DECISION

Fair Work Act 2009
s 160—Variation of modern award to remove ambiguity or uncertainty or correct error

Application by The Australian Retailers Association
(AM2024/9)

GENERAL RETAIL INDUSTRY AWARD 2020
[MA000004]

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER MATHESON

SYDNEY, 7 MAY 2024

Application to vary the General Retail Industry Award 2020 – proposed variation C – clause 16.6(b) – clause ambiguous and uncertain – award varied – rate of 200 per cent to apply to employee's minimum hourly rate.

Introduction

[1] The Australian Retailers Association (ARA) has made an application under ss 158(1) and 160(2)(c) of the *Fair Work Act 2009* (Cth) (FW Act) to vary several provisions of the *General Retail Industry Award 2020*[1] (Retail Award). The ARA has set out 17 proposed variations marked A through Q in its application. Variation E has already been determined by a Full Bench of this Commission together with matter AM2023/17.[2]

[2] The ARA's proposed variation C concerns clause 16.6 of the Retail Award, which currently provides:

> **16.6 Breaks between work periods**
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> **(a)** An employee must have a minimum break of 12 hours between when the employee finishes work on one day and starts work on the next.
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> **(b)** If an employee starts work again without having had 12 hours off work, the employer must pay the employee at the rate of **200%** of the rate they would be entitled to until the employee has a break of 12 consecutive hours.
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> **(c)** The employee must not suffer any loss of pay for ordinary hours not worked during the period of a break required by clause 16.6.
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> **(d)** The employer and an individual employee or a group of employees may agree that clause 16.6 is to have effect as if it provided for a minimum break of 10 hours.

[3] Proposed variation C would alter clause 16.6 in two respects:

(a) Clause 16.6(b) would be varied to clarify that the prescribed penalty rate is 200 per cent of the minimum hourly rate by providing as follows:

> If an employee starts work again without having had 12 hours off work, the employer must pay the employee for each hour worked at the rate of 200% of the employee's minimum hourly rate otherwise applicable under clause 17 – Minimum rates until the employee has a break of 12 consecutive hours.

(b) The references to 12 hours in paragraphs (a) and (b) of clause 16.6 would be replaced with references to 10 hours, and paragraph (d) would be deleted.

[4] This decision concerns only the first aspect of proposed variation C. The second aspect will be dealt with at a later time together with other proposed variations in the ARA's application which remain contested. The variation we are dealing with here is supported by the National Retail Association (NRA) and the Australian Industry Group (AiG) and opposed by the Shop, Distributive and Allied Employees' Association (SDA), the Australian Workers' Union (AWU) and Retail and Fast Food Workers Union Incorporated (RFFWU Inc).

[5] The ARA seeks this variation pursuant to s 160(1) of the FW Act, or in the alternative, s 157(1)(a). For the reasons which follow, it is only necessary for us to consider and determine this aspect of the application pursuant to s 160(1). Section 160 provides:

> **160 Variation of modern award to remove ambiguity or uncertainty or correct error**
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> (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
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> (2) The FWC may make the determination:
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> (a) on its own initiative; or
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> (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or
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> (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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> (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.

[6] The principles concerning the interpretation and application of s 160 are well-established and are not in dispute. They are as summarised in paragraphs [51]–[53] of the Full Bench decision in *Modern award superannuation clause review*.[3] The ARA contends that clause 16.6(b) is ambiguous and uncertain as to the rate to which the 200 per cent penalty provided for is to be applied, and that the variation it seeks would appropriately remove this ambiguity. Our task is therefore, first, to determine whether the ambiguity or uncertainty

contended for exists and, if so, second, to determine in the exercise of our discretion whether we should make the variation sought or some other variation to resolve the identified ambiguity or uncertainty.

History of clause 16.6(b)

[7] In order to place in context the parties' submissions as to ambiguity and uncertainty, it is first necessary to set out the history of the development of clause 16.6(b) of the Retail Award. That history, as recounted below, is not in dispute.

[8] The Retail Award was developed as part of the statutorily-mandated award modernisation process conducted by the Australian Industrial Relations Commission (AIRC) in 2008–2009. In this process, the AIRC took into account and drew upon then-existing awards (federal and State) which applied to the retail sector. The federal awards were the following:

- *Shop Distributive and Allied Employees Association Victorian Shops Interim Award 2000*[4] (Victorian Award);
- *Retail, Wholesale and Distributive Employees (NT) Award 2000*[5] (NT Award); and
- *Retail and Wholesale Industry – Shop Employees – Australian Capital Territory Award 2000*[6] (ACT Award).

