

IN THE FAIR WORK COMMISSION

AM2017/43

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

GENERAL RETAIL INDUSTRY AWARD 2010

RE: 4 Yearly Review of Modern Awards- General Retail Industry Award 2010

RE: Award Specific Penalty Rates Claim- AM2017/43

1. The following submissions are made on behalf of the Australian Retailers Association (**ARA**) and Master Grocers Australia (**MGA**) and refer to the correspondence filed on behalf of the Shop, Distributive and Allied Employees' Association (**SDA**) on 5 October 2018.
2. The SDA appears to assert that the Correction issued by the Commission on 1 October 2018¹ (**Corrected Decision**) to the final increment of the reduction of Sunday penalty rates for shiftworkers in the transitional arrangements amounts to an error, and that the Full Bench's original decision on 27 September 2018 should be reinstated, at least as it relates to Sunday shiftwork penalties. For the reasons set out below, ARA and MGA submit that the SDA's submission should be rejected.
3. The SDA puts forward three contentions in relation to the corrected decision at paragraph [275]. These are that the corrected decision:
 - (a) imposes a penalty rate reduction on what was originally provided for in that paragraph;
 - (b) imposes a greater reduction for shiftworkers than the reduction to Sunday penalty rates previously determined by the Full Bench in the *Penalty Rates Decision*² to be necessary for the Award to meet the modern awards objective, and therefore creates an anomaly; and
 - (c) goes further than what was sought by ARA and MGA.

¹ [2018] FWCFB 5897

² [2017] FWCFB 1001

4. In relation to the first, ARA and MGA submit that the Commission's Decision of 27 September, at paragraph [221], confirmed a reduction to the Sunday shiftwork penalty rate for full-time and part-time employees, from 200 per cent to 175 per cent, and from 225 per cent to 200 per cent for casuals. This was not fully reflected in the transitional provisions at paragraph [275] of the Decision. This was brought to the Commission's attention and the Corrected Decision was issued. That there was an initial error in the transitional arrangements in the initial decision, which was later the subject of correction in the Corrected Decision, does not render the initial decision wrong nor does it mean the transitional arrangements set out in the Corrected Decision are wrong, and the SDA's first contention should be rejected.
5. The SDA's second contention is plainly wrong and appears to be based on a misapprehension of either the Corrected Decision, the *Penalty Rates Decision* or both. The SDA's contention appears to be that shiftwork attracts an additional penalty rate of 30% of the base rate, Sunday work has been determined to attract an additional penalty rate of 50% (plus the casual loading for casual employees), therefore the combined shift loading and penalty rate should be 80% (105% for casual employees), and that any determination of the Commission that does not sit within these parameters creates an anomaly. What this ignores is that the Award does not establish a standard shift loading which applies at all times.
6. A 30% shiftwork penalty is simply one of a number of shiftwork penalties which applies under the Award. Notably, shiftwork on weekends has never reflected a 30% shiftwork component. Under clause 30.3(b) of the Award shiftwork undertaken on a Saturday attracts a loading of an additional 50% (75% for casuals). Under clause 29.4(b) of the Award work performed on Saturdays by day workers attracts a penalty of an additional 25% (to be transitioned to 50% for casual employees). Taking these together, the shiftwork component for Saturdays is 25%.
7. Turning to Sundays, the Corrected Decision provides for a combined penalty and loading of an additional 75% (100% for casuals). Following the *Penalty Rates Decision* the Sunday penalty rate will transition to 50% (75% for casuals). This means the Sunday shiftwork component is 25%, which is consistent with Saturday. ARA and MGA submit that if the Commission was to accede to the

SDA's position in relation to Sunday shiftwork it would result in the creation of an anomaly rather than addressing one.

8. It is likely, though we accept not certain, that the differential between weekday and weekend shift loadings is due to the single loading applicable on weekends, whereas the Award provides for different loadings depending on when the employee is working and what work they do (Baking Production employees are entitled to an additional 12.5% loading for shifts commencing at or after 2.00am and before 6.00am).
9. Given the above, the SDA's contention that the Corrected Decision goes beyond the parameters of the *Penalty Rates Decision*, and/or that it creates an anomaly should be rejected.
10. In relation to the SDA's third contention' the Corrected Decision at paragraph [221] mirrors the variation sought by ARA and MGA both in this matter and in the *Penalty Rates Case*. Paragraph [210] of the *Transitional Arrangements Decision*³ provides the following:

"The Retail Associations propose that from 1 July 2017 the rate for shiftwork performed on Sundays be 175% (200% for casuals) of the ordinary time rate".
11. On 31 July 2017 the ARA and MGA filed a Draft Determination to vary the Award in the terms set out in paragraph 8 above. For that reason it cannot be concluded that what the Commission determined, as reflected in the Corrected Decision, goes beyond that which was sought by ARA and MGA. Given this, the SDA's contention should be rejected.
12. For the sake of completeness, ARA and MGA contend that the Corrected Decision as it relates to Sunday shiftworkers plainly identifies the Commission comprehensively disposed of its obligations in relation to ARA and MGA's application. Whilst the Full Bench relied of the findings and determinations in the *Penalty Rates Decision* to conclude that "*it is appropriate that the Sunday shiftwork rates be reviewed*" (paragraph 199), the Full Bench considered the modern award objective, taking into account the particular considerations identified in (1)(a)-(h) of section 134 of the *Fair Work Act 2009* (Cth). At

³ [2017] FWCFB 1934

paragraph [221] the Full Bench confirmed it had *“taken into account those considerations insofar as they are relevant to the matter before us and have decided to reduce the Sunday shiftwork penalty rate for full-time and part-time employees, from 200 per cent to 175 per cent and from 225 per cent to 200 per cent for casuals.”*

13. By asking the Full Bench to re-instate paragraph [275] of the decision issued on 27 September 2018, and to subsequently amend paragraphs [221] and [269] (which would be inconsistent with the Full Bench’s original decision), the SDA is attempting to re-contest the ARA and MGA’s initial application. This should be rejected.
14. Should the SDA disagree with the Full Bench’s decision to accept the application made by ARA and MGA to reduce the Sunday shiftwork penalty, after taking into account the particular considerations as against the modern awards objective, SDA can seek review of the decision.
15. Given the above, the SDA’s concerns in relation to the Corrected Decision should be rejected, and that decision, including the transitional arrangements, should stand.

23 October 2018