1, in particular, Proposition 5 and Proposition 10.

---

447 PN 17032, PN 16377 and PN 15992.

241. Further, at its highest, the evidence of the retail employers is that most would *consider* rostering additional hours if penalty rates were reduced. Under cross-examination, none were prepared to commit to doing so. Retail employers would only roster more work for any employees, particularly managers or experienced staff members, if it was profitable to do so. Reference is made to Appendix 1, in particular, Proposition 5.

242. Some of the key evidence distilled from the more detailed analysis undertaken in Appendix 1 as relevant to the above analysis is captured in the box below.

When Mr D'Oreli was asked under cross-examination about the basis on which he asserted that all or at least a substantial majority of the labour cost savings brought about by a reduction in penalty rates would be re-invested into labour hours within his store, he conceded that he hadn't undertaken any particular analysis or calculations[448] and that it was something that he would reassess if the penalty rate change came to pass.[449]

In relation to whether he would roster more work for employees, Mr Barron conceded:[450]

> …In general terms, you agree that the changes you outline there would only transpire if you were satisfied in relation to each particular store that in the face of reduced Sunday penalty rates the income made it profitable to trade on a Sunday or to extend your trading yours on that day?---Correct.

Similarly, Mr Goddard's evidence revealed that any additional hours would be sales driven:[451]

> …Sorry, I was just going to say –which is our preference to do, but – you know, it's a much broader discussion than what I'm allowed to offer you at the moment.
>
> Whether those additional hours were in fact put back into the business would depend principally on your anticipated level of sales in particular stores, that's correct?---Yes, it would do.

Accordingly to Mr Gough, he'd only *"anecdotally"*[452] looked at how the impact of the proposed reductions in penalty rates might improve profitability. Ms Daggett conceded that, whether she offered additional hours to new or existing staff was, *"...a thing that you have to sort of play with and see whether it's going to work or not."*[453]

Mr Barron explained in cross-examination that:[454]

448 PN17198.
449 PN17194-PN17206.
450 PN 16245.
451 PN16436-PN 16437.
452 PN16690.
453 PN17053.
454 PN15992.

> ...That dollar wage budget is then converted to a percentage and the reason we give a percentage – if I may explain, the reason we give a percentage and they don't have to stick to a dollar wage budget is because our business trading fluctuates from day to day, from week to week, from store to store. So managing the flexibility to staff up when we're exceeding sales budget and thereby give better customer service and similar if the store is underperforming, where possible, we flex down. So by giving her a wage percentage budget she has the ability to staff up knowing that she's still going to get her incentives.

A reduction in Sunday penalty rates will enhance productivity and increase retail sales

243. Whilst the employer retail witnesses gave evidence that they *believed* Sunday penalty rates were impacting negatively on their Sunday trading, there was little probative evidence that it was in fact penalty rates or the cost of labour more generally that was the cause. The level of demand on Sunday was key to determining trading hours, productivity and profitability. Competition[455] or competition assisted traffic,[456] rent and lease costs,[457] externally imposed operating hours, [458] and customer demographic[459] were the other relevant factors identified by the retail employer witnesses as contributing to the decision whether to trade on Sundays. Further, no evidence led by the retail employers demonstrated that there was any critical need for their businesses to carry out additional operational tasks on Sundays, already being performed on other days. Reference is made to Appendix 1, in particular, Proposition 3.

244. Some of the key evidence distilled from the more detailed analysis undertaken in Appendix 1 as relevant to the above analysis is captured in the box below.

Under cross-examination, Mr Barron, conceded that central to the question of whether to open for retail trade on any given day is the anticipated volume of sales relative to the cost of opening:[460]

> I take it that it's retailing basics that the key determinant of whether a – a key determinant of whether store opens on any particular day is an estimation of whether or not the volume of sales are sufficient to warrant the opening on that day?---The volume of sales when related to the overhead.
>
> Yes?---Yes. Not sales alone, it's sales related
>
> No, the sales relative to how much it's going to cost you to open?---Yes, correct

In response to questioning from Commissioner Hampton, Mr D'Oreli confirmed that:[461]

---

455 PN16762. See also PN 16766, PN 16792 and PN 17012-PN 17013.
456 PN 16107.
457 PN 16127 and PN 16144.
458 PN 16084.
459 PN16287.
460 PN 16101-PN 16103.
461 PN 1720.

> …There's a lot of factors [why the other 10 stores won't open on Sunday even if penalty rates are reduced]…. The other ten may not be open because there is no Sunday traffic flow or there's no environment for that Sunday shopping.

Mr Antonieff acknowledged as follows:[462]

> …What you're saying is that that further reduction is principally attributed to the Woolworths opening up next door? – Absolutely. In the process of managing labour costs, yes.

Mr Barron accepted under cross-examination that if restocking or administration around the store is not done on a Sunday, it is simply done on another day of the week[463] and Mr Gough acknowledged, when questioned:[464]

> Yes, and those duties and work just get done when you can on other days, other than Sundays?---Well, they're also rostered on other days as well. We have days for doing different tasks and those tasks don't happen to fall on Sundays.

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

245. There was little evidence from the employer lay witnesses to support the contention that increased Sunday penalty rates in NSW negatively impacted employment and labour hours in the retail industry. The employers rely on the evidence of Mr Barron, Mr Goddard and Ms Daggett to suggest that there was such an impact. A complete analysis of those witnesses' evidence shows that this characterisation of the evidence is misleading. Reference is made to Appendix 1, in particular, Proposition 2.

246. Some of the key evidence distilled from the more detailed analysis undertaken in Appendix 1 as relevant to the above analysis is captured in the box below.

> In cross-examination, Mr Barron conceded that he had not determined the net effect of the transition to the Retail Award for NSW and ACT Sportsgirl and Sussan stores having regard to both the increase in Sunday costs and other offsetting benefits.[465] Moreover, he appeared unwilling to accept that the changes he reported in Sunday employment hours in Victorian stores since 2010 could not be attributed to penalty rates as they had remained unchanged in that state.[466]
>
> Mr Goddard's evidence in cross-examination was that he had been able to grow his business from 32 to 56 stores in less than four years[467] and that the proportion of the hours worked on Sundays

462 PN 16766. See also PN 16792.
463 PN 16165.
464 PN 166680.

465 PN16184-PN 16197.
466 PN16234.
467 PN 16339.

had actually increased between 2009 and 2015 from eight to ten per cent.[468] Mr Goddard also admitted to furthering the growth of the company in Queensland, NSW, ACT and Victoria, opening eight stores in the last 12 months and recruiting for sales, management and merchandising staff.[469]

Ms Daggett could not recall the operative industrial instruments that regulated her business in NSW prior to 2010, casting doubt on her capacity to assess the impact of any transition to the Retail Award after that date.[470]

468 PN 16344.
469 PN 16427 – PN 16430
470 PN 17025-PN 17029.

SECTION E: EXPERT EVIDENCE RELIED ON BY SDA AND PROPOSED FINDINGS

247. This section of the submissions examines both the expert and lay evidence on which the SDA relies in resisting the ARA and ABI parties' applications for the reduction in Sunday and public holiday penalty rates under the Retail Award. Detailed consideration is given to the evidence of each expert witness, followed by an analysis of the retail employee evidence adduced by the SDA in this proceeding.

Ms Serena Yu

248. In the Transitional Review in which the employers sought to reduce Sunday penalty rates in the Retail award from 100% to 50%, the Full Bench observed that, although many employers who were covered by the award were "*subject to increasing Sunday penalty rates through the transitional arrangements*," there was "*no evidence as to how the particular different levels of the transitional arrangements have impacted upon employment, costs and profitability*." [471]In referring to the "*significant 'evidentiary gap'* " in the cases put by the employers, the Full Bench went on to state that:[472]

> It is particularly telling that there is no reliable evidence regarding the impact of the differing Sunday (or other) penalties when applied upon actual employer behaviour and practice. This is a most unfortunate omission given that the transitional provisions, which rely upon the differing NAPSA entitlements, provide an opportunity for evidence to be led from employers operating in multiple states to provide these comparisons. There is also no reliable evidence about the impact of the existing differential Saturday and Sunday penalties upon employment patterns, operational decisions and business performance.

The Full Bench noted that, in the context of the 4 yearly review, it would be particularly assisted by evidence regarding the above matters.[473]

249. Despite the above invitation from the Full Bench and the fact that in this proceeding the employers have adduced evidence from employers including some operating in multiple States, the employers have not led any evidence about the impact of differing Sunday penalties applying in different States due to the operation of transitional arrangements. Evidence about such matters is peculiarly within the knowledge of employers represented by the employer parties and is not known by the SDA. Despite leading detailed evidence from 3 employers[474] with national or multi-State operations about the claimed impact of Sunday penalty rates, the employers have not preferred any explanation for why evidence of the type referred to by the Full Bench has not been adduced.

---

471 [2013] FWCFB 1635 at [144].
472 [2013] FWCFB 1635 at [234].
473 [2013] FWCFB 1635 at [236].
474 Messrs Barron, Goddard and D'Oreli.

250. Given the above matters and in circumstances where the ARA and related parties are now seeking the same relief as was sought in the Interim Review, the Commission should proceed on the basis that, if evidence about the about the impact of differing Sunday penalties applying in different States was available and which assisted the employers' case, it would have been adduced. It was not.

251. Although the SDA is not in a position to adduce evidence about the impact at the level of an individual firm of recent differential Sunday penalty rates on matters such as employment patterns, operational decisions and business performance, the expert evidence of Ms Yu is squarely directed at the employment effects of differential Sunday penalty rates at an aggregate State wide level in the retail sector. Ms Yu's evidence examined the existence and extent of any employment effects generated by the five incremental increases in Sunday penalty rates imposed in NSW between 2010 and 2014 pursuant to the transitional arrangements. Over the same period, Sunday penalty rates in Victoria remained unchanged. These circumstances therefore offered up a "natural experiment" to empirically test the nature of the relationship between penalty rates and employment, being a matter of theoretical controversy and about which there is a paucity of empirical research.

252. Ms Yu's research, the results of which are set out in her report entitled "*Evaluating the Impact of Sunday Penalty Rates in the NSW Retail Industry*" dated 1 September 2015 (the **Yu Report**)[475] and elaborated upon in her further evidence given to the Commission,[476] was based on a quasi-natural experimental approach known as a difference-in-difference (**DID**) regression model.[477] That methodology is directed at comparing changes in outcomes between a "treatment" group and a counterfactual "control" group, before and after a policy intervention. Ms Yu's evidence that the DID model has been used widely in diverse areas including labour economics, psychology, public health and education was unchallenged.[478] It was the methodology utilised in the seminal work Card & Krueger in 1994 which examined the impact of changes to the minimum wage on employment.[479]

253. In applying the DID model, Ms Yu utilised regression analyses to identify whether the increases in Sunday penalty rates in NSW between 2010 and 2014 gave rise to adverse effects on employment as measured by three measures: (i) the *total number of employees* in the NSW retail industry; (ii) *the aggregate number of hours worked* by employees in the NSW retail industry;

---

475 Exhibit SDA-39.
476 Statement of Serena Yu dated 5 November 2015, Exhibit SDA -40 (**Yu Reply**); Witness Statement of Serena Yu dated 18 December 2015, Exhibit SDA-55 (**Yu Rejoinder**).
477 Exhibit SDA-39, pg 15.
478 Exhibit SDA-39, pg 16.
479 Exhibit SDA-39, pg 16.

and (iii) the *probability of working on Sundays* in the NSW retail industry. In undertaking this analysis, Ms Yu controlled for numerous State-specific factors, namely:[480]

(a) the employment-to-population ratio for all workers;

(b) the employment-to-population ratio for youth workers aged 15 to 24;

(c) the unemployment rate for all workers;

(d) the unemployment rate for youth workers aged 15 to 24;

(e) state retail sales;

(f) time trend;

(g) quarterly seasonal factors.

254. In relation to *total employment* in the New South Wales retail industry, the regression analysis demonstrated that the increases in Sunday penalty rates in NSW had "*no consistent effects on employment*".[481] Ms Yu identified and concluded that, although the number of employees fell following the initial increase in Sunday penalty rates in 2010, the magnitudes and directions of the employment effects thereafter varied and were statistically insignificant such that the cumulative effect of the increase in penalty rates "*was not statistically different from zero*".[482]

255. The same results emerged when *aggregate hours* worked in the NSW retail industry was considered. Ms Yu identified and concluded that, although there was a drop in aggregate hours in 2010, the following years showed variable effects in magnitude and direction such that the "*cumulative effect on hours was again statistically insignificant*".[483]

256. In the Yu Report, Ms Yu summarised her conclusions about the effect on aggregate employment and aggregate hours in NSW of the five increases in Sunday penalty rates in NSW as follows:[484]

> Overall, the results indicate that the cumulative effect of the incremental increases in Sunday penalty rates has been inconsistent and statistically insignificant. After the five increases moving from time and a half to double time in NSW retail, the impact has been to have no significant effect on the total number of employees or hours worked.

480 Exhibit SDA-39, pg 20.
481 Exhibit SDA-39, pg 21.
482 Exhibit SDA-39, pg 21.
483 Exhibit SDA-39, pg 21.
484 Exhibit SDA-39, pg 21.

257. In a check against these findings, Ms Yu then considered whether, in the context of increases in Sunday penalty rates, NSW employers did not simply reduce staff and/or working hours, but instead redistributed them away from Sunday work.[485] This was achieved by undertaking a regression analysis on HILDA data which captured information about the proportion of retail employees in NSW and Victoria who reported usually working on Sundays. Using a linear probability model, the regression analysis showed the change in probability of NSW retail workers working on a Sunday following each of the Sunday penalty rate increases between 2010 and 2013.[486] Three models were used to undertake this analysis: one without controls for other factors; one with controls for important demographic differences between employees in the two States;[487] and another with controls for workplace differences. Ms Yu's evidence about the results of these analyses was as follows:[488]

> Again, the results show that the cumulative effect of the increase in Sunday penalty rates was not statistically different from zero, and year to year, the effects were also found to be statistically insignificant and inconsistent. The analysis did find a large positive effect amongst junior employees, who reported being much more likely to work on Sundays following the increases in penalty rates. However, this result for junior workers was found in only one year (2012), and not consistently over the period of increasing penalty rates. Moreover, there was no commensurate decline in non-junior employees working on Sundays. It is likely that other factors are motivating these preferences for deploying junior employees on Sundays.

258. On the basis of her analysis of changes in aggregate employment, aggregate hours worked and the probability of working on Sunday as outlined above, Ms Yu's ultimate conclusion set out in the Yu Report was that:[489]

> Overall, the research showed no systematic evidence of an adverse effect on employment following the transitional increases in the Sunday penalty rates in the New South Wales retail industry.

259. The Yu Report was the subject of a far ranging and extensive critique by Ms Pezzullo from Deloitte Access Economics.[490] Ms Yu responded to and engaged with these criticisms.[491] Her response was considered and included the making of concessions and revisions to her analysis in light of some of the specific matters raised by Ms Pezzullo. This reflects positively on Ms Yu's

---

485 Exhibit SDA-39, pg 22.

486 Exhibit SDA-39, pg 23. As noted by Ms Yu at footnote 16, the latest wave of HILDA data was collected in August-September 2013 and as such evaluation of the fourth increase in Sunday penalty rates on 1 July 2013 is based on very limited data.

487 Exhibit SDA-39, pg 23. As noted by Ms Yu retail employees in New South Wales were shown to be more likely to be female, younger and more likely to be employed on a casual basis.

488 Exhibit SDA-39, pg 28.

489 Exhibit SDA-39, pg 28.

490 As set out in Exhibit Retail-12 and Exhibit Retail-13.

491 See the Yu Reply (Exhibit SDA-40); and the Yu Rejoinder (Exhibit SDA-55).

commitment to her area of professional expertise and the independent disposition she adopted as an expert witness in the proceeding.

260. Ms Yu's constructive engagement with Ms Pezzullo's criticisms is highlighted by Ms Yu's acceptance that her original analysis in the Yu Report could be improved by accommodating and addressing three particular issues raised by Ms Pezzullo. In the Yu Rejoinder, Ms Yu modified her original analysis in light of Ms Pezzullo's critique by:[492]

(a) testing State-based time trends to check the assumption of common employment trends across Victoria and New South Wales;

(b) using period-specific dummy variables instead of a time trend variable to account for period-specific effects; and

(c) commencing the analysis from 2001 instead of 2000 to remove the possibility of State-specific employment effects caused by the introduction of the GST in July 2000.

261. With these modifications, Ms Yu revised her original analysis. Two differences emerged as compared to the results of the original analysis:[493]

(a) the statistically significant negative effect of the increase in penalty rates on employment outcomes in NSW in the first year (2010) was greater than originally identified;[494] and

(b) a weakly significant *positive* effect on employment in NSW was identified in the second year, whereas no statistically significant effect on employment or hours had been identified in the original analysis.

262. Having revised her original analysis in this way, Ms Yu concluded that that results of the analysis was:[495]

> … otherwise consistent with the original analysis in the Yu Report and the conclusion that the five increases in Sunday penalty rates in New South Wales did not have a systematic effect on aggregate employment outcomes in the New South Wales retail industry

263. Although Ms Pezzullo read the Yu Rejoinder,[496] she did not directly challenge the revised analysis advanced by Ms Yu. Her evidence largely did not engage with the content of the Yu

---

492 See Yu Rejoinder, paras 9-11.
493 Yu Rejoinder, para 13.
494 Being a reduction in total employment of 7.7% compared to 4.7% and a reduction in aggregate hours worked of 7.1% compared to 6.1%.
495 Yu Rejoinder, para 14.
496 PN 25854.

Rejoinder and was instead a reiteration of her previous evidence (which had been addressed by Ms Yu) that there had been a structural break in the employment data such that the common trend assumption did not hold[497] (considered below).

264. Despite the breadth and number of criticisms made of the Yu Report by Ms Pezzullo, the employers only rely on the four criticisms and submissions referred to below. In the following section of these submissions, those criticisms and submissions are shown to be either without foundation or to be overstated such that the Commission should accept Ms Yu's evidence summarised above.

265. On the basis of Ms Yu's evidence, the Commission should accordingly find that the increases in Sunday penalty rates under the Retail Award in the NSW retail industry between 1 July 2010 and 1 July 2014 did not have an adverse effect on employment, including Sunday employment, in the NSW retail industry. The broader significance of that finding in the context of this proceeding is further considered below.

Employer criticism of Ms Yu's evidence and related submissions

266. The employers advance the following criticisms of Ms Yu's evidence and related submissions , each of which is addressed separately below:

(a) Ms Yu's analysis is invalid because of the absence of a common trend in employment between Victoria and New South Wales;[498]

(b) Ms Yu's conclusions are unreliable because of a failure to control for a number of variables in the period after 2010;[499]

(c) contrary to Ms Yu's conclusions, Ms Pezzullo's evidence shows that there has been a statistically significant and enduring reduction in both employment and hours worked in NSW from the increases in Sunday penalty rates;[500] and

(d) even if Ms Yu's analysis is accepted, it shows that the increases in Sunday penalty rates had adverse employment effects in 2010/11 and does not in any event enable reliable conclusions to be drawn about the impact on employment of decreasing penalty rates.[501]

---

497 PN 25826-25841.
498 ARA submissions, para's 72-74; ABI submissions para's 27.31-27.33.
499 ABI submissions para's 27.34-27.42.
500 ARA submissions, para's 75-77.
501 ARA submissions, para's 80-83.

The common trend assumption

267. It is common ground that the validity of the DID analysis undertaken by Ms Yu requires the existence of comparable State employment trends prior to the increase in Sunday penalty rates in NSW from 2010.

268. Contrary to the ARA's claim, Ms Yu's analysis did not assume the relevant trends for Victoria and New South Wales were the same. Ms Yu explicitly directed herself to this premise in the Yu Report by setting out graphical representations of data which showed parallel trends in terms of total retail employment, aggregate retail full-time hours and aggregate retail part-time between New South Wales and Victoria in the period between 1991 and 2009.[502]

269. It is correct that Ms Pezzullo did undertake a trend-break analysis to further test whether the common trend assumption was sound. She concluded that there was a break in the trend, at around the end of 2007. Ms Yu's evidence was that the trend-break analysis conducted by Ms Pezzullo did not invalidate the results in the report.[503] She gave three reasons for this conclusion, none of which were challenged by Ms Pezzullo in her evidence on the Yu Rejoinder:[504]

(a) Volatility in the employment data in NSW between 2007 and 2010 does not invalidate the existence of common employment trends. The existence of those trends is revealed in Figures 2 and 3 in the Yu Report and Figures 1 and 2 in the Yu Reply. As Ms Yu stated in the Yu Reply, relevant academic standards do "*not require that the parallel trends be precisely the same, rather that substantial grounds for invalidating the methodology be ruled out*".[505] What is required, is that the common trend assumption apply in full to the relevant "before" period (i.e. 2000 to July 2010) "*and not to sub-periods effectively 'cherry picked' by the researcher,"* being an exercise in "*data-mining.*"[506]

(b) Further and in any event, Ms Yu was able to demonstrate that there was no actual structural break in the NSW employment data as asserted by Ms Pezzullo. She accepted that, in the absence of any control variable, the trend in NSW in employment data before and after November 2007 is different.[507] As noted by Ms Pezzullo, the obvious hypothesis for that break was the global financial crisis.[508] Ms Yu then extended Ms

---

502 Yu Report, pg 11-13.
503 Yu Rejoinder, para 6.
504 Yu Rejoinder, paras 6(i)-(iv).
505 Yu Reply, para 7(b).
506 Yu Reply, para 7(b). As stated by Ms Yu, "data-mining" involves the search for patterns in data without prior hypotheses for why these patterns might exist.
507 Yu Rejoinder, para 6(iii).
508 Yu Rejoinder, para 6(ii).

Pezzullo's analysis by adding a control variable to account for the impact of the global financial crisis.[509] When this was done, the trend-break in November 2007 apparent on the raw data was no longer present.

(c) Thirdly, Ms Yu had tested whether state-specific trends materially affected the results of her original analysis. She concluded that they did not.[510] This is a matter which Ms Yu incorporated in her revised analysis and adds a further robustness check to the analysis.

270. Contrary to the evidence about what is required by the common trend assumption, the ABI "cherry picks" a number of periods between 2006 and 2010 when the trends in employment and hours of work diverged between Victoria and NSW.[511] Such differences are unsurprising and were properly acknowledged by Ms Yu in cross-examination. The ABI omits to note however that Ms Yu also stated that these differences were "*not relevant to the methodology*".[512] Ms Yu's evidence in this regard was not challenged. This is understandable in light of Ms Yu's unchallenged evidence that the DID methodology requires comparable or similar trends and not precisely the same trends.[513] The ABI's criticisms are misdirected and without foundation.

Failure to control for post-2010 variables

271. The ABI contends that Ms Yu's analysis is inherently unreliable because of *"all of these differences between the economic conditions prevailing in NSW and Victoria"*" and that "*any number of factors*" could have influenced employment in NSW.[514] This submission should be rejected for the following reasons.

(a) The ABI has not proved that there were in fact differences in economic conditions between the two States in relation to sales margins and operating profits between employers, differences in business confidence, differences in energy costs and differences in other costs associated with running a business.

(b) The only differences arguably established are confined to changes in workers' compensation premiums in NSW and changes in payroll tax arrangements in that State. Even if it is assumed that these changes constituted a significant net change in the regulatory or cost burden on employers, there is no evidence of the extent of those effects on the retail industry. Nor is there any evidence about the existence of any relationship

509 Yu Rejoinder, para 6(iii).
510 Yu Reply, para 11(k); Yu Rejoinder, para 6(iv).
511 ABI Submissions, paras 27.31-27.33.
512 PN 22658.
513 Exhibit SDA-55, para 5, Exhibit SDA-40, paras 7(a) and (b).
514 ABI Submissions, para 27.42.

between changes in payroll tax and employment and between changes in workers' compensation premiums and employment. It is entirely speculative that any of these changes would have affected employment outcomes in the NSW retail industry.

(c) It is not to be overlooked that Ms Yu controlled for many variables in her analysis.[515] Her evidence was that she took into account variables in relation to which there was available information.[516] The import of the ABI's case is that, unless *all possible variables* are controlled for, the results of an economic regression analysis are inherently unreliable. The positing of such a standard of perfection is not only self-serving, but unrealistic.

Statistically significant and enduring reduction in employment and hours in NSW?

272. The ARA relies on Ms Pezzullo's evidence that her modelling establishes that there had been a statistically significant and enduring reduction in both employment and hours worked in NSW resulting from the increase in Sunday penalty rates.[517]

273. The fundamental difficulty with this submission is that it rests on a conclusion reached by Ms Pezzullo[518] which is not in fact supported by the tests she conducted. This was identified by Ms Yu in the Yu Rejoinder in which she stated that:[519]

> . . . The modelling set out in Part 4 of Pezzullo Report B does not yield any significant results or a conclusion about the employment effects arising from higher Sunday penalty rates. The only concluding statement in paragraph 4.21(g) is that 'behaviour in NSW may have moved towards that in Victoria as Sunday penalty rates in NSW have moved to the level in Victoria'. This statement is unclear in its meaning. However, more importantly, it is based on line g in Table 4.5. This result, a p-value of 0.2, indicates that the model was *unable* to establish a statistically significant difference between retail employment in NSW and Victoria post-2010.

Although Ms Pezzullo read the Yu Rejoinder,[520] she did not give evidence challenging the above evidence given by Ms Yu.

274. Beyond this fatal flaw in Ms Pezzullo's evidence, the modelling undertaken by Ms Pezzullo is seriously flawed. The following unchallenged evidence was given by Ms Yu outlining the key weaknesses in the modelling:

---

515 Exhibit SDA-39, p 20: the employment-to-population ratio for all workers; the employment-to-population ratio for youth workers aged 15 to 24; the unemployment rate for all workers; the unemployment rate for youth workers aged 15 to 24; state retail sales; time trend and quarterly seasonal factors.

516 PN 22703.

517 ARA Submissions, para 76.

518 Exhibit Retail-13, para 2.1(a).

519 Yu Rejoinder, para 18.

520 PN 25848-PN 25854.

(a) The model fails to incorporate variables controlling for the impact of the GFC. These variables were shown to be highly significant in the Yu Report.[521] Not only were these variables omitted from the model, Ms Pezzullo failed to test the impact of excluding them. Controlling for labour market conditions and the business cycle is standard in studies of employment effects. The "reverse causality" argument used by Ms Pezzullo to justify the exclusion of these variables (that retail employment in NSW determined state-wide labour market conditions during the GFC) is highly infeasible.[522]

(b) The model does not take into account the passage of time. Ms Pezzullo excluded the time-trend variable in her model without explaining why she did not consider dropping the retail sales variable instead. As a result, the model does not account for employment effects across different years, including the adverse employment changes in 2009 during the GFC.[523]

(c) Ms Pezzullo erroneously asserts that her results are more conservative than those calculated with heteroscedasticity-consistent standard errors. In fact, the statistical significance of her results is likely to be overstated, and any results therefore require further testing before there can be any confidence in their statistical significance.[524]

(d) Ms Pezzullo did not perform most of the specification tests that she identified as being necessary to evaluate the robustness of Ms Yu's analysis.[525]

275. The ARA's submission that the evidence of the employer lay witnesses supports Ms Pezzullo's conclusion that the increased Sunday penalty rate in New South Wales has caused a decrease in employment in that state, is misleading. The ARA's analysis of each of Mr Barron, Mr Goddard and Ms Daggett's evidence is critiqued above.

Conclusions

276. It is correct as the ARA submits[526] that Ms Yu's analysis does indicate that the increase in NSW penalty rates are likely to have caused a 7.7% reduction in retail employment and a 7.1% reduction in aggregate hours of work in the retail industry in 2010/2011. However it is important to note the following:

---

521 Exhibit SDA-39, p 22. See specifically, Table 3.
522 Exhibit SDA-55, [16a].
523 Exhibit SDA-55, [16b].
524 Exhibit SDA-55, [16c].
525 Exhibit SDA-55, [17]. The tests were: the RESET test for functional form misspecification; stability tests; augmented Dickey-Fuller test for non-stationarity; tests for endogeneity; and tests for multicollinearity. See Exhibit Retail 12, para's 3.22(b),(c), 3.27, 3.31.
526 ARA Submissions, para 80.

(a) These adverse effects were confined to the first year in which the transition to higher Sunday penalty rates occurred in NSW – notably, the negative effect did not increase as the 'bite' of NSW penalty rates increased from time and a half to double time;

(b) Ms Yu's analysis identified a weakly significant *positive* effect on employment in NSW in the second year of the transition to increase Sunday penalty rates – this increase may have partially offset the negative effect on employment in the first year.

277. These findings must however be seen in light of Ms Yu's central finding: that there was no systematic evidence of an adverse effect on employment following the transitional increases in the Sunday penalty rates in the NSW retail industry. This finding about the effect over time of five 10 percentage point increases in penalty rates is necessarily of greater significance in assisting the Commission to understand the relationship between employment and changes in penalty rates.

278. Contrary to the submission of the ARA,[527] Ms Yu did not give any evidence about whether or not her analysis enables any reliable conclusions to be drawn about the impact on employment of *decreasing* penalty rates. She simply confirmed the self-evident; that her analysis she was not considering the effects of a reduction in penalty rates.[528] She stated that, within the research design of her analysis, it was not possible to consider the effect of a decrease in penalty rates.[529]

279. The ARA submits that it is not possible for the Commission to accept from Ms Yu's evidence that the impact of reducing penalty rates will substantially align to the impact of increasing penalty rates, albeit in reverse. It is accepted that Ms Yu's evidence cannot be regarded as a definitive account of the reverse scenario involving a reduction in penalty rates.

280. Ms Yu's evidence is nonetheless strongly probative of the direction and strength of the relationship between penalty rates and employment. The employers' reliance on Professor Lewis' evidence about the effect of *increases* in wages and penalty rates on employment in their claim for reductions in penalty rates indicates that they too accept the relevance of the "counterfactual" scenario in determining the effect of cuts in penalty rates on employment. Ms Yu's evidence provides critical empirical support for the analysis of the evidence given by Professors Borland, Quiggin and Lewis set out in Section D which demonstrates that cutting penalty rates will have no measureable impact on levels of employment. Ms Yu's evidence is important because, unlike much of the literature which is directed at the effect of changes in minimum wages on employment, it focuses on the effects of penalty rates *per se* and does so on

527 ARA Submissions, para 81.
528 PN 22626-22628.
529 PN 22629.

a purely empirical basis. Ms Yu's evidence undercuts and is inconsistent with the employer case that there is a positive relationship between cuts in penalty rates and employment such that a reduction in penalty rates will generate an increase in employment and/or hours of work.

Further reasons for preferring Ms Yu's evidence to Ms Pezzullo's evidence

281. The SDA submits that an analysis of the actual evidence given by Ms Yu and Ms Pezzullo as set out above itself provides a compelling and sufficient basis for the Commission to accept Ms Yu's evidence and to reject Ms Pezzullo's critique of that evidence and her alternative analysis. The Commission can however be fortified in adopting that approach in light of the following observations about Ms Yu and Ms Pezzullo as expert witnesses in the proceeding.

282. As explained above, in giving evidence in this proceeding, Ms Pezzullo approached her task as an advocate for her client's case and without the degree of independence the Commission should reasonably expect of expert witnesses. By comparison, Ms Yu displayed an appropriate detachment and independence in giving her expert evidence. She produced a report which, as the ARA submissions indicate, identified various limitations and qualifications on her analysis and which included conclusions which were not wholly favourable to the SDA's case (in that it confirmed the likelihood of adverse employment effects in the first year of the increase in penalty rates in NSW). In her evidence, Ms Yu at all times remained properly within her sphere of expertise. Importantly and as outlined above, in the face of a wide ranging and detailed critique of her work from Deloittes, she exhibited a preparedness to accept criticism and to modify her analysis accordingly.

283. Further, Ms Pezzullo's evidence indicated that she had a limited and flawed understanding of the analytical method deployed by Ms Yu in her evidence. This is evidenced by various misconceived criticisms advanced by Ms Pezzullo which reveal a poor understanding of the DID model. It is notable that none of these criticisms are now relied upon by the employers in their submissions in the proceeding. For example:

    (a) Ms Pezzullo's suggestions that all states and territories be included for a more complete analysis[530] and that other states and territories be compared to Victoria[531] were unsound. Such suggestions fail to understand that the DID model requires that the control group receives 'zero treatment' (i.e. no change in the Sunday penalty rate) and that this was why Victoria was chosen as the appropriate counterfactual scenario to NSW in the Yu Report.[532]

---

530 Exhibit Retail-12, [3.5].
531 Exhibit Retail-13, [3.5(a)].
532 Exhibit SDA-40, [8b)].

(b) Ms Pezzullo's assertion that a structural change may be estimated using only data from NSW before the break, it being unnecessary to use data from Victoria, illustrated her lack of awareness about the most basic concepts of control group analysis in the performance of a natural experiment using DID modelling.[533] As Ms Yu states, *"[T]he Pezzullo claim demonstrates an absence of understanding that without Victoria as a counterfactual scenario, it is impossible to disentangle other trend factors influencing NSW retail employment."* [534]

(c) Ms Pezzullo's critique of Ms Yu's use of the DID modelling approach to assess HILDA data relevant to an individual's likelihood of working on a Sunday following the increase in NSW penalty rates in 2010, again showed her lack of understanding of the DID model. Inherent in the DID model, is its ability to control for unobserved effects, in this case, those that may influence an individual's likelihood of working on a Sunday (i.e. other than an increase in penalty rates). When Ms Pezzullo suggested that the HILDA data would benefit from panel data techniques to control for such unobserved effects, it is clear that she yet again misunderstood the way in which the DID model works.[535]

Professor Sara Charlesworth

284. The 2014 Australian Work and Life Index (**AWALI**) survey was the subject of evidence by Professor Charlesworth in her co-authored report entitled 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 (**AWALI Expert Report**).[536]

285. The AWALI survey is designed to reveal common views, experiences and patterns of association in the Australian working population.[537] Specifically, it measures perceptions of work-life interference among Australian workers on the basis of a work-life index, which captures the various ways in which workers experience the intersection of work with other aspects of their lives.[538] Relevantly for this Review, the 2014 AWALI survey had as one of its themes, the effect of unsocial working times on work-life interference.[539]

---

533 Exhibit Retail-12, [3.14]. See also Exhibit SDA-40, [8a)].
534 Exhibit SDA-40, [8a)].
535 Exhibit SDA-40, [9].
536 Exhibit SDA-43, Introduction (**Introduction**) and Part A: Report of 2014 AWALI Survey Analysis (**Part A**). See PN23488 where Professor Charlesworth confirms that the Introduction and Part A of Exhibit SDA-43 accurately set out the opinions formed by her on the basis of her expertise.
537 Exhibit SDA-43, Introduction, [6].
538 Exhibit SDA-43, Part A, [2]-[3].
539 Exhibit SDA-45, p 1.

286. The results of the survey and those that should form the basis of the Commission's findings are as follows:

(a) Employees sometimes, often or almost always working on Saturdays or on Sundays experience worse work-life interference than employees who rarely or never work these hours.[540]

(b) Employees sometimes, often or almost always working Sundays alone or in combination with working Saturdays experience worse work-life interference than employees who sometimes, often, almost always work Saturdays alone.[541]

(c) There is no significant difference between retail and non-retail employees in the impact of working on Saturdays or on Sundays; retail employees have similar work-life interference patterns in respect of Saturday and Sunday work as non-retail employees.[542]

(d) There is no significant difference between work-life interference in 2008 and 2014 for employees working sometimes, often or almost always on the weekend.[543]

287. The AWALI survey is a large and nationally representative survey[544] and forms, by far, the most substantial body of evidence before the Commission on the effect of unsociable working hours on work-life interference. By way of illustration, Professor Rose's survey results relied on data from just 443 respondents,[545] whereas the 2014 AWALI survey results are drawn from a total of 2279 respondents. [546] It has a correspondingly high level of statistical significance[547] and low level risk of bias.[548]

288. Given the fundamental flaws in Professor Rose's experiment and the inherent limitations in discrete choice modelling as detailed earlier in Section D of these submissions, the internationally peer reviewed[549] AWALI survey should be regarded as the most reliable body of evidence before the Commission on the effect of unsociable working hours on work-life interference. As Professor Charlesworth stated:[550]

---

540 Exhibit SDA-43, Introduction [7], [13] and [33]-[34].
541 Exhibit SDA-43, Introduction [8], [16] and [37].
542 Exhibit SDA-43, Introduction [7], [15] and [33]-[34].
543 Exhibit SDA-43, [21] and [42].
544 Exhibit SDA-43, Part A, [6].
545 Exhibit ABI-1, p ii.
546 Exhibit SDA-43, Part A, [6].
547 PN-23843.
548 PN-23838.
549 PN-23574.
550 PN-23858.