[9] The State awards were:

- *Shop Employees (State) Award* (NSW)[7] (NSW Award);
- *Retail Industry Award – State 2004* (Qld)[8] (Qld Award);
- *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* (WA)[9] (WA Award);
- *Retail Trades Award* (Tas)[10] (Tasmanian Award); and
- *Retail Industry (South Australia) Award* (SA)[11] (SA Award).

[10] The Tasmanian Award and the SA Award contained no provisions concerning the length of the break required between work periods. The Victorian Award, ACT Award and the NSW Award variously provided for minimum break periods of 10, 11 or 12 hours in specified circumstances, but did not provide for the payment of a penalty rate for any work performed within the prescribed break period. The NT Award, the Qld Award and the WA Award did however contain provision for the payment of such a penalty rate in prescribed circumstances. Clauses 30.1 and 30.3 of the NT Award provided:

> 30.1 All work done outside ordinary hours in excess of the daily spread of hours, or in excess of 38 hours in any week or 76 hours in any two week period or 152 hours in any four week period shall be paid for at the rate of time and half for the first three hours and double time thereafter, such double time to continue until after the completion of the overtime work.
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> . . .
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> 30.3 When overtime is necessary, it shall, wherever reasonably practicable, be so arranged that employees have at least ten consecutive hours off duty between the work of successive days. If, on the insistence of his or her employer an employee resumes or continues work without having had ten consecutive hours off duty, an employee shall be paid at double

> rates until he or she is released from duty for such period and shall then be entitled to be absent from duty for such period until he or she has had ten consecutive hours off duty without loss of pay for ordinary time occurring during such absence.
>
> (underlining added)

[11] Clause 6.2.7(b) of the Qld Award provided, in respect of clerks working overtime:

> 6.2.7 *Clerks only working overtime*
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> …
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> (b) An employee who works so much overtime between the termination of that employee's ordinary work on one day and the commencement of the employee's ordinary work on the next day that the employee has not at least 10 consecutive hours off duty between those times shall, subject to clause 6.2.7, be released after completion of such overtime until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.
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> If on the instructions of the employer such an employee resumes or continues work without having had such 10 consecutive hours off duty, the employee shall be paid double rates until the employee is released from duty for such period and the employee shall then be entitled to be absent until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absences.
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> (underlining added)

[12] Clause 13(9) of the WA Award provided:

> 13. OVERTIME
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> …
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> (9) When overtime work is necessary it shall, wherever reasonably practicable, be so arranged that workers have at least eight consecutive hours off duty between the work of successive days. A worker (other than a casual worker) who works so much overtime between the termination of his ordinary work on one day and the commencement of his ordinary work on the next day that he has not had at least eight consecutive hours off duty between those times, shall, subject to this paragraph, be released after completion of such overtime until he has had eight consecutive hours off duty without loss of pay for ordinary working time occurring during such absence. If, on the instructions of his employer, such a worker resumes or continues work without having had eight consecutive hours off duty, he shall be paid at double rates until he is released from duty for such period and he shall then be entitled to be absent until he has had eight consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.
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> (underlining added)

[13] As part of the award modernisation process, the AIRC invited interested parties to submit draft awards for their respective industry sectors or occupations. The SDA's draft award for the retail sector, filed on 1 August 2008, contained the following clause:

> 54.2 Breaks Between Work Periods
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> …
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> 54.2.2 Where an employee recommences work without having had 12 hours off work then the employee must be paid at double the rate they would be entitled to until such time as they are released from duty for a period of 12 consecutive hours

> off work without loss of pay for ordinary time hours occurring [during] the period of such absence.
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> (underlining added)

[14] The ARA proposed that there simply be a requirement for an 8-hour break between shifts with no provision for a penalty payment if work was performed within the required break period.

