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Chamber of Commerce**

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21 June 2016

Vice President Hatcher
Fair Work Commission
Terrace Tower
80 William Street VIC 3000

**By Email: chambers.hatcher.vp@fwc.gov.au
 amod@fwc.gov.au**

Dear Vice President,

S.156 – 4 yearly review of modern awards

MATTER NO: AM2014/93 – Vehicle Manufacturing, Repair, Services and Retail Award 2010

s. 160 Application to Vary - Shop, Distributive and Allied Employees Association (SDA).

Please find attached reply submissions filed on behalf of the Motor Trades Organisations.
The reply submissions respond to the application filed by the SDA and submissions in support filed by the SDA on 7 June 2016.

Yours faithfully

Bill Chesterman
Industrial Relations Manager
VACC

For and on behalf of MTA NSW, South Australia and Western Australia

**IN THE FAIR WORK COMMISSION
MELBOURNE**

**MATTER: AM2014/93 4 YEARLY REVIEW OF MODERN AWARDS
GROUP 1C – Vehicle Manufacturing, Repair, Services and Retail Award 2010**

**REPLY SUBMISSIONS ON BEHALF OF THE MOTOR TRADERS ASSOCIATIONS AND
THE VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE**

1. These Reply Submissions (**submissions**) are made on behalf of the following organisations, the Motor Traders' Association of New South Wales, the Motor Trade Association of South Australia and the Motor Trade Association of West Australia (the **MTAs**), and the Victorian Automobile Chamber of Commerce (the **VACC**), collectively referred to as the '**Motor Trades Organisations**' in this submission.
2. The reply submissions are in response to the Shop Distributive and Allied Workers Union (the **SDA**) submissions filed on 7 June 2016. The submissions filed by the SDA and the Motor Trades Associations are in accordance with the Directions issued by the Full Bench of the Fair Work Commission dated 10 June 2016.

The history of the SDA and Motor Trades Organisation submissions

3. The SDA initially filed a submission on award specific claims to increase casual loading rates for the fuel retailing casual classifications on 25 March 2015. The Motor Trades Associations filed reply submissions on 13 May 2015, opposing the SDA's claims.
4. In a submission filed by the SDA on 25 March 2015 the SDA sought an increase in casual loadings for the fuel retailing casual classifications. They also sought an amendment to the existing traditional formula previously established by the Australian Industrial Relations Commission (the **AIRC**) and used by the parties on a consensual basis over the years to calculate such casual hourly rates. The basis of this claim was that the formula had been '*problematic in the past and present*'. The submission also sought an increase in the existing formula used to calculate the Monday to Friday rates from the current percentage rate of 31.7% to 37.5%.
5. Additionally, the SDA sought an increase in the percentage for weekend and public holiday loadings for casual console operators and roadhouse attendants at Level 4 only, primarily engaged to cook other than take away meals from 70.47 to 71.9%.
6. The Motor Trades Organisations filed a reply submission on 13 May 2015 in which they opposed the increases to adjust these casual hourly rates for weekday, weekend and public holiday work for all fuel retailing classifications. Any change to the traditional formula was also opposed. The Motor Trades Organisations relied on a Full Bench decision of the then Australian Industrial Relations Commission, which heard and determined a similar Application filed by the SDA in 1998.