> The AWALI survey is asking people about their current jobs; that is, their real jobs and their real life; it's not asking hypotheticals. Asking preferences, where people express preferences, are notoriously unreliable, and I would refer you to an excellent article by Brigid van Wanrooy and Iain Campbell in Human Relations in 2014, I think, which actually goes to the unreliability of preference data, because it's so contextual.

289. The AWALI index has also been shown to have a satisfactory internal consistency or reliability,[551] negating the risk of response bias to the questions as framed and asked in the survey.[552] The regression analysis is similarly robust, relevantly highlighting the statistically significant association between working unsocial hours and work/life interference[553] (there being no intention to measure any other factors predictive of such interference).[554]

290. The employer criticisms of the AWALI survey are either misconceived or overstated. We address them each in turn below.

(a) Whilst the AWALI survey is not a longitudinal survey,[555] such that it surveys different people each year, it does allow for a comparison of results across annual surveys.[556] Indeed, the evidence before the Commission is that not only has there been little change in work-life index scores over consecutive AWALI surveys from 2008 - 2014,[557] but, more specifically, there has been no significant difference in average AWALI scores in 2008 (46.1503) and 2014 (47.1157) for employees working sometimes, often or almost always on the weekend.[558]

(b) Whilst the AWALI survey is likely to be biased against those who do not have a telephone at home,[559] the CATI landline methodology has a number of benefits including that it allows fast data collection and increased quality through interview controls and clarifications.[560] Moreover, a system of call backs and appointments was used to facilitate a higher response rate and the inclusion of responses from people that do not spend much time at home.[561]

---

551 Exhibit SDA-43, Part A, [3]. See also PN-23703-PN-23708.
552 AIG Final Submissions, [258.3]. See also PGA Final Submissions, [126].
553 PN-23581-PN-23584. See also PGA Final Submissions, [131].
554 PGA Final Submissions, [130].
555 Final Submissions for the Pharmacy Guild of Australia, 12 February 2016, (**PGA Final Submissions**), [123].
556 Exhibit SDA-45, p 9.
557 Exhibit SDA-45, p 2.
558 Exhibit SDA-43, [21], [38]-[42].
559 Exhibit SDA-43, [12]. See also SDA-45, p 9. PGA Final Submissions, [126]; Written Closing Submissions filed on behalf of ACCI, NSWBC and ABI, 2 February 2015, (**ABI Final Submissions**), [20.46(e)].
560 Exhibit SDA-43, [12]. See also Exhibit SDA-45, p 9.
561 Exhibit SDA-43, [12]. See also Exhibit SDA-45, p 9.

(c) Whilst no employees under the age of 18 participated in the AWALI survey[562] due to ethics protocols,[563] all estimates reported have been weighted by Roy Morgan Research[564] on the basis of Australian Bureau of Statistics data on age, highest level of schooling completed, sex and area (capital city and balance of State/Territory) to adjust for differences between the AWALI sample and the Australian population on these key demographics.[565]

(d) Whilst the AWALI survey was not intended to be representative at an industry level,[566] it was able to determine that there was no statistical difference between the degree of work-life interference experienced by retail employees of working Sundays and/or Saturdays when compared to all employees.[567] Thus, despite a small sample size reducing the capacity to directly compare those retail workers who work on Saturdays with those who work on Sunday, it is reasonable to conclude that retail employees have similar work-life interference patterns in respect of Sunday and Saturday working to all employees in the survey.[568]

(e) The fact that the AWALI survey analysis does not include various types of information referred to by the employers[569] does not affect its quality and probative value. The primary objective of the AWALI survey is to compare weekend and non-weekend workers in terms of the degree of work/life interference each group experiences, [570] rather than to examine or to provide insights into the various other matters to which the employers refer. In particular, those not in the workforce, such as the unemployed,[571] were not relevant to such analysis,[572] nor was an examination of the comparative work/life

---

562 ABI Final Submissions, [20.46(e)]. Outline of Submission of Australian Industry Group, (**AIG Final Submissions**), [258.4]. See also Exhibit SDA-45, p 12.

563 PN-23547.

564 PN-23597.

565 Exhibit SDA-43, Part A, [6]. See also Exhibit SDA-45, p 9.

566 PN-23652. See also Exhibit SDA-43, [12] and ABI Final Submissions, [20.47]; AIG Final S ubmissions, [258.2]; PGA Final Submissions, [134].

567 Exhibit SDA-43, [12].

568 Exhibit SDA-43, [12].

569 The non-work activities with which there has been interference and the importance of these activities to the employees surveyed (ABI Final Submissions, [20.46(a)]. See also PGA Final Submissions, [133]); the degree to which there has been interference with non-working time (ABI Final Submissions, [20.46(c)]); whether weekend workers also worked during the week (ABI Final Submissions, [20.46(b)]); whether weekend workers took compensatory measures such as shifting non-work activities to weekdays (PGA Final Submissions, [132]); the positive aspects of working (ABI Final Submissions, [20.46(d)]. See also PGA Final Submissions, [128]); the appropriate level of compensation that should apply to the disability associated with weekend work (Submissions on behalf of the Australian Hotels Association and the Accommodation Association of Australia (**AHA Final Submissions**), [267]).

570 PN-23571 and PN-23574.

571 PGA Final Submissions, [126].

572 PN-23558.

interference experienced by part-time and full-time workers,[573] or employees and the self-employed.[574]

Dr Fiona Macdonald

291. The evidence of Dr Fiona Macdonald in the AWALI Expert Report co-authored with Professor Charlesworth,[575] consisted of a qualitative analysis of the AWALI 2014 survey through in-depth telephone interviews with 25 respondents.[576]

292. As outlined earlier in these submissions, the strength of qualitative research is to reveal the complex issues underlying attitudes, preferences and behaviours including shedding light on contexts, motivations and explanations concerning certain experiences.[577] It does not present the results of large-scale data analysis and is not (and is not intended to be) statistically representative.

293. It is vital to appreciate two aspects of the nature of the research undertaken by Dr Macdonald. First, Dr Macdonald was concerned to explore how work-life interference associated with working on Sundays is similar to or different from interference associated with working on Saturdays.[578] This explains the "logical sequence"[579] adopted by Dr Macdonald in her interviews whereby participants were first asked about Sunday and then about Saturday. Secondly, the aim of Dr Macdonald's research was to generate knowledge about the nature of work/life interference and the way in which Australian retail workers experienced it, not whether,[580] or to what extent,[581] such interference existed. Merely because Dr Macdonald's research was undertaken on the basis that the AWALI survey findings had identified the association of work/life interference with working on Sundays to be more significant than the association of work/life interference with Saturdays,[582] it does not follow that the interviews were loaded[583] or biased[584] in favour of Sunday over Saturday, once the nature and purpose of the research is properly understood.

---

573 AIG Final Submissions, [258.8].
574 Exhibit SDA-43, Part A, [7].
575 Exhibit SDA-43, Introduction (**Introduction**) and Part B: Report of 2014 AWALI Qualitative Analysis (**Part B**). See PN24092-PN24093 where Dr Macdonald confirms that the Introduction and Part B of Exhibit SDA-43 accurately set out the opinions formed by her on the basis of her expertise.
576 Exhibit SDA-43, [2].
577 Exhibit SDA-43, [1] referring to Flyvbjerg, B (2006), 'Five misunderstandings about case-study research', Qualitative Inquiry, vol 12, no 2, pp 219-45; Yin, R (2003), Case study research: design and methods, 3rd edition, Sage, Thousand Oaks, Calif.
578 Exhibit SDA-43, [2].
579 PN-24444.
580 Exhibit SDA-43, [2] and [8].
581 Exhibit SDA-43, [13].
582 PN 24118.
583 PN24434 per Catanzariti VP.
584 Compare ABI Final Submissions, [20.52(b)] and PGA Final Submissions, [140(c)].

294. Dr Macdonald's research was undertaken through an academically recognised technique known as a "grounded" approach to the analysis of interview transcripts aimed at systemically discovering themes in data provided by respondents.[585]"The process is one of going through, reading and rereading and rereading, and in this case because there was only this much material, I didn't do it through a computer program, which would normally be the case with a larger number of interviews, I did it with highlighter pens, and I went through and noted themes and themes and themes, and then went back again and picked up the same themes."[586] The exhaustive and detailed nature of this process inherently minimises the risk of selectivity or omission in reporting upon the key themes emerging from the telephone interviews. The sample size of 25 was considered to be large enough to reach 'saturation', the point at which collecting new data would not have shed any further light on the specific issue under investigation.[587]

295. The telephone interview participants were selected on the basis of a theoretical sampling framework, free from systemic bias and representative of the population in the AWALI survey who said that they worked sometimes, often or always on weekends. [588] Not only was the sample representative of this group in terms of sex, age and employment status,[589] but those in the sample "…were selected specifically because … the research was investigating the nature of any work/life interference experienced by retail employees working on weekends, so the sample was selected as a sample of respondents who could inform that question; so there was no point in selecting a sample of people who were not retail employees or didn't necessarily work regularly on weekends."[590]

296. Dr Macdonald identified the main themes referred to below as arising from her research about the nature of work/life interference and the way in which it is experienced by Australian retail workers. She concluded that these views, experiences and perceptions are characteristic of retail employees across all age groups, including young people who are combining study and part-time employment, who work sometimes, often or always on weekends.[591]

(a) Sunday is different to other days and is not a regular work day:

> While perceptions of work-life interference varied and were influenced by the particular context of each individual's working week and life circumstances the

---

585 Exhibit SDA-43, [15] referring to Strauss, A and Corbin, J (1990) 'Basics of qualitative research: techniques and procedures for developing grounded theory', Sage Publications, Thousand Oaks, Calif.
586 PN-24459.
587 Exhibit SDA-43, [10].
588 PN-24103. Compare PGA Final Submissions, [140(a)].
589 PN-24103. Compare PGA Final Submissions, [140(a)].
590 PN-24103. Compare PGA Final Submissions, [140(a)].
591 Exhibit SDA-43, [3]-[4].

> view that Sunday is different and not a regular work day was held by almost all the retail employees interviewed.[592]

(b) Sunday is different from Saturday:

> With very few exceptions employees told us that Sundays was different to Saturdays…people spoke of it feeling different having to work on Sundays than on Saturdays as 'everyone else' was not at work and they spoke of Sunday as a family day, a 'free' day or a rest day.[593]

(c) Working on Sundays is more negative in its effect on work-life interaction than working on Saturdays[594] because:

(i) For most of the community, Sunday is a day off, a "free" day and/or a "family and friends" day:

> Underlying the idea that Sunday is different from Saturday in negatively affecting work-life interaction there was a commonly held view that for most of the community Sunday is a day off;[595]
>
> and
>
> The idea that Sunday is a day of the week when people get together was central to the common views of the interviewees that Sunday is a 'family day' and a day for catching up with friends and engaging in social activities.[596]

(ii) Sunday work is perceived by retail employees as interfering with relaxation and as isolating or excluding them from "life":

> Both the sense of being excluded from a time for relaxation that 'everyone else' enjoyed and dislike of missing out on socialising and

---

592 Exhibit SDA-43, [4]. See, for example, Exhibit Retail-11 – Job 33524, p 2; Job 34707, p 100; Job 34768, p 119.

593 Exhibit SDA-43, [41]. See, for example, Exhibit Retail-11 – Job 33524, p 2; Job 34040, p 57; Job 34699, p 70; Job 34700, p 74; Job 34705, p 90; Job 34707, p 101; Job 34719, pp 112-113; Job 33601, p 135; Job 34225, pp 139-140.

594 Exhibit SDA-43, [44], [45] and [46].

595 Exhibit SDA-43, [44]. See, for example, Exhibit Retail-11 – Job 33524, p 3; Job 34034, pp 22-23; Job 34036, p 34; Job 34037, pp 42-43 and 44; Job 34038, pp 48-49; Job 34040, p 58; Job 34041, p 65; Job 34699, p 70; Job 34700, p 74; Job 34707, pp 100-101; Job 34719, pp 112-113; Job 34768, p 117; Job 34810, pp 124 and 126-127, p 129; Job 34225, p 139; Job 33512, p 150.

596 Exhibit SDA-43, [49]. See also Exhibit SDA-43, [50]-[54]. See, for example, Exhibit Retail-11 – Job 33524, p 3; Job 34034, pp 22-23; Job 34036, p 34; Job 34037, pp 42-43 and 44; Job 34038, pp 48-49; Job 34040, p 58; Job 34041, p 65; Job 34699, p 70; Job 34700, p 74; Job 34707, pp 100-101; Job 34719, pp 112-113; Job 34768, p 117; Job 34810, pp 124 and 126-127, p 129; Job 34225, p 139; Job 33512, p 150.

relaxing with family and friends – as Sunday would be their day off too – were strongly expressed by employees.[597]

(d) Work-life interference experienced by retail and other employees from working on Sundays has ripple effects beyond the employee concerned, impacting adversely on families and on relationships with friends.[598]

Dr Olav Muurlink

297. The SDA relies on the evidence of Dr Muurlink to establish the following propositions:

(a) Working on weekends is associated with six key markers of negative health which are consecutively, overload, uncontrollability, unpredictability, asynchronicity, and arrhythmia. The presence of these factors also spill over into a negative impact on the wellbeing, social life, and relationships of the worker.

(b) Weekend work disrupts social patterns, because the majority of social and leisure activity takes place on weekends, and particularly on Sundays. Research shows that Sunday is traditionally reserved to a degree greater than Saturday to rest and family activities and there are elevated well-being consequences that are particular to Sunday. The negative impact of weekend work on the employee also has a secondary impact on the partner and/or the children of the worker.

(c) Weekend workers are not able to fully off-set or mitigate the negative effects of weekend work by reshuffling activities usually done on weekends done on other days. Sunday workers in particular lose even more recreation time relative to standard workers.

Weekend work has a negative impact on health and on social patterns

298. Dr Muurlink identifies six interrelated phenomena associated with weekend work in his report entitled, *The impact of weekend work: consecutivity, overload, uncontrollability, unpredictability, asynchronicity and arrhythmia* (**Muurlink Report**). As the title of his report suggests, these six phenomena are consecutivity, overload, uncontrollability, unpredictability, asynchronicity, and arrhythmia. Consecutivity and overload are associated with fatigue as a result of working for long periods without a rest period of more than 24 hours, and is associated with higher rates of injury and illness.[599] In one study, Dr Muurlink reported, a high weekend workload along with job insecurity and low levels of perceived control at work was one of the best

---

597 Exhibit SDA-43, [45]. See also Exhibit SDA-43, [47]-[48]. See, for example, Exhibit Retail-11 – Job 33524, pp 3-4; Job 33523, p 9; Job 34040, pp 57-58; Job 34701, p 78; Job 34706, p 95; Job 34707, pp 100 and 102; Job 34719, pp 112-113.

598 Exhibit SDA-43, [36]. See, for example, Exhibit Retail-11 – Job 33524, p 4; Job 34040, p 57; Job 34701, p 78.

599 See Muurlink Report, Section 4.0, Section 5.0, especially [144]–[150].

predictors of premature cardiovascular disease mortality for men and women.[600] The cumulative load associated with consecutivity and overload are also experienced with being 'on call' for work – which is a common feature of casual retail work.[601]

299. Unpredictability and uncontrollability describe the inability of workers to predict when they will be working, and the length of time spent at work, and are a natural consequence of casual work. As Dr Muurlink states, "irregularity, uncertainty, variability, and temporariness all tap in to a single factor, control", which is discussed below.[602]

300. Asynchronicity and arrhythmia describe the experience of being 'out of sync' with social groups and close relationships, and of being 'out of the rhythm' of the community. The working week "adds a rhythm and predictability to adult life," and "weekend work is particularly disruptive of social patterns".[603] This finding is consistent with the findings of Young & Lim, and the evidence of Professor Charlesworth discussed below, and has not been challenged by the employer parties other than by presenting individual examples of certain workers who said they had "chosen" to work on the weekends. Where weekend work prevents socialising with friends and family, the impact of being 'out of sync' is profound. Dr Muurlink reported the results of studies showing that "even working a single weekend day a month increases depressive symptoms", and that weekend work was "*the* key predictor of psychological distress".[604] Further evidence presented by Dr Muurlink demonstrates that weekend work and asynchronous work is associated with negative impacts on marital satisfaction,[605] which logically extends to any form of marital relationship.

301. Dr Muurlink's evidence is that, collectively, these factors have a negative impact on weekend workers. In particular, consecutivity and overload are associated with fatigue, which in turn impacts on physical health; uncontrollability and unpredictability contribute to a lack of control by the worker; and asynchronicity and arrhythmia negatively impact on the work-life balance of the worker.[606] Weekend work has many of the features associated with the six variables identified by Dr Muurlink, and any overlap between those factors does not mitigate or negate the impact of one factor in isolation from the others.[607]

---

600 Muurlink Report, [29]–[30]. In their submissions at [257.26], AIG claimed Dr Muurlink's evidence in this regard was "unnecessarily alarmist", but they did not put this proposition to Dr Muurlink, and presented no evidence to counter the studies cited by Dr Muurlink,

601 Muurlink Report, [24]. 38% of retail employees are engaged casually compared to 24.3% for all industries: see IPR at Table 5.6.

602 Muurlink Report, [97].

603 Muurlink Report, [85], [7], [104].

604 See Muurlink Report, [6].

605 Muurlink Report, [39], [164],

606 Muurlink Report, Model of *Overview of Relationship Between Key Variables*, 13.

607 See Muurlink Report, Section 2.1, 29.

302. Some employer parties argue that Dr Muurlink's findings about the negative effects of weekend work are associated not with weekend work *per se*, but with phenomena including abnormal hours, overwork, a lack of control, unpredictable, precarious and irregular work, and consecutive days of work.[608] But this argument fails to recognise that the majority of the hospitality and retail workforce, including the weekend workforce, is comprised predominantly of casual workers and seasonal workers, who experience those conditions as a regular feature of their employment. It is axiomatic that:

(a) Casual work is by its nature irregular and unpredictable, both week-to-week, and over the working year, and seasonal work is particularly common in the hospitality sector by nature of its association with holiday periods (ie, when most people are not working).

(b) Being on call is a feature of casual hospitality work. Evidence shown to Dr Muurlink by AIG demonstrated that 31.2 per cent of accommodation and food services workers were usually required to be on call or on standby, one of the highest industry rates among Australian workers.[609]

(c) Casual work is characterised by shift work rather than set working hours. Accommodation and food services workers have the second highest rate of shift work among Australian workers (37.6 per cent), with only mining (42.6 per cent) ranked higher, and considerably higher than the third highest rate of 30.6 per cent among transport workers.[610]

(d) Casual work is, by its nature, not fixed and is therefore precarious.[611]

(e) As the majority of Australians do not work on weekends,[612] weekend work is abnormal.

303. ABI acknowledge that people who work on Sundays may be subject to 'some' of the factors identified by Dr Muurlink, but say that "these factors would affect all their days of work, as opposed to just Sundays". This is not the case – asynchronicity and arrhythmia in particular are associated with weekend days of work, and as Dr Muurlink identified, particularly with Sundays.[613]

304. Further, the argument that casual workers or retail workers more broadly, do not suffer the effects of consecutivity and overload due to occupational health and safety regulation in Australia

---

608 See ABI Submissions, [18.10]–[18.12]; AIG Submissions, [257].

609 ABS, *Australian Social Trends*, December 2009, tendered as Exhibit AIG-15 on 4 November 2015.

610 ABS, *Working Time Arrangements, Australia, November 2012, Catalogue No 6342.0*, Table 7.

611 See paragraphs 310 above.

612 Victorian Government Submission, 11 March 2016, [3.24]-[3.25] referring to ABS data. The majority of Australians (70%) continue to work a standard Monday to Friday week.

613 See paragraph 306 below.

mandating regular breaks, for example, ignores those workers who are studying, have caring responsibilities, or hold multiple jobs. For those workers, time away from work is not 'rest time', which should be readily understood by anyone who has ever attended school, looked after children or parents, or balanced multiple jobs.

Week days are not a substitute for weekends

305. Weekend workers miss out on time with friends and family, as well as individual time spent on household tasks and rest. Weekend workers can only shift those activities to days when the employee is not working to a limited extent. There are three principal reasons for this. First, the ability to time-shift *social* weekend activities is extremely limited – one cannot attend a birthday party, or a group dinner, or a football match, at a time other than when those events are held. Second, while *solitary* activities like housework or rest can be shifted to week days, this is only a valid option where those days are free. Clearly, where weekend workers are engaged in other, non-leisure activities during the week such as studying, child care, or working a second job, there is no blank space in which to slot traditionally 'weekend' activities. Third, even where time-shifting attempts do occur, the evidence is "they are not an unadulterated success".[614]

306. Dr Muurlink reviews the leading Australian and international literature on this subject.[615] The evidence from the literature review is that Sunday workers lost time traditionally associated with Sunday as a day of rest, such as sleeping, personal care, and eating with family members; in most cases, workers were unable to 'make up' this lost time during the week, and that Sunday workers suffered particularly negative levels of work-life interference.[616] The Australian literature in particular demonstrated that "there is still a significant differentiation between Sunday and Saturday",[617] which findings are consistent with the findings from the AWALI survey reported by Professor Charlesworth.

307. Two other objections were raised by the employer parties to Dr Muurlink's evidence. First they argue that because Dr Muurlink did not consider the demographics of the particular industries covered by the modern awards, the particular amendments sought to the awards, and did not exclusively consider evidence from Australian studies, that his evidence has no application to the matters before the Commission.[618] This argument fails to grasp the concept that general principles have broad application. A human being is a human being, regardless of whether they work in a

---

614 Muurlink Report, [10].
615 Muurlink Report, [173]–[195].
616 See Muurlink Report, [27]–[28].
617 PN 20302 (Muurlink RXN).
618 ABI Submissions, [18.5], [18.6], [18.7]; AHA Submissions, [256]; PGA Submissions, [164]; AIG Submissions, [257.1]–[257.2], [257.28],

shop, a restaurant, or a 'community pharmacy'.[619] There is no evidence that the consequences of weekend work are experienced differently according to the occupation of the worker. Instead, Dr Muurlink's evidence shows that the point of difference is related to factors such as the level of control exercised by the worker, and the extent to which their work schedule is synchronous with their family and friends. The same criticism applies to the insular complaint that only Australian studies can be relevant to Dr Muurlink's inquiry if that inquiry is to 'apply' to the employer parties.[620]

308. Second, some employer parties, claim that there is no requirement in the modern awards objective to consider the health effects of a particular type of work and this means that Dr Muurlink's report is not relevant to the Commission's overall task of ensuring that any amendments to the modern awards meet the modern awards objective.[621] This claim only makes sense if s 134(1)(da) of the FW Act excludes any recognition that the need for additional remuneration for employees working weekends or public holidays is due, at least in part, to the negative effects of working on those days. Logically, 'negative effects' must include health effects.

309. The SDA also relies on the evidence of Dr Olav Muurlink to establish the basic principle that 'choice', in practice, is not a concept unfettered by parameters including availability. In his report, Dr Muurlink addressed the concept of 'choice' and the impact of choice on workers' wellbeing. Dr Muurlink's evidence is that "weekend work is … associated more with precarious work, thus it is more likely to be carried out by workers who have less choice about their working schedules".[622] Moreover, as Dr Muurlink noted, workers in unstable employment may deal with the insecurity of their position by taking whatever additional work is available, which is likely to lead to an increase in willingness to work on weekends or public holidays.[623] There is evidence that workers' willingness to be flexible about their work hours is prominent in employer's preferences for low skilled and therefore low paid workers.[624]

310. The emphasis on unstable, precarious, and insecure work is highly relevant to the retail workforce, which has a significant proportion of casual workers in the industry. Casual work is by its nature unstable and precarious. As the Full Federal Court said in *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78, a casual employee is one "*who works only on demand by the employer*".[625] The correlation between casual work and a lack of control in the retail sector is consistent with ABS data that only 34.1 per cent of employees in the retail industry

---

619 PN 21285 (Muurlink RXN).
620 PN 21285–21297 (Muurlink RXN).
621 AHA Submissions, [257]–[259].
622 Muurlink Report, [30] (citations omitted).
623 Muurlink Report, [103].
624 Muurlink Report, [93].
625 (2001) 115 FCR 78, [38].

have some say in the start and finishing times of their jobs, a degree of control which is close to the bottom of all industries.[626]

311. The concept of choice is closely linked to the concept of control – greater freedom of choice is likely to be associated with having a greater sense of control over those choices. Dr Muurlink's evidence is that "a sense of control is a critical [concept] in health psychology, and subsequently time sovereignty – the degree that employees have discretion over the distribution of their working time – is worth considering closely".[627] Dr Muurlink reported on a study by Costa et al (2006) about the impact of flexibility on health. Costa defined flexibility from the perspective of both the employer and the employee, using the term 'variability' to describe employer control over working hours and 'flexibility' to describe individual workers' discretion and autonomy to adjust working hours to reduce work life conflict and better accommodate other activities, needs and responsibilities.[628] On the basis of this distinction Dr Muurlink found that while 'flexibility' can have a *positive* effect on a workers' sense of wellbeing, because "variability reduces employee control", employer-focused concepts of 'flexibility' can have a *negative* impact on employee well-being.[629]

312. Although some workers may indicate a preference for weekend work, even preference is not a straightforward synonym for control, and it is not a 'magic bullet' that can cure the negative impact of a lack of choice. It was put to Dr Muurlink in cross-examination that on reading his report as a whole, "individual preference would have a significant positive influence" on people's experiences of working on the weekend. In response, Dr Muurlink said:

> Human preference is a bit of a fickle thing. It goes into a field that we refer to as meta-knowledge – people's knowledge of themselves – which is remarkably, well, unsure. So, for example, everybody thinks they're a better driver than statistical average, you know … people's knowledge of even relatively objective things is quite limited. And even in relation to preference there is a degree of self-deception going on.
>
> Preference has an impact on people's sense to which they are in charge of their destiny, and that is really quite an important moderator of some of these negative effects. I completely concede that."[630]

313. The dichotomy between 'choice' and 'availability' was raised with Dr Muurlink during cross-examination, and Dr Muurlink agreed that "there might be a number of employees who choose to work on weekends to suit their personal circumstances", including students not available

---

626 Australian Bureau of Statistics, *Working Time Arrangements, Australia, November 2012*, Cat No 6342, table 5, and cited in the PC Report at 452.

627 Muurlink Report, [88].

628 Muurlink Report, [93]. Dr Muurlink was cross-examained about the quality of the Costa et al study, and gave evidence that it was a good and well-conducted study. His response was not challenged: PN 20923–20937.

629 Murrlink Report, [93].

630 PN 20874.

to work on a week day, parents with carer's responsibilities, and semi-retired employees retired. Relevantly, it is important to note that each of these classes of people were put to Dr Muurlink in terms that emphasised the *availability* of those employees to work on weekends rather than their choice. For example, counsel for the PGA put the following questions to Dr Muurlink:

> "If the students are *not available* to work on a week day because they're attending school or university, obviously their *choice* would only be to work on weekends."[631]

> "[Weekend work] may also suit parents who have carer's responsibilities and where mothers and fathers which to coordinate their schedules, so that at least one of them is looking after their children at all times."[632]

> "[Weekend work] might also apply to employees who are semi-retired and they wish to spend time with friends during week days."[633]

314. That is, the form of the questions acknowledged that availability, particularly for students and parents, was the determining or was a highly relevant factor within the matrix of "choice". This acknowledgment was confirmed by Dr Muurlink in his response to the questions, where he noted that "[students] preference may be related to factors other than choice … [such as] necessity or the fact that they are desperate for work and they can't work during the week. I mean these factors would reduce the degree to which the control is genuine …".[634] This answer was not challenged on cross examination. When seen in this light, it is inaccurate to say, as AIG submit, that "employees… exercise control over their hours by determining the availability of their work hours".[635] 'Choice' and 'availability' are two distinct concepts.

315. What arises from the evidence of not only Dr Muurlink but also of Professor Charlesworth and of Dr Macdonald is that work-life balance cannot be solved alone. Working on weekends and public holidays has a negative impact on the social life and wellbeing of the worker. Weekend workers cannot simply transfer 'weekend activities' to weekdays, because the value of 'time off' is higher when it is in sync with the rest of a person's social and community group. When time is measured in terms of quantity, then it makes sense to argue that 'time off' on weekends has the same value as 'time off' on a Monday or Tuesday. But when 'time off' is measured in terms of co-ordination with others, its value is significantly increased where synchronous with others.

---

631 PN 22080.
632 PN 21081.
633 PN 21082.
634 PN 21079.
635 AIG Submissions, [257.8].

316. The paradox at the centre of the employers' case is that the reason Saturdays, Sundays, and public holidays are busy days in the retail sector is that *most people are not at work*,[636] and so have time to go out for dinner with friends and family. The standard work week serves as a co-ordinating mechanism, and the sense of 'freedom' of the weekend stems in large part from the availability of others.

317. The employers have taken an individualistic approach to this issue, focusing on the impact on the individual worker and arguing that certain people like working on weekends and suffer no ill-effects. This focus is misplaced for two reasons. First, as stated above, preference by itself is not necessarily a reliable indicator of control or that the activity preferred is harmless. Second, the relevant counterfactual of the weekend retail worker is not the retail sector, but the community as a whole. Seen in this light, the impact of weekend work is relevant not just on the individual worker, but on their family and friends, and on society more broadly.

318. The value of time off' depends in part on an individual's ability to co-ordinate that time with others. This is the thesis of the article by Young and Lim included in the Commission's research list.[637] The concept of time as a 'network good' is illustrated using the telephone as an example: in early 1910, few people had telephones in their home, and so there was little reason to own a phone. But as the network of telephone ownership expanded, there was more and more benefit to investing in a telephone, and hence the telephone is a 'network good'.[638] The authors reason that "time is a quintessential network good", and that "the efficacy of things like factory production, political protests, church gatherings, Christmas parties, family dinners, and football games depend on how many people show up for them".[639] Time spent alone converts 'free time' to 'spare time', leaving individuals with the prospect of "bowling alone".[640]

319. Applying this analysis to the weekend, Young and Lim hypothesise that "the standard work week serves as a coordinating mechanism", and "the freedom of the weekend stems in large part from the availability of others".[641] The authors conducted a study to test their hypothesis. using unemployed people as a strategic case to focus on the difference-in-difference comparisons of workers and the unemployed by day of the week, and found that both groups

---

636 Victorian Government Submission, 11 March 2016, [3.24]-[3.25] referring to ABS data. The majority of Australians (70%) continue to work a standard Monday to Friday week.

637 Young C and Lim C, 'Time as a Network Good: Evidence from Unemployment and the Standard Workweek' (2014) 1 *Sociological Science* 10 (**Young & Lim**).

638 Young & Lim, 12.

639 Young & Lim, 12.

640 Young & Lim, 11-12.

641 Young & Lim, 11.

experienced a clear spike in their well-being on weekends and a drop in well-being during the week. Specifically, the unemployed group experienced about 75 per cent of the subjective benefit of weekends, and not working during the week gives the unemployed only a quarter of the 'weekend experience'.[642] These results clearly suggest that 'a day off is not a day off'. From a pure time budget perspective, weekends for the unemployed should not matter, but from a network good or qualitative perspective, Young and Lim found that they mattered considerably.[643]

320. When exploring their hypothesis, the authors reviewed the experience of a rotating seven-day workweek – a precursor to the '24/7 workplace', implemented in the Soviet Union in 1929, in an effort to maximise industrial production. The 'Red Calendar' divided months into five-day rather than seven-day weeks, increasing worker leisure time from one day out of seven to one day out of five. The Red Calendar was a failure for many reasons, but among those was the experience that workers' increased free time within five-day week made it exceedingly difficult to coordinate that time with anyone else. In particular, families lost Sundays as a shared day of rest, and the Red Calendar was abandoned after two years.[644]

321. The upshot of the Young and Lim study is that work/life balance is not a problem that can be solved alone. The balance component relies on the availability of peer groups, family, and social occasions at the same time as the individual.

Dr Ian Watson

322. The SDA relies on the uncontested[645] evidence of Dr Ian Watson in his report entitled *Employee Earnings in the National Retail Industry*[646] (**Watson Report**) to support the making by the Commission of the findings set out below. The Watson Report is based on HILDA and ABS data and engages a careful scientific method to avoid arbitrary outcomes and to provide confidence in its results.[647] The findings of Professor Watson concerning the low paid nature of the retail industry are consistent with those in *Section 6.1 Earnings* of the IPR.

323. On the basis of the uncontested evidence in the Watson Report, the Commission should make the following findings:

---

642 Young & Lim, 11.
643 Young & Lim, 14.
644 Young & Lim, 13–14.
645 PN-22173-PN-22174.
646 Exhibit SDA-35.
647 Exhibit SDA-35, p 3, lines 7-21.

(a) Between 29% and 42% of employees in the retail industry, being a substantially greater proportion than the all industries average, have their pay and conditions set by reference to award minima.[648]

(b) Employees in the retail industry are amongst the lowest paid workers in the nation.[649]

(c) Together with the hospitality and food services industries, the retail industry has the largest proportion of low paid workers in the nation.[650]

(d) Between 2010 and 2014, the earnings situation of retail workers has deteriorated relative to workers in other industries.[651]

(e) Households in which there is at least one adult retail employee (**retail households**) have lower living standards than households in which there are no adult retail employees.[652]

(f) The burden of cost of living is broadly equivalent for retail households and households including employees from other industries, but the financial resources for meeting those needs are substantially less for retail households.[653]

(g) Employees in the retail industry experience lower living standards at the household level compared to employees in households including employees from other industries.[654]

Dr Ian Watson & Professor David Peetz

324. The uncontested[655] evidence of Professor Ian Watson and Professor David Peetz in their co-authored report, *Characteristics of the Workforce in the National Retail Industry* [656](**Watson and Peetz Report**) is relied on by the SDA to support the making of the findings referred to below. In bringing the latest available unpublished data[657] from HILDA and ABS sources to bear on a number of questions regarding the characteristics of the retail workforce in Australia, the Watson and Peetz Report provides reliable information on the issues relevant to the Review in the retail industry. Their evidence regarding the composition and working patterns of the retail workforce is not inconsistent with *Section 5 Labour Market Structure and Trends* of the IPR.

---

648 Exhibit SDA-35, p 17, lines 9-13.
649 Exhibit SDA-35, p 29, lines 22-28.
650 Exhibit SDA-35, p 45, lines 7-9.
651 Exhibit SDA-35, p 38, lines 2-5.
652 Exhibit SDA-35, p 52, lines 1-12.
653 Exhibit SDA-35, p 58, lines 16-18.
654 Exhibit SDA-35, p 59, lines 8-12.
655 PN-22173-PN-22174.
656 Exhibit SDA-36.
657 Exhibit SDA-36, p 1, line 2.

325. On the basis of uncontested evidence in the Watson and Peetz Report, the Commission should make the following findings:[658]

(a) The proportion of retail workers:

(i) aged 25 years or over is 61%;[659]

(ii) aged 24 years or under is 38-39%;[660]

(iii) aged 19 years or under is 19-21%;[661]

(iv) who usually work on either one or both of the weekend days is approximately 62%;[662] and

(v) who usually work on Sundays is 31-35%.[663]

(b) Between 2004 and 2012:

(i) the average age of the weekend workforce and the weekend retail workforce steadily increased;[664]

(ii) there was no statistically significant change in the proportion of 15 to 18 year olds in the weekend workforce and in the weekend retail workforce;[665] and

(iii) there was no statistically significant increase in the proportion of dependent students in the weekend workforce and in the weekend retail workforce.[666]

(c) The proportion of retail employees who are under 25 years, but who are not full-time students is 18%.[667]

(d) The proportion of retail employees who are under 25 years and who are full-time students is 20-22%, comprised approximately of equal proportions of secondary school students and tertiary students.[668]

---

658 Exhibit SDA-36, p 4, lines 17-19.
659 Exhibit SDA-36, p 2 and p 15, lines 2-4, Table 20.
660 Exhibit SDA-36, p 2 and p 15, lines 2-4, Table 20.
661 Exhibit SDA-36, p 2 and p 5, lines 5-6, Table 3. See also p 16, lines 16-18.
662 Exhibit SDA-36, p 2 and p 7, lines 1-4, Table 8.
663 Exhibit SDA-36, p 2 and p 7, lines 17-20. See also p 18, lines 10-12.
664 Exhibit SDA-36, p 2 and pp 9-10, lines 15-20, Tables 12 and 13.
665 Exhibit SDA-36, pp 10-11, lines 4-10, Tables 14 and 15.
666 Exhibit SDA-36, p 12, lines 15, 21-22.
667 Exhibit SDA-36, p 19, Table 24.
668 Exhibit SDA-36, p 19, Table 25.

