



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—Broadcasting, Recorded Entertainment and Cinemas Award 2020

(AM2021/48)

Broadcasting and recorded entertainment industry

JUSTICE ROSS, PRESIDENT

MELBOURNE, 12 MAY 2021

Broadcasting, Recorded Entertainment and Cinemas Award 2020 – provisional view to correct error.

Introduction

[1] On 7 October 2020, the Full Bench in AM2019/17 issued a determination finalising the technical and drafting review of the *Broadcasting, Recorded Entertainment and Cinemas Award 2020* (the Award) as part of the 4 yearly review of modern awards, operative from 13 November 2020.¹ On 11 November 2020 a correction determination was issued by the Full Bench which took effect on 13 November 2020.² The varied award became operative on 13 November 2020 and on 1 December 2020 a further correction determination was issued by the Full Bench which took effect on 1 December 2020.³

[2] An error has been identified relating to clause 13.4 of the Award and the rate of pay for employees classified as Cinema Worker Level 3.

[3] A ‘new’ Cinema Worker Level 3 classification was inserted into the Award with its rate set at the Grade 4 rate in accordance with the Report to the Full Bench issued on 21 July 2016.⁴ The previous Cinema Worker Levels 3 to 6 were then redesignated to Levels 4 to 7, respectively. This became effective when the 2020 Award came into operation on 13 November 2020.

[4] The current Grade 4 weekly rate in clause 13.3 is \$832.80, while the current Cinema Worker Level 3 weekly rate in clause 13.4 is \$818.50. The ‘error’ was introduced into the

¹ [PR722495](#).

² [PR724227](#).

³ [PR725013](#).

⁴ [Report to the Full Bench](#).

Award when the increase arising out of the 2019-20 Annual Wage Review determination⁵ issued on 26 June 2020 was not applied to the Level 3 rate in clause 13.4. The weekly base rate should be \$832.80, not \$818.50. It follows that the current 8 per cent penalty averaging component per week and both the minimum weekly and minimum hourly rate that are calculated from the weekly base rate of the Cinema Worker Level 3 in clause 13.4 are also in error.

Statutory framework

[5] 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
 - (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

[6] 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*⁶ 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

⁵ [PR718909](#).

⁶ [\[2012\] FWA 10134](#).

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.’

[7] In the *4 yearly review of modern awards — Vehicle Manufacturing, Repair Services and Retail Award 2010*⁷ 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.’

[8] I intend to deal with this matter as a single Member of 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.

[9] My *provisional* view is that the base weekly rate of “\$818.50” appearing in the fifth row of the table (Cinema Worker Level 3) in clause 13.4 and the corresponding calculated rates in the third, fourth and fifth columns constitute an ‘error’ for the purposes of s.160, as the error does not reflect the tribunal’s intention when the 2019-20 Annual Wage Review determination was issued. The purpose of the 2019-20 Annual Wage Review determination was to increase rates payable under the Award in accordance with the 2019-2020 Annual Wage Review decision,⁸ and this did not occur for the new Cinema Worker Level 3 classification when it was incorporated in the October 2020 determination.⁹

[10] A draft determination deleting the figure “\$818.50” and inserting “\$832.80” in the fifth row of the table (Cinema Worker Level 3) appearing in clause 13.4 of the Award will be issued with this Statement. The associated calculated rates including the 8% penalty averaging per week in the third column of \$65.48, the minimum weekly rate in the fourth column of \$883.98 and the minimum hourly rate in the fifth column of \$23.26 will also be revised to \$66.62, \$899.42 and \$23.67, respectively. A table reproducing these revisions will substitute the current table appearing in clause 13.4.

[11] My *provisional* view is that the determination will operate from **Thursday 27 May 2021**.

Next steps

⁷ [\[2016\] FWCFB 4418](#) at [73].

⁸ [\[2020\] FWCFB 3500](#).

⁹ [PR722495](#).

[12] 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.

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

[14] 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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