

IN THE FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

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

AM2017/40

SUBMISSION OF HAIR AND BEAUTY AUSTRALIA

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A. BACKGROUND

1. Ai Group Workplace Lawyers files this submission on behalf of Hair and Beauty Australia (**HABA**).
2. HABA is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. It represents the interests of employers in the hair and beauty industries.
3. This submission is filed in accordance with the directions issued by Vice President Catanzariti on 4 October 2017, and the subsequent extension of time granted on 2 March 2018.
4. HABA seeks that the Fair Work Commission (**Commission**) vary the *Hair and Beauty Industry Award 2010* (**HBI Award** or **Award**) in the terms set out in section C of this submission.
5. HABA is pursuing its claim in the context of the Commission's 4 Yearly Review of Modern Awards (**Review**), which is being conducted pursuant to s.156 of the *Fair Work Act 2009* (**FW Act** or **Act**).
6. The proposed variation meets all of the relevant requirements of the FW Act, including that the terms proposed are necessary to meet the modern awards objective in s.134 of the Act.

B. PERMISSION TO REPRESENT

7. Ai Group Workplace Lawyers seeks permission to represent HABA in these proceedings.
8. Granting leave would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter. Accordingly, s.596(2) of the FW Act enables the Commission to grant permission to Ai Group Workplace Lawyers to represent HABA in these proceedings.
9. Numerous other legal representatives have been granted permission to represent employer and union parties in penalty rate cases during the Review, given the complexity of these matters.
10. In *4 yearly review of modern awards – Penalty Rates*¹ (**2017 Penalty Rates Decision**), at paragraph [2062], the Full Bench called for expressions of interest from employer representatives prepared to take on the proponent role in a review of penalty rates within the Award. HABA, as represented by Ai Group Workplace Lawyers, was the only party to file an expression of interest.

¹ [2017] FWCFB 1001, 23 February 2017.

C. THE CHANGES SOUGHT

11. HABA has filed a draft determination that reflects the following variations to the HBI Award:

- By varying clause 31.2(d) as follows:

(d) Sunday work

~~A 100% loading will apply for all hours of work for full-time, part-time and casual employees on a Sunday. A full-time, part-time and casual employee will be paid 150% of the minimum hourly rate for all hours worked on a Sunday~~

- By varying clause 35.3 as follows:

35.3 ~~Work on a public holiday must be compensated by payment at the rate of double time and a half~~ of 225% of the minimum hourly rate for full-time, part-time and casual employees.

12. The effect of the proposed changes would be to:

- a) Reduce the penalty rate payable for all work performed on a Sunday to full-time, part-time and casual employees from 200% of the minimum hourly rate to 150% of the minimum hourly rate.
- b) Reduce the penalty rate payable for all work performed on a public holiday to full-time, part-time and casual employees from 250% of the minimum hourly rate to 225% of the minimum hourly rate.

D. THE STATUTORY FRAMEWORK AND THE COMMISSION'S APPROACH TO THE REVIEW

13. HABA is pursuing its proposed variation in the context of the Review, which is being conducted by the Commission pursuant to s.156 of the FW Act.
14. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).
15. The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h).
16. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the FW Act, which includes s.156.
17. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*² provides the framework within which the Review is to proceed.
18. In *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd*,³ Allsop CJ, North and O'Callaghan JJ described the Commission's task during a 4 Yearly Review in the following manner: (emphasis added)

28 The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and

² 4 Yearly Review of Modern Awards: *Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

³ [2017] FCAFC 123.

conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.

29 Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.

19. HABA's proposed variation to the HBI Award aligns with all of the relevant statutory requirements and the principles in the *Preliminary Jurisdictional Issues Decision*. Accordingly, the proposed variation should be made.

E. PRIOR CONSIDERATION OF THE RELEVANT ISSUES

20. The issue of penalty rates payable under the HBI Award has been before the Commission and its predecessors on three occasions outlined below. Our research has not revealed any other detailed consideration of the appropriate quantum for Sunday and public holiday rates in the hair and beauty industry.
21. It was observed by the Commission in the *Preliminary Jurisdictional Issues Decision* that the Commission should take into account previous decisions that are relevant to a contested issue and that previous Full Bench decisions “should generally be followed, in the absence of cogent reasons for not doing so”: (emphasis added)

[25] Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 et seq.”

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (*Cetin*):

“Although the Commission is not, as a non-judicial body, bound by principles of *stare decisis*, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.⁴

⁴ 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

22. The *2017 Penalty Rates Decision* provides examples of cogent reasons for *not* following previous Full Bench decisions: (emphasis added)

[255] As observed by the Full Bench in the *Preliminary Jurisdictional Issues decision*, while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review it is necessary to consider the context in which those decisions were made. The particular context may be a cogent reason for *not* following a previous Full Bench decision, for example:

- the legislative context which pertained at that time may be materially different from the FW Act;
- the extent to which the relevant issue was contested, and, in particular, the extent of the evidence and submissions put in the previous proceeding will be relevant to the weight to be accorded to the previous decision; or
- the extent of the previous Full Bench’s consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.⁵

23. As the summary of the relevant decisions below will demonstrate, the decisions below should not be followed because of the following cogent reasons:

- a) They were made in a legislative context that was materially different to the one that here applies;
- b) The limited nature of the evidence and submissions put in the previous proceedings renders those decisions of little weight; and
- c) The specific bases upon which the Full Bench refused to reduce the penalty rates also renders those decisions of little weight.

E.1 THE 2008 DECISION

24. The Award was made during the Part 10A Award Modernisation process. No detailed consideration was given to the appropriate Sunday and public holiday penalty rates under that Award at that time. Indeed:

- a) On 1 August 2008, the SDA filed a draft award covering the ‘retail industry’, which was expressed to cover the hair and beauty industry as

⁵ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [255].

contemplated by the Award. It proposed a rate of 200% for work on a Sunday and 250% for work on a public holiday.

- b) On 12 September 2008, the Australian Industrial Relations Commission (**AIRC**) published an exposure draft titled 'Retail Industry Award 2010', which was expressed to cover 'hair and beauty establishments' and adopted the Sunday and public holiday rates proposed by the SDA. Little was said by the AIRC in its accompanying statement about the hair and beauty industry and nothing specific was said about Sunday and public holiday penalty rates.⁶
- c) Various employers and employer representatives opposed the incorporation of the hair and beauty industry within the proposed Retail Industry Award.⁷ The submissions filed by those parties did not respond in detail to the specific terms and conditions proposed in the aforementioned exposure draft, including Sunday and public holiday penalty rates. The focus was on the appropriate coverage of the exposure draft and the creation of a separate award for the industry.
- d) On 19 December 2008, the AIRC issued a decision in which it referred to the parties' opposition to the inclusion of the hair and beauty industry under the proposed Retail Industry Award⁸ and determined that there would be a separate modern award covering the hair and beauty industry.⁹ The Award was published with the decision (i.e. there was no exposure draft of the Award first published for comment). The Full Bench stated that it had "generally followed the main federal industry awards where possible and had regard to all other applicable instruments".¹⁰

⁶ *Award Modernisation* [2008] AIRCFB 717 at [88] – [92].

⁷ Hair and Beauty SA submission dated 6 October 2008; Business SA submission dated 9 October 2008; NRA and ANRA submission dated October 2008 and ARA submission dated 10 October 2008.

⁸ *Award Modernisation* [2008] AIRCFB 1000 at [281].

⁹ *Award Modernisation* [2008] AIRCFB 1000 at [284].

¹⁰ *Award Modernisation* [2008] AIRCFB 1000 at [286].

e) The [Draft awards audit](#) list on the Commission’s website identifies nine award-based transitional instruments of relevance to the HBI Award, those being: three federal awards that operated in Victoria, the ACT and the NT; five NAPSAs that operated in NSW, QLD, SA, WA and Tasmania; and a Victorian Minimum Wages Order. The “main federal industry award” in the hair and beauty industry (as referred to by the Award Modernisation Full Bench¹¹) would appear to have been the *Hairdressing and Beauty Services - Victoria - Award 2001*. This award contained the following penalty rates for work on Sundays and public holidays, which are similar to the current rates in the HBI Award:

- **Sundays:** 200% for full-time, part-time and casual employees; (i.e. the casual loading was not payable on Sundays).
- **Public holidays:** 250% for full-time, part-time and casual employees (i.e. the casual loading was not payable on Sundays).

25. Self-evidently, the AIRC’s decision should not be followed because of the following cogent reasons:

- a) It was made in a legislative context that was materially different to the one that here applies;
- b) There was no evidence or submissions put before the AIRC regarding the appropriate Sunday or public holiday penalty rates; and
- c) The Full Bench’s decision does not reveal any detailed consideration of the appropriate Sunday or public holiday penalty rates. Rather, it appears that terms and conditions under the Award were set on the basis of that which prevailed in the main federal pre-modern industry award (consistent with the AIRC’s general approach during the Award Modernisation process).

¹¹ *Award Modernisation* [2008] AIRCFB 1000 at [286].

E.2 THE 2010 DECISION

26. A reduction in the Sunday penalty rates in the HBI Award was sought by Hair and Beauty Australia Ltd soon after the Award was made.

27. Relevantly:

a) No evidence was filed in support of the application; and

b) The application was determined pursuant to item 14 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, which gave Fair Work Australia limited power to make an order varying a modern award if it considered that the variation was necessary to give effect to the award modernisation request as it was in effect immediately before 1 January 2010. The award modernisation request did *not* require that the tribunal ensure that modern awards contained only terms necessary to ensure that they provided a fair and relevant minimum safety net, taking into account the matters now listed at s.134(1).

28. The basis upon which the claim was advanced was summarised by the Full Bench as follows:

[16] The HBA submits that prior to the modern award coming into effect, the Sunday penalty rates were either 50% or 100% in different States across Australia. It submits that the penalty payable under the modern award will lead to increased costs for employers who are required by the terms of their lease within shopping complexes to open salons on Sundays. Those that previously paid a 50% penalty for work performed on Sunday will have an additional cost impost which will not enable them to operate profitably.¹²

29. The following paragraph sets out the reasons given by the Full Bench for dismissing the application: (emphasis added)

[18] The adoption of a single national penalty payment for Sundays will inevitably have an impact on cost or employee entitlements where employees are paid near the modern award level and the variation between state instruments is significant. It would be inconsistent with the general approach in award modernisation to adopt a rate lower than the rate that previously applied in most states. We therefore dismiss this part of

¹² Re *Hair and Beauty Industry Award 2010* [2010] FWAFB 1983 at [16].

the application. The transitional provisions have been developed to ameliorate the impact of such changes on employers.¹³

30. As can be seen, the application was dismissed on the basis that if granted, it would have been inconsistent with the general approach in award modernisation; that being the adoption of the penalty rate that applied in most states and territories. The reasons for the Full Bench's decision did not turn on any of the issues raised in the matter here before the Commission.
31. For the reasons articulated above, this decision should therefore not be followed by the Commission.

E.3 THE 2013 DECISION

32. During the two year review of modern awards, the Hair and Beauty Industry Association sought the abolition of Saturday and Sunday public holiday rates in the Award.¹⁴
33. The decision noted the very different legislative context governing the two year review in the following terms: (emphasis added)

[5] The principal legislative provision in respect of the Transitional Review is Item 6 of Schedule 5 to the Transitional Provisions Act:

"6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years

(1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWA must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.

Note: The review required by this item is in addition to the annual wage reviews and 4 yearly reviews of modern awards that FWA is required to conduct under the FW Act.

(2) In the review, FWA must consider whether the modern awards:

(a) achieve the modern awards objective; and

(b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

¹³ Re *Hair and Beauty Industry Award 2010* [2010] FWA FB 1983 at [18].

¹⁴ *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [15].

(2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent FWA from reviewing 2 or more modern awards at the same time.

(3) FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate to remedy any issues identified in the review.

Note: Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).

(4) The modern awards objective applies to FWA making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.

...

[7] At the outset it is important to note that the Transitional Review contemplated in Item 6 is quite separate from, and narrower in scope than, the 4 yearly reviews of modern awards provided for in s.156 of the *Fair Work Act 2009* (Cth) (the Act). The scope of the Transitional Review was a matter of contention in the June 2012 Full Bench proceeding.

...

[12] These considerations led the June 2012 Full Bench to conclude as follows:

“[91] It is important to recognise that we are dealing with a system in transition. Item 6 of Schedule 5 forms part of transitional legislation which is intended to facilitate the movement from the WR Act to the FW Act. The Review is a “one off” process required by the transitional provisions and is being conducted a relatively short time after the completion of the award modernisation process. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Review. Such changes are more appropriately dealt with in the 4 year review, after the transition process has completed. In this context it is particularly relevant to note that s.134(1)(g) of the modern awards objective requires the Tribunal to take into account:

“the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia . . .”

[99] To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a “high threshold” for

the making of variation determinations in the Review, as proposed by the Australian Government and others....¹⁵

34. It appears from the Commission’s decision that the only evidence in support of the Hair and Beauty Industry Association’s claim was that which was led from one employer in the industry.¹⁶ The Full Bench described the evidentiary case as consisting of “little or no probative evidence dealing with the proposed penalty rate reductions”.¹⁷

35. The Full Bench ultimately dismissed the application as follows:

[154] There is little evidence concerning the general trading, employment and other circumstances applying in this industry.

[155] There is no evidence of any significant change since the making of the modern award.

...

[318] ... Despite the fact that such a variation would represent a major change to this award nothing of substance was put to us to justify the change. No cogent reason has been established for altering the penalty rate provisions determined by the Award Modernisation Full Bench.

[319] There is no basis to vary clause 31 of this award as part of the Transitional Review.¹⁸

36. Further to the reasons articulated above, this decision should not be followed because:

- a) The variation sought was markedly different to that which is here proposed (i.e. the complete abolition of Saturday and Sunday public holidays as compared to a *reduction* to Sunday and public holiday penalty rates);

¹⁵ *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [5] – [12].

¹⁶ *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [125].

¹⁷ *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [120].

¹⁸ *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [154] – [155] and [318] – [319].

- b) The legislative context applying to the two year review rendered it narrower in scope than the current Review. Further, it is not necessary in this Review for the proponent of a claim to establish that there has been a “significant change since the making of the modern award”.
- c) The nature of the case here advanced by HABA (including the presentation of probative evidence) means that it cannot be the subject of the same criticism made by the Commission during the two year review.
- d) The Commission determined that, “as part of the [two year review]”, Saturday and Sunday penalty rates would not be abolished. The Commission did *not* make any general finding or ruling regarding a potential reduction to penalty rates under the Award.

F. THE 2017 PENALTY RATES DECISION

37. In February 2017, a five-Member Full Bench of the Commission handed down its decision¹⁹ regarding Sunday and public holiday penalty rates in various awards, having considered detailed written and oral submissions and considerable evidence. The claims there before the Commission were considered in the context of the current Review.
38. The following key findings made and conclusions reached by the Full Bench in the *2017 Penalty Rates Decision* are relevant to the Commission's consideration of HABA's claim.
39. **First**, deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates: (emphasis added)
- [39] Having regard to more recent authority, the terms of the modern awards objective, and the scheme of the FW Act, we have concluded that deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates. We accept that the imposition of a penalty rate may have the *effect* of deterring employers from scheduling work at specified times or on certain days, but that is a consequence of the imposition of an additional payment for working at such times or on such days, it is not the *objective* of those additional payments. Compensating employees for the disutility associated with working on weekends and public holidays is a primary consideration in the setting of weekend and public holiday penalty rates.²⁰
40. Accordingly, when determining the appropriate Sunday and public holiday penalty rates, the Commission should not be misguided by any desire to set a rate that deters employers from scheduling work on Sundays or public holidays. Rather, Sunday and public holiday penalty rates are to be set having regard to the disutility associated with working on Sundays and public holidays.
41. **Second**, the extent of the disutility associated with working on Sundays is much less than times past.²¹ Therefore, the existing Sunday penalty rate in the HBI Award (which was set during the Part 10A Award Modernisation process based on the main federal pre-modern award) is not consistent with the provision of a 'relevant' safety net.

¹⁹ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001.

²⁰ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [39].

²¹ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [689].

42. **Third**, the disutility associated with working on public holidays has been ameliorated somewhat by the introduction of the statutory right to refuse to work on reasonable grounds on such days. Section 114(3) of the FW Act is a significant contextual matter which was not taken into account when the existing public holiday penalty rates were set.²² Therefore, the existing public holiday penalty rate in the HBI Award (which was set during the Part 10A Award Modernisation process based on the majority of pre-modern awards) is not consistent with the provision of a ‘relevant’ safety net.
43. **Fourth**, consistent with the view expressed in the [Productivity Commission Report](#), there are likely to be some positive employment impacts from reducing Sunday penalty rates.²³ Despite the potential difficulty associated with quantifying the extent of that positive impact,²⁴ this is factor that lends favour to reducing Sunday penalty rates, particularly where supported by employer lay evidence²⁵ as is here the case. This is so even though the impact will not be the same on all employers in the industry.²⁶
44. **Fifth**, the expectation of consumers to access services in the ‘hospitality, entertainment, retail, restaurants and cafes’ industries (which includes the hair and beauty industries as covered by the HBI Award²⁷) on the weekend is a distinguishing feature, which is relevant to the setting of Sunday penalty rates: (emphasis added)

[76] It is important to appreciate that the conclusions we have reached in relation to the weekend and public holiday penalty rates in the *Hospitality and Retail Awards* is largely based on the circumstances relating to these particular awards. The Hospitality and Retail sectors have a number of characteristics which distinguish them from other industries.

[77] The distinguishing characteristics of the Hospitality and Retail sectors are alluded to in the PC Final Report, where it explains the rationale for focussing on the ‘HERRC’ (hospitality, entertainment, retail, restaurants and cafes) industries.

²² 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [74].

²³ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [684].

²⁴ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [684].

²⁵ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [683].

²⁶ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [72].

²⁷ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [314].

‘... the appropriate *level* for regulated penalty rates for weekend work — particularly on Sundays in a number of discretionary consumer service industries — has become a highly contested and controversial issue. The industries of greatest concern are hospitality, entertainment, retail, restaurants and cafes (HERRC). These are industries where consumer expectations of access to services has expanded over time so that the costs of penalty rates affect consumer amenity in ways they did not when penalty rates were first introduced. Such industries are also important sources of entry-level jobs for, among others, relatively unskilled casual employees and young people (particularly students) needing flexible working arrangements. The provision of discretionary, and therefore demand responsive, services on weekends is less frequent in most other industries, which is a key (but not only) rationale for a focus of concerns on the HERRC industries. It is notable that the FWC is currently also considering appropriate penalty rates in awards, and that their focus almost exactly matches the group of industries that the Productivity Commission has identified as the most relevant.’ (footnotes omitted)²⁸

45. **Sixth**, the aforesaid consumer expectations have developed over time and as such represent a material change in circumstances. Specifically:
- a) The share of weekly retail sales on Sunday has more than doubled over the last few decades.²⁹
 - b) The average daily foot traffic in shopping centres between 2009 and 2014 was greater for Sunday than the remaining days of the week.³⁰
46. These findings are relevant to the hair and beauty industry because those businesses generally operate in similar conditions to those in the retail industry more broadly; particularly those that are located in shopping centres.
47. **Seventh**, weekend work is more prevalent amongst employers and employees as a result of points five and six. See para 504 – 505 and para 596 of the Decision.
48. **Eighth**, the notion of relative disutility supports a proportionate approach to the fixation of weekend and public holiday penalty rates.³¹ Therefore, public holiday penalty rates should not be disproportionately higher than Sunday penalty

²⁸ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [76] – [77].

²⁹ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [505], [1589] and Chart 57.

³⁰ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [58] and Chart 58.

³¹ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1950].

rates.³² This consideration should also be taken into account once the Commission has determined the appropriate Sunday penalty rate.³³ In our submission if the Sunday penalty rate is reduced, it necessarily follows that in order to maintain proportionality between the Sunday and public holiday penalty rates, the public holiday penalty rate must also be reduced. This would be consistent with the approach adopted by the Commission in relation to the *Hospitality Industry (General) Award 2010*, the *Restaurant Industry Award 2010*, the *General Retail Industry Award 2010*, the *Fast Food Industry Award 2010* and the *Pharmacy Industry Award 2010*.³⁴

49. **Ninth**, greater consistency (short of uniformity) in Sunday and public holiday penalty rates is a relevant consideration.³⁵ This is particularly so in circumstances such as the hair and beauty industry, which in various regards operates under similar circumstances as the retail and pharmacy industries, which were the subject of the *2017 Penalty Rates Decision*.

³² *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1952].

³³ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1954].

³⁴ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1954].

³⁵ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [64].

G. THE SCOPE OF THE HAIR AND BEAUTY INDUSTRY

50. “Hairdressing and Beauty Services” is described in the ANZSIC system as follows:³⁶

Division S OTHER SERVICES
Subdivision 95 PERSONAL AND OTHER SERVICES
Group 951 PERSONAL CARE SERVICES
Class 9511 Hairdressing and Beauty Services

This class consists of units mainly engaged in providing hairdressing services or in providing beauty services such as nail care services, facials or applying make-up.

Primary activities

- Barber shop operation
- Beauty service
- Electrolysis service
- Hair restoration service (except hair transplant service)
- Hairdressing service
- Make-up service
- Nail care service
- Skin care service
- Tanning (solarium) service

Exclusions/References

Units mainly engaged in providing medical skin care services such as cosmetic surgery and dermatology services, or in providing medical or surgical hair replacement or transplant services, are included in Class 8512 Specialist Medical Services.

51. There is a considerable degree of alignment between the description of “Hairdressing and Beauty Services” in ANZSIC Code 9511 and the definition of “hair and beauty industry” in the HBI Award.

³⁶ Australian Bureau of Statistics, 1292.0 - Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006 (Revision 1.0)
<http://www.abs.gov.au/ausstats/abs@.nsf/0/30A09B2C856967A2CA25711F0014704B?opendocument>

52. The definition in the HBI Award is:

hair and beauty industry means:

(a) performing and/or carrying out of shaving, haircutting, hairdressing, hair trimming, facial waxing, hair curling or waving, beard trimming, face or head massaging, shampooing, wig-making, hair working, hair dyeing, manicuring, eye-brow waxing or lash tinting, or any process or treatment of the hair, head or face carried on, using or engaged in a hairdressing salon, and includes the sharpening or setting of razors in a hairdressing salon; and/or

(b) performing and/or carrying out manicures, pedicures, nail enhancement and nail artistry techniques, waxing, eyebrow arching, lash brow tinting, make-up, analysis of skin, development of treatment plans, facial treatments including massage and other specialised treatments such as lymphatic drainage, high frequency body treatments, including full body massage and other specialised treatments using machinery and other cosmetic applications and techniques, body hair removal, including (but not limited to) waxing chemical methods, electrolysis and laser hair removal, aromatherapy and the application of aromatic plant oils for beauty treatments, using various types of electrical equipment for both body and facial treatments

53. The classification structure in the HBI Award is located in Schedule B. It is relatively short. It covers hair and beauty employees within the same structure, rather than including different streams. The occupations specifically referred to in the structure are: hairdresser, beauty therapist, beautician, nail technician, make-up artist, cosmetologist, trichologist, receptionist and sales assistant.

54. The classification structure is reproduced below:

Schedule B—Classifications

B.1 Hair and Beauty Employee Level 1 means a receptionist or salon assistant.

B.2 Hair and Beauty Employee Level 2 means:

(a) a make-up artist who holds a Certificate II in make-up services (or equivalent);

(b) a nail technician who holds a Certificate II in Nail Technology (or equivalent); or

(c) an unqualified beautician or cosmetologist.

B.3 Hair and Beauty Employee Level 3 means:

(a) a beautician who holds a Certificate III in Beauty Services (or equivalent);
or

(b) a hairdresser who holds a Certificate III in Hairdressing (or equivalent).

- B.4 Hair and Beauty Employee Level 4** means a Beauty Therapist who holds a Certificate IV in Beauty Therapy (or equivalent).
- B.5 Hair and Beauty Employee Level 5** means:
- (a) a hairdresser who holds a Certificate IV (or equivalent); or
 - (b) a trichologist who is a hairdresser and holds a Certificate IV in Trichology (or equivalent).
- B.6 Hair and Beauty Employee Level 6** means a beauty therapist who holds a Diploma in Beauty Therapy (or equivalent)

H. THE NATURE OF THE HAIR AND BEAUTY INDUSTRY

H.1 THE WORKFORCE IN THE HAIR AND BEAUTY INDUSTRY

55. In 2017, 54,400 hairdressers were employed in Australia, down from 62,400 in 2016 and 63,700 in 2015.³⁷

56. In 2017, 35,400 beauty therapists were employed, up from 33,900 in 2015 and 26,800 in 2015.³⁸

57. For hairdressers:

- a) More than half work full-time;
- b) The workforce is fairly young. The average age is 33 years (compared to the all jobs average of 40 years). Around 3 in 10 workers are young (aged 15 to 25 years).³⁹

58. For beauty therapists:

- a) Part-time work is very common;
- b) The workforce is fairly young. The average age is 32 years (compared to the all jobs average of 40 years). Around 2 in 10 workers are young (aged 15 to 25 years).⁴⁰

³⁷ Australian Government Job Outlook, 2017 – Hairdressers – ANZSCO ID 3911
<http://joboutlook.gov.au>

³⁸ Australian Government Job Outlook, 2017 – Beauty Therapists – ANZSCO ID – 4511.

