

AM 2021/4

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

Variation of the *Vehicle Repair, Services and Retail award 2020* on the initiative of the Commission

Shop Distributive and Allied Employees' Association (SDA)

Reply Submission

7 May 2021

1. The SDA has reviewed the submissions provided by the employer organisations.
2. The SDA will address first the issue about the 20 year rate for permanent Driveway attendants, Roadhouse attendants and Console operators.
3. The employers have provided an overview of some of the history of the Award. Whilst not entirely agreeing with some of the descriptions of the past history the SDA will not in these submissions provide the intricate details of these as this could be a distraction from the real issue in the submissions.
4. Both the Motor Trades Organisations (MTOs) and the Australian Industry Group (AIG) claim in various forms that:
 - They have no knowledge of the change which they regard now as a drafting error
 - The change was not a discussion point between parties
 - The change was done in a quick timeframe with little thought
 - FWC would have issued detailed decisions in this matter
5. The following extracts highlight these points

27. The Motor Trades Organisations are unable to provide an explanation as to how this drafting error was not identified as such by the parties, other than to suggest that if the history of the Award is any guide, it stems from a combination of: the large volume of matters that were dealt with as part of the 4-yearly review; the longstanding roadhouse attendant definition error; and an understandable preoccupation of the parties on casual arrangements, reflecting both the Award history and the nature of the service station industry referred to earlier in this submission.

28. What the Motor Trades Organisations can submit with certainty is that had there been any deliberate and considered agreement between the parties to make a substantial change to the Award to provide that a 20-year-old weekly hire (full-time and part-time) roadhouse attendants, driveway attendants and console operators being paid the adult rate for the first time in the history of the Award spanning 50 years – firstly, the parties would have a clear

remembrance and awareness of it; and secondly, the weekly hire provision of the Award would have been amended accordingly.

(Submission MTOs (Inc VACC, MTA SA, MTA WA) 16 April 2021 PN 27 and 28)

48 The variations to Schedule B contradict s. 16.6 which provides that that full and part-time console operators, driveway attendants and roadhouse attendants receive junior rates up to and including the age of 20. At the time the relevant alterations were made, a large number of changes were introduced with a view to resolving minor technical and drafting matters in the final stages of the 4 yearly review. If a substantive change were intended to be effected by the variations, which would be likely to have a significant impact for employers, it would be reasonable to assume that greater discussion of the issue would be present in submissions drafted by the parties or decisions issued by the Commission.

Submission AIG 16 April 2021 PN 48

6. The SDA previously provided some detail as to the history of the Schedule B in the current award in its submission of 16 April 2021.
7. The SDA has now undertaken some further examination of the process given the claims now raised by the employers.
8. As noted in our earlier submission some of the matters were dealt with between the parties and did not involve the Commission. In order to preserve the integrity of what were fairly open exchanges between various parties the SDA will not attach the various emails as they were not for public disclosure. The SDA will provide detail of the email (from/to, date) and make a reference to the material which should not breach the process undertaken by the parties.
9. The SDA did note that there was a lengthy process for the Review of the Award and have done some further tracking over 2 years.
10. **20th May 2016** VACC provided a reply submission to FWC for the Motor Trades Organisations which included the following issues ¹

15. Schedule B

Summary of hourly rates of pay – inclusion of hourly rates - was not requested by parties. A summary was not considered to be suitable for inclusion in this Award as confirmed by Full Bench in paragraph 62 of their 13 July 2015 decision re ordinary hourly rate of pay.¹

¹ <https://www.fwc.gov.au/sites/awardsmodernfouryr/am201493-sub-mto-200516.pdf> pg 4

16. Schedule B

A number of rates in Schedule B are incorrect.

(For example, the console operator rates at 20 years of age should not be included with junior rates in B.3.4 (a) & (b) and are wrongly calculated. The overtime rate in B.4.2 for a 20 year old is also in error.

Setting aside the opposition parties still had to the schedule B point 15 point 16 clearly shows that the 20 year old issue was alive and front of mind for the employers in 2016.