[15] On 12 September 2008, the AIRC award modernisation Full Bench published an exposure draft of the proposed modern Retail Award. In its accompanying Statement, the Full Bench said:

> [86] The [SDA] supported a single award for the retail sector and proposed a draft award which provided for comprehensive coverage of employees in the sector.
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> …
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> [88] The draft *Retail Industry Award 2010* covers the broad range of retail operations considered as part of this exercise, apart from specified exclusions of operations which are more sensibly covered by another modern industry award because the retail aspect is a small part of a different type of operation.
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> [89] The terms and conditions in the draft award have been set having regard to the disparate terms and conditions currently in [federal] awards and [State Awards]. Those instruments contain a variety of different obligations and entitlements. Differences exist between the rates and conditions in different States, different parts of the industry and even between different groups of employers within the same part of the industry.[12]

[16] Clause 31.2(b) of the AIRC's exposure draft of the Retail Award substantially adopted the SDA's proposed clause 54.2.2 in its draft award as follows:

> 31.2(b) Where an employee recommences work without having had 12 hours off work then the employee will be paid <u>at double the rate they would be entitled to</u> until such time as they are released from duty for a period of 12 consecutive hours off work without loss of pay for ordinary time hours occurring [during] the period of such absence.

[17] The modern Retail Award was made on 19 December 2008 and clause 31.2(b) of the exposure draft was adopted and renumbered as clause 30.2(b).[13] In the decision by which this modern award was made of the same date, the AIRC award modernisation Full Bench said:

> [285] In reaching this decision we have placed significant reliance on the objective of not disadvantaging employees or leading to additional costs. We note that such an approach will not lead to additional awards applying to a particular employer or employee.
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> [286] The contents of the four awards we publish with this decision are derived from the existing [federal] awards and [State awards] applying to the different sectors. Although the scope of the awards is obviously reduced, this did not eliminate the variations in terms and conditions within each part of the industry. We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments. In this regard we note in particular the significant differences in [federal] awards and [State awards] applying to the fast food and pharmacy parts of the industry.

> [287] Many of the submissions made to us from employers expressed concern at additional costs arising from provisions of the Retail industry exposure draft regarding hours of work, overtime, penalty rates, annual leave and allowances. We have revised these provisions having regard to the terms, incidence and application of relevant instruments for each sector. The result is provisions which more closely approximate existing instruments for the relevant parts of the industry but which adopt different standards from one part to another. We have addressed submissions concerning the application of allowances and hours provisions and made other changes consistent with the approach to such matters in the main part of this decision. [14]

[18] The modern Retail Award took effect on 1 January 2010. Clause 30.2(b) was renumbered as clause 31.2(b) as a result of a variation that took effect on 1 July 2010.[15] The award was subsequently the subject of the 4 yearly review of modern awards which commenced in 2014. Part of this review involved the redrafting of major awards, including the Retail Award, in plain language. The relevant aspect of this review is that, on 25 July 2018, the Commission issued a revised plain language exposure draft for the Retail Award (Revised PLED). Clause 16.6(b) of the Revised PLED, which contained a re-draft of clause 31.2(b), was as expressed follows:

> If an employee starts work again without having had 12 hours off work, the employer must pay the employee at the rate of **200%** of the rate they would be entitled to until the employee has a break of 12 consecutive hours.

[19] The Revised PLED contained a comment about the above redrafted clause for the attention of interested parties as follows:

> Parties are asked to clarify whether the rate an employee is entitled to be paid is a percentage of the minimum hourly rate. Alternatively, does the 200% compound with other applicable penalties such as weekend penalties?

[20] Interested parties expressed different views in relation to the above question. On 27 September 2018, the then President, Justice Ross, conducted a conference for the purpose of discussing contested issues in the Revised PLED, including proposed clause 16.6(b). The conference was attended by the SDA, Australian Business Industrial and the NSW Business Chamber. In a Statement issued after the conference on 1 October 2018[16] (October 2018 Statement) the President addressed the contested issues. In relation to clause 16.6(b), the October 2018 Statement said:

> [41] The SDA previously submitted that that clause 16.6(b) should read 'that an employee will be paid double the rate they would be entitled to' which must be inclusive of all relevant penalties, overtime and loadings.
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> [42] Business SA and ABI & NSWBC previously opposed the SDA's submission, arguing that such an interpretation is not supported by the current award and would be a substantive change. Business SA submitted that where multiple penalties may be payable to an employee, the penalty which is to the greatest advantage to the employee will be paid. In the absence of further evidence from the SDA, Business SA opposed suggestions that the 200% rate compounds with other penalties.
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> …
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> [45] During the September 2018 conference interested parties agreed that this item be resolved by retaining the wording of PLED clause16.6(b). The issue in dispute relates to the meaning of the words 'the rate the employee would be entitled to...'. Item 56A is resolved on the basis that

there is a level of ambiguity in the current provisions, which continues to exist in the terms of the PLED.