³⁹ Australian Government Job Outlook, 2017 – Hairdressers – ANZSCO ID 3911.

⁴⁰ Australian Government Job Outlook, 2017 – Beauty Therapists – ANZSCO ID – 4511.

H.2 BUSINESSES IN THE HAIR AND BEAUTY INDUSTRY

Businesses in the industry are typically small

59. The hair and beauty Industry is predominantly made up of small to medium businesses employing less than 20 people.⁴¹⁴²
60. Enterprises which employ less than 20 people account for an estimated 96.8% of hairdressing businesses, 90% of industry employment and 86% of total revenue.⁴³

Businesses face very significant cost and competitive pressures

61. As reported in IBISWorld's *Hairdressing and Beauty Services – January 2017 Report (IBISWorld Report)*:

'The industry is highly competitive, with a large number of small operators and high entry and exit rates. The battle for customers has put downward pressure on prices, forcing the exit of many inefficient operators. External competition has also increased over the past five years, with day spas, hotels and airports now offering a range of hair and beauty services.'⁴⁴

62. The IBISWorld Report goes on to state:

Profitability and innovation

Intense competition in the Hairdressing and Beauty Services industry has caused many operators to lower prices to retain their market share. Some operators have also introduced specials to attract customers, offering deals with substantially lower prices through websites such as Groupon. This high price-based competition has caused industry profit margins to fall over the players enter the industry annually, this trend is typically offset by the high failure rate. Despite this, the number of industry enterprises is expected to rise over the five years through 2016-17.

Early in the period, the industry benefited from the move beyond traditional hairdressing towards higher value services. These include laser hair removal, microdermabrasion, chemical peels and dermal fillers. To offset this decline, salons have some hairdressers and beauty therapists have focused on promoting higher margin services and products. The introduction of new services has caused the number of industry operators to increase, which has further intensified

⁴¹ Retail and Personal Services Training Council, *RAPS Hairdressing Scan 2015*, p.2.
<http://rapstc.com.au/wp-content/uploads/2011/12/Hairdressing-Environmental-Scan-2015.pdf>

⁴² Retail and Personal Services Training Council, *RAPS Beauty Scan 2015*, p.2.
<http://rapstc.com.au/wp-content/uploads/2011/12/Beauty-Environmental-Scan-2015.pdf>

⁴³ Retail and Personal Services Training Council, *RAPS Hairdressing Scan 2015*, p.8.

⁴⁴ IBISWorld's *Hairdressing and Beauty Services – January 2017*, p.4.

competition and downward pricing pressure. Although a large number of have been able to generate growth by developing relationships with local plastic surgeons and, to a lesser extent, general practitioners and dermatologists. However, more salons are following this trend, causing price-based competition to increase and revenue growth to slow.⁴⁵

63. A 2015 report released by the Retail and Personal Services Training Council (a body that includes industry and union representatives⁴⁶) shows that businesses in the hairdressing industry face very significant cost and competitive pressures. Some of the drivers for these pressures are:

- a) There has been an increase in the number of customers opting to purchase hair and beauty products online. This trend is largely attributed to the consumer's desire to save money. Online stores, free from salon overheads, are able to offer lower priced products, which impact upon in-store salon sales.⁴⁷
- b) Demand for hairdressing salon industry services is sensitive to changes in household disposable income, fashion and social mores.⁴⁸
- c) The industry tends to operate with a fair degree of price-based competition, resulting in a high rate of salon closure.⁴⁹
- d) Competition in this industry is high and is increasing. The main basis of competition between hairdressers is price, and therefore profit margins are very low.⁵⁰
- e) External competition comes from mobile hairdressers who perform their services in a home (as opposed to a salon), as well as from the DIY sector, as some people do their own hair treatments using off-the-shelf products.⁵¹

⁴⁵ IBISWorld's *Hairdressing and Beauty Services – January 2017*, p.6.

⁴⁶ The Chairperson of the Board of Management of the Retail and Personal Services Training Council is currently Mr Ben Harris, the Assistant Secretary of the Western Australian Branch of the Shop, Distributive and Allied Employees Association (SDA).

⁴⁷ Retail and Personal Services Training Council, *RAPS Hairdressing Scan 2015*, p.9.

⁴⁸ Retail and Personal Services Training Council, *RAPS Hairdressing Scan 2015*, p.9.

⁴⁹ Retail and Personal Services Training Council, *RAPS Hairdressing Scan 2015*, p.9.

⁵⁰ Retail and Personal Services Training Council, *RAPS Hairdressing Scan 2015*, p.9.

⁵¹ Retail and Personal Services Training Council, *RAPS Hairdressing Scan 2015*, p.9.

64. The above cost and competitive pressures support the need for Sunday and weekend penalty rates to be adjusted in the manner sought by HABA.

Labour costs represent a high proportion of total turnover

65. ATO Benchmarking for 2014-15 (the latest available benchmarks) highlights that labour costs represent a high proportion of total turnover for the hair and beauty industry (table 1).

Table 1: ATO Benchmarks for 2014-15⁵²

<i>Hairdressing – Key benchmarks for 2014-15</i>			
Annual turnover:	\$50,000 - \$150,000	\$151,000 - \$300,000	Over \$300,000
Labour costs as a proportion of turnover:	26%-37%	29%-40%	34%-44%
<i>Beauty Services – Key benchmarks for 2014-15</i>			
Annual turnover:	\$65,000 - \$200,000	\$201,000 - \$400,000	Over \$400,000
Labour costs as a proportion of turnover:	22%-33%	25%-36%	29%-37%

Source: *ATO Hairdressers Benchmarks 2014-15* and *ATO Beauty Services Benchmarks 2014-15*.

66. Given that labour costs represent such a high proportion of total turnover for hair and beauty businesses, it can be logically inferred that the level of penalty rates will have a larger impact on hair and beauty businesses than the impact on businesses which operate in an environment where labour costs represent a smaller proportion of total turnover. This supports the need for Sunday and weekend penalty rates to be adjusted in the manner sought by HABA.

⁵² *ATO Hairdressers Benchmarks 2014-15* https://www.ato.gov.au/Business/Small-business-benchmarks/In-detail/Benchmarks-A-Z/G-K/Hairdressers/?page=1#Performance_benchmarks and *ATO Beauty Services Benchmarks 2014-15* <https://www.ato.gov.au/Business/Small-business-benchmarks/In-detail/Benchmarks-by-industry/Health-care-and-personal-services/Beauty-services/>

Most of the revenue in the industry comes from households

67. The hair and beauty industry provides services to consumers and, accordingly, most of the revenue in the industry comes from households.⁵³

It is very common for hair and beauty businesses to operate on Sundays

68. Given the fact that Australian workers are not usually able to access hair and beauty services during working hours, it is very common for hair and beauty businesses to operate on Sundays.

69. The IBISWorld Report identifies Just Cuts as the largest operator in the hair and beauty industry.⁵⁴

70. The Just Cuts website (www.justcuts.com.au) identifies all of the Just Cuts salons in Australia. The opening hours of all 181 Just Cuts salons, except for 2 salons, are set out on the website. It can be seen from table 2 that 155 of the 179 Just Cuts salons (87 per cent) that identify their opening hours on the website, are open on Sundays. This table was prepared on 8 March 2018 on the basis of the information on the website on that date.

Table 2: Just Cuts salons that are open on Sundays

No.	Salon	Open on Sundays – Yes / No
ACT		
1.	Belconnen	YES
2.	Canberra Centre	YES
3.	Coolleman Court-Weston Creek	YES
4.	Erindale	YES
5.	Fyshwick	YES
6.	Gungahlin	YES
7.	Majura Park	YES

⁵³ Retail and Personal Services Training Council, *RAPS Hairdressing Scan 2015*, p.2 and Retail and Personal Services Training Council, *RAPS Beauty Scan 2015*, p.2-3.

⁵⁴ IBISWorld's *Hairdressing and Beauty Services – January 2017*, p.24.

No.	Salon	Open on Sundays – Yes / No
8.	Manuka	YES
9.	Tuggeranong	YES
10.	Woden	YES
NSW		
11.	Academy - Head Office	NO
12.	Albury	YES
13.	Armidale	YES
14.	Balgowlah	YES
15.	Ballina	YES
16.	Bateau Bay	YES
17.	Batemans Bay	YES
18.	Bathurst	NO
19.	Blacktown	YES
20.	Bondi Junction Eastgate	YES
21.	Bondi Junction Westfield	YES
22.	Broadway	YES
23.	Brookvale-Warringah Mall	YES
24.	Burwood	YES
25.	Campbelltown Macarthur Square	YES
26.	Carnes Hill	YES
27.	Castle Hill	YES
28.	Castle Hill Home Hub	YES
29.	Charlestown	YES
30.	Chatswood	YES
31.	Chatswood Chase	YES
32.	Coffs Harbour-Park Beach	YES
33.	Corrimal	YES
34.	Dapto	YES

No.	Salon	Open on Sundays – Yes / No
35.	Dubbo 1 (Orana Mall)	YES
36.	Dubbo 2 (Dubbo Square)	NO
37.	Eastgardens - Pagewood	YES
38.	Engadine	NO
39.	Erina-The Corner	YES
40.	Erina-The Market	YES
41.	Figtree	YES
42.	Forster	YES
43.	Glendale	YES
44.	Gordon	YES
45.	Gosford	NO
46.	Grafton	NO
47.	Green Hills	YES
48.	Hornsby	YES
49.	Jesmond	YES
50.	Lake Haven	YES
51.	Lavington	YES
52.	Leichhardt	YES
53.	Lismore	NO
54.	Marketown - Newcastle	YES
55.	Marrickville	YES
56.	Miranda	YES
57.	Mittagong	YES
58.	Mt Hutton	YES
59.	Narellan	YES
60.	Northbridge	YES
61.	Nowra	Not specified on website
62.	Orange	NO

No.	Salon	Open on Sundays – Yes / No
63.	Parramatta	YES
64.	Penrith	YES
65.	Port Macquarie-Port Central	YES
66.	Port Macquarie-Settlement City	YES
67.	Queanbeyan	YES
68.	Randwick	YES
69.	Raymond Terrace	YES
70.	Richmond Kiosk	YES
71.	Rockdale	YES
72.	Roselands	YES
73.	Rouse Hill	YES
74.	Salamander Bay	YES
75.	Shellharbour	YES
76.	Singleton	YES
77.	Sydney Central Plaza	YES
78.	Sylvania - Southgate Shopping Centre	YES
79.	Tamworth	NO
80.	Taree	YES
81.	Top Ryde	YES
82.	Tuggerah	YES
83.	Tweed City-Tweed Heads	YES
84.	Wagga Wagga	YES
85.	Warrawong	YES
86.	Warriewood	YES
87.	Wollongong Central	YES
88.	Woy Woy	YES
89.	Wyong	NO

No.	Salon	Open on Sundays – Yes / No
NT		
90.	Casuarina	YES
QLD		
91.	Bundaberg	YES
92.	Burleigh Heads	YES
93.	Cairns 1 - Stocklands	YES
94.	Cairns 3 - Central	YES
95.	Cairns-Smithfield	NO
96.	Carindale	YES
97.	Chermside	YES
98.	Cleveland	YES
99.	Elanora-The Pines	YES
100.	Gladstone	YES
101.	Helensvale	NO
102.	Hervey Bay	YES
103.	Indooroopilly	YES
104.	Ipswich	YES
105.	Kawana	YES
106.	Logan Hyperdome	YES
107.	Mackay-Canelands	YES
108.	Mango Hill-North Lakes	YES
109.	Mt Gravatt	YES
110.	Mt Ommaney	YES
111.	Mt Sheridan	YES
112.	Pacific Fair	YES
113.	Robina	YES
114.	Rockhampton- Stockland	YES
115.	Rockhampton-City Centre Plaza	YES

No.	Salon	Open on Sundays – Yes / No
116.	Springfield	YES
117.	Strathpine	YES
118.	Toowoomba	YES
119.	Toowoomba 2	Not specified on website
120.	Townsville Willows	NO
121.	Townsville-Castletown	NO
122.	Townsville-Stocklands	NO
123.	Underwood	YES
SA		
124.	Colonnades	YES
125.	Elizabeth	YES
126.	Kilkenny-Arndale	YES
127.	Marion	YES
128.	Modbury-Tea Tree	YES
129.	Newton Village	NO
130.	Parabanks-Salisbury	NO
131.	Rundle Place	NO
132.	Seaford	NO
133.	West Lakes	YES
TAS		
134.	Devonport	NO
135.	Eastlands	YES
136.	Glenorchy	NO
137.	Hobart-Cat And Fiddle	NO
138.	Kingston	YES
139.	Meadow Mews	YES
140.	The Quadrant Mall	NO

No.	Salon	Open on Sundays – Yes / No
VIC		
141.	Bendigo	YES
142.	Brandon Park	YES
143.	Delacombe	YES
144.	Doncaster	YES
145.	Doncaster East - The Pines	YES
146.	Epping	YES
147.	Frankston	YES
148.	Greensborough	YES
149.	Knox Westfield	YES
150.	Lilydale	YES
151.	Maribyrnong-Highpoint	YES
152.	Melbourne Central	YES
153.	Melbourne Central 2 (Ground Level)	YES
154.	Melton-Woodgrove	YES
155.	Mildura Central	YES
156.	Myer - Fountain Gate	YES
157.	Plenty Valley	YES
158.	Point Cook	YES
159.	Ringwood-Eastlands Vic	YES
160.	Shepparton	YES
161.	Southland	YES
162.	Tarneit	YES
163.	The Glen	YES
164.	Victoria Gardens	YES
165.	Watergardens	YES
166.	Waurm Ponds	YES
167.	Wendouree	YES

No.	Salon	Open on Sundays – Yes / No
168.	Werribee Plaza	YES
169.	Williams Landing	YES
170.	Wodonga	YES
WA		
171.	Belmont	YES
172.	Booragoon	YES
173.	Cockburn	YES
174.	Hay Street Perth	NO
175.	Joondalup	YES
176.	Karrinyup	YES
177.	Mandurah	YES
178.	Morley-Galleria	YES
179.	Ocean Keys-Clarkson	YES
180.	Warwick	YES
181.	Whitford City	YES

Lease arrangements often require hair and beauty businesses to open on Sundays and public holidays

71. Lease arrangements in major indoor shopping malls often require tenants, including hair and beauty businesses, to be open on Sundays and on public holidays on which the shopping centre is open.
72. Accordingly, many hair and beauty businesses are not able to avoid Sunday and public holiday penalties.

H.3 SIMILARITIES TO, AND COMPETITION WITH, BUSINESSES IN THE RETAIL INDUSTRY

73. There are obvious similarities between businesses in the retail industry and those in the hair and beauty industry, including:
- a. Businesses in both industries predominately sell to consumers;
 - b. A large range of hair and beauty products are sold by businesses in both industries;
 - c. Businesses in both industries operate from similar locations, e.g. shopping strips and shopping malls;
 - d. The opening hours of businesses in both industries are often similar; and
 - e. Lease arrangements for businesses in both industries are similar.
74. Businesses in the hair and beauty industry compete with businesses in the retail industry in respect of the sale of hair and beauty products.
75. Unless the penalty rates in the HBI Award are reduced, hair and beauty industry businesses will be at a competitive disadvantage, in respect of the sale of hair and beauty products, to businesses in the retail industry.
76. In the *2017 Penalty Rates Decision*, the Commission decided to reduce Sunday and public holiday penalty rates in the retail industry to a level substantially below the penalty rates in the HBI Award. Many of the reasons why penalty rates were reduced in the retail industry are equally relevant to the hair and beauty industry (see section F above).

H.4 SIMILARITIES TO, AND COMPETITION WITH, BUSINESSES IN THE PHARMACY INDUSTRY

77. There are obvious similarities between businesses in the pharmacy industry and those in the hair and beauty industry, including:
- a. Businesses in both industries predominately sell to consumers;
 - b. A large range of hair and beauty products are sold by businesses in both industries;
 - c. Businesses in both industries operate from similar locations, e.g. shopping strips and shopping malls;
 - d. The opening hours of businesses in both industries are often similar; and
 - e. Lease arrangements for businesses in both industries are similar.
78. Businesses in the hair and beauty industry compete with businesses in the retail industry in respect of the sale of hair and beauty products.
79. Unless the penalty rates in the HBI Award are reduced, hair and beauty industry businesses will be at a competitive disadvantage, in respect of the sale of hair and beauty products, to businesses in the pharmacy industry.
80. In the *2017 Penalty Rates Decision*, the Commission decided to reduce Sunday and public holiday penalty rates in the pharmacy industry to a level substantially below the penalty rates in the HBI Award. Many of the reasons why penalty rates were reduced in the pharmacy industry are equally relevant to the hair and beauty industry (see section F above).

I. APPRENTICESHIP DEVELOPMENTS

81. A recent huge decline in the number of apprenticeship commencements in the hair and beauty industry is deeply worrying for the industry.
82. The decline has been particularly pronounced since August 2013 when a Full Bench of the Commission handed down its *Modern Awards Review 2012 – Apprentices Decision*⁵⁵ (**2013 Apprentices Decision**) dramatically increasing wage rates for first and second year apprentices in the hair and beauty industry by up to \$400 per week.
83. Of the more than 30 modern awards where minimum wage rates were increased for apprentices, the increases were the highest, by far, in the hair and beauty industry.

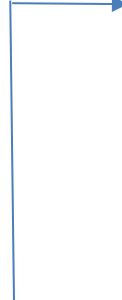
I.1 RELEVANT STATISTICS AND TRENDS

84. The National Centre for Vocational Education Research (**NCVER**) is the national body responsible for collecting, analysing and publishing research and statistics on Australia’s vocational education and training sector. NCVER was established in 1981 and is an entity owned jointly by the Australian Government and the State and Territory Governments.
85. NCVER regularly publishes statistics on apprenticeship commencements for a large number of occupations, including hairdressers.
86. In 2017, the NCVER released its *Australian Vocational Education and Training Statistics – Apprentices and trainees 2016 – Annual* publication. This publication (on page 7) includes annual statistics on apprenticeship commencements in hairdressing. Table 3 below identifies the number of commencements since modern awards were introduced in 2010.

⁵⁵ [2013] FWCFB 5411.

Table 3: Apprenticeship commencements in hairdressing

Year	Commencements
2016	3,700
2015	3,900
2014	4,200
2013	4,900
2012	4,900
2011	5,100
2010	6,100



1 January 2014 – operative date of higher apprentice wages under *2013 Apprentices Decision*.

87. It can be seen that there has been a very large decrease in apprenticeship commencements since the implementation of the Commission’s *2013 Apprentices Decision* and that, so far, this trend is continuing.

I.2 PROBLEMS RESULTING FROM THE 2013 APPRENTICES DECISION

88. The increases that were granted by the Commission for first and second year hairdressing apprentices in the *2013 Apprentices Decision* are set out in Table 4 below.

Table 4: Increases in hairdressing apprentice wage rates as a result of the FWC 2013 Apprentices Decision

<i>Stage of apprenticeship</i>	<i>Wage rate prior to FWC decision (\$ per week)</i>	<i>Wage rate after FWC decision (\$ per week)</i>	<i>Increase per week (\$ and %)</i>
Year 1 – First 3 months	35% of standard rate⁵⁶ = \$283.20	50% of standard rate if completed Yr 12 = \$404.60	If completed Yr 12: \$121.40 increase (i.e. 43% increase)
		55% of standard rate if not completed Yr 12 = \$445.00	If not completed Yr 12: \$161.80 increase (i.e. 57% increase)
		80% of standard rate if an adult = \$647.30	If an adult: \$364.10 increase (i.e. 129% increase)
Year 1 – After 3 months	45% of standard rate = \$364.10	50% of standard rate if completed Yr 12 = \$404.60	If completed Yr 12: \$40.50 increase (i.e. 11% increase)
		55% of standard rate if not completed Yr 12 = \$445.00	If not completed Yr 12: \$80.90 increase (i.e. 22% increase)
		The lowest adult rate in clause 17 = \$763.20	If an adult: \$399.10 increase (i.e. 110% increase)
Year 2	55% of standard rate = \$445.00	60% of standard rate if completed Yr 12 = \$485.50 65% of standard rate if not completed Yr 12 = \$525.90	\$40.50 increase (i.e. 9% increase)

89. It can be seen from the above that minimum wage rates for hairdressing apprentices who were not adults increased by **up to 57% and \$364.10 per week** and by **up to 129% and \$399.10 per week** for adult apprentices, as a result of the Commission's *2013 Apprentices Decision*.

90. Given the huge magnitude of these increases, it is not surprising that there has been a sharp decline in the number of hairdressing apprenticeships over the period since the Decision was handed down.

⁵⁶ The standard rate is currently \$809.10, as at 1 July 2017.

91. The new rates were phased-in through two annual increments on 1 January 2014 and 1 January 2015. However, given the magnitude of the increases, the phasing arrangements did little to offset the negative impacts for hair and beauty industry employers, and the consequent substantial reduction in the number of apprenticeships offered by employers in the Industry.
92. In addition to the very large minimum wage increases, the *2013 Apprentices Decision* increased costs for hair and beauty industry employers in relation to:
- Travel costs for apprentices attending training; and
 - Training fees and books for apprentices.
93. The significant labour cost increases for hair and beauty industry businesses which resulted from the *2013 Apprentices Decision* were exacerbated by the weekend penalty rates that are payable under the HBI Award because the penalty rates are loaded on top of the higher minimum wage rates.
94. The modest adjustments to Sunday and public holiday penalty rates sought by HABA in these proceedings would reduce the negative impacts on businesses of the labour cost increases which resulted from the *2013 Apprentices Decision* and would potentially increase the number of apprentices in the industry.
95. An increase in the number of apprentices would deliver the following beneficial outcomes for the community, employers and employees:
- Overcoming existing skill shortages⁵⁷ and hence leading to increased productivity and competitiveness of businesses in the hair and beauty industry. (This is a matter relevant to s.134(1)(d),(f) and (h) of the Act);
 - Increased employment (This is a matter relevant to s.134(1)(h)); and
 - Increased participation in the workforce (This is a matter relevant to s.134(1)(c) of the Act).

⁵⁷ See Retail and Personal Services Training Council, *RAPS Hairdressing Scan 2015* and Retail and Personal Services Training Council, *RAPS Beauty Scan 2015*

J. EVIDENCE IN SUPPORT OF THE PROPOSED VARIATION

96. In presenting an evidentiary case in support of its proposed variations HABA has sought to respond to the Full Bench's finding in the *2017 Penalty Rates Decision* that the Sunday penalty rates and casual penalty rates within the HBI Award require review, and the associated invitation for an employer party to act as the proponent of a variation in order to assist the Commission to negate the practical impediments that it would face if it were to act of its own motion to obtain relevant lay evidence. The relevant passage from the decision follows (emphasis added):

[2055] As mentioned in Chapter 5.2, the PC Final Report identified a number of 'discretionary consumer service industries' in which the appropriate level of regulated penalty rates for Sunday work has been a highly contested issue, noting that:

'The industries of greatest concern are hospitality, entertainment, retail, restaurants and cafes (HERRC). These are industries where consumer expectations of access to services has expanded over time so that the costs of penalty rates affect consumer amenity in ways they did not when penalty rates were first introduced. Such industries are also important sources of entry level jobs for, among others, relatively unskilled casual employees and young people (particularly students) needing flexible working arrangements. The provision of discretionary, and therefore demand responsive, services on weekends is less frequent in most other industries, which is a key (but not only) rationale for a focus of concerns on the HERRC industries. It is notable that the FWC is currently also considering appropriate penalty rates in awards, and that their focus almost exactly matches the group of industries that the Productivity Commission has identified as the most relevant.'

[2056] As noted by the Productivity Commission the modern awards before us closely align with the HERRC awards identified in the PC Final Report. The only 2 HERRC awards which we have not dealt with are the *Amusement, Events and Recreation Award 2010* (the *AER Award*) and the *Hair and Beauty Industry Award 2010*.

...