Mr Kevin Kirchner

326. Mr Kevin Kirchner provided uncontested evidence to the Commission in his report, *A Critique of the Report entitled "Retail Award Research"* which allows the following findings to be made about recent economic and employment conditions in the national retail industry:

(a) Retail sales have continued to grow in real terms over the period 2010-2014/15.[669]

(b) Total profits across the retail industry have remained at a strong level over recent years.[670]

(c) Since 2012/13, total profits for the retail sector have exceeded the record level reached at the end of the boom period (i.e. around 2008), following almost 15 years of sustained strong growth.[671]

(d) Profit margins in the retail industry have remained at strong levels in the period from 2010 until 2015, around historical highs, notwithstanding a slight decline in the average retail profit margin in the past 12 months.[672]

(e) Since about 2010, wages in the retail industry have not generally grown at a faster rate than wages growth across the economy as a whole.[673]

(f) In recent years, the number of persons employed in the retail industry and aggregate hours worked have continued to increase.[674]

(g) The number of persons aged 15-19 years employed in the retail industry has continued to decline over recent years, as the number of persons in other ages employed in the retail industry has increased.[675]

327. These findings are consistent with the IPR's *Section 3 Industry Overview* and *Section 4.3 industry Performance,* as detailed in paragraph 5 of these submissions.

669 Exhibit SDA-32, Exhibit KPK-1, pp 9 and 12 (Figure ES1 and Table ES1). See also pp 19-22.
670 Exhibit SDA-32, Exhibit KPK-1, pp 10 and 13 (Figures ES2 and ES3). See also, p 27.
671 Exhibit SDA-32, Exhibit KPK-1, pp 10 and 13 (Figures ES2 and ES3). See also, pp 27-28.
672 Exhibit SDA-32, Exhibit KPK-1, pp 10 and 14 (Figure ES4). See also, pp 27-29.
673 Exhibit SDA-32, Exhibit KPK-1, p 10. See also pp 29-33.
674 Exhibit SDA-32, Exhibit KPK-1, p 10. See also pp 33-36.
675 Exhibit SDA-32, Exhibit KPK-1, p 11. See also pp 37-38 (Figure 18).

Lay Witnesses

328. The Commission received evidence from 7 witnesses employed under the Retail Award.[676] On the basis of that evidence, the SDA submits that the Commission should make the findings referred to below.

(a) Existing penalty rates are an essential part of the minimum safety net

In particular:

(i) Existing penalty rates are an essential part of the minimum safety net of terms and conditions of employment for employees employed under the Retail Award.

(ii) Employees employed under the Retail Award are low paid.

(iii) Penalty rates comprise a substantial proportion of the overall earnings of employees employed under the Retail Award.

(iv) Many of the households in which employees employed under the Retail Award reside have low living standards and find it difficult to secure the financial resources necessary to meet the cost of living.

(v) Reducing penalty rates will have a deleterious effect on the income and living standards of employees employed under the Retail Award.

A summary of the evidence in support of the above finding is as follows:

Witness 16:

Witness 16's evidence was that his hourly rate of pay was $19.75 and his fortnightly income after tax, $1556.88.[677] This was used to cover the usual household and living expenses, swimming and sports lessons for his son as well as his medication, private health insurance and specialist appointments for Crohn's Disease.[678] Witness 16 said that the Sunday penalty rate was crucial to assisting him to meet his financial obligations.[679]

---

676 Exhibit SDA-15 (Statement of Witness 15 – dated 5 October 2015); SDA-16 (Statement of Witness 16 – dated 5 October 2015); Exhibit SDA-17 (Statement of Witness 17 – dated 5 October 2015); Exhibit SDA-18 (Statement of Witness 18 – dated 5 October 2015); Exhibit SDA-19 (Statement of Witness 19 – dated 5 October 2015); Exhibit SDA-20 (Statement of Witness 20 – dated 5 October 2015); Exhibit SDA-21 (Statement of Witness 21 – dated 5 October 2015); Exhibit SDA-22 (Statement of Witness 22 – dated 5 October 2015).

677 Exhibit SDA-16, [7].

678 Exhibit SDA-16, [8]-[11].

679 PN 17879 - PN 17880.

Witness 17:

Witness 17 earned a gross fortnightly income of $1606.75, received Family Tax Benefit A and Family Tax Benefit B payments of about $340.00 as well as child support of around $15 a fortnight.[680] Her uncontested evidence was that:

"[M]y fortnightly income and benefits are spent on paying the mortgage and on covering the basics – house and land rates, groceries as well as utility and phone bills. My 17 year-old son is also financially dependent on me and requires me to cover many of his expenses. For example, earlier this year, I paid for my son to complete his Automotive Certificate 1 course at TAFE. I am a single mother so these responsibilities rest entirely with me. I have almost no capacity to save money."[681]

The following evidence was also uncontested:

"I rely on my weekend penalties to boost my take home pay. If Sunday penalty rates were reduced, it would be even harder for me to survive financially than at present. This is especially so given the fact that I may no longer receive my financial assistance payments in the near future. I would loose just over $60.00 a fortnight if Sunday penalty rates were reduced to time and a half, which is a lot of money to me."[682]

Witness 18:

Witness 18, a single father with two children,[683] gave evidence under cross-examination that he was earning just enough financially to survive.[684] He also gave evidence that he was heavily reliant on penalty rates, *"[A]lthough my hours can vary depending on the amount of overtime I work, last fortnight as an example, I worked 46.25 hours. Only 18 of those hours were paid at my ordinary hourly wage."*[685]

Witness 19:

In cross-examination,[686] Witness 19 confirmed her evidence in chief that, *"I feel that every bit I earn is needed to get me across the line from week to week."*[687] Witness 19

680 Exhibit SDA-17, [4].
681 Exhibit SDA-17, [6].
682 Exhibit SDA-17, [10].
683 Exhibit SDA-18, [7].
684 PN 18059.
685 Exhibit SDA-18, [6].
686 PN 18154.
687 Exhibit SDA-19, [14].

gave further evidence that *"[T]o save money, one thing I do is to use a fireplace instead of heaters. I have little savings and I do not receive any government payments."*[688]

Witness 20:

Witness 20 gave uncontested evidence that, *"[M]y current fortnightly income of $1,056.00 barely meets my costs of living"*[689] and *"I do not have contents insurance because I can't afford it"*[690] and *"I also cannot presently afford to go to the dentist to receive follow up treatment from a procedure I undertook about two years ago."*[691]

Witness 21:

Witness 21 was not challenged on her evidence that:

"[I]f the Sunday penalty rate were reduced from 100% to 50%, I would earn $28.47 per hour instead of $37.96, a difference of $9.49 per hour. On my current roster, this would mean that I would earn $37.96 less per fortnight, about 4% of my current fortnightly income before tax. This is a lot of money to me. Considering the difficulties I have meeting my living costs on my current income, a reduction in my Sunday penalty rate would place me under even more financial strain."[692]

Witness 22:

As a single mother of two daughters, both of who are dependent on her, Witness 22 gave evidence that after the usual household and living expenses are paid, *"I have very little, if anything, left over for savings or discretionary spending. If something unexpected occurred, I would struggle to meet those needs. As it is, I am currently using the service, My Budget, to help me balance my finances."*[693]

(b) There needs to be proper compensation for the negative impacts of working unsociable hours

In particular:

688 Exhibit SDA-19, [10].
689 Exhibit SDA-20, [7].
690 Exhibit SDA-20, [10].
691 Exhibit SDA-20, [11].
692 Exhibit SDA-21, [12].
693 Exhibit SDA-22, [10].

(i) Current penalty rates appropriately recognise the value that employees employed under the retail group awards and the community, including employers, place on weekends and public holidays.

(ii) Current penalty rates are a necessary compensation for the negative impacts on employees employed under the retail group awards of working unsociable hours.

(iii) The negative impacts of working unsociable hours include the detriment employees experience in their personal, social, familial and spiritual lives.

(iv) The detriment to employees' personal, social, familial and spiritual lives is most acutely felt as a result of working on Sundays.

(v) The negative impacts of working unsociable hours are also felt by the families and friends of employees employed under the retail group awards.

A summary of the evidence is support of these findings is as follows:

Witness 16:

Witness 16's uncontested evidence was that:

"I had to work on Father's Day morning this year at 5:30am. You miss out on a lot when you work on a Sunday, particularly spending quality time with people you care about like your family and friends, most of who work jobs Monday through to Friday. My partner Irene does not enjoy me being away from home on Sundays."[694]

Witness 16 also gave evidence that:

"I also work the majority of public holidays that fall on a Monday, as I am currently rostered every Monday. The reason that I volunteer to work on the public holidays is because of the penalty rate of double time and a half. I would much prefer to be spending this day with family and friends. It is a sacrifice to work on public holidays and if the penalty rate were reduced on these days, I would be far less likely to volunteer to work them." [695]

Witness 17:

694 Exhibit SDA-16, [14].
695 Exhibit SDA-16, [16].

Whilst Witness 17 said that she tries to plan non-work activities in advance as best she can so that they do not fall on the weekends that she is working,[696] her evidence was that, *"[W]hen my children were young, I had trouble working on the weekends. My children often wanted to participate in school or other social activities, such as sport or friends' birthday parties on Saturdays or Sundays and I couldn't take them to these events because of my work."*[697]

Witness 18:

Witness 18 gave evidence that he experienced intrusion into his Saturday night social life because he has to work early on Sunday mornings.[698] In cross-examination Witness 18 said, *"...most occasions usually happen on a Saturday night and I can't go to them because I have to be in bed quite early to start work on Sunday morning, early*."[699] In relation to public holidays, Witness 18 stated:

"I work on average seven out of the ten public holidays, depending on when these public holidays fall. Sometimes I work all the public holidays in the year. I am not in a position to refuse to work on public holidays as I need the extra money but I'd prefer not to work on these days from a social perspective."[700]

Witness 19:

Witness 19 gave evidence that:

"I have had to miss out on family gatherings, such a Christenings, as well as local community events, such as sports, because I work on Sundays…These are good opportunities for me to see people I grew up with and have known for many years and I feel sadness in often not being able to participate in these activities with them."[701]

In cross examination she stated, *"I come from a small town near* [redacted] *so anything that is on there on the weekends I would really like to go to catch up with people that I've known all my life and you know I can't take work off because I need to work, you know to make a liveable pay."*[702]

696 PN 18003-18004.
697 Exhibit SDA-17, [8].
698 Exhibit SDA-18, [11].
699 PN 18088.
700 Exhibit SDA-18, [13].
701 Exhibit SDA-19, [13].
702 PN 18189.

Witness 20:

Evidence was given by Witness 20 under cross-examination that, *"...when my grandchildren come down, like last weekend, I couldn't see them. They were down Friday, Saturday, Sunday; I didn't get to see them because I was at work"*[703] and *"[P]enalty rates are a critical component of my income and make missing out on Sunday family time more tolerable."*[704] Witness 20 also gave evidence that, *"[I]n the past, when a public holiday has fallen on my rostered days, I have elected to work that day in order to get the public holiday penalty rate that applies. This is despite not wanting to work on these holidays."* [705]

Witness 21:

According to the uncontested evidence of Witness 21, penalty rates *"...compensates me for the weekend events that I often miss, particularly on Sundays when my family and friends most often get together for social functions."*[706] Witness 21 also gave evidence that, *"[W]hen I work on a public holiday, I do so because of the extra money I am able to earn and it is always a trade off with the time I would ordinarily spend with my family or friends."*[707]

(c) There is an inability to offset the negative impacts of working unsociable hours

In particular, those employees:

(i) are not able to offset the negative impacts of working unsociable hours on their personal, social, spiritual and familial lives by shifting ordinary weekend activities to alternative days during the week;

(ii) often have other commitments such as unpaid caring responsibilities or study during the week, which limit their capacity to shift ordinary weekend activities to alternative days during the week;

(iii) recognise weekends, particularly Sundays, and public holidays as different from weekdays and important to their personal, social, spiritual and familial lives.

---

703 PN 1247.
704 Exhibit SDA-20, [12].
705 Exhibit SDA-20, [13].
706 Exhibit SDA-21, [11].
707 Exhibit SDA-21, [13].

A summary of the evidence in support of the above findings is as follows:

Witness 16:

Witness 16 said that whilst his shift on a Sunday finished at 1:30pm,[708] *"[M]ost of our big social occasions are on Sundays and I am regularly arriving late to birthdays and barbeques with family and friends. Sometimes I miss these events altogether."*[709]

Witness 17:

Despite attempting to plan non-work activities in advance so that they do not take place on the weekends that she is working, Witness 17's evidence was that she still experiences interference on Sundays:

"[N]ow, I find the difficulty with working weekends arises in my own social life. If there is a special family celebration on a Sunday, for example, I will try to organise annual leave in advance or simply arrive late to the function. Taking time off on the weekends that I am rostered to work is not really an option."[710]

Witness 18:

In cross-examination, when being asked about his involvement in the [redacted], he gave evidence that his charitable work for this group meant that he had to attend a Sunday fundraiser when he was supposed to be working, *"[J]ust recently, I actually had to take annual leave to attend a major one which was for* [redacted]*. I was working and I had no choice but to take annual leave to attend."*[711] Witness 18 had no capacity to offset the negative impacts of working on Sunday by shifting this activity to another day through the week and besides, his caring responsibilities as a single father of two gave him little flexibility.[712]

Witness 19:

In both examination in chief and cross-examination, Witness 19 confirmed the difficulties she experienced as a result of her weekend work in spending time with her grandchildren who were only able to visit her from Sydney on weekends.[713]

---

708 PN 17931.
709 Exhibit SDA-16, [14].
710 Exhibit SDA-17, [9].
711 PN 18083-PN 18084.
712 Exhibit SDA-18, [9].
713 Exhibit SDA-19 at [11]. See also PN 18163-PN 18164.

Witness 20:

In cross-examination, Witness 20 identified a number of non-work activities which she has no capacity to reschedule, *"I miss out on Mother's Day usually because I'm at work, I miss out on Sunday, going to church…"*[714] Witness 20's evidence further indicated that even if she could re-schedule non-work activities to days other than the weekends, she didn't have the flexibility to do so, *" [O]n the days that I am not required to work, namely on Monday and Tuesday, I look after my grandchildren."*[715]

Witness 21:

Witness 21 gave evidence underscoring the fact that not everything can be rescheduled to days other than on the weekends, *"[M]y family is tight knit and my two brothers live close by, one is just up the street. I have often missed my nieces' and nephews' birthday parties because of my weekend work."*[716]

(d) There is limited or no choice regarding working unsociable hours

In particular:

(i) They often work unsociable hours out of necessity rather than choice (whether due to financial necessity or the necessity of maintaining employment by accepting the hours available for work);

(ii) They are often allocated rosters, which require them to work unsociable hours;

(iii) Their availability to work weekends does not negate the negative impacts of working these unsociable hours.

A summary of evidence in support of the above findings is as follows:

Witness 16:

714 PN 18247.
715 Exhibit SDA-20, [7].
716 Exhibit SDA-21, [11].

Although Witness 16 said that when he took his job, he knew that he would be working Sundays,[717] he said that he did not like working on Sundays but that the double time was crucial to assisting him to meet his financial obligations.[718]

Witness 17:

The "choice" available to Witness 17 in deciding whether or not to work on Sundays was not really a choice at all. Her evidence was that:

"[I]f I had a choice, I would prefer not to work weekends. I don't think that is possible at [redacted]*. If I refused to work weekends, or pushed back on my weekend roster in any way, I doubt I'd have a job. Besides, I need the penalty rates to manage financially."*[719]

When it was suggested to Witness 17 in cross-examination that she chose to accept a job that required her to work weekends she said, *"[I]t was part of my roster, yes",*[720] again underscoring the limited nature of the "choice" available to her.

Witness 18:

When asked under cross-examination whether he had ever said to his employer that he didn't wish to work on Sundays, Witness 18 said, *"[W]e don't get a choice."*[721] When asked about whether he had sought an alternative retail job that did not require Sunday work, Witness 18 responded, *"[N]o, I haven't, for the simple reason that I am on a disability pension and the work there entails, at the airport, I'm able to manage with my disability."*[722]

Witness 19:

In examination in chief, the evidence of Witness 19 was that, *"I don't feel as though I have much choice in working Sundays because that is the shift the company gives me."*[723] Whilst accepting that she was aware that she would be required to work on weekends when accepting her job, Witness 19 again said, *"I didn't see that I had a choice because its limited employment in* [redacted]*, like there are no other employers and I would have to travel to* [redacted] *or* [redacted]*. And another concern was my age and no recent*

717 PN 17865.
718 PN 17880- PN 17882. See also SDA-16, [13].
719 Exhibit SDA-17, [4].
720 PN 17992.
721 PN 18066.
722 PN 18069.
723 Exhibit SDA-19, [12].

experience."[724] In cross-examination, Witness 19 said that, in any event, *"I need the penalty rates to be able to make a decent pay."*[725]

Witness 20:

Whilst Witness 20 accepted that she did "choose" to work Saturdays or Sundays, she explicitly said that this was *"because of the money."*[726]

Witness 21:

Although Witness 21 acknowledged that she accepted her job knowing that she would be working Saturdays and Sundays,[727] her evidence was that:

"[W]hilst my roster requires that I work on Saturdays and Sundays and whilst I'd prefer to have my weekends to myself, the reality is that I rely on the money that I receive in penalty rates on these days to support myself financially."[728]

Witness 22:

Though Witness 22 recognised that she accepted work on Saturdays and Sundays,[729] she also said that:

"[T]he reason that I work on Sunday is that the higher rate of pay has a significant effect on my ability to cope financially – I used to struggle even more than I do now to pay my debts and living expenses. I decided to take up the offer of working on Sundays as I suspected that if I refused, the company would find someone else to take my place on that day and the opportunity for more income would be lost."[730]

329. The Commission issued Directions inviting interested third parties to make submissions in these proceedings. As at 11 March 2016, 3370 individual workers, many of whom are employed in the retail industry, had made submissions to the Commission. The issues and concerns raised by them echo and are confirmatory of the proposed findings above, in particular that:

(a) Existing penalty rates are an essential part of the minimum safety net;

724 PN 18147.
725 PN 18191.
726 PN18231.
727 PN 18278.
728 Exhibit SDA-21, [11].
729 PN 18339.
730 Exhibit SDA-22, [11].

(b) There needs to be proper compensation for the negative impacts of working unsociable hours; and

(c) There is limited or no choice regarding working unsociable hours.

330. Themes that repeat throughout the submissions include, employees' heavy reliance on penalty rates to meet the cost of living; anticipated financial hardship in the event that penalty rates are reduced and grievances about the thought of having to continue to sacrifice Sundays and other unsocial hours for less pay.

331. Further, the number of responses received indicates that the importance of current penalty rates to workers both financially and as compensation for the disamenity of working unsociable hours are characteristic of the experience of many retail employees and are not confined to the 8 witnesses who gave evidence.

SECTION F: RESPONSE TO EMPLOYER CASE FOR REDUCTION OF SUNDAY PENALTY RATES

332. The ARA contends that Sunday penalty rates in the Retail Award should be reduced for three broad reasons: [731]

(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.

(c) The reduction of the Sunday penalty rate from 100% to 50% is likely to lead to increased employment in the retail industry.

333. These general claims are further developed in paragraph 12 of the ARA submissions, which identifies the specific reasons why the existing Sunday penalty rate provisions in the Retail Award are not necessary to achieve the modern awards objective and as such must be varied. Various arguments and evidence are advanced by reference to other parts of the ARA submissions. In this section of the submissions, the SDA responds to and examines the evidentiary, legal and logical foundation of each the specific reasons said to support the proposed variations as set out in paragraph 12 of the ARA submissions.

334. For convenience and given the overlap in arguments presented by the ARA and the ABI, this section of the SDA's submissions also responds to each of the specific reasons said to support the ABI's proposed variations as set out in paragraph 30.2 of the ABI submissions.

335. The gravamen of the case put by the ABI parties in respect of the Retail Award (and the Restaurant Award) as set out in paragraph 30.2 is that those awards do not provide a fair and relevant minimum safety net but will provide a fair and relevant minimum safety net once varied in the terms sought because:[732]

(a) The awards presently confer a minimum safety net which penalises businesses for opening on Sundays and public holidays in a manner disproportionate to the disability associated with working on such days.

---

731 ARA submissions, para 3.
732 ABI submissions, para 30.2.

(b) The disproportionate penalisation of penalty rates means that the awards currently do not create a "minimum safety net" but instead create a safety net that over-compensates employees and creates excessive financial windfalls for working certain days of the week.

(c) Furthermore, the current safety net is not *"relevant*" as the existing award penalty rate provisions derive from historical case law that is substantially removed from today's legislative framework (particularly in the case of public holidays) and social context.

(d) The ABI claims remedy each of the concerns identified above, thus eliminating the barriers to the creation of a fair and relevant minimum safety net. Furthermore, the ABI claims further all of the relevant 'limbs' of the modern awards objective.

Existing Sunday work penalties are not a "relevant" minimum safety net of terms and conditions[733]

336. The ARA advances five propositions in support of the claim that the existing provisions of the Retail Award in respect of Sunday work penalties are not a relevant minimum safety net of terms and conditions. Each of those propositions is identified and examined below.

"The double time Sunday penalty was set in 1919 being a time when society, and the retail industry, was different to current times"[734]

337. This claim is addressed in detail in Section C of these submissions. As referred to above, the ABI advances a similar argument, namely that *"The current safety net is not "relevant" as the existing award penalty rate provisions derive from historical case law that is substantially removed from today's legislative framework (particularly in the case of public holidays) and social context."*[735] This claim is addressed in detail both in Section C and Section G of these submissions.

338. In short, for the reasons set out in Sections C and G, the arguments presented by the ARA and the ABI proceed from a flawed and selective analysis of the history of award making in the retail sector, including in particular the fixing of penalty rates for Sunday.

339. With respect to the fixing of penalty rates for Sunday work, the existing provision made by the Retail Award for Sunday work is a product of Full Bench decisions of the Commission's

---

733 ARA submissions, para 12(a).

734 See related contentions in ARA submissions: *Of the three reasons identified historically for the imposition of penalty rates, only one has any application* (p 18); *There has been no comprehensive assessment of the appropriateness of a double time Sunday penalty rate in the retail industry.*

735 ABI submissions, para 30.2(c).

predecessors undertaken in recent and contemporary circumstances.[736] There is no evidence of any change in prevailing conditions in the retail industry or society more generally since the time of those decisions to justify a departure from or reconsideration of the award standards in respect of Sunday work determined by those decisions. The employers' reference to societal and industry conditions in 1919 is a false and simplistic comparison.

340. As outlined in Section C, the contemporary assessment by the Commission's predecessors of appropriate penalties for Sunday work in the retail industry indicates that the original rationale underpinning Sunday penalty rates has been adapted to contemporary and relevant conditions. As noted by the Full Bench in the Interim Review:[737]

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

341. There is a clear, but modified, connection and lineage between this approach and the statement by Higgins J that:[738]

> The (extra pay 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 . . .

342. As the evidence before the Commission demonstrates further below in Section E, notwithstanding the increased secularisation of society and the diminution in religious worship on Sundays, this underlying rationale remains as apposite today as when it was expressed by Higgins J in 1919. The rationale for penalty rates for Sunday work has never been anchored solely or substantially in the notion of that day being a day of religious devotion; that quality has always been but one aspect or manifestation of the special significance of Sundays.

"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"

343. It is accepted that, for *some* retailers, Sunday is a significant trading day. However, there is no evidence before the Commission to support a finding that this is the case across all of the retail

---

736 *Shop, Distributive and Allied Employees Association v $2 and under* (2003) 135 IR 1; *Award Modernisation Decision* [2008] AIRCFB 1000 and *Re Modern Awards Review 2010 – Penalty Rates* [2013] FWCFB 1635.

737 *Re Modern Awards Review 2010 – Penalty Rates* [2013] FWCFB 1635 at [206].

738 (1919) 13 CAR 437 at 469.

sector, or for the majority of retailers. This is a topic about which expert evidence could have usefully been adduced; it was not.

344. Neither is there sufficient evidence for the Commission to find that there have been changes in consumer and societal behaviour (since the introduction of Sunday trading) as a result of which the number of consumers seeking access to retail services on Sunday is increasing.

345. In support of this contention, the ARA relies upon the three propositions advanced in paragraph 85 of its submissions which appears under the heading, "*Retail Businesses Cannot Avoid Sunday Penalties*". Two of those propositions ("*that shopping centre leases mandate that tenants open on Sundays*" and "*retail businesses would lose customers to competitors if they closed on Sundays*"), even if properly established by the evidence, are not probative of the claim that there have been changes in consumer and societal behaviour as a result of which increasing numbers of consumers seek to access retail businesses on Sundays.

346. The remaining proposition relied upon by the ARA[739] is the claim that "*consumers demand access to retail businesses on Sundays*". The evidence cited thereunder does not however enable the Commission to make any findings about general trends or changes in consumer and societal behaviour, including in particular whether, since the deregulation of trading hours, there has been an increase in the number of consumers seeking to access retail businesses on Sundays. In particular:

(a) It is not open to the ARA to rely upon Table 2, Figure 11, pp 29-30 of the Sands Report[740] as that part of the said report was not read into evidence.

(b) The remaining evidence relied upon is evidence given by four retailers and the results of Dr Sands' interviews with 16 retailers. This is an insufficient basis for the Commission to make finding about changes in consumer and societal behaviour in general including in relation to Sundays. So much follows from the mixed nature of the evidence from retailers on this point. Although two of the four retailer witnesses referred to by the ARA did refer to increases in Sunday trade, for others, the level of Sunday trade was either the same as other days, or they did not open on Sundays. The interviews conducted by Dr Sands also do not provide a sufficient basis to support the propositions advance - Dr Sands himself accepting under cross-examination that they are not statistically generalisable or representative.[741]

---

739 See para 85(a) of the ARA Submissions.
740 Exhibit Retail 2.
741 PN 9887- PN 9892.

(c) The only expert evidence adduced by the employers in relation to consumer demand for retail services on Sundays was that contained in Ms Pezzullo's Weekend Work Report, specifically the Weekend Worker Survey comprised therein.[742] For the reasons advanced in Section D of these submissions, the Weekend Worker Survey does not provide a proper basis for the Commission to make findings of fact in relation to employee or consumer behaviour in the weekend retail workforce or industry. In any event however, the Weekend Worker Survey showed that only 3.1% of respondents chose Sunday as their preferred day to access retail services.[743] Indeed, the survey results demonstrated that Sunday is (by a significant margin) the lowest rating day in terms of consumer demand for services not only in retail but also in the fast food and pharmacy industries.[744]

"There is no, or limited, greater disability associated with Sunday work than with Saturday work"[745]

347. The evidence does not support a finding that "*there is no, or limited, greater disability associated with Sunday work than with Saturday work."* The evidence upon which the ARA relies in support of this contention, as set out in paragraphs 122-132 of its submissions, is examined below.

348. At its highest, the evidence of Dr Muurlink supports a finding that longitudinal Canadian studies have shown that Saturdays and Sundays are merging in terms of the degree to which they are "emotionally attractive" in Canada, albeit that there is still a "separation" between these days.[746] Dr Muurlink's only evidence in the Australian context is in relation to there being a trend in the change in patterns of work and society[747] – nothing is said by Dr Muurlink about the degree to which Saturdays and Sundays are "emotionally attractive" or the extent to which work on those days is associated with disamenity for employees in Australia. Of note in the Australian context is the fact that, as reported in the Final Productivity Commission Report, around 90% of Australians do not work on Sundays.[748]

349. The ARA's characterisation of the Bittman paper is misleading and selective. Importantly, although Bittman sets out data in graphical form from the ABS *1997 Time Use Survey* demonstrating the time allocation of various activities by day of the week, he does not devote specific analysis of this data to looking at the equivalence or otherwise of Saturdays or Sundays for each of the activities listed. Professor Bittman's focus is on the effect of *Sunday* working on

---

742 Exhibit PG-34.
743 Exhibit PG-34, p 38 (marked p 57).
744 Exhibit PG-34, pp 38-39 (marked pp 57 and 58).
745 See also related contentions in the ARA submissions: *Sunday can no longer be considered the only day on which one's friends are free* (p 16) *Sunday can no longer be considered, for retail employees, the day that is the most valuable for rest and amenity under our social habits* (p 17).
746 Exhibit UV-26, para 65. See also PN 20886.
747 Exhibit UV-26, para 64. See also PN 20884, PN 20895 and PN 20896.
748 Final Productivity Commission Report, Appendix F, p 1116.

time spent with family, friends, colleagues and neighbours. To this end, he finds:

> In terms of social contact, Sunday is the most important day of the week for Australians of working age…Time spent with immediate family (spouse and where applicable, children) on Sunday is roughly 70 per cent higher than in mid-week. As could be expected, a similar pattern holds for time spent with children, with parents devoting 70 % more time to leisure activities with their children than midweek. Sunday is also the day that adults devote the greatest amount of time to eating with other members of their family – 50 per cent more than the time spent on that activity that (sic) on a weekday.
>
> Taking these findings together, it is reasonable to conclude that Sunday is the most critical day for families to spend time together. Although not quite as important as Saturday, Sunday is also an important day of social contact with friends, colleagues and neighbours, as working-age Australians devote roughly 60 percent more time to these activities than on a weekday.

Professor Bittman's paper later concludes that *"Sunday is still a very special day in Australia. Many activities are especially reserved for Sundays, notably rest, recreation and association with significant others. The overwhelming majority of the workforce does not work on a Sunday."*[749]

350. Contrary to the ABI's submissions, Professor Bittman did not make "findings" of the type claimed. His work focused on the effect of working on Sundays, not its overall equivalence to Saturdays.

351. The ARA's reliance on the Craig and Brown study to support the contention that, *"[T]here is no, or limited, greater disability associated with Sunday work than with Saturday work"* is also misplaced. Whilst the Craig and Brown study provides commentary about the impact of weekend work on time spent on various leisure and social activities, it does not provide any analysis of the disability experienced by weekend workers. As the authors acknowledge, *"[T]his study is subject to a number of limitations. Our data are quantitative and cannot tell us how respondents feel about the time allocation patterns we have described."*[750]

352. The assertion made in the Productivity Commission Final Report that, *"…there is very little difference in the degree to which people engage in social activities between Saturdays and Sundays (compared to weekdays)…"* and that *"…the largest deviation in social activities between weekdays and weekends – 'social and community interaction' – is actually higher on Saturdays"*[751] says nothing about the level of disamenity experienced by employees who work on Sundays. In any event, the ABS data on which the Productivity Commission relies in making

---

749 Bittman, Michael, *Sunday Working and Family Time,* Labour & Industry, Vol 16, No 1, August 2005, p 78.

750 Exhibit ABI-13, p 724.

751 Productivity Commission Final Report, p 437.

these claims also shows that the largest deviation in 'recreation and leisure' between weekdays and weekends is higher on *Sundays* than Saturdays.[752] Moreover, for the reasons set out in Chapter 3 of these submissions, the Commission should not place any weight on the Productivity Commission's analysis of the AWALI data in making findings about the disability experienced by weekend workers in Australia.

353. The ARA also relies on the evidence of two SDA witnesses and a number of employee interviews carried out by Dr Macdonald to support its contention that *"there is no, or limited, greater disability associated with Sunday work than with Saturday work."* This evidence is not only insufficient but, as detailed in Section E, the employee interviews are not (and were never intended to be) statistically generalisable or representative.

354. The evidence of a further three retail employee witnesses is insufficient to support a finding that *"there is no, or limited, greater disability associated with Sunday work than with Saturday work"* in the retail weekend workforce generally. In any event, as the ABI concedes, three other retail lay witnesses indicated either that the level of work/life intrusion was greater on Sunday or that Sunday was the day on which their social and family events were typically held. Moreover, the employers' own lay evidence was revealing in this regard. In cross-examination, Mr Antonieff said:[753]

> …I have a young family, I have three kids…so I give those hours back, and in return I also get a quality of life back and spend time with my kids as well.
>
> So what do you want to spend your time with on Sundays instead of working Sundays?---With my family.

Further, Mr Daggett, in cross-examination, recounted that:[754]

> One of those things understandably is that you say that you would not work on the weekends which would mean that you'd roster another employee to work. I presume that's just to regain some of your work/life balance, is it?---Yes, because I have young children.
>
> Would I be right in assuming that you'd be wanting to spend time with your children on a Sunday instead of work?---Yes, because they go to school during the week, so I don't see them during the week.

355. No reliance can properly be placed on the finding from the Weekend Worker Survey that 69% of employees under 35 years old view both days as equal. For the reasons advanced in Section D

---

752 Productivity Commission Final Report, p 437.

753 PN 16974-16975.

754 PN 17063-17064.

of these submissions, principally that the Weekend Worker Survey results are unreliable and provide no basis for making findings in relation to retail workers.

356. Equally, for the reasons provided in Section D of these submissions, the ARA's reliance on the AWALI 2014 survey data to support its contention that Saturday and Sunday *together* stand out above weekday work in terms of the interference caused to personal lives, is based on a misapplication and misinterpretation of the AWALI data.

357. The ABI parties also rely on the Rose Report in so far as it is said to reveal the importance and value retail employees place on time, including on working "unsociable hours", to support its contention that *"the disability associated with working on Saturdays is the same or substantially similar to the disability associated with working on Sundays."* First, the methodology that underpins this part of the Rose Report is fundamentally flawed given that, as detailed in Section D of these submissions, Professor Rose erroneously conflates the value an employee places on an activity with the value that employee places on time at a specific point in the day. Second, Professor Rose's attempt to assess employees' willingness to accept work on Sundays is not only unsound, for the reasons set out in Section D of these submissions, but it does not in any event shed light on whether and to what extent such employees experience disability when working on that day.

358. For the reasons advanced above in relation to the ARA submissions, the ABI's reliance on the Bittman paper and the Craig and Brown study referred to in evidence by Professor Markey must not be given undue weight.

359. The ABS data provided in the Productivity Commission Final Report concerning what people do with their time and with whom they spend it, does not provide any evidence of the relative disamenity occasioned by employees working on Saturdays and Sundays. Moreover, for the reasons set out in Chapter 3, the Commission should not place any weight on the Productivity Commission's analysis of the AWALI data in making findings about the disability experienced by weekend workers in Australia.

360. The evidence of Professor Markey upon which the ABI seeks to rely provides an insufficient basis on which any finding can be made by the Commission that *"there is no, or limited, greater disability associated with Sunday work than with Saturday work."* The ABI again refers to Professor Markey's reliance on the Bittman paper and the Craig and Brown study and, for the reasons expressed above, such reliance is misplaced. Moreover, as acknowledge by the ABI, the Skinner and Pocock research to which Professor Markey refers identifies greater work/life

interference for those who work "Sundays only" compared to those who work "Saturdays only". For the very reason that the ABI parties caution against reliance on this research, namely that they did not have an opportunity to properly test Skinner and Pocock's findings, so too the SDA cautions against reliance on the Bittman paper and the Craig and Brown study.

361. On the basis of the submissions set out in Section E, the ABI parties' critique of Dr Muurlink's evidence fails to undermine the fundamental findings that can properly be drawn from his evidence, namely that:

(a) Working on weekends is associated with six key markers of negative health which are consecutively, overload, uncontrollability, unpredictability, asynchronicity, and arrhythmia. The presence of these factors also spill over into a negative impact on the wellbeing, social life, and relationships of the worker.

(b) Weekend work disrupts social patterns, because the majority of social and leisure activity takes place on weekends, and particularly on Sundays. Research shows that Sunday is traditionally reserved to a degree greater than Saturday to rest and family activities and there are elevated well-being consequences that are particular to Sunday. The negative impact of weekend work on the employee also has a secondary impact on the partner and/or the children of the worker.

(c) Weekend workers are not able to fully off-set or mitigate the negative effects of weekend work by reshuffling activities usually done on weekends done on other days. Sunday workers in particular lose even more recreation time relative to standard workers.

362. For the reasons expressed in Section D, the ABI parties' reliance on the evidence of Professor Charlesworth and Dr Macdonald to support the contention that *"there is no, or limited, greater disability associated with Sunday work than with Saturday work"* should be disregarded on the basis that their analysis of the AWALI survey and qualitative interview data is flawed.

