



DECISION

Fair Work Act 2009

s 160— Variation of modern award to remove ambiguity or uncertainty or correct error

Variation on the Commission's own motion – junior rates

(AM2023/27)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 19 DECEMBER 2023

Section 160 of the Fair Work Act 2009 (Cth) – proposed variations on the Commission's own motion to remove uncertainty – junior rates – various awards – awards varied.

[1] On 8 November 2023, I issued a Statement¹ (Statement) in relation to uncertainties identified in the way age ranges were expressed in junior rates provisions in the 34 awards listed in Appendix A to the Statement.

[2] In the Statement, I expressed the *provisional* view that the terminology identified in those awards gave rise to an uncertainty for the purposes of s 160 of the *Fair Work Act 2009* (Cth) (FW Act) and should be varied to remove the identified uncertainties. It was my *provisional* view that the proposed amendments set out in Appendix B of the Statement would improve clarity for the average reader and make the awards internally consistent. Draft determinations that would give effect to the *provisional* view were published together with the Statement.

[3] Any submissions opposing the *provisional* view were to be filed by 4.00 pm (AEDT) on 29 November 2023. In the Statement, I said that if no submissions were filed opposing the *provisional* view, final determinations would be issued in the same form as the draft determinations.

[4] One submission was received from the Motor Trades Organisations (MTOs) opposing the *provisional* view relating to the *Vehicle Repair, Services and Retail Award 2020*² (Vehicle Award).

[5] The MTOs opposes the *provisional* view on the basis that the use of the term '16 and under' in the Vehicle Award is clear in its meaning — that it applies to employees who are 16 years old and employees who are under 16 years old. The MTOs distinguish this from the provision in the *Black Coal Mining Industry Award 2020* (Black Coal Award) where the higher number in one age grouping was the lower number in the next. The MTOs submitted that, unlike the Black Coal Award, there was no uncertainty about what rate in the Vehicle Award would apply to an employee aged 16 years or under.

[6] In support of their submission, the MTOs refer to *Application on the Commission's own initiative to vary Journalists Published Media Award 2020* which they rely on for the

proposition that a clause may be uncertain if its meaning or application is either vague or uncertain.³ The MTOs submit that a term will be uncertain in its application where there is an arguable case for more than one interpretation of a clause and that, in the case of the Vehicle Award, there is not more than one arguable interpretation of the term ‘16 and under’. Therefore, they submit, it is not uncertain for the purposes of section 160 of the FW Act. The MTOs further contend that the proposed amendments neither improve clarity nor make the Vehicle Award internally consistent.

[7] I do not accept the MTOs’ submission in relation to the Vehicle Award. ‘Uncertainty’ for the purpose of s 160 does not require ambiguity in the sense of there being competing arguable interpretations of the term in question.⁴ It is sufficient that the provision be doubtful, vague or indistinct in its expression.⁵ I consider that the use of the expression ‘16 years and under’ to describe the application of a junior rate of pay in clauses 16.6(c), 27.3(b) and Schedule B to, inter alia, persons who are over 16 years of age but under 17 years of age is uncertain in that it may give rise to doubt and confusion. The amendments to the Vehicle Award proposed in Appendix B to the Statement would replace this expression with ‘under 17 years’. This would remove the uncertainty and use language consistent with that used in the majority of modern awards to describe the application of junior rates. For these reasons, I consider that I should exercise my discretion to vary the Vehicle Award as proposed.

[8] No submissions were received in relation to the other 33 awards listed in Appendix A to the Statement. I confirm my *provisional* views at paragraph [6] of the Statement in relation to these awards. I consider that the identified provisions are uncertain (for the same reason as stated in respect of the Vehicle Award) and the variations should be made pursuant to s 160 of the FW Act to remove the uncertainties.

[9] Determinations varying the 34 awards will be issued with this decision in the same terms proposed in the draft determinations, with the exception that the determination for the *Hair and Beauty Industry Award 2020*⁶ will, in addition, contain variations arising from matter AM2022/33. The determinations will operate from 31 December 2023.



PRESIDENT

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¹ [\[2023\] FWC 2889](#).

² MA000089.

³ [\[2022\] FWC 839](#) at [8].

⁴ *Bianco Walling Pty Ltd v CFMMEU* [2020] FCAFC 50, 275 FCR 385 at [73]–[78] (in relation to s 217 of the FW Act, which provides for the variation of enterprise agreements to ‘remove an ambiguity or uncertainty’).

⁵ *Ibid.*

⁶ MA000005.