[21] All the provisions of the Retail Award were replaced to give effect to the outcome of the 4 yearly review plain language process on 10 September 2020, with an operative date of 1 October 2020.[17] The Retail Award as varied contained the current clause 16.6(b) from this operative date.

Submissions

ARA

[22] The ARA submitted that clause 16.6(b) is ambiguous or uncertain because the 'rate' to which the 200 per cent is to apply is not expressly identified. It contends that the clause, properly construed, requires only that an employer pay the employee 200 per cent of the minimum hourly rate prescribed by clause 17 of the Retail Award for work performed during the specified minimum break period. Contrary to this, the position of the SDA is that the penalty rate would apply cumulatively upon any loading or penalty which would otherwise be payable for the hours worked in question. These rival contentions demonstrated, the ARA submitted, the existence of ambiguity. The textual context of the award as a whole does not assist in resolving this ambiguity. Other provisions involving penalty rates or loadings either specify that the additional amount is calculated based on the applicable minimum hourly rate or state that it is inclusive of penalty rates or loadings otherwise applicable. The phrase 'the rate they would be entitled to' used in clause 16.6(b) is not used in any other clause of the Retail Award.

[23] As to the historical context, the ARA submitted that clause 30.2(b) of the Retail Award as made was not intended to increase any existing penalty rate, as the AIRC's decision of 19 December 2008 made clear. The pre-modern award provisions which contained the penalty rate for work performed during the required break period used the phrase 'double rates', which was interchangeable with 'double time'. There is no indication, the ARA submitted, that this was intended to operate as a penalty upon a penalty. The ARA pointed to the October 2018 Statement as demonstrating that current clause 16.6(b) was recognised by the parties and the Commission as being ambiguous before it was made. The ARA also referred to the decision in *Fantastic Furniture Pty Ltd*,[18] affirmed on appeal,[19] in which the Commission (Masson DP) did not accept the SDA's construction of what was then clause 31.2(b) of the Retail Award.

[24] The ARA submitted that its proposed variation to clause 16.6(b) would resolve the ambiguity or uncertainty by giving effect to the provision's intended meaning. It also submitted that if there was a concern about the interaction between the 200 per cent penalty in the clause and the higher penalty rates for working on public holidays prescribed by clause 22, clause 16.6(b) could alternatively be amended to provide:

> (b) If an employee starts work again without having had 12 hours off work, the employer must pay the employee for each hour worked at the rate of 200% of the employee's minimum hourly rate otherwise applicable under clause 17 – Minimum rates until the employee has a break of 12 consecutive hours, <u>except on public holidays where the employer must instead pay the higher hourly rate under clause 21 – Overtime or clause 22 – Penalty rates as applicable.</u>
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> (additional words underlined)

[25] As to operative date, the ARA submitted that the Commission ought to retrospectively vary clause 16.6(b) with effect from 1 October 2020, being the date of operation of the plain language version of the Retail Award. The ARA contended that such retrospective application is justified because the plain language drafting process perpetuated ambiguity and uncertainty.

NRA and AiG

[26] The NRA and the AiG supported the ARA's submissions.

SDA

[27] The SDA submitted that clause 16.6(b) is neither ambiguous nor uncertain. It contended that the clause simply requires, first, a determination as to the rate the employee is entitled to having commenced work without the 12-hour break, and second, doubling that rate. In support of this interpretation, the SDA noted that in other provisions of the award in which a penalty rate is intended to operate upon the minimum hourly rate, that award does so in express terms. The October 2018 Statement did not amount to a concession by the SDA that ambiguity exists but rather simply closed off the debate and left it for another time.

[28] As to the historical context, the SDA drew attention to the fact that no submissions were made in response to the AIRC exposure draft concerning what is now clause 16.6(b). The SDA submitted that, prior to the Retail Award, employers operating under a number of the pre-modern awards could not compel employees to work without a significant break between shifts on consecutive days, and that the 200 per cent rate, which could apply cumulatively, was to balance the advantage of flexibility attained by employers. The SDA also submitted that the Full Bench ought to reject the argument that the phrases 'double rates' and 'double time' were used interchangeably in the Retail Award's predecessors, and that they were distinct terms with different meanings.

[29] The SDA also submitted, if the ARA's construction is accepted, there exists no industrial rationale for why an employee working without the stipulated break on a public holiday should be entitled to a lower rate under clause 16.6(b) than the standard public holiday penalty. The SDA also opposed the ARA's alternative variation on the basis that there would be no effective penalty payment on a public holiday and no disincentive to the employer to require a return to work without the appropriate break.