<u>"There is lesser disability associated with Sunday work than with evening/night work"</u>

363. The AWALI data upon which the ARA relies in advancing this proposition[755] does not show that there is lesser work/life interference or disability associated with Sunday work than with evening/night work. Rather it shows that there is lesser work/life interference associated with regular *weekend* work than with evening/night work. Moreover, it establishes that regular weekend *and* evening/night work produces the highest level of work/life interference. In any event, it does not follow from the fact that there is lesser work/life interference or disability

[755] Exhibit SDA-45, p 28, Figure 13,

associated with weekend work than evening/night work that the current Sunday penalty rate is no longer relevant. Critically, the same AWALI data confirms that regular (often/almost always) working Sundays is clearly associated with higher work-life interference than regular (often/almost always) working Saturdays, whether employees work regular Sundays (but not regular Saturdays) or regular Sundays and regular Saturdays.[756]

Sunday penalty rates "are higher than the penalty rates applicable under the relevant awards in other service sector industries"

364. The Commission is required to review each modern award in its own right in the conduct of the 4 yearly review pursuant to s 156 of the FW Act.[757] The penalty rates applicable in various other awards are of limited relevance in determining whether the current provision of the Retail Award achieves the modern award's objective. In any event however, the ARA's submission is flawed for a number of reasons.

365. *First*, the comparison proceeds by reference to a narrow (and self-serving) conception of "*other service sector industries*". The "service industry" is not confined to the retail, restaurants, fast food and hospitality sectors. According to the ABS:[758]

> A service industry produces services valuable to consumers as a final product, such as services provided by cafés and restaurants, or valuable to other service and goods producers as an intermediary input, such as wholesale trade and accounting services. …

According to the ABS ANZSIC classification, service industries encompass the following sectors: wholesale trade; retail trade; accommodation and food services; information, media and telecommunications; financial and insurance services: rental, hiring and real estate services; professional, scientific and technical services; administrative and support services; public administration and safety; education and training; healthcare and social assistance; arts and recreation services and other services.[759]

366. *Secondly*, within the above ANZSIC definition of "service industries", the Commission has made the following modern awards which apply to industries in which services are provided on Sundays and which also contain an entitlement to a penalty rate of double time for Sunday work:

(a) Hair and Beauty Industry Award 2010;

(b) Racing Clubs Events Award 2010;

---

756 Exhibit SDA-45, p 29.
757 Section 156(5) of the FW Act.
758 www.abs.gov.au/websitedbs/c311215.nsf/all+documents+by+title/service+industries+statistics.
759 Ibid.

(c) Security Services Industry Award 2010;

(d) Rail Industry Award 2010;

(e) Social, Community, Homecare and Disability Services Industry Award 2010;

(f) Cleaning Services Award 2010;

(g) Commercial Sales Award 2010;

(h) Corrections and Detention (Private Sector) Award 2010.

367. *Thirdly*, there are various other awards of the Commission that cover sales work, or which are otherwise part of the broader retail and allied industry, and which contain an entitlement to double time for Sunday work. They include the:

(a) Nursery Award 2010;

(b) Storage Services and Wholesale Award 2010;

(c) Wine Industry Award 2010;

(d) Road Transport and Distribution Award 2010; and

(e) Drycleaning and Laundry Industry Award 2010.

368. *Fourthly*, there are at least two modern awards which provide for double time for Sunday work and which cover occupations which are also covered by the Retail Award. The Meat Industry Award 2010 covers a butcher employed in a standalone butcher shop, but a butcher in a supermarket is covered by the Retail Award. Similarly, a clerical worker working in a shop is covered by the Retail Award, but is covered by the Clerks - Private Sector Award 2010 if working, for example, at a retailer's head office.

Existing Sunday work penalties are not a fair minimum safety net of terms and conditions[760]

369. The ARA parties advance four propositions as to why the existing provisions of the Retail Award in respect of Sunday work penalties are not a fair minimum set of terms and conditions. Each of those propositions is identified and examined below.

---

760 ARA Submissions, para 12(b).

Existing Sunday penalty rates "result in employees being restricted in the number of hours they are offered by their employers on Sundays"[761]

370. It is not disputed that the retail employer witnesses gave evidence that they considered themselves restricted in the number of hours which they could offer their employees on Sundays. However, whilst the retail employer witnesses suggested that this was a result of the cost of labour, specifically penalty rates, a proper analysis of the employers' evidence, as set out in Section D of these submissions, reveals that demand, or anticipated levels of sales, is the primary driver of Sunday labour allocation.

371. The ABI makes substantially the same claim to the ARA, albeit that the ABI's claim is inverted, namely that *"[A] reduction in penalty rates on Sundays/Public Holidays will increase the hours offered to employees on these days."* The ABI premise their claim on the assumption that decreasing penalty rates will increase employment and thus increase the hours offered to employees. For the reasons set out in Section D of these submissions, this assumption is unsound. The ABI also relies on the survey of retail employers carried out by Ms Baxter in suggesting that there would be more hours allocated to employees on Sundays with a reduction in the penalty rate. For the reasons outlined in paragraphs 111-114, the Commission should not place weight on the results of this survey.

Existing Sunday penalty rates "inhibit employers in their ability to provide additional hours to employees and employment opportunities to unemployed persons"

372. There is little evidence to support the proposition that it is penalty rates which inhibit employers in providing employees with additional hours or to provide opportunities to the unemployed. First, as detailed in Section D of these submissions, demand is the key determinant of Sunday labour allocation. Second, most employers gave evidence that they fixed labour costs as a percentage of sales and thus any restriction on rostering additional Sunday hours falls away if the Sunday sales justify the cost regardless.

---

761 See also related contentions in ARA submissions: *Retail businesses are responsive to changes in labour costs* (p 21); *A reduction in the Sunday penalty rate would see retailers likely to increase trading hours on Sundays* (p 30); *A reduction in the Sunday penalty rate would see retailers likely to open more stores on Sundays* (p 30).

Existing Sunday penalty rates "impact negatively on retail business operations on Sundays, including in relation to trading hours and sales performance"[762]

373. It is correct that the employer retail witnesses gave evidence in chief that they believed Sunday penalty rates were impacting negatively on their Sunday trading. Again however, there is little probative evidence that it is in fact the cost of labour, and penalty rates specifically, that is the cause of this impact – rather, as expanded upon in Section D of these submissions, it is the level of Sunday demand that is key.

Existing Sunday penalty rates "go beyond what is required to compensate for the disability associated with Sunday work"[763]

374. The ARA first relies on the evidence of Professor Charlesworth in support of the claim that retail employees identify low levels of interference associated with Sunday work. For the reasons set out in Section D of these submissions, such reliance is based on a flawed application and interpretation of the AWALI data.

375. Secondly, the ARA relies on the evidence of Professors Watson and Peetz to suggest that a high proportion of retail weekend workers (22.1%) are aged 15 to 18 and to submit that there is little evidence of any disability associated with Sunday work for persons of this age group. This analysis ignores the additional evidence of Professor Watson based on the most recent HILDA data that there was no statistically significant change in the proportion of 15 to 18 year olds in the weekend retail workforce between 2004 and 2012 (see paragraph 171(b)(ii) above).[764]

376. The ABI puts forward a similar proposition to that of the ARA, namely that, *"[T]here is some disability associated with working on Saturdays and Sundays, however this disability does not apply to all segments of the workforce. Indeed, some employees wish to work Saturdays and Sundays."* In support of this proposition, the ABI relies on the "Primary Pezzullo Report", the Sands Report, the Productivity Commission Final Report and some individual employer evidence. This evidence is assessed below.

---

762 See related contentions in ARA submissions: *Retail businesses operate under lower profit margins and average operating profits, and higher product costs, when compared to industry generally* (p 20); *A reduction in the Sunday penalty rate would see retailers carry out additional tasks* (p 31)*; A reduction in the Sunday penalty rate would see the number of hours worked by owner operators reduce* (p 31); *Increased staff on Sundays will lead to increased sales turnover* (p 32). See also related contention in ABI submissions: *Sunday trading generates an important proportion of revenue in the retail industry* (p 28).

763 See related contentions in ARA submissions: *Retail employees choose to work on Sundays* (p 34); *Retail employees will continue to work on Sundays at a 50% penalty* (pp 35 and 36). See also related contentions in ABI submissions: *Employees do wish to be paid a premium to work Sundays however, the premiums sought by employees in order to work are lower than the premiums presently imposed by the retail award* (p 62); *In some industries, particularly retail, employees know and accept that working in the industry necessarily involves weekend work* (p 56).

764 Exhibit SDA-36, pp 10-11, lines 4-10, Tables 14 and 15.

377. The "Primary Pezzullo Report", specifically the weekend worker survey, is relied on by the ABI parties to support three claims; work practices and preferences vary considerably between individuals, employees may wish to work traditionally atypical hours for a range of reasons; and a decision to work weekends is likely to relate to or be influenced by the characteristics of the particular worker (with weekend workers being demographically different from the population as a whole and often 'opting into' weekend work as a result of demands in other areas of life. First, as a matter of logic, none of these claims, even if substantiated, bear on the question of whether and to what extent any given retail worker experiences disamenity in working on weekends. The fact that a retail employee may elect to work on weekends is not necessarily reflective of the disability experienced by that worker when doing so. Second, for the reasons expressed in paragraphs 202-214 of these submissions, the weekend worker survey does not provide a proper basis for the Commission to make findings of fact which relate to retail workers' attitudes and experience of weekend work. Moreover, as was the evidence of Professor Charlesworth, the assumption that only a particular type of person works on weekends is flawed – there is a diverse group of people who work on weekends, just as there is a diverse group of people who do not.[765] The value of the 2014 AWALI survey is that, notwithstanding this diversity, it shows that for weekend workers there is a consistent and strong effect that they experience worse work-life outcomes than non-weekend workers.[766]

378. For the reasons outlined in these submissions in Section D, the Sands Report is fundamentally unsound such that it does not permit reliable conclusions to be drawn on the basis of its "findings", including any that the ABI parties seek to make about the disability experienced by retail employees who work on weekends. In any event, the fact that, a number of shopfloor employees surveyed by Dr Sands indicated that there were some advantages experienced by them when working weekends (for example, easier parking and flexibility around life commitments like study and family), is not determinative of whether and to what extent such employees experienced disamenity when working on these days.

379. For the reasons set out in Chapter 3 of these submissions, the Commission should not place any weight on the Productivity Commission's analysis of the AWALI data in making findings about the preferences of weekend workers or the disability experienced by them. Again, as was the evidence of Professor Charlesworth, the assumption that only a particular type of person works on weekends is flawed – there is a diverse group of people who work on weekends, just as there is a diverse group of people who do not.[767] The value of the 2014 AWALI survey is that,

---

765 PN 23547. See also SDA-44, [8]-[14].
766 Exhibit SDA-44, [14].
767 PN 23547. See also Exhibit SDA-44, [8]-[14].

notwithstanding this diversity, it shows that for weekend workers there is a consistent and strong effect that they experience worse work-life outcomes than non-weekend workers.[768]

380. The fact that some retail employer lay witnesses suggested that they did not have difficulties in finding people to work on Sundays says little, if anything, about the level of disability or otherwise experienced by those employees when electing to work on Sundays. To suggest that such evidence supports the proposition that *"existing Sunday penalty rates "go beyond what is required to compensate for the disability associated with Sunday work"* is illogical and misleading.

Existing Sunday work penalty rates impact negatively on the low paid [769]

381. The claimed negative impact on the low paid is said to arise by reason of the increasing workload of retail employees on Sundays and because the existing Sunday penalty rates limit the ability of retail employees to earn additional income by working on Sundays. Each of these claims is examined separately below.

Sunday penalty rates increase the workload of retail employees

382. This submission is based on an erroneous understanding of the reference to the "low paid" in the modern award's objective. Section 134(1)(a) refers to the "needs" of the low paid. It is submitted that the statutory context indicates that this principally is a reference to the financial needs of the low paid. Notions of "workload" are not relevant to this consideration. In any event, for the reasons presented in Section D of these submissions, the Sands Report does not provide a reliable basis for the underlying claim. In particular, the ARA relies on selected verbatim quotes obtained from survey respondents which, as detailed in paragraph 198 above and on Dr Sands' own admission, were not always sourced from answers to questions concerning the particular issue in question.[770]

Sunday penalty rates limit the ability of retail employees to earn additional income[771]

383. This proposition is not supported by the evidence. As the analysis undertaken in Section D demonstrates, at its highest, the evidence of the retail employers is that most would *consider* rostering additional hours if penalty rates were reduced. Under cross-examination, none were

---

768 Exhibit SDA-44, [14].

769 ARA Submissions, para 12(c).

770 PN 9945, PN 9948-PN 9951.

771 See related contentions in ARA submission: *A reduction in the Sunday penalty rate will increase overall labour hours worked in retail stores* (p 31)*; A reduction in the Sunday penalty rate will lead to benefits to employees and unemployed persons* (p 32)*; There is limited financial disability associated with reducing the Sunday penalty* (p 38).

prepared to commit to doing so. The fact that the retail employers suggested that employees might have the opportunity to replace or offset income lost from a reduction in penalty rates by being offered more hours, offers little. Working longer to earn the same money is not compensatory or advantageous when measured against maintaining the status quo.

Existing Sunday work penalty rates do not meet the requirement that a modern award encourages collective bargaining [772]

384. The ARA has not adduced any evidence, to allow the Commission to make a finding that the Retail Award does not encourage collective bargaining *and* that a reduction in the Sunday penalty rate would encourage collective bargaining. The requirement that the Retail Award encourage collective bargaining is addressed further in Section H below.

Existing Sunday penalty rates do not promote social inclusion through increased workforce participation [773]

385. The ARA has not provided any evidence to support a finding by the Commission that existing Sunday penalty rates do not promote social inclusion through increased workforce participation. The uncontested evidence of Mr Kirchner in this matter is that the number of persons employed in the retail industry and aggregate hours worked has continued to increase in recent years.[774] Moreover, for the reasons expressed in Section D, the ARA's assertion that the reduction in penalty rates is likely to result in increased employment (and among other things, opportunities for the unemployed) is fundamentally flawed. The requirement that the Retail Award promote social inclusion through increased workforce participation is examined in more detail in Section H below.

Existing Sunday penalty rates do not promote flexible modern work practices and the efficient and productive performance of work [775]

386. The ARA relies on the retail lay evidence from employers to assert that a decrease in the Sunday penalty rate would increase the number of rostered hours and in turn drive sales. First, as the analysis undertaken in Section D demonstrates, at its highest, the evidence of the retail employers is that most would *consider* rostering additional hours if penalty rates were reduce. Under cross-examination, none were prepared to commit to doing so. Second, it was not established on the evidence that the capacity of employers to roster additional Sunday labour hours would necessarily result in greater demand or increased sales. As set out in Section D above, the

---

772 ARA Submissions, para 12(d).
773 ARA Submissions, para 12(e).
774 Exhibit SDA-32, Exhibit KPK-1, p 10. See also pp 33-36.
775 ARA Submissions, para 12(f).

evidence establish that retail employers would only roster more work for employees, particularly managers or experienced staff members, if it was profitable to do so.

Existing Sunday penalty rates have a negative impact on business, including on productivity and employment costs [776]

387. For the reasons expressed in Section D, existing Sunday penalty rates cannot be said to have a negative impact on business, including on productivity and employment costs. As set out on paragraph 29 of these submissions, the IPR suggests that the retail industry has had strong average annual growth in productivity between 2003-04 to 2014-15,[777] a finding that is consistent with the uncontroverted evidence of Mr Kevin Kirchner detailed at paragraph 30 of these submissions concerning the retail industry's strong economic performance in recent years.[778]

Existing Sunday penalty rates have a negative impact on employment and the proposed variations are likely to have a positive impact on employment [779]

388. For the reasons expressed in Section D of these submissions, the ARA has failed to establish either that existing Sunday penalty rates have a negative impact on employment or that the proposed reductions to that penalty rate are likely to have a positive effect on such employment.

389. The ABI argues for a similar proposition at paragraph 27 of its submissions, namely that, *"The imposition of penalty rates on Saturdays, Sundays and Public Holidays does negatively impact on employment levels on these days"* which, on the same basis as expressed above, is not made out on the evidence before the Commission.

390. In addition to the contentions outlined above, the ARA and ABI include a number of additional contentions in their submissions. The vast majority of these additional contentions overlap with those outlined above and have been referred to in the relevant footnotes. However, two of these additional contentions raise new matters which are addressed below.

Sunday can no longer be considered the day for religious reunion

391. This contention is also made by the ABI, *"Sunday's importance as a day of religious observance has dramatically reduced"*.

392. Whilst religious observance rates are unquestionably less than they were 100 years ago, a significant proportion of people still attend church or practice other forms of religious observance

776 ARA Submissions, para 12(h).
777 IPR, pp 24-25.
778 Exhibit SDA-32, Exhibit KPK-1.
779 ARA Submissions, para 12(i).

on Sunday. The *Changing Work Patterns* document[780] produced by the Commission in December last year shows that the frequency of attendance at religious services, according to HILDA survey data, has not dramatically changed between 2004 and 2014. Indeed, there is no evidence before the Commission that establishes any shift in religious observance on Sundays since the Retail Award was introduced in 2010.

No evidence of adverse health consequences from working Sundays

393. The ABI makes a comparable claim to this ARA contention to the effect that, *"There is no evidence that adverse health consequences arise from working on a Saturday, Sunday or a Public Holiday."* Dr Muurlink establishes the general proposition that working on weekends is associated with five key markers of negative health - consecutively, overload, uncontrollability, unpredictability, asynchronicity, and arrhythmia. The presence of these factors for any worker will spill over into a negative impact on the wellbeing, social life, and relationships of the worker. The SDA refers to and relies on the submissions it makes in relation to Dr Muurlink's evidence in Section E above. It also refers to the evidence that arose from Dr Sands' survey that 29% of respondents said that Sunday work had an adverse impact on the health and development of their children.[781]

SECTION G: RESPONSE TO ABI CASE ON PUBLIC HOLIDAY

394. The ABI invites the Commission to "*review and reframe entitlements arising out of public holidays in the context of the specific operation of the FW Act*".[782] It does so upon observations and assertions concerning: (a) conditions that existed when public holidays first arose; (b) the fact that the identification of particular public holidays has primarily been a matter of state law, and has not been uniform; and (c) the gradual increase in levels of public holiday loading, up to the 1970s, in tandem with gradual increases in entitlements to annual leave.[783]

395. None of those observations and assertions, even if borne out, would justify (let alone compel) the undertaking of a "*review and reframing*" of public holiday entitlements at large.

396. Public holiday entitlements have been stable for a long time. By the time that the awards now under review had been modernised, in 2010, most awards had established public holiday penalty rates of 250%, and those rates had been in place for 30-40 years. The *Public Holidays Test Case* (1994) principles had been adhered to for more than 15 years and it was well-established that the

---

780 *Changing work patterns,* Material to assist AM2014/305 – Penalty rates case, *Workplace and Economic Research Section, Tribunal Services Branch,* December 2015, p 23.

781 PN 10010.

782 ABI Submissions at 11.12.

783 ABI Submissions at 11.11.

underlying purpose of public holiday penalty rates was both dissuasive and compensatory. The issue of the rate for Public Holidays was largely uncontroversial and uncontested during the award modernisation proceedings in relation to the Retail Industry. The MGA[784] and ARA[785] put forward positions of 250% for Public Holiday work, with the NRA/ANRA[786] putting forward a view that there was a range of rates with 250% in the majority of States, but also 200% for South Australia.

397. Having called for a "*review and reframing*" of public holiday entitlements, ABI then departs the field. There are no submissions contending that penalty rates should be anything other than dissuasive and compensatory. Nothing is sought to be drawn from the fact that state law plays a role in identifying particular days as public holidays, or that public holidays are not uniform between the states. There is just a bare claim that public holiday penalty loadings ought be reduced from 150% to 100% (and to 25% for casuals).

398. ABI says that public holiday entitlements developed, as a dissuasive influence, over periods when performance of work on public holidays was mandatory.[787] Nothing of the kind is demonstrated by ABI's account of statutory and arbitral history, whether in connection with any of the awards under review, or at all. If anything, ABI's account reinforces the opposite conclusion, insofar as it recites a history of colonial and early 20th century state law prohibiting trade on particular days. In any event, had such conditions (performance of work on public holidays being mandatory) ever existed, such conditions had long since fallen away by the time the awards under review were modernised.

SECTION H: CONSIDERATION OF THE MODERN AWARD'S OBJECTIVE

399. The Commission should not reduce penalty rates in the modern awards unless it is satisfied that the proposed reductions are necessary to achieve the modern awards objective.[788] As outlined in Chapter 1 of these submissions, the employer parties must establish the ***necessity*** of the proposed variations, and that necessity means more than what is just desirable. On the evidence before the Full Bench, the employers have failed to meet that threshold.

400. In respect of the considerations set out in s 134(1)(a)-(h) of the Act, no particular weight should be attached to any one consideration over another; and not all of the identified criteria will necessarily be relevant to a particular proposal to vary a modern award.[789] To the extent that there is any tension between the considerations in s 134(1 "*the Commission's task is to balance the*

784 Master Grocers Association submission 1 August 2008 pg 12
785 Australian Retailers Association submission 1 August 2008 pg 48-49
786 National Retail Association and ANRA submission 1 August 2008 pg 20
787 ABI Submission, 11.11(b).
788 Section 138 of the Act.
789 *Annual Leave decision* at [19], [20].

various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions."[790]

401. The overall objective is to ensure that modern awards provide a fair and relevant safety net. The Commission is required to have regard to the s 134(1)(a)-(h) considerations, but the sum of those particular (mandatory) considerations is not determinative of the Review, if those considerations alone would otherwise result in approval of a variation that would not ensure a fair and relevant safety net.

Fair and relevant safety net

402. The existing penalty rates in the Retail Award are an essential element of a fair and relevant safety net because of the disruptive and harmful effects of working at the times at which those penalties currently apply. As detailed in Section E of these submissions, the evidence establishes that working on weekends and public holidays has a negative effect on the physical and psychological health, and on the social life, of workers and their families. Weekends, particularly Sundays, and public holidays are important and valuable. The current penalty rates appropriately recognise the value that workers and the community, including employers, place on weekends and public holidays.

403. This submission is in part accepted by the retail employers who agree that some compensation is needed for working on weekends and public holidays, but who argue that the current rates are set at the wrong level. The current penalty rates in the Retail Award are set at the appropriate levels, because, as established by the evidence in Section E of these submissions, weekend work, and particularly Sunday work, has a negative impact on the health, including the wellbeing, of the employee. Empirical studies have found that levels of work-life interference on Sundays are worse than on Saturdays.[791]

404. The existing penalty rates prescribed by the Retail Award are a product of substantial and numerous assessments by this Commission and its predecessors about the appropriate minimum standard to apply to work at unsociable times in the retail industry, particular on Sundays. That assessment has occurred in a contemporary context characterised by, amongst other things, the introduction and spread of deregulated trading hours and a workforce comprised of greater proportions of young people, women and those employed on a casual or part-time basis.

405. The question of the appropriateness of and level of penalty rates, particular on Sundays, was also the subject of extensive argument and consideration in award modernisation. The retail employers have not demonstrated any material change in circumstances relating to the operation and effect of the Retail Award which would now render that assessment as inappropriate.

---

790 Ibid [20].

791 See the evidence of Dr Muurlink and Professor Charlesworth in Section E of these submissions.

s 134(1)(a) – relative living standards and the needs of the low paid

406. Section 134(1)(a) expressly requires the Commission to take into account relative living standards and the needs of the low paid.

407. Penalty rates form part of the minimum safety net of pharmacy workers' terms and conditions of employment. As the uncontested evidence of Dr Watson establishes, employees in the retail industry are amongst the lowest paid workers in the nation with significantly greater reliance on award minima than the all industries average.[792] Together with the hospitality and food services industries, the retail industry has the largest proportion of low paid workers in the nation.[793] Dr Watson's evidence also confirms that the earnings situation of retail workers has deteriorated relative to workers in other industries between 2010 and 2014 and that their living standards at the household level are lower compared to households including employees from other industries.[794] The financial resources for meeting the costs of living are substantially less in retail households.[795]

408. This factor is not supportive of the proposed variation.

s 134(1)(b) – encouragement of collective bargaining

409. Neither the ARA nor the ABI have adduced any evidence that, since the Retail Award was made in 2010, the environment for collective bargaining in the retail sector has changed in any material respect, or that any such change would mean that the reduction in penalty rates would encourage collective bargaining. As the ARA concedes, *"…there is no evidence which directly identifies a link between the current Sunday penalty rate in the GRIA with collective bargaining…"*[796] and as the ABI admits, *"[W]e have not specifically sought to direct evidence to the prevalence of collective bargaining in the relevant industries."*[797]

410. The ARA refers to *Trends in Federal Enterprise Bargaining data* as referenced in the IPR as Department of Employment, *Trends in Federal Enterprise Bargaining,* September 2015 (**September Trends Report**). The September Trends Report shows that, in the September 2015 quarter, 17 agreements were approved in the retail industry, covering 874,000 employees, the second largest number of employees covered by agreements in the retail industry since the

792 Exhibit SDA-35, p 29, lines 22-28 and p 17, lines 9-13.
793 Exhibit SDA-35, p 45, lines 7-9.
794 Exhibit SDA-35, p 38, lines 2-5 and p 59, lines 8-12.
795 Exhibit SDA-35, p 58, lines 16-18.
796 ARA submissions, para 141.
797 ABI submissions, para 32.1.

September 2012 quarter.[798] Moreover, although the number of retail agreements has fallen over the three-year period from September 2012 to September 2015, the number of employees covered by agreements in the industry has not proportionally fallen.[799] Also of note is the fact that the retail industry had the highest Average Annualised Wage Increase (AAWI) for the September quarter of 4%.[800]

411. This factor is not supportive of the proposed variation.

s 134(1)(c) – promotion of social inclusion through workforce participation

412. The need to promote social inclusion through increased workforce participation is a reference to higher employment.[801] This objective is identical to s 284(1)(b) of the Minimum Wages Objective in Part 2-6, Division 2 of the Act. When considering the application of s 284(1)(b) of the Act, the Expert Panel "*must form a view on the employment impacts of an increase in the national minimum wage and modern award minimum wages of the size that we have in mind and in the economic circumstances that we face*".[802] This is the same exercise that the Full Bench should undertake in considering whether cuts penalty rates will mean higher employment, although of course the variables will be different.

413. For the reasons outlined in Section D of these submissions, the expert evidence of Professors Borland and Quiggin in reply to the evidence of Professor Lewis demonstrates that cuts to penalty rates would have no measurable effect on employment. That conclusion is supported by Ms Yu's evidence about the effect on employment of increases in penalty rates which occurred in NSW between 2010 and 2014. Nor does the employer lay evidence provide analysed in Section D of these submissions enable the Commission to find that the proposed cuts in penalty rates would likely lead to any measurable increase in employment.

414. This factor is not supportive of the proposed variation.

---

798 Table 7, September Trends Report.

799 Table 8, September Trends Report. It should also be noted that "current agreements" are defined by reference to their nominal expiry date and that the database analysed includes Office of the Employment (OEA) and Workplace Authority (WA) agreements.

800 September Trends Report, p 7.

801 See, eg, *2014-2015 Annual Wage Review*, [51].

802 *2014-2015 Annual Wage Review*, [52].

s 134(1)(d) - promotion of flexible modern work practices

415. The contention advanced by the employers[803] is essentially threefold: (1) weekends are an important time of trade unlike when penalty rates were first fixed; (2) there is no longer a valid justification to deter employment on weekends; (3) penalty rates are "dis-incentivising" employers from trading times which would otherwise be profitable and productive to trade.

416. For the reasons outlined at length in these submissions, this contention is misconceived as: (1) current penalty rates in the retail sector were fixed in a contemporary and recent context which included deregulated trading hours; (2) the existing penalty rates for weekend work are expressly directed at compensating employees and do not contain any element of "deterrence"; and (3) there is no sufficient evidence for the Commission to find that penalty rates *per se*, as distinct from other commercial considerations such as the level of demand, have the effect that employers do not trade on the times at which they apply.

417. This factor is not supportive of the proposed variation.

s 134(1)(da) – need to provide additional remuneration for working unsocial hours or weekends

418. The SDA refers to and relies on the submissions above as to the "fair and relevant safety net." It is acknowledged however that, whether the proposed variations are approved or not, the Retail Award will provide additional remuneration for working unsocial hours or weekends.

s 134(1)(e) – equal remuneration for equal work

419. More than half of the retail workforce is female.[804] Any cuts to penalty rates in the Retail Award will therefore disproportionately affect women.

420. The Commission has taken this factor into account when considering the impact on adjustments to the minimum wage. After acknowledging that "the gender pay gap is significant" on any measure used,[805] stating in the most recent *Annual Wage Review* that:

> **[54]** Women are disproportionately represented among both the low paid and the award reliant and hence an increase in minimum wages is likely to promote pay equity, though we accept that moderate increases in minimum award wages would be likely to have only a small effect on the gender pay gap. The principle of equal

---

803 See for example ABI submission para 34.
804 IPR (Table 5.1) which identifies that 55.4% of the retail workforce is female.
805 *2014-2015 Annual Wage Review*, [482].

> remuneration is a factor in favour of an increase in the NMW and the minimum wages in modern awards.
>
> …
>
> **[492]** Women are disproportionately represented among both the low paid and the award reliant and hence an increase in minimum wages is likely to promote pay equity, though we accept that moderate increases in minimum award wages would be likely to have only a small effect on the gender pay gap. The other mechanisms available under the Act, such as bargaining and equal remuneration provisions, provide a more direct means of addressing this issue.
>
> **[493]** The principle of equal remuneration is a factor in favour of an increase in the NMW and the minimum wages in modern awards and as such has been considered together with the various other statutory considerations the Panel is required to take into account.

421. This factor is not supportive of the proposed variation.

s 134(1)(f) – likely impact on business, including productivity, employment costs and regulatory burden

422. Although a reduction in penalty rates would result in lower (per unit) employment costs, there is otherwise no evidence that a reduction in penalty rates would affect the productivity of enterprises in the retail industry, or affect any regulatory burden upon such enterprises. The ARA's claim that reductions in penalty rates will have a positive effect on business through higher revenue and productivity relies on the retailer lay evidence that there will be "increased employee numbers on Sundays". That assumption is unsound for the reasons summarised above in respect of s 134(1)(c).

423. This factor is not supportive of the proposed variation.

s 134(1)(g) – need for a simple and sustainable modern award system

424. A simple and sustainable modern award was made in 2010. This consideration has no particular relevance to the Review.

s 134(1)(h) – likely economy-wide effects

425. The claimed economy-wide effects of the proposed variations assumes that cuts in penalty rates will lead to increases in employment. For the reasons summarised above in respect of s 134(1)(c), that submission is misconceived.

Conclusion

426. In all the circumstances, the proposed amendments are not necessary to meet the modern awards objective. The penalty rates currently set out in the Retail Award provide a fair and relevant minimum safety net of terms and conditions.

CHAPTER 3: PHARMACY INDUSTRY AWARD 2010

Introduction

429. The Pharmacy Guild of Australia (the **Guild**) has applied for a determination effecting the reduction of penalty rates payable under the *Pharmacy Industry Award 2010* (the **Pharmacy Award**). The Guild has provided a draft determination specifying its claims.[806]

430. The Guild's statement of the effect of its proposed determination, appearing at page 5 of its submission, is incomplete. That statement summarises the effect upon *weekday* and *weekend* penalty rates. The Guild's proposed determination would also have the effect of reducing penalty rates payable on *public holidays*: from 250% to 200% (and from 275% to 125% for workers engaged under casual rates).

Summary

431. The SDA's principal contentions in respect of the Guild's proposed variations to the Pharmacy Award as further developed below are as follows:

(a) The Guild has not demonstrated that, since the making of the Pharmacy Award, there has been a material change in circumstances relating to the operation or effect of that award such that it is no longer meeting the modern awards objective. Such a case is required to be established for the reasons explained in Chapter 1. The Guild has not in fact sought to establish relevant change since the making of the Pharmacy Award.

(b) Consideration of the process of award modernisation makes clear that, when the Pharmacy Award was made, it achieved the modern awards objective. The same issues now agitated by the Guild were the subject of extensive submissions, evidence and argument and resolved by the Commission through the making of the Pharmacy Award in its existing terms.

(c) Putting to one side the contentions identified in subparagraphs (a) and (b):

(i) the Guild's proposed variations are in any event not underpinned by cogent merit arguments supported by sufficient probative evidence properly directed to demonstrating the facts upon which the proposed variations are advanced;

---

806 A draft declaration was first provided by correspondence dated 13 February 2015. A corrected form of draft declaration was provided by correspondence dated 17 February 2015. The Guild's submission incorrectly refers to the 13 February 2015 version (paragraph [4]), although the table at pages 4-5 of that submission reflects the terms of the corrected draft declaration of 17 February 2015.

(ii) the evidence adduced by the Guild does not provide a sufficient basis for the Commission to find that the penalty rates provisions of the Pharmacy Award have the negative effects as asserted by the Guild; and

(iii) in critical respects, the evidence relied on by the Guild was unreliable because it was selective, self-serving and overstated.

(d) The Guild's proposed variations to the Pharmacy Award do not meet the modern awards objective; the award in its existing terms does meet that objective.

Award modernisation

432. In award modernisation, the Guild not only provided extensive submissions to the Commission on the issue of penalty rates, but it adduced expert evidence, prepared detailed costing's analysis and obtained numerous testimonials from pharmacists, all of which raised many of the very issues advocated by the Guild in this 4 yearly review.

433. The Guild's draft modern award sought a Sunday penalty rate of time and a half.[807] In response to the Commission's exposure draft award, the Guild again filed submissions which sought a Sunday penalty rate of 150%, citing the unique characteristics of the industry's regulated health environment and long trading hours as justifications for the less than double time rate.[808] This submission contained extensive cost comparisons as against the exposure draft award utilising actual and representative community pharmacy rosters.[809]

434. To support its submission to the Commission on the exposure draft award, the Guild also filed a Chartered Accountant's report detailing financial costing's concerning the impact of the new award on wages paid in community pharmacy.[810]

435. Again in submissions dated 29 May 2009, as part of the Commission's consultation about transitional provisions for the Pharmacy Award, the Guild made its position clear, stating among other things that, *"[T]he penalty rate provisions in the PIA do not reflect the non standard working time patterns of employees"* and *"[T]he penalty rate provisions in the PIA do not reflect the seven day a week and late trading practices that prevail in the community pharmacy sector,*

---

807 *Draft Community Pharmacy Industry Modern Award 2008, Pharmacy Guild of Australia Submission,* cl 16.1.

808 *Comments of the Pharmacy Guild of Australia on the Retail Award 2010 – Exposure Draft – September 2008,* 10 October 2008, [39]-[40].

809 *Comments of the Pharmacy Guild of Australia on the Retail Award 2010 – Exposure Draft – September 2008,* 10 October 2008, Schedule 1.

810 *Pharmacy Guild of Australia in relation to Exposure Draft September 2008 Retail Industry Award 2010, Comparative Analysis of Wages paid in the Pharmacy Industry,* 23 October 2008, prepared by Peter Saccasan, Saccasan Bailey.

as primary health care providers."[811] These submissions were supported by a number of comprehensive testimonials from pharmacists and pharmacy assistants, all of whom repeated themes consistent with the Guild's primary position that the particular role of community pharmacy in primary health care provision required that it escape the penalty rates proposed in the Pharmacy Award.[812]

436. In yet further submissions dated 26 June 2009, the Guild resisted the SDA's submission that *"employees required to work the unsociable hours associated with late nights and weekends should get the benefit of the penalties and loadings provided by the Awards as soon as possible,"* arguing that:[813]

> Modern awards and the provisions they contain should be just that, modern. In the 1970's a meal of fish and chips was generally considered an exotic meal out for the average Australian family. In the 1980's a meal at a Chinese restaurant was considered out of the ordinary. The population has changed, the culture has changed and what suits people has changed. Many Australian families now have two working parents and quite often one parent now works in the hours when the other parent is able to be at home to care for the children. Students want and need to work outside of school or university hours. The SDA wants to impose 1970's 9-5 working ideals on a population that demands a completely different set of working time patterns.

The Australian community pharmacy industry

The role of community pharmacy in Australia

437. In section E(a) of its submission, the Guild reproduces the account in Armstrong's statement,[814] to the effect that community pharmacies provide good services in addition to the dispensing of medicines, and make valuable contributions to the function of Australia's health care system.