[2058] The *Hair and Beauty Industry Award 2010* was the subject of a claim to reduce Sunday penalty rates, by ABI, which was part of these proceedings. In correspondence dated 14 September 2016 ABI stated that its claim in respect of this award was no longer pressed. The weekend penalty rates in the *Hair and Beauty Industry Award 2010* are set out below:

Full-time/part-time employee		Casuals	
Sat	Sun	Sat	Sun
133%	200%	133%	200%

[2059] The existing rates appear to raise issues about the level of the Sunday penalty rate and the penalty rates applicable to casual employees.

[2060] It is appropriate that these rates be reviewed.

[2061] There would be significant practical impediments to the Commission acting on its own motion to obtain relevant lay evidence. A proponent for change (and a contradictor) would be a useful means of measuring that all of the relevant considerations were appropriately canvassed.

[2062] We seek expressions of interest from employer organisations prepared to take on the proponent role. Any such expressions of interest should be filed to amod@fwc.gov.au by **4.00 pm Friday, 24 March 2017**. We assume that the SDA will appear as contradictor in any subsequent proceedings...

96. Given the comments of the Full Bench, HABA has sought to present relevant lay evidence, to the extent that it is feasible given the resources available to it. Such material provides a sound basis for varying the Award in the terms sought. Nonetheless, as identified by the Full Bench in the context of the review of penalty rates in the Clubs Award and the Restaurant Award, these are not simply *inter partes* proceedings.⁵⁸ Section 156 imposes an obligation on the Commission to review each modern award, and as such, the onus for advancing a sufficient evidentiary case in support of a variation does not fall solely to HABA.
97. We also note that these proceedings represent a continuation of the common issues proceedings conducted as part of the 4 Yearly Review of Modern Awards. The Full Bench, as currently constituted, is entitled to have regard to the evidence adduced in those proceedings and the finding and reasoning contained in previous decisions handed down in the context of the “Penalty Rates Common Issues Proceedings”.⁵⁹ HABA proposes to rely upon such material in support of the proposed variations.
98. Further, the Commission should recognise in these proceedings, as it has done in other modern award proceedings, that it is inherently difficult to demonstrate and quantify by direct evidence the employment effects of a proposed modern award variation. In this regard, in *Re SDA*⁶⁰, the Full Bench relevantly stated:

⁵⁸ [2017] FWCFB 1001 at [995] and [1156].

⁵⁹ AM2014/205.

⁶⁰ [2011] FWA FB 6251.

[24] In this context we note that it is inherently difficult to demonstrate by direct evidence the employment effects of a proposed award variation such as that being considered by the Vice President, let alone quantify those effects. It should also be remembered that the tribunal is not bound by the rules of evidence and that the Vice President was entitled to place weight on material such as the response of the Brotherhood of St Laurence referred to in paragraph [23] of the Vice President's decision.

24. Accordingly, in the Review the Commission should not require the identification of the precise impact of a proposed variation as a condition of varying a modern award.

J.1 THE EMPLOYER SURVEY

99. A witness statement of Patrick Sullivan has been filed. The Statement relates to a survey conducted of HABA's membership regarding Sunday and public holiday penalty rates.
100. A total of 145 responses were received from employers covered by the Award.⁶¹ Together those employers operate 227 salons⁶² and employ 1,336 employees.⁶³
101. Of the 145 respondents:
- a) 37 (25%) open one or more salons on Sundays.⁶⁴ Thirty of those (81%) are required to be open on a Sunday as a condition of their lease or contract.⁶⁵
 - b) 39 (27%) open one or more salons on public holidays.⁶⁶ Twenty five (64%) of those are required to be open on a public holiday as a condition of their lease or contract.⁶⁷

⁶¹ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 1.

⁶² Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 6.

⁶³ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 5.

⁶⁴ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 11.

⁶⁵ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 13.

⁶⁶ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 17.

⁶⁷ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 19.

102. The survey accordingly demonstrates that a large proportion of salons open on Sundays and public holidays, are required to so open as a term of their lease or contract.
103. The survey results also demonstrate that wages and other employee entitlements constitute a significant proportion of the respondents' total costs:
- a) 34.5% of respondents stated that 50% or more of the total costs of their business were comprised of wages and other entitlements for employees.⁶⁸
 - b) 55.18% of respondents stated that 40% or more of the total costs of their business were comprised of wages and other entitlements for employees.⁶⁹
 - c) 82.08% of respondents stated that 30% or more of the total costs of their business were comprised of wages and other entitlements for employees.⁷⁰
104. Survey respondents who at the time of the survey opened on a Sunday were invited to describe the impact on their business if the Sunday penalty rate under the Award was reduced as proposed. All responses to this question are set out at Attachment H to Mr Sullivan's statement.⁷¹ Various common themes emerge, including:
- a) The respondents' **employment costs would be lowered**.⁷² This is a matter relevant to s.134(1)(f) of the Act.
 - i. We note that respondent 246 states that "these savings [can be directed] to extra training and educational purpose".⁷³

⁶⁸ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 9.

⁶⁹ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 9.

⁷⁰ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 9.

⁷¹ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16.

⁷² Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16. See in particular response ID 47, 68, 86, 177, 229, 239 and 246.

⁷³ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15.

- b) The respondents' business **may or would no longer be unprofitable on Sundays**.⁷⁴ Some go further and state that it would ensure their viability⁷⁵ or would "stop [them] from closing down".⁷⁶ This is a matter relevant to s.134(1)(f) of the Act.
- c) The respondents would **roster (or, at the very least, would consider rostering) additional staff**.⁷⁷ This is a matter relevant to s.134(1)(c) of the Act.
- d) The respondents would **increase their trading hours** (or at the very least, consider doing so).⁷⁸ This is a matter relevant to ss.134(1)(d) and 134(1)(h) of the Act.
- e) The respondents would **roster existing employees for a greater number of hours**.⁷⁹ This is a matter relevant to ss.134(1)(d) and 134(1)(h) of the Act.
- i. Respondent 97 observed that some employees wish to work on Sundays due their caring responsibilities, however the business is currently unable to accommodate this due to high labour costs:
- I would offer more shifts on a Sunday. At present I only ever roster on the absolute minimum required to stay open that day. Many of my team members who have children wish that they would work a Sunday as it works well with their families and partners, but I don't offer it to many people due to costs.⁸⁰

⁷⁴ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15. See in particular response ID 34, 88, 110, 148, 220, 262 and 266.

⁷⁵ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15, response ID 81.

⁷⁶ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15, response ID 80.

⁷⁷ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16. See in particular response ID 47, 49, 50, 79, 97, 110, 112, 148, 171, 204, 231, 237 and 267.

⁷⁸ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16. See in particular response ID 31, 50 and 266.

⁷⁹ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 15 – 16. See in particular response ID 61, 97, 108, 148 and 239.

⁸⁰ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15.

- ii. Respondent 108 highlighted the slim margin between the business' pricing structure and operating costs such as rent, which has an inevitable bearing on its scope to roster employees on Sundays:

1) we charged the customer \$65 for one hour job, including GST

2) Rental rate is \$41 an hour for the salon.

We open Sunday to cover the rental cost, not for profit. If the rate is going down we can give more hours to our staffs. ...⁸¹

- f) **Service delivery would improve.**⁸² This is a matter relevant to s.134(1)(h) of the Act.

105. Survey respondents who at the time of the survey opened on a public holiday were invited to describe the impact on their business if the public holiday penalty rate under the Award was reduced as proposed. All responses to this question are set out at Attachment H to Mr Sullivan's statement.⁸³ Various common themes emerge, including:

- a) The respondents' **employment costs would be lowered.**⁸⁴ This is a matter relevant to s.134(1)(f) of the Act.

- b) The respondents' business **may or would no longer be unprofitable on public holidays.**⁸⁵ This is a matter relevant to s.134(1)(f) of the Act.

- i. We note that some respondents express the view that they would nevertheless remain unable to trade profitably.⁸⁶

⁸¹ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15.

⁸² Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 15, response ID 148.

⁸³ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22.

⁸⁴ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22. See in particular response ID 31, 47, 68, 81, 177, 239 and 246.

⁸⁵ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22. See in particular response ID 34, 88, 148 and 204.

⁸⁶ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22. See in particular response ID 31, 97, 110 and 266.

- c) The respondents would **roster (or, at the very least, would consider rostering) additional staff**.⁸⁷ This is a matter relevant to s.134(1)(c) of the Act.
- d) The respondents would **increase their trading hours including opening on additional public holidays** (or at the very least, consider doing so).⁸⁸ This is a matter relevant to ss.134(1)(d) and 134(1)(h) of the Act.
- e) The respondents would **roster existing employees for a greater number of hours**.⁸⁹ This is a matter relevant to ss.134(1)(d) and 134(1)(h) of the Act.
- f) **The cost of the business' services could be reduced**.⁹⁰ This is a matter relevant to s.134(1)(h) of the Act.

J.2 EVIDENCE OF LAY WITNESSES

106. Witness Statements of the following lay witnesses have been filed:

Deborah Cook

Graham Thatcher

Annette Harman

Rocco Petrucci

Elke Richter

Benny Khoo

⁸⁷ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22. See in particular response ID 30, 47, 50, 108, 166, 174 and 231.

⁸⁸ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22. See in particular response ID 50, 148, 174 and 220.

⁸⁹ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, page 21, response ID 108.

⁹⁰ Witness statement of Patrick Sullivan dated 16 February 2018 at Attachment H, pages 21 – 22, response ID 243.

Sarkis Akle

Graham Downs

K. THE SUNDAY PENALTY RATE AND THE MODERN AWARDS OBJECTIVE

107. The statutory requirements relating to ss.134 and 138 of the FW Act are addressed in section D above. The reasons why the proposed variation to the Sunday penalty rate is consistent with ss.134 and 138 are addressed below.

K.1 A FAIR SAFETY NET

108. In exercising its modern award powers, s.134 of the Act requires that the Commission ensure that “modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions” taking into account each of the matters listed at ss.134(1)(a) – (h).

109. As identified at paragraphs [117] – [119] of the *2017 Penalty Rates Decision*, and in the authorities cited: (emphasis added).

“...fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.”

110. Before turning to the specific matters that are required to be taken into account pursuant to s.134(1), we here raise other relevant considerations as to why the current Sunday penalty rates regime cannot be considered ‘fair’ from the perspective of employers.

111. One such consideration is that fact that many employers covered by the HBI Award do not have any capacity to avoid trading on a Sunday and the consequent exposure to the costs of such trading.

112. As already stated, many businesses within this industry are required as a term of their lease arrangements to open on Sundays. This is particularly common amongst those operating in major retail shopping centres. Other operators feel pressures to trade on a Sunday out of fear that they will lose clients to competitors who now trade on such days (and who, for various reasons, may not be paying penalty rates – see below.) Such businesses are consequently compelled to trade in circumstances where it is not profitable. In both circumstances, the current penalty rates regime has a significant adverse

impact on employers.

113. To the extent that market conditions are such that many employers must now trade on Sundays in circumstances where it is not financially sensible to do so, fairness dictates that there be a recalibration of the current penalty rates to reflect such contemporary circumstances.

114. The difficulties many small retailers face in negotiating the term of retail leases with the owners of large retail shopping centres are notorious. The need to have regard to such difficulties when considering what constitutes a ‘fair’ safety net is consistent with that element of the object of the Act which speaks to achieving a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

“(g) acknowledging the special circumstances of small and medium-sized businesses”⁹¹

115. The hair and beauty industry is, overwhelmingly comprised of small businesses.

116. Another relevant consideration is the significant extent to which employers covered by the HBI Award, and complying with the current penalty rates regime, are faced with significant competition from employers that do not pay penalty rates because:

- They do not employ any staff (this includes the proportion of the sector that operates at home);
- They utilise independent contractors (whether legitimately or not); or
- They do not properly comply with their obligations under the HBI Award.

117. HABA does not seek to condone or excuse non-compliance with awards or other forms of industrial regulation. Nonetheless, the extent to which maintenance of the current expensive Sunday penalty rates regime puts employers subject to the Award at a competitive disadvantage, should be taken

⁹¹ Section 3.

into account. A similar matter fell for consideration in the context of the award review proceedings dealing with whether overtime penalty rates should apply to casual employees covered by the *Horticulture Award 2010*.⁹² A Full Bench there observed:

[750] Additionally the evidence of the AWU demonstrated what we, from our collective experience, already know to be the case, namely that award non-compliance in the horticultural industry is widespread. Therefore the addition of further significant labour costs on award-compliant employers is likely to increase their competitive disadvantage vis-a-vis non-compliant employers, or to lead to greater non-compliance.

[751] It is necessary to bear these matters in mind in the application of overtime penalty rates to casual employees under the Horticulture Award in order to ensure that any variation is not counter-productive and frustrates the achievement of the modern awards objective...⁹³

118. The current penalty rates regime results in employers struggling to compete, not only with non-compliant employers, but also with the other businesses in the industry that can legitimately avoid the HBI Award's application. In this particular industry, the level of competition with such businesses is particularly significant. A reduction in Sunday penalty rates would reduce the extent of these difficulties. This is a factor that lends support to the proposed reduction in penalty rates.

K.2 A RELEVANT SAFETY NET

119. The changes that HABA is seeking to the HBI Award are aimed at ensuring that the Award remains relevant to the hair and beauty industry.
120. In the *2017 Penalty Rates Decision*, the Full Bench determined that the word "relevant" is intended to convey that an award should be suited to contemporary circumstances: (emphasis added)

[120] Second, the word 'relevant' is defined in the Macquarie Dictionary (6th Edition) to mean 'bearing upon or connected with the matter in hand; to the purpose; pertinent'. In the context of s.134(1) we think the word 'relevant' is intended to convey that a

⁹² [2017] FWCFB 3541.

⁹³ *ibid*

modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:

‘527 ... the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations.*’ (emphasis added)

121. HABA contends that Sunday trading has become an increasingly prominent feature of the industry. Its importance has, in part, been a product of the establishment of major retail shopping centres and the increasing extent to which businesses in the hair and beauty industry are now located in such centres. It is also a product of the growth in retail trade on Sundays, as discussed earlier. Hair and beauty businesses are now an integral part of the retail trading environment.
122. The finding in the *2017 Penalty Rates Decision* that there has also, generally, been a reduction in the disutility associated with working on a Sunday for many workers is of course also relevant in the context of the hair and beauty industry.⁹⁴ Consequently, we contend that the current level of penalty rates is not proportional to the disutility of working on a Sunday, in contemporary circumstances.
123. The penalty rates regime should be amended to reflect these factors, as proposed by HABA.

K.3 THE MODERN AWARDS OBJECTIVE

Section 134(1)(a) – Relative living standards and needs of the low paid

124. Section 134(1) requires that the Commission take into account ‘relative living standards and the needs of the low paid. In the *2017 Penalty Rates Decision*, the Full Bench held that, “A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is ‘low paid’, within the meaning of s.134(1)(a)”.⁹⁵

⁹⁴ [2017] FWCFB 1001 at [689].

⁹⁵ [2017] FWCFB 1001 at [817].

125. It is accepted that a portion of employees covered by the Award would fall within the scope of this benchmark.
126. Any negative impacts on relative living standards may be ameliorated through additional hours being provided to employees on a Sunday or Public Holiday, as a consequence of the reduced disincentive to engage employees on these days. Indeed, to the extent that any reduction in relevant penalty rates is a catalyst for some employers electing to either commence trading, extend trading hours or employ additional labour on such days it may have a positive impact upon the income levels of some low paid employees in the sector (through the availability of additional hours of work attracting penalty rates).
127. Nonetheless, even if the Full Bench determines that this is a factor that weighs against the granting of HABA's proposal, this is not solely determinative of the merits of the claim. As noted by the Full Bench in the *Penalty Rates Transitional Arrangements Decision*:
- “...the Act accords no particular primacy to any one of the s.134 considerations and, further, while the Commission must take into account the matters set out at s.134(1)(a)–(h), the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions.”⁹⁶
128. In the context of its consideration of whether to reduce penalty rates in the Retail Sector, in the *2017 Penalty Rates Decision*, the Full Bench observed:
- [823]** The ‘needs of the low paid’ is a consideration which weighs against a reduction in Sunday penalty rates. But it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates or pay (independent of penalty rates).⁹⁷
129. HABA contends that the current penalty rates regime applicable to the hair and beauty industry does not constitute a fair and relevant minimum safety net, when regard is had to the broader range of considerations relevant to the operation of s.134.

⁹⁶ [2017] FWCFB 3001 at [37].

⁹⁷ [2017] FWCFB 1001 at [823].

130. In the *2017 Penalty Rates Decision*, the Full Bench undertook a detailed consideration of the relevant issues in the context of the *Hospitality, Fast Food, Retail and Pharmacy Awards* and determined that reductions in the penalty rates regimes were warranted, notwithstanding the acknowledged adverse impact that it may have upon some employees.⁹⁸ There is no apparent reason why a consideration of the matters identified in s.134(1)(a) would warrant a different outcome in these proceedings. There is no distinguishing characteristic of employees in the hair and beauty industry which would warrant any greater weight being afforded to such factors so as to justify a divergent outcome. A consistent approach should be adopted across the relevantly similar sectors.
131. Furthermore, should the Full Bench be concerned about the impact of any change, this can be further ameliorated through the implementation of appropriate transitional arrangements. This reflects the approach adopted by the Full Bench in the context of other awards in which penalty rates have been reduced. Whilst we acknowledge that HABA has not proposed any specific transitional arrangements, it is well established that in the context of this Review the Commission is not bound to grant a remedy in the terms sought.⁹⁹ In relation to the transitional arrangements which have been implemented in relation to the awards that have already been the subject of penalty rates reductions, the Full Bench held:

[43] We accept that while the transitional arrangements determined in this decision will ameliorate the adverse impact of our decision upon the employees affected, it will not remove that impact and the implementation of the variations we propose (albeit over an extended time period) are still likely to reduce the earnings of the employees affected. The phased reductions in Sunday penalty rates that we intend to make will be implemented at the same time as the implementation of any increases arising from the Annual Wage Review decision. This will usually mean that the affected employees will receive an increase in their base hourly rate of pay at the same time as they are affected by a reduction in Sunday penalty rates. As such, the take home pay of the employees concerned may not reduce to the same extent as it otherwise would – but it is also important to acknowledge that they will receive a reduction in the earnings they would have received but for the implementation of the *Penalty Rates decision*. Accordingly, any Annual Wage Review increase cannot be said to ameliorate the impact of our decision. It is the phased implementation of the Sunday penalty rate cuts

⁹⁸ [2017] FWCFB 1001.

⁹⁹ [2017] FWCFB 1001 at [110].

which provides a degree of amelioration.¹⁰⁰

132. In advancing the above submissions HABA is not proposing that extended transitional arrangements are warranted. Employers covered by the Retail, Hospitality, Pharmacy and Fast Food awards are already receiving, in part, the benefits of the Commission's decision to reduce penalty rates applicable to them. It is important that employers in the hair and beauty industry receive similar relief as soon as possible, notwithstanding the iterative nature of these proceedings.

Section 134(1)(b) – The need to encourage collective bargaining

133. A reduction in penalty rates is likely to incentivise employees covered by the ABI Award, and any union that represents them, to engage in collective bargaining. This would be particularly likely to be the case if the change is strongly opposed. In this respect, the proposed change would be consistent with the need to encourage collective bargaining.
134. Even if it were asserted that the reduction may reduce the incentive upon employers to bargain (a point which is not conceded), there are mechanisms available to employees under the Act which could be utilised to compel an employer to bargain. On balance, we contend that s.134(1)(b) is a factor that favours the granting of the application.

Section 134(1)(c) – The need to promote social inclusion through increased workforce participation

135. Obtaining employment is the focus of this section.¹⁰¹ In the *2017 Penalty Rates Decision*, the Full Bench concluded, on the basis of the common evidence, that a reduction in penalty rates was likely to result in some positive employment effects. The lay evidence upon which HABA intends to rely is consistent with this general proposition.

¹⁰⁰ [2017] FWCFB 3001.

¹⁰¹ [2017] FWCFB 1001 at [179].

136. We do not propose to address the evidence to be adduced from individual witnesses in detail at this point. Their Witness Statements are attached to this submission.
137. It is clear that the current penalty rate regime under the HBI Award operates to discourage employers from engaging employees to work on a Sunday. Indeed, some have elected not to trade at all on Sundays as a result of Sunday penalty rates, or at the very least as a result of factors including Sunday penalty rates.
138. Moreover, it appears that some employers intend to respond to the proposed reduction in such rates, if granted, by expanding their engagement of labour on a Sunday. Of course, employer perceptions or intentions in relation to such matters are particularly important factors in the context of a consideration of s.134(1)(c), regardless of the extent to which they may inevitably be somewhat speculative, given they are likely ultimately determinative as to employment outcomes.
139. A consideration of the matters referred to in s.134(1)(c) lends support to the granting of the claim.

Section 134(1)(d) – The need to promote flexible modern work practices and the efficient and productive performance of work

140. We deal with this factor below in the part of our submission that addresses s.134(1)(f).

Section 134(1)(da) – The need to provide additional remuneration for employees

141. The *2017 Penalty Rates Decision* sets out a number of salient observations regarding s.134(1)(da).¹⁰² The provisions had not previously been the subject of substantive arbitral or judicial consideration.

¹⁰² [2017] FWCFB 1001 at [184]-[203].

142. Without traversing the full breadth of the Full Bench's comments, it is particularly relevant to note the observation that, in effect, s.134(1)(da) does not mandate that employees *must* be paid additional remuneration for working in the circumstances contemplated by the provision:

[195] Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a 'relevant consideration' in the *Peko-Wallsend* 93 sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

'To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant'.

[196] Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission's task is to take into account the various considerations and ensure that the modern award provides a 'fair and relevant minimum safety net'

143. Relevantly, the Full Bench also observed that:

[45] An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified requires a consideration of a range of matters, including:

- (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
- (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and
- (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

144. We here address each of these three key considerations. For convenience, we deal with matters (ii) and the (iii) first.

145. In relation to matter (ii), HABA acknowledges that the minimum rates contained in the Award do not already compensate employees for working on weekends. However, it is relevant to observe that there are terms of the Award which operate to minimise the incidence of Sunday work.
146. Subclause 28.2 only permits limited scope for the working of ordinary hours on a Sunday. The provision states:

28.2 Ordinary hours

- (a) Ordinary hours must not exceed an average of 38 per week and may be worked within the following spread of hours:

Days	Spread of hours
Monday to Friday, inclusive	7.00 am–9.00 pm
Saturday	7.00 am–6.00 pm
Sunday	10.00 am–5.00 pm

- (b) Hours of work on any day will be continuous, except for rest periods and meal breaks.

147. Pursuant to subclause 28.2, ordinary hours may only be worked on a Sunday between 10.00am and 5.00pm. This is a much shorter spread than is available on either a Monday to Friday or on a Saturday. This is also a much shorter span of ordinary hours than is available under the Retail Award, which provides that ordinary hours may be worked between 9.00am and 6.00pm on a Sunday.
148. HABA is not seeking to remove this limitation. It limits the extent to which employees can be required to work ordinary hours commencing early in the morning or late into the evening. This moderates part of the disutility that may be experienced by employees working on a Sunday.
149. If employees work outside the hours specified in subclause 28.2, overtime penalties apply. Importantly, the restrictive spread of hours on a Sunday, when compared to other days of the week, means that overtime rates will more readily be payable to employees. In this regard the Award already provides significant compensation for employees working before 10.00am or after 5.00pm on a Sunday.

150. Clause 30 prescribes relatively restrictive requirements regarding rostering when compared to the provisions of most awards:

30. Rostering principles

30.1 A roster period cannot exceed four weeks.

30.2 Ordinary hours will be worked on not more than five days in each week, provided that if ordinary hours are worked on six days in one week, ordinary hours in the following week will be worked on no more than four days.

30.3 Consecutive days off

(a) Ordinary hours will be worked so as to provide an employee with two consecutive days off each week or three consecutive days off in a two week period.

(b) This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements, which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request.

(c) An employee can terminate the agreement by giving four weeks' notice to the employer.

30.4 Ordinary hours and any reasonable additional hours may not be worked over more than six consecutive days.

30.5 Unless otherwise mutually agreed, an employee who elects to work Sundays as part of ordinary hours is to be rostered off at least one Sunday every four weeks.

151. Clause 30 does not apply to casual employees.

152. Subclause 30.5 mandates that, for rostering purposes, an employee must be given at least one Sunday off every four weeks (absent an individual agreement to the contrary). Consequently, an employee cannot be forced to work every Sunday. This partly ameliorates the disutility of working Sundays because an employee cannot be compelled to entirely miss out on the benefits of having Sundays free from work (unless the employee otherwise agrees). It cannot be reasonable asserted that an employee who elects to work on a Sunday suffers the same disutility as one who is compelled to work on such days.

153. It is also relevant that subclauses 30.2 and 30.3 operate to ensure employees are afforded consecutive days off. This provides a meaningful benefit to employees who may be rostered to work ordinary hours over all seven days of

the week. It is not a common provision within the award system.

