

From: Chambers - Ross J
Sent: Monday, 15 October 2018 1:44 PM
To: Nick Tindley; 'djmacken@macken.com.au'; 'sue-anne@sda.org.au'
Cc: AMOD
Subject: AM2017/43 - General Retail Award - Award specific Penalty Rates claims

Dear parties,

I refer to the above matter.

I attach correspondence from the SDA dated 5 October 2018 in response to [Decision \[2018\] FWCFB 5897](#) issued on 27 September 2018 and the [correction](#) issued on 1 October 2018.

The Full Bench seeks the views of interested parties in relation to the matters raised by the SDA in its correspondence.

Submissions are to be sent to amod@fwc.gov.au by **4.00pm Tuesday, 23 October 2018**.

Kind regards,

Casey Sutton
Associate to The Hon. Justice IJK Ross
President

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The Fair Work Commission acknowledges that our business is conducted on the traditional lands of Aboriginal and Torres Strait Islander peoples. We acknowledge their continuing connection to country and pay our respects to their Elders, past, present and emerging.

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5 October 2018

Associate to President Ross

Fair Work Commission

By email

Dear Associate,

Re: 4 Yearly Review of Modern Awards – General Retail Industry Award 2010

Re: Award Specific Penalty Rates Claims - AM2017/43

We refer to the above matter and, in particular, the Full Bench's reasons for decision handed down on 27 September 2018 and the subsequent correction to that decision dated 1 October 2018.

We are instructed to bring the following matters to the attention of the Commission for its consideration.

In the corrected decision at paragraph [275] (dealing with transitional arrangements), the Full Bench has identified a period of time within which the rates of pay for full time and part time shiftworkers on the one hand, and casual shiftworkers on the other, will eventually fall by 1 July 2020 to 175% and 200% respectively.

The correction to paragraph [275] imposes a further reduction on what was originally provided for in that paragraph, namely an endpoint of 180% for full time and part time shiftworkers and 205% for casual shiftworkers.

The SDA invites clarification from the Full Bench as to whether there has been an inadvertent error in the Full Bench's decision which requires further correction or re-correction.

The Full Bench's attention is drawn to paragraph [192] of the primary decision. There, the Full Bench acknowledged that it was no part of the employers' case to seek any reduction in the

component of the Sunday shiftwork penalty which relates to the disutility of shiftwork itself. The point was further emphasised by the Full Bench setting out the relevant extract (complete with emphasis added) of the Retail Employers' written submission dated 21 May 2018.

Consistent with the case as presented by the Retail Employers, the Full Bench's reasons for decisions, as originally articulated in paragraph [275] accepted a reduction in the penalty rate component of the shiftworker rate which mirrored the same reduction that had been found to be appropriate to apply to Sunday non shiftworkers.

The correction now made to paragraph [275] imposes, it is submitted anomalously, a greater reduction for shiftworkers (one not sought by the employers) than the reduction to penalty rates previously determined to meet the modern awards objective for non shiftworkers working the same hours and presumably suffering the same degree of disutility for doing so.

There is no explanation in the Reasons for Decision for this anomalous distinction. It may be an inadvertent error which is appropriate to be corrected. Certainly, paragraph [276] appears on its face to acknowledge that what the Commission intended to do was to bring into alignment Sunday penalty rates for shiftworkers and non-shiftworkers. If so, paragraph [275] as corrected does not achieve this intended objective.

If the reductions now contemplated by paragraph [275] as corrected are intended, the SDA respectfully seeks reasons (where none have presently been given) for the creation of the anomaly, particularly where this has occurred in the context of a decision by the Full Bench which acknowledged and gave effect to the SDA's case for correction of such an anomaly in the case of casual employees working weekday evenings and on Saturdays.

If the decision to pay a lower penalty rate to shiftworkers than applies to non-shiftworkers was an inadvertent error, it would appear that the original form of paragraph [275] will need to be reinstated, and paragraphs [221] and [269] will require correction.

We have forwarded this communication to the employer parties. The position of the employer parties is made clear in the reasons for decision and indeed highlighted in the terms referenced above. But the Commission may consider it appropriate that all interested parties have the opportunity to respond to this correspondence.

Yours faithfully,



A J MACKEN & CO.