438. To the extent that the submission is a good one, its connection to the Guild's ultimate submission concerning the reduction of penalty rates is unexplained. The Guild submits no more than that it is "relevant" for the Commission to have regard to "*the central role that community pharmacies play in the delivery of primary health care in Australia and the public service which they provide to local communities*".[815]

---

811 *Submission to the AIRC regarding Transitional Consultations for Pharmacy Industry Award 2010,* 29 May 2009, Part 2, p 3.

812 *Submission to the AIRC regarding Transitional Consultations for Pharmacy Industry Award 2010,* 29 May 2009, Part 2, p 14.

813 *Submission to the AIRC regarding Transitional Consultations for Pharmacy Industry Award 2010, (Additional Submission),* 26 June 2009, p 9.

814 Exhibit PG-29.

815 PGA submission at 35(a).

439. One measure of the validity of the Guild's "good works" submission is the extent to which, through regulation (ownership restrictions and location rules) and funding (including both PBS dispensing remuneration and direct program funding), the Commonwealth effectively ensures that the commercial viability of pharmacy enterprises is preserved. If the services are good and the contributions valuable, then the Commonwealth is that much less likely to take steps – by modification of its dispensing remuneration or program funding arrangements – that would jeopardise the ultimate viability of the community pharmacy sector. In this respect community pharmacy proprietors enjoy privileges wholly unavailable to other retail enterprise proprietors.

Regulation of community pharmacy

440. The Guild's submission reproduces much of Armstrong's account of the regulatory environment for the community pharmacy sector in Australia.

441. That submission's connection to the Guild's ultimate submission concerning the reduction of penalty rates is unexplained. The Guild submits no more than that it is "relevant" for the Commission to have regard to "*the unique ... regulatory context that applies to Australian community pharmacies*".[816] The submission does not say how that "unique context" bears upon the exercise of the Commission's discretion as it deals with the application to reduce penalty rates.

442. The submission refers to Armstrong's high-level description of some basic features of: the National Medicines Policy; pricing control under the PBS, including the Guild's role in fixing prices by agreement with the Commonwealth; restrictions on authorisation to dispense medicines; ownership restrictions and location rules. Those basic features are fairly described.

443. The Guild's description and then discussion of pharmacy ownership restrictions[817] captures the Guild's side of a notorious argument.[818]

444. On their face, the ownership restrictions are strikingly anti-competitive. The primary, objective consequence of those restrictions is that the pool of funds available to be invested in pharmacy enterprises is limited to the capital of pharmacy professionals, and the entirety of the profit share in the sector is captured by pharmacy professionals. The effect of those restrictions is compounded, and the interests of incumbents preserved, by high barriers to entry effected by location rules. The public is excluded from the economic benefit of a more competitive and efficient regulatory environment.

---

816 PGA submission at 35(b).
817 PGA submission section E(b)(ii), paragraphs 68–73.
818 PN 24718–20; Exhibit PG-29, Annexure B.

445. The Guild's contention, here and elsewhere, is that the anti-competitive arrangements are justified because ownership control is the only or the most appropriate context in which pharmacists can exercise their statutory professional responsibilities, and exercise their discretion to make non-commercial or altruistic decisions in the conduct of their enterprises.[819]

446. To date, the Guild's contentions about ownership restrictions and location rules have carried the day. The question of how this has occurred might make for an interesting study, but the present Review is not the occasion for that study.

The commercial position of community pharmacies in Australia

447. The Guild has advanced some submissions concerning the commercial position of community pharmacies in Australia. The submission does not say, expressly, what use if any the Full Bench is asked to make of those submissions and the evidence to which they refer. At paragraph 35(b), the Guild submits that it is relevant for the Commission to have regard to "*the unique business ... context that applies to Australian community pharmacies*". There is no synthesis of the submission to identify those characteristics of the "business context" that might be said to bear upon the exercise of the Full Bench's task in the Review.

448. The submissions concerning "commercial position" can, however, be understood to be developing a general theme. The general theme is that pharmacy enterprises in Australia are presently experiencing a period of significant decline in profitability, verging on a threat to the viability of some of those enterprises.

449. If that is the theme developed in that part of the submissions, the connection between that theme and the ultimate submission concerning variation to penalty rate entitlements has not been articulated.

450. The particular claims advanced in the Guild's submission are examined below. Broadly speaking, those submissions do not present a reliable survey of their subject matter. Perhaps most significantly, much of the material advanced is out of date, and there is every reason to infer that business conditions have improved since the period described.

451. After that examination, some general observations about the commercial position of the pharmacy sector and the Guild's case are advanced.

---

819 PGA submission at 71–73.

Snapshot of industry size

452. At paragraph [83], the Guild draws upon largely uncontroversial data to present a snapshot of aggregate information about the size of the community pharmacy sector in Australia. That submission contains two errors.

453. First, the authors of the submission have misstated the currency of the data. Data concerning aggregate revenue, value of prescriptions, total number of prescriptions and total number of pharmacy enterprises has been presented as current for the period 2013-2014. That is not correct. Those data are derived from the executive summary of the *2014 Guild Digest*.[820] The 2014 edition of that publication reports data as at 30 June 2013.

454. Second, it is submitted that the pharmacy industry added $42.38 billion in "value" in 2012-13. The authority for that submission is the FWC research document *Industry Profile – Retail Trade* (December 2015). The PGA submission inflates the amount provided in that research document by an order of magnitude. The correct value is $4.3 billion.[821]

Revenue

455. The core of the Guild's submission, at paragraphs [85]–[88], is the proposition that "*[i]n recent years, the business revenue and profitability of community pharmacies has come under increasing pressure*",[822] and the related proposition that that "increasing pressure" has had or may have a number of deleterious effects.

456. The first claim is that "*average sales in pharmacies have been declining since 2008-09*".[823] The reference is to *Guild Digest* series data, as summarised by Pezzullo and Armstrong. The claim is a fair representation of *Guild Digest* data, as far as it goes, but subject to an important qualification. The qualification is that the "declining revenue" trend is observed to extend from 30 June 2009 to 30 June 2013, and no further. The trend is observed over a period of 4 years, and that period ended nearly 3 years ago.

457. The notable feature of this submission is the election to refer to an average decline in the period between 2008-09 and 2012-13 (in 2014 dollars, or "inflation adjusted" terms), as opposed to any

---

820 The footnotes to PGA Submission [83] refer to Exhibit PG29 Annexure D. Annexure D consists of copies of the 2012, 2013 and 2014 editions of the *Guild Digest* survey and data series report.

821 Industry *Profile – Retail Trade* (FWC, December 2015), Table 4.1 at [6].

822 PGA submission at [85].

823 PGA submission at [85].

other period. On the same dataset, it would be no less accurate to say that (in 2014 dollars, or "inflation adjusted" terms) the average revenue of pharmacy enterprises in Australia has *increased*, in the period between 2006-07 and 2012-13.[824]

458. The observed trend of declining revenue over the period 30 June 2009 to 30 June 2013 is no safe basis for a finding that the community pharmacy sector "is" (currently) experiencing "*increasing pressure*".

Expenses

459. The submission advances the claim that, in the decade to 2012-13, there have been increases in "expenses" (excluding cost of goods sold) at an average rate of 7% per year, including increases of 4.6%, 7.5% and 4.0% in the last three years of that series.[825] Those data are uncontroversial. Two further observations may be made.

460. First, caution ought be taken in reading these expense increase data alongside the revenue trend data, above. The revenue trend data are presented by Deloitte in "2014 dollar" or "inflation adjusted" terms. The expense increase data are presented by Armstrong in nominal, unadjusted dollar terms. A comparison between the two is not a comparison between like and like. A reading of those two series without sensitivity to the difference in presentation would tend to overstate the *relative* decrease in revenue and increase in expenses, over the selected period.

461. Second, it would be an error to attribute the expenses growth to salary and wages expenses in general, or to the effects of the Pharmacy Award (post-2010) in particular.

462. The "expenses" classification includes a range of items. The two largest such items, historically, have been salaries and wages, and rent. The *Guild Digest* data series aggregates all other expense items together ("other expenses").

463. To the extent that expenses have increased, that increase is explained primarily by a marked increase in the value of 'other expenses'; it is explained somewhat by some increase in spending on rent; it is explained not at all by expenditure on salaries and wages.[826] Between 2006-07 and

---

824 Deloitte Pharmacy Report, Chart 2.2; Exhibit PG-35 at page 27.

825 PGA Submission at [85], citing Armstrong's summary of data drawn from Guild Digest series (Exhibit PG-29 Appendix D).

826 The relative contributions of "other expenses", "rent" and "salaries and wages" to the change in total expenses is vividly illustrated by the "Expenses" table presented in the 2014 Guild Digest (Exhibit PG-29, Appendix D at page 299).

2012-13, and expressed as a proportion of sales: 'other expenses' increased from 9.2% to 12.5%; 'rent' increased from 3.5% to 4.7%; 'salaries and wages' *decreased* from 11.4% to 11.3%.[827]

Profitability

464. The PGA submission points to a decline in profitability across the sector "since 2008-09", and cites Armstrong's reference to a 'survey', the results of which reported that some proprietors 'forecasted' a 7% reduction in profitability for the 2014-15 year.[828]

465. The submission concerning profitability ought be treated with caution for the same reasons as the submission concerning revenue.

466. The "declining profitability" trend is observed to extend from 30 June 2009 to 30 June 2013, and no further. The trend is observed over a period of 4 years, and that period ended nearly 3 years ago.

467. The notable feature of this submission is the election to refer to an average decline in the period between 2008-09 and 2012-13 (in 2014 dollars, or 'inflation adjusted' terms), as opposed to any other period. On the same dataset, it would be no less accurate to say that (in 2014 dollars, or 'inflation adjusted' terms) the average profitability of pharmacy enterprises in Australia has *increased*, in the period between 2005-06 and 2012-13.[829] As with revenue, it can be observed that the pharmacy sector experienced a spike in profitability in 2008-09, and that profitability was observed to moderate over the following four years, to 2012-13.

468. The submission goes on to adopt Armstrong's reference to a survey, apparently conducted at a PGA conference in April 2015,[830] which resulted in a finding that pharmacy proprietors "*forecast*" a further 7% reduction in profitability, for the 2014-15 year. Armstrong describes the conduct of that survey and annexes a copy of the survey form to his supplementary statement.[831] The survey form informs participants that the data will be analysed anonymously '*to support The Pharmacy Guild of Australia in negotiating and representing the interests of members*'. The survey was taken at a time when the PGA was in the final stages of negotiation with the Commonwealth, for the making of the Sixth Community Pharmacy Agreement (**6CPA**).

---

827 Calculations upon data presented in the 2014 Guild Digest, Table 1 (Exhibit PG-29, Appendix D at page 293).

828 PGA Submission at [85].

829 Deloitte Pharmacy Report, Chart 2.5; Exhibit PG-35 at page 29.

830 Statement of Armstrong, Exhibit PG-29 at paragraph 89(c).

831 Exhibit PG-30 at paragraphs [7]–10], and Annexure D.

Trading hours

469. The PGA's only submission concerning trading hours is a reference to the results of a "survey" it conducted in April 2014.[832] The claim is that (as at that date) "*1 in 10 pharmacies intend to* reduce trading by at least one day per week due to revenue pressures".

470. That submission is a record of statements of "intention" expressed in particular conditions at a particular time. Participants were instructed that "*this survey seeks to assess the impact on pharmacy services and accessibility in the next 12 months if no additional funding is made available"*, and that the PGA will use the survey results '*to advocate for you to key decision makers*'.[833] The expressions of 'intention' were collected in advance of the PGA's negotiations with the Commonwealth for the making of 6CPA.

471. The submission does not point to any statistical data demonstrating that any such 'intention' – if ever genuinely held, and if held to the extent suggested by the survey – had been acted upon.

472. The PGA had its opportunity to present its own selection of lay witnesses to amplify the submissions it intended to make. 23 proprietors were selected and presented. The PGA might have selected 23 proprietors, each of whom had reduced trading by '*at least one day per week*' since April 2014. That evidence, had it been given, would not have been a reliable substitute for objective statistical material demonstrating that the April 2014 prophecy had come to pass.

473. In the event, *none* of the 23 proprietor lay witnesses testified that they had reduced trading 'by at least one day per week'. Two of the witnesses reported an *increase* in trading hours.[834] 18 reported no change. Three witnesses reported some decrease in trading hours, but only of a few hours at the margin, and none of those amounted to '*at least one day per week*'.[835]

Expectations of business failure

474. The PGA's submission refers to a survey reporting that a significant proportion of proprietor respondents (15.4%) entertained a 'high' or 'almost certain' risk of business failure within the coming five years.[836]

---

832 Statement of Armstrong, Exhibit PG-29 at paragraphs [82]-[83], citing 'Services Expectations Report', Annexure C at page 145.
833 Supplementary Statement of Armstrong, PG30 paragraph [6] and Annexure C.
834 Chong Exhibit PG-9; Topp PG25
835 Farrell Exhibit PG-12; Playford Exhibit PG-13; Pollock Exhibit PG-18.
836 PGA Submission at [85].

475. The survey relied upon was the same survey, conducted at a PGA conference in April 2015, which reported the 'profitability' forecasts, referred to above.[837] Armstrong describes the conduct of that survey and annexes a copy of the survey form to his supplementary statement.[838] The survey form informs participants that the data will be analysed anonymously '*to support The Pharmacy Guild of Australia in negotiating and representing the interests of members*'. The survey was taken at a time when the PGA was in the final stages of negotiation with the Commonwealth, for the making of 6CPA.

476. The submission refers to similar such surveys having been conducted, at conferences in 2013 and 2014.

477. It is of course certainly possible that one or more community pharmacy enterprises in Australia may have 'failed' since the dire expectation was reported in April 2015 (or in 2014, or in 2013). The PGA has presented no data to demonstrate such an event. There is no statistical information. *None* of the 23 proprietor lay witnesses presented by the PGA testified to the failure of their business (or any of their various businesses) or reported having heard of any pharmacy having failed.

478. Such objective material as is available tends to suggest that the prospect of any significant wave of pharmacy business failures is most unlikely.

479. Pharmacists in Australia have, collectively, invested in a significant expansion of new pharmacy enterprises over the past decade. The number of pharmacy enterprises were once relatively stable. Between about 2008 and 2014, however, the number of pharmacy enterprises has grown by more than 11%.[839] The growth has been steady and consistent over that period, notwithstanding the introduction of price transparency in 2007, and the various other 'challenging' commercial conditions complained of in the PGA submission.

"Reasons" for decline in profitability

480. The PGA makes a submission that 'the' decline in business profitability '*has been attributed to the consequences of price disclosure and the competitive pressures of the marketplace.*'[840]

481. That submission is sourced to the Deloitte report, but the claim at source is a much narrower one than that advanced in the submission. Deloitte reported that its survey of proprietor opinion

---

837 Statement of Armstrong, Exhibit PG-29, paragraph [85].
838 Exhibit PG-30 at paragraphs [7]–10], and Annexure D.
839 Statement of Armstrong, Exhibit PG-29 at paragraph [17] and Annexure A.
840 PGA Submission at [86].

attributed those 'reasons' as explanation for only the 0.02% decline in net profits reported by pharmacies providing data across the particular financial years 2011 and 2012.[841]

482. In any event, the Deloitte report's survey of proprietor opinion material is unreliable for the reasons discussed below.

Recent Commonwealth initiatives

483. The Guild has submitted that '*[t]he further strengthening of the price disclosure regime in the 6CPA combined with other associated Commonwealth Government budget savings, such as the de-listing from the PBS of certain high-volume medicines that are available over-the-counter and the optional co-payment discount of up to $1, mean the ongoing business conditions for pharmacies continue to be very challenging*' (emphasis supplied).[842]

484. This is a disingenuous submission.

485. First, the only evidence relied upon is one paragraph of Armstrong's statement which identifies the fact of recent de-listing of certain high-volume medicines, and the fact of the introduction of the optional co-payment discount.[843] There is no underlying material (expert opinion or otherwise) demonstrating that the fact of the introduction of those initiatives 'means' anything about overall business conditions in the present or future.

486. Second, the isolation of those particular elements (changes to price disclosure arrangements, de-listing of certain medicines, and introduction of co-payment discount option) is an entirely selective statement of the effect – presently experienced, or anticipated – brought about by 6CPA and associated budget measures. It might be fair to say that those particular selected elements, together, can be expected to bring about some downward pressure on pharmacy business profitability. But any reliable statement of the effect of 6CPA and associated measures would require a full assessment of the range of initiatives introduced by 6CPA, including those that would be expected to improve pharmacy business profitability (new program funding, and the introduction of the 'administration, handling and infrastructure fee' arrangements).

---

841 Deloitte Report, Exhibit PG-36 at page 26.
842 PGA Submission, paragraph [86].
843 Statement of Armstrong, Exhibit PG-29 at paragraph 60(a) and (b).

Competition

487. The Guild submission makes some claims about the intensification of competition in the marketplace, and the sources of that competition.[844] Those claims are sourced to passages in the Deloitte report, and paraphrase those passages.

488. The passages in the Deloitte report are bare assertions. Lynne Pezzullo acknowledged that Deloitte had conducted no analysis of market structure for the purposes of preparing its report.[845] She claimed that, in advancing those assertions, Deloitte had relied upon a 'different analysis' previously conducted for the PGA. The sources and product of that "different analysis" were not disclosed. No reliance ought be placed on Deloitte's assertions.

489. If "competitive pressure" is relevant, the Full Bench is limited to drawing inferences from *Guild Digest* data. As noted above, that data series discloses that there has recently been a substantial investment by pharmacists, collectively, in the opening of many new pharmacy enterprises. To the extent that there are relatively more enterprises seeking to draw profitability from the same funding pool, it might be inferred that competitive pressures would be experienced as increasing.

490. In any event, the regulation and construction of "market" or "competitive" conditions in the pharmacy sector is a matter of acute controversy, controversy entirely unexamined by Deloitte or the PGA in its submission. It is notorious that the ownership restrictions and location rules applicable to community pharmacy have been the subject of criticism – from the Productivity Commission, the recent Competition Review,[846] and others – to the effect that those restrictions artificially suppress competition in the pharmacy sector, and artificially support pharmacists' profitability at the expense of consumers.[847]

Ancillary services

491. The PGA submission refers to a survey reporting that significant proportions of proprietors 'were planning to' discontinue or restrict availability to home delivery services or 'may be forced to' increase the cost to patients for dose administration aids.[848]

492. That submission is a record of statements of 'intention' expressed in particular conditions at a particular time. The survey referred to is the same April 2014 survey relied upon for the PGA

---

844 PGA Submission at [87].
845 PN 24716.
846 See PGA *Submission to the Treasury in response to Competition Policy Review Final Report March 2015*, Exhibit PG-29 Annexure B.
847 PN 24718-9.
848 PGA Submission at [88].

submission concerning trading hours.[849] Participants were instructed that '*this survey seeks to assess the impact on pharmacy services and accessibility in the next 12 months if no additional funding is made available*', and that the PGA will use the survey results '*to advocate for you to key decision makers*'.[850] The expressions of 'intention' were collected in advance of the PGA's negotiations with the Commonwealth for the making of the 6CPA.

493. The submission does not point to any statistical data demonstrating that any such 'intention' – if ever genuinely held, and if held to the extent suggested by the survey – had been acted upon.

Further observations on Guild case on commercial viability

494. The commercial position of community pharmacy enterprises in Australia is determined, primarily, by the Commonwealth's fixing, by agreement with the Guild, of the prices it will pay to pharmacists for the dispensing of PBS listed medicines.

495. To the extent that pharmacy enterprise revenue and profitability has fluctuated in recent years, that fluctuation is explained primarily by (a) pharmacists having enjoyed the benefit of the difference between Commonwealth remuneration and the discounting extracted from pharmaceutical suppliers, and (b) the Commonwealth having recently clawed back, for the benefit of taxpayers, a proportion of the value of that discounting.

496. The predominant effect of terms of 6CPA has been to relieve pharmacists of the financial impact of price transparency, and to confine the effects of price transparency to the revenue of pharmaceutical suppliers. This has been effected by 6CPA terms which convert a proportion of Commonwealth funding of dispensing remuneration from funding fixed by reference to the price paid by pharmacists to suppliers, to funding unrelated to price paid (the 'administration, handling and infrastructure fee').

497. The Guild has established a substantial analytic capability within its secretariat. One of the distinct functional units within the secretariat is something called the Pharmacy Viability Group. Stephen Armstrong explained that the Pharmacy Viability Group '*undertakes work in relation to the analysis of the pharmacy trends, particularly economic and financial trends, impacts of changes to government policy, the management of communications to members regarding changes to the Pharmaceutical Benefits Scheme and the monitoring of changes around the Pharmaceutical Benefits Scheme as they occur.*'[851]

---

849 Statement of Armstrong, Exhibit PG-29 at paragraph [100] and Annexure C.
850 Supplementary Statement of Armstrong, Exhibit PG-30 paragraph [6] and Annexure C.
851 PN 22264.

498. Within the Pharmacy Viability Group, and during the time that Stephen Armstrong was the PGA's Chief Economist and one of the Group Executives, there was a section comprised of about 14 people who reported to Armstrong. That group of people were responsible for, among other things, the gathering in and analysis of data concerning economic trends affecting the pharmacy sector, and the collection and analysis of survey data. The group's responsibilities included '*modelling of the impact of changes or potential changes to government policies or the operating environment in which pharmacies exist, and in some cases the provision of tools and services and information to the Guild's members in relation to all of those matters that may assist them*.'[852]

499. One of the tools which the Pharmacy Viability Group developed, to support modelling and analysis of that kind, is ScriptMAP. Armstrong explained that that tool has been in use since about 2008. The ScriptMAP tool "*provides information to members based on their own prescription volume information of the impact of changes to pricing of medicines on the PBS.*"[853] The ScriptMAP tool is designed to model the effect on individual pharmacies of changes in the prices of PBS medicines and the remuneration received for dispensing PBS medicines.

500. The Pharmacy Viability Group also conducted modelling to estimate the effect on pharmacies of the changes introduced through 6CPA. That modelling was conducted using the same "framework" as the ScriptMAP tool.[854] The group developed models of typical or average pharmacy operations to try and gauge the potential effects of different remunerations proposed or advanced in the negotiations for that agreement. The group had been able to develop those sorts of models by reference to detailed information and data collected by the Guild from its members and from other sources.[855] That modelling informed the Guild's approach to negotiations with the Commonwealth Government for the making of 6CPA.[856]

501. Following the making of the 6CPA, the Guild created an online resource called the 6CPA Forecaster. The function of the 6CPA Forecaster tool is to compare a pharmacy's 2014-15 dispensary remuneration with projected dispensary remuneration in the future, under 6CPA, and then compare the 6CPA projection with the estimated value of remuneration in future years had 5CPA continued unchanged.[857] The underlying capability of the 6CPA Forecaster is based on the forecasting capacities of the ScriptMAP tool.[858]

---

852 PN 22265.
853 PN 22268.
854 PN 22276.
855 PN 22283-4.
856 PN 22277-8.
857 PN 22323-4; Exhibit SDA-37.
858 PN 22330.

502. The 6CPA Forecaster tool is hosted on the Guild's website and permits the entry of a number of variables to reflect the dispensing characteristics of an individual pharmacy. The output includes a projection of increases in dispensing remuneration over the five year life of 6CPA.

503. A copy of a 6CPA Forecaster tool output, based on inputs said to be reflective of an "average" pharmacy, is in evidence.[859] Armstrong agreed that the inputs of historical dispensing characteristics were, to his understanding, reflective of those of an 'average' pharmacy, with one exception. He said that he thought that the 'growth' value was higher than average. Armstrong did not know the proportion of pharmacies that were likely to exercise a new option of applying a co-payment discount of up to $1.[860] Armstrong was not in a position to describe how the Forecaster had been constructed, or how its default values had been selected, as he had left the Guild's employ before that tool was created.

504. The forecast given by the 6CPA Forecaster is that, for an average pharmacy with the inputs provided, 6CPA would deliver an increase in dispensing remuneration, over the five year life of that agreement, compared to 2014-15 remuneration, of some $662,619 (or, an average increase of about $132,500 per year). The forecast difference between the projected trajectory of remuneration under 6CPA, compared to projected trajectory if 5CPA arrangements had remained undisturbed, was an amount of some $509,211 over the life of 6CPA (about $100,000 per year).

505. In effect, this 6CPA Forecaster output reflects an analysis by the Guild that 6CPA will deliver substantial increases in dispensing remuneration, both in absolute terms and also when compared to the remuneration trajectory under a hypothetical extension of 5CPA operation.

506. The Guild's submissions concerning the 'commercial position' of the pharmacy sector ought be read with regard to evidence of the Guild's extensive capability to model the effect of 6CPA on pharmacy dispensing income, and the use to which that capability has been put, before, during and after the conclusion of negotiations for the making of 6CPA.

507. The Guild has chosen not to advance, through its case, any frank statement or description of the way that it expects 6CPA to improve the dispensing remuneration revenue of its members. The Guild evidently has a great reservoir of data, and some carefully constructed forecasting tools. The Guild might have exposed its real forecasts, and the assumptions underlying them, if it wished to assist the Full Bench with the material most relevant to any assessment of the 'commercial position' of the pharmacy sector, as it is today. That material has been withheld.

---

859 Exhibit SDA-38.

860 PN 22299-22317; 22401-22431.

Pharmacy workforce

508. The Guild's submission provides some uncontroversial data concerning the number of employees in the sector,[861] the proportion of part-time employment and of female employees.[862]

509. The uncontested[863] evidence of Professor Ian Watson in his report entitled *Employee Earnings in the National Retail Industry*[864] concerning the low paid nature of retail employees, includes those working in the pharmacy industry.[865] The specific findings that the Commission should make on the basis of this evidence are addressed in Chapter 2.

510. At paragraph [90], the submission refers to a 'downward trend' in employment. The 'trend' is observed for the period between 2008-09 and 2013-14. As discussed above, that period is taken to commence from a year in which the pharmacy sector experienced a notable spike in revenue and profitability.

511. The submission refers to a reduction in employment equivalent to 1.0 FTE per store, in 2014-15. On the Guild's account, and assuming that the submission is good, that employment contraction in that year is not explicable by reference to the introduction of the Pharmacy Award. The Guild's contention is that the Pharmacy Award explains a reduction of only 0.13 FTE, over 5 years.[866]

512. The employment 'contraction' is not explained by an actual reduction in labour employed in existing community pharmacy enterprises. The explanation offered is that the reduction in employment was associated in the rise of discount stores, which typically employ fewer pharmacy assistants.[867]

The impact of penalty rates on the Australian community pharmacy industry

513. The Guild relies upon two sources of evidence said to demonstrate the negative impact of penalty rates on business profitability, service provision and employment in the community pharmacy sector namely, the Deloitte Pharmacy Award Report and evidence given by pharmacy proprietors. For the reasons detailed below, neither of these sources of evidence support the findings proposed by the Guild as to the claimed negative impact of penalty rates.

---

861 PGA submission at [89].
862 PGA submission at [92].
863 PN-22173-PN-22174.
864 Exhibit SDA-35.
865 Exhibit SDA-35, pp 4-8.
866 PGA submission at [99].
867 Exhibit PG-35 at page 23.

The Deloitte Pharmacy Award Report

514. The primary submission of the SDA is that the Deloitte Pharmacy Award Report[868] (the **Pharmacy Report**) is not probative of any claimed negative effect of the Pharmacy Award because, as its author, Ms Pezzullo accepted, it is a '*purely historical*' document which is unable to shed light on the claimed impact of the award. Secondly, the report does not provide a reliable basis for conclusions of the type proposed by the Guild because: (i) it is based upon a survey which does not meet Deloitte's own minimum requirements for statistical confidence; and (ii) it is characterised by fatal biases in its design and implementation.

Out of date

515. The Pharmacy Report is dated 25 June 2015.[869] It is presented as a statement of 'the current state' of community pharmacy in Australia.[870] The report contains no express statement of the currency of the data upon which its authors drew.

516. In two important respects, the Pharmacy Report is out of date.

517. First, the report's authors relied on a data series that concluded three years prior to the filing of the report. The principal data source for the report, or at least that section of the report which describes 'the commercial position' of community pharmacy in Australia, is the *Guild Digest* series. The most recent dataset available to Deloitte by the time of the completion of the report was *Guild Digest 2013*. *Guild Digest 2013* is a collation of data collated from a survey conducted by the Guild, referable to the financial year 2011-12.[871] The data drawn from that survey, and presented in *Guild Digest 2013*, were three years old by the time that the Pharmacy Report was filed.[872]

518. Second, the report does not take into account, or analyse, what Ms Pezzullo acknowledged to have been the '*substantial changes*' brought about by 6CPA.[873]

519. Ms Pezzullo maintained that, in addressing the current state of the commercial position of the community pharmacy sector, it is important to consider history and context, as well as analysing current events.[874] Ms Pezzullo accepted that her report was a '*purely historical*' document.[875]

---

868 Exhibit PG-35.
869 Exhibit PG-35, Annexure B.
870 Exhibit PG-35, page 12.
871 Exhibit PG-29, Annexure D, p 207 ff.
872 PN 24707-8.
873 PN 24748-9.
874 PN 24749.
875 PN 24753.

520. In one sense it is wholly understandable, and unremarkable, that the Pharmacy Report is an out of date, 'purely historical' document. At the time that it was prepared, *Guild Digest 2013* was the latest available instalment of that particular data series. At the time that it was prepared, 6CPA had not been agreed or released. As Ms Pezzullo was at pains to point out, she could not have drawn upon unreleased data, or any future agreement reached between the Guild and the Commonwealth, when settling the report.[876]

521. The Pharmacy Report was prepared during the middle part of 2014. The final version was delivered to the Guild about a year before being filed in the Commission. The report is now more than 18 months old.

522. What remains unexplained, or poorly explained, is why it is that in mid-2015, Deloitte and the Guild presented the Pharmacy Report to the Commission as an analysis of the '*current state*' of community pharmacy in Australia, without attempting to update that report's analysis to incorporate the then available recent data, and in particular without attempting to describe (or even refer to) the 'significant changes' brought about by 6CPA. That is, it remains unexplained why Deloitte and the Guild were content to deliver a 'purely historical' document.

523. There was ample opportunity for the Guild to request that Deloitte consider current data, and the implications of 6CPA. There were, evidently, further communications between the Guild and Deloitte, concerning the Pharmacy Report, subsequent to its final delivery in September 2014. There were some discussions, at least, to secure a re-dated copy for the purpose of filing in mid-2015,[877] and Ms Pezzullo worked with the Guild's lawyers to prepare the affidavit to which the report was annexed.[878] Certainly by this time, Ms Pezzullo was aware of the imminent expiry of 5CPA and commencement of 6CPA.[879] Some months later (September 2015), Ms Pezzullo was again involved in work associated with the present Review, when she was engaged to prepare a reply report, responsive to certain material filed by the union parties.[880] Nevertheless, Ms Pezzullo has said that the question – the question whether the Pharmacy Report ought address 6CPA – '*didn't arise*'.[881]

Sample size

524. The Pharmacy Guild seeks that the Commission adopt findings based upon the results of a survey conducted by Deloitte in July 2014. The Commission ought not adopt those proposed findings,

---

876 PN 24704.
877 PN 24758.
878 Exhibit PG-35.
879 PN 24760.
880 Exhibit PG-36.
881 PN 24766.

because it has not been demonstrated that the survey data is reliably representative. The sample size was too small.

525. In early 2014, PGA and Deloitte discussed a proposed engagement of Deloitte by PGA, for the purpose of delivering a report concerning the PIA for use in the present Review.[882] As a result of those discussions, Deloitte delivered a formal project Proposal to PGA.[883] The Proposal provided for a survey, and included a statement of the survey sample size "requirement", calculated by Deloitte according to "*standard methodology for a descriptive study to estimate a single proportion*" The derived "minimum" sample size was 400 survey respondents.[884]

526. The survey was conducted in July 2014. About a week before the scheduled conclusion of survey data collection, the survey response had been poor. Barbara Dixon reported to Lynne Pezzullo that "*we have received 179 responses out of a required sample of 400 for statistical significance*".[885]

527. At the request of the Guild, and in order to increase the sample size, Deloitte developed an alternative data collection tool for the "Banner Groups", "*to enable data from multiple pharmacies to be entered simultaneously under each survey question by a member of each of their respective head offices*."[886]

528. With the aid of bulk survey responses harvested from Banner Group head offices, Deloitte were able ultimately to claim a survey sample size of n=302,[887] a sample size equivalent to 75.5% of the amount said by Deloitte to be the "minimum" requirement to meet the nominated statistical confidence level.[888]

529. The claimed sample size "n=302" is misleading. The value 302 represents the number of survey responses which answered any of the survey questions. The survey was comprised of some 30 different questions.[889] At the end of the data collection phase, Bryce Stevens reported to Barbara Dixon concerning the extent to which the survey responses had been complete:[890]

882 PN 24626-30.
883 Exhibit SDA-46.
884 Exhibit SDA-46, pp 5-6.
885 Exhibit SDA-48, email 17 July 2014.
886 Exhibit SDA-48, email 17 July 2014.
887 Exhibit PG-35, page 12.
888 Exhibit SDA-46, page 6.
889 Exhibit PG-36, Appendix A.
890 Exhibit SDA-49, email 8 August 2014.

> From the looks of things, while we got 301 responses, 299 really have answers to any of the questions, and if you check the 'grey writing' above the questions, most have much less than that. In short, we're not that representative – we may be relying on 100-200 responses for some of the answers.

530. Mr Stevens' observation is borne out by data reported in the Pharmacy Report. The authors of the report have not disclosed the response rate to each question, but to the extent that response rates are disclosed, it appears that the usual response rate was well below 302 answers, and in several cases fell below 80 answers. There is no single (reported) question which attracted 302 answers. The highest value was 300;[891] the lowest was 54.[892] The average reported response value seems to have been approximately 175 (44% of the 'minimum requirement').

531. The authors of the Pharmacy Report make no or no serious attempt to explain how the confidence intervals resulting from these small data samples satisfy any respectable or widely accepted standard for reliable economic or social research. Where the 'representativeness of the survey' is discussed,[893] there is no reference to authoritative literature; instead, resort is had to a comparison with sample sizes achieved by the Guild in the collation of the Guild Digest data series over recent years. It seems correct that the Deloitte survey attracted a sample size roughly comparable to the sample usually collected for the Guild Digest. An observation of that sort is of no assistance to the Commission. The representativeness or otherwise of the Guild Digest survey history is not a meaningful standard. Unsurprisingly, it is not a comparison that was relied upon by Deloitte when that firm first advised the Guild about survey design and sample size.[894]

Bias (1)

532. The survey results are unreliable because, while Deloitte designed the survey and analysed its responses, the tasks of distribution to and communication with survey respondents were left in the hands of the Guild.[895] There is reason to infer that the Guild's communications introduced bias.

533. Deloitte assumed that the Guild's communication with survey respondents would remain neutral, and avoid introducing bias.[896] Ms Pezzullo was unable to say if there was any supervision of the Guild's communications by her staff.[897]

---

891 Table 3.1, page 33.
892 Table 3.13, page 47.
893 Section 3.1.3, pages 34-35.
894 Exhibit SDA-46.
895 PN 24785-6.
896 PN 24794.
897 PN 24791.

534. The terms of the Guild's various communications with survey respondents have not been put in evidence. Such material as has been put in evidence makes available the inference that those communications were prone to introduce bias.

535. On 24 July 2014 the relevant senior person at the Guild responsible for managing the Guild's engagement of Deloitte, Ms Whelan, was concerned about the low response rate to the Deloitte survey. She wrote to members of the Guild's National Council, and to its Branch Directors. She exhorted those persons to '*encourage members one last time to complete the survey*' and observed '*without our target of 400 responses, the validity of our evidence and therefore our arguments for changes to the PIA are significantly weakened*'. She reminded those persons that "*we are attempting to show a detrimental impact on the industry of the award since its introduction in 2010 – in terms of the evidence standard, we need to show what has been the negative impacts over the four year period*."[898]

536. That communication is not, itself, a communication directly to survey respondents (except to the extent that members of the National Council themselves may have been survey respondents). But it is an expression of urgency, with a clear focus on the task of assembling evidence that would demonstrate "negative impacts" to support the Guild's "*arguments for changes to the PIA*".

537. If the senior officer of the Guild, responsible for managing the Guild's engagement of Deloitte, was not sensitive to the need to avoid motivated bias in the collection of survey responses, there is no reason to expect that National Council members or Branch Directors would have exhibited greater sensitivity. Ms Whelan presented the key concepts that those persons might use to encourage members to complete the survey and to assist the Guild's purposes.

