



DECISION

Fair Work Act 2009

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

The Master Plumbers' and Mechanical Services Association of Australia (AM2011/24)

Plumbing industry

SENIOR DEPUTY PRESIDENT WATSON

MELBOURNE, 22 JULY 2011

Application to vary the Plumbing and Fire Sprinklers Award 2010.

Introduction

[1] On 6 May 2011, The Master Plumbers' and Mechanical Services Association of Australia (MPMSAA) made an application under s.160 of the *Fair Work Act 2009* (the Act) to vary numerous provisions of the *Plumbing and Fire Sprinklers Award 2010*¹ (the modern award), to remove ambiguity and/or uncertainty or correct error.

The variations proposed

[2] The variations proposed may be grouped as set out in the table below.

Ground	Variation	Reasons for variation
1. Adult apprentice definition (Application: variation 1)	Deleting from clause 3, the definition of "adult apprentice", which appears as clause 16.1.	Remove repetition.
2. Adult apprentice definition - trainee apprentices (Application: variation 7)	Amending the definition in clause 16.1 to replace "to a trade within the scope of the award" with "or apprenticeship contract".	To ensure that clause 16.1 also applies to trainee apprentices in New South Wales.
3. Adult apprentices - Application of general conditions of	Replacing the current clause 16.2 with "The provisions of this award apply to	Remove uncertainty by making it clear that persons

<p>apprenticeship (Application: variation 8)</p>	<p>adult apprentices engaged under this award from the commencement of this award”.</p>	<p>engaged as apprentices, when adults under pre-modern award instruments will complete their apprenticeships under the conditions of such instruments and all persons so engaged after the commencement of the modern award will be subject to the modern award, without transition.</p>
<p>3. Types of employment (Application: variations 2-6)</p>	<p>(a) deleting “weekly hire” from clause 10.1(c) and 10.2; (b) altering “Weekly hire employment” to “Full-time weekly hire employment” in the clause heading in clause 12; (c) deleting 12.1 heading; (d) renumbering clauses 12.1(a) and (b) as clauses 12.1 and 12.2; (e) renumbering clause 12.2 as 13; (f) add to the end of new clause 13.2 “To avoid doubt the wage rate for a part-time daily hire employee (plumbing and mechanical services classifications only) shall be calculated as for a daily hire employee”; (g) renumbering clause 13 - Casual employment- as clause 14; (h) combining old clauses 13 - Casual employment and 14 - Casual conversion to full-time or part-time employment in the new clause 14.</p>	<p>Correct an error which had the effect of preventing plumbing and mechanical services employees being engaged on a part-time basis, other than as casual employees, with renumbering to minimise disruption to the numbering of the award.</p>
<p>4. Allowances for apprentices (Application: variations 9 and - 13)</p>	<p>(a) varying clause 20.2(a) to add “except clause 21.1(d) - Special fixed allowance”; (b) adding a new clause 20.2(d) to reflect wage and allowances for trainee apprentices in New South Wales on a transitional basis; (c) varying clause 20.3(b)(iii) to replace “industry disability allowance as prescribed” with “clause 21.1(a) - industry allowance”; (d) replacing clauses 21.1(a) and (b) to include the basis of payment of all-purpose allowances, to remove an ambiguity in clause 21.1(b)(iv) and to remove the quantum of allowances replaced by all-purpose allowances;</p>	<p>Correct an error by which allowances which never previously applied to apprentices were included in their rates, to correct an oversight of trainee apprentices in NSW, to clarify the operation of the industry allowance for plumbers and gasfitters and to rectify the omission of the definition of all-purpose allowance.</p>

	(e) inserting after “all employees” in clause 21.1(d) the words “other than apprentices”.	
5. Sprinkler fitter registration allowances (Application: variation 14)	Varying clause 21.1(h)(i) to replace “the holder of a certificate issued by the Plumbers, Gasfitters and Drainers Board of New South Wales” with “registered under the relevant State or Territory authority”.	Correct an error by removing a reference to a defunct regulatory authority.
6. Employees accepting responsibility to statutory authorities in Tasmania (Application: variation 15)	Inserting, at the commencement of clause 21.5(b)(ii) “In Tasmania,” and adding a new 21.5(b)(iii) to give clause 21.5(b)(ii) a transitional operation.	Correct an error which applied clause 21.5(b)(ii) generally, rather than a transitional provision in Tasmania.
7. Other disability related allowances paid on a per incidence basis (Application: variation 16)	Reformulating clause 21.6(a).	Remove uncertainty by making clear the inter-action with all-purpose allowances in substitution of disability allowances.
8. Allowance definitions (Application: variation 17)	Reformulating clause 21.7, including placing allowances in alphabetical order.	Consequential upon amendment of clauses 21.1 and 21.6.
9. Penalty rates - Weekend work (Application: variation 18)	Varying clause 32.1(a)(i) to reflect nationally applicable weekend penalties (other than Victoria) and applicable weekend penalties for Victoria, in place of single penalty rate. Renumber 32.1(a)(ii) as (iii) and insert new (ii).	Correct an error whereby weekend penalty rates in Victoria were applied nationally.
10. Classification definitions (Application: variations 19 and 20)	Inserting into Schedule B— Classification Definitions - a new clause B.1.10 to make it clear that “Employees shall be paid in accordance with the level of skills required to perform the work of a particular position or job offered by an employer”. Inserting into clause B.2.1(c) “Registered Drainer - New South Wales”.	Correct ambiguity and error.

[3] The MPMSAA relied on s.160(1) of the Act in support of its application. Section 160(1) provides that:

“FWA may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.”

