

IN THE FAIR WORK COMMISSION

AM2017/43

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

GENERAL RETAIL INDUSTRY AWARD 2010

SUPPLEMENTARY SUBMISSIONS OF THE ARA AND MGA

1. The following submissions supplement the submissions filed by ARA and MGA on 23 October 2018. In those submissions ARA and MGA identified for the Commission why the SDA's concerns, as set out in their correspondence of 5 October 2018, are baseless and should be rejected. These submissions address the question of whether the Commission should, even if the SDA's position was to be accepted, amend the Decision as sought by the SDA.
2. The question is whether any part of the Corrected Decision requires further correction. The SDA asserts that either the transitional provisions require correction so that the penalty rate for permanent shiftworkers on Sundays from 1 July 2020 is 180% (and 205% for casuals) or it is entitled to reasons for what it calls an "anomalous distinction".
3. The SDA has not identified the basis on which it says the Commission can vary the Corrected Decision in the way it seeks. The Commission has a broad power to correct obvious errors, defects or irregularities in its decisions under section 602(1) of the Fair Work Act 2009 (Cth). It is noted, however, that this does not include an error, defect or irregularity in a modern award or national minimum wage order.
4. Whether section 602(1) prevents the Commission from correcting its own decision at the time the decision is made, and prior to a Determination being issued, is unclear. It does appear from the language of section 602(1) that the intention is for there to be a separate process under section 160 to correct errors in award terms in force. This would support a conclusion that section 602(1) does apply to this matter.

5. In any event, regardless of whether the power to further “correct” the Corrected Decision lies in section 602(1) or section 160, what the SDA is seeking should not be granted. Under either section, unless it is abundantly clear that an error has been made, the “correction” should not be made. Section 602 is limited to “obvious” errors, defects or irregularities. ARA and MGA submit there is no obvious error, defect or irregularity in the Corrected Decision as it relates to Sunday shiftwork. For the reasons set out in the submission of 23 October 2018, ARA and MGA do not accept the Commission granted a variation beyond what the ARA and MGA sought, beyond what was granted for non-shiftworkers or beyond what was contemplated in the Corrected Decision itself.
6. While section 160 does not impose the same restrictions in correcting decisions as section 602(1), it is clear from previous Commission decisions regarding errors that the requirement that for the Commission to correct an error under section 160 the error must be an obvious, clear error (see for example *Determination on Fair Work Australia’s own initiative to remove ambiguity or uncertainty to correct error* [2011] FWA 4435).
7. Given there is no obvious error, defect or irregularity in the Corrected Decision, the Commission should not entertain any further correction as proposed by the SDA.
8. In relation to the SDA’s request for reasons “for the creation of the anomaly”, ARA and MGA contend that, for the reasons set out in the 23 October submission, no anomaly has been created, and as such no explanation is required. The SDA is suggesting that shiftwork does, and should always, attract a loading of 30%. For reasons outlined in the 23 October submission this is plainly wrong.
9. The SDA has not sought to vary the Saturday shiftwork loading provided for in clause 30.3(b) of the Award. It has not sought to vary the public holiday shiftwork loading provided for in clause 30.3(d) of the Award. And it has not sought to vary the shiftwork loading which applies to baking production employees provided for in 30.4(a) of the Award. It can be presumed the SDA accepts these provisions are correct given it has had numerous opportunities to seek to “correct” them yet has elected not to.

10. 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.

29 October 2018