538. There is a reasonable basis to infer that, in the course of communicating with members, the Guild communicated that it was seeking evidence that would demonstrate "negative impacts" of the PIA, and that that evidence was to be deployed in support of the Guild's efforts to persuade the Commission to reduce penalty rates in the PIA. This is one example of the type of bias, recognised by Ms Pezzullo,[899] that ought be excluded from a survey so far as possible.

Bias (2)

539. A significant proportion of the survey responses were harvested from "Banner Group" head offices, in circumstances raising real doubt about the validity of those responses.

---

898 Exhibit SDA-49, email 24 July 2014, 7.28am.
899 PN 24778-9.

540. As noted above, the original survey data collection system was modified, half-way through the survey exercise, at the request of the Guild and in response to a poor response rate. Deloitte developed an alternative data collection tool for the "Banner Groups", "*to enable data from multiple pharmacies to be entered simultaneously under each survey question by a member of each of their respective head offices*."[900]

541. The alternative data collection tool was in the form of an excel spreadsheet, created by Deloitte and then delivered to PGA. PGA then, apparently, circulated copies of that tool to Banner Group head offices, in circumstances beyond Deloitte's control or supervision.

542. The survey responses harvested from Banner Group head offices amounted to 25% of the total survey responses.[901]

543. The Guild has made some striking concessions concerning the responses received from Banner Group head offices. By correspondence through its lawyers,[902] PGA reported its conclusion to the effect that more than a *third* of the "opinion based" responses received from Banner Group head offices were *not "non-uniform"*. That is, on the account of PGA, more than a third of the Banner Group responses appeared to be comprised of 'uniform' expressions of opinion.

544. The compelling inference to be drawn is that particular Banner Group head offices have manufactured at least those survey responses which the PGA classify as "opinion based". If those head offices had created statements purporting to be expressions of proprietor opinion, then real doubt must apply to the answers received from those sources, in response to what PGA would call "non-opinion based" answers.

545. It is impossible to rely upon the Banner Group proportion of the survey responses, and it is impossible to disaggregate those responses from the total survey sample. The survey data is polluted and unreliable.

Particular findings – survey results

546. At paragraph [98] of the Guild's submission, various of the survey report findings are summarised.

---

900 Exhibit SDA-48, email 17 July 2014.

901 In response to a request from the Full Bench, the PGA's solicitors provided information concerning the Banner Group responses, by correspondence of 22 December 2015. That correspondence disclosed that there were 6 Banner Group responses, purportedly on behalf of a total of 74 individual pharmacy practices. The Pharmacy Report itself does not disclose data of this sort.

902 Letter from Meridian Lawyers to FWC Modern Award Review, of 22 December 2015.

547. The survey responses are predominantly expressions of opinion, and all of these results ought be treated with caution, in light of the manner by which survey respondents were recruited, and the extent to which Banner Group head offices appear to have contributed identical opinions in large batches.

548. At paragraph 98(g), the submission asserts that "*most survey respondents had decreased their trading hours since December 2009*". That assertion is wrong. The Deloitte report records that of the proprietors who answered the question (N=259), about 33 reported having decreasing their trading hours since December 2009.[903]

549. Similarly, at 98(h), the submission asserts that "close to two-thirds of respondents" explained the reduction in their trading hours by reference to the "need to reduce expenses on wages". This assertion is wrong. The Deloitte report says that 259 proprietors responded to the question about changes in trading hours,[904] and that 56 of those proprietors said that they had reduced their hours and that the reason had to do with wage expenses.[905]

Particular findings – regression analysis

550. The PGA has, it appears, largely abandoned reliance upon the regression analysis advanced by Deloitte. Reliance in the submission is confined to the propositions that the introduction of the Pharmacy Award explains: (i) a net reduction in employment of 0.13 full-time equivalent positions per pharmacy, and (ii) an average reduction of 3 trading hours per week, weighted toward reductions in weekend trading hours. That limited reliance is misplaced for the reasons outlined below.

551. These propositions are the result of a regression analysis which was designed to test the hypotheses that: (1) there had been a change in trading hours per week due to the Pharmacy Award; and (2) there had been a change in FTE's employed due to the Pharmacy Award.[906]

552. The regression model included "PIA" as a "dummy variable" given the value of 1 in the time period when the Pharmacy Award was in place (2014) and a value of 0 if the Pharmacy Award was not in place (2009).[907]

---

903 Exhibit PG-35 at [48].
904 Exhibit PG-35 at [48].
905 Exhibit PG-35 at [50].
906 Exhibit PG-35 at [35].
907 Exhibit PG-35 at [36].

553. A "dummy variable" is an artificially constructed variable that captures qualitative information.[908] The effect of including the "PIA" dummy variable in the regression model is that *any changes* in the environment between 2009 and 2014, *capable of having caused* a change in trading hours or a change in FTE's (and after controlling for the impact of other identified confounding factors) are attributed to the Pharmacy Award.[909]

554. Dr O'Brien criticised this approach in two ways.

555. First, Dr O'Brien observed that the estimated coefficient of PIA, set at 0 in 2009 and 1 in 2014, will capture the effect of everything that has changed on that constant term, between those years, that is not captured in the other explanatory variables included in the model. Dr O'Brien observed that it would be expected that a vast array of factors had changed in the period 2009 to 2014 apart from the *Pharmacy Industry Award*.[910]

556. Ms Pezzullo accepted that the PIA dummy variable would capture the effects of all variables that had changed between 2009 and 2014 and which are not included in the models.[911] She said that she considered Dr O'Brien's suggestion that the GFC may have also been a material component of the dummy variable and gave her reasons for rejecting that contention. She said that it is difficult to envisage other impacts that could be affecting the PIA variable, that are not the macroeconomic environment nor the "micro variables" included in the modelling.[912]

557. There was a second and more fundamental criticism advanced by Dr O'Brien: "*This PIA dummy variable was assigned the value of 0 in 2009 and 1 in 2014 for every pharmacy included in the regression dataset. No attempt has been made to measure or account for anything specific to the Pharmacy Industry Award in this dummy variable (0, 1) specification*."[913]

558. The specification (0, 1) is valid in the narrow sense that the modern award *existed* in 2014, and *did not exist* in 2009. But to observe that the award came into existence is not the same thing as measuring or accounting for anything specific that could rationally explain any part of the hypotheses under investigation (changes in trading hours, changes in EFT employment).

559. Dr O'Brien is correct to observe that Ms Pezzullo made no attempt to measure or account for anything specific to the Pharmacy Award which justified the (0, 1) specification. Ms Pezzullo's discussion of the Pharmacy Award included a brief description of the process of modernisation

---

908 Exhibit SDA-41 at [8].
909 Exhibit PG-35 at [36]; Exhibit PG-36 at [19].
910 Exhibit SDA-41 at [4].
911 Exhibit PG-36 at [19].
912 Exhibit PG-36 at [20].
913 Exhibit SDA-42 at [2].

of awards,[914] and identified the Pharmacy Award as one such award that had resulted from that process.[915] She identified that the Pharmacy Award had replaced obligations previously imposed by other federal and state awards. She did not identify any substantive changes in conditions, which accompanied the making of the modern award. Nothing in that brief historical analysis identified any *new* feature of the Pharmacy Award, rationally capable of affecting either trading hours or number of EFT's employed, which existed in 2014 but did not exist in 2009.

560. The Pharmacy Award provides, among other things, for penalty rates to be paid for work performed at particular times of the week. It might be rational to construct and test a hypothesis that the *introduction* of a penalty rates obligation affected trading hours, or number of persons employed, over a period following such introduction. But the introduction of a penalty rates obligation could not be specified as a dummy variable (0, 1) unless there had been no penalty rates obligation in existence at the commencement of the period under investigation. Plainly, pharmacy enterprises were under obligations to pay penalty rates prior to the making of the modern award.[916] In many States, those penalty rates were not at any rate lower than the rates now contained in the modern award.

561. In short, Ms Pezzullo's claim – the claim to have demonstrated that *the introduction of the PIA* caused some particular proportion of changes in trading hours or EFT employment – is equivalent to, and carries no more explanatory power than a claim to have demonstrated that *a change in the name of the operative industrial instrument* has caused those things.

The lay evidence of pharmacy proprietors

562. The Guild presented evidence from 23 lay proprietor witnesses. Six of those are officials of the Guild.[917]

563. The following themes emerge from the evidence given by pharmacy proprietors:

    (a) Contrary to its case to the Commission, the Guild has loudly conveyed to proprietors that 6CPA will deliver significant benefits to the profitability of pharmacy enterprises and a

914 Exhibit PG-35, section 1.1 at [16]-[17].
915 Exhibit PG-35, section 1.2 at [17]-[18].
916 Guild Submissions at [30].
917 Logan is the Guild's National Senior Vice President, the President of the Queensland Branch, and a director of the Guild's commercial operations subsidiary, PN 15255, 15261; Tassone is the President of the Victorian Branch, PN 12141; Pricolo, Chong and El-Ahmad are members of the governing committee of the Victorian Branch, PN 12930, 13953, 14271; Da Rui is a member of the governing committee of the WA Branch, PN 13061.

number of proprietors agreed that it would likely deliver significant improvement dispensing income for their pharmacies.

(b) There is no evidence to support the Guild's claim that community pharmacies have been able to cross-subsidise unprofitable aspects of their business and that price disclosure has diminished this ability and will continue to do so even more in the future.

(c) Contrary to the suggestion that community pharmacy proprietors operate in a shrinking industry with limited growth prospects, there has been continuing investment in pharmacies by proprietors in recent years many of whom have interests in several pharmacies.

(d) The claims by many of the proprietors that the penalty rate provisions of the Pharmacy Award were having an adverse effect on their businesses were significantly overstated, without foundation or based on a misunderstanding of the applicable award provisions.

(e) There is little evidence to support a finding that, in the event the Guild's claims were upheld by the Commission, there would likely be an increase in employment or hours of work in the community pharmacy sector.

Sixth Community Pharmacy Agreement

564. Among the themes which emerges strongly from the lay evidence are the following: (a) the Guild's own opinion is that 6CPA delivers significant benefits to the profitability of pharmacy enterprises in Australia, and (b) the Guild has been careful to minimise those benefits in its case before the present Review.

565. The body of affidavits tendered by the Guild have a great deal to say about factors affecting the profitability of the pharmacies operated by the various deponents, but they are almost wholly silent about 6CPA. To the extent that 6CPA is referred to, many of the deponents speak (in strikingly similar terms) about the Commonwealth's requirement that there should be extended trading hours as a requirement for the flow of community pharmacy program funding.[918] That is, the only time 6CPA is mentioned, it is for the purpose of raising one isolated unfavourable term.

566. Guild officials Tassone and Pricolo were asked if they could explain why, when their affidavits had been directed towards factors affecting profitability, and they had accepted that 6CPA represented a significant improvement in the funding of dispensing income for their pharmacy,

---

[918] Keane Exhibit PG-3 at [17]; Pricolo Exhibit PG-4 at [24]; Chong Exhibit PG-9 at [21]; Spiro Exhibit PG-15 at [21]; Cruthers Exhibit PG-16 at [22]; Pollock Exhibit PG-18 at [17]; Twomey Exhibit PG-24 at [19]; Topp Exhibit PG-25, fourth dot point.

they had made no mention of those improvements in their evidence. Those witnesses could offer no explanation, or said that they did not know that it was relevant. Each denied that they had omitted discussion of 6CPA funding improvements, because they knew that that would not help the Guild's case.[919]

567. Mr Tassone is the President of the Victorian Branch of the Guild.[920] He was involved in working on the Guild's preparation for negotiations with the Commonwealth for the making of 6CPA, but he was not a member of the negotiating team.[921] He has a good knowledge of the terms of 6CPA.[922] He is familiar with some documents which the Guild has prepared to summarise and explain some of the important benefits to pharmacists arising from 6CPA.[923]

568. Mr Tassone acknowledged that 6CPA delivered an increase in pharmacists' dispensing income of $2.4 billion,[924] and an increase in funding for the community pharmacy program of $600 million.[925] Mr Tassone considered that the funding for increased dispensing income was essentially a restoration of income that had been lost to pharmacists by reason of the implementation of the Commonwealth's price disclosure initiatives, during the period of 5CPA.[926]

569. Mr Tassone confirmed that location rules had been confirmed and continued under 6CPA, and that the retention of location rules has been a matter of hot concern for the Guild over many years.[927] He accepted that there is, in his words, "*a possibility in some cases*" that location rules restrict and limit completion in the provision of pharmacy services.[928]

570. Mr Pricolo is another official of the Guild, a member of the committee governing the Victorian Branch.[929] He said that 6CPA is a good agreement for pharmacy,[930] and that it provides certainty to proprietors.[931] He said that the extra $1.4 billion in dispensing income, and the extra $600 million in program funding, will bear positively on pharmacists' bottom lines.[932] Like Mr

---

919 Tassone PN 12392-6; Pricolo PN 12949.
920 PN 12141.
921 PN 12316-8.
922 PN 12319.
923 PN 12357 and Exhibit SDA-9; PN 12366 and Exhibit SDA-10.
924 PN 12391.
925 PN 12438.
926 PN 12456.
927 PN 12374.
928 PN 12383.
929 PN 12930.
930 PN 12936
931 PN 12939.
932 PN14926.

Tassone, Mr Pricolo considered that the increase in dispensing income amounts to the restoration of income that had previously been lost due to price disclosure.[933]

571. Mr Da Rui is another Guild official. He is a member of the committee of the WA branch.[934] Mr Da Rui also considered that the increased dispensing income under 6CPA is "*stabilising*" what had been taken away from pharmacists by price disclosure under the 5CPA period.[935] Mr Da Rui was less prepared than other witnesses to agree that 6CPA would provide significant benefits. He said he was not sure how it would all pan out.[936] He said that he was aware that there had been "*a lot of modelling*."[937]

572. Mr Chong has been a member of the committee of the Victorian Branch of the Guild, for a year or so.[938] He expressed less familiarity with 6CPA than did the other Guild officials who gave evidence.[939] He looked at the 20 benefits set out by the Guild in its Fact Sheet, but he did not agree that those represented any "significant benefit." He thought it was just a little bit of a benefit.[940]

573. Other witnesses expressed a variety of opinions and differing levels of familiarity with the effect of 6CPA.

574. Mr Keane thought that the Guild's fact sheet was a reasonable summary of the benefits offered by 6CPA.[941] Overall, he thought that 6CPA represented a significant improvement over 6CPA.[942] He sees 6CPA as "*putting things right*."[943]

575. Mr Mahoney was aware that 6CPA would bring some changes to funding. He said he wasn't able to agree or to disagree with the Guild's claim that the new AHI fee arrangements would mean that pharmacists would be immune from the further effects of price disclosure.[944]

---

933 PN 12945.
934 PN 13061.
935 PN 13254.
936 PN 13255.
937 PN 13258.
938 PN 13953.
939 PN 13983.
940 PN 13996.
941 PN 12588.
942 PN 12585.
943 PN 12586.
944 PN 14208.

576. Ms Spiro said she had only a general understanding of 6CPA. When she was preparing her witness statement it was all very new to her. She agreed that 6CPA provides significant benefits to pharmacists.[945]

577. Mr Pollock's understanding is that 6CPA introduced a new AHI fee to make pharmacies immune from price transparency. He said that this has arrested the fall in remuneration.[946]

Price disclosure, cross-subsidisation of unprofitable aspects of business and provision of additional services

578. The Guild's submission at 100(d) asserts that a theme emerging from the lay evidence is that '*until recently, community pharmacies have been able to cross-subsidise the unprofitable aspects of their business such as opening outside ordinary hours but price disclosure has diminished this ability and will continue to do so even more in the future.*'

579. The extracts referred to in the Guild's supporting Schedule (pages 15-17) do not support that contention. There is no discussion of cross-subsidisation in the lay witness evidence, and there is no assertion that price disclosure will continue to affect the profitability of pharmacy enterprises. The lay witness evidence discussed in the preceding section demonstrates that the view of the Guild and a number of its officials and other lay witnesses has been that the new AHI fee effectively protects pharmacists from the effects of price disclosure in the future.

580. Further, the suggestion that pharmacies provide a host of services free of charge for the benefit of the community is overstated and not borne out by the evidence. The affidavits recited lists of services that pharmacies provide. However, many of those services attract a fee from customers, or government funding, or both. The services which attract fees and funding include: the filling and delivering of dose administration aids (Webster-pak),[947] home medicine reviews,[948] medication management programs (MedsCheck),[949] staged supply,[950] weight management programs (Impromy),[951] screening programs (blood pressure, glucose management etc),[952] methadone and buprenorphine supply,[953] sick leave certification,[954] chronic obstructive

---

945 PN 14708-12.
946 PN 15154-7.
947 Tassone PN 12422; Da Rui PN 13069; Quinn On PN 13518; Kourtis PN 13644; Mahoney PN 14198; El-Ahmad PN 14272; Playford PN 14544; Bird PN 14696; Cruthers PN 14900; Pollock PN 15133.
948 Tassone PN 12326.
949 Tassone PN 12431; Keane PN 12558; Kourtis PN 13645; Farrell PN 14430; Cruthers PN 14900; Pollock PN 15133.
950 Tassone PN 12433; Keane PN 12559; Da Rui 13073; Quinn On PN 13518.
951 Tassone PN 12336; Kourtis PN 13645.
952 Tassone PN 12334; Da Rui PN 13069.
953 Keane PN 12560; Quinn On PN 13518; Mahoney PN 14198.
954 Pricolo PN 12952; Quinn On PN 13534.

pulmonary disease (CPOP) screening,[955] vaccinations,[956] compounding,[957] equipment hire,[958] mobility services,[959] bone density screening,[960] national diabetes scheme programs[961] and needle exchange services[962]

Ownership of and investments in pharmacies

581. One theme arising from the lay evidence of pharmacy proprietors is the extent and range of individuals' investments in pharmacy enterprises, and a pattern of continuing investment in recent years. The picture is not one of individuals sitting with confined, stranded assets in a shrinking industry with limited growth prospects.

582. Most of the witnesses own, or have interests in, a number of pharmacy enterprises, with several having interests in 5, and one having interests in 6.[963] A significant proportion of the proprietors appear to have made new investments in purchasing interests in, or establishing new pharmacy businesses, within the recent few years.[964]

Overstatement of adverse effects caused by the Pharmacy Award

583. The evidence given by of some of the proprietors (persons who also happened to be officials of the Guild) proceeded from a misunderstanding about the recent history of penalty rate terms. Their evidence was to the effect that their business had suffered adverse effects arising from the imposition of or increase in penalty rates caused by the making of the Pharmacy Award. They were proprietors of Victorian pharmacies. Ultimately they accepted that, compared to the award regulation which had operated previously, the Modern Award had increased the rate for public holidays only, but had otherwise reduced penalty rates for weekday evenings and Saturday

---

955 Pricolo PN 13069; Kourtis PN 13645.

956 Da Rui PN13069; Quinn On PN 13534; Mahoney PN 14196; Farrell PN 14430.

957 Quinn On PN 13518.

958 Kourtis PN 13645.

959 El-Ahmad PN 14272.

960 Bird PN 14696.

961 Bird PN 14603.

962 Spiro PN 14706.

963 Keane (3 pharmacies), PN 12502; Pricolo (4 pharmacies), PN 12876; Da Rui (3 pharmacies), PN 13006; Quinn On (3 pharmacies), PN 13480-4; Chong (5 pharmacies), PN 13747-50; Mahoney (3 pharmacies), PN 14135; Farrell (2 pharmacies), PN 14399-404; Cagney (3 pharmacies), PN 14979; Pollock (2 pharmacies), PN 15062; Costigan (2 pharmacies), PN 15289; Xynias (5 pharmacies), PN 1609, 1621; Lewellen (4 pharmacies), PN 1725, 1728; Twomey (2 pharmacies), PN 16466-9; Topp (6 pharmacies), PN 17261.

964 Keane (bought back in to Berri pharmacies in 2012), PN 12505; Da Rui (bought back in to Wray Avenue business within last year), PN 13047; Quinn On (commenced operating Menai Discount Drug Store in about 2012), PN 13407; Kourtis (took ownership interest in 2013), PN 13623; El-Ahmad (purchased current business about a year ago), PN 14260; Farrell (purchased second business in 2012), PN 14399; Xynias (established fifth pharmacy business within last 2 years), PN 1621; Twomey (became proprietor in second business in 2012), PN 16469; Topp (new business within last year), PN 17271.

afternoons.[965] Their evidence attributing adverse effects on their pharmacies to increases in penalty rates caused by the making of the Pharmacy Award was without foundation.

584. Ms Spiro expressed her main concern to be that of penalty rates applicable on weekday morning hours. Her business opens at 9 in the morning. She had thought that she was obliged to pay penalty rates after 8am. She was relieved of that misapprehension during the course of her evidence.[966]

585. Further, there was evidence from a number of proprietors to the effect that they had increased their trading hours in recent years (early and late on weekdays, or on weekends), and that this had occurred since the introduction of the Pharmacy Award. In some cases these proprietors conducted their businesses in states where the prevailing penalty rates, prior to 2010, were lower than those now operative.

586. Ms Kourtis (from the ACT) extended each of her morning and evening weekday hours, morning and evening Saturday hours, evening Sunday hours and public holiday hours, about 2.5 years ago.[967] Mr Costigan (from Queensland) introduced Sunday trading within the last 3 years.[968] Mr Bird (from NSW) is soon to be expanding his trading hours on Thursday evening, Saturday and Sunday afternoons.[969] Mr Quinn On (from NSW) had extended his Thursday evening trading hours a few years ago.[970] Mr Pollock (from Queensland) extended his trading hours about 18 months ago.[971] Kin Chong (from Victoria) has expanded Sunday and public holiday trading hours in the past 3 years.[972]

587. This evidence is directly contrary to the Guild's claims that the penalty rates provisions of the Pharmacy Award impede the extension of trading hours and stifles growth in employment and hours of work.

Future intentions

588. Proprietors generally expressed an intention to consider the option of extending trading hours to some extent, in the event that the Guild's proposal to reduce penalty rates is accepted, as a theoretical possibility. Few claimed to have formed any particular plans that would be put into effect, or to have conducted analysis of a business case. Most agreed that the reduction in penalty

---

965 Tassone PN 12217-93; Pricolo PN 12893-907.
966 Spiro PN 14687.
967 Kourtis PN 13627-39.
968 Costigan PN 15295.
969 Bird PN 14611.
970 Quinn On PN 13410.
971 Pollock PN 15088.
972 Chong PN 13877-8.

rates was only one factor that would influence a decision to change trading hours. Other important considerations included the assessment of whether there would be sufficient customer trade to justify such change. Proprietors generally considered that, if they were ever to increase hours of trading, they would tend toward offering more hours to current employees rather than engaging new employees.[973]

589. Other proprietors had in mind to absorb the reduced penalty rates straight to the profit line, rather than expand hours.[974] Ms Spiro spoke convincingly about how it would mean that she would be able to cease working on (every second) Sunday herself, and engage an employee pharmacist to take her place. It would mean she would be able to be with her family on a Sunday, and enjoy some work/life balance.[975] Mr Topp had the same aspiration.[976]

Guild's proposed findings based on evidence on the community pharmacy industry

590. The Guild urges three 'key findings' upon the Commission.

591. *First*, it is asserted that the evidence establishes that penalty rates make it unprofitable for the majority of pharmacies to open for extended trading hours.[977]

592. This proposed finding is not open, because:

(a) the existence of the penalty rate obligations has not prevented pharmacies from opening on hours that proprietors have characterised as unprofitable;

(b) pharmacists make decisions about their trading hours based on a range of considerations including their overall business profitability, their expectations of custom and trade over different hours, as well as the particular penalty rates applicable at different hours;

(c) the material presented in the Guild's case concerning overall profitability of pharmacy enterprises is out of date and has been overtaken by the substantial improvements anticipated from 6CPA; and

(d) the particular evidence cited in support of the proposed finding does not substantiate the claim.

---

973 Tassone PN 12439-43;Pricolo PN 12977-80; Heffernan PN 13349-60; Quinn On PN 13528-30; Kourtis PN 13653-90; Chong PN 14019-23; Playford PN 14549-53; Bird PN 14629-35.

974 Eg Mahoney PN 14232.

975 Spiro PN 14720.

976 Topp PN 17345-50.

977 Guild Submissions at para 103(a).

593. The evidence relied upon for that assertion are the survey results in the Pharmacy Report concerning "unprofitable trading hours"[978] and "labour costs".[979] For the reasons set out earlier in these submissions, the survey is profoundly flawed and does not provide a reliable basis for the making of any findings.

594. In any event, the survey results tend to undercut, rather than support, the proposed key finding. Taken at face value, the results say that, even though some proprietors say that terms of the Pharmacy Award make some trading hours less profitable than other trading hours, those proprietors have nevertheless chosen to organise their businesses, including by entering leases or affiliating with medical centres, based on their assessments of the best way to achieve their purposes. Evidently, those proprietors have concluded that it is worth their while to open during times of higher cost or lower custom and trade, in light of the overall benefits that an association with the lessor or medical centre will bring. Lease conditions are not an external force about which proprietors have no control or choice, and the value of trading over particular hours is not assessed in isolation.

595. The *second* proposed key finding is that, in the event penalty rates were reduced, it would "*improve the chances*" that pharmacies current extended hours would trade more profitably, "*provide an incentive*" for pharmacies to open more extended hours and as a consequence of those things, deliver better access to services for customers.[980] The *third* proposed key finding is of a similar kind. The proposition is that *if* pharmacy proprietors further extended their trading hours, then certain public benefits might follow.[981]

596. These are weak claims, in the sense that nothing testable is advanced. Proprietors might respond to a reduction in penalty rates by increasing their trading hours, and they might not. The lay evidence of pharmacy proprietors was to the effect that many of them already trade during hours they consider "unprofitable". Most of them acknowledged that they would consider a range of other factors (including the overall profitability of their business, and the anticipated levels of custom and trade over further extended hours) before committing to a change.

---

978 Exhibit PG-35 section 3.3.5 at page 47.
979 Exhibit PG-35 section 3.3.7 at page 52.
980 Guild Submissions at para 103(b).
981 Guild Submissions at para 103(c).

The level of disabilities associated with working on weekends and public holidays

597. The Guild properly acknowledges that "*Australian life revolves around a standard Monday to Friday working week.*"[982] The Guild also acknowledges, that for some individual workers, there is a degree of disability associated with working on weekends.[983]

598. In this section of its submissions, the Guild ultimately submits that the disability associated with working on weekends does not support the current level of penalty rates on four grounds:[984]

(a) survey evidence said to indicate that the level of disabilities associated with working on weekends is not high relative to other days of the week;

(b) in the retail industry (said to include the community pharmacy industry), a majority of workers seek out part-time or casual jobs and a large number of them "*do not mind and, indeed in many cases, prefer to work on weekends rather than weekdays*";

(c) workers are willing to work on weekends for a lower premium than the current level of penalty rates; and

(d) there is no material difference between the disabilities working on Saturdays and Sundays which warrant the significant difference in penalty rates between those days.

599. This critical part of the Guild Submissions is unsatisfactory because no attempt has been made to attribute any of the abovementioned grounds to specific evidence before the Commission. They are instead advanced in a rolled-up way following a review of some of the evidence before the Commission (considered below). The parties and the Commission are left to speculate as to how and to what extent the evidence referred to supports each of the grounds advanced.

600. In any event, the evidence relied upon by the Guild provides little if any support for the above grounds. That evidence is referred to below.

Deloitte Weekend Work Report

601. One source of evidence relied on by the Guild is the weekend worker survey in the Deloitte Weekend Work Report. That survey is evaluated in detail in Chapter 2 of these submissions. For the reasons there set out the survey is characterised by numerous limitations and weaknesses which collectively mean that the Commission cannot be confident that reliable conclusions can

---

982 Guild Submissions, para 106.
983 Guild Submissions, para 106.
984 Guild Submissions, para 157.

be drawn from it. Further, even if it is regarded as being able to produce reliable conclusions, Ms Pezzullo's own evidence indicates that it does not provide a proper basis for the Commission to make findings of fact which relate to weekend work in any of the specific industries to which it refers, including the community pharmacy industry.

The Rose Report

602. The Guild submits *inter alia* that the Rose Report strongly suggests that the current level of penalty rates overcompensates employees for the time worked on weekends, in particular, on Sundays. This and related contentions advanced on the basis of the Rose Report are considered in detail in Chapter 2 of this submission. For the reasons there set out, the Rose Report does not provide a proper basis for the submissions advanced by the Guild.

AWALI and the Charlesworth Report

603. The SDA refers to and relies on its submissions in Chapter 2 in relation to the Charlesworth Report and AWALI in response to the assertions made by the Guild as to the application and interpretation of the AWALI data.

604. The Guild's primary criticism of the AWALI index, that it provides an inferior analysis to the *"more sophisticated and detailed analysis of the data conducted by the Productivity Commission"*[985] is wrong for the three reasons articulated below.

605. *First*, and most fundamentally, the Productivity Commission's analysis of the AWALI data not only control for hours of work in assessing people's work/life interference, but also controls for a range of socio demographic characteristics, namely single status, gender, age and the presence of young children.[986] Whilst, as Professor Charlesworth acknowledges, controlling for hours worked is critical to a proper analysis of the data,[987] controlling for socio demographic characteristics such as those identified above, profoundly misunderstands the purpose of work-life research. People's socio demographic circumstances have a critical effect on their experience of work/life interference and are thus an integral component of the AWALI data set. To exclude such variables undermines and is inconsistent with the entire purpose of the research.

606. *Secondly*, the AWALI index effectively captures various aspects of work-life interference to provide an overall indicator of the extent of work-life interference.[988] It is important to interpret these single item measures in the context of the overall index, rather than analysing responses to

985 Guild Submissions, [127].
986 Final Productivity Commission Report, p 441.
987 Exhibit SDA-43, [11].
988 Exhibit SDA-43, [3].

single items, which the Productivity Commission seeks to do.[989] This approach fails to provide an accurate interpretation of the overall patterns of work-life interference and is at greater risk of response biases. In particular, comparing weekend and weekday workers using single items on the AWALI measure introduces a significant confounding factor to interpretation, as differences in work hours are not controlled for. The most accurate approach to analysing the full impact of weekend work on work-life interference is to use the comprehensive AWALI index measure and to control for hours of work so that the unique contribution of the scheduling of work on weekends can be properly identified.

607. *Thirdly*, assessing people's subjective level of "happiness" based on the measure of "flourishing" included in the 2014 AWALI survey as the Productivity Commission seeks to do[990] has significant limitations. "Flourishing" is predicated on a range of individual and social factors[991] and has only recently received interest in wellbeing related research.[992] Accordingly, the 2014 AWALI survey report was only able to make very broad conclusions about the relationship between flourishing and work/life interference.[993]

The Macdonald Report

608. The Guild asserts that the evidence given by Dr Macdonald has serious deficiencies which significantly weakens the conclusions to be drawn from it. These criticisms are unfounded for the reasons set out in Chapter 2 of this submission.

ABS Time Use Survey 2006

609. The Guild's reliance on data from the 2006 ABS Time Use Survey is of little weight and of not relevance. The 2006 ABS Time Use Survey consists of old data comparing results from 1992, 1997 and 2006 Time Use Surveys and is of no probative value to the Commission in determining whether there have been changes in work/life interference patterns since 2010.

Productivity Commission Final Report

610. Each of the observations/recommendations that the Guild attributes to the Productivity Commission appear to have been fashioned by the Guild to the extent that none of them reflect the actual wording contained in the Productivity Commission Final Report. Regardless, to the extent that each of the observations/recommendations rely on the Productivity Commission's

---

989 Final Productivity Commission Report, p 442.
990 Final Productivity Commission Report, p 443, Box 12.3.
991 Exhibit SDA-45, p 48.
992 Exhibit SDA-45, p 47.
993 Exhibit SDA-45, pp 47-48.

interpretation of the AWALI 2014 survey data, they should be disregarded for the reasons outlined above.

Lay evidence of employees

611. The Guild's criticism of the union's case based on the limited lay evidence presented is misplaced. It is a matter for the Guild to adduce evidence in support of its case, there is no obligation on the unions to adduce evidence supporting the retention of existing award obligations.

612. Further, the Guild's submissions misstate the effect of the evidence of the unions' lay witnesses.

APESMA witness

613. The APESMA witness is an example of an employee who directly experienced the inconvenience and disruption of weekend work. In his experience as an employee in a former position he was required to work Saturdays,[994] and directly experienced the disruption to himself and his family relationships, including by his exclusion from social activity, caused by that requirement.[995] The social activity was of a kind that would occur on Saturdays, Sundays and public holidays, so his experience of the disruption caused by Saturday work is equally explanatory of his aversion to Sunday work. Further, the APESMA witness' commitment to his church and its community,[996] and to participation in a theatre group, are further matters explaining his aversion to Sunday work.

SDA witness

614. The SDA witness is an example of an employee who relies upon penalty rates to maintain a basic minimum standard of living.[997] She is limited by reason of her health to hours that are, while substantial, still less than full-time.[998] She nominates preferred hours but is not in a position to determine her roster.[999] Sometimes she makes requests for adjustments that are not accommodated.[1000]

Working on weekends and public holidays is not unhealthy

615. The Guild claims that there is no requirement in the modern awards objective to consider the health effects of a particular type of work and that this means that Dr Muurlink's report is not

994 Exhibit APESMA-1 at [8].
995 Exhibit APESMA-1 at [9].
996 Exhibit APESMA-1 at [12].
997 Exhibit SDA-15 at [7].
998 Exhibit SDA-15 at [5]. See also PN 17678.
999 Exhibit SDA-15 at [3] and [8]. See also PN 17663.
1000 PN 17827.

relevant to the Commission's overall task of ensuring that any amendments to the modern awards meet the modern awards objective. This claim only makes sense if s 134(1)(da) of the FW Act excludes any recognition that the need for additional remuneration for employees working weekends or public holidays is due, at least in part, to the negative effects of working on those days. Logically, 'negative effects' must include health effects.

616. Dr Muurlink's establishes the general proposition that working on weekends is associated with five key markers of negative health - consecutively, overload, uncontrollability, unpredictability, asynchronicity, and arrhythmia. Contrary to the Guild's submissions, it is immaterial that Dr Muurlink does not specifically consider pharmacy employees in his report, the strength of his evidence lying in the fact that that the presence of these factors for any worker will spill over into a negative impact on the wellbeing, social life, and relationships of the worker. The SDA refers to and relies on the submissions it makes in relation to Dr Muurlink's evidence in Chapter 2 of these submissions.

Casuals working on weekends and public holidays

617. The Guild's proposed reductions in penalty rates applicable to casual employees are substantial. In the case of the reduction applicable to public holiday rates, the Guild's proposal is extraordinary. The award currently provides for public holiday penalty rates at 275% of the minimum ordinary rate of pay. The proposal is to reduce that rate to 125%. Little if any evidence specific to the effect of public holiday penalty rates has been adduced by the Guild.

618. It may also be noted that the Guild's claim is directly contrary to the recommendation expressed by the Productivity Commission that *"The Fair Work Commission should not reduce penalty rates for existing public holidays."*[1001]

619. The Guild's assertion is that employees paid under casual rates are 'overcompensated' by the application of penalty rates upon minimum usual rates inclusive of casual loadings. The sole submission advanced in support of that contention is that the contention is "consistent with" reasoning adopted by the Full Bench in the 2014 *Restaurants Case*.[1002]

620. The Full Bench in the *Restaurants Case* determined that one category of employees was "overcompensated" by the superimposition of casual loadings and Sunday penalty rates.[1003] The

---

1001 Productivity Commission Final Report, Recommendation 15.4, p 503.

1002 Guild submission at [165], citing *Restaurant and Catering Industry Association of Victoria* [2014] FWC 1996 at [265].

1003 [2014] FWCFB 1996 at [139].

category of workers identified were "transient and lower-skilled casual employees working primarily on weekends" who are "primarily younger workers".[1004]

621. The Full Bench had found that there was a degree of evidence supporting the proposition that the restaurant industry and special and peculiar characteristics. Those characteristics included the fact that a 'very large proportion' of the workforce consists of young people pursuing full-time studies or women with weekday carers' responsibilities who work significantly less than full-time hours on a casual basis. The Full Bench drew a distinction between what it saw, in the restaurant industry, as "transient" as opposed to 'core' or 'career' employees.[1005]

622. The profile of employment in the pharmacy sector is strikingly different to that of the restaurant industry, as described by the Full Bench. Further the *Restaurants Case* does not stand for the proposition that casual employees are *always* to be considered "overcompensated" when in receipt of casual loadings together with penalty rates, no matter what the setting or the profile of employees. It was a case directed to ascertained circumstances in that particular industry.