11. 25 November 2016 Bill Chesterman (VACC) sent an email to

Sue-Anne Burnley Lena Lettau Warren Butler Brent Ferguson Ruchi Bhatt >; Stephen Smith; Michael Sheehan Albert Baumgartner (SDA,AMWU,AIG,MTA SA , MTA NSW), recirculating the 20 May issues.

12. 8 March 2017 Lena Lettau (AMWU) sent an email to Leyla Yilmaz, Albert Baumgartner, Warren Butler, Stephen Smith, Sue-Anne Burnley, Bill Chesterman, Michael Sheehan

This included a document 'Remaining Issues-VIRSR Award ED – 22 April 2016' (dated 14 Feb 2017) This document included a reference that pages 130 and 132 of the ED were incorrect for junior driveway, roadhouse or console operators. This was one of 12 issues identified by parties.

13. 27 March 2017 Bill Chesterman sent an email to Leyla Yilmaz, Albert Baumgartner, Warren Butler, Stephen Smith, Sue-Anne Burnley, Michael Sheehan, Lena Lettau. This was in relation to the 8 March email.

14. 28 March 2017 email exchanges over the day including Stephen Smith, Bill Chesterman and Lena Lettau. Meeting on the 29th March to discuss the coverage issue and the 12 outstanding issues.

15. 26 Oct 2018 Email from Bill Chesterman to the parties (not FWC) with list of changes to exposure draft Michael Sheehan ; Lena Lettau ; Sue-Anne Burnley Albert Baumgartner , Ron.Ballucci Ted Kowalski , Antonette Soliven , Hamish Harrington , Lorraine D'Silva (VACC) Mark Weldon

16. 26 Oct 2018 Email from Bill Chesterman to parties (not FWC) stating included changes from Hamish (AIG) into the list of changes to the exposure draft

17. 30 October 2018 Michael Sheehan (MTA SA) email to parties Lena Lettau ; Sue-Anne Burnley; Bill Chesterman ; Albert Baumgartner ; Antonette Soliven ; Ron Ballucci, Ted Kowalski ; Hamish Harrington and to the Chambers of Commissioner Bissett. This was a document with a list of amendments for the ED as had been discussed and provided in the emails 26 October 2018

This was not placed on the FWC webpage. The SDA had identified this was an unpublished document in its previous submission at PN K6.

The document describes the various **detailed** changes required to Schedule B re Driveway attendants ,Roadhouse attendants and Console operators to have all 20 year olds paid the adult rate

- 18.** The SDA relies on its previous submission for the subsequent adjustment to the exposure draft.
- 19.** This examination of emails shows that the issue of the rate for 20 year old Driveway attendants, Roadhouse Attendants and Console Operators was not a mere aside, a mistake or oversight seeking these changes but a considered position over several years, from **ALL** parties. There was '**great discussion**' and many exchanges between parties.
- 20.** As put by the MTOs submission they don't understand why clause 16 wasn't changed and claim this then demonstrates it was not an intended change to pay 20 year olds the adult rate in this area. This claim is just that a mere claim unsupported, given the bulk of evidence which weighs heavily that the parties agreed to this position.
- 21.** As being a party who was involved closely in many of the discussions the SDA knows that the focus of the parties was to have the rates precise and accurate in the Schedule B. In the late stages there were still issues of rounding of 1 or 2 cents being debated between the employers and FWC. The focus was on the accuracy of the Schedule B as this is what would be followed in the industry.
- 22.** The FWC should follow the proposed change suggested by the SDA in its submission to amend Clause 16 as provided in Attachment A. This simply and cleanly removes the ambiguity.
- 23.** The second issue the SDA will address is the definition of the roadhouse attendant.
- 24.** Given the issues raised over the employers' knowledge of the modernisation process the SDA would not support a change in the roadhouse definition and would caution the FWC relying on the current submissions of the employers on this matter.

7 May 2021