154. Further, HABA contends that it is very common in industry for employee preferences regarding the working of Sunday to be taken into consideration in the setting of rostering arrangements.
155. In relation to matter (iii), we observe that weekend work is a common feature of the hair and beauty industry. The survey evidence, the lay employer evidence and Table 2 in this submission are consistent with the proposition that a significant proportion of employers already operate on a Sunday.
156. The evidence also demonstrates that there is an expectation amongst some consumers that hair and beauty services are available on a Sunday. This is consistent with the Full Bench's findings regarding the retail trade generally.¹⁰³
157. In advancing these submissions, it is acknowledged by HABA that not all employers operating in the hair and beauty industry trade on a Sunday. Nonetheless, we doubt that it is contentious that a substantial proportion of businesses in this industry do. Factors such as the location of the employer's business and the nature of the service they provide impact upon such matters. As reflected in the Employer Survey and in the lay employer witness evidence, it is particularly common for operators based in major shopping centres to be open on a Sunday. Indeed, many are subject to lease arrangements that either require or assume for costing purposes that the business will trade on Sundays.
158. The HBI Award itself reflects an acknowledgement of the fact that Sunday work is a feature of the Industry. It regulates the ordinary hours that may be worked on such days, the rates to apply and the rostering of work on such days. Such provisions could not be said to be "necessary to achieve the modern awards objective" if Sunday work was not a recognised and significant feature of the industry.

¹⁰³ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [76]-[77].

159. In relation to matter (i), there is no reason to consider that the extent of the disutility of working on a public holiday is any less pronounced for employees covered by the awards the subject of the previous penalty rates proceedings than for employees covered by the HBI Award. A consideration of this matter does not warrant higher penalty rates being applied in this sector than in the hospitality and retail industries more broadly. Employees in this sector are not immune to the reduction in the relative disutility of Sunday work that has generally occurred over time and which has been recognised by the Full Bench.¹⁰⁴ Indeed, Sunday work is now preferred by some employees in the sector who utilise it to balance family, study or personal commitments. Such matters warrant a reduction in Sunday penalty rates, as proposed.
160. Finally, even if the Sunday penalty rates were reduced as proposed, employees working on such days would still receive additional remuneration for working on a Sunday.

Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value

161. This is a neutral consideration in the context of the current proceedings.
162. Subsection 134(1)(e) requires that the Full Bench take into account the principle of equal remuneration for men and women ‘for work of equal or comparable value’. If the Sunday and public holiday penalty rates are reduced as proposed, the change will apply equally to work undertaken by men and women covered by the award. Accordingly, consistent with the logic of the Full Bench in the *2017 Penalty Rates Decision*, the proposed reduction in penalty rates would not enliven s.134(1)(e).¹⁰⁵

¹⁰⁴ [2017] FWCFB 1001 at [689].

¹⁰⁵ Ibid at [205] to [216].

Section 134(1)(f) – The likely impact on business including productivity, employment costs and the regulatory burden and s.134(1)(d) – the need to promote flexible modern work practices and the efficient productive performance of work

163. Adopting the approach taken by Full Bench in *2017 Penalty Rates Decision*, we here address the considerations referred to in both s.134(1)(d) and s.134(1)(f).

164. In relation to s.134(1)(f), the *2017 Penalty Rates Decision* identified that the provision is “...expressed in very broad terms”¹⁰⁶ and that it is, “...not confined to a consideration of the impact of exercise of modern award powers on ‘productivity, employment costs and the regulatory burden. It is concerned with the impact of the exercise of those powers on business.”¹⁰⁷

165. At paragraph [220] the Full Bench made the following salient observation:

“It is axiomatic that the exercise of modern award powers to vary a modern award to reduce penalty rates is likely to have a positive impact upon business, by reducing employment costs for those businesses that require employees to work at times, or on days, which are subject to a penalty rate. The impact of a reduction in penalty rates upon productivity is less clear.”

166. As in the context of the other industries considered in the *2017 Penalty Rates Decision*, it is self-evident that a reduction in Sunday and public holiday penalty rates will reduce employer costs in the hair and beauty industry and have a positive impact on business. This is a factor weighing heavily in favour of the claim.

167. In relation to the notion of productivity, as contemplated in s.134(1)(f), the *2017 Penalty Rates Decision* states:

[224] The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. As the Full Bench observed in the *Schweppes Australia Pty Ltd v United Voice - Victoria Branch*:

‘...we find that ‘productivity’ as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output

¹⁰⁶ [2017] FWCFB 1001 at [218].

¹⁰⁷ Ibid at [1669].

relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.

Financial gains achieved by having the same labour input - the number of hours worked - produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense.'

[225] While the above observation is directed at the use of the word 'productivity' in s.275, it is apposite to our consideration of this issue in the context of s.134(1)(f).

168. Even adopting this particular definition of productivity, the proposed variation would likely improve productivity in some circumstances. This would occur where the engagement of additional staff enabled more efficient servicing of clients. For example, within the context of hairdressing sector of the industry it is typical for a range of ancillary tasks to be undertaken beyond cutting/treatment of hair. This would include answering phones, greeting customers, serving drinks or other refreshments, general cleaning activities, and other miscellaneous activities. The engagement of additional staff can improve productivity, as contemplated by s.134(1)(f), by enhancing the efficiency of a salon's operations. Put simply, it enables those engaged directly in producing the relevant output (i.e. servicing clients) to undertake this work more efficiently as they are not distracted by other tasks. The extent of any such productivity gains will be dependent upon variables associated with the nature of each employer's operations and, as such, we do not suggest that the precise extent of productivity improvements at the industry level could be readily identifiable.
169. The lay evidence demonstrates that the current Sunday penalty rates have impacted upon staffing and service levels in the hair and beauty industry, with adverse consequences for employers. In the context of at least some employers the current penalty rates regime has led to businesses taking measures such as:
- Restricted trading hours on a Sunday or not opening on a Sunday;
 - Seeking to minimise the number of staff who work on a Sunday, or curtailing the hours that are allocated to those staff that do work;

- Providing poorer customer service (such as extended waiting times or rushed/inferior quality services) and associated potential losses in revenue to the businesses (given the discretionary nature of spending on this industry's services and the highly competitive nature of the industry);
 - Altering their rostering decision regarding the type, classification or skill level of employees selected to work; and
 - Owners of salons working on Sundays instead of rostering employees.
170. A reduction in Sunday penalty rates will likely result in changes in the hair and beauty industry such as:
- More salons being open on Sundays;
 - Increased Sunday trading hours by salons; and
 - An increase in the availability of work for employees on a Sunday.
171. To the extent that a reduction in penalty rates removes a barrier to the engagement of additional staff and/or the simultaneously engagement of additional staff within a salon, it can be said to promote flexible modern work practices. It is also likely to facilitate the efficient and productive performance of work.
172. In terms of broader benefits businesses in this industry, the proposed variation will, by removing or reducing the barrier to engaging additional staff on a Sunday:
- Enable businesses to take greater advantage of 'walk in' customers by ensuring they are better able to meet such variable demand; and
 - Afford businesses a greater opportunity to recover their fixed costs by facilitating an expansion in their level of Sunday trading.

Section 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards

173. This is a neutral consideration.

Section 134(1)(h) – The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

174. Given that the proposed variation would have a positive impact on employment, section 134(1)(h) weighs in favour of the variation.

Conclusion

175. In summary, the specific factors comprising the modern awards objective weigh strongly in favour of granting the proposed variation.

L. THE PUBLIC HOLIDAY PENALTY RATE AND THE MODERN AWARDS OBJECTIVE

176. The *2017 Penalty Rates Decision* determined that the public holiday penalty rates for full-time and part-time employees specified in the Hospitality Award, Restaurant Award, Retail Award, Fast Food Award and Pharmacy Award would be reduced from 250 per cent to 225 per cent.¹⁰⁸
177. The decision also provided that the Hospitality Award, Retail Award, Fast Food Award and Pharmacy Award would be amended to reduce the rate that must be paid to casual employees on a public holiday.
178. The HBI Award currently provides for a public holiday penalty rate of 250%. HABA proposes that the penalty rate be reduced to 225% for full-time, part-time and casual employees.
179. It is appropriate that the Full Bench, as currently constituted, grant the proposed variation pertaining to public holiday penalty rates for full-time, part-time and casual employees given:
- a. The current penalty rates regime does not constitute a fair and relevant safety net of minimum terms and conditions, as contemplated by s.134.
 - b. The change in Sunday penalty rates that HABA seek would, on the grounds of proportionality, be a catalyst for a reassessment of the public holiday rates. It is appropriate that such matters be dealt with simultaneously. Such a proposition is consistent with the need for the Commission to take into account the maintenance of a “stable” modern award system in undertaking this Review (s.134(1)(g)).
 - c. For reasons associated with the nature of the industry and the broader structure of the HBI Award, it is important that the penalty rates regime not be amended to introduce different and/or higher rates for casual employees working on a public holiday.

¹⁰⁸ [2017] FWCFB 1001

- d. Many of conclusions and reasons set out in the *2017 Penalty Rates Decision* for implementing the relevant public holiday penalty rate reduction in the aforementioned awards apply with similar force in the context of the HBI Award.
 - e. Neither the Commission or any party has proposed that a differentiated penalty rates regime for casual employees, compared to other types of employees, be introduced.
 - f. All parties have been on notice of the nature of the change proposed by HABA for an extended period of time.
180. As an overarching proposition, HABA contends that the current penalty rates regime is neither a fair or relevant element of a minimum safety net of terms and conditions, as contemplated by s.134(1). The submissions advanced as to why the current Sunday penalty rates cannot be considered 'fair' or relevant' are generally equally apt in the context of the public holidays penalty rates regime. Moreover, the following mandatory considerations specifically referred to in s.134(1) support the proposed variation:
- a. The need to provide additional remuneration to employees working on weekends or public holidays (s.134(1)(da)). In this regard we point to the need to adopt a proportionate approach to the fixation of weekend and public holiday rates and the amelioration of the disutility of working on a public holiday resulting from the introduction of statutory right to refuse work on public holidays pursuant to s.114(3).
 - b. The need to promote social inclusion through increased workforce participation (s.134(1)(c));
 - c. The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)); and
 - d. The likely impact on business, including on productivity and employment costs. (s.134(1)(f)).

L.1 SECTION 134 CONSIDERATIONS THAT WEIGH IN FAVOUR OF GRANTING HABA'S CLAIM

181. For convenience, we deal firstly with **s.134(1)(da)**.
182. As mentioned earlier, the requirement to take into account the factors identified in s.134(1)(da) necessitates a consideration of a range of matters, including:
- (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
 - (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through loaded minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work
 - (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.
183. We here address each of these matters. However, before doing so we observe that even if the penalty rates were reduced, as proposed, employees would still receive 'additional remuneration'.
184. In relation to matter (i), we note that there is no reason to consider that the extent of the disutility of working on a public holiday is any less pronounced for employees covered by the awards the subject of the previous penalty rates proceedings than for employees covered by the HBI Award. A consideration of this matter does not warrant higher penalty rates being applied in this sector than in the hospitality and retail sectors.
185. As identified in the *2017 Penalty Rates Decision*, disutility can be seen in relative terms and as such, a reduction in Sunday penalty rates may warrant a recalibration of public holiday penalty rates so they are set at a proportionate level.¹⁰⁹ Relevantly, in the *2017 Penalty Rates Decision* the Full Bench held: (emphasis added)

¹⁰⁹ [2017] FWCFB 1001 at [1950] to [1955].

[1950] Disutility can also be seen in relative terms. The disutility of working on public holidays is greater than the disutility of working on Sundays (which in turn is greater than Saturday work). The notion of relative disutility supports a proportionate approach to the fixation of weekend and public holiday penalty rates.

[1951] As we mentioned earlier (at [893]), in a 1993 decision in relation to the *Hotels, Resorts and Hospitality Award 1992* (a predecessor award to the *Hospitality Award*) Commissioner Gay applied a proportionality approach to the fixing of Saturday and Sunday penalty rates:

‘The Saturday rate for ordinary time worked in this industry should be loaded over the Monday to Friday rate, but not punitively so... The Sunday ordinary time rate should be less than the overtime rate and yet appreciably more than the Saturday rate’.

[1952] The concept outlined by the Commissioner may be extended to the fixation of public holiday penalty rates – they should be higher than Sunday penalty rates, but not disproportionately so.

[1953] The proportionality approach is consistent with the findings of the time valuation modelling exercise in the Rose Report. It will be recalled that the model results were that, on average, respondent employees value working on Saturdays as somewhere between 106 to 135 per cent of their current normal hourly pay, Sundays somewhere between 126 and 165 per cent, and working on a public holiday as being between 124 and 224 per cent. As mentioned in Chapter 4.1, there are limitations to the Rose Report and the modelling results should not be mechanically applied as a means of fixing an appropriate penalty rate. But the results do provide some insight into the *relative* disutility of Saturday, Sunday and public holiday work.

[1954] In determining the appropriate penalty rate for public holiday work, we have had regard to the level of Sunday penalty rates in the *Hospitality and Retail Awards* (after applying the decisions we have made to reduce those rates).¹¹⁰

186. If a consistent approach to that taken in the *2017 Penalty Rates Decision* is applied in the context of the current proceedings, the reduction in Sunday penalty rates proposed by HABA would, if granted, be a factor weighing strongly in favour of the granting of a proportionate reduction in the public holiday rates.
187. Further, as accepted in the *2017 Penalty Rates Decision*, the disutility in relation to working on public holidays has been ameliorated somewhat by the introduction of the statutory right to refuse to work on such days, on reasonable grounds, pursuant to s.114(3).¹¹¹ This is a significant contextual matter which was not taken into account in the setting of penalty rates currently contained within the HBI Award. Consistent with the approach taken in the *2017 Penalty*

¹¹⁰ [2017] FWCFB 1001.

¹¹¹ Ibid.

Rates Decision, this is a factor that weighs in favour of the granting of the claim.

188. In relation to matter (ii), the minimum wage rates in the HBI Award do not appear to already compensate employees for working on public holidays.
189. In relation to matter (iii), work on public holidays is now a well-established feature of the industry. It is particularly common in businesses that trade in major shopping centres and certainly, in relative terms, is more common than in most other industries.
190. Nonetheless, it is accepted that not all employers in the industry trade on such days. Whether or not a business in the industry operates on a public holiday is undoubtedly dependent upon a range of multifaceted considerations. The level of demand for services within a particular area is one such factor. In some trading environments there is reduced demand for services from the industry on public holidays or at least on certain public holidays. In other environments, or on certain public holidays, demand for services remains very high.
191. The high cost of penalty rates currently applicable on public holidays is a factor that contributes to many employers deciding to either:
- Not trade on public holidays;
 - To limit their trading hours;
 - To limit their labour costs on such days by reducing the number of staff engaged and/or otherwise adjusting their rostering arrangements relating to matters such as the type or classification of employee who is rostered on such days; or
 - Limit the services offered on such days and/or the activities undertaken by staff on such days.
192. Some businesses are required by the terms of applicable lease arrangements to trade on public holidays (or at least some public holidays). This is common in major retail shopping centres and, as previously identified, many employers are unable to negotiate any release from such requirements. HABA contends

that many operators in the sector only trade on such days as a consequence of lease arrangements and that, given the current penalty rates regime, it is often not commercially sensible for business to open on public holidays.

193. Other operators feel compelled to open due to a view that this is expected by at least some clients and the associated risk that such clients may be lost to competitors on an ongoing basis if such preferences are not accommodated.
194. The extent to which many operators in the industry only trade on public holidays out of compulsion (be it pursuant to lease arrangements or commercial pressures) rather than merely out of a desire to improve their profitability, renders it appropriate that a more reasonable balance is struck between the interests of employees and employers relating to public holiday rates. Fairness dictates that employers be afforded some modest relief from the currently very expensive penalty rates regime in the HBI Award.
195. **In relation to s.134(1)(c)**, it is likely that a reduction in public holiday penalty rates will lead to additional employment. The nature of the hair and beauty industry and, in particular, the circumstances faced by employers in the industry, are relevantly analogous to that of employers covered by the Hospitality Award and the Retail Award. As such the common evidence which was said in the *2017 Penalty Rates Decision* to justify the conclusion that a reduction in public holiday rates in such industries was warranted also provides support for a comparable approach being taken in respect of the HBI Award.
196. The lay evidence advanced by HABA demonstrates that the current regime has been a barrier to engagement of labour on public holidays. It also demonstrates that some employers perceive that they are likely to increase the volume of labour engaged on public holidays if the HABA claim is granted.
197. **In relation to s.134(1)(d)**, our submissions relating to this consideration in the context of the proposed variation to Sunday penalty rates apply with similar force in respect of the proposed variation to public holiday rates.

198. In short, we contend that the extent to which the reduction in public holiday penalty rates encourages employers to either engage additional labour on a public holiday, or to offer additional services, it is likely to have a positive effect on the 'efficient and productive performance of work' and would promote flexible modern work practices.
199. Such considerations support the granting of the proposed variation.
200. **In relation to s.134(1)(f)**, again, our submissions regarding this consideration in the context of the proposed variation to Sunday penalty rates claim apply with similar force in relation to the proposed variation to public holiday rates.
201. A reduction in public holiday penalty rates will undoubtedly be beneficial to business. It will, of course, reduce labour costs on a public holiday.
202. For those businesses that already trade on a public holiday, the change may either enhance the profitability of trading on such days or at least allow them to moderate their losses. For businesses that currently elect not to trade on such days it may be a sufficient catalyst for them to expand to operate on such days, with all the associated benefits that this affords.
203. The reduction may even permit some employers to reduce the prices they charge customers. Alternatively, it would likely be a catalyst for some to improve the quality of their services, through the engagement of additional labour on a public holiday. This could take the form of reduced waiting times, a reduction in pressure on staff (and a consequent improvement in the quality of the work) or simply the offering of services that are not currently made available on these days due to limited staffing. These changes may, in turn, enable employers covered by the HBI Award to grow their businesses or to retain regular clients. Such benefits are significant given the discretionary nature of spending on many of the services and products offered by the sector and the highly competitive nature of the industry.

L.2 THE REMAINING SECTION 134 CONSIDERATIONS

Section 134(a) – Relative living standards and the needs of the low paid

204. In the *2017 Penalty Rates Decision*, the Full Bench identified this consideration as a factor weighing against the granting of a reduction in penalty rates. It was not however determined that such matters warranted maintenance of the current penalty rates in the relevant awards.¹¹² The same approach should be adopted in the HBI Award. In support of this we raise the following arguments:

- a. The extent to which lower wages may induce a greater demand for labour on public holidays and thereby somewhat ameliorate the reduction in income per hour for such work.¹¹³
- b. The proposition that the purpose of such rates is to compensate employees for working on a public holiday rather than to address the needs of the low paid.¹¹⁴
- c. The Full Bench's observation that the needs of the low paid are best addressed through the setting of an appropriate minimum wage.¹¹⁵
- d. The fact that public holidays only occur intermittently and that where an employee's ordinary hours fall on a public holiday they will still be entitled to their base rate of pay for such hours if they do not work.

Section 134(1)(b) – The need to encourage collective bargaining

205. We refer to our submissions regarding this point in the context of the proposed change to Sunday penalty rates. Our arguments apply with similar force to the proposed change to public holiday penalty rates.

¹¹² [2017] FWCFB1001 at [1927]-[1929].

¹¹³ *Ibid* at [1928].

¹¹⁴ *Ibid* at [1929].

¹¹⁵ *Ibid* at [1660].

Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value

206. This is a neutral consideration.

Section 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern awards system

207. This is a neutral consideration, save that it favours varying the public holiday rates at the same time as the Sunday rates.

Section 134(1)(h) – The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

208. Given that the proposed variation would have a positive impact on employment, section 134(1)(h) weighs in favour of the variation.

M. CASUAL PENALTY RATES

209. The Full Bench in the *2017 Penalty Rates Decision* held that it was appropriate that penalty rates for casual employees covered by the HBI Award be reviewed.¹¹⁶
210. HABA has proposed that there be a uniform reduction in the Sunday penalty rates. It has similarly proposed that there be a uniform reduction in public holiday penalty rates. That is, it has not proposed that differentiated rates apply to casual and permanent employees on such days.
211. Neither the Commission, nor any party, has raised a proposal for any variation to the Saturday rates. It is not a matter that squarely fall for consideration in the context of these proceedings.
212. We address the rational for HABA's approach to Sunday penalty rates for casual employees in this section. Before doing so we acknowledge that the *2017 Penalty Rates Decision* reflected a 'preference' for the 'default' approach to the setting of casual loadings identified in the Productivity Commission Inquiry Report into the Workplace Relations Framework (**PC Report**).¹¹⁷ Under this approach the casual loading is always set as a percentage of the ordinary/base wage (and not the ordinary wage plus relevant weekend or public holiday penalties).
213. In support of this approach the PC Report stated:
- "For neutrality of treatment, the casual loading should be added to the penalty rate of a permanent employee when calculating the premium rate of pay over the basic wage rate for weekend work..."¹¹⁸
214. Paragraph [316] of the *2017 Penalty Rates Decision* notes that a recommendation in the PC Report (Recommendation 15.1) was that the Fair Work Commission, as part of the current award review process:

¹¹⁶ [2017] FWCFB 1001 at 259 to 260

¹¹⁷ [2017] FWCFB 1001 at 1714

¹¹⁸ at 496

“investigate whether weekend penalty rates for casuals in these industries should be set so that casual penalty rates on weekends would be the sum of the casual loading and the revised penalty rates applying to permanent employees, with the principle being that there should be a clear rationale for departing from this.”¹¹⁹ (Emphasis added)

215. The Full Bench observed that the ‘default approach is also consistent with the consideration arising under s.134(1)(g) of the FW Act in that it provides a casual loading that is simple and easy to understand.’¹²⁰
216. HABA contends that there is both a cogent rationale and significant merit based arguments that support its proposal to maintain an approach that sees all employees in the same classification receive the same rates for working on Sundays and public holidays, regardless of whether they have been engaged as casual or permanent employees. In essence, such an approach is warranted for reasons including the structure of the HBI Award’s treatment of penalty rates, the unique nature of the industry, and certain restrictions contained within the Award regarding rostering.

The structure of the HBI Award

217. We deal firstly with why the structure of the HBI Award justifies applying the same rates to casual and permanent employees.
218. Central to such considerations is the manner in which the Award currently deals with the remuneration of casual employees as well as the regulation of hours of work of both casual and permanent employees. Before outlining these provisions, we note that a recent decision to vary the Award to provide casual employees with an entitlement to overtime penalties in certain circumstances appears to have introduced certain ambiguities or anomalies in the penalty rates regime contained within the Award.¹²¹ This is a matter that we will explain further.

¹¹⁹ [2017] FWCFB 1001.

¹²⁰ [2017] FWCFB 1001 at [338].

¹²¹ We are here referring to a change introduced as a consequence of Casual and Part-time Employment Decision [2017] FWCFB 3541.

219. Clause 13 of the HBI Award deals with casual employment:

13.1 A casual employee is an employee engaged as such.

13.2 For all work between 7.00 am and 9.00 pm Monday to Friday, a casual will be paid both the hourly rate for a full-time employee and an additional 25% of the ordinary hourly rate.

13.3 For all work performed outside the hours in clause 28.2, except Sundays, a casual employee will be paid the hourly rate for a full-time employee in this award plus 50%. For Sundays, the additional loading will be 100%.

13.4 The following provisions of this award do not apply to casuals:

- Clause 14—Termination of employment;
- Clause 15—Redundancy;
- Clause 21.2—Meal allowances;
- Clause 21.4—Excess travelling costs;
- Clause 21.5—Travelling time reimbursement;
- Clause 21.8—Transport of employees' reimbursement;
- Clause 28—Hours of work;
- Clause 29—Notification of rosters; and
- Clause 31.2(a)—Overtime and penalty rates.

13.5 Casual employees will be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.

220. Subclause 31.2 sets out the overtime and penalty rates that apply to casual employees. These include rates of pay that apply on a Saturday and Sunday. The provision was recently introduced into the Award as a product of the *Casual and Part-time Employment Decision*¹²² and states:

31.2 Overtime and penalty rates

(a) Overtime hours worked in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Hours worked by casual employees:

¹²² [2017] FWCFB 3541 at [676] and [677].

(i) in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle;

(ii) in excess of 10 ½ hours per day;

shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate of pay thereafter (inclusive of the casual loading).

(c) Saturday work

A loading of 33% will apply for ordinary hours of work for full-time, part-time and casual employees within the span of hours on a Saturday.

(d) Sunday work

A 100% loading will apply for all hours of work for full-time, part-time and casual employees on a Sunday.