623. The Guild has identified no characteristics of the pharmacy sector, or of its employees, which establish a rational basis for the 'overcompensation' contention.

Section 134(1) - Modern awards objective

624. The Commission should not reduce penalty rates in the modern awards unless it is satisfied that the proposed reductions are necessary to achieve the modern awards objective.[1006] As outlined in Chapter 1 of these submissions, the employer parties must establish the ***necessity*** of the proposed variations, and that necessity means more than what is just desirable. On the evidence before the Full Bench, the employers have failed to meet that threshold.

625. In respect of the considerations set out in s 134(1)(a)-(h) of the Act, no particular weight should be attached to any one consideration over another; and not all of the identified criteria will necessarily be relevant to a particular proposal to vary a modern award.[1007] To the extent that there is any tension between the considerations in s 134(1 "*the Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions*."[1008]

1004 [2014] FWCFB 1996 at [138].
1005 [2014] FWCFB 1996 at [132].
1006 Section 138 of the Act.
1007 *Annual Leave decision* at [19], [20].
1008 Ibid [20].

626. The overall objective is to ensure that modern awards provide a fair and relevant safety net. The Commission is required to have regard to the s 134(1)(a)-(h) considerations, but the sum of those particular (mandatory) considerations is not determinative of the Review, if those considerations alone would otherwise result in approval of a variation that would not ensure a fair and relevant safety net.

Fair and relevant safety net

627. The existing penalty rates in the Pharmacy Award are an essential element of a fair and relevant safety net because of the disruptive and harmful effects of working at the times at which those penalties currently apply. As detailed in Section E of Chapter 2 of these submissions, the evidence establishes that working on weekends and public holidays has a negative effect on the physical and psychological health, and on the social life, of workers and their families. Weekends, particularly Sundays, and public holidays are important and valuable. The current penalty rates appropriately recognise the value that workers and the community, including employers, place on weekends and public holidays.

628. This submission is in part accepted by the Guild which agrees that some compensation is needed for working on weekends and public holidays, but argues that the current rates are set at the wrong level. The current penalty rates in the Pharmacy Award are set at the appropriate levels, because, as established by the evidence in Section E of Chapter 2 of these submissions, weekend work, and particularly Sunday work, has a negative impact on the health, including the wellbeing, of the employee. Empirical studies have found that levels of work-life interference on Sundays are worse than on Saturdays.[1009] The question of the appropriateness of these rates was the subject of substantial argument in award modernisation; the Guild has not demonstrated any material change in circumstances relating to the operation and effect of the Pharmacy Award which would now render that assessment as inappropriate.

s 134(1)(a) – relative living standards and the needs of the low paid

629. Section 134(1)(a) expressly requires the Commission to take into account relative living standards and the needs of the low paid.

630. Penalty rates form part of the minimum safety net of pharmacy workers' terms and conditions of employment. As the uncontested evidence of Dr Watson establishes, employees in the retail and pharmacy industries are amongst the lowest paid workers in the nation with significantly greater

---

[1009] See the evidence of Dr Muurlink and Professor Charlesworth in Section E of Chapter 2 of these submissions.

reliance on award minima than the all industries average.[1010] Together with the hospitality and food services industries, the retail industry has the largest proportion of low paid workers in the nation.[1011] Dr Watson's evidence also confirms that the earnings situation of retail and pharmacy workers has deteriorated relative to workers in other industries between 2010 and 2014 and that their living standards at the household level are lower compared to households including employees from other industries.[1012] The financial resources for meeting the costs of living are substantially less in retail and pharmacy households.[1013]

631. This factor is not supportive of the proposed variation.

s 134(1)(b) – encouragement of collective bargaining

632. The Guild has not advanced any case that, since the Pharmacy Award was made in 2010, the environment for collective bargaining in the pharmacy sector has changed in any material respect, or that any such change would mean that the reduction in penalty rates would encourage collective bargaining. This factor is not supportive of the proposed variation.

s 134(1)(c) – promotion of social inclusion through workforce participation

633. The need to promote social inclusion through increased workforce participation is a reference to higher employment.[1014] This objective is identical to s 284(1)(b) of the Minimum Wages Objective in Part 2-6, Division 2 of the FW Act. When considering the application of s 284(1)(b) of the FW Act, the Expert Panel "*must form a view on the employment impacts of an increase in the national minimum wage and modern award minimum wages of the size that we have in mind and in the economic circumstances that we face*".[1015] This is the same exercise that the Full Bench should undertake in considering whether cuts penalty rates will mean higher employment, although of course the variables will be different.

634. The Guild's contention is that lowered employment costs would automatically result in greater numbers of persons joining the pharmacy workforce. It has not however sought to rely on expert evidence in support of that contention. Such other expert evidence as is available in the Review (the evidence of Professors Borland and Quiggin, in reply to the evidence of Professor Lewis

---

1010 Exhibit SDA-35, p 29, lines 22-28 and p 17, lines 9-13.
1011 Exhibit SDA-35, p 45, lines 7-9.
1012 Exhibit SDA-35, p 38, lines 2-5 and p 59, lines 8-12.
1013 Exhibit SDA-35, p 58, lines 16-18.
1014 See, eg, *2014-2015 Annual Wage Review*, [51].
1015 *2014-2015 Annual Wage Review*, [52].

considered in Chapter 2) demonstrates, by reference to economic principle, that cuts to penalty rates would have no measurable effect on employment.

635. The lay evidence of pharmacy proprietors does not support the Guild's contention. The evidence is predominantly to the effect that, were the proposed variation given effect, pharmacy proprietors would favour increasing hours of work for existing employees rather than engaging new employees.

636. Further, the evidence is predominantly to the effect that pharmacy proprietors are anxious about a restoration of higher rates of profitability in their enterprises. It can be anticipated that, in some material proportion, any reduction in labour costs will be absorbed as profit rather than applied to increasing the hours of work (whether by existing or new employees).

637. This factor is not supportive of the proposed variation.

s 134(1)(d) - promotion of flexible modern work practices

638. The Guild has not advanced any case that flexible modern work practices would be any more effectively promoted by the reduction in penalty rates in 2016. This factor is not supportive of the proposed variation.

s 134(1)(da) – need to provide additional remuneration for working unsocial hours or weekends

639. The SDA refers to and relies on the submissions above as to the "fair and relevant safety net." It is acknowledged however that, whether the Guild's variation is approved or not, the award will provide additional remuneration for working unsocial hours or weekends.

s 134(1)(e) – equal remuneration for equal work

640. As submitted by the Guild,[1016] 77.1% of total employment in the pharmacy sector is female, being the highest proportion of female workers amongst all sectors of the retail industry. Any cuts to penalty rates in the Pharmacy Award will therefore disproportionately affect women.

641. The Commission has taken this factor into account when considering the impact on adjustments to the minimum wage. After acknowledging that "the gender pay gap is significant" on any measure used,[1017] stating in the most recent *Annual Wage Review* that:

> **[54]** Women are disproportionately represented among both the low paid and the award reliant and hence an increase in minimum wages is likely to promote pay

---

1016 Guild submissions, para 92.
1017 *2014-2015 Annual Wage Review*, [482].

> equity, though we accept that moderate increases in minimum award wages would be likely to have only a small effect on the gender pay gap. The principle of equal remuneration is a factor in favour of an increase in the NMW and the minimum wages in modern awards.
>
> …
>
> **[492]** Women are disproportionately represented among both the low paid and the award reliant and hence an increase in minimum wages is likely to promote pay equity, though we accept that moderate increases in minimum award wages would be likely to have only a small effect on the gender pay gap. The other mechanisms available under the Act, such as bargaining and equal remuneration provisions, provide a more direct means of addressing this issue.
>
> **[493]** The principle of equal remuneration is a factor in favour of an increase in the NMW and the minimum wages in modern awards and as such has been considered together with the various other statutory considerations the Panel is required to take into account.

642. This factor is not supportive of the proposed variation.

s 134(1)(f) – likely impact on business, including productivity, employment costs and regulatory burden

643. The Guild's contention is that reduced employment costs will result in increased trading hours.

644. The Guild has not demonstrated that lower employment costs will result, predominantly, in pharmacy enterprises increasing their hours of trade. The evidence is that most pharmacies already operate extended hours attracting penalty rates.

645. The Guild's complaint is that extended trading hours are difficult to maintain and are not profitable. The complaint about the unprofitability of those hours is made within a context of broader anxiety among pharmacists about business profitability in general. If employment costs applicable to existing "unprofitable hours" are reduced, then the default position will be that pharmacists will enjoy increased profitability on the same trading hours. The evidence is that, from that point, most pharmacists would merely contemplate the possibility of extending their trading hours further.

646. Further, the Guild's claims of increasing pressure and declining profitability suggests that proprietors would be increasingly likely to absorb cost savings directly to the profit line.

647. This factor is not supportive of the proposed variation.

s 134(1)(g) – need for a simple and sustainable modern award system

648. A simple and sustainable modern award was made in 2010. This consideration has no particular relevance to the Review.

s 134(1)(h) – likely economy-wide effects

649. A reduction in penalty rates in the pharmacy sector would not have economy-wide effects.

650. This factor is not supportive of the proposed variation.

Conclusion

651. In all the circumstances, the proposed amendments are not necessary to meet the modern awards objective. The penalty rates currently set out in the Pharmacy Award provide a fair and relevant minimum safety net of terms and conditions.

652. For the avoidance of doubt, the SDA refers to and relies on the expert evidence in Chapter 2 of these submissions in relation to the Pharmacy Award. Specifically, the evidence of Ms Yu (paras 248-283); Professor Charlesworth (paras 284-290); Dr Macdonald (paras 291-296); Dr Murrlink (paras 297-321); Professor Watson (paras 322-323); Professors Watson and Peetz (paras 324-325); Professor Borland and Professor Quiggin (critiquing Professor Lewis, paras 82-142) and Professor Altman (critiquing Professor Rose, paras 159-185).

CHAPTER 4: FAST FOOD INDUSTRY AWARD 2010

Introduction

653. Variations to the *Fast Food Industry Award 2010* (the **Fast Food Award**) are sought by the Australian Industry Group (the **Ai Group**) and by Restaurant and Catering Industry Industrial (**RCI**). The National Retailers Association (**NRA**) has withdrawn its proposal for particular variations, and advances submissions supportive of the variations proposed by Ai Group and RCI.

The NRA

654. NRA does not press any application for award variations. It has confined its role to advancing submissions supplementary to those of Ai Group and RCI. NRA led no evidence. NRA makes no submission addressed to the particular variations sought by Ai Group or RCI. The submissions are confined to: citing one paragraph from the Restaurants Case, in a manner repetitive of Ai Group's submission (Part 3 of NRA Submission); observing and "accepting" (or "supporting") various propositions said to be drawn from the FWC's research papers (Part 4) and the Productivity Commission's review report (Part 5), and criticising the evidence of Professor Altman and Dr O'Brien (Part 6). The criticisms of the evidence of Altman and O'Brien do not address the substance of their evidence.

RCI

655. RCI seeks to:

(a) remove altogether the 10% evening work penalty for hours between 9:00 pm and 12:00 am;

(b) reduce from 15% to 5% the early morning penalty for hours between 12:00 am and 5:00 am;

(c) reduce the level of the Sunday work penalty to the same level as Saturdays (a reduction from 50% to 25% for full-time and part-time employees and from 75% to 50% for casual employees (inclusive of casual loading); and

(d) reduce the level of the public holiday work penalty from 150% (175% for casual employees) to 50% (for all employees) or (at the employee's option) an alternative entitlement to four hours time off in lieu.

656. The submissions of RCI are predominantly directed toward RCI's application concerning the Restaurants Award. To the extent that the submissions touch upon the Fast Food Award, those submissions advance no reasons for variations of the kind sought by RCI, beyond those sought by Ai Group. The submissions refer to the evidence of two lay witness fast food business proprietors, but no particular findings are sought to be drawn from that evidence. The submissions otherwise rely upon the reports of Professors Rose, Lewis and Sands, but there are no observations to be drawn from those submissions that are not raised and responded to in connection with the Retail Industry Award in Chapter 2 of these submissions.

Ai Group Application

657. The Ai Group seeks to:

(a) change the starting time for the evening work penalty from 9:00 pm to 10:00 pm; and

(b) reduce the level of the Sunday work penalty to the same level as Saturdays (a reduction from 50% to 25% for full-time and part-time employees and from 75% to 50% for casual employees (inclusive of casual loading).

Summary

658. The case advanced by the Ai Group is fundamentally misdirected for two central reasons which, separately or together, should lead the Commission to refuse the proposed variations. Specifically, and as developed in detail below:

(a) Contrary to the presentation of its submissions, the Ai Group has not adduced sufficient evidence to enable the Commission to make findings of the type proposed in respect of the industry and workforce covered by the Fast Food Award. The Ai Group's evidentiary case is overwhelmingly directed at the workforce of two employers, McDonald and Hungry Jacks, which form part of a much larger industry. There is insufficient evidence before the Commission to enable it to find that the characteristics of McDonalds and Hungry Jacks businesses and their employees are typical or characteristic of the fast food industry generally.

(b) The Ai Group has not attempted to establish (and has not in fact established) material change in circumstances relating to the operation or effect of the Fast Food Award since it was made in 2010. For the reasons set out in Chapter 1, because the Fast Food Award is deemed to have met the modern award's objective when made in 2010, it is incumbent upon the Ai Group to demonstrate relevant change since that time.

Case misdirected (1) – insufficient evidence for findings relevant to fast food industry as a whole

659. The Ai Group's case is explicitly constructed around what are said to be the unique or special characteristics or features of the "*typical fast food employee*" and the "*fast food industry*". For example, in summarising their argument, the Ai Group submits that, given "*the characteristics of the typical employee in the fast food industry*"; "*the nature of the modern fast food industry"*; and the lack of disability experienced by "*the typical fast food employee*" in working on weekends, the Commission should vary the Fast Food Award as proposed for various reasons identified (which reasons are also explicitly or implicitly expressed by reference to "the typical fast food employee" and the "fast food industry").[1018] The point is also exemplified in the Ai Groups submission that because "*the characteristics of the fast food industry, as well as the characteristics of employees in the fast food industry, are distinct from the characteristics of other industries*" the Commission may be more readily able to make the variation proposed than the changes proposed by other parties.[1019]

660. The underlying difficulty with the Ai Group's argument is that, when the evidence is examined, at best all it arguably supports are findings in relation to that part of the fast food industry and workforce comprised of McDonalds and Hungry Jacks. In its submissions however, the Ai Group has elided McDonalds and Hungry Jacks with the fast food industry as a whole.

661. Although it is correct as the Ai Group submits that, as at July 2015, about half of the approximately 215,000 employees employed in the fast food industry worked for McDonalds or Hungry Jacks, those businesses collectively represent a small minority of the total number of fast food establishments across Australia.

    (a) As at 2014-2015, the fast food industry was comprised of approximately 24,564 enterprises across Australia in an industry characterised by high competition between businesses offering a wide range of different fast food options.[1020]

    (b) As at 19 May 2015, there were 943 McDonalds restaurants in operation in Australia (including company owned restaurants and franchisee operated restaurants).[1021] The evidence does not disclose the number of establishments or restaurants operated by Hungry Jacks.

1018 Ai Group Submissions, para 204.
1019 Ai Group Submissions, para 15.
1020 SDA/Ai Group Aide Memoire dated 25 January 2016 (unmarked), para 3.
1021 Exhibit AIG-3, para 3.

(c) If it is assumed that collectively there are between 1,000 and 1,300 McDonalds and Hungry Jacks stores, it follows that those stores collectively represent only between approximately 4% and 6% of the total number of fast food establishments in operation across Australia.

662. The Ai Group has not adduced any evidence, whether expert or lay, about the operations of the remaining 95% of fast food operators which collectively employ about 50% of the fast food industry workforce. In relation to the remaining 95% of fast food operators, all the Commission has before it is evidence from two fast food operators called by RCI: the operator of 3 hamburger restaurants employing 65 employees in South Australia[1022] and the operator of 9 shopping centre food court outlets employing 120 employees in Queensland.[1023] No attempt has been made to assimilate the evidence given by these two RCI witnesses with the various detailed propositions and submissions advanced by the Ai Group about the "*typical fast food employee*" or the "*fast food industry*". It would be unsound and unsupported by the evidence for the Commission to assume that 95% of fast food operators (and their employees), bear the same characteristics, experiences of the award and preferences as McDonalds and Hungry Jacks (and their employees).

663. This is of critical significance given the broad coverage of the Fast Food Award and the fact that it is not confined to McDonalds and Hungry Jacks employees and employers. In the language of the Full bench in the Security Industry decision, in relation to some 95% of operators in the fast food industry, the Commission simply does not have before it "*detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes*."[1024]

664. Further, as the Ai Group points out in its submissions,[1025] employees of McDonalds and Hungry Jacks are covered by various enterprise agreements. The effect then of the Ai Group's submission is to invite the Commission to undertake its statutory function in the 4 yearly modern award review by reference not only to a small minority of fast food operators, but operators whose employees' terms and conditions of employment are not determined by the Fast Food Award. It is submitted that, for that further reason, the evidence relating to McDonalds and Hungry Jacks and their employees is inherently of less relevance or weight to the Commission's task in the four yearly review.

665. The elision in the Ai Group submissions is most apparent in Section I of its submissions entitled "*Employees in the Fast Food Industry*". After referring to the total number of employees in the

---

1022 Exhibit RCI-20.
1023 Exhibit RCI-21.
1024 Security Award decision, at [8].
1025 Ai Group Submissions, para 110.

industry and the number of employees employed by McDonald and Hungry Jacks, there then follows 21 paragraphs[1026] explicitly directed at various demographic characteristics, hours of work and preferences of employees of McDonalds and Hungry Jacks. The Ai Group then submits (emphasis added):

> Based on the data relating to McDonalds and Hungry Jacks, and consistent with the data relating to Australian employees aged 15-24 years and Australian employees working in the accommodation and food services industries, the typical employee in the fast food industry is:
>
> (a) aged between 14-24 years (see paragraphs [65] and [66] of this outline;
>
> (b) single (see paragraph [72] of this outline);
>
> (c) studying (see paragraph [75] of this outline; see also paragraphs [51] and [55] of this outline);
>
> (d) working part-time (see paragraph [67] of this outline; see also paragraphs [47], [48], [49], [50], [51], [52] and [59] of this outline);
>
> (e) living with one or both of their parents (see paragraph [73] of this outline; see also paragraph [54] of this outline);
>
> (f) not supporting a dependent family (see paragraph [74] of this outline);
>
> (g) working 1 to 15 hours a week (see paragraph [70] of this outline; see also paragraph [51] of this outline);
>
> (h) working regularly one day of a weekend (see paragraph [76] of this outline; see also paragraph [56] of this outline); and
>
> (i) preferring to work some time on weekends (see paragraph [77] of this outline).

666. There is no proper basis for the claim that "*the typical employee in the fast food industry*" has the characteristics, experiences or preferences outlined above. The highest it can arguably be put is that the typical employee of McDonalds and Hungry Jacks has those characteristics, experiences and preferences. Dealing with each of the claims in turn:

(a) The claims in the above paragraph that that the "*typical employee in the fast food industry*" is:

(i) aged between 14-24 (para (a));

(ii) single (para (b));

[1026] Ai Group Submissions, paras 64-85.

(iii) not supporting a dependent family (para (f)); and

(iv) prefers to work some time on weekends (para (i)),

are based on evidence solely drawn from McDonalds and Hungry Jacks; reference is not made to any other sources of evidence.

(b) The claim that "*the typical employee*" is studying (para (c)) is principally sourced from a paragraph ([75]) which again explicitly refers to evidence relating to employees of McDonalds and Hungry Jacks. The remaining two sources of evidence to which reference is made are ABS and HILDA data about Australian employed persons aged 15-19 years and the number of Australian weekend workers who were dependent students. Neither is referrable to the fast food industry.

(c) The claim that "*the typical employee*" is working part-time (para (d)) is principally drawn from paragraph [67] which again is a summary of evidence about employees working in McDonalds and Hungry Jacks stores. The remaining sources of evidence to which reference is made are ABS data relating to Australians aged either 15-24 years or 15-19 years which is not specific to employees in the fast food industry. The reference to paragraph [59] is a reference to the proportion of the 436,200 employed persons in the food and beverage section of the accommodation and food services industries who work on a part-time basis. That class includes, but is not limited to, employees working in the fast food industry.

(d) The claim that the "*typical employee*" is living with one or both of their parents appears (para (e)) is principally drawn from paragraph [73] which again is specific to McDonalds and Hungry Jacks employees. The reference to paragraph [54] is a reference to ABS data of all Australian persons aged 15-24 years and is not specific to the fast food industry.

(e) The claim that the "*typical employee*" works 1-15 hours a week (para (g)) is principally based on paragraph [70] which refers primarily to evidence about McDonalds and Hungry Jacks employees. The reference to paragraph [51] is a reference to ABS data of persons aged 15-19 years and is not confined to fast food.

(f) The claim that the "*typical employee*" regularly works one day of a weekend is principally drawn from paragraph [76] which refers to evidence about employees of McDonalds and Hungry Jacks. The reference to paragraph [56], is a reference to ABS data concerning accommodation and food service industries, which includes, but is substantially greater than, the fast food industry.

667. The same technique of (erroneously) relying on evidence specific to McDonalds and Hungry Jacks and proposing findings about the "*fast food industry*" in general, the "*typical employee*" working in that industry and "*fast food workers*" occurs throughout the Ai Groups submissions and in relation to various propositions which appear central to the Ai Group's case. For example:

(a) The claim in paragraph [89] that there is a "*clear distinction*" between career and non-career employees working in the fast food industry, is drawn from sources confined to Hungry Jacks and McDonalds employees.

(b) The claim in paragraph [101] that approximately 30% of weekly sales in the fast food industry were achieved on the Saturday and 18% on a Sunday is largely drawn from evidence relating to the experience of McDonalds and Hungry Jacks.

(c) The claim in paragraph [104] that the majority of employees working in the fast food industry choose to do so and that over three-quarters of employees in the industry are students, is overwhelmingly based upon evidence drawn from McDonalds and Hungry Jacks.

(d) The claim in paragraph [105] that the majority of employees working in the fast food industry on weekends are content to do so and do not complain about working on weekends is solely based on evidence relating to McDonalds stores.

(e) Section J8 of the Ai Group's submissions advances the proposition "*no difficulties in recruiting Sunday workers*". Again, this contention is largely based on the experience at McDonalds.

(f) The claim in paragraph [107] that there is "*no evidence of adverse impact on social interaction by employees working in the fast foods industry on weekends*" is based solely on evidence relating to McDonalds and Hungry Jacks stores.

(g) The claim in paragraph [116] that "the typical employee in the fast food industry working on the weekend works a shift of between one and six hours" is based solely on evidence relating to McDonald's and Hungry Jacks stores, and the claims in section L also generally rest on evidence from that source.

(h) The claim in paragraph [158] that "the typical fast food employee chooses to work on a weekend even in the absence of penalty rates" is largely based on evidence relating to McDonald's and Hungry Jacks stores.

Case misdirected (2) – No evidence of material change in circumstances since the making of the modern award

668. For the reasons set out in Chapter 1 of these submissions, because the Fast Food Award is taken to have met the modern awards objective when made in 2010, it is incumbent on a proponent of a variation to the award to establish that there has been material change since that time in the circumstances relating to its operation or effect.

669. The Ai Group has not sought to demonstrate such change. Nor is there any evidence before the Commission to support a finding of material change in circumstances relating to the operation or effect of the Fast Food Award since 2010. Instead, as outlined above, the evidence adduced by the Ai Group is near wholly confined to being a "snap shot" about McDonalds and Hungry Jacks and their employees as at mid-2015. By its nature, it does not enable the Commission to assess the extent to which there has been any material change in circumstances relating to the operation and effect of the Fast Food Award since it was made. There is no way of knowing whether the portrayal of McDonalds and Hungry Jacks operations and the demographic composition, preferences and experiences of their employees has, or has not, changed since 2010. Where Ai Group has made submissions about changes to conditions, the changes are those said to have arisen since penalty rates were first introduced into industrial awards, a century ago.[1027]

Award modernisation

670. In the Preliminary Jurisdictional decision, the Full Bench stated that in this Review the Commission will proceed on the basis that, *prima facie*, the modern award being reviewed achieved the modern awards objective at the time that it was made. A review of the history relating to the making of the Fast Food Award from the process of award modernisation confirms that the Commission explicitly directed itself to ensuring that the Fast Food Award, including specifically the provisions in respect of evening and weekend penalty rates, achieved the modern awards objective. This conclusion emerges from the following short history of award modernisation in relation to the Fast Food Award.

671. In Stage 1 of the award modernisation process, the Ai Group submitted that a separate and distinct award should be created for the Fast Food industry which did *not include any penalty rates* in relation to Saturday or Sunday work or work before 1am.[1028]

672. In September 2008, the AIRC issued an exposure draft award which covered the retail, fast food, pharmacy, and hairdressing and beauty industries. That award included a loading of 25% to

---

1027 Ai Group Submission, section S.

1028 Schedule 1 to the submissions of the Ai Group dated 1 August 2008.

apply to work performed after 6pm on weeknights, a penalty rate of 125% to apply to all work performed on a Saturday and a penalty rate of 200% to apply for all work performed on a Sunday.

673. The exposure draft award elicited complaints from fast food operators that its provisions, including those referred to above, would result in substantial increases in costs, reductions in trading hours and reduction in employee numbers.[1029] In its submissions dated October 2008, the NRA/ANRA strongly objected to the inclusion of the fast food industry in a single modern award and the terms of that award. The NRA/ANRA provided lengthy submissions in support of its position including those to the effect that the imposition of penalties for work on Friday, Saturday and Sunday nights would have the "*capacity to undermine, and in some cases destroy, the viability of many Fast Food businesses*".[1030]

674. The Ai Group likewise filed extensive and detailed submissions objecting to the inclusion of the fast food industry in a single modern award and the terms of that award. The submissions emphasised the claimed unique features of the fast food industry and examined the history of industrial regulation in the industry.[1031]

675. The Ai Group took particular issue with the provision made in the exposure draft award for penalty rates for evening, night and weekend work. It submitted that, because the industry operates 24 hours over 7 days a week, Sunday is an ordinary trading day and therefore does not have any special status, with the consequence that no penalty should be payable for work on either that day (or on Saturday). This was said to be supported by a number of identified NAPSAs.[1032] It was claimed that penalties for Saturday or Sunday work would have an excessive cost on fast food operators and that many businesses would not be able to absorb those costs or pass them on.[1033] In support of these claims, the Ai Group provided some seven statutory declarations from fast food operators deposing to the claimed adverse economic consequences of the exposure draft award. The Ai Group also argued that the imposition of a penalty for work performed after 6pm was excessive and inconsistent with prevailing provisions made by NAPSAs and enterprise awards.[1034] It also submitted that, if the penalty rates contained in the exposure draft award were imposed, those rates "*could have the effect of penalising the fast food industry from operating at times and on days when they are most in demand*" which "*will inevitably increase costs for employers"* and *"impact upon decisions as to the length of opening hours*".

1029 See for example submissions of Jatmag Pty Ltd and Jatam Pty Ltd (both trading as McDonalds) dated 17 August 2008; submission of Jubcan Venture Pty Ltd (trading as McDonalds) dated 10 August 2008 and the submission of the Australasian Association of Subway Franchisees dated 10 October 2008.

1030 Submissions of the NRA/ANRA dated October 2008, paras 99-100.

1031 Submissions of the Ai Group dated 10 October 2008, para 69.

1032 Ibid, para 79.17.

1033 Ibid, see for example paras 79.19-79.21.

1034 Ibid, see for example paras 79.22-79.23.

As a consequence, the penalty rates structure was said to be "*not economically sustainable for the industry to continue to operate as it does currently*".[1035]

676. The Ai Group provided a further draft award as to the terms and conditions, which in its view, should apply in the fast food industry. That award also did not provide for penalty rates for weekend work or for evening work, save for work performed between 10pm and 12am in relation to which a loading of 10% would apply with a loading of 25% to apply for work performed after midnight and before 4am.

677. In support of this draft award, both the Ai Group and the NRA/ANRA restated their submissions outlined above in proceedings before the AIRC on 5 November 2008.[1036] The Ai Group emphasised that the exposure draft would substantially increase the costs for businesses in the fast food industry because of three main areas of concern – penalty rates for weekend work, night penalties and allowances.[1037] Those penalties were said to be inconsistent with the fact that the hours to which they related were the main trading hours in the fast food industry. The Ai Group emphasised the cost consequences of weekend penalties by referring to a statement from a witness[1038] on behalf of the companies which controlled all of the KFC operations in Queensland and Tweed Heads which stated that the weekend penalties alone would increase the costs to the business by in excess of $10 million.[1039]

678. In its decision dated 19 December 2008,[1040] a Full Bench of the AIRC acceded to the submission advanced by the employers that a separate award should be established for the fast food industry. The Full Bench stated that in deciding to make four separate awards it had "*placed significant reliance on the objective of not disadvantaging employees or leading to additional costs*".[1041] The Full Bench stated:[1042]

> 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

---

1035 Ibid, para 84.6.
1036 See in particular PN 3318-3358.
1037 PN 3323.
1038 Ms Judy Fenton, the HR Manager of Collins Restaurants Management P/L which provided labour to Collins Restaurants Qld P/L (trading as KFC Qld) and Collins Restaurants NSW P/L (trading as KFC Tweed Heads NSW), franchisors of YUM Restaurants Australia P/L, which held the franchise rights to KFC in Qld and Tweed Heads NSW.
1039 PN 3327.
1040 [2008] AIRCFB 1000.
1041 Ibid at [285].
1042 Ibid at [286].

> instruments. In this regard we note in particular the significant differences in awards and NAPSAs applying to the fast food and pharmacy parts of the industry.

679. The Full Bench also specifically noted the concern expressed by many employers about the additional costs arising from provisions contained in the exposure draft regarding hours of work, overtime, penalty rates, annual leave and allowances. In that regard, the Full Bench stated:[1043]

> … 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. ...

680. The Fast Food Award issued on 19 December 2008 provided for a loading of 75% to apply for all hours worked on a Sunday; a loading of 25% for ordinary hours of work within the span of hours on a Saturday; and a loading of 10% for ordinary hours of work within the span of hours between 6pm and midnight Monday to Friday.[1044] These provisions elicited continuing objections from employer organisations. In the context of submissions about transitional arrangements, the Ai Group submitted that the issues of most concern concerning the Fast Food Award included the penalty provisions which were said to have a substantial cost impact on many fast food operators. The Ai Group sought that the commencement of operation of the above and other provisions be delayed until after the two year review.[1045]

681. In a decision dated 29 January 2010,[1046] FWA considered various applications to vary the recently made Fast Food Award including an application by the NRA and the Ai Group to vary the provisions in respect of penalty rates. The employer parties had some success in this application. In particular:

(a) The employers sought to reduce the penalty payable for ordinary hours worked on Sunday for full-time and part-time employees from 75% to 25%. The Full Bench concluded that having "*reconsidered the level of this loading having regard to the Sunday penalty rates in relevant pre-reform awards and NAPSAs and in particular the penalties now applicable in the restaurant industry*", that a loading of 50% for full-time and part-time employees and 75% for casuals was "*fair and appropriate*".[1047]

(b) The employers sought the deletion of the entitlement then provided of a loading of 10% for ordinary hours of work within the span of hours between 6pm and midnight and an additional 25% on top of the casual rate in respect of casual employees. Although the

---

1043 Ibid at [287].
1044 Clause 26.2.
1045 See submissions of the Ai Group dated 29 May 2009, paras 114-116.
1046 [2010] FWAFB 379.
1047 Ibid at [26].

Full Bench did not grant that variation as sought, it varied the provision to provide for a 10% loading after 9pm and a 15% loading after midnight with casual employees receiving the loading in addition to the 25% casual loading.[1048]

682. Three conclusions emerge from this review of the proceedings which led to the making of the Fast Food Award in its current terms.

(a) *First*, the question of the appropriate penalties for evening and weekend work was a central controversy and one which was addressed by extensive submissions and evidence filed by the employers.

(b) *Secondly,* the provisions of the Fast Food Award in respect of penalty rates were not only considered and determined by a Full Bench, but indeed "*reconsidered*" (and reduced) by another Full Bench.

(c) *Thirdly,* following its reconsideration of penalty rates in the Fast Food Award, the current provision made by the Fast Food Award in respect of penalty rates was described by the Full Bench as *"fair and appropriate*".[1049]

683. In light of these matters, there can be no doubt that, in the making of the Fast Food Award, the Commission explicitly directed itself to the question of evening and weekend penalty rates and determined that the award containing penalty rates as currently prescribed achieved the modern awards objective.

Other comments

684. The propositions at sections J2 ('Production of Non-Preservable Items'), J3 ('Responsive to Consumer Demand') and J4 ('No Opportunity to Avoid Penalties') are advanced as describing inherent characteristics of the industry. The Ai Group does not assert, let alone attempt to establish, that any of those characteristics have appeared for the first time, intensified or otherwise changed over any recent time. If these characteristics fairly describe the industry in 2015, they fairly described the industry in 2010.

685. Further, the particular proposition at section J4 ('No opportunity to avoid penalties') does not bear upon the modern award objective, and is irrelevant. The Ai Group calls in aid an extract from reasons offered, in dissent, in a consideration of an award in a wholly different industry.

1048 Ibid at [23].
1049 Ibid at [26].

686. At J7, Ai Group makes contentions about employees working on the weekends 'choosing' to do so. Again, the evidence is derived from McDonalds only. The evidence advanced about McDonald's employees elides distinctions between an employee's nomination of 'available' working hours and those the employee prefers or chooses to work.

687. Employees' expressions of continuing 'availability' is maintained in a system called 'metime'.[1050] The records held in 'metime' are not necessarily a record of employees' 'preferences'. One indicator of employees' preferences is the frequency with which employees ask to withdraw their availability, for particular days of the week. Requests of that kind are documented. Individual restaurants maintain books through which employees record such requests; these are called "N/A books" or "Time out" books.[1051] Examples of such books were called for and produced.[1052] Those books reveal a marked, consistent pattern. Employees consistently communicate requests to be taken out of consideration for the roster on weekends more frequently than weekdays, and Saturday is the day subject to the greatest number of such requests. This is apparent both from a perusal of the books themselves, and from analyses of those books adopted by restaurant proprietors as according with their experience in the management of their businesses.[1053]

688. At Section K, it is submitted that 'Employers in the retail industry will offer more or longer shifts on weekend if penalties are reduced. The evidentiary foundation for that submission consists of the assertions of the owner of one bakery in NSW[1054] and a manager of a clothing retailer in NSW.[1055] The submission is a large one and the evidentiary basis is very small. No weight ought be given to this submission.

689. At Section M it is submitted that the distinction between Saturdays and Sundays has or is becoming “merged” or is being “erased” or is becoming “blurred”. Reliance is placed on the evidence of Dr Muurlink for the making of these propositions. Contrary to the AIG submissions, the evidence of Dr Muurlink, at its highest, supports a finding that longitudinal Canadian studies have shown that Saturdays and Sundays are merging in terms of the degree to which they are “emotionally attractive” in Canada, albeit that there is still a “separation” between these days.[1056] Dr Muurlink’s only evidence in the Australian context is in relation to there being a trend in the change in patterns of work and society[1057] – nothing is said by Dr Muurlink about the degree to

---

1050 Dunn Exhibit AIG-1 par [61].
1051 Dunn Exhibit AIG-1 par [61]; Agostino Exhibit AIG-7 par [50(b)]; Eagles Exhibit AIG-9 par [45].
.1052 Exhibit SDA-23, Exhibit SDA-24, Exhibit SDA-27, Exhibit SDA-29.
1053 Exhibit SDA-25 and Dando PN18789; Exhibit SDA-28 and Agostino PN19103; Exhibit SDA-30 and Eagles 19206.
1054 Daggett Exhibit R-7.
1055 D'Oreli Exhibit R-8.
1056 Exhibit UV-26, para 65. See also PN 20886.
1057 Exhibit UV-26, para 64. See also PN 20884, PN 20895 and PN 20896.

which Saturdays and Sundays are "emotionally attractive" or the extent to which work on those days is associated with disamenity for employees in Australia. Of note in the Australian context is the fact that, as reported in the Final Productivity Commission Report, around 90% of Australians do not work on Sundays.[1058]

Section 134(1) – Modern Award Objective

690. The Commission should not reduce penalty rates in the modern awards unless it is satisfied that the proposed reductions are necessary to achieve the modern awards objective.[1059] As outlined in Chapter 1 of these submissions, the employer parties must establish the necessity of the proposed variations, and that necessity means more than what is just desirable. On the evidence before the Full Bench, the employers have failed to meet that threshold.