[4] The MPMSAA submitted that there were exceptional circumstances, as required by s.165(2) of the Act, to make the variations retrospective, to operate from the date when the modern award commenced - 1 January 2010. It contended that the exceptional circumstances were found in the uncertainty within the provisions to be varied and in particular the uncertainty around the application of the modern award to adult apprentices and that a retrospective variation was necessary to ensure that the protections of s.167 of the Act apply.

The process for dealing with the application

[5] The MPMSAA application was posted on the Fair Work Australia modern award variations web-site, along with directions for the filing of submissions and a date of 15 June 2011 set down for consultations. All persons who had registered an interest in the modern award were provided with email advice of the application and all postings to the web-site.

[6] An interim decision concerning variations to part 3 of the Award - Types of Employment and Termination of Employment - in respect of variations 2-6 of the MPMSAA was issued on 21 June 2011.² The decision resulted in further consultations on 1 July 2011.

Submissions

[7] The MPMSAA submitted that its experience, in excess of 12 months, in advising its members on the application of the modern award has brought to light a limited number of ambiguities, uncertainties and apparent errors.

[8] In respect of part-time employment, the MPMSAA submitted that the absence of part-time provisions for daily hire employees creates an uncertainty where employees may be already working under such conditions. It submitted that an ambiguity now exists whereby the only form of non full-time employment permitted to plumbing and mechanical services employees is casual employment, causing the loss of many conditions of employment enjoyed by non casual employees.

[9] The MPMSAA submitted that the variation proposed to clause 16.2 of the modern award is to make it clear that persons engaged as apprentices, when adults under pre-modern award instruments, will complete their apprenticeships under the conditions of such instruments and all persons so engaged after the commencement of the modern award will be subject to the modern award, without transition, removes ambiguity and/or uncertainty created as to whether transitional provisions apply to adult apprentices engaged prior to the operative date of the modern award, which is reflected in an interpretation being given to the transitional wage entitlements of adult apprentices by the office of the Fair Work Ombudsman.

[10] The MPMSAA submitted that the variation proposed to amend clause 20.2 corrects an error whereby the wage rates for the unique-to-New South Wales classification of “trainee apprentice” were not included in the modern award. It submitted that it is necessary that they

be included as trainee apprentices in New South Wales are on different wages and conditions than indentured apprentices. It noted a similar variation made to the *Electrical, Electronic and Communications Contracting Award 2010*.³ The proposed new clause includes a “sunset” clause whereby it will cease to operate from 31 December 2014 in keeping with the award modernisation principles.

[11] The MPMSAA submitted that the variation of clause 20.3 corrects an error by which the “industry allowance” for plumbing and mechanical trades was described as the “industry disability allowance”, an allowance which is peculiar to sprinkler fitting grades. It also removes uncertainty as to the application of these two distinct allowances.

[12] In respect of the other variations proposed, the MPMSAA submission largely repeated the grounds relied upon in the application as summarised in the table above.

[13] In a supplementary submission of 2 June 2011, the MPMSAA advised that in respect of the proposed variations to the definition of adult apprentice in clause 16.1 and apprentice wages in clause 20.2 to accommodate the trainee apprentice in New South Wales, the amendment of the Registration allowances provision in clause 21.1(h)(i), and the two variations proposed to Schedule B—Classification definitions, the Master Plumbers and Mechanical Contractors Association of New South Wales (MPMCANSW) had advised the MPMSAA that it had further developed the material that it had previously provided to MPMSAA and was now “of the opinion that it is best placed to argue for those matters and may amend them in its submissions”. The MPMSAA indicated that in those circumstances it did not intend to pursue those variations which would “now be addressed by submissions by MPMCANSW which may include variations to the actual wording of the proposed new clauses”.

[14] The Air Conditioning and Mechanical Contractors’ Association submitted that having studied the MPMSAA application, it supported the variations proposed, believing that the variations will improve the modern award and provide greater clarity and certainty.

[15] The National Fire Industry Association supported the MPMSAA application.

[16] The Master Plumbers’ Association of Queensland (MPAQ) supported the MPMSAA application except in relation to any items about adult apprentices or trainee apprentices. It submitted that the changes proposed by MPMSAA, except for those referencing New South Wales specific provisions, have national impact and it supported all of them as they are important to provide clarity and ease for employers to implement the modern award. It submitted that the MPMSAA’s proposed amendment in respect of part-time work for plumbing classifications and labourers provides certainty for those plumbing employers looking to provide another type of employment in family friendly workplaces. It submitted that retrospectivity is an important aspect of these changes because some of the clauses proposed to be varied by this application imposed monetary obligations on employers in error.

[17] The Master Plumbers and Gasfitters Association of WA (Union of Employers) (MPGAWA) supported the change to the definition of adult apprentices in clause 16.1 so as to clearly state and identify an adult apprentice, supported the definition proposed by the MPMCANSW in clause 3 of the modern award and sought clarification of transitional provisions within the modern award.

[18] The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) submitted that except where it and the other parties consent to a variation, the modern award should not be varied. It submitted that a number of the variations sought do not fall into the category of removing ambiguity or uncertainty or correcting an error, which is the basis of the application. Accordingly such matters should be dismissed. It submitted that if the employer parties want to pursue such matters then the forthcoming review or four yearly reviews would be the appropriate time to consider them.