221. Subclause 35.3 of the Award regulates rates of pay for casuals on a public holiday:

35.3 Work on a public holiday must be compensated by payment at the rate of double time and a half for full-time, part-time and casual employees.

222. Subject to a *potential* ambiguity regarding the interaction of the above cited provisions, the effect of the Award's current penalty rates regime upon a casual employee is as follows:

- A casual employee receives a 33% loading for any ordinary hours of work performed within the "span of hours" on a Saturday. The span of hours is that referred to in clause 28.2. It falls between 7.00am and 6.00pm.
- A casual employee receives a 50% loading for hours of work for a casual employee that are performed outside the span of hours set by subclause 28.2 on a Saturday. That is, they are paid 150%.
- All employees receive a 100% loading for all hours worked on a Sunday (regardless of whether they are ordinary hours or overtime hours).
- A casual employee that works hours within the parameters identified in clause 31.2(b), is entitled to receive 175% of the minimum hourly rate of pay for the first three hours and 225% thereafter. (Whether the relevant

rates should be calculated on the basis that each day stands alone is not specified, but we proceed on the assumption that this would be the case).

- A casual employee working on a public holiday is entitled to be paid double time and a half.

223. There is currently a potential ambiguity or anomaly in relation to whether a casual employee who works outside of the parameters specified in clause 31.2(b) on a Saturday or Sunday is to be paid the rates specified by clause 31.2(b) or the rates specified by clauses 13, 31.2(c) and 31.2(d). If the rates in clause 31.2(b) are applicable, a casual employee will receive a higher rate of pay for working at such times on a Saturday than would be applicable under the other clauses. However, adopting this approach in relation to Sunday work would result in an employee being paid a lower rate of pay for working on a Sunday than would be applicable under clause 31.2(d) or clause 13.

224. A similar difficulty arguable arises in relation to the interaction between clause 31.2(b) and clause 35.3 (which deals with public holiday rates), unless clause 35.3 operates to the exclusion of clause 31.2(b).

225. HABA contends that clause 35.3 governs the rate of pay for all hours worked by full-time, part-time and casual employees working on a public holiday.

226. HABA advanced its proposed variation in the current proceedings before the Commission varied the Award to introduce overtime rates for casual employees. That is, before clause 31.2(b) was inserted into the Award.

227. To accommodate the outcome contemplated by the *Casual and Part-time Employment Decision*,¹²³ HABA proposes that work performed by a casual employee on a Sunday that meets the criteria identified in clause 31.1(b) should be paid at 175%, for the first three hours and at 225% thereafter.

¹²³ [2017] FWCFB 3541.

228. If the Award is varied as proposed by HABA, any anomalous outcomes on a Sunday would be avoided. It would also assist in ensuring that the Award is “simple and easy to understand.”¹²⁴
229. If HABA’s proposal was granted, the rate of pay for a casual employee working on a public holiday would, in all circumstances be 225%. Accordingly, there would be no inconsistency between clause 31.1(b) and clause 35.3. The *Casual and Part-time Employment Decision* did not provide that casuals should receive an additional premium for performing ‘overtime’ on a public holiday.

The Importance of casual employment on weekends given the nature of the Industry

230. The nature of the industry justifies a departure from the “default approach” to the application of casual loading on Sundays and public holidays.
231. Labour typically represents a very significant component of an employer’s cost structure in this industry. Moreover, given the nature of the work typically performed within certain sectors of the industry, each client must commonly be directly serviced by an employee. Consequently, in the hair and beauty industry there is a particularly pronounced imperative for employers to align labour allocation/costs with client/customer demand. Such considerations are arguably much more important in this sector than in the retail industry more generally or in the hospitality sector.
232. There are however unique challenges that employers in this industry face in seeking to achieve such alignment. For example, it is common for clients to either cancel or make bookings at short notice. Moreover, some employers rely upon ‘walk-in’ trade, the volume of which is inherently variable.
233. Given these challenges, casual employment provides a crucial mechanism for achieving the abovementioned alignment.
234. The need to utilise a casual employee is particularly pronounced on Sundays and public holidays, given the application of penalty rates. Accordingly, HABA

¹²⁴ As contemplated by s.134(1)(g).

seeks to ensure that a meaningful reduction to the Sunday and public holiday rates is implemented. Obviously, the benefits of a reduction in the relevant penalty rates would be muted if it coincided with a variation to the award so that a casual loading was also payable on such days.

235. The proposal for a significant reduction in the Sunday and public holiday rates for casual employees is intended to maximise the likelihood that the reduction will facilitate additional labour being engaged on such days.

Importance of casual employment given the structure of the HBI Award

236. A striking element of the HBI Award's operation is that, pursuant to clause 13.4, certain provisions of the Award do not apply to casual employees. Relevantly, clause 13.4 provides that clause 31.2(a), which deals with overtime penalty rates, does not apply to casual employees. At the time of the HBI Award's commencement in 2010, this provision had the effect of excluding casual employees from any entitlement to overtime penalties.

237. In the *Casual and Part-time Employment Decision*, a Full Bench determined that the Award would be varied to extend to casual employees an entitlement to overtime penalty rates: (emphasis added)¹²⁵

[676] For these reasons, we conclude that it is necessary to vary the awards to provide for overtime penalty rates to apply to casuals in order to meet the modern awards objective. In reaching this conclusion, we have taken into account all the matters specified in s.134(1), but we have placed particular weight on s.134(1)(da)(i), and we have also considered the effect of casual overtime rates on employment costs and the operation of businesses generally pursuant to s.134(1)(f). Each award should provide that casual employees should receive the same overtime penalty rates as full-time and part-time employees performed in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle. In respect of daily hours, the position should be as follows:

- (1) In the Retail Award, overtime penalty rates hours should apply to hours worked outside the span of hours for each day specified in clause 27.2(a), or for hours worked by in excess of 9 hours per day, provided that one day per week a casual employee may work 11 hours without attracting overtime penalty rates (consistent with clause 27.3).

¹²⁵ [2017] FWCFB 3541 at [676].

- (2) In the Fast Food Award, a casual employee should receive overtime penalty rates for hours worked in excess of 11 hours in a day, consistent with clause 25.3.
- (3) In the Hair and Beauty Award, hours worked in excess of 10½ hours in a day should attract overtime penalty rates consistent with clause 28.3.

[677] In each case overtime penalty rates are to be applied to the ordinary hourly rate of pay, with the casual loading also to be applied to the ordinary hourly rate of pay. Overtime rates should not compound upon the casual hourly rate of pay.

238. The decision resulted in a Determination being issued on 12 December 2017 inserting into the HBI Award a new clause 31.2(b) in the following terms:

(b) Hours worked by casual employees:

- (i)** in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle;
- (ii)** in excess of 10 ½ hours per day;

shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate of pay thereafter (inclusive of the casual loading).¹²⁶

239. HABA understands, based on its involvement in the proceedings associated with the drafting of this provision, that the bracketed words “inclusive of the casual loading” contained in clause 31.2(b) are intended to clarify that that there is no separate casual loading payable, rather than to suggest that the 175% or 225% is to be calculated upon an amount that includes a casual loading. That is, no casual loading is separately payable in addition to these amounts and the rates do not compound upon a casual loading. Whilst this may not be completely apparent from the manner in which the clause is drafted, HABA understand that it was envisaged by the Commission that any dispute as to the wording of such matters is to be addressed in either the award stage proceedings or in the context of proceedings associated with the redrafting of the HBI Award in plain language.¹²⁷

¹²⁶ PR598498

¹²⁷ [2017] FWCFB 6181 at [8].

240. The introduction of overtime penalties for casual employees is a significant development for the industry. While it is still too early to reliably identify the impact that the variation will have, it undoubtedly will increase costs for employers. In advancing this submission we acknowledge the following reasoning of the Full Bench in the *Casual and Part-time Employment Decision*:

[675] We do not consider that a requirement for employers under the 3 awards to pay overtime penalty rates for casuals would result in the imposition of a significant costs burden upon them. Most casuals in the industries covered by the awards do not work full-time hours. Ms Limbrey's evidence concerning the McDonald's businesses, for example, showed that about 87% of their casual employees worked 20 hours or less per week.¹²⁸

241. Notwithstanding such comments, we respectfully observe that the Full Bench did not have before it evidence that would properly establish working patterns of casual employees in the hair and beauty Industry. Regardless, even if it were accepted that most casuals in the industry did not work full-time hours, this does not preclude the possibility of some employers engaging casual employees to work on such a basis. Industry trends will be of little comfort to an individual employer that is adversely affected by such a change.

242. The additional costs that have been imposed upon employers through the introduction of overtime penalties for casuals is a factor that must be taken into consideration in assessing the impact of any change to penalty rates for casual employees. This is a factor that weighs in favour of the approach proposed by HABA. In the context of this review, individual award clause should not be reviewed in isolation of a consideration of the award's provisions as a whole.¹²⁹

243. The introduction of this additional benefit to casual employees has the potential to partly ameliorate any reduction in earnings of a casual employees that may flow from a reduction in Sunday penalty rates, although, we accept that this will be dependent upon the individual circumstances at play.

244. Putting aside the issue of the application of overtime rates, the HBI Award more broadly is framed so that various strictures applicable to the engagement of full-time or permanent employees do not have application in the context of casual

¹²⁸ [2017] FWCFB 3541

¹²⁹ *CFMEU v Anglo-American Coal Pty Ltd* [2017] FCAFC 123 at 28.

employment. Most significantly, the relatively onerous provisions relating to rostering do not apply in the context of casual employment.¹³⁰

245. It may be argued that such provisions are justifiable in circumstances where an employer is able to utilise casual employees on Sundays and public holidays without the application of such provisions and without the cost of any additional casual loading being payable on top of Sunday and public penalty rates. However, if a casual loading had to be paid in addition to such rates a reconsideration of such matters may be warranted. Of course, this argument applies with less force in circumstances where the penalty rates for all employees are being reduced and the rates for casuals are simply reduced by a smaller quantum.
246. Also relevant to the Full Bench's consideration is that a further outcome of the *Casual & Part-time employment Decision* is that the HBI Award will likely be varied to provide for casual conversion in the near future.¹³¹ This will be another significant change for this industry. The terms of any such clause are not yet finalised. Nonetheless, suffice to say that casual employees to whom the Award applies will soon gain new rights to access permanent employment. This serves to address any concern that may be advanced about employers utilising casual employees for an extended period, in circumstances where this is not in accordance with the wishes of the employee, in order to avoid the restrictive elements of the Award.

HABA's position in the alternative

247. Notwithstanding the arguments advanced above, it is acknowledged that the Full Bench is not bound to grant a remedy in the terms proposed by HABA.
248. If, contrary to HABA's submissions, the Full Bench considers that casual employees should receive a separate and additional loading in relation to work performed on Sundays or public holidays, this is an even greater imperative for there to be a reduction in the rates for full-time and part-time employees and in

¹³⁰ See clause 13.4 of the HBI Award.

¹³¹ *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541.

the penalty rate component of the remuneration of a casual employee for work on a public holiday.

249. That is, the rates for Sunday could be 175% (inclusive of a casual loading), while the rate for a casual rate for work on a public holiday could be retained at 250% (inclusive of a casual loading).
250. We do not propose to deal with this alternate proposition in any detail given neither the Commission or any party is proposing that an award provision introducing a separate casual loading on Sundays or public holidays is necessary, as contemplated by s.138, in the context of the hair and beauty industry.

IN THE FAIR WORK COMMISSION

AM2017/40 Penalty Rates – Hair and Beauty Industry Award 2010

WITNESS STATEMENT OF PATRICK SULLIVAN

I, Patrick Sullivan of 51 Walker Street, North Sydney (NSW) do solemnly and sincerely declare and state the following:

Background

1. I am employed by the Australian Industry Group (**AI Group**) as a Digital Marketing Services Manager. I have been employed by Ai Group in this role since July 2017.
2. Prior to that I was employed by Ai Group as a Senior Marketing Executive since August 2015.

The Survey of Hair and Beauty Australia's Members

3. I understand that Ai Group Workplace Lawyers (**AIGWL**) is acting for Hair and Beauty Australia (**HABA**) in relation to a case to reduce penalty rates in the hair and beauty industry.
4. In support of HABA's case, a survey of HABA's members was conducted using LimeSurvey 2.73.
5. LimeSurvey is an open source online survey application that enables users to develop and publish online surveys.
6. The survey opened on 20 November 2017. An email drafted by AIGWL with a link to the survey was sent on that date to a list of recipients provided to me by AIGWL on 17 November 2017 (**List**). A copy of that email is at **Attachment A**.
7. In accordance with instructions from AIGWL, a reminder email drafted by AIGWL was sent to the same List on 4 December 2017 and 15 January 2018. Those emails are at **Attachment B** and **Attachment C**.

8. In accordance with instructions from AIGWL, I closed the survey at 4.15pm on 25 January 2018.

The Questions and Results of the Survey

9. On 2 February 2018, I was provided with written instructions by AIGWL that required me to extract the survey questions and results using LimeSurvey. A copy of those instructions is at **Attachment D**.
10. In accordance with those instructions, on 5 February 2018, I:
 - a) Extracted a copy of the survey questions from LimeSurvey (**Attachment E**);
 - b) Extracted a full set of all survey responses (complete and incomplete) from LimeSurvey in the form of an Excel spreadsheet (**Attachment F**);
 - c) Extracted another set of complete survey responses from LimeSurvey in the form of an Excel spreadsheet from those respondents who answered 'yes' to the question '*Is your business covered by the Hair and Beauty Industry Award 2010?*' (**Attachment G**); and
 - d) Prepared a report using LimeSurvey which displays the quantitative and qualitative results of the complete survey responses from those respondents who answered 'yes' to the question '*Is your business covered by the Hair and Beauty Industry Award 2010?*' (**Attachment H**).
11. Based on Annexure F, 151 respondents submitted a 'complete response', meaning that they answered all mandatory questions in the survey and clicked 'submit' at the end of the survey. There are another 102 'incomplete responses', meaning that 102 respondents opened the survey but did not answer all mandatory questions and / or did not click 'submit' at the end of the survey.
12. To produce Attachment H, I generated a report from LimeSurvey using the Responses and Statistics tool. This allows you to filter the responses based on certain criteria. In this case I filtered all responses who had answered "yes" to

the question: *Is your business covered by the Hair and Beauty Industry Award 2010.*

13. Preparing the report was straight forward and took approximately 10 minutes to generate.



Patrick Sullivan

Date: 16 February 2018

List of Attachments

The attachments with Patrick Sullivan's witness statement can be viewed via the following links:

1. [Attachment A](#)
2. [Attachment B](#)
3. [Attachment C](#)
4. [Attachment D](#)
5. [Attachment E](#)
6. [Attachment F](#)
7. [Attachment G](#)
8. [Attachment H](#)

List of Attachments

The attachments with Patrick Sullivan's witness statement can be viewed via the following links:

1. [Attachment A](#)
2. [Attachment B](#)
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4. [Attachment D](#)
5. [Attachment E](#)
6. [Attachment F](#)
7. [Attachment G](#)
8. [Attachment H](#)

IN THE FAIR WORK COMMISSION

AM2017/40 Penalty Rates – Hair and Beauty Industry Award 2010

WITNESS STATEMENT OF DEBORAH COOK

I, Deborah Cook of [REDACTED] do solemnly and sincerely declare and state the following:

1. I am one of the Directors of Stylz Franchising Pty Ltd (**Stylz**). I have held the position of Director since October 2004.
2. I have been working in the hairdressing industry for 44 years. I have worked as a hairdresser and have trained hundreds of hairdressers. I was on the Professional Hairdressing Association board for over 10 years. Over the course of my career, I have had discussions with countless owners and managers of other hairdressing businesses.
3. Stylz owns and operates salons in three Westfield shopping centres in Sydney (**Owned Salons**):

Salon	Opened In
Stylz Hair - Westfield Shopping Centre Sydney CBD (CBD Salon)	2006
Stylz Hair - Westfield Shopping Centre Paramatta (Parramatta Salon)	1996
Stylz Hair - Westfield Shopping Centre Eastgardens (Eastgardens Salon)	1988

4. Stylz has also franchised five salons to three franchisees.
5. Stylz manages the operations of four of those five salons (**Franchised Salons**). That includes payroll functions, oversight of rostering arrangements, recruiting staff and ordering stock.
6. The Franchised Salons are located in Westfield shopping centres in Bondi Junction (**Bondi Junction Salon**), Tuggerah (**Tuggerah Salon**), Hornsby (**Hornsby Salon**) and Warringah Mall (**Warringah Salon**).

7. I refer to the Owned Salon and Franchised Salons collectively as the **Salons**. I refer to the shopping centres in which they operate collectively as the **Shopping Centres**.
8. I am responsible for the overall operations of the Salons. This includes the negotiation and renegotiation of leases, marketing, payroll, managing budgets and the general operations of the Salons on behalf of or in conjunction with the franchisees. I am also responsible for the day-to-day management of the Salons including recruiting staff, overseeing rostering, managing staff and monitoring sales.
9. I spend approximately three days a week in the Salons. My time is shared across the Salons.
10. The fifth franchised salon is located in Chatswood. The franchisee of that salon conducts its own day-to-day operations. Stylz does not, for example, oversee the rostering of its employees or order stock for that salon.

The Operations of the Salons

11. The Salons offer clients haircuts, colouring, styling and treatments.
12. The Salons also sell a range of products from brands such as Kerestase, Redken, Loreal and GHD. This includes haircare products and electrical goods such as hair straighteners and blow dryers.
13. The Salons have come to increasingly rely on revenue from the Salons' retail function due to the cost increases they have faced. Approximately 30 – 40% of the Salons' turnover is attributable to its retail sales.
14. The Salons all operate in shopping centres and as a result, there is considerable passing foot traffic. The sale of goods by the Salons is a way of trying to recoup the high rental expenses facing the Salons by leveraging off that foot traffic in a way that is less labour intensive than hairdressing.

15. Hairhouse Warehouse and Price Attack are two of the Salons' major competitors, as they sell a similar range of products. They also have small salons at the back of their stores that provide hairdressing and/or beauty services.
16. It is my understanding that Hairhouse Warehouse and Price Attack are primarily retailers and that the salons that they operate are an ancillary part of their businesses. Further, I am aware that some of the brands that they stock do not permit a business to stock their products unless the business is operating a hairdressing salon.
17. The opening hours of the Salons as at the time of drafting this statement are as follows:

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
CBD Salon	0930 – 1800	0930 – 1800	0930 – 1800	0930 – 2100	0930 – 1800	0930 – 1800	1000 - 1800
Parramatta Salon	0930 – 1800	0930 – 1800	0930 – 1800	0930 – 2100	0930 – 1800	0900 – 1800	1000 - 1800
Eastgardens Salon	0900 – 1730	0900 – 1730	0900 – 1730	0900 – 2100	0900 – 1730	0900 – 1700	1000 – 1700
Bondi Junction Salon	0930 - 1800	0930 - 1800	0930 - 1800	0930 – 2100	0930 – 1900	0930 – 1800	1000 - 1800
Warringah Salon	0900 - 1730	0900 - 1730	0900 - 1730	0900 – 2100	0900 – 1730	0900 – 1700	1000 - 1700
Hornsby Salon	0900 - 1730	0900 - 1730	0900 - 1730	0900 – 2100	0900 – 1730	0900 – 1700	1000 - 1700
Tuggerah Salon	0900 - 1730	0900 - 1730	0900 - 1730	0900 – 2100	0900 – 1730	0900 – 1700	1000 - 1700

18. The Salons are required to trade during the above hours as a term of their lease agreements with Westfields. If the Salons do not trade at those times, they are in breach of their lease agreements.
19. The Salons are also required to open on all public holidays except Good Friday, and Christmas Day as a term of their lease agreements. As a consequence, the Salons trade on such public holidays in accordance with the lease agreements.
20. In my experience, there is no scope to negotiate with Westfields about the terms of the Salons' lease agreements that relate to trading hours. Further, I have not observed any shop or other outlet in any of the Shopping Centres not open during the Shopping Centres' trading hours, except for bank branches.

21. If the Salons were not required to open at the above hours, I would alter their trading hours. For example, the Salons would:
- a) Close earlier on Sunday afternoons and/or public holidays. For example, the shopping centres in which the Salons operate are typically very quiet after 4pm on a Sunday afternoon.
 - b) Not open on certain public holidays such as ANZAC Day or Australia Day, which are typically very quiet days for the Salons.
22. The Salons employ a combination of full-time, part-time and casual employees as follows (including apprentices):

	Full-time	Part-time	Casual	Total
CBD Salon	7	0	5	12
Parramatta Salon	9	0	4	13
Eastgardens Salon	8	0	4	12
Bondi Junction Salon	6	0	4	10
Warringah Salon	7	0	9	16
Hornsby Salon	8	0	4	12
Tuggerah Salon	10	1	1	12

23. It is my understanding that the salon managers, salon assistant managers, stylists, apprentices, salon assistants and receptionists employed at the Salons are all covered by the *Hair and Beauty Industry Award 2010 (Award)*.

Rostering at the Salons

24. Hairdressing is very labour intensive. Each customer requires the direct service of at least one employee of a Salon. Accordingly, there is a need to align staffing levels (i.e. the number of employees rostered at a time and the skills mix of those employees) with customer demand.
25. Rostering involves making a judgement call as to the appropriate number and skills mix of employees. Whilst data about customer demand during the previous year is taken into account when determining rosters, the precise number of customers who attend the Salons on any given day is nonetheless difficult to predict. This is all the more so because a significant proportion (sometimes up to 70%) of a Salons' clientele on any given day is walk-in clients, who have not made a prior appointment.

26. The Salons' labour costs constituted approximately 44 – 50% of their revenue during the 2016/2017 financial year. Wages are the Salons' highest operating cost.
27. In the event that a surplus of staff is rostered to work on Sundays and public holidays and they are not undertaking productive work throughout the course of the day, the Salons are burdened with a considerable cost impost. Accordingly, a precautionary approach is taken to rostering on Sundays and public holidays. This is despite the fact that Sundays are typically the third busiest day of the week at the Salons.
28. Typically, on days other than Sundays and public holidays, the roster will include:
 - a) A manager or assistant manager who, in addition to other supervisory duties, assists with retail sales;
 - b) Two or more stylists who undertake most of the hairdressing duties; and
 - c) Apprentice(s) and/or a salon assistant who assist the stylists by undertaking duties such as washing hair, general cleaning, applying colour to a customer's hair etc.
29. On Sundays and public holidays however, a different approach is taken to the composition of the roster because of the penalty rates payable under the Award. For example, the receptionists employed at the CBD Salon and the Bondi Junction Salon are not rostered to work on Sundays. There is a risk that the receptionists may not be fully occupied for the entire duration of a shift on Sundays or public holidays. Because of the premium payable for work on those days, that is not an economical outcome. The decision not to roster them is made despite the knowledge that it likely results in some customers waiting for longer to be served at the front desk and/or leaving because they are unwilling to wait.
30. Rostering in this way has various consequences:
 - a) It leads to inefficiencies on Sundays and public holidays. It results in stylists spending a greater proportion of their time undertaking duties that

would otherwise be undertaken by a salon assistant or apprentice. Examples include laundry, general cleaning, shampooing hair etc.

- b) Activities such as stocktaking are not undertaken on Sundays or public holidays unless they are essential.
 - c) On some occasions it results in longer waiting times for customers who do not have an appointment. I have observed that some customers will not be willing to wait and, as a result, will leave a Salon after enquiring how long the wait is. I have also observed that where such customers leave, in the vast majority of instances, they will not return to the Salon but will instead visit one of the Salons' competitors. It also causes the Salons to lose the repeat business of customers. As a result, I am concerned that long wait times result in the Salons losing business.
 - d) I have observed that the Salons' employees who are rostered to work on Sundays and public holidays that are busier than anticipated are required by the relevant Salon's manager to work harder and faster, in order to be able to service the maximum number of customers and minimise waiting times. Some employees who have resigned from the Salons have stated that one of the reasons for their resignation was because they felt that they were under pressure to work faster when the Salons were particularly busy.
31. The Salons utilise casual labour on Sundays and public holidays because they provide the Salons with greater flexibility than full-time and part-time employees. For example, when a Salon is not as busy on a Sunday afternoon as was anticipated when the roster was prepared, the Salon will direct a casual employee to finish their shift earlier than the rostered finishing time.
32. Casual employees are also engaged by the Salons to ensure that there is relief staff available to cover staff absences (e.g. because of leave).
33. I consider that the Salons' customers expect the Salons to be open on Sundays and many public holidays. I have observed this expectation grow over time.