7. The 1998 Application sought either an increase in the casual rates of pay for the same classifications covered by the 25 March 2015 submission or an increase in the percentages paid to these casual employees. The SDA based its claim on an alleged "inequity" existing in the casual rates of pay. The Application was one of two applications filed by the SDA, each of which was determined by a Full Bench of the Australian Industrial Relations Commission. The Full Bench handed down a decision in June 2000 dismissing both SDA claims.¹ **(A copy of Applications and the decision attached marked MTO1).**
8. At the Full Bench hearing on 10 August 2015² the SDA advised the Full Bench that it would not be proceeding with its claim to increase the formula (from 31.7% to 37.5%) used to calculate the casual hourly rate for casual driveway attendants, roadhouse attendants and console operators working in a fuel retailing outlet on Monday to Friday shifts.
9. However, the SDA advised the parties that it would continue to pursue its claim in relation to the Monday to Friday and Weekend and Public Holiday rates in respect to casual console operators/ roadhouse attendants Level 4 rate as contained in Clause 36 of the current Vehicle Manufacturing, Repair, Services and Retail Award 2010 (the **VMRSR Award**).
10. The basis of the SDA claim is the assertion that an anomaly arose when the casual console operator rate was introduced in 1994 into the then Federal Vehicle Industry Repair Services and Retail Award.
11. At the initial hearing on the award specific matters on 10 August 2015, submissions were filed by all major parties in relation to the **VMRSR Award**. At the hearing the SDA advised the Full Bench that it was amending their claim, Vice President Hatcher advised the parties that the SDA should have a period of five weeks to discuss its amended claim with the parties and report back to the Full Bench³
12. On 29 September 2015 in a document titled "**PARTIES REPORT TO THE FULL BENCH**"⁴ the parties responded to a number of items raised at the proceedings on 10 August 2015, which required clarification. At paragraph 44, the Full Bench was advised that the SDA and the Motor Trades Organisations had been unable to reach agreement on the SDA's new claim.
13. On 20 May 2016, the Motor Trades Organisations filed submissions on the draft Exposure Award. Following earlier advice from Vice President Hatcher that the SDA had in fact lodged its amended application on 5 October 2015 in relation to proposed increases to casual service station staff rates at Level 4, the Motor Trades

¹ Full Bench AIRC – rates of pay for driveway attendants, roadhouse attendants and console operators V0019 710/00 Print S7227

² Vehicle Manufacturing, Repair, Services and Retail award 2010 - AM 2014/ 93 at PN's 247,249,256 & 257

³ AM2014/93 10 August 2015 hearing at PN332

⁴ Parties Report To The Full Bench dated 29 September 2015

Organisations also included submissions opposing the SDA application in paragraphs 5 to 23 of this submission.

14. The Motor Trades Organisations continue to rely on the submissions filed on 13 May 2015 and 20 May 2016.
15. Whilst it is not the Organisations' wish to repeat submissions already filed, it is necessary to refer to some previous submissions to clarify the basis of the Motor Trades Organisations reply submissions in this consolidated submission, rather than cross referencing paragraphs in the other two reply submissions. The Motor Trades Organisations have also now included additional submissions to specifically address the amended claim filed on 5 October 2015.

The SDA claim filed on 5 October 2015

16. The Motor Trades submissions will respond to the submissions filed by the SDA on 7 June 2016 in relation to the following matters:
 - 1) The claim to vary the casual rates paid to console operators and casual roadhouse attendants Level 4 required to cook other than take away meals in line with the changes outlined in the application filed on 5 October 2015.
 - 2) The application filed by the SDA under Section 160 of the Fair Work Act 2009, as amended is to "remove an ambiguity or uncertainty or correct an error". The Motor Trades Organisations will submit that 'an error' has not occurred in the rates to warrant the variation sought by the union.⁵
 - 3) The alleged mathematical reasoning for the discrepancy in the rate that has resulted in an error, the historical setting where the rate erroneously began, the long history of the award rates covering these employees and previous AIRC rectifications of past errors or anomalies that have affected these rates, as alleged by the SDA.⁶
 - 4) The current award rates for casuals (Level 4 console /roadhouse attendants in clause 36.3 in the VMRSR Award, (as at 16 June 2016) show that the level 4 rates table do not provide the same "loading" over the base classification rate when compared to the Driveway casual rate (level 1) and Roadhouse Attendant (level 2).
 - 5) The SDA's arguments to rectify the alleged error, anomaly.⁷

The Vehicle Manufacturing Repair, Services and Retail Award – Background June 2008 to September 2009