691. In respect of the considerations set out in s 134(1)(a)-(h) of the FW Act, no particular weight should be attached to any one consideration over another; and not all of the matters identified in s 134(1) will necessarily be relevant to a particular proposal to vary a modern award.[1060]

692. To the extent that there is any tension between the considerations in s 134(1), the Full Bench has determined that 'the Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.'[1061]

693. The overall objective is to ensure that modern awards provide a fair and relevant safety net. The Commission is required to have regard to the s 134(1)(a)-(h) considerations, but the sum of those particular (mandatory) considerations is not determinative of the review, if those considerations alone would otherwise result in approval of a variation that would undermine a fair and relevant safety net.

Fair and relevant safety net

694. The existing penalty rates in the Fast Food Award are an essential element of a fair and relevant safety net because of the disruptive and harmful effects of working at the times at which those penalties currently apply. As detailed in Section E of Chapter 2 of these submissions, the evidence establishes that working on weekends and public holidays has a negative effect on the physical and psychological health, and on the social life, of workers and their families. Weekends, particularly Sundays, and public holidays are important and valuable. The current penalty rates

---

1058 Final Productivity Commission Report, Appendix F, p 1116.
1059 Section 138 of the Act.
1060 Four Year Review of Modern Awards - Annual Leave [2015] FWCFB 3406, [19], [20]
1061 Ibid at [20]

appropriately recognise the value that workers and the community, including employers, place on weekends and public holidays.

695. This submission is in part accepted by Ai Group which agrees that some compensation is needed for working on weekends and public holidays, but argues that the current rates are set at the wrong level. The current penalty rates in the Fast Food Award are set at the appropriate levels, because, as established by the evidence in Section E of Chapter 2 of these submissions, weekend work, and particularly Sunday work, has a negative impact on the health, including the wellbeing, of the employee. Empirical studies have found that levels of work-life interference on Sundays are worse than on Saturdays.[1062] The question of the appropriateness of these rates was the subject of substantial argument in award modernisation; Ai Group has not demonstrated any material change in circumstances relating to the operation and effect of the Fast Food Award which would now render that assessment as inappropriate.

134(1)(a) – relative living standards and the needs of the low paid

696. Section 134(1)(a) expressly requires the Commission to take into account relative living standards and the needs of the low paid. Penalty rates form part of the minimum safety net of fast food workers' terms and conditions of employment. Penalty rates form part of the minimum safety net of pharmacy workers' terms and conditions of employment.

697. Significant proportions of employees in the fast food industry are low paid, or very low paid. The percentage of workers who are low paid is nearly 80%, and the proportion who are very low paid is at least 60%.[1063]

698. These high proportions are not wholly explained by the incidence of part-time work in the fast food industry. The proportion of full time workers who are low paid is in the vicinity of 50-60%. The proportion who are very low paid is in vicinity of 25-30%.[1064]

699. The Ai Group seeks to discount the incidence of low pay and very low pay in the fast food industry by reference to characteristics of employees of McDonalds and Hungry Jacks establishments. The age, hours worked and living arrangements of such employees is said to be relevant. Those are characteristics of employees in a small minority of employers in the fast food

---

1062 See the evidence of Dr Muurlink and Professor Charlesworth in Section E of Chapter 2 of these submissions.

1063 O'Brien Report, ACTU3, paragraph [40]

1064 O'Brien Report, ACTU3, paragraph [41].

industry. No attempt has been made to demonstrate relevant characteristics (if they are relevant characteristics) across the industry as a whole.[1065]

700. The Ai Group contends that there is "no" evidence about relative living standards of employees in the fast food industry. It is true that such data as are available are data inclusive of those drawn from employees in cafes, restaurants and hospitality.[1066] But those data are inclusive of data drawn from employees in fast food. They are not the most precise indicator conceivable, but they are capable of being given some weight.

701. The data concerning relative living standards and hardship show that employees in the food and beverage services sector (of which fast food is part) experienced hardship at least 150% and sometimes more than 200% as frequently as employees across all industries, for many of the relevant indicators: incidence of renting, inability to pay rent on time, dissatisfaction with financial circumstances, going without meals, and inability to raise emergency funds.[1067]

702. Ai Group contends that relative living standards and the needs of the low paid are irrelevant or neutral in a review of penalty rate obligations because the primary means of addressing those matters is the setting of the minimum rates of pay in an annual wage review. That submission is misconceived. The setting of the minimum wage in an annual wage review setting is performed in a context where penalty rates (and other conditions) are taken as given. A variation to penalty rates in a modern award review is a variation to the mix of circumstances which obtained when an annual wage review was conducted. The Commission is required to have regard to each of the consideration comprising the modern awards objective when conducting the present Review, and there is no warrant for excluding consideration of relative living standards and the needs of the low paid.

134(1)(b) – encouragement of collective bargaining

703. Ai Group has not advanced any case that, since the modern award was made in 2010, the environment for collective bargaining in the fast food industry has changed in any material respect, or that any such change would mean that the reduction in penalty rates would be encourage collective bargaining. This factor is not supportive of the proposed variation.

1065 Ai Group Submissions at [166].
1066 O'Brien Report, ACTU, page 5.
1067 O'Brien Report, ACTU3, Table 3.5 at page 31.

134(1)(c) – promotion of social inclusion through workforce participation

704. The need to promote social inclusion through increased workforce participation is a reference to higher employment.[1068] This objective is identical to s 284(1)(b) of the Minimum Wages Objective in Part 2-6, Division 2 of the FW Act. When considering the application of s 284(1)(b) of the FW Act, the Expert Panel "must form a view on the employment impacts of an increase in the national minimum wage and modern award minimum wages of the size that we have in mind and in the economic circumstances that we face."[1069] This is the same exercise that the Full Bench should undertake in considering whether cuts to penalty rates will mean higher employment, although of course the variables will be different.

705. Ai Group's contention is that it is "axiomatic" that additional jobs would be provided to employees in the fast food industry, if penalty rates were to be reduced. The evidence of the labour economists (discussed in Chapter 2, above) reveals no such axiom. The evidence of Professors Borland and Quiggin, in reply to the evidence of Professor Lewis demonstrates, by reference to economic principle, that cuts to penalty rates would have no measurable effect on employment. That conclusion is supported by Ms Yu's evidence considered in Chapter 2 about the absence of any systematic effect on employment of increases in penalty rates which occurred in the NSW retail industry between 2010 and 2014.

706. This factor is not supportive of the proposed variation.

134(1)(d) - promotion of flexible modern work practices

707. Ai Group have not advanced any case that flexible modern work practices would be any more effectively promoted by the reduction in penalty rates in 2016, than they may have been by a reduction at the time the modern award was made in 2010. This factor is not supportive of the proposed variation.

134(1)(da) – need to provide additional remuneration for working unsocial hours or weekends

708. The SDA refers to and relies on the submissions above as to the "fair and relevant safety net." It is acknowledged however that, whether Ai Group's variation is approved or not, the award will provide additional remuneration for working unsocial hours or weekends.

1068 See, eg, 2014-2015 *Annual Wage Review*, [51].
1069 Ibid, [52].

134(1)(e) – equal remuneration for equal work

709. A majority of fast food industry employees are women.[1070] Any cuts to penalty rates in the Fast Food Award will therefore disproportionately affect women.

710. The Commission has taken this factor into account when considering the impact on adjustments to the minimum wage. After acknowledging that "the gender pay gap is significant" on any measure used,[1071] stating in the most recent Annual Wage Review that:

> [54] Women are disproportionately represented among both the low paid and the award reliant and hence an increase in minimum wages is likely to promote pay equity, though we accept that moderate increases in minimum award wages would be likely to have only a small effect on the gender pay gap. The principle of equal remuneration is a factor in favour of an increase in the NMW and the minimum wages in modern awards.
>
> …
>
> [492] Women are disproportionately represented among both the low paid and the award reliant and hence an increase in minimum wages is likely to promote pay equity, though we accept that moderate increases in minimum award wages would be likely to have only a small effect on the gender pay gap. The other mechanisms available under the Act, such as bargaining and equal remuneration provisions, provide a more direct means of addressing this issue.
>
> [493] The principle of equal remuneration is a factor in favour of an increase in the NMW and the minimum wages in modern awards and as such has been considered together with the various other statutory considerations the Panel is required to take into account.

711. This factor is not supportive of the proposed variation.

134(1)(f) – likely impact on business, including productivity, employment costs and regulatory burden

712. Although a reduction in penalty rates would result in lower (per unit) employment costs, there is otherwise no evidence that a reduction in penalty rates would affect the productivity of enterprises in the fast food industry, or affect any regulatory burden upon such enterprises.

713. Ai Group has not sought to demonstrate that any foreseeable resulting effects on fast food enterprises, arising from reduced employment costs, would be of any different quality or scale in 2016, than they would have been had penalty rates been reduced in 2010.

714. This factor is not supportive of the proposed variation.

[1070] Industry Profile AFS (December 2015), Table 5.1 at p 27; Limbrey Exhibit AIG-3 pars [28]-[29].
[1071] 2014-2015 Annual Wage Review, [482].

134(1)(g) – need for a simple and sustainable modern award system

715. A simple and sustainable modern award was made in 2010. This consideration has no particular relevance to the Review.

134(1)(h) – likely economy-wide effects

716. Ai Group concedes that its proposed variation would not have economy-wide effects.

Conclusion

717. In all the circumstances, the proposed amendments are not necessary to meet the modern awards objective. The penalty rates currently set out in the Fast Food Award provide a fair and relevant minimum safety net of terms and conditions.

718. For the avoidance of doubt, the SDA refers to and relies on the expert evidence in Chapter 2 of these submissions in relation to the Fast Food Award. Specifically, the evidence of Ms Yu (paras 248-283); Professor Charlesworth (paras 284-290); Dr Macdonald (paras 291-296); Dr Muurlink (paras 297-321); Professors Borland and Quiggin (critiquing Professor Lewis, paras 82-142) and Professor Altman (critiquing Professor Rose, paras 159-185).

APPENDIX 1

PROPOSITIONS CONTENDED BY ARA & ABI PARTIES	RETAIL LAY EVIDENCE RELIED UPON IN SUPPORT OF PROPOSITION	SDA ASSESSMENT BASED ON PROPER ANALYSIS OF EVIDENCE
ARA <u>Proposition 1 a):</u> **Retail businesses fix labour budgets to a proportion of sales, and changes in the cost of labour lead to changes in labour hours** <u>Proposition 1 b):</u> **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**	**Para 62** Barron Exhibit Retail-3 at [10] Goddard Exhibit Retail-4 at [11]-[12] Gough Exhibit Retail-5 at [11] Antonieff Exhibit Retail-6 at [9] Daggett Exhibit Retail-7 at [9] D'Oreli Exhibit Retail-8 at [8] **Para 63** Barron Exhibit Retail-3 at [11]	As a broad-brush statement, the two propositions advanced by the ARA can generally be accepted but it is submitted that the propositions are open to criticism on the basis that they offer too simplistic an analysis. For example, the propositions ignore other relevant factors, most significantly the issue of demand, which impact on how retail businesses fix their labour budgets and in consequence their labour hours, including whether the retail operation chooses to trade at all on particular days. Thus: **Anticipated volume of sales** Barron T: (19/10/2015), PN 16101-PN 16103 "I take it that it's retailing basics that the key determinant of whether a – a key determinant of whether store opens on any particular day is an estimation of whether or not the volume of sales are sufficient to warrant the opening on that day?---The volume of sales when related to the overhead. Yes?---Yes. Not sales alone, it's sales related No, the sales relative to how much it's going to cost you to open?---Yes, correct" Goddard T: (19/10/2015), PN 16377

		Gough T: (19/10/2015), PN 16676 "..[Sunday is] one of your quietest days and you want to keep the costs down on that day?---Well it's certainly because of cost" **Competition or competition assisted traffic in the relevant area on the relevant day** Barron T: (19/10/2015), PN 16107 "A key factor in that I think you've just mentioned is whether or not the other stores in the relevant area are also trading on Sundays? ---One of the elements, it's not necessarily the key element but one of the elements. Antonieff T: (19/10/2015), PN 16766, PN 16792 "..What you're saying is that that further reduction is principally attributable to the Woolworths opening up next door?---Absolutely. In the process of managing labour costs, yes. Daggett T: (19/10/2015), PN 17012-PN 17013 "Where did you relocate from and to?---We relocated from in front of Big W down to be in front of or beside Woolworths in their new fresh food precinct.

		And that no doubt has seen some advantages for the custom that you've received with that relocation?---Yes D'Oreli T: (19/10/2015), PN 17208 (Responding to Hampton C): "---There's a lot of factors [as to why 10 stores would still not open on Sundays even if penalty rates were reduced]. Mostly the cost is the biggest thing. The other ten may not may be open because there is no Sunday traffic flow or there's no environment for that Sunday shopping. For instance, some country towns there's no point opening on Sundays because they just – the whole town doesn't open…" **Other factors impacting on opening a store such as:** **Rent/Lease costs** Barron T: (19/10/2015), PN 16127, PN 16144 **Externally imposed operating hour**s Barron T: (19/10/2015), PN 16084 **Customer demographic** Barron (Responding to Asbury DP) T: (19/10/2015, PN 16287

ARA <u>Proposition 2:</u> **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**	**Para 78** Barron Exhibit Retail-3 at [20] Goddard Exhibit Retail-4 at [25] Daggett Exhibit Retail-7 at [15], [18],	The employer retail lay evidence relied upon to support this proposition is submitted to be unsatisfactory or inconclusive. Thus, in XXn: Barron T:(19/10/2015), PN 16184-PN 16197 "So to be clear you haven't determined the net effect of the transition to the GRIA for your Sportsgirl and Sussan stores, having regard to both the increase in Sunday costs and other offsetting benefits?---No, because I've particular focused on Sundays and what is a pure cost of a Sunday." T: (19/10/2015), PN 16234 "Can I suggest to you though that your experience in New South Wales contradicts or is inconsistent with your evidence in that regard because Sunday penalty rates have increased there, but the reduction in Sunday hours is vastly less than has occurred in Victoria when penalty rates remain unchanged. Do you accept that?---No." Goddard T: (19/10/2015), PN 16339 "So in less than four years you've been able to grow your business from 32 stores to 56, that's…?---Correct" T:(19/10/2015), PN 16344 "In fact looking at the annexures to your statement, the proportion of the hours worked on Sundays has actually increased [between 2009

		and 2015] from eight to 10 per cent in that time, that's so?---Yes" See also: Daggett T: (19/10/2015), PN 17025-PN 17029 Could not in XXn recall the operative industrial instruments that regulated her business in NSW prior to 2010, casting doubt on her capacity to assess the impact of any transition to GRIA after that date.
ARA <u>Proposition 3:</u> **Current Sunday Penalty Rates have an impact on labour allocation and retail operations by:** **Closing stores on Sundays**	**Para 84** Barron Exhibit Retail-3 at [12] Goddard Exhibit Retail-4 at [13] D'Oreli Exhibit Retail-8 at [12]	But see analysis generally above in relation to other operating factors impacting upon the decision to trade or not trade on Sundays. Barron T: (19/10/2015), PN 16101- PN 16103 "I take it that it's retailing basics that the key determinant of whether a – a key determinant of whether store opens on any particular day is an estimation of whether or not the volume of sales are sufficient to warrant the opening on that day?---The volume of sales when related to the overhead. Yes?---Yes. Not sales alone, it's sales related No, the sales relative to how much it's going to cost you to open?---Yes, correct" **Competition or competition assisted traffic in the relevant area on the relevant day** Barron

		T: (19/10/2015), PN 16107 "A key factor in that I think you've just mentioned is whether or not the other stores in the relevant area are also trading on Sundays? ---One of the elements, it's not necessarily the key element but one of the elements. **Rent/Lease costs** Barron T: (19/10/2015), PN 16127, PN 16144 **Externally imposed operating hour**s Barron T: (19/10/2015), PN 16084 **Customer demographic** Barron (Responding to Asbury DP) T: (19/10/2015, PN 16287 See also: Goddard T: (19/10/2015), PN 16406 "..You accept though that the volume of work performed on a Sunday across your businesses has in fact increased between 2009 and 2015?---Yes, it has gone up slightly, yes…" D'Oreli (Responding to Hampton C) T: (20/10/2015), PN 1720 "…There's a lot of factors [why the other 10 stores won't open on Sunday even if penalty rates

		are reduced]…. The other ten may not be open because there is no Sunday traffic flow or there's no environment for that Sunday shopping." See analysis above in relation to ARA Submissions, paras. 62 & 63. It is too simplistic a proposition to say that trade is particularly driven (or even at all driven) by labour costs as opposed to, for example, anticipated sales revenue and other external factors impacting on sales. See also analysis below in relation to ABI Submissions, para. 27.22 where concessions were made that sales, not wages bills, inform labour budgets.
Limiting and reducing trading hours on Sundays	Barron Exhibit Retail-3 at [12], [18] Daggett Exhibit Retail-7 at [19(b)] D'Oreli Exhibit Retail-8 at [18(a)]	This proposition takes the matter no further than an assertion that employers will responsibly organise their businesses to perform particular operational activities (particularly re-stocking) on days and at times of reduced labour cost. Real inconvenience to employers of undertaking these tasks on days other than Sundays is not established on the evidence given by any of the retail employer lay witnesses. Thus: Barron T: (19/10/2015), PN 16165 "..All I'm putting to you is that there's a certain number of hours of work that necessarily need to be done in the nature of restocking and administration around a store. If that work's not
Limiting operational activities undertaken on Sundays such that Sundays are dedicated to customer service and selling	Barron Exhibit Retail-3 at [12], [19] T: (19/10/2015), PN 16161- PN 16169 Goddard Exhibit Retail-4 at [27]	

	Gough Exhibit Retail-5 at [19(b)-(c)] T: (19/10/2015), PN 16677 Antonieff Exhibit Retail-6 at [18] Daggett Exhibit Retail-7 at [19(a)-(d)] D'Oreli Exhibit Retail-8 at [16]	done on a Sunday that needs to be done on another day of the week, that's so?---Correct" See also: Gough T: (19/10/2015), PN 16680 "..Yes, and those duties and work just get done when you can on other days, other than Sundays?---Well, they're rostered on other days as well. We have days for doing different tasks and those tasks don't happen to fall on Sundays." Reliance for this proposition derives from XXn where D'Oreli believes on no particular analysis that adding additional hours into the business will substantially increase customer service and inferentially, although he does not give this evidence, sales. See: D'Oreli T: (20/10/2015), PN17196-17198
Offering fewer hours to employees on Sundays than on other days, or limiting labour allocations on Sundays	D'Oreli T: (20/10/2015), PN17196 Gough Exhibit Retail-5 at [17]-[18]	Again, the premise behind this proposition is that labour costs rather than sales and other external factors drives labour allocation. See analysis above. But the evidence of Daggett was that she chooses to trade beyond the minimum trading hours of the

		shopping centre where her business is located and her business is profitable. Daggett T: (19/10/2015), PN 17015-17016, PN 17038
Offering fewer hours to employees on days other than Sundays	Daggett Exhibit Retail-7 at [15] Goddard Exhibit Retail-4 at [26]	The evidence of Goddard relied upon is not evidence for the proposition advanced. It speaks only of capping hours on Sundays, not on other days. The evidence of D'Oreli is that the current penalty rate structures promote the employment of multiple employees instead of one. This is a good outcome. The evidence of Barron relied upon does not address the proposition contended for.
Structuring rosters to eliminate breaks and shift crossover	D'Oreli Exhibit Retail-8 at [18(b)] *NB ref to [21(b)] is intended Barron Exhibit Retail-3 at [26]	The evidence supports this proposition. The proposition does not however address whether this is a good or a bad thing, with penalty rates on the evidence of the retail employer lay witnesses affording opportunities for employment for younger employees, which otherwise they might not have. The proposition may be accepted that owners roster themselves to work on Sunday to avoid penalty rate costs. But in XXn, neither Antonieff or Daggett themselves wanted to work on Sundays because of work/life balance issues
Operating with less experienced and lower cost junior employees	Gough Exhibit Retail-5 at [19(a)]	

Operating on Sundays with owners and their family members instead of rostering employees because of the cost of labour	Antonieff Exhibit Retail-6 at [18(b)] Daggett Exhibit Retail-7 at [19(e)] Gough Exhibit Retail-5 at [19(d)] Antonieff Exhibit Retail-6 at [17] Daggett Exhibit Retail-7 at [19(f)]	Antonieff T: (19/10/2015), PN 16974-PN 16975 "…I have a young family, I have three kids. … so I give those hours back, and in return I also get a quality of life back and spend time with my kids as well." "So what do you want to spend your time with on Sundays instead of working Sundays?---With my family. Daggett T: (19/10/2015), PN17063-PN 17064 "One of those things understandably is that you say that you would not work on the weekends which would mean that you'd roster another employee to work. I presume that's just to regain some of your work/life balance, is it?---Yes, because I have young children. "Would I be right in assuming that you'd be wanting to spend time with your children on a Sunday instead of work?---Yes, because they go to school during the week, so I don't see them during the week."
ARA <u>Proposition 4:</u> **Retail businesses cannot avoid Sunday penalties because:**	**Para 85** Goddard Exhibit Retail-4 at [15]	This proposition is too broadly put to have any probative force. The evidence in fact establishes

Consumers demand access to retail businesses on Sunday	Barron Exhibit Retail-3 at [14]-[16] T: (19/10/2015), PN16250-16253 Antonieff Exhibit Retail-6 at [11] Daggett Exhibit Retail-7 at [13]	that employers in many cases exercise unfettered commercial judgment to open or not open on Sundays and they do so for a variety of reasons ultimately connected with whether or not it is profitable for them to do so, although there are other operating factors which weigh in the making of that decision. See analysis of the evidence in relation to ARA Submissions, para. 62 above.
Shopping centre leases mandate that tenants open on Sundays	D'Oreli Exhibit Retail-3 at [12]	Some shopping centres or precincts do; some don't. Presumably, whether or not a lessee store owner opens or not on Sundays and on what terms is a matter for commercial negotiation at the time the lease is entered into. See: Barron T: (19/10/2015), PN 16084 ff re "Greenwood Plaza store"
Retail businesses would lose customers to competitors if they closed stores on Sundays	Gough Exhibit Retail-5 at [12]	The evidence cited in support of this proposition is that of Gough who only asserts that he opens at least the same hours as his competitors, not that he would lose customers to competitors if he didn't. The proposition is not supported by this evidence.
ARA <u>Proposition 5:</u>		But some existing stores which presently do not trade on Sundays can never trade on a Sunday, regardless of whether or not Sunday penalty rates are reduced:

A reduction in the Sunday penalty rates would favourably impact on labour allocation and operations by:	**Para 87**	See: Barron T: (19/10/2015), PN 16084 ff re Greenwood Plaza store Also some regional stores in regional cities are closed for other factors unrelated to the rate of Sunday penalty loading such as sales.
ARA **Retailers opening more stores**	**Para 88** Barron Exhibit Retail-3 at [12], [13] and [28] D'Oreli Exhibit Retail-8 at [14]	Barron T: (19/10/2015), PN 16159 "The reason for that differential outcome [some stores opening, others not] as a matter of commercial reality as we sit here today, is because the sales justify opening the store in one case and not the other store, that's right? ---The sales together with the costs. D'Oreli (Responding to Hampton C) T: (20/10/2015), PN 17208 "…What are the major factors that lead you to the view that you probably wouldn't open in relation to the other 10?---There's lots of factors. Mostly the cost is the biggest thing. The other 10 may not be open because there is no Sunday traffic flow or there's no environment for that Sunday shopping. For instance, some country towns there's no point opening on Sundays because they just – the whole town doesn't open.."

ARA **Increasing trading hours on Sundays**	**Para 89** Barron Exhibit Retail-3 at [15], [28] Goddard Exhibit Retail-4 at [13], [14] D'Oreli Exhibit Retail-8 at [21] T: (20/10/2015), PN 17190-17193; PN 17212-PN 17214	The evidence establishes that the proposition is no more than merely aspirational, unsupported by analysis and is contingent upon sales justifying that course of action See analysis above in relation to ARA Submissions, para 62 and 88. See D'Oreli T: (20/10/2015), PN17198 "Your conclusion's not based on any particular analysis or calculation you've undertaken?---No"
ARA **Carrying out additional operational tasks on Sundays**	**Para 90** Barron Exhibit Retail-3 at [13], [28] Gough Exhibit Retail-5 at [20] Daggett Exhibit Retail-7 at [21]	No evidence led by any of the retail employer lay witnesses demonstrated that there was any critical need for their business to carry out additional operational tasks on Sundays. The XXn extracted the concession that this is work that already is being done on other days and at other times in the week. Barron T: (19/10/2015), PN 16165 "..All I'm putting to you is that there's a certain number of hours of work that necessarily need to be done in the nature of restocking and administration around a store. If that work's not

		done on a Sunday that needs to be done on another day of the week, that's so---Correct." Gough T: (19/10/2015), PN 166680 "Yes, and those duties and work just get done when you can on other days, other than Sundays?---Well, they're also rostered on other days as well. We have days for doing different tasks and those tasks don't happen to fall on Sundays."
ARA **Reducing the number of hours worked by owners**	**Para 91** Gough Exhibit Retail-5 at [20] Antonieff Exhibit Retail-6 at [19] Daggett Exhibit Retail-7 at [21]	The proposition is essentially premised upon an acceptance of the position that working Sundays has a significantly adverse work/life balance cost which owners are as anxious to avoid as the employees. The evidence does establish that owners do not want to work on Sundays either. See: Antonieff T: (19/10/2015), PN 16974-PN 16975 "…I have a young family, I have three kids. … so I give those hours back, and in return I also get a quality of life back and spend time with my kids as well." "So what do you want to spend your time with on Sundays instead of working Sundays?---With my family.

		Daggett T: (19/10/2015), PN 17063- PN 17064 "One of those things understandably is that you say that you would not work on the weekends which would mean that you'd roster another employee to work. I presume that's just to regain some of your work/life balance, is it?---Yes, because I have young children. "Would I be right in assuming that you'd be wanting to spend time with your children on a Sunday instead of work?---Yes, because they go to school during the week, so I don't see them during the week."
ARA **Increasing overall labour hours worked in retail stores**	**Para 92** Barron Exhibit Retail-3 at [13], [27], [28] Goddard Exhibit Retail-3 at [31]-[32] D'Oreli Exhibit Retail-8 at [14], [19], [31] T: (20/10/2015), PN17194-17196 Daggett T: (19/10/2015), PN17039	The evidence establishes that the proposition is no more than merely aspirational. There was no probative evidence given that increasing overall labour hours worked in retail stores would necessarily lead to increased retail sales turnover. In the absence of demonstrated increase in retail sales or profitability, the evidence that the retail lay employer witnesses would increase hours regardless is scant or to the contrary of the proposition advanced See analysis below in relation to ARA Submissions, para 94(a) and 95.
ARA	**Para 93**	The evidence does not establish that any of the retail lay employer witnesses would roster more

More work for managers and experienced staff members	Gough Exhibit Retail-5 at [20] Daggett Exhibit Retail-7 at [21]	work for any employees, particularly managers or experienced staff members, unless it was profitable to do so. See analysis below in relation to ARA Submissions, para 94(a).
ARA **Additional hours of work will be allocated to existing employees in the retail industry**	**Para 94(a)** Barron Exhibit Retail-3 at [13] and [27] Goddard Exhibit Retail-4 at [31]-[32] D'Oreli Exhibit Retail-8 at [19]	The proposition, weighed against the evidence given by the retail lay employer witnesses in XXn, can be dismissed as no more than merely aspirational and qualified in each case by the employer party witness: See: Barron T: (19/10/2015), PN 16245 "…In general terms, you agree that the changes you outline there would only transpire if you were satisfied in relation to each particular store that in the face of reduced Sunday penalty rates the income made it profitable to trade on a Sunday or to extend your trading yours on that day?---Correct." Goddard T: (19/10/2015), PN 16436- PN 16437 "…---Sorry, I was just going to say –which is our preference to do, but – you know, it's a much broader discussion than what I'm allowed to offer you at the moment. Whether those additional hours were in fact put back into the business would depend principally

		on your anticipated level of sales in particular stores, that's correct?---Yes, it would do." D'Oreli T: (20/10/2015), PN 17194- PN 17206 "That's something that you would reassess if that change came to pass?---…Yes".
ARA **More employees will be employed in the retail industry**	**Para 94(b)** Goddard Exhibit Retail-4 at [31] Barron Exhibit Retail-3 at [28] D'Oreli Exhibit Retail-8 at [14] Daggett T: (19/10/2015), PN17039	But the business of Mr Goddard is already thriving in the current penalty rate environment. Goddard T: (19/10/2015), PN16373 "..You've been able to maintain the employment of your employees and provide new employment and additional hours of work to employees. That's so?---We have done that, yes." As with the proposition contended for in ARA Submissions, para 94(a) above and para 95 below, the proposition that more employees would be hired is no more than aspirational and contingent upon the assumption that increasing staffing levels alone will increase retail sales. There was no probative evidence given by the retail lay employer witnesses that this assumption is correct.
ARA <u>Proposition 6:</u> **Increased staff on Sundays will lead to increased retail sales turnover**	**Para 95**	The evidence of the retail employer lay witnesses in XXn did not identify any real analysis done by the witnesses to support this proposition. Daggett T: (19/10/2015), PN17053

	Daggett Exhibit Retail-7 at [22] T: (19/10/2015), PN 17038 Gough Exhibit Retail-5 at [20] D'Oreli Exhibit Retail-8 at [20]	"…so that'll just be a thing that you have to sort of play with and see whether it's going to work or not" Gough T: (19/10/2015), PN16690 "I take it you actually haven't sat down and calculated the impact of the proposed reductions in penalty rates on how that would improve profitability?---Well anecdotally we've looked at what would happen if we operated our bakery, for example, and you know you've got to understand we're just a small business really. We don't have a lot of resources to forecast and to put all of these things together…" D'Oreli T: (20/10/2015), PN 17198 "Your conclusion's not based on any particular analysis or calculation you've undertaking?---No."
ARA <u>Proposition 7:</u> **Retail employees will continue to work on Sundays at a 50% penalty (rather than 100% penalty)**	**Para 106** Antonieff Exhibit Retail-6 at [20] SDA Witness 17 T: (20/10/2015), PN17985 SDA Witness 18 T: (20/10/2015), PN18057-18061 SDA Witness 19 T: (20/10/2015), PN18155-18156	As to the evidence relied upon to support the proposition as put by the ARA: The evidence of Antonieff goes no higher than a statement that he could source sufficient workers at what was at the time a lawful maximum penalty loading of 50%. The evidence of Antonieff does not address the present circumstance in which it is put as a proposition by employer parties that workers will surrender a higher penalty rate loading to still continue to work on Sundays (and public holidays).

	SDA Witness 20 T: (21/10/2015), PN18233-18235 SDA Witness 21 T: (21/10/2015), PN18279-18280 SDA Witness 22 T: (21/10/2015), PN18341-18342	The evidence in chief and the XXn evidence in each case of the retail employees was in or to the effect that their particular financial circumstances left them little choice but to accept a reduction: Thus, by way of illustration: SDA Witness 17 Exhibit SDA-17 at [4] And SDA Witness 17 T: (19/10/2015), PN 17984- PN 17985 "Is it your position that your current take home pay with the Sunday penalty rates is just sufficient for you to financially survive?---Yes, I would say that. All right. If the rates were reduced by 50% to a 50% loading it's the position then given that any penalty is critical that you would still work on the Sunday so that you could financially survive"---I would have to. As it's part of my roster I would have to."
ABI <u>Proposition 8:</u> **There is <u>some</u> disability associated with working on Saturdays & Sundays, however this disability does not apply to all segments of the workforce. Indeed some employees wish to work Saturdays and Sundays.**	**Para 17**	The proposition as articulated understates on the evidence the disruption of the retail employee's work/life balance caused by weekend work and makes assumptions unsupported by the evidence about the preference, as opposed to the need, for some employees to work on Saturdays and Sundays. Thus: SDA Witness 17 Exhibit SDA-17

ABI **Employers in the retail industry experience few challenges in engaging weekend workers.** **A considerable proportion of employees in the retail industry have a preference to, and in fact do, work weekends**	**Para 17.18** Antonieff Exhibit Retail-6 at [20] Barron Exhibit Retail-3 at [29]-[30] Daggett T:(19/10/2015) PN 17040 Gough Exhibit Retail-5 at [22] D'Oreli Exhibit Retail-8 at [22]	at [4] "If I had a choice, I would prefer not to work weekends" at [9] "Now, I find the difficulty with working on weekends arises in my own social life…I simply have to work around my shifts and plan activities with my family in advance, given that many of them work more regular weekday hours." Also see the evidence in chief of the retail employee lay witnesses in relation to disruption occasioned by weekend work. SDA Witness 16 Exhibit SDA-16 at [14] SDA Witness 17 Exhibit SDA-17 at [8], [9] SDA Witness 18 Exhibit SDA-18 at [11], [13] SDA Witness 19 Exhibit SDA-19 at [11], [13]-[14] SDA Witness 20 Exhibit SDA-21 at [11]

ABI <u>Proposition 9:</u> **Sunday Trading generates an important proportion of revenue in the retail industry**	**Para 16.4** Antonieff Exhibit Retail-6 at [11] T:(19/10/2015) PN 16747 Barron Exhibit Retail-3 at [15] Daggett Exhibit Retail-7 at [12]-[13] Goddard Exhibit Retail-4 at [21] D'Oreli Exhibit Retail-8 at [13]	The proposition contended for can probably be accepted with some qualification as to what the employer parties intend by use of the word "important". Thus: Antonieff Exhibit Retail-6 at [11] "Sunday trading accounts for approximately 14% of…weekly trading". And see: Barron Exhibit Retail-3 at [16] "Sunday trading accounts for approximately 10.5% and 11.75% respectively of Sussan and Sportsgirl weekly trading, taking only stores which trade Sundays into account." Daggett Exhibit Retail-7 at [13] "Sunday trading currently accounts for approximately 10% of …weekly trading". D'Oreli Exhibit Retail-8 at [13] "In 2009, Sunday trading accounted for 10.5% of the week's sales compared with 12.4% in 2014".
ABI <u>Proposition 10:</u>	**Para 27.22** Barron Exhibit Retail-3 at [12]-[15]	It may be accepted on the evidence that employers who operate a labour budget benchmarked as a dollar amount against sales have an incentive to reduce employment levels on

The imposition of penalty rates on Saturdays, Sundays and Public Holidays does negatively impact on employment levels on these days	Daggett Exhibit Retail-7 at [9], [15] Goddard Exhibit Retail-4 at [13]-[14]	Saturdays, Sundays and Public Holidays where the labour costs are higher by reason of penalty rates. But the proposition is not necessarily true for those businesses who (as most of the retail employer witnesses did) operate a labour budget benchmarked as a percentage of sales. In such circumstances, the level of sales, not the quantum of the wages, determines employment Sunday employment levels.
ABI	**Paras. 27.62-27.63** Antonieff Exhibit Retail-6 at [11] T:(19/10/2015) PN 16747 Barron Exhibit Retail-3 at [12]-[13], [18], [28] Goddard Exhibit Retail-4 at [13]-[14], [26]-[31] Gough Exhibit Retail-5 at [17]-[21] Antonieff Exhibit Retail-6 at [18] Daggett Exhibit Retail-7 at [16]-[21] D'Oreli Exhibit Retail-8 at [14], [18]-[19]	See, for example: Barron T: (19/10/2015), PN15992 "..That dollar wage budget is then converted to a percentage and the reason we give a percentage – if I may explain, the reason we give a percentage and they don't have to stick to a dollar wage budget is because our business trading fluctuates from day to day, from week to week, from store to store. So managing the flexibility to staff up when we're exceeding sales budget and thereby give better customer service and similar if the store is underperforming, where possible, we flex down. So by giving her a wage percentage budget she has the ability to staff up knowing that she's still going to get her incentives." See also: Daggett T: (19/10/2015), PN17032

		"..direct labour costs are required to be limited to a maximum of 35 per cent retail sales." Goddard T: (19/10/2015), PN16377 "..Obviously, your anticipated level of sales is the key driver in that calculation [of the labour budget]?---In a reasonable situation, yes." Antonieff T: (19/10/2015), PN16762 Asserted that increase in penalty rates from 2010 was a "contributing factor" in the reduction in Sunday labour hours but also at PN16766 acknowledged reduction in sales due to competition as a contributing factor in reduction in labour hours from 2013-2015.