34. Also, over time I have observed an increase in the number of hairdressing salons in the Shopping Centres and as a result, an increase in the number of salons that compete with the Salons and are open on Sundays.
35. Some of the Salons' employees, particularly casual employees, want to work on Sundays. They request to be rostered on Sunday shifts. In my experience, it is not difficult to find staff who are willing to work on Sundays.
36. In late 2017, a 10% surcharge for services on Sundays and public holidays was implemented in the Salons. I am closely monitoring its impact on the Salons' operations. Customers are told before a Salon employee commences work on their hair that they will be charged a surcharge. To date, some customers have left when they were advised about the surcharge and have expressed their frustration or disappointment. Whilst others have not left, they have nonetheless expressed their unhappiness about having to pay 10% more and I am concerned that they will not attend the Salons again.
37. As at the time of drafting this statement, in light of the customer feedback that the Salons have received, I am unsure whether the surcharges will be maintained.

The Nature of the Hairdressing Industry

38. The Salons face considerable competition from other hairdressing salons operating in the Shopping Centres. For example, at the time of drafting this statement, there are eight hairdressing salons in Westfield Hornsby, in addition to the Hornsby Salon.
39. The Salons' prices are reviewed annually. That review includes a consideration of the Salons' costs and the prices charged by the Salons' competitors.
40. The level of competition facing the Salons limits the extent to which the Salons can increase their prices. Although the Salons' costs (including wages and rent) increase each year, the Salons have not increased their prices for the past four years.

41. The Salons' also face competition from individual hairdressers who work from home. I am aware that several hairdressers who have previously been employed by the Salons are now operating from their own homes. I consider that it is virtually impossible to compete with such hairdressers because they do not incur many of the overhead costs that the Salons do (e.g. Award wages and rent). The practice of operating from home is rife in the industry.

Hair and Beauty Australia's Claim

42. I understand that Hair and Beauty Australia (**HABA**) has proposed a variation to the Award to reduce Sunday and public holiday penalty rates as follows:

	Current Rate	Proposed Rate
Sunday	200% of hourly rate	150% of hourly rate
Public holiday	250% of hourly rate	225% of hourly rate

43. I understand that the claim would be relevant to the Salons' Award-covered full-time, part-time and casual employees.

44. It is my understanding that the Sunday penalty rates payable in the hairdressing industry in NSW increased incrementally from 2010 over several years, up to the current 200% penalty rate. I recall that when the increase was first decided and implemented, in approximately 2010, it was the talk of the industry. I spoke to a large number of operators who were concerned about the impact it would have on their business.

The Potential Impact of a Reduction to the Sunday and Public Holiday Penalty Rate

45. If the Sunday penalty rate was reduced to 150%:

- a) At least one additional stylist would be rostered at each of the Salons on Sundays except for the case of the CBD Salon and Bondi Junction Salon, where either an additional stylist or a receptionist would be rostered to work.

b) A less restrictive approach would be taken to rostering more generally. For example, casual employees' shifts would not need to be shortened as frequently.

46. I consider that increasing the number of employees rostered to work on Sundays would increase the capacity of the Salons to develop the business. It would allow the Salons to service customers that they are otherwise currently not able to service. I consider that it would also allow the Salons to provide a more timely and efficient service, with shorter waiting times.
47. Whilst the current Sunday penalty rates prevent the Salons from investing in additional staff to work on Sundays and from developing the business, the penalty rate reductions proposed by HABA would remove that barrier.
48. I am not concerned that at the reduced penalty rates proposed, the Salons will encounter any difficulty finding employees who are willing to work on Sundays. I am aware that some employees, particularly casual employees, want to work on Sundays because of their personal commitments such as caring responsibilities or study commitments.
49. If the public holiday penalty rate was reduced to 225%, a less restrictive approach would be taken to rostering on those days. For example, casual employees' shifts would not need to be shortened as frequently.
50. I would roster additional employees (including stylists, apprentices and/or salon assistants) to work on Sundays and public holidays if the level of customer demand on Sundays and public holidays grew further.



Deborah Cook

Date: 12.3.18

IN THE FAIR WORK COMMISSION

AM2017/40 Penalty Rates – Hair and Beauty Industry Award 2010

WITNESS STATEMENT OF GRAHAM THATCHER

I, Graham Thatcher of [REDACTED], do solemnly and sincerely declare and state the following:

1. I am the Director of the Thatcher Group (**Group**), which is a family owned business. The Group owns and operates businesses in the beauty and other industries. I have held the position of Director since March 2004.
2. The Group is a multi-site franchisee of Ella Bache. It currently owns and operates two Ella Bache salons in Queensland (**Salons**). In the past the Group has owned and operated up to five Ella Bache salons. It opened its first salon in 2004. Two of those salons were closed because they were not profitable. One of the reasons they were unprofitable was because of high labour costs and this contributed to the Group's decision to close them.
3. I am responsible for the management of all "back office" functions of the Salons, including strategic planning, financial, marketing and maintenance.
4. I also provide a consulting service to other Ella Bache franchisees providing assistance with lease negotiations and renewals, and mentoring salon owners and managers. As a result, I am very familiar with the financial and lease arrangements binding a number of Ella Bache salon owners.
5. I am also the Vice President of Hair and Beauty Australia's (**HABA**) Board of Directors. I was elected to the Board in November 2015 and was elected to the position of Vice President in November 2017.
6. In my role as Vice President, I assist the President with the ongoing operation of the organisation. I also sit on the Board's Finance Sub-Committee.

Ella Bache

7. There are approximately 100 Ella Bache salons operating as franchises in Australia and approximately 50 distributors. Ella Bache also operates concessions in David Jones stores.
8. Ella Bache salons provide a broad range of beauty treatments including:
 - a) body bronzing treatments such as spray tans;
 - b) body treatments such as back detoxes, body massages, thermal mud body treatment masks etc;
 - c) eyelash and eyebrow treatments such as tinting, shaping and perms,
 - d) waxing;
 - e) facial treatments such as anti-ageing, anti-fatigue treatments and high performance facial treatments such as collagen stimulation facials;
 - f) hands and feet treatments such as exfoliation and treatment masks;
 - g) manicures and pedicures; and
 - h) 'indulgence packages' which involve a range of treatments over the course of 2 – 4+ hours.
9. Ella Bache salons also sell a range skincare, sun care and tanning products for men and women.

The Group's Ella Bache Salons

10. The Group's Salons are located in the Myer Centre in the Brisbane CBD and Westfield Carindale.
11. The operating hours and employee numbers as at 8 February 2018 of each of the Salons are provided below.

Ella Bache Salon in Brisbane CBD

12. The Brisbane CBD salon is located at Shop 202, Level 1 Myer Centre at the Queen Street Mall. It operates within a shopping centre.

13. The Brisbane CBD salon's opening hours are as follows:

Day	Opening Hours
Monday	9:00am – 5:30pm
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 5:30pm
Thursday	9:00am – 5:30pm
Friday	9:00am – 9:00pm
Saturday	9:00am – 5:00pm
Sunday	10:00am – 4:00pm

14. The Brisbane CBD salon does not open on all public holidays. The specific public holidays on which it opens can vary from year to year. In 2017, it opened on Easter Saturday and Boxing Day.

15. The Brisbane CBD salon employs 6 employees. It is my understanding that they are all covered by the *Hair and Beauty Industry Award 2010 (Award)*. They are employed on part-time or casual basis as follows:

Type of Employment	Number
Part-time	2
Casual	4
Total	6

16. There is no enterprise agreement applying to these employees.

Ella Bache Salon in Carindale

17. The Carindale salon is located in Westfield Carindale, corner of Creek & Old Cleveland Roads. It operates within a shopping centre.

18. The Carindale salon's opening hours are as follows:

Day	Opening Hours
Monday	9:00am – 5:30pm
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 5:30pm
Thursday	9:00am – 9:00pm
Friday	9:00am – 5:30pm

Saturday	9:00am – 5:00pm
Sunday	10:00am – 4:00pm

19. The Carindale salon does not open on all public holidays. The specific public holidays on which it opens can vary from year to year. In 2017, it opened on Easter Saturday, Easter Sunday and Boxing Day.
20. The Carindale salon employs 14 employees. It is my understanding that they are all covered by the Award. They are employed on a full-time, part-time or casual basis as follows:

Type of Employment	Number
Full-time	4
Part-time	1
Casual	9
Total	14

21. There is no enterprise agreement applying to these employees.

HABA's Claim

22. I understand that HABA has proposed a variation to the Award to reduce Sunday and public holiday penalty rates as follows:

	Current Rate	Proposed Rate
Sunday	200% of hourly rate	150% of hourly rate
Public holiday	250% of hourly rate	225% of hourly rate

23. I understand that the proposed change would apply to the Salon's award-covered full-time, part-time and casual employees.

The Nature of the Beauty Industry

24. The Salons operate in a very competitive market. I consider that this competition has increased over recent years.
25. Ella Bache provides a very broad range of beauty services. There are many businesses that provide some but not all of the services that the Salons offer (**Specialist Competitors**). These include laser clinics, 'brow bars', 'make up

bars', nail salons etc. I consider that there has been a growth of such businesses in the last five – six years.

26. There are 26 businesses operating in the Carindale shopping centre which I consider to be the Salon's competitors and 14 competitors in the Myer Centre. They generate a considerable amount of competition for the Salons.
27. All of the Salons' competitors referred to in the above paragraph are open on Sundays. This is one of the primary reasons for the Brisbane CBD salon opening on Sundays, notwithstanding that it is only profitable during peak periods (i.e. summer (especially Christmas trading) and Easter trading). For example, over the last four Sundays, on average the Brisbane CBD salon has faced a loss of approximately \$420 each Sunday.
28. The Salons and their competitors rely on repeat appointments from their clients. One of the KPIs for the Salons' therapists is the number of re-bookings they obtain.
29. Repeat business arises because of the nature of the services that the Salons provide. For example, clients will typically seek certain types of treatments every few weeks or months. This includes waxing, manicures/pedicures, body bronzing etc.
30. The level of competition that the Salons face, and the fact that their competitors operate within close physical proximity to the Salons, means that customers are very readily able to access the same services elsewhere if the Salons are not open on Sundays and public holidays. I am aware of this occurring when the Brisbane CBD salon previously did not operate on a Sunday.
31. It is particularly damaging to the Salons' business if they lose clients on an ongoing basis, who thereafter continue to visit the Salons' competitors. In those circumstances, the loss of revenue for a Salon is not limited to a single instance.
32. In my experience, once a client starts to visit a competitor in relation to their routine treatments instead of the Salons, it is extremely difficult to regain their business.

The Demand for Ella Bache's Services on Sundays and Public Holidays

33. The Salons' clients can make an appointment or walk-in. The majority of clients make an appointment ahead of time.
34. The availability of appointments and the ability of the Salons to provide the service sought to a walk-in client depends on various factors including the number of staff rostered on at a particular time.
35. I am aware that from time-to-time, the Salons are unable to provide the services sought by walk-in clients and therefore they are turned away. As I have earlier explained, because of the steep competition facing the Salons, this affects the Salons' client base and revenue on an ongoing basis.
36. Over time, I have found that the demand for services on public holidays has increased. Whilst previously the Group's salons did not open on any public holidays, there is now a clear expectation from clients that they remain open on certain public holidays such as Boxing Day and Easter Saturday because the shopping centres they operate in are open. Clients regularly ask the Salons for appointments on those days.
37. Because of this client expectation and because many of the Salons' competitors open on public holidays, I consider that the Salons can no longer remain closed on all public holidays.
38. I have also found that over time, there has been an increasing trend towards Sunday trading in the beauty industry. I consider that this is because shopping centres increasingly require lessees to remain open on Sundays and because of increased customer expectation that businesses remain open on Sundays.

The Cost of Operating on Sundays and Public Holidays

39. The Salons' largest operating costs are wages and rent. Overall, wages (including superannuation) represent 40 – 50% of the Salons' revenue and 60 – 65% of the Salons' total costs.

40. On Sundays, wages constitute a greater proportion of the Salons' revenue. For example, over the last four Sundays, wages have represented 84% of the Myer CBD salon's revenue and 61% of the Carindale salon's revenue.
41. The Salons' cost structure is greater than standalone street-front salons because they operate in shopping centres and therefore incur higher rental costs.
42. Typically, there are three employees rostered to work on a Sunday at the Brisbane CBD salon and five – six employees rostered to work on a Sunday at the Carindale salon.
43. The number of employees rostered to work on a Sunday and the specific employees who are rostered depends on various factors including:
 - a) Labour costs;
 - b) Staff availability (e.g. some employees request to work on Sundays because of their caring responsibilities or study commitments);
 - c) An appropriate skills mix, because not all employees can necessarily provide all of the services offered at the Salons; and
 - d) An expectation of how busy the Salons will be, based on prior experience.
44. In relation to the skills mix referred to above; at all times at least one or two employees who can together perform every treatment offered by the Salon are rostered to work. This is because, in order to remain competitive, the Salons must be able to provide any treatment that a client seeks at all times within trading hours.
45. Not all employees employed by the Salons are equally efficient and productive. Some possess greater skills and experience. Their engagement is therefore more profitable to the Salons.
46. The Salons are not able to roster only their most efficient and productive employees on Sundays for reasons including staff availability. This means that despite the high labour costs incurred by the Salons on Sundays, they are not necessarily receiving the highest possible return on the services being provided.

47. It is my understanding that after the Award came into operation, there was a transitional period during which the penalty rates payable on a Sunday increased proportionally each year until 1 July 2014.
48. In 2014, because of the further increase to the Sunday penalty rate, a 10% surcharge was introduced at the Carindale salon for its services on Sundays.
49. There was considerable backlash from clients at the time, who were not prepared to pay a premium for the salon's services on a Sunday. I am aware of instances in which clients were abusive towards staff when they were informed of the surcharge and advised that they would not be returning. I am also aware that clients took to social media to express their frustration, anger and disappointment at the change. The Carindale salon also received emails of a similar nature.
50. Because of the reaction from clients at that time, the Group has not attempted to implement another Sunday or public holiday surcharge since.
51. As a result of my experience in assisting Ella Bache franchisees with their lease arrangements, I am aware that the vast majority of shopping centres who enter into lease arrangements with Ella Bache salons include core trading hours in their contracts, which compel tenants to remain open during those times. In my experience, the majority of such lease arrangements require the tenant to open on Sundays. It is very unusual for a shopping centre to not include that requirement. Some also require the tenant to trade on public holidays.
52. Of all of the Ella Bache salon owners that I have assisted with their lease arrangements, none have granted them exclusivity as a term of their lease. That is, in no instance has the lessor agreed that the shopping centre will not lease shop space to another business that is a competitor of the Ella Bache salon. More generally, I am not aware of any shopping centre ever agreeing to such a term of a lease.

The Salons' Pricing Structure

53. The prices charged to clients for the services provided at the Salons are determined by the Group, having regard to the retail price recommended by Ella

Bache, the Salons' costs and the prices charged by competitors. Determining a pricing structure for the Salons' services involves finely balancing these competing considerations.

54. The Salons, and Ella Bache more generally, seek to position themselves in the market as providing high quality services at competitive prices. It is because of those high quality services that the Salons are able to justify pricing its services at slightly above the retail price recommended by Ella Bache.
55. The competition facing the Salons places considerable limitations on the extent to which the Group is able to increase its prices. The Salons' traditional competitors generally offer the same services for prices that are similar to the Salons' prices. Specialist Competitors, however, provide their services at a cheaper price. I have observed that as the number of these Specialist Competitors has increased, as a result of the competition amongst themselves, prices have been driven down to levels that the Salons simply cannot match because of their cost base. I am also aware that the rental expenses associated with leasing a 'kiosk' in a shopping centre, in which many Specialist Competitors operate, is much lower than leasing a shop space like ones in which the Salons operate.
56. As I have explained earlier in my statement, because of this competition, customers are readily able to access alternate services if they consider that the Salons' services are over-priced.

The Potential Impact of a Reduction to the Sunday and Public Holiday Penalty Rate

57. Currently, the bare minimum number of employees are rostered to work at the Salons on Sundays for the bare minimum number of hours. This is because, due to the high penalty rates, rostering employees who are not productively engaged throughout their shift has a serious financial impact on the Salons.
58. For example, instead of rostering employees to work all day on a Sunday (10:00am – 4:00pm), employees are rostered to work either 11:00am – 4:00pm or 10:00am – 3:00pm. It is my understanding that under the Award, if an

employee works five hours or less, they do not have to be given a meal break. Employees are therefore rostered in this way on a Sunday as a cost-minimising measure.

59. If HABA's claim was granted, the lower labour costs would enable the Salons to roster employees for the entire shift on a Sunday. It would also enable the Salons to extend their trading hours to 9:00am – 5:00pm, consistent with the shopping centres' trading hours. The main reason that the Salons currently only open 10:00am – 4:00pm on Sundays is the labour costs faced by the Group.
60. If HABA's claim was granted, it would also enable the Salons to roster additional employees to work on Sundays.
61. The minimal number of employees currently rostered to work on Sundays means that the Salons generally have limited capacity to service walk-in clients. It also means that the Salons are often unable to provide clients with 'add-on' services or up-sell additional services (which the Salons' therapists are encouraged to do). This further impacts the Salons' profits.
62. Lower Sunday penalty rates would allow the Salons to build their capacity to service additional clients and provide additional services. There would also be greater scope to bear the risk of rostering additional employees who might not be fully utilised throughout the shift because the cost of labour would be lower. Currently, the Group is not prepared to bear that risk because of the high penalty rates which is why, as I explained earlier, only the bare minimum number of employees are rostered on.



Graham Thatcher

Date: 23/2/18 .

IN THE FAIR WORK COMMISSION

AM2017/40 Penalty Rates – Hair and Beauty Industry Award 2010

WITNESS STATEMENT OF ANNETTE HARMAN

I, Annette Harman of Shop G057, Gateway Plaza, Leopold (Vic) do solemnly and sincerely declare and state the following:

1. I am the Director of Vitality Laser and Skin (**Vitality**).
2. In my role as Director, I am responsible for the overall management of Vitality's two salons (**Salons**). This includes payroll, rostering, finances, recruitment and the negotiation and renegotiation of the Salon's lease arrangements.
3. From time to time, depending on the number and experience of employees employed, I also work on the floor in one or both of the Salons, providing beauty services to the Salons' clients. As at the time of drafting this statement, I am working on the floor because of recent staff absences and departures.
4. I have worked in the beauty services industry for 24 years. I have owned Vitality for over 13 years.

The Salons

5. The two Salons are in the following locations:
 - a) Ocean Grove Market Place, Ocean Grove (Vic) (**Ocean Grove Salon**);
and
 - b) Gateway Plaza, Leopold (Vic) (**Leopold Salon**).
6. The Salons provide:
 - a) a range of clinical services including laser hair reduction, skin needling, clinical skin peels, microdermabrasion, anti-aging treatments, anti-wrinkle treatments and EPI blading; and

b) a range of beauty services such as facial treatments, body treatments, massage therapies, manicures and pedicures, waxing, spray tanning, ear candling, teeth whitening and vital retreat packages.

7. The operating hours and employee numbers as at 7 March 2018 of the Salons are below. In addition to the employees identified below, the Salons also employ a small number of medically trained staff to provide medical or injectable treatments.

The Ocean Grove Salon

8. The opening hours of the Ocean Grove Salon are as follows:

Day	Opening Hours
Monday	9:00am – 6:00pm
Tuesday	9:00am – 6:00pm
Wednesday	9:00am – 6:00pm
Thursday	9:00am – 8:00pm
Friday	9:00am – 6:00pm
Saturday	9:00am – 4:00pm
Sunday	Closed
Public holidays	Closed

9. There are 3 employees employed at the Ocean Grove Salon who I understand to be covered by the *Hair and Beauty Industry Award 2010 (Award)*. They are employed on a full-time or casual basis as follows:

Type of Employment	Number
Full-time	2
Casual	1
Total	3

10. There is no enterprise agreement applying to these employees.

The Leopold Salon

11. The opening hours of the Leopold Salon are as follows:

Day	Opening Hours
Monday	9:00am – 6:00pm
Tuesday	9:00am – 6:00pm
Wednesday	9:00am – 6:00pm
Thursday	9:00am – 8:00pm
Friday	9:00am – 7:00pm
Saturday	9:00am – 4:00pm
Sunday	Closed
Public holidays	Closed

12. There are five employees employed at the Leopold Salon who I understand to be covered by the Award. They are employed on a full-time, part-time or casual basis as follows:

Type of Employment	Number
Full-time	3
Part-time	1
Casual	1
Total	5

13. There is no enterprise agreement applying to these employees.

Hair and Beauty Australia's Claim

14. I understand that Hair and Beauty Australia (**HABA**) has proposed a variation to the Award to reduce Sunday and public holiday penalty rates as follows:

	Current Rate	Proposed Rate
Sunday	200% of hourly rate	150% of hourly rate
Public holiday	250% of hourly rate	225% of hourly rate

15. I understand that the proposed change would be relevant to the Salons' Award-covered full-time, part-time and casual employees.

16. Some of the Salons' Award covered employees are paid an hourly rate that is higher than the minimum amount prescribed by the Award. I pay some employees above-Award rates for two inter-related reasons:
- a) The turnover of the Salons' employees is high. Therefore, I pay some employees above the Award rate in order to try to retain employees once they have demonstrated that they have the skills and training necessary to do the job.
 - b) I consider that good customer service and providing clients with a positive experience at the Salons is essential to attracting and retaining business. In my experience, customers expect professionalism and a high quality service every time they attend either of the Salons. In order to provide such service, the Salons need well trained and experienced employees.

Trading on Sundays and Public Holidays

17. The Salons do not open on Sundays or public holidays because of the high penalty rates currently payable to Award covered employees. Apart from the cost of labour, there is no other significant operational cost that the Salons would incur by opening on Sundays.
18. Both Salons operate in shopping centres (**Shopping Centres**). The Shopping Centres open on Sundays and some public holidays.
19. The Shopping Centres initially included, as a term of their lease requirements, an obligation to be open on Sundays and public holidays. I negotiated with the Shopping Centres and eventually reached an agreement with them to allow the Salons to not open on Sundays and public holidays.
20. I went through this long process, even though it was very stressful, because I consider that it is not cost effective to open on a Sunday or public holidays as a result of the high penalty rates that I understand would be payable.
21. Most of the shops in the Shopping Centres are open on Sundays and public holidays. The Shopping Centres are, as a result, very busy on Sundays and public holidays. This includes the Salons' competitors. For example, there is a

nail bar near the Leopold Salon which is very busy on Sundays. The Leopold Salon also offers various nail services (such as manicures and pedicures). I am concerned that the Leopold Salon is losing business to the nail bar and other competitors who open on Sundays. There are also two salons offering massages near the Leopold Salon, both of which open on Sundays. I am similarly concerned that the Leopold Salon is losing business to those two salons.

22. Shopping centres by their nature attract foot traffic. I consider this to be one of the primary benefits of operating in a shopping centre and it is the reason why I am prepared to pay the very high rental expenses. I have observed such foot traffic translate into business for the Salons. As a result, I consider that if the Salons opened on Sundays, the foot traffic through the Shopping Centres would result in customers visiting the Salons on Sundays.
23. Further, the Salons are routinely asked by customers whether they are open on Sundays and public holidays. For example, I am aware that there is a demand for the Salons' services from many women who work during the week and would like to attend the Salons for a relaxing treatment on a Sunday.
24. The Salons pay the Shopping Centres a base rent, marketing contribution and for other outgoing expenses. As a term of the Salons' leases, those amounts increase every year by up to 4.5%. Further, when the Salons' lease arrangements have fallen due for renewal in the past, the rent has been increased by an upfront amount upon the commencement of the renewed lease, followed by subsequent annual increases during the life of the lease agreement.
25. I am aware that some of the Salons' employees have caring responsibilities for their children and as a result, it is their preference to work on weekends (including Sundays) and have some time off during the week instead. It is my understanding that that would enable their respective partners to look after their children during the weekend and vice versa.

The Salons' Pricing Structure

26. The pricing structure of the Salons is determined having regard to the prices charged for similar services by the Salons' competitors. I am concerned that if the Salons' prices are too high, the Salons will be priced out of the market. I consider that the Salons do not enjoy an unlimited ability to pass on cost increases to customers.
27. The services provided by the Salons are priced within a very broad range. A high volume of the work performed by the Salons' Award covered employees consists of services that cost as little as \$13 (lip or chin wax), \$15 (shellac removal from nails) or \$20 (eyebrow wax). There are also treatments that are more time consuming and are charged at a higher price.
28. The nature of the work performed by the Salons' employees is very labour intensive. An employee can only service one client at a time and whilst they are assisting that client, cannot also undertake other duties.
29. I have observed the degree of competition in the beauty services industry increase significantly during the 24 years that I have worked in the industry. This competition has been driven by:
 - a) An increase in the total number of businesses providing services similar to the Salons in the areas surrounding the Salons, resulting in more choice for customers;
 - b) An increase in the number of businesses that provide specific services such as 'brow bars' and tanning salons, who charge less for their services than the Salons; and
 - c) The 'at home' beauty industry, which consists of individual persons providing certain beauty services (e.g. waxing, tanning, eyelash tinting/extensions etc) from home at significantly lower prices than the Salons. It is my understanding that they work from a very different cost base and do not have to comply with all of the same regulations as the Salons (e.g. tax obligations).