[19] The CEPU opposed:

1. The proposed deletion of the definition of “adult apprentice” in clause 3, submitting that it is not uncommon for modern awards to contain the same definition in more than one place;
2. The proposed variations of the Types of Employment provision in Part 3 of the modern award (Application grounds 2-6) to accommodate the employment of plumbing and mechanical services employees on a part-time basis, other than as casual employees. The CEPU submitted that there is no error, with the modern award providing for part-time employment (see clause 10.1(c)). It submitted that there is no exclusion under the modern award preventing plumbing and mechanical services employees being engaged on a part-time weekly hire basis and that what the employers are really attempting to do is to create a new form of employment; that is part-time daily hire.
3. The variation proposed to clauses 20.2 - Apprentice wages - and 21.1(d) - Special fixed allowance - to exclude the application of the Special fixed allowance to apprentices, noting that the “Special fixed allowance” was not paid to apprentice plumbers in Victoria under the previous award, but was paid to apprentice plumbers in South Australia, Western Australia, Queensland and Tasmania.

[20] It follows from the introduction to the CEPU’s submission that it does not oppose the other variations sought.

[21] The MPMCANSW submitted that the definition of adult apprentices should be dealt with by deleting the definition in clause 16.1 and amending the definition in clause 3 to read:

“**adult apprentice** means a person of 21 years of age or over at the time of entering into an indenture or apprenticeship contract to a trade within the scope of this award.”

[22] It submitted that such a variation was required to remove the uncertainty arising from two slightly different definitions currently in clauses 3 and 16.1 of the modern award and it was preferable that the definition be placed in the general definitions clause.

[23] The MPMCANSW opposed the MPMSAA’s application to vary clause 10 of the modern award, in relation to Types of employment. The MPMCANSW agreed that part-time employment provisions are appropriate, but did not agree that specific reference to part-time daily or weekly employees is necessary or appropriate. The MPMCANSW submitted that due

to the nature of daily hire employment, it is inconsistent to have part-time employment on a daily hire basis.

[24] The MPMCANSW opposed the MPMSAA's application to vary clause 10.1 of the modern award, to apply the modern award to adult apprentices engaged from the commencement of the modern award. It submitted that the variation proposed by the MPMSAA was inconsistent with the clear intent of the Award Modernisation Full Bench⁴ to apply the transitional provisions to all apprentices to whom the modern award applies and who were employed prior to and after the operative date of the modern award.

[25] The MPMCANSW supported the variation of the modern award to accommodate the existence of trainee apprentices in New South Wales, but proposed a more fulsome variation of similar effect to that proposed by MPMSAA. It proposed:

“11.1 Clause 20.2(a) is amended by inserting the words ‘or clause 21.’ at the end of the clause.

11.2 Clause 20.2(b)(ii) is amended by adding the words ‘with the exception in New South Wales only the trade allowance forms part of the minimum wage, up until 31 December 2014 at which time the amended wording ceases to operate’

11.3 After clause 20.2(b)(iii) insert the title in bold ‘Trainee apprentices minimum wages (New South Wales only)’

11.4 After clause 20.2(b)(iii) insert Clauses 20.2(iv), (v), (vi) and (vii): [sic]

‘(iv) in addition to the minimum wage rate arising out of clause 20.2(i), (ii), (iii) and (iv), apprentices must be paid the full amount of the tool allowance in clause 21.2(a), the industry allowance in clause 21.1(a), and if applicable the fares allowance in clause 21.8(c) and/or the standard travelling time allowance in clause 21.8(d).

(v) a training apprentice in New South Wales will be paid the percentages of the minimum wage for the plumbing and mechanical services tradesperson classification in clause 20.1 as set out in the following table:

Trainee apprentice	% per week
1st year	41.5
2nd year	61
3rd year	77
4th year	95.5

(vi) Clauses 20.2(b)(iv) and 20.2(b)(v) will cease to operate on 31 December 2014.”

[26] The MPMCANSW supported the variation proposed by MPMSAA to clause 21.1(h)(i) of the modern award in respect of the application of the special fixed allowance to apprentices.

[27] The MPMCANSW otherwise supported the application of the MPMSAA.

[28] The MPMCANSW supported the variation proposed by MPMSAA to Schedule B:

- by inserting a new clause B.1.10:

“Employees shall be paid in accordance with the level of skills required to perform the work of a particular position or job offered by an Employer”; and

- amending Schedule B.2.1(c) by inserting “Registered Drainer New South Wales”.

[29] It also proposed the addition of “Roof Plumber (NSW)” in Schedule B.2.1(c).

[30] The MPMCANSW proposed two further variations:

1. variation to clause 20.2(b)(ii) and the insertion of 20.2(b)(iv) to continue the entitlement of apprentices and trainee apprentices in New South Wales to the full tool allowance on a transitional basis; and
2. variation of the title to clause 15.10, clause 15.10(a) and 15.10(b) to replace the words “technical schools” with the words “Registered Training Organisations” and the addition, in clause 3, of a definition:

“Registered Training Organisation’ means a training organisation registered by the Australian Skills Quality Authority (ASQA), or under state or territory legislation.”

[31] The second additional variation reflects changes to the vocational education and training laws and the introduction of the *National Vocational Education and Training Regulator Act 2011*.

[32] The MPGAWA supported the MPMCANSW proposal to vary clause 15.10 - Attendance at technical schools.

[33] In a supplementary submission after the MPMCANSW submission was filed the MPAQ supported the MPMCANSW proposals in relation to adult apprentice wage rates, submitting that the changes to the definitions of adult apprentice proposed by MPMCANSW appear to achieve clarity. It supported the proposition that the Award Modernisation Full Bench of the Australian Industrial Relations Commission (AIRC) intended the transitional provisions to apply to all apprentices to whom the modern award applies and noted that no comparable adult apprentice classification existed in Queensland prior to the modern award.

The legislation

[34] Section 160 of the Act provides for variation of the modern award to remove ambiguity or uncertainty or correct error, in the following terms:

“(1) FWA may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

- (2) FWA 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.”

