



STATEMENT

Fair Work Act 2009

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

Variation to the *Vehicle Repair, Services and Retail Award 2020* on the initiative of the Commission (AM2021/4)

Vehicle repair services and retail industry

COMMISSIONER BISSETT

MELBOURNE, 11 FEBRUARY 2021

*Section 160 of the Fair Work Act 2009 (Cth) – Commission acting on its own initiative–
Vehicle Repair, Services and Retail Award 2020 – rates of pay for 20 year old full-time and
part-time console operator, driveway attendant and roadhouse attendant.*

Introduction

[1] On 22 January 2021 the Fair Work Commission (the Commission) received [correspondence](#) from HR Legal, on behalf of several businesses in the vehicle retail industry, raising a concern as to the correct rates of pay for 20 year old full-time and part-time employees classified as console operators, driveway attendants and roadhouse attendants (CO/DA/RA) in the *Vehicle Repair, Services and Retail Award 2020* (Vehicle Award).

[2] The Commission has determined to create a new matter on the Commission’s own initiative under s.160(2)(a) of the *Fair Work Act 2009* (the Act) to deal with this issue.

[3] Section 160 of the Act provides:

‘Variation of modern award to remove ambiguity or uncertainty or correct error

- (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.’

The issue

[4] HR Legal notes that there is an apparent conflict within the terms of the Vehicle Award as to whether CO/DA/RA employees aged 20 years should be paid the full adult rate (see clause B.3 of the Vehicle Award), or be treated as junior employees and be paid at the rate of 87.5% of the relevant adult rate (see clause 16.6).

[5] In its correspondence, HR Legal identifies that the potential ambiguity has occurred as a result of the interaction between clauses 16.6(a) to (d) and the following:

- clause 2;
- clause 27.3(b); and
- clause B.3.

Clauses 16.6(a)-(d)

[6] Clauses 16.6(a)-(b) of the Vehicle Award appear in the following terms:

“(a) The minimum weekly rate for a junior employed in the classifications as set out in clause 16.6(b), will be the following:

Age	% of Level 1 rate	\$ per week (full-time employee)	\$ per hour
16 years and under	47.5	358.06	9.42
17 years	50.0	376.90	9.92
18 years	62.5	471.13	12.40
19 years	75.0	565.35	14.88
20 years	87.5	659.58	17.36

(a) For the purpose of clause 16.6(a), the following classifications apply:

...

- Driveway attendant

...

- Roadhouse attendant, required to cook takeaway foods

...”

[7] Clauses 16.6(c)-(d) of the Vehicle Award appear in the following terms:

“(c) The minimum weekly rate for a junior employed in the classifications set out in clause 16.6(d), will be the following:

Age	% of Level 4 rate	\$ per week (full-time employee)	\$ per hour
16 years and under	47.5	395.58	10.41
17 years	50.0	416.40	10.96
18 years	62.5	520.50	13.70
19 years	75.0	624.60	16.44
20 years	87.5	728.70	19.18

(d) For the purposes of clause 16.6(c), the following classifications apply:

...

- Console operator

...

- Roadhouse attendant, if engaged primarily to cook other than takeaway foods

...”

Clauses 2, 27.3(b) and clause B.3.

[8] Clause 2 of the Vehicle Award defines an ‘adult roadhouse attendant’ as ‘an employee of 20 years of age or over employed in a roadhouse, snack bar, kiosk or restaurant...’.

[9] Clause 27.3(b) of the Vehicle Award provides specific provisions for junior *casual* employees in the CO/DA/RA classifications referring only to employees who are 19 years of age or below. Clause 27.3(a) provides adult *casual* rates and specifically includes the cohort of employees ‘20 year old and over’.

[10] Under clauses B.3.1 to B.3.3, full-time and part-time CO/DA/RA employees who are ‘20 years and over’ receive the full adult rate. Moreover, the tables in clauses B.3.4 to B.3.6 only contain rates of junior full-time and part-time CO/DA/RA employees who are aged 19 years and below.

[11] HR Legal outline in their correspondence that the rates contained in Schedule B do not appear to have a direct source in the body of the Vehicle Award.

[12] HR Legal outlined that

“We recognise that this might not strictly be considered an ‘error’ with respect to roadhouse attendants, as the definition in Clause 2 might override the rates set out in Clause 16.6. However, this interpretation still doesn’t allow for consideration of 20-year-old driveway attendants and console operators, who are also given adult rates in Schedule B.3.1.”

History of the clauses identified

[13] Clause 16.6 of the Vehicle Award appeared in the first iteration of the Exposure Draft published by the Commission on [15 October 2014](#) at clause 33.6 and has remained mostly unchanged.

[14] The definition of ‘adult roadhouse attendant’ in clause 2 was discussed in the Transitional Review following receipt of an application by Motor Traders’ Association of New South Wales (MTANSW) to insert the word ‘adult’ into the defined term. MTANSW submitted that:

“The previous award defined an adult roadhouse attendant as an employee who is 20 years of age. The title in the award definitions clause incorrectly omitted the word adult. This was a drafting error over a number of years.

The amended definition is consistent with Clause 36 which sets out the casual rates for driveway attendants, roadhouse attendants and console operators. Clause 36.2 identifies that a roadhouse attendant who is 20 years of age is deemed an adult employee and paid the “(adult rate)”. The purpose of the definition is to prescribe at what age the adult rate applies as this differs for fuel establishments as against other vehicle industry sectors where the adult rate applies at 21 years of age.”¹

[15] Ultimately the insertion of the word ‘adult’ was accepted by Deputy President Gooley in a decision issued 8 August 2013² and a determination amending the award was subsequently issued.³

[16] As to clause 27.3(b) of the Vehicle Award, a corresponding provision appeared in the [15 October 2014 Exposure Draft](#) at clause 37.4. This iteration of the clause contained casual rates for employees classified as CO/DA/RA which were the same as now appear, including the adult rate for a casual employee aged 20 years and over receiving the adult rate.

[17] The current terms of Schedule B were first published in the [13 February 2019 Exposure Draft](#). Prior to this publication, the words ‘(20 years and over)’ did not appear in the headings at clauses B.3.1 to B.3.3. Additionally, prior to the 13 February 2019 Exposure Draft, the tables in clauses B.3.4 to B.3.6 contained junior rates of pay for 20 year old employees in the CO/DA/RA classifications.

[18] It is noted that on 19 December 2016 the Australian Manufacturing Workers' Union (AMWU) made a submission as part of the 4 yearly review of modern awards noting that a number of rates in Schedule B of the Vehicle Award were incorrect.⁴ For example, the AMWU submitted that the console operator rates at 20 years of age should not be included with junior rates in clauses B.3.4 (a) and (b). The AMWU further submitted that the overtime rate in clause B.4.2 for a 20 year old was incorrect.

¹ MTANSW, [Submission](#), 23 November 2012, [7]-[8]

² [\[2013\] FWC 3714](#)

³ [PR538947](#)

⁴ AMWU [submission](#), 19 December 2016 at p. 25.

Next steps

[19] A conference will be convened by Commissioner Bissett on **Thursday, 4 March 2021** at **2.00pm**. The purpose of the conference is to discuss the issues raised, and to explore what, if any, action should be taken with respect to the relevant provisions in the Vehicle Award.

[20] A separate notice of listing will be issued shortly.

COMMISSIONER

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