[30] It was further submitted by the SDA that, if the ARA's construction of clause 16.6(b) is correct, there would be a reduction in entitlements. If clause 16.6(b) provides for a penalty of an additional 100 per cent of the minimum hourly rate, any penalty that would otherwise be payable would be absorbed by that 100 per cent penalty. By way of example, if an employee works on Thursday, and then on Friday without the 12-hour minimum break, a penalty rate of 200 per cent of the minimum hourly rate would apply. If the employee works on a Friday, and then on Saturday without the minimum break, the same rate of 200 per cent would apply. In the latter example, the 125 per cent Saturday penalty rate stipulated by clause 22.1(b) of the Award is absorbed by the 200 per cent rate, resulting in a lower effective penalty rate than on Monday–Friday.

[31] Should the Commission make a variation in accordance with the ARA's application under s 160(1), the SDA opposed retrospectivity since the requisite exceptional circumstances do not exist, and no evidentiary material had been put forward to support the proposition that there has been difficulty arising from the operation of clause 16.6(b).

AWU and RFFWU Inc

[32] The AWU and RFFWU Inc supported the submissions of the SDA. RFFWU Inc also submitted that, should clause 16.6(b) be varied, a note should be added referring to an employee's NES right in s 114(3) of the FW Act to refuse an unreasonable request to work on a public holiday or to reasonably refuse such a request.

Consideration

[33] We are satisfied that, in its expression of the penalty rate payable when work is performed within the minimum break period between work on one day and work on the next, clause 16.6(b) is both ambiguous and uncertain. It is ambiguous because there are two competing interpretations of the clause which, in our view, are reasonably arguable. The SDA's interpretation is favoured by the text of the clause considered in isolation. The clause does not use the usual formulation for penalty rates used throughout the award, and in other awards, namely a percentage amount applying to the minimum hourly rate applicable during ordinary time. The words used instead, namely '200% of the rate they would be entitled to', are capable of being read as meaning double the rate of pay, inclusive of any loading or penalty rate, which would otherwise be payable for the hours of work.

[34] However, the SDA's interpretation was not accepted in *Fantastic Furniture Pty Ltd*[20] (as earlier stated, affirmed on appeal) for the purpose of the application of the better off overall test to an enterprise agreement. In that decision, Masson DP said:

> [18] The Agreement provides at clause 5.8 that where an employee is recalled to work without having had 10 consecutive hours of work, the employee is entitled to receive "200% of the Base Rate of Pay" for work performed until such time as they do have the requisite 10 hour rest period. That wording is to be contrasted with clause 31.2 of the Retail Award which relevantly provides for a penalty of "double the rate" the employee would be entitled to until released from duty.
>
> [19] The SDA submit that the terms in the Retail Award are clear and unequivocal. The effect of the SDA construction is that if an employee rostered to work ordinary hours of work that attracted a shift or weekend penalty were recalled to work such hours without having had the requisite rest period, than the penalty of double time would be applied to the total 'rate' inclusive of the shift or weekend penalty for such ordinary hours until released. Unsurprisingly, the Applicant rejects the SDA's construction and submits that a payment of a penalty on a penalty is not provided for in the Retail Award.
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> [20] What must be firstly said is that despite the SDA's submission I do not regard the terms of the Retail Award as unequivocal. While, the award term refers to the 'rate' the employee would be entitled to until released from duty, it (the 'rate') is not defined. Furthermore, the SDA did not advance a detailed case for their contended construction of the clause. It is also relevant to note that the ambiguity of the clause was explicitly noted by his Honour Justice Ross in proceedings relating to the plain language re-drafting (PLED) of the Retail Award as part of the

> 4 yearly review of modern awards in a decision dated 1 October 2018. The parties to those proceedings, including the SDA, apparently accepted that a level of ambiguity would continue to exist in the provisions of the PLED.
>
> [21] Absent a compelling case by the SDA as to the proper construction of clause 31.2 of the Retail Award, I am not persuaded that the terms of the Agreement are less beneficial. The provision of the Agreement (clause 5.8) is therefore a neutral consideration for the purpose of the BOOT assessment.

[35] On the SDA's interpretation, clause 16.6(b) would produce very high — indeed, on one view, absurdly high — penalty rates of up to 500 per cent for work performed during the break period. It is difficult to accept that such an outcome was intended absent very clear language. In that context, we consider that 'the rate they would be entitled to' might reasonably be read as referring to the minimum hourly rate applicable to the employee in question.