[35] Section 157 of the Act relevantly provides that:

- “(1) FWA may:
- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or
 - (b) make a modern award; or
 - (c) make a determination revoking a modern award;

if FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.”

[36] The modern awards objective is set out in s.134 of the Act. It provides as follows:

- “(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
- (a) relative living standards and the needs of the low paid; and
 - (b) the need to encourage collective bargaining; and
 - (c) the need to promote social inclusion through increased workforce participation; and
 - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
 - (e) the principle of equal remuneration for work of equal or comparable value; and
 - (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
 - (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.”

Consideration

Definition of adult apprentice (MPMSAA variations 1 and 7)

[37] The modern award currently contains definitions of adult apprentice in clauses 3 and 16.1, with the definition in clause 3 being a truncated form of the definition in clause 16.1. I am satisfied that the slightly different definitions create some uncertainty which should be removed. The addition of “or apprenticeship contract” is necessary to accommodate trainee apprentices in New South Wales. The modern award will be varied to:

1. replace the definition in clause 3 with “**adult apprentice** is defined in clause 16.1”; and
2. replace the definition in clause 16.1 with “For the purpose of this award, an **adult apprentice** means a person of 21 years of age or over at the time of entering into an indenture or apprenticeship contract to a trade within the scope of this award”.

Part-time work (MPMSAA variations 2-6)

[38] The MPMSAA submitted that, in the context of an increasing trend where employees engaged on daily hire wish to be employed on a part-time basis and some are already employed on that basis, the absence of part-time provisions for daily hire employees creates an uncertainty whereby the only form of non full-time employment permitted to plumbing and mechanical services employees is casual employment, causing the loss of many conditions of employment enjoyed by non casual employees.

[39] It submitted that variations to clauses 10, 12 to 14 of the modern award were required to correct an error which had the effect of preventing plumbing and mechanical services employees being engaged on a part-time basis, submitting that to be engaged on other than a full-time basis such employees would have to be engaged on a casual basis.

[40] The variations proposed by MPMSAA were:

1. deleting “weekly hire” from clause 10.1(c) and 10.2, so that it reads “part-time employees” and “part-time or casual employees” respectively;
2. replacing the current heading to clause “12 - Weekly hire employment” with “12 - Full-time weekly hire employment” and renumbering the current clauses 12.1(a) and (b) as clauses 12.1 and 12.2 respectively;
3. renumbering the current clause 12.2 - Part-time employment as clause 13, and renumbering clauses 12.2(a) to (e) as clauses 13.1 to 13.5;

4. renumbering the current clause 13 - Casual employment as clause 14 and the current clause 14 - Casual conversion to full-time or part-time employment as clause 14.3, and renumbering current clauses 14.1 to 14.12 as clauses 14.3(a) to 14.3(l).

[41] As noted above, the variation was opposed by the MPMCANSW and the CEPU.

[42] As also noted above, an interim decision was made in respect of this issue on 21 June 2011.

[43] In the 21 June 2011 decision, I noted:

“[7] It is clear from the Stage 2 Exposure Draft statement [[2009] AIRCFB 50] of the Award Modernisation Full Bench that it intended to include a provision for part-time employment in the modern award [[2009] AIRCFB 50, at para 40]. Provisions in respect of Types of Employment were included in the Exposure Draft in the terms of the current modern award provision, save that in the final modern award daily hire was limited to plumbing and mechanical services classifications, consistent with previous award provisions, and some minor amendments were made in the final modern award to the Types of Employment provision in the Exposure Draft [Decision in relation to making of Stage 2 modern awards, [2009] AIRCFB 345 at para 105]. The latter amendments included the integration of the Exposure Draft clauses 12 - Full-time weekly hire employment and 13 - Part-time employment, into the modern award clause 12 - Weekly hire employment, which contains clause 12.1 - Full-time and 12.2 - Part-time employment. The Exposure Draft clause 13.1 became clause 12.2(a), which was amended to include the underlined words:

‘(a) A part-time employee is an employee who works an average of fewer than 38 ordinary hours per week or fewer than eight ordinary hours per day and has reasonably predictable hours of work.’

[8] It appears to me that there is some uncertainty as to the circumstances in which part-time work is permitted by the modern award, with part-time employment being contained as a subclause within clause 12 - Weekly hire employment, but with the addition of the criteria for part-time work of working fewer than eight ordinary hours per day suggesting application of part-time work to the circumstances of daily hire employment.

[9] The uncertainty arises in the context of:

- The intent of the Award Modernisation Full Bench to include provisions for part-time work within the modern award;
- The proposition advanced by the MPMSAA that there exists a demand for part-time employment by some plumbing and mechanical services employees on the basis of daily hire employment in order to maintain the conditions associated with that form of employment;

- The proposition advanced by MPMCANSW that the nature of daily hire employment is inconsistent with part-time employment on a daily hire basis;
- The protections within the part-time provision of the modern award in respect of part-time employment, found in clause 12.2(b) to (e), consistent with the “the essential integrity of part-time employment which should be akin to full time employment in all respects except that the average weekly ordinary hours are fewer than 38 [[2008] AIRCFB 1000, at para 291].”

[44] As is also noted above, further consultations occurred about part-time employment on 1 July 2011. At those consultations, MPMSAA proposed an alternate form of variation:

“10. Types of employment

10.1 Employees under this award will be employed in one of the following categories:

- (a) daily hire employees (plumbing and mechanical services classifications only);
- (b) weekly hire employees; or
- (c) casual employees.

10.2 At the time of engagement an employer will inform each employee, in writing, of the terms of their engagement and, in particular, whether they are engaged as daily hire, weekly hire or casual employees.