30. I have observed that the Salons' customers are typically very price sensitive. For example, due to the merchant fees payable by the Salons when customers pay by EFTPOS, the Salons charge a 2.5% surcharge on any payments made by EFTPOS. Customers have complained to the Salons about having to pay that surcharge.
31. The Salons have also received negative feedback and complaints from customers when they have previously increased their prices.
32. I have also observed that the Salons' customers are typically aware that there are several other service providers in the industry and that some of them provide the same or similar services at a lower price than the Salons. I am also aware that some customers shop around for what they consider to be the best deal.
33. Because of these factors, I consider that there is very little (if any) scope to pass on increased costs to the Salons' customers. It is for this reason that the Salons' prices have not been increased for the past two years.
34. As a result, if the Salons opened on Sundays or public holidays, I would not implement a surcharge in order to pass on some of the additional labour costs. Having regard to the above experience, I would not be prepared to take the risk of implementing such a surcharge and consequently losing unhappy customers.
35. Whilst I am aware that some salons charge a surcharge for services on a Sunday and/or public holiday, they are typically large day spas who do not operate in a shopping centre. They offer a higher level of service and experience to customers in a different environment to the Shopping Centres that the Salons operate in.

The Potential Impact of a Reduction to the Sunday and Public Holiday Penalty Rate

36. If HABA's claim was granted, I would open both of the Salons on Sundays and on some public holidays.
37. Based on the foot traffic through the Shopping Centres on Sundays and the customer queries the Salons receive about whether they open on Sundays (described earlier in my statement), I consider that there would be sufficient demand for the Salons' services to warrant opening if the penalty rate was 150% instead of 200%.
38. The rent, marketing contribution and other outgoing expenses payable by the Salons to the Shopping Centres are the same, regardless of how many days a week the Salons are open. As a result, opening the Salons on Sundays and public holidays would benefit the business as it would enable the Salons to recover some of those costs.



Annette Harman

Date: 13/3/18

IN THE FAIR WORK COMMISSION

AM2017/40 Penalty Rates – Hair and Beauty Industry Award 2010

WITNESS STATEMENT OF ROCCO PETRUCCI

I, Rocco Petrucci of Zucci Hairdressing, do solemnly and sincerely declare and state the following:

1. I am the Director and founder of RoccoPetrucci Family Trust Iccuz (aust) PL (**Zucci**).
2. I opened the first Zucci salon over 33 years ago. At Zucci's salons (**Salons**), clients can have their hair cut, styled and/or coloured. The Salons also sell some hair and beauty related products, however this is only an ancillary function of the Salons.
3. In my role as Director, I am responsible for managing the business and team development.

Zucci Salons

4. There are four Zucci Salons in Melbourne that employ employees who I understand to be covered by the *Hair and Beauty Industry Award 2010* (**Award**):
 - a) Zucci Ivanhoe;
 - b) Zucci South Melbourne;
 - c) Zucci St James Place; and
 - d) Zucci Lifestyle Salon, David Jones.
5. The operating hours and employee numbers as at 25 February 2018 of each of the Salons are provided below.
6. Some of the full-time employees employed at the Salons are apprentices. It is my understanding that in 2014, the Award was varied to introduce significantly higher adult apprentice rates for apprentices who commenced their employment on or after 1 January 2014. The resulting cost increase has deterred me from

engaging new adult apprentices, unless they can demonstrate significant prior experience.

Zucci Ivanhoe

7. Zucci Ivanhoe is a high street salon. The opening hours of the salon are as follows:

Day	Opening Hours
Monday	10:00am – 6:00pm
Tuesday	10:00am – 5:00pm
Wednesday	10:00am – 6:00pm
Thursday	10:00am – 9:00pm
Friday	10:00am – 6:00pm
Saturday	8.00am – 5:00pm
Sunday	Closed
Public holidays	Closed

8. There are 11 employees employed at Zucci Ivanhoe. It is my understanding that they are all covered by the Award. They are employed on a full-time or part-time basis as follows:

Type of Employment	Number
Full-time	6
Part-time	5
Total	11

9. There is no enterprise agreement applying to these employees.

Zucci South Melbourne

10. Zucci South Melbourne is a high street salon. The opening hours of the salon are as follows:

Day	Opening Hours
Monday	10:00am – 6:00pm
Tuesday	10:00am – 6:00pm
Wednesday	10:00am – 6:00pm
Thursday	10:00am – 9:00pm
Friday	10:00am – 7:30pm
Saturday	9:00am – 5:00pm
Sunday	Closed
Public holidays	Closed

11. There are 10 of employees employed at Zucci South Melbourne. It is my understanding that they are all covered by the Award. They are employed on a full-time or part-time basis as follows:

Type of Employment	Number
Full-time	7
Part-time	3
Total	10

12. There is no enterprise agreement applying to these employees.

Zucci St James Place

13. Zucci St James Place is the flagship salon. The opening hours of the salon are as follows:

Day	Opening Hours
Monday	Closed
Tuesday	10:00am – 5:00pm
Wednesday	10:00am – 7:00pm
Thursday	10:00am – 9:00pm
Friday	10:00am – 7:00pm
Saturday	9:00am – 4:30pm
Sunday	Closed
Public holidays	Closed

14. There are 4 full-time employees only employed at Zucci St James Place. It is my understanding that they are all covered by the Award.
15. There is no enterprise agreement applying to these employees.

Zucci Lifestyle Salon, David Jones

16. Zucci Lifestyle Salon is located on level 1 in David Jones, Melbourne CBD. The opening hours of the salon are as follows:

Day	Opening Hours
Monday	10:00am – 6:00pm
Tuesday	10:00am – 6:00pm
Wednesday	10:00am – 7:00pm
Thursday	10:00am – 9:00pm
Friday	10:00am – 7:00pm
Saturday	9:00am – 6:00pm
Sunday	10:00am – 6:00pm

17. The Zucci Lifestyle Salon opens on all public holidays except Christmas Day and Good Friday.
18. There are 10 employees employed at the Zucci Lifestyle Salon. It is my understanding that they are all covered by the Award. They are employed on a full-time, part-time or casual basis as follows:

Type of Employment	Number
Full-time	5
Part-time	4
Casual	1
Total	10

19. There is no enterprise agreement applying to these employees.

Hair and Beauty Australia's Claim

20. I understand that Hair and Beauty Australia (**HABA**) has proposed a variation to the Award to reduce Sunday and public holiday penalty rates as follows:

	Current Rate	Proposed Rate
Sunday	200% of hourly rate	150% of hourly rate
Public holiday	250% of hourly rate	225% of hourly rate

21. I understand that the proposed change would be relevant to the Salons' Award-covered full-time, part-time and casual employees.

Trading on Sundays and Public Holidays

22. As a term of the lease agreement with David Jones, the Zucci Lifestyle Salon must remain open on Sundays and certain public holidays. None of the remaining Salons open on Sundays or any public holidays. The penalty rates payable on those days are a significant contributing factor to my decision not to open them.
23. Many clients expect that the Salons will remain open on Sundays and public holidays. In some cases, this is because of a client's personal circumstances (for example, they work full-time Monday – Friday and therefore can only visit the Salons on weekends).

24. Customers have expressed their disappointment and frustration to me when they find out that a Salon is closed on Sundays or public holidays and/or where it is difficult to obtain an appointment at the Zucci Lifestyle Salon on Sundays because it is busy. This is in large part because only a bare minimum number of employees are rostered to work on Sundays at that salon, which limits its capacity to accept more appointments.
25. At the Zucci Lifestyle Salon, only a senior operator and an apprentice are rostered to work on Sundays. Further, the salon seeks to reduce the length of an employee's shift on Sundays with their agreement where it appears that their labour is not necessary at the start or end of their shift, based on the number of appointments made.
26. By rostering employees in this way, the Zucci Lifestyle Salons' capacity to deal with walk in clients is also limited. It is difficult to predict how many employees will walk in without an appointment on a particular Sunday and/or what time during the day. Accordingly, whilst additional staff could be rostered to attend to walk in clients, there is a risk that such staff will not be utilised to full capacity where there are no or few walk in clients. Due to the current penalty rate payable on Sundays, bearing that risk is too costly.
27. Further, the Zucci Lifestyle Salon does not trade for all hours that David Jones does on Sundays and public holidays. This is because of the high penalty rates payable on those days.

The Salons' Pricing Structure

28. The Salons operate in very competitive environments. For example, there are another 13 hair salons in the shopping strip in which Zucci Ivanhoe operates. Similarly, there are almost 20 hair salons operating in very close proximity to Zucci South Melbourne. In the Melbourne CBD, there are numerous hair salons.
29. There is limited scope to pass the higher costs of trading on Sundays and public holidays to clients. Prices that are out of step with market rates can cause the Salons to be priced out of the market. I consider that the Salons' pricing structure is comparable to other salons that provide similar services of a similar quality.


30. In my experience, customers are unwilling to pay a premium for services on Sundays.
31. In approximately 2009, a 10% surcharge for services on Sundays was introduced at the Zucci Lifestyle Salon. At that time, the number of employees rostered to work on Sundays was more than the number of employees currently rostered to work on Sundays.
32. Clients were informed when they contacted the salon to make an appointment that there would be a surcharge. On numerous occasions, clients did not proceed with making an appointment. As a result, the surcharge was discontinued and has not been implemented again since. The number of employees rostered to work on Sundays has also been reduced.

The Potential Impact of a Reduction to the Sunday and Public Holiday Penalty Rate

33. If HABA's claim was granted, I would:
 - a) Extend the trading hours of the Zucci Lifestyle Salon.
 - b) Roster additional employees to work at the Zucci Lifestyle Salon and take a more liberal approach to rostering. For example, there would not be the same imperative to shorten employees' shifts on Sundays where there are fewer than expected appointments and accordingly, such roster changes would not be necessary.
34. Currently, because of the minimal number of employees rostered on Sundays and the limited opening hours, clients seeking appointments and walk in clients are often turned away at the Zucci Lifestyle Salon on Sundays. Therefore, if the penalty rate was at 150% instead of 200%, I consider that there is sufficient consumer demand to viably roster additional employees and extend the salon's opening hours.
35. By doing so, the Zucci Lifestyle Salon would also have an additional business development opportunity, by building relationships with new clients that it is currently unable to service.

36. Decisions about rostering employees involve considerations associated with the number of employees to be rostered and the skills mix of those employees. The current approach to rostering on Sundays and public holidays at the Zucci Lifestyle Salon (described earlier in my statement) results in an inability to roster a blend of skills.
37. Because of the current penalty rates, there is no scope to roster additional employees to work on Sundays, including additional apprentices or employees at lower classifications. As a consequence, an experienced stylist rostered to work on a Sunday is unable to operate at the optimal rate of efficiency.
38. Rostering additional employees at lower classifications and/or apprentices is a more cost-effective and productive outcome for the Salons. It is the basis upon which employees are rostered to work on other days of the week. On Sundays and public holidays however, only a skeleton staff is rostered and as a result, the Zucci Lifestyle Salon does not enjoy the same efficiencies on those days.
39. If the penalty rates were lowered in accordance with HABA's claim, there would be greater scope to roster employees on Sundays and public holidays on the same basis as other days. Based on my experience, I consider that this would improve efficiency.
40. For example, I consider that apprentices form a valuable part of the business model because they are engaged to predominantly provide 'value add' services such as head and neck massages, hand rituals, mini facials etc. They are also assigned tasks such as sweeping the floor, attending to the front counter, getting beverages for clients and undertaking specific tasks associated with colouring and styling hair.
41. This distribution of labour gives experienced stylists greater capacity to perform other work that is of higher value to the Salons, because it generates greater revenue. I.e. the stylists have greater capacity to move from client to client performing higher level work, thus increasing the Salons' efficiency and productivity.

42. As another example, a casual receptionist is rostered to work on Monday – Saturday at the Zucci Lifestyle Salon. Whilst the employee's specific hours of work can vary week to week, she is never rostered to work on Sundays. This means that if someone needs assistance at the front desk or there is a telephone enquiry, either the senior operator or apprentice attends to it. If they do so whilst also attending to a client's hair, this is both inefficient and compromises the salon's service delivery to that client.
43. Currently, there are certain tasks that cannot be undertaken on a Sunday at the Zucci Lifestyle Salon such as stocktake. If more employees there would be greater capacity for such activities to be undertaken.
44. If HABA's claim was granted, I would also aim to trial opening the Salons other than the Zucci Lifestyle Salon on Sundays and public holidays.



Rocco Petrucci

Date: 28-2-18

IN THE FAIR WORK COMMISSION

AM2017/40 Penalty Rates – Hair and Beauty Industry Award 2010

WITNESS STATEMENT OF ELKE RICHTER

I, Elke Richter of [REDACTED] do solemnly and sincerely declare and state the following:

1. I run the following salons that are owned by my family's business (**Salons**):

Salon	Commenced operation
Forever Beautiful at Advanced Beauty Concepts and Medispa (Forever Beautiful) (Cottesloe, WA)	2008
Advanced Beauty Concepts and Medispa (Advanced Beauty) (Mosman Park, WA)	2005
Skin Inspired (Leederville, WA)	2015

2. I am responsible for overseeing the running of the Salons. This includes, amongst other responsibilities, the recruitment of employees and overseeing the preparation of rosters.

The Salons and their Employees

Forever Beautiful

3. Forever Beautiful offers a broad range of beauty services including:
- a) Clinical treatments such as microdermabrasion, peels, Omnilux, IPL hair removal & skin rejuvenation;
 - b) Facials;
 - c) Relaxation treatments including body exfoliation and massage;
 - d) Eye treatments such as eyebrow tinting, eyelash tinting and eyelash extensions;
 - e) Manicures, pedicures and other hands and feet treatments;
 - f) Waxing;

g) Tanning; and

h) Make-up, including bridal make-up.

4. As at 1 March 2018, Forever Beautiful's opening hours are as follows:

Day	Opening Hours
Monday	9:00am – 6:00pm
Tuesday	9:00am – 7:00pm
Wednesday	9:00am – 7:00pm
Thursday	9:00am – 8:00pm
Friday	9:00am – 6:00pm
Saturday	8:00am – 4:00pm
Sunday	Closed
Public holidays	Closed

5. As at 1 March 2018, Forever Beautiful employs five casual therapists and two casual receptionists. It is my understanding that those employees are covered by the *Hair and Beauty Industry Award (Award)*.

Advanced Beauty

6. Advanced Beauty offers a range of treatments that are similar to those offered at Forever Beautiful.

7. As at 1 March 2018, Advanced Beauty's opening hours are as follows:

Day	Opening Hours
Monday	9:00am – 5:30pm
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 5:30pm
Thursday	9:00am – 8:00pm
Friday	9:00am – 5:30pm
Saturday	8:30am – 3:00pm
Sunday	Closed
Public Holidays	Closed

8. As at 1 March 2018, Advanced Beauty employs five casual therapists, one casual receptionist and one permanent part-time receptionist. It is my understanding that those employees are covered by the Award.

Skin Inspired

9. Skin Inspired is primarily a distribution agency for Inskincosmedics. It is a wholesale business that sells skin care, beauty products and equipment to beauty salons and medical practices. The employees who perform work associated with this distribution function are employed as Business Development Managers. They are not hairdressers or beauty therapists and it is my understanding that they are not covered by the Award.
10. In the same location, Skin Inspired also runs a small beauty salon.
11. As at 1 March 2018, the opening hours of the salon at Skin Inspired are:

Day	Opening Hours
Thursday	9:00am – 7.00pm
Saturday	9:00am – 3:00pm
Sunday – Wednesday and Friday	Closed
Public holidays	Closed

12. As at 1 March 2018, there is 1 casual therapist employed by Advanced Beauty who works some of her shifts at Advanced Beauty and some of her shifts at the Skin Inspired salon. It is my understanding that she is covered by the Award.

The Salons' Operations

13. The nature of the work performed by the Salons' employees is client-focussed and therefore labour intensive. An employee will generally be focussed on only one client at a time. Whilst they are servicing that client, they are typically unable to service any other client or undertake other tasks.
14. The cost of labour represented 42% of Forever Beautiful's revenue during the 2016/2017 financial year. It represented 49% of Advanced Beauty's revenue during the 2016/2017 financial year. The Salons also incur various other operational costs such as rent, electricity and water.
15. The Salons face a lot of competition because there are several other beauty salons nearby providing the same or similar services as them. The services provided by the Salons are not, as such, unique.

16. The pricing structure of the services offered by the Salons is influenced significantly by the prices charged by the Salons' competitors.
17. I have observed that in respect of some of the services offered by the Salons, its prices are already at the top of the range of prices charged by their competitors. This is because they provide a premium quality service and they are targeting the portion of the market that wants high quality services. However, I do not consider that the Salons prices can be increased further at this stage for the reasons explained at paragraphs 15 – 19 of this statement.
18. I have observed that many customers are very price sensitive. When the Salon has increased prices for its services in the past, I have received negative feedback and complaints from customers. Employees of the Salons have also received negative feedback.
19. Because of this feedback, the Salons have not increased their prices since 2016 for certain services that are widely available at other salons and which bring a high volume of customers into the Salons, such as waxing.
20. I have previously employed casual employees who wanted to work only on the weekends because they had study commitments or caring responsibilities.
21. Typically, when recruiting for a new beauty therapist, the Salons will advertise for a "Beauty / Dermal Therapist". Depending upon the time of year that the advertisement is published, the Salons receive up to 50 applications for such a role.
22. Many trainees have considerable difficulty finding a position with a salon. I have previously engaged trainees and consider that they require intense supervision and on-the-job training, which is very time consuming and labour intensive.

Hair and Beauty Australia's Claim

23. I understand that Hair and Beauty Australia has proposed a variation to the Award to reduce Sunday and public holiday penalty rates as follows:

	Current Rate	Proposed Rate
Sunday	200% of hourly rate	150% of hourly rate
Public holiday	250% of hourly rate	225% of hourly rate

24. I understand that the proposed change would be relevant to the Salons' Award-covered full-time, part-time and casual employees.
25. The majority of the Salons' Award-covered employees are paid in accordance with the Award.
26. Some of the Salons' Award-covered employees are paid above the Award. In certain cases, this is because when they were first employed, they were being paid above the Award by their ex-employer. In my experience, to attract such employees, it is necessary to agree to pay at least as much as their previous employer if not more.

Trading on Sundays


27. Forever Beautiful is located on a street front amongst a strip of shops, restaurants and cafes, many of which are open on Sundays. As a result, there is considerable foot traffic in the area on Sundays.
28. Advanced Beauty is the busiest of the Salons. It is located in a shopping centre. That shopping centre is currently undergoing refurbishments and as a result, Advanced Beauty will be relocated to another part of the shopping centre, near eateries and food outlets, which will be open on weekends. This relocation is expected to occur in October 2018.
29. I am aware that some of the Salons' competitors who operate nearby are open on Sundays. I am concerned that, because they provide services that are similar to the Salons, customers take their business there instead of coming to the Salons on alternate days when they are open.

30. The Salons rely on repeat business from their customers. Once a customer goes to a competitor, in my experience it is difficult to regain their business.
31. I consider that there is sufficient demand for Forever Beautiful and Advanced Beauty's services for those salons to open on Sundays. Based on my experience, I consider that the foot traffic near those salons would generate walk in clientele. Further, the Salons' often receive queries from their customers as to whether they are open on Sundays.
32. Despite this, I am currently deterred from opening Forever Beautiful and Advanced Beauty on Sundays because of the penalty rates payable under the Award.
33. Forever Beautiful opens on the three Sundays prior to Christmas. This is because of the high demand for its services leading up the festive season. It also opens partly out of a sense of obligation to its customers, many of whom expect the salon's services to be available.
34. During that period, Forever Beautiful's employees are generally rostered so that they are not required to work on both Saturday and Sunday during any of those three weekends. I have not received any complaints from employees about having to work on a Sunday.
35. A 10% surcharge is charged on all services offered by Forever Beautiful on those Sundays, however that does not completely offset the higher labour costs that the salon faces on Sundays because of the penalty rates. Some customers have complained about the surcharge or have queried why they have to pay it.
36. I have observed that customers are very busy during December with a range of personal and professional commitments and Forever Beautiful's services are in high demand on Sundays as a result. Also, customers' need for Forever Beautiful's services is often time sensitive (for example, they want a certain treatment in time for a Christmas party that they are attending or before they leave for a holiday). These circumstances do not, however, apply all year round.

37. Accordingly, I consider that I cannot implement a surcharge on Sundays throughout the year if the Salons opened on Sundays because I am concerned that customers would be very dissatisfied and may take their business elsewhere as a result.
38. Further, some of the services provided by the Salons are sold as packages, which involve repeat visits by the customer to receive a series of treatments. The price for that series of treatments is quoted and sometimes paid in full when they first start the treatment. If a 10% surcharge was implemented on Sundays, it would require the relevant Salon to adjust that quote if the customer chooses to access one or more of the treatments on a Sunday. Based on the feedback I have received about price increases to the Salons' services and the 10% surcharge implemented before Christmas, I expect that many customers would be dissatisfied with such an arrangement.

The Potential Impact of a Reduction to the Sunday Penalty Rate

39. If the penalty rate payable on Sundays is reduced to 150%, I would open Advanced Beauty and Forever Beautiful on Sundays. I would initially do this cautiously, by opening for half the day and rostering a small number of employees. If the salons had sufficient clientele on Sundays, I would then consider extending the opening hours and rostering additional staff, including by engaging new employees.
40. The current 200% penalty rate is too high to allow me to take the risk of opening on a Sunday but if the penalty rate was 150%, I would be willing to take that risk and allow the business to develop on Sundays over time, even if initially the salons were not profitable on Sundays. The current penalty rate of 200%, however, deters me from taking that risk because of the potential financial implications if it does not succeed.



Elke Richter

Date:

IN THE FAIR WORK COMMISSION

AM2017/40 Penalty Rates – Hair and Beauty Industry Award 2010

WITNESS STATEMENT OF BENNY KHOO

I, Benny Khoo of [REDACTED], do solemnly and sincerely declare and state the following:

1. My wife and I run three Khool Hair and Beauty salons in Brisbane (**Salons**). They are located at the:
 - a) Sunnybank Hills Shopping Centre (**Sunnybank Hills Salon**);
 - b) Bellbowrie Shopping Plaza (**Bellbowrie Salon**); and
 - c) Park Ridge Shopping Centre (**Park Ridge Salon**).
2. The oldest of the Salons opened 10 years ago.

The Salons' Employees and Opening Hours

3. As at 28 February 2017, the Salons employ 14 employees covered by the *Hair and Beauty Industry Award 2010* (**Award**). This includes a combination of full-time employees, part-time employees, casual employees and apprentices. There is no enterprise agreement applying to these employees.
4. Currently, there are three apprentices employed at the Salons. I used to employ more apprentices but in 2014, it is my understanding that the minimum wages payable to apprentices under the Award increased significantly. Because of this cost increase, I have since been employing fewer apprentices.
5. In my experience, it is difficult to recruit qualified and skilled hairdressers. I continue to employ a small number of apprentices because during their apprenticeship and after it is completed, apprentices provide trained and qualified labour for the Salons.
6. The Salons' operating hours as at 28 February 2018 are as follows.

The Sunnybank Hills Salon

7. The Sunnybank Hills Salon's opening hours are as follows:

Day	Opening Hours
Monday	9:00am – 5:30pm
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 5:30pm
Thursday	9:00am – 9:00pm
Friday	9:00am – 5:30pm
Saturday	9:00am – 4:00pm
Sunday	Closed
Public holidays	Closed

The Bellbowrie Salon

8. The Bellbowrie Salon's opening hours are as follows:

Day	Opening Hours
Monday	9:00am – 5:30pm
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 5:30pm
Thursday	9:00am – 9:00pm
Friday	9:00am – 5:30pm
Saturday	9:00am – 4:00pm
Sunday	Closed
Public holidays	Closed

The Park Ridge Salon

9. The Park Ridge Salon's opening hours are as follows:

Day	Opening Hours
Monday	9:00am – 5:30pm
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 5:30pm
Thursday	9:00am – 9:00pm
Friday	9:00am – 5:30pm
Saturday	9:00am – 4:00pm
Sunday	Closed
Public holidays	Closed

Hair and Beauty Australia's Claim

10. I understand that Hair and Beauty Australia has proposed a variation to the Award to reduce Sunday and public holiday penalty rates as follows:

	Current Rate	Proposed Rate
Sunday	200% of hourly rate	150% of hourly rate
Public holiday	250% of hourly rate	225% of hourly rate

11. I understand that the proposed change would apply to the Salons' Award-covered full-time, part-time and casual employees.

