



# STATEMENT

*Fair Work Act 2009*

s.160—Application to vary a modern award to remove ambiguity or uncertainty or correct error

## Variation on the Commission’s Own Motion—Concrete Products Award 2020

(AM2021/5)

Cement and concrete products

JUSTICE ROSS, PRESIDENT

MELBOURNE, 12 MAY 2021

*Concrete Products Award 2020 – provisional view to vary to correct error.*

### Introduction

[1] On 14 February 2020, the Full Bench in AM2019/17 issued a determination finalising the technical and drafting review of the *Concrete Products Award 2020* (the Award) as part of the 4 yearly review of modern awards, operative from 4 May 2020.<sup>1</sup> On 30 April 2020 a correction determination was issued by the Full Bench which took effect on 4 May 2020.<sup>2</sup>

[2] An error has been identified concerning the description of the ‘Bituminous sprayer allowance—Sand-blasting allowance’ in clause C.1.2 of the Award.

[3] Clause 18.2(f)(iii) of the Award sets out the wage-related Bituminous sprayer allowance for an employee using a sandblasting machine:

‘(iii) An employee required to use a sand-blasting machine will be paid an allowance of \$0.93 per hour or part of an hour whilst so engaged.’ [emphasis added]

[4] The allowances payable under the Award are also set out in a summary table at Schedule C. The Bituminous sprayer allowances appear at table C.1.2:

‘**C.1.2** The following wage-related allowances in this award are based on the standard hourly rate as defined in clause 2—Definitions as 1/38th of the standard weekly rate for a Level 1 in clause 16.1 = **\$19.84**.

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<sup>1</sup> [PR716630](#).

<sup>2</sup> [PR718385](#).

<b>Allowance</b>	<b>Clause</b>	<b>% of standard hourly rate</b>	<b>\$</b>	<b>Payable</b>
Cement or concrete allowance	18.2(c)	3.0	0.60	per hour or part thereof
Bituminous sprayer allowance—Exterior surfaces	18.2(f)(i)	3.0	0.60	per hour or part thereof
Bituminous sprayer allowance—Epoxy based materials allowance	18.2(f)(ii)	4.7	0.93	per hour or part thereof
Bituminous sprayer allowance—Sand-blasting allowance	18.2(f)(iii)	4.7	0.93	per hour
Fork-lift operators allowance	18.2(g)	24.5	4.86	per week <sup>3</sup>

[5] The words ‘or part thereof’ appear to have been omitted in error from the ‘payable’ column in relation to the Bituminous sprayer allowance—Sand-blasting allowance.

[6] The ‘error’ was introduced into the Award in the 2019-20 Annual Wage Review determination<sup>3</sup> issued on 26 June 2020 which came into operation on 1 November 2020. Prior to the determination varying the Award on 1 November 2020, the Award terms at clause C.1.2 matched the wording in clause 18.2(f)(iii).

### **Statutory framework**

[7] Section 160 of the *Fair Work Act 2009* (Cth) (the Act) allows the Commission to make a determination varying a modern award to remove ambiguity, uncertainty or to correct an error. It provides as follows:

#### **‘Variation of modern award to remove ambiguity or uncertainty or correct error**

- (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
- (2) The FWC may make the determination:
  - (a) on its own initiative; or
  - (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or
  - (c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or

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<sup>3</sup> [PR718874](#).

(d) if the modern award includes outworker terms--on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.’

## Consideration

[8] The principles applicable to the interpretation and application of s.160 were set out by Asbury C (as she then was) in *Property Sales Association of Queensland, Union of Employees re Real Estate Industry Award 2010*<sup>4</sup> as follows (footnote omitted):

‘[14] The power in s.160 of the Act to vary a modern award is discretionary. The exercise of the power first requires consideration of whether there is an ambiguity, uncertainty or error in an award. If it is established that this is the case, further consideration is required as to whether the discretion should be exercised. Where there is no ambiguity or uncertainty, or where the Tribunal is not satisfied that there is an error in the terms of an award, there is no jurisdiction to vary a modern award under s.160 of the Act. This is consistent with the clear intention of the legislature to limit the circumstances under which modern awards can be varied outside 4 yearly and annual wage reviews.’