⁵ SDA submission dated 7 June 2016 – paragraphs 5 to 8 and paragraph 13

⁶ SDA Submission dated 7 June 2016 - paragraphs 9 to 11

⁷ SDA Submission dated 7 June 20106 - paragraphs 18 to 20

17. At paragraphs 22 to 28 of their 7 June 2016 submissions , the SDA refer to the circumstances leading up to the creation of an integrated Modern Vehicle Manufacturing, Repair, Services and Retail Award 2009 by a seven member Award Modernisation Full Bench of the AIRC on 4 September 2009.
18. The eventual composition of a modern award in the Vehicle industry was the result of numerous submissions by the major parties on what should happen to the then predecessor awards; the Federal Vehicle Industry, Repair, Services and Retail Award 2002 and the Vehicle Industry Award 2000 during the award modernisation process.
19. The process included the filing of approximately seven draft exposure awards by the major parties during the consultation period. The consultation process commenced in June 2008 and concluded with a final consultation session before the Award Modernisation Full Bench on 22 June 2009.
20. During this period of time the SDA were proactive in pursuing major award changes to the fuel retailing sector both by the filing of exposure drafts and submissions, supporting changes to casual loading and other payments to fuel retailing casual classifications.
21. In paragraph 26 of their submissions the SDA states that - *“The rates set for casual console operators, roadhouse attendants and driveway attendants directly arose out of the predecessor award” (the Federal Vehicle Industry, Repair, Services and Retail Award 2002.*
22. This statement is basically true but does not provide the complete picture because the Award Modernisation Full Bench had submissions and documentary evidence before it, tendered by the SDA, which they could have adopted to change both coverage and penalty allowances for casual staff but they chose not to on the evidence before them and decided to maintain the status quo.
23. In its decision dated 4 September 2009, the Award Modernisation Full Bench clearly confirmed the appropriateness of maintaining the status quo for pay and conditions in fuel retailing outlets while rejecting the SDA submissions:

“Vehicle Manufacturing, Repair, Services and Retail Award 2010”

[270] *There has been widespread support for an integrated vehicle industry award to apply as reflected in the exposure draft – the Vehicle Manufacturing, Repair, Services and Retail Award 2010 (the Modern Vehicle Award). In adopting that course we have accepted a number of changes in the exposure draft arising from the parties’ submissions, so that the modern award generally accords with the structure and content of the antecedent awards.*

[271] *Consistent with unification of the vehicle awards, and notwithstanding the representations of the Shop, Distributive and Allied Employees*

Association, we have preserved the existing classification structures, including provisions as to the retailing of fuel and other commodities through the console operations which characterise modern service/petrol stations and which have been the subject of review in several earlier Commission proceedings”⁸ (our highlighted emphasis)

24. The Full Bench was well aware of the 24 hour, seven-day environment that service stations operated in and took this into account when making their decision. Certainly, the SDA used that as the basis of their submissions to the Full Bench in arguing for higher rates for casual service station staff during the award modernisation process.
26. While coverage was a major consideration as to the composition of the modern Award, other contentious award issues were also raised during the course of the consultation process by the SDA and other parties with an interest in the make-up of the new modern award. In their written submissions dated 15 June 2009 the SDA presented comprehensive submissions on a 24 hour rate for casual and permanent Driveway Attendants, Console Operators and Roadhouse Attendants.⁹
27. At paragraphs 119 to 126 the SDA put forward a 24 hour alternative to the then existing loadings for casuals working Mondays to Fridays, Saturdays, Sundays and Public Holidays applying in the predecessor award.
28. At paragraphs 124 – 126 of their written submissions dated 15 June 2009 the SDA outlined the change it was seeking:

124. Alternative 24 Hour Flat Rate for Casuals

“There is a different method to arrive at this rate for casuals. This involves using the rate applying to other casuals in the award.

125. Casuals working Monday –Friday receive either a 25% loading or a 50% loading for working 6.00am – 6.00pm or 6.00pm to 6.00am respectively.

Averaging the rates results in:

$$(\$19.86 + \$23.84)/2 = \$21.85$$

126. This is a lower rate option than the first option. A slightly higher rate would apply for weekends - \$31.78 vs \$30.79). If this is the approach to be adopted then it supports the view that the different permanent penalties that apply to “fuel” retailing should not apply. If “fuel “ retail casuals are to

⁸ [2009] AIRCFB 826 - Award modernisation (AM2008/25-63)

⁹ Submission to the Australian Industrial Relations Commission – Consultation; Award Modernisation AM 2001/61 - 15 June 2009 at paragraphs 77 to 126.

be treated in line with other casuals, then permanents should also be aligned in the areas of public holiday rates and Saturday morning”.

29. During the final consultation proceedings before the Award Modernisation Full Bench on 22 June 2009 the SDA again presented submissions on their proposal for an alternative 24 hour rate for casual and permanent fuel retailing employees. At PN 478 of the transcript of proceedings on 22 June 2009 the Union stated:

PN 478 Ms Burnley:” I`m dealing very briefly hopefully , with just a couple of outstanding issues and then dealing with the issue of the rates for the service station, the 24 hour rate issue which has been part of submissions and also raised by some of the other submissions today”.¹⁰

30. At PN 490 the SDA referred to the casual loadings formula which applied in the predecessor award, the Federal Vehicle Industry, Repair, Services and Retail Award 2002, **(the predecessor award)**, which still applies in the new VMRSR Award, and stated:

PN 490 “Now we say that this in an inequitable position which is why we had a look at a 24 hour rate which is different. It is simplistic and we put that into our written submissions. What I would hand up to the Commission is an elaboration of that 24 hour rate in that it just sets out the tables which would apply...