[36] That clause 16.6(b) is open to competing interpretations and is therefore ambiguous was recognised at the outset in the October 2018 Statement. We see no reason to depart from what Ross J said in that Statement.

[37] We also consider that clause 16.6(b) is uncertain because, even if the SDA's interpretation of the text of the clause is correct, that interpretation is at odds with the historical meaning of the clause and gives rise to uncertainty about whether the text has given proper effect to the presumed intention of the Commission when making the clause.

[38] Both the ARA and the SDA accept that the penalty rate of 'double the rate they would be entitled to' provided for in clause 30.2(b) of the Retail Award, as it was when first made in 2008, was intended to constitute the same quantum of entitlement as that of payment at 'double rates' in clause 6.2.7(b) of the Queensland Award, clause 30.3 of the NT Award and clause 13(9) of the WA Award. The SDA contends that 'double rates' in these provisions bore a meaning distinct to that of 'double time', which is a long-established term of art meaning double the unloaded ordinary-time or 'minimum' rate of pay, but directed us to no authority to that effect. It merely directed us to the use of both phrases in different parts of clause 30 of the NT Award and submitted that they would not be expected to have the same meaning in those circumstances.

[39] A review of a wide range of early arbitral decisions and awards in the federal arbitration system makes it apparent that, as the ARA submitted, 'double time' and 'double rates' have traditionally been understood to be interchangeable expressions with the same meaning. Three examples of this will suffice for present purposes. First, in *Federated Society of Boilermakers and Iron Shipbuilders of Australia v Adelaide Steamship Co Ltd and Others*,[21] the Commonwealth Court of Conciliation and Arbitration (Quick DP) considered the appropriate penalty rates to be awarded for work on Sundays and public holidays as follows:

> In all existing State awards covering the boilermaking trade, provision is made for the payment of <u>double rates</u> for work done on Sunday, except in the Victorian Railways where time and a half is paid up to twelve hours of duty, and <u>double time</u> thereafter. As to public holidays, existing awards provide for payment of <u>double time</u>, if worked. Of course, it is understood that, except in the case of members of the union employed in Government Services, boilermakers under the hourly or daily hiring system are not paid for public holidays if they do not work, but if they are called on to work on those days, they get <u>double rates</u>.

> Under the proposed engineers' award all time on duty on Sundays or holidays is paid for at the rate of double time, except in the case of employees effecting repairs to or renewals of plant and/or machinery necessary to enable work to be safely resumed on Monday, or the earliest working day. In such cases payment is made at the rate of time and a half instead of double time, but this exception does not apply to the work of installing new machinery. I propose to follow the terms of the President's award.[22]
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> (underlining added)

[40] It should be noted that the term of the 'proposed engineer's award' which Quick DP determined to follow, when made, used the expression 'double rate' to express the entitlement in conjunction with 'time and a half':

> **Overtime—Sundays and/or Holidays.**
>
> 4.(a) For all time of duty on Sundays or holidays employees not in a continuous process shall be paid at double rate, except in the case of employees effecting repairs to or renewals to plant and/or machinery—which it is necessary to effect on Sundays or holidays to enable work to be safely resumed on Monday or the earliest working day—in which case payment shall be made at the rate of time and a half. This exception does not apply to work installing new machinery.[23]
>
> (underlining added)

[41] However, the clause made by Quick DP which was intended to provide for the same Sunday penalty rate entitlement as the above clause used the expression 'double time':

> **Sunday Work.**
>
> 8. (a) For all time of duty on Sundays employees shall be paid at the rate of double time. Provided that in the case of employees effecting repairs to or renewals of their employers' plant and/or machinery (as herein defined) necessary to enable work to be safely resumed on the next following working day payment shall be made at the rate of time and a half. This proviso shall not apply to the installation of new' machinery or other plant.[24]
>
> (underlining added)

[42] Second, in a 1943 decision concerning industrial action in pursuit of a higher penalty rate for Sunday work during wartime,[25] the Court (Kelly J) said:

> The employees having failed to obtain a favorable decision from the Court to which they appealed, now persist in their defiant attitude. They refuse to accept the decision of the Court constituted by Statute to determine such an appeal. They say that they will not work on Sundays unless their demand for double rates is satisfied. They do not accept the proposition that this being a seven-day-a-week industry the claim for double-time penalty rates is not justified. And they refuse to be bound by the agreement above referred to—the agreement between their own Union and the employers.[26]
>
> (underlining added)