[9] In the *4 yearly review of modern awards — Vehicle Manufacturing, Repair Services and Retail Award 2010*<sup>5</sup> the Full Bench said the following in relation to whether an error was established in that matter for the purpose of s.160 of the Act:

‘[73] With respect to the SDA, this is not demonstrative of any error. It only demonstrates that a methodology was used which the SDA, with the benefit of hindsight, would prefer not to have been used. Nothing was placed before us to suggest that the AIRC did not intend to use that methodology, or that some mathematical error was made in calculating the rates in accordance with that methodology. We do not accept that disagreement - even a well-founded disagreement - with a previous decision is sufficient to establish an error for the purposes of s.160. What is necessary is to show that some sort of mistake occurred, in that a provision of the award was made in a form which did not reflect the tribunal’s intention.’

[10] I intend to deal with this matter as a single Member of the Fair Work Commission (the Commission) pursuant to s.616(3D)(a) of the Act. Under s. 616(3D)(a) of the Act, the President may direct a single Member to perform a function or exercise a power under s.160 of the Act varying a modern award.

[11] My *provisional* view is that the omission of the words ‘or part thereof’ from the fifth row of the table (Bituminous sprayer allowance—Sand-blasting allowance) in clause C.1.2 constitutes an ‘error’ for the purposes of s.160. This is because the omission of these words does not reflect the Commission’s intention in issuing the 2019-20 Annual Wage Review determination. The Commission’s intention was to increase rates payable under the Award, including wage-related allowances, in accordance with the *2019-2020 Annual Wage Review decision*.<sup>6</sup> The determination was not intended to change the basis for payment of any allowance.

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<sup>4</sup> [2012] FWA 10134.

<sup>5</sup> [2016] FWCFB 4418 at [73].

<sup>6</sup> [2020] FWCFB 3500.

[12] A draft determination inserting the words ‘or part thereof’ after the words ‘per hour’ in the fifth row of the table (Bituminous sprayer allowance—Sand-blasting allowance) appearing in clause C.1.2 of the Award will be issued with this Statement.

[13] Section 165 of the Act specifies when variation determinations come into operation (other than determinations setting, varying or revoking modern award minimum wages), and provides that:

**‘When variation determinations come into operation, other than determinations setting, varying or revoking modern award minimum wages**

Determinations come into operation on specified day

- (1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.

Note 1: For when a modern award, or a revocation of a modern award, comes into operation, see section 49.

Note: For when a determination under this Part setting, varying or revoking modern award minimum wages comes into operation, see section 166.

- (2) The specified day must not be earlier than the day on which the determination is made, unless:
  - (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and
  - (b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

- (3) The determination does not take effect in relation to a particular employee until the start of the employee’s first full pay period that starts on or after the day the determination comes into operation.’

[14] My *provisional* view is that the determination should operate retrospectively from 1 November 2020 (being the date the error was introduced into the Award). In considering whether there are exceptional circumstances as contemplated by s.165(2)(b) of the Act, I have considered the following matters:

- administrative errors in Annual Wage Review determinations are uncommon;
- the error has resulted in a misdescription of the allowance in a summary table of the Award only, the entitlement in the body of the Award has not been affected by error at any time;

- the error has been detected by Commission staff and no issue of underpayment as a result of the error has been raised with the Commission;
- employers paying the allowance prior to 1 November 2020 are unlikely to have changed their payment practices as a result of the error; and
- the error could only result in underpayment of the allowance to an employee in respect of a part of an hour, so if any underpayment has occurred it will not be very large.

### **Next steps**

**[15]** Any submission opposing my *provisional* views should be filed by **4pm (AEST)** on **Wednesday 26 May 2021**. Submissions should be sent to [amod@fwc.gov.au](mailto:amod@fwc.gov.au).

**[16]** If any submissions are filed opposing my *provisional* views then a hearing will be scheduled.

**[17]** If no submissions are filed opposing my *provisional* views then a determination in the form set out in the draft determination will be issued.

### **PRESIDENT**

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