11. Daily hire employees (plumbing and mechanical services classifications only)

The following provisions will apply to daily hire employees:

- 11.1** One day’s notice of termination of employment will be given by either party or one day’s pay must be paid or forfeited;
- 11.2** Notice given at or before the usual starting time of any ordinary working day will expire at the completion of that day’s work;
- 11.3** A tradesperson will be allowed one hour prior to termination to gather, clean, sharpen, pack and transport tools; and
- 11.4** Nothing in this clause will affect the right of an employer to dismiss an employee without notice for misconduct or refusing duty.
- 11.5** This clause will not apply to employees engaged as apprentices or in the classifications of fire sprinkler fitting.

12. Weekly hire employment

A weekly hire employee works an average of 38 ordinary hours per week.

13. Part-time employment

13.1 A part-time employee is an employee who works an average of fewer than 38 ordinary hours per week or fewer than eight ordinary hours per day and has reasonably predictable hours of work.”

[45] The remainder of the existing Part 3 of the modern award follows the above, without amendment, save for necessary renumbering.

[46] On 1 July 2011 MPMSAA proposed:

- Deleting all references to full-time and part-time work in clause 10;
- Inserting a new clause 11.5 for clarity, consolidating provisions previously in clauses 10.1(b) and 12(a);
- Clarifying the application of weekly hire employment; and
- Deleting clause 12.2 and inserting as clause 13 - Part-time employment as a separate “employment type”;
- Renumbering clauses in the new clause 13 and renumber subsequent clauses, unaltered, combining the old clauses 13 - Casual employment and 14 - Casual conversion to full-time or part-time employment into a single clause 14 - Casual employment.

[47] In further submissions of 19 July 2011 MPMSAA submitted that, in light of the complexity of the issue of part-time employment of daily hire employees, the issue should be considered during the award review process, but continued to support some variations in the terms proposed on 1 July 2011 to give clarity to the types of employment provision in the modern award.

[48] I am satisfied that the modern award should be varied to remove the uncertainty found to exist in my interim decision broadly in the terms proposed by MPMSAA in its 1 July 2011 submissions, save for two matters.

[49] In my view the new clause 13.1 should not contain the words “or fewer than eight ordinary hours per day”, so that it would read:

“**13.1** A part-time employee is an employee who works an average of fewer than 38 ordinary hours per week and has reasonably predictable hours of work.”

[50] The definition of part-time work as less than 38 hours per week or less than eight hours per day is not required in light of the clarification of Part 3 through the other variations made.

[51] Further, clause 12 will read:

12. Weekly hire employment

12.1 Weekly hire employment is subject to the notice provisions in clause 17.

12.2 A full-time weekly hire employee works an average of 38 ordinary hours per week.

[52] Clause 12.1 distinguishes weekly hire employment from daily hire employment in clause 11. Clause 12.2 distinguishes full-time weekly hire from part-time employment (now in clause 13).

[53] As indicated in the interim decision, the Award Modernisation Full Bench decided to include provision for part-time employment. As also indicated in the interim decision, the current provisions are uncertain as to their effect and in particular in what circumstances part-time work can occur. Confusion arises in large part because of the difficulty in integrating the concepts of daily hire and part-time employment. The parties who put submissions all stated that daily hire is the predominant form of engagement of plumbing and mechanical services employees, particularly in the construction sector of the industry. Several employer associations and the CEPU also indicated that there is some, albeit limited, usage of part-time employment of plumbing and mechanical services employees, in circumstances such as a consensual reduction in hours of employees approaching retirement and the development of part-time return to work plans for employees returning to work following an injury.

[54] I am satisfied that the reformulation of Part 3 of the modern award recorded above provides appropriate clarity as to the operation of part-time work in the modern award. Reflecting the intention of the Award Modernisation Full Bench, the reformulated provision sets out the employment types of daily hire, only in respect of plumbing and mechanical services employees,⁵ weekly hire and casual employment. Daily hire remains as an optional employment type for plumbing and mechanical services classifications, associated with a lost time loading and an additional payment to reflect the lesser security associated with daily hire employment relative to weekly hire employment. Again reflecting the intention of the Award Modernisation Full Bench, provision is made, in the amended clause 13, for part-time employment.

[55] The MPMCANSW and CEPU argued against the availability of part-time employment in respect of daily hire employment, submitting that it blurs the distinction between part-time and casual employment. In my view, this perception arises from the insecurity, relative to weekly employment, associated with daily hire employment and not from the access provided to work on a part-time basis. It is a concern associated with daily hire employment, rather than part-time employment. That relative insecurity is addressed by the lost time loading for daily hire employees in clause 20.4 of the modern award. Part 3 of the modern award, as amended, contains the essential distinction between part-time and casual employment in terms which are common across modern awards. Part-time employment is distinguished by the requirement for predictability of hours, payment of terms and conditions applicable to full-time employees, on a pro-rata basis, and the requirement for written agreement as to the hours to be worked, the days of work, commencement times and the period of part-time employment.

[56] In a submission of 20 July 2011, the CEPU submitted that any tension between part-time work and daily hire employment could be addressed by removing all reference to daily hire employment within the modern award. This proposition is not consistent with the decision of the Award Modernisation Full Bench to retain daily hire employment as an employment type in construction industry awards and the significant usage of daily hire employment within the construction sector of the industry.

[57] The issue of part-time employment of daily hire employees can be further considered in the modern award reviews.

Allowances for apprentices - “special fixed allowance” - (MPMSAA variations 9 and 13)

[58] The MPMSAA has proposed two variations, the effect of which is to remove an entitlement of apprentices to the special fixed allowance in clause 21.1(d) (which will be renumbered as clause 21.1(e)) of the modern award:

1. To add the words “except clause 21.1(d) - Special fixed allowance” in clause 20.2(a), so that it reads:

“Apprentices will be entitled to all terms, conditions, amounts and allowances as prescribed elsewhere in this award (including clause 21.8), except clause 21.1(d) - Special fixed allowance, at the full rate unless otherwise prescribed by this clause.”

2. To add the words in clause 21.1(d) “, other than apprentices,”, so that it reads:

“All employees, other than apprentices, in the plumbing and mechanical services classifications must be paid a special allowance of \$7.70 per week to compensate for excess travelling time incurred by employees in the building industry and the removal of loadings from various building industry awards. This allowance will not be adjusted.”

[59] The MPMSAA submitted that the “special fixed allowance” of \$7.70 per week in clause 21(1)(d) had not previously applied to apprentices and was extended to them in error in the modern award and the variation is required to correct an error in drafting the modern award which escaped the attention of the parties.

[60] The CEPU opposed the variation, submitting that whilst the allowance was not paid to apprentice plumbers in Victoria under the previous award, apprentice plumbers in other states (South Australia, Western Australia, Queensland and Tasmania) did receive this “special fixed allowance” under their previous awards.

[61] In making the modern awards, the approach of the Award Modernisation Full Bench was as follows;

“The content of the awards we have formulated is a combination of existing terms and conditions in relevant awards and existing community standards. In order to minimise disadvantage to employees and increases in costs for employers we have generally

adopted terms and conditions which have wide application in the existing awards in the relevant industry or occupation.”⁶

[62] An examination of the pre-modern award instruments discloses that the “special fixed allowance” applied to apprentices in South Australia and Tasmania under both federal and State instruments and Queensland and Western Australia under the *Plumbing Industry (QLD and WA) Award 1999*.⁷ However, it did not apply to apprentices in Victoria under the *Plumbing Trades (Southern States) Construction Award, 1999*,⁸ (Southern States award) in New South Wales under the *Plumbers and Gasfitters (State) Consolidated Award*,⁹ in the Australian Capital Territory¹⁰ or apprentices covered by the *Plumbing Trades (Mixed Industry) Award 2000*¹¹ or the *Building and Construction Industry (Northern Territory) Award 2002*.¹² Given the approach of the Award Modernisation Full Bench of adopting terms and conditions which have wide application in existing industry or occupational awards, I am satisfied that the application of the “special fixed allowance” to apprentices in the modern award reflects an error which should be corrected by varying the award in the terms proposed by the MPMSAA, as set out above.

Trainee apprentices in New South Wales (MPMSAA variation 10) and tool allowance New South Wales apprentices (MPMCANSW) and consequential variations proposed by MPMCANSW

[63] The MPMCANSW sought a variation to clause 20.2 - Apprentice wages - to reflect the circumstances of trainee apprentices in New South Wales. The MPMCANSW relied on s.157 of the Act as the basis for the variation it proposed. In support of its proposed variation it submitted that trainee apprentices have been a significant feature of the plumbing industry in New South Wales for many years, under the *Apprenticeship and Traineeship Act 2001* (NSW) (ATA). It submitted that arguably New South Wales employers covered by the modern award may not be able to comply with s.7(3)(d) of the ATA, if the modern award does not make specific provision for employment of trainee apprentices and therefore cannot meet the requirements of the ATA to enable them to employ trainee apprentices. It submitted that the inability of New South Wales employers to engage trainee apprentices will have a significant and detrimental impact on apprenticeship employment in that State. The MPMCANSW noted that a similar issue was encountered in respect of the *Electrical, Electronic and Communications Contracting Award 2010*¹³ and the *Nursery Award 2010*,¹⁴ resulting in variations¹⁵ to those awards pursuant to s.157 of the Act.

[64] The MPMCANSW sought a variation to clause 20.2(b)(ii) and the insertion of a transitional provision prescribing the application of various allowances to apprentices and trainee apprentices in New South Wales to continue the entitlement of apprentices and trainee apprentices in New South Wales to the full tool allowance on a transitional basis.

[65] I am satisfied that the variations proposed by the MPMCANSW are necessary to give effect to the modern awards objective and should be given effect, on a transitional basis, by:

- Varying clause 20.2(a) by inserting the words “or clause 21” at the end of the clause;
- Varying clause 20.2(b)(ii) by inserting the words “with the exception, until 31 December 2014, in New South Wales” at the end of the clause;

- By inserting as a new clause 20.2(c) “Trainee apprentices minimum wages (New South Wales only)”;
 - By inserting new clauses 20.2(c)(i), (ii) and (iii) in the following terms:
 - “20.2(c)(i) in addition to the minimum wage rate arising out of clause 20.2(i), (ii) and (iii), apprentices must be paid the full amount of the tool allowance in clause 21.2(a), the industry allowance in clause 21.1(a), and if applicable the fares allowance in clause 21.8(c) and/or the standard travelling time allowance in clause 21.8(d).
 - 20.2(c)(ii) a trainee apprentice in New South Wales will be paid the percentages of the minimum wage for the plumbing and mechanical services tradesperson classification in clause 20.1 as set out in the following table:
- | Trainee apprentice | % per week |
|---------------------------|-------------------|
| 1st year | 41.5 |
| 2nd year | 61 |
| 3rd year | 77 |
| 4th year | 95.5 |
- 20.2(c)(iii) clauses 20.2(c)(i) and (ii) will cease to operate on 31 December 2014.”
 - By renumbering the current clause 20.2(c) as clause 20.2(d).