[43] Third, in a 1969 decision of the Commonwealth Conciliation and Arbitration Commission concerning the *Metal Trades Award 1952*,[27] consideration was given to a claim for an enhanced penalty rate for 'short shifts'. A Full Bench considered and determined the claim in the following way:

> The present prescription which provides the rate of time and a half for work on afternoon or night shifts which do not continue for at least five successive afternoons or nights in a five day workshop or six successive afternoons or nights in a six day workshop was awarded in 1935. Previously the award prescribed overtime rates for such shifts. The claim is for double rates. Short shifts of this nature are not a frequent occurrence and indeed no evidence was adduced concerning them. We believe that when they are worked they are usually introduced to cope with some emergency which has occurred and that normally they would be brought about by factors beyond the control of the employer. In the circumstances, we do not consider that the rate should be so high that it would be a complete deterrent in emergency situations. On the other hand, it is understandable that such a shift must cause extreme disruption to the normal routine of the employees concerned and we consider that a reasonably high recompense is justified. Particular reference was not made by the respondents to this part of the claim except to say that the applicant had not made out a case. In our opinion, the rate of double time for all such work is too high and to this extent we would refuse the claim. However, although the material before us is somewhat limited we are of the opinion that, having regard to the disabilities which must be encountered by employees in such circumstances, the existing rate should be increased to some extent. Accordingly, we fix a premium of 50 per cent extra for the first four hours of each such shift and 100 per cent for the remaining hours thereof.[28]
>
> (underlining added)

[44] In some very early cases, it appears that 'double rates' was used to describe the concept of 'double time' as applied to pieceworkers paid according to a piece rate.[29] However, this distinction was never consistently applied even at the time and appears to have fallen out of use.

[45] A large number of pre-modern awards had provisions prescribing minimum rest periods between work days or shifts and requiring the payment of a penalty rate expressed as 'double rates' for any work done within the prescribed rest period. However, when these penalty rate entitlements were translated into the modern award system, they were generally expressed as an entitlement to be paid double time or equivalent. A clear example of this occurred in the metal industry. Clause 6.4.4 of the pre-modern *Metal, Engineering and Associated Industries Award 1998*[30] relevantly provided:

> **6.4.4 Rest Period after Overtime**
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> **6.4.4(a)** When overtime work is necessary it must, wherever reasonably practicable, be so arranged that employees have at least 10 consecutive hours off duty between the work of successive working days.
>
> …
>
> **6.4.4(c)** If on the instructions of the employer an employee resumes or continues work without having had the 10 consecutive hours off duty the employee must be paid at double rates until he or she is released from duty for such period. The employee is then entitled to be absent until he or she has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during the absence.
>
> (underlining added)

[46] The equivalent clause in the modern *Manufacturing and Associated Industries and Occupations Award 2020*[31] (Manufacturing Award) is clause 32.12, which relevantly provides:

> **32.12 Rest period after overtime**
>
> …

> (b) When overtime work is necessary it must, wherever reasonably practicable, be arranged so that an employee has at least 10 consecutive hours off duty between the work of successive working days.
>
> …
>
> (d) If, on the instructions of the employer, an employee resumes or continues work without having had 10 consecutive hours off duty the employee must be paid at **200%** of the ordinary hourly rate[32] until the employee is released from duty. The employee is then entitled to be absent until the employee has had 10 consecutive hours off duty without loss of pay for ordinary hours occurring during the absence.
>
> (underlining added)

[47] This is consistent with the traditional understanding that 'double rates' and 'double time' mean the same thing. Against that background, what occurred in the formulation and making of the Retail Award appears to have been an anomaly. It is clear that the AIRC award modernisation Full Bench did not intend to increase the applicable penalty rate and thereby impose additional costs on employers. The passage from the AIRC decision set out in paragraph [17] above makes this pellucidly clear. However, the adoption of the form of words proposed in the SDA's draft award by the AIRC obscured, and left uncertain, that intention. The redraft of the clause as part of the plain language process did not improve the situation, as the October 2018 Statement makes apparent. It remains uncertain whether the text of the clause reflects the intention of those who made it, and this uncertainty has obviously extended to the application of the clause in practice.