Trading on a Sunday

12. Based on my 13 years of experience of running the Salons, I have observed that various operational costs have increased. This includes electricity, wages, prices for the products used at the Salons to service clients and very significant increases in rent. I consider that I am unable to provide more detailed information about the Salons' rental expenses and the specific increases to rental expenses because it is confidential information.
13. The rent paid by the Salons is the same, regardless of how many days in a week the Salons trade.
14. One of the ways in which the Salons have tried to reduce costs is by rostering the bare minimum number of employees at a time. Also, I have not been replacing any employees that leave the business immediately because of the high costs facing the Salons. Instead I have been trying to make do and only replace them if it is essential.
15. Making decisions regarding rostering is a two-edged sword. On the one hand, less employees means less scope to take on more business and therefore increase revenue. However, more employees means more costs and inefficiencies if those employees are not busy all the time.
16. Because wage costs are so high, the Salons are more cautious about how many employees are rostered on and therefore take the first approach rather than the second one.

17. Because there are less employees rostered on, the Salons can take less appointments and have less capacity to service walk-in customers. I am aware that the Salons often have to turn customers away because there is insufficient staff to attend to them.
18. Another way in which I have tried to tackle increased costs is by opening the Sunnybank Hills Salon on Sundays.
19. The Sunnybank Hills Salon was opened on Sundays during the 10 weeks leading up to Christmas in 2017. This was because there is a very high demand for hair and beauty services in the lead up to Christmas; however, it is not that busy all year round. It was also because three employees requested that we open on Sundays to help them make some extra money in the lead up to Christmas.
20. Since Christmas 2017, the Sunnybank Hills Salon has not opened on Sundays.
21. However, commencing 4 March 2018, the Sunnybank Hills Salon will open on Sundays. Because the penalty rates are so high, only my wife and I will work on Sundays. The Sunnybank Hills Salon cannot bear the financial risk of rostering additional employees on Sundays under the current penalty rates in case there are not enough customers to keep those employees constantly busy.
22. As a result, not all services will be offered. Only men's haircuts and some women's haircuts will be available. No beauty services or more complex hairdressing (such as colouring) will be offered. This is a way of trying to increase revenue while increasing costs by a smaller proportion.
23. The Salons' prices are based partly on what its competitors charge for similar services.
24. There is very limited scope to pass on increased costs to the Salons' customers. This is because:
 - a) Customers can access the same services from a competitor if they find the Salons too expensive. Most of the Salons' customers are regular customers, who attend routinely. If one of those clients leaves, the loss

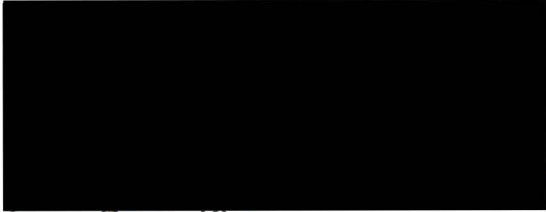
of revenue to the Salons is ongoing and it is very difficult to regain their business.

- b) In my experience, there is less consumer confidence now than there has been in the past. I have observed that customers are spending less money at the Salons by either coming less frequently or accessing fewer services.
25. Despite the very high costs facing the Salons, its pricing structure is roughly the same or only slightly more than its competitors. I am concerned that if the Salons' prices are noticeably higher than its competitors' prices, clients would no longer come to the Salons.

The Potential Impact of a Reduction to the Sunday Penalty Rate

26. Some of the Salons' employees have asked to work on Sundays. I am aware that they have personal financial circumstances (e.g. a mortgage) because of which they want to work on a Sunday.
27. If the Sunday penalty rate was lowered to 150%, I would roster others (i.e. not just my wife and I) to work on Sundays at the Sunnybank Hills Salon. This would include existing staff and new staff who are willing to work on a Sunday. As a result, the Sunnybank Hills Salon would be able to service more clients and it would be able to offer a broader range of its services on Sundays.
28. If the Sunday penalty rate was lowered to 150%, I would also roster apprentices to work on Sundays. Apprentices can undertake specific tasks such as cleaning, sweeping the floor, making tea or coffee for clients, answering the telephone, washing hair and colour application. This frees up more of the qualified hairdressers' time to perform skilled tasks such as cutting and styling hair. This improves efficiency.
29. If the Sunday penalty rate was lowered to 150%, I would also extend the opening hours of the Sunnybank Hills Salon beyond 10:00am – 2:00pm. The shopping centre that it operates in is open until 6:00pm.

30. The lower penalty rate would make it more viable to have extra staff over longer opening hours, even if the employees did not have back-to-back clients all day every Sunday.



Benny Khoo

Date: 1/3/2018

IN THE FAIR WORK COMMISSION

AM2017/40 Penalty Rates – Hair and Beauty Industry Award 2010

WITNESS STATEMENT OF SARKIS AKLE

I, Sarkis Akle of [REDACTED] do solemnly and sincerely declare and state the following:

1. I am the Director of Hair by Phd. I have held this position since 1997.
2. In my role as Director, I am responsible for the back-end management of Hair by Phd. This includes a range of duties including rostering, staff training, marketing, and managing the business' finances. I spend time across all of Hair by Phd's Salons (**Salons**).
3. I have worked in the hairdressing industry since 1985.

The Salons

4. There are three Salons. All are located in Sydney:
 - a) Phillip Street, Parramatta (**Parramatta Salon**);
 - b) Carmen Drive, Carlingford (**Carlingford Salon**); and
 - c) Albert Barker Arcade, Camden (**Camden Salon**).
5. The Salons provide haircuts, styling, colouring and treatments.
6. The operating hours and employee numbers of the Salons as at 7 March 2018 are below.

The Parramatta Salon

7. The opening hours of the Parramatta Salon are as follows:

Day	Opening Hours
Monday	Closed
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 8:00pm
Thursday	8:30am – 9:00pm
Friday	8:30am – 5:30pm
Saturday	8:00am – 4:00pm
Sunday	Closed
Public holidays	Closed

8. There are 15 employees employed at the Parramatta Salon. It is my understanding that they are all covered by the *Hair and Beauty Industry Award 2010 (Award)*. They are employed on a full-time or casual basis as follows:

Type of Employment	Number
Full-time	11
Casual	4
Total	15

9. There is no enterprise agreement applying to these employees.

The Carlingford Salon

10. The opening hours of the Carlingford Salon are as follows:

Day	Opening Hours
Monday	Closed
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 9:00pm
Thursday	9:00am – 5:30pm
Friday	9:00am – 5:30pm
Saturday	8:00am – 4:00pm
Sunday	Closed
Public holidays	Closed

11. There are 6 employees employed at the Carlingford Salon. It is my understanding that they are all covered by the Award. They are employed on a full-time or casual basis as follows:

Type of Employment	Number
Full-time	5
Casual	1
Total	6

12. There is no enterprise agreement applying to these employees.

The Camden Salon

13. The opening hours of the Camden Salon are as follows:

Day	Opening Hours
Monday	Closed
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 9:00pm
Thursday	9:00am – 5:30pm
Friday	9:00am – 5:30pm
Saturday	8:00am – 4:00pm
Sunday	Closed
Public holidays	Closed

14. There are 3 full-time employees employed at the Camden Salon. I understand that they are covered by the Award.
15. There is no enterprise agreement applying to these employees.

Hair and Beauty Australia's Claim

16. I understand that Hair and Beauty Australia (**HABA**) has proposed a variation to the Award to reduce Sunday and public holiday penalty rates as follows:

	Current Rate	Proposed Rate
Sunday	200% of hourly rate	150% of hourly rate
Public holiday	250% of hourly rate	225% of hourly rate

17. I understand that the proposed change would be relevant to the Salons' Award-covered full-time, part-time and casual employees.

Trading on Sundays and Public Holidays

18. For a period of 12 – 18 months during 2012 – 2013, the Parramatta Salon opened on Sundays. It ceased trading on Sundays because of the high labour costs that it was incurring on Sundays. I did not consider that operating on Sundays was viable.
19. Due to the high Sunday penalty rate, a cautious approach was taken to rostering. For example; generally only two stylists were rostered to work and the receptionist was never rostered to work on Sundays.
20. I conceive of labour costs as an investment in the business, however there is a risk that the business will not receive a sufficient return to cover the cost of that investment, let alone make a profit. That risk is heightened when the cost of the investment is so high (i.e. an hourly rate of 200% or 250%).
21. As the Parramatta Salon became busier on Sundays, there appeared to be a need to roster additional staff, however this further increased labour costs. Rostering additional employees resulted in the business carrying the risk that such employees would not be productively engaged for their full shift and as a result, there would be a very small return on that investment.
22. The Parramatta Salon was often unable to service walk in customers on Sundays because of the low staffing levels. I was concerned that if fewer employees were rostered to work on Sundays, the Parramatta Salon would have to turn away many customers who contacted the salon to make an appointment and/or walk in clients.
23. Turning away customers has two consequences:
 - a) A lost opportunity to generate revenue and recover some of the Parramatta Salon's costs; and
 - b) A potentially disappointed and/or unhappy customer who, in addition, may not attend the Parramatta Salon again.

24. I did not implement a surcharge on Sundays when the Parramatta Salon opened because I was concerned that customers would react adversely and leave the business.
25. I remain concerned that customers would react that way if the Salons currently opened on Sundays and implemented a surcharge. Accordingly, if the Salons opened on Sundays, I would not implement a surcharge.
26. The Salons receive queries from some new and existing customers about whether they open on Sundays.
27. None of the Salons open on public holidays. I consider that because of the current penalty rate of 250%, labour costs are too high for the Salons to viably operate on public holidays.

The Salons' Pricing Structure

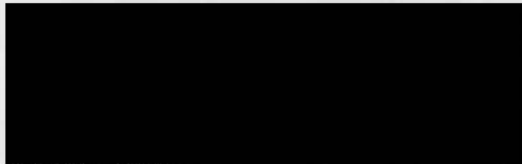
28. I review the Salons' prices annually. The purpose of the review is to evaluate whether the prices need to be increased in light of the Salons' costs. Some of Salons' costs, such as rent and wages, increase every year.
29. The Salons cannot, however, pass on all its cost increases to customers. This is because the hairdressing industry is very competitive. I consider that there is a risk that if prices are increased too far, the Salons will be priced out of the market.
30. The Salons competitors include other hairdressing salons, however it is not limited to those salons. I consider that the Salons are also competing against other discretionary expenditure by the Salons' customers. That is, I conceive of money spent by customers on their hair as constituting a portion of their discretionary spending. The services provided by the Salons are not, as such, essential services; apart from basic haircuts. Therefore, I consider that the Salons are effectively competing for a portion of a customer's discretionary spending, which they will otherwise spend on something else. I consider that this factor also limits the extent to which the Salons' prices can be increased.

The Potential Impact of a Reduction to the Sunday Penalty Rate

31. I have observed that there are several new residential apartment blocks and other housing in and around Parramatta, which has developed recently. As a result of these developments, I consider that there is a new market for the Parramatta Salon to try to attract.
32. The potential customers that fall within that new market can be distinguished from our current largely transient clientele who generally work in the Parramatta CBD or are passing foot traffic through what is known as Parramatta's 'Eat Street'; a large number of restaurants and cafes along Phillip Street and the nearby Church Street. The new market consists of local potential customers who live in the Parramatta CBD or surrounding areas. In my experience, such local clientele often brings repeat business.
33. To the extent that some of those potential customers work on weekdays, I consider that opening the Parramatta Salon on a Sunday would give them an additional opportunity to access Hair by Phd's services; not just one-off but also on an ongoing basis.
34. The Parramatta Salon's aim is to attract new customers, retain existing customers and continually grow its business. Opening on Sundays is an additional opportunity to attract, retain and grow the business.
35. The observations I have made in the paragraphs above about the growth of the residential population in and around Parramatta has caused me to consider opening on Sundays in recent times, however because of the current penalty rate, I have not felt confident about taking the risk of opening. If the Sunday penalty rate was reduced to 150%, I consider that that risk would be reduced significantly and I would open the Parramatta Salon on Sundays.
36. I am aware that the nearby restaurants and cafes referred to above are generally open on Sundays. I expect that as a result, the Parramatta Salon would have walk in customers visit on Sundays from the resulting foot traffic. This is consistent with my experience of opening the Parramatta Salon on Sundays in 2012 – 2013. The foot traffic in the area brought in walk in customers.

Sundays in 2012 – 2013. The foot traffic in the area brought in walk in customers.

37. Initially, I would roster two stylists and an apprentice to work on Sundays. If the business grew busier, I would increase the number of employees rostered to work on Sundays. I would roster existing employees willing to work on Sundays and, if the need arose, recruit additional casual staff to work on Sundays.



Sarkis Akle

Date: 9/3/18.

IN THE FAIR WORK COMMISSION

AM2017/40 Penalty Rates – Hair and Beauty Industry Award 2010

WITNESS STATEMENT OF GRAHAM PHILLIP DOWNS

I, Graham Phillip Downs of [REDACTED] do solemnly and sincerely declare and state the following:

1. I am a Director of the following four entities that own and operate four Just Cuts franchises (**Salons**):

Entity	Ownership Commenced
Just Cuts Belmont Belmont Cuts Pty Ltd (ACN 622 460 762) as trustee of the Belmont Trust	November 2017
Just Cuts Cockburn Downet (WA) Pty Ltd (ACN 127165057) as trustee of the Success Trust	October 2007
Just Cuts Booragoon Booragoon Pty Ltd (ACN 600 981 913) as trustee of the Booragoon Family Trust	October 2014
Just Cuts Karrinyup KGYK Pty Ltd (ACN 162970 667) as trustee for the Karrinyup Trust	June 2013

2. In my role, I am responsible for the overall operations of the Salons. This includes satisfying franchising requirements, involvement in negotiation and renegotiation of leases, marketing, payroll, managing budgets and the financial operations of the businesses.
3. The day to day management at each Salon is undertaken by team leaders who report to me.
4. By profession I am a Chartered Accountant, Registered Tax Agent and Licensed Financial Adviser.

Just Cuts

5. There are approximately 170 – 180 Just Cuts salons in Australia. Just Cuts is the largest hairdressing franchise in the Southern Hemisphere. Generally, all Just Cuts salons are franchised. It is my understanding that on occasion Just Cuts may own and operate a salon temporarily where, for example, the salon is between franchisees.
6. The Salons also sell Just Cuts hair products, including products under Just Cuts' brand name of 'Justice Professional'.
7. Just Cuts is the lessee in the case of each of the Salons. The Salons sublease from Just Cuts. I am heavily involved in the negotiation and renegotiation of the Salons' leases alongside personnel from Just Cuts.

The Salons

8. The opening hours and employee numbers of the four Salons as at the time of drafting this statement are set out below. It is my understanding that all employees employed at the Salons are covered by the *Hair and Beauty Industry Award 2010 (Award)*.
9. In each of the Salons, labour constituted just under 50% of their revenue during the 2016/2017 financial year.
10. Each of the Salons operate in a shopping centre (**Shopping Centres**) in Perth, Western Australia.
11. The Salons do not take appointments from customers. Customers are serviced on a walk-in system only.

Just Cuts Belmont

12. Just Cuts Belmont is located in the Belmont Forum Shopping Centre.
13. Just Cuts Belmont's opening hours are as follows:

Day	Opening Hours
Monday	9:00am – 5:30pm
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 5:30pm
Thursday	9:00am – 9:00pm
Friday	9:00am – 5:30pm
Saturday	9:00am – 5:00pm
Sunday	11:00am – 4:00pm
Public holidays	Closed

14. There are six casual stylists employed by Just Cuts Belmont.

Just Cuts Cockburn

15. Just Cuts Cockburn is located in the Cockburn Gateway Shopping Centre.
16. Just Cuts Cockburn's opening hours are as follows:

Day	Opening Hours
Monday	9:00am – 5:30pm
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 5:30pm
Thursday	9:00am – 9:00pm
Friday	9:00am – 5:30pm
Saturday	9:00am – 5:00pm
Sunday	11:00am – 4:00pm
Public holidays	Closed

17. There are seven casual stylists employed by Just Cuts Cockburn.

Just Cuts Booragoon

18. Just Cuts Booragoon is located in the Garden City Shopping Centre.
19. Just Cuts Booragoon's opening hours are as follows:

Day	Opening Hours
Monday	8:30am – 5:30pm
Tuesday	8:30am – 5:30pm
Wednesday	8:30am – 5:30pm
Thursday	8:30am – 9:00pm
Friday	8:30am – 5:30pm
Saturday	8:30am – 5:00pm
Sunday	11:00am – 4:00pm
Public holidays	Closed

20. There are six casual stylists employed by Just Cuts Booragoon.

Just Cuts Karrinyup

21. Just Cuts Karrinyup is located in the Karrinyup Shopping Centre.
22. Just Cuts Karrinyup's opening hours are as follows:

Day	Opening Hours
Monday	9:00am – 5:30pm
Tuesday	9:00am – 5:30pm
Wednesday	9:00am – 5:30pm
Thursday	9:00am – 9:00pm
Friday	9:00am – 5:30pm
Saturday	9:00am – 5:00pm
Sunday	11:00am – 4:00pm
Public holidays	Closed

23. There are seven casual stylists employed by Just Cuts Karrinyup.

The Nature of the Hairdressing Industry

24. I consider that the hairdressing industry is very competitive and that competition has increased during the time that I have owned Just Cuts salons.
25. I have observed that over time, the proportion of retail shops as compared to services in the Shopping Centres has changed. The proportion of retail shops has declined and the proportion of services (including hairdressers, beauty services

and food outlets) has increased. As a result, there is a greater number of competitors of the Salons in the Shopping Centres than there was in the past.

26. In the 10 years that I have owned Just Cuts Cockburn, I have observed a direct correlation between the increased number of other hairdressing salons in the Cockburn Gateway Shopping Centre and a reduction in Just Cuts Cockburn's profits.

Trading on Sundays

27. At least two stylists are rostered to work on Sundays at the Salons. For reasons associated with safety and security, the Salons do not roster only one employee to work at a time despite my concerns about labour costs on Sundays. Where a Salon is particularly busy, three stylists are rostered to work on Sundays.
28. The trading hours of the Salons on Sundays are shorter than the trading hours of the respective Shopping Centres. This is because it is not cost effective to expand the Salons' trading hours and roster employees to work at times when customer demand is lower than it is during the hours of 11:00am – 4:00pm.
29. Despite this, over the course of a Sunday, there are peaks and troughs in customer demand. Certain times of the day are busier than others. For example, the Salons are generally visited by fewer customers between 11:00am – 12:00pm and 3:00pm – 4:00pm than the middle of the day.
30. Because the Salons do not take appointments, customers often have to wait before they can be serviced. Whilst the waiting times vary from Salon to Salon, Sunday to Sunday and within the course of a given Sunday; the waiting time on Sundays often exceeds one hour. These waiting times are of concern, particularly considering that some of the Salons' competitors sometimes trade on Sundays.
31. The Salons regularly roster additional employees on Monday – Friday in order to ensure the convenience of customers by minimising waiting times.
32. Rostering only 2 – 3 employees on Sundays results in certain inefficiencies. For example, every time the phone rings or a customer/potential customer arrives at the front desk, a stylist attends to the customer even if they are attending to another

customer's hair at the time. It therefore takes the stylist longer to finish working on that customer's hair, which extends waiting times for other customers.

33. Despite this, I consider that the Sunday penalty rate is too high to roster an additional employee (or additional employees) because there is a risk that they will not be productively engaged throughout the duration of their shift. I consider that it is not cost effective to roster an employee to work where they are not gainfully employed throughout their shift on Sundays because of the 200% penalty rate.
34. Because all the Salons' stylists are casual employees, it is my understanding that they must be engaged for at least three hours at a time. Within a period of three hours, the Salons can go from being very busy to very quiet, depending on the number of customers that visit the Salon. This makes rostering an additional employee on a Sunday even more costly.
35. I consider that the Salons' customers have come to rely upon and expect the Salons to be open on Sundays. This is particularly the case because they have been trading on Sundays for some time.
36. I am concerned that if the Salons did not open on Sundays, they would receive complaints from customers and/or that the Salons' customers would go to one of its competitors. I am particularly concerned that loyal customers might cease to attend the Salons on an ongoing basis.
37. Accordingly, the Salons open on Sundays so that they provide customers with the convenience of being able to access Just Cuts' services on Sundays.
38. Employees are not made to work on Sundays. They are only rostered to work on Sundays if they agree to.
39. The Salons have not experienced any difficulty finding employees who are willing to work on Sundays. Some of the Salons' employees only work on weekends because, for instance, they have caring responsibilities for children who are looked after by another family member on the weekend.
40. When determining the roster for a Sunday, preference is given to employees who are efficient. An inefficient hairdresser, who takes longer to cut hair than other employees, is very costly for a Salon on a Sunday because of the 200% penalty

rate. In order for the Salons' operations to be cost effective on Sundays, the Salons' first preference is to roster its most efficient employees, who are capable of bringing in a return that is greater than the Salons' less efficient or inefficient employees.

41. The efficiency of individual employees is also important in circumstances where the Salons are only rostering 2 – 3 employees to work on Sundays and there are often long waiting times as a result. If one of those 2 – 3 employees is inefficient, that increases waiting times further.
42. Just Cuts determines the services provided by its franchisees. The primary service is a 'Style Cuts cut', which has a core price of \$31. Franchisees do not have the discretion to charge any other price for a Style Cuts cut. The core price is mandatory.
43. The exception to that rule is the special prices charged for certain categories of customers, such as senior citizens and children. In those instances, Just Cuts sets a narrow range within which the franchisees must charge. Accordingly, franchisees have slightly more discretion as to how much is charged in relation to such services.
44. For those services, the Salons charge a price that falls approximately at the middle of the range set by Just Cuts. On Sundays, however, the Salons charge the full price (i.e. \$31) for all cuts because of the higher labour costs incurred on Sundays. The Salons have received a number of complaints from customers about this.
45. There are also various additional services that are offered such as shampoos and 'Blow Waves'. The core price of a Blow Wave is \$55 - \$75, depending upon the length of the customer's hair.
46. A Blow Wave can take up to an hour. At some of the Salons, Blow Waves are not offered on Sundays because of the period of time they take to complete. The relevant Salons determined that offering Blow Waves was an inefficient use of the Salons' resources having regard to the time taken to complete a Blow Wave and the return that the Salon receives on that time. Further, the relevant Salons had observed that by offering Blow Waves on Sundays, because only 2 – 3 stylists were rostered to work at a time, the waiting time of other customers increased as a result. For example, the provision of one Blow Wave could result in a waiting time for other customers of an hour or more.

47. One of the Salons has received a complaint from a customer who wanted a Blow Wave on a Sunday but was told that the Salon could not provide that service on that day.
48. It is my understanding that in Western Australia, shops cannot be made to open on Sundays by lessors.
49. The lease agreement between Just Cuts and the relevant lessors in relation to each of the Salons do not include Sundays or public holidays as part of their core hours. Because the Salons nonetheless open on Sundays, Just Cuts (and as a result, the Salons) are required to pay an additional amount in rent and outgoing expenses in relation to their Sunday trading hours.
50. The specific practices of the Shopping Centres vary in this regard. The additional amounts are either charged as an hourly amount depending on the specific number of hours that the Salons open on Sundays or alternatively they are charged as an extra amount for the day, regardless of their specific trading hours.
51. It is my understanding that trading on a Sunday in Western Australia used to be prohibited, but that prohibition has since been lifted. It is my understanding that, nonetheless, a shopping centre cannot require the Salons to open on Sundays.

Hair and Beauty Australia's Claim

52. I understand that Hair and Beauty Australia has proposed a variation to the Award to reduce Sunday and public holiday penalty rates as follows:

	Current Rate	Proposed Rate
Sunday	200% of hourly rate	150% of hourly rate
Public holiday	250% of hourly rate	225% of hourly rate

53. I understand that the proposed variation would be relevant to the Salons' Award-covered full-time, part-time and casual employees.

The Potential Impact of a Reduction to the Sunday Penalty Rate

54. If the Sunday penalty rate was reduced to 150%, an additional stylist or stylists would be rostered to work at some Salons on busy Sundays and/or trading hours would be extended. This would have the benefit of improving customer service by reducing waiting times.
55. A lower penalty rate would allow me the take the financial risk associated with rostering an additional employee (or additional employees) and/or extending trading hours with the aim of developing the Salons' business on Sundays further.
56. I would also review the Salons' pricing structure on Sundays and reconsider whether to continue charging the full price on Sundays for all Just Cuts cuts.



Graham Downs

Date: