



# 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—Textile, Clothing, Footwear and Associated Industries Award 2020**

(AM2021/59)

Clothing industry

JUSTICE ROSS, PRESIDENT

MELBOURNE, 12 MAY 2021

*Textile, Clothing, Footwear and Associated Industries Award 2020 – provisional view to vary to correct error.*

### **Introduction**

[1] On 4 December 2020, the Full Bench in AM2019/17 issued a determination finalising the technical and drafting review of the *Textile, Clothing, Footwear and Associated Industries Award 2020* (the Award) as part of the 4 yearly review of modern awards, operative from 1 February 2021.<sup>1</sup> On 27 January 2021 a correction determination was issued by the Full Bench which took effect on 1 February 2021.<sup>2</sup>

[2] An error has been identified concerning the expression of the entitlements for the afternoon and night shift and the permanent night shift in clause 29.3 of the Award, being described as 115% and 130% of the weekly award rate, respectively. This is inconsistent with the method of calculating payments applied for those same shifts in clauses C.3.1 and C.5.1 of the Award. The calculation method set out in clauses C.3.1 and C.5.1 is 15% or 30% of the ordinary weekly rate per shift *in addition* to whatever payment would be received for ordinary hours.

[3] Clause 29.3 of the Award sets out the payment for shiftwork as follows:

- ‘(a) A shiftworker while on afternoon or night shift will be paid 115% of the weekly award rate for the classification concerned.
- (b) A shiftworker while on permanent night shift will be paid 130% of the weekly award rate for the classification concerned.

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<sup>1</sup> [PR724998](#).

<sup>2</sup> [PR726403](#).

NOTE: See Schedule C—Summary of Hourly Rates of Pay for a summary of hourly rates of pay including overtime and penalty rates.’ [emphasis added]

[4] Clauses C.3.1 and C.5.1 of the Award provides:

**‘C.3.1 Full-time and part-time employees—shiftworkers other than in the textile industry—ordinary and penalty rates**

	<b>Ordinary hours</b>	<b><u>Afternoon &amp; night<sup>2</sup></u></b>	<b><u>Permanent night shift<sup>2</sup></u></b>	<b>Public holiday</b>
	<b>% ordinary hourly rate<sup>1</sup></b>	<b><u>% of ordinary weekly rate</u></b>		<b>% ordinary hourly rate<sup>1</sup></b>
	<b>100%</b>	<b>15%</b>	<b>30%</b>	<b>250%</b>
	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Trainee	19.84	113.07	226.14	49.60
Skill level 1	20.41	116.31	232.62	51.03
Skill level 2	21.19	120.77	241.53	52.98
Skill level 3	21.92	124.92	249.84	54.80
Skill level 4	23.09	131.64	263.28	57.73
Skill level 5 and thereafter	24.54	139.89	279.78	61.35

<sup>1</sup> Rates in table are calculated based on the minimum hourly rate, see clauses C.1.1 and C.1.2.

<sup>2</sup> Payment is per shift in addition to applicable ordinary hourly rate.

...

**C.5.1 Casual employees—shiftworkers other than in the textile industry—ordinary and penalty rates**

	<b>Ordinary hours</b>	<b><u>Afternoon &amp; night<sup>2</sup></u></b>	<b><u>Permanent night shift<sup>2</sup></u></b>	<b>Public holiday</b>
	<b>% ordinary hourly rate<sup>1</sup></b>	<b><u>% of ordinary weekly rate</u></b>		<b>% ordinary hourly rate<sup>1</sup></b>
	<b>125%</b>	<b>15%</b>	<b>30%</b>	<b>275%</b>
	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Trainee	24.80	113.07	226.14	54.56
Skill level 1	25.51	116.31	232.62	56.13
Skill level 2	26.49	120.77	241.53	58.27
Skill level 3	27.40	124.92	249.84	60.28
Skill level 4	28.86	131.64	263.28	63.50
Skill level 5 and thereafter	30.68	139.89	279.78	67.49

<sup>1</sup> Rates in table are calculated based on the minimum hourly rate, see clauses C.1.1 and C.1.2.

<sup>2</sup> Payment is per shift in addition to applicable ordinary hourly rate. [emphasis added]

[5] The ‘error’ was introduced into the Payment for shiftwork provision in the [Exposure Draft](#) published on 4 November 2015<sup>3</sup> and also appeared in the [Exposure Draft](#) published on 29 January 2020.<sup>4</sup> The error was transferred into the 2020 Award which became operative on 1 February 2021.

### Statutory framework

[6] 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

[7] 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>5</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

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<sup>3</sup> Clause 17.3.

<sup>4</sup> Clause 29.3.

<sup>5</sup> [\[2012\] FWA 10134](#).

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.’

[8] In the *4 yearly review of modern awards — Vehicle Manufacturing, Repair Services and Retail Award 2010*<sup>6</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.’

[9] 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.

[10] My *provisional* view is that the wording of the Payment of the shiftwork provision in clause 29.3 of the Award is incorrect and inconsistent with clauses C.3.1 and C.5.2 and constitutes an error for the purposes of s.160 of the Act.

[11] I propose that clause 29.3 be amended as follows:

- ‘(a) A shiftworker while on afternoon or night shift will be paid an additional 15% ~~115%~~ of the weekly award rate per shift for the classification concerned.
- (b) A shiftworker while on permanent night shift will be paid an additional 30% ~~130%~~ of the weekly award rate per shift for the classification concerned.

NOTE: See Schedule C—Summary of Hourly Rates of Pay for a summary of hourly rates of pay including overtime and penalty rates.’

[12] A draft determination incorporating my provisional amendments to clause 29.3 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**

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<sup>6</sup> [2016] FWCFB 4418 at [73].

### 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 February 2021 (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:

- the error has resulted in the incorrect method of calculating shiftwork entitlements in the body of the Award only, the entitlements in the Schedule C—Summary of Hourly Rates of Pay—General 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 has been caused as a result of the error; and
- employers paying the shiftwork payments prior to 1 February 2021 are unlikely to have changed their payment practices as a result of the error.

### 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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