Industry allowances for adult apprentices (MPMSAA variation 11)

[66] The MPMSAA variation seeks to correct an error, whereby clause 20.3(b)(iii), which prescribes wages for plumbing and mechanical adult apprentices references “industry allowance as prescribed”, an allowance peculiar to sprinkler fitting grades, rather than the industry allowance in clause 21.1(a) of the modern award. I am satisfied this is an error which should be corrected. Clause 20.3(b)(iii) will be varied to read:

“Subject to clauses 20.3(b)(i) and 20.3(b)(ii) the rate of pay of an adult apprentice will be not less than:

- the federal minimum wage plus the full rate of clause 21.1(a) - Industry allowance;
or
- the amount prescribed for apprentices generally in clause 20.2;

whichever is the greater.”

All-purpose allowances and incidence based allowances (MPMSAA variations 12, 16 and 17)

[67] The MPMSAA variation seeks to correct errors in clause 21.1 “All-purpose allowances” by:

- inserting a new clause 21.1(a) defining all-purpose allowance;
- renumbering subsequent clauses within clause 21.1;
- removing references to the quantum of allowance applicable for allowances for which the plumbing trades allowance is substituted; and reformulating clause 21.6; and
- consequent variations to clause 21.7 (and reordering in alphabetical order).

[68] The MPMSAA submitted that the absence of a definition and the inclusion of the quantum of allowances not payable caused confusion and should be amended. I am satisfied that the variation should be made to remove uncertainty caused by the absence of a definition of all-purpose allowances. The variation to clauses 21.6 and 21.7 will clarify uncertainty as to the entitlement of employees to allowances on an incidence basis or are consequential. The variations will reflect variations 12, 16 and 17 in the MPMSAA application, with consequent renumbering of subsequent clauses within clause 21.

Employees accepting responsibility in Tasmania (MPMSAA variation 15)

[69] This variation corrects an error whereby the words “in Tasmania” were omitted from clause 21.5(b)(ii), which incorporated in the modern award an allowance that specifically applied in Tasmania. The allowance in clause 21.5(b)(ii) applied only in Tasmania and the variation is necessary to correct the error by which it applies generally in the modern award, as currently prescribed, by applying it only in Tasmania, on a transitional basis. The variation will be given effect in the terms reflected in variation 15 of the MPMSAA application.

Sprinkler fitter registration allowance (MPMSAA variation 14)

[70] The MPMSAA proposed the variation of clause 21.1(h)(i) of the modern award to replace “the holder of a Certificate of Registration issued by the Plumbers, Gasfitters and Drainers Board of New South Wales” with “registered under the relevant State or Territory authority”. The variation is advanced to rectify an error in referencing a defunct regulatory authority. I am satisfied that the variation sought should be made under s.160 of the Act.

Penalty for weekend work (MPMSAA variation 18)

[71] The variation proposed by MPMSAA corrects an error in clause 32.1(a) whereby penalty rates for weekend work which, prior to the introduction of the modern award, were applicable only in Victoria became applicable to the whole of Australia. The extension of the penalty rate which applied only in Victoria to all States and Territories is not consistent with the approach applied by the Award Modernisation Full Bench and reflects error. Clause 32.1(a) will be amended as proposed by MPMSAA in variation 18, save that the new clause 32.1(a)(ii) in relation to Victoria will operate as a transitional provision, which ceases to have effect on 31 December 2014.

Key concepts and terms (MPMSAA variation 19)

[72] The MPMCANSW sought the addition to the key concepts and terms in Schedule B—Classification definitions of a new clause B.1.10, stating:

“Employees shall be paid in accordance with the level of skills required to perform the work of a particular position or job offered by an Employer.”

[73] The MPMCANSW and MPMSAA submitted that the variation was necessary to the rationale for determining the classification of employees within the new structure. The variation was opposed by the CEPU on the basis that the variation might be interpreted as permitting an employer to alter the work and classification level of an employee. This concern has no basis because an employer is not able to unilaterally alter the position or job offered by an employer and accepted by an employee.

[74] The rationale for the classification structure reflected in Schedule B of the modern award is found in the statement of the Award Modernisation Full Bench concerning the publication of the exposure drafts in Stage 2. The Award Modernisation Full Bench noted:

“The classification structure we have included is a combination of the current ‘Award restructuring—new classification structure’ appendices to the *Plumbing Trades (Southern States) Construction Award, 1999* and the *Sprinkler Pipe Fitters’ Award 1998*. Each of the appendices was expressed to operate by agreement for a period of 12 months, after which time it was to be inserted in the award.”¹⁶

[75] Appendix A - Award Restructuring - New Classification Structure - of the *Southern States award*¹⁷ contained a clause, 8.2, which went to the operation of the classification structure in the following terms:

“Employees will be eligible to move up the classification structure upon completion of the training requirements, competency based assessment or experience as specified in the classification definitions. Payment will be on the basis of the level of skills and training required to perform the work of a particular position or job offered by an employer.”

[76] It appears that clause 8.2 of Appendix A of the Southern States award was removed in editing the Appendix for inclusion in the modern award new classification structure. I am satisfied that clause 8.2 was removed in error. Accordingly, I am satisfied that the modern award should be varied, but to include the full terms of clause 8.2, rather than in the limited form proposed by the MPMCANSW and MPMSAA.

[77] A new clause B.1.10 will be inserted in Schedule B—Classification definitions, stating:

“Employees will be eligible to move up the classification structure upon completion of the training requirements, competency based assessment or experience as specified in the classification definitions. Payment will be on the basis of the level of skills and training required to perform the work of a particular position or job offered by an employer.”

Translation to classification structure (MPMSAA variation 20)

[78] The MPMCANSW sought to rectify the omission of two classifications from the *Plumbers and Gasfitters (State) Consolidated Award (NSW)*¹⁸ - Registered Drainer - New South Wales and Roof Plumber (NSW) - in clause B2.1(c) of Part B2 - Translation to classification structure - of Schedule B of the modern award. I am satisfied that the omission was in error and the two additional classifications should be included for translation purposes.