[48] As we have earlier recounted, historical considerations suggest that pre-modern award clauses which provided for the payment of 'double rates' during the prescribed break period between work days or shifts meant the payment of 'double time' — that is, double the minimum hourly rate. The standard for these types of provisions in modern awards is that the penalty rate is now expressed as 200 per cent of the minimum hourly rate (or the ordinary hourly rate where all-purpose allowances are included). We have earlier referred to clause 32.12 of the Manufacturing Award; other examples include clause 14.4(d) of the *Security Services Industry Award 2020*, clause 29.8(d) of the *Building and Construction General On-site Award 2020*, clause 21.4(c) of the *Storage Services and Wholesale Award 2020* and clause 21.4(c) of the *Road Transport and Distribution Award 2020*. Accordingly, we will vary clause 16.6(b) consistent with this standard approach in order to resolve the identified ambiguity and uncertainty and give effect to the apparent intention of the AIRC award modernisation Full Bench to maintain but not increase the pre-existing entitlement. We will add a note to clarify that the public holiday rate is as prescribed in Table 11 in clause 22.1.

[49] Clause 16.6(b) will be varied to provide as follows:

> If an employee starts work again without having had 12 hours off work, the employer must pay the employee for each hour worked at the rate of **200%** of the employee's minimum hourly rate until the employee has a break of 12 consecutive hours.
>
> NOTE: **Table 11—Penalty rates** in clause 22.1 prescribes the penalty rate payable for all work performed on public holidays.

[50] We will not make the variation retrospective to 1 October 2020, as proposed by the ARA. The ambiguity and uncertainty which we have found to exist in fact dates back to 1 January 2010. There is no evidence before us as to the way in which clause 16.6(b) has been

applied in practice and we are concerned that, if we granted retrospectivity, the result may conceivably be that some repayment is owed by employees to employers. We are not satisfied therefore that the requisite exceptional circumstances exist. The variation will operate from 14 May 2024.

[51] As earlier stated, this aspect of the ARA's application has been determined pursuant to s 160 of the FW Act. We consider that there are some policy issues underlying this clause which may warrant further consideration. These include:

- the rationale of an award provision which, first, requires a minimum break period between work days and then, second, allows such a break period not to be provided by the employer if a penalty rate is paid; and

- whether the employer can require the employee to work during the prescribed break period.

[52] These issues may arise for consideration in the context of the determination of the second aspect of the ARA's claim concerning clause 16.6(b) set out in paragraph [3(b)] above.

PRESIDENT

Appearances:

F Leoncio, counsel, and *L Morris*, solicitor, for The Australian Retailers Association.
L Cruden for The Australian Industry Group
L Carroll for National Retail Association Limited.
W Friend KC with *S Burnley*, *G van Rensburg* and *H May* for the Shop, Distributive and Allied Employees Association.
G Taylor for The Australian Workers' Union.
J Cullinan and *L Kakogiannis* for Retail and Fast Food Workers Union Incorporated.

Hearing details:

2024.

Sydney and Melbourne by video link using Microsoft Teams:
1 May.

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[1] MA000004.

[2] [2024] FWCFB 197.

[3] [2023] FWCFB 264.

[4] AP796250.

[5] AP794741.

[6] AP794740.

[7] AN120499.

[8] AN140257.

[9] AN160292.

[10] AN170088.

[11] AN150130.

[12] [2008] AIRCFB 717.

[13] [2008] AIRCFB 1000.

[14] Ibid.

[15] PR998580.

[16] [2018] FWC 6075.

[17] [2020] FWCFB 4839.

[18] [2020] FWCA 699.

[19] [2020] FWCFB 3570.

[20] [2020] FWC 559.

[21] [1924] CthArbRp 234, 20 CAR 770.

[22] Ibid at 799.

[23] [1924] CthArbRp 258, 20 CAR 1075 at 1081.

[24] [1924] CthArbRp 234, 20 CAR 770 at 830.

[25] [1943] CthArbRp 447, 50 CAR 604.

[26] Ibid at 605.

[27] [1969] CthArbRp 581, 129 CAR 239.

[28] Ibid at 245.

[29] For example, *Australian Timber Workers Union v John Sharp and Sons Limited & Ors* [1920] CthArbRp 137, 14 CAR 811 at 822.

[30] AP789529.

[31] MA000010.

[32] 'Ordinary hourly rate' is defined in clause 2 of the Manufacturing Award to mean 'the hourly rate for the employee's classification specified in clause 20 — Minimum rates , plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes'. It does not include any penalty rates payable for ordinary hours worked.