Clause 15 Apprentices: Registered Training Organisations (MPMCANSW proposed variation)

[79] The MPMCANSW sought the variation of the title to clause 15.10 and the wording in clauses 15.10(a) and (b) to replace the words “technical schools” with the words “Registered Training Organisations” and the addition, in clause 3, of a definition:

“‘Registered Training Organisation’ means a training organisation registered by the Australian Skills Quality Authority (ASQA), or under state or territory legislation.”

[80] The variation proposed overcomes reference to a limited and outdated concept and overcomes uncertainty attached to reference to technical schools. The variation, as proposed by MPMCANSW, will be made. Further similar variations are made to clauses 15.7, 20.2(c) which is renumbered as 20.2(d) and 33.4.

Transitional provisions for apprentices (MPMSAA variation 8)

[81] The MPMSAA proposed that clause 16.2 of the modern award, which states “The provisions of this award apply to adult apprentices unless specifically provided otherwise by clause 16—Adult apprentices” be replaced with “The provisions of this award apply to adult apprentices engaged under this award from the commencement of this award”. The variation is advanced on the basis that the existing clause in the modern award has created uncertainty as to whether transitional provisions apply to adult apprentices engaged prior to the operative date of the modern award. The effect of the variation proposed is to make it clear that there is no retrospective operation of the adult apprenticeship provisions and that persons engaged as apprentices when adults under pre modern award industrial instruments will complete their apprenticeship under the conditions of such instruments and all persons engaged as adult apprentices after the commencement of the modern award will be subject to the modern award provisions from the day they are engaged without any transition.

[82] The MPMCANSW opposed the MPMSAA’s application to vary clause 16.2 of the modern award, to apply the modern award to adult apprentices engaged from the commencement of the modern award. It submitted that the variation proposed by the MPMSAA was inconsistent with the clear intent of the Award Modernisation Full Bench¹⁹ to apply the transitional provisions to all apprentices to whom the modern award applies and who were employed prior to and after the operative date of the modern award.

[83] Following the 1 July 2011 consultation, the MPMSAA consulted with various parties and filed a revised proposal on 12 July 2011, which was supported by MPMCANSW, MPAQ, the Air Conditioning and Mechanical Contractors Association of Australia and the National

Fire Industry Association. The revised proposed variation distinguishes adult apprentices on the basis of whether they commenced their apprenticeship before or after the making of the modern award. The Award Modernisation Full Bench rejected a proposal to distinguish between apprentices on the basis of when they commenced their apprenticeship, when making the modern award:

“The Joint Parties proposed a transitional arrangement to preserve respective existing year level take-home pay for ‘ongoing’ apprentices who will complete their apprenticeship under the modern award. For the reasons earlier expressed in relation to a general consideration of that proposition, we have decided against such an approach, in favour of the application of the phasing schedule.”²⁰

[84] There is no uncertainty about the intention of the Award Modernisation Full Bench or the application of the Schedule A transitional provisions to apprentices, including adult apprentices. Nor is there any error in the relevant terms of the modern award. That part of the MPMSAA application which seeks to vary clause 16.2 of the modern award in respect of transitional arrangements is refused.

[85] However, some editorial changes arising out of the MPMSAA further submission on 12 July 2011 will be made:

- Clause 16.2 will be varied to read:

“The provisions of this award apply to adult apprentices unless specifically otherwise provided.”

- Clause 20.3(a)(iii) will be amended to read:

“Subject to clauses 20.3(a)(i) and 20.3(a)(ii), the rate of pay of an adult apprentice will be not less than:

- the federal minimum wage plus the full rate of industry disability allowance as prescribed; or
- the amount prescribed for apprentices generally in clause 20.2;

whichever is the greater.”

[86] A new issue concerning part-time apprentices in Queensland was introduced by MPAQ in the further consultations of 1 July 2011. It was addressed by MPAQ in a submission posted on 1 July 2011 and was the subject of further directions made on 13 July 2011. Subsequently, in a submission of 20 July 2011 MPAQ advised that taking account of the opposition raised by a number of the parties, and potential complexity of various consequential drafting issues, it is now proposed that it is more suitable to leave this issue to another forum and at some other time. In light of this submission, the variation proposed by MPAQ will not be made.

[87] The variations approved in this decision will have effect from 1 January 2010. I am satisfied that there are exceptional circumstances for the retrospective operation of the variations in circumstances where they correct error and ambiguity and where employers in New South Wales would be exposed to potential non-compliance with s.7(3)(d) of the ATA in relation to the continuing engagement of trainee apprentices in that State since the making of the modern award.

SENIOR DEPUTY PRESIDENT

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¹ MA000036.

² [2011] FWA 3920.

³ MA000025, in Determination PR998941.

⁴ [2009] AIRCFB 800, at paras 31 and 35.

⁵ [2009] AIRCFB 50, at para 40 and [2009] AIRCFB 345 at para 105.

⁶ [2009] AIRCFB 800, at para 4.

⁷ AP792354.

⁸ AP792355CRV.

⁹ AN120684.

¹⁰ *Plumbing Industry (Australian Capital Territory) Award 1999*, AP792330CRA.

¹¹ AP792574.

¹² AP812941CRN.

¹³ MA000025.

¹⁴ MA000033.

¹⁵ [2010] FWA 4410 and [2009] AIRCFB 896.

¹⁶ [2009] AIRCFB 50, at para 53.

¹⁷ AP792355.

¹⁸ AN120684.

¹⁹ [2009] AIRCFB 800, at paras 31 and 35.

²⁰ *Ibid*, at para 128.