PN 492 This was just putting down into writing and reflecting the way that the award is currently structured as to how it sets out the rates which are paid for employees in the fuel area. It has on the left hand side the permanent rates and three tables on the right hand side are the casual rates which would be applied and all I have done is taken what we put in our written submission which was based on the console operator rates as to what their Monday to Friday, weekend and public holiday rates were and expanded it to put all the junior rates in there, apply it to the roadhouse attendant level 2 and the driveway attendant and then added the section regarding casuals.”

31. A copy of the exhibit titled SDA calculations for the 24 hour rate tendered at proceedings on 22 June 2009, **(a copy is attached marked MT0 2)**.
32. The Motor Trades Organisations submit, that based on the written and oral submissions presented by the SDA during the course of the award modernisation proceedings that the Full Bench had before it substantial evidence and opportunity to determine whether the formula which applied in the predecessor award should be changed in the new modern award. As indicated earlier, the Full Bench decided that the status quo should be maintained.

¹⁰ Transcript of proceedings – s. 576E – award modernisation 22 June 2009 at PN`s 478 to PN 509.

33. The Motor Trades Organisations submit that nothing has changed in the context of the work performed by casual service station staff since the establishment of the modern Vehicle Award to justify a review of the existing casual rates.
34. There have been no issues arising out of the operation of the VMRSR Award since it was introduced on 1 January 2010. The only objections are raised by the SDA claiming an alleged error or anomaly introduced by the consent of the parties in 1994. The SDA have over the years run numerous cases on casual and full time payments for fuel retailing staff before Commissioners and Full Benches of the then AIRC over a period in excess of 20 years. Frankly, after so many years to go back and revisit and question an agreement of the parties in 1994 is completely inappropriate.
35. The Motor Trades Organisations submit that the award modernisation process, the introduction of the Vehicle Manufacturing, Repair, Services and Retail Award 2010 and the decision of the Full Bench not to accept the "*representations of the SDA*" put to the Full Bench during the consultation process should be the end of the matter.¹¹
36. Importantly, in its Preliminary Jurisdictional Issues decision for the 4 Yearly Review, the Full Bench also indicated that previous Full Bench decisions should generally be followed and that "*the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it is made*".¹²

History of the RSR Award

37. At paragraphs 35 to 42 of the SDA submission refer to the history of applications by the SDA and decisions of the then Australian Industrial Relations Commission.
38. The Motor Trades Organisations have already responded to the history of applications and decisions in their submissions **dated 13 May 2015** at paragraphs 25 to 29 and rely on these submissions. For completeness in responding to the SDA 7 June 2016 submissions, the Motor Trades Organisations response to the SDA history of the RSR award in relation to alleged inequities and anomalies which were the subject of previous decisions is set out below:

¹¹ [2009] AIRCFB 826 - Award modernisation (AM2008/25-63) PN 271

¹² 2014 FWCFB 1788- 17 March 2014 PN 60 3

- 25 The SDA has highlighted a number of decisions of the Australian Industrial Relations Commission in the History section of their submissions which had varied the conditions introduced in the 1970 Award.¹³ There have been other more relevant cases which were not mentioned in this history which the Motor Trades Organisations submit are very relevant to the variations that the SDA are seeking.
- 26 In June 2000, a Full Bench handed down a decision rejecting two applications filed by the SDA.¹⁴ One application, **31111 of 1998**, sought an increase to rates of pay for casual service station employees employed in the Driveway Attendant, Roadhouse Attendant (Level 2), Roadhouse Attendant and Console Operator (Level 4). The SDA was seeking to redress, what is described as an inequity by increasing casual rates for the same casual classifications in the current claim, by seeking either an increase in the casual rate or the percentage being paid to these classifications. A copy of the Application to Vary is attached and marked 'MTAO 1'.
- 27 The other application, **31186 of 1998**, sought to increase penalty rates for permanent service station employees working on Saturdays, Sundays, Public Holidays or when working overtime. The applications which were originally filed in the Commission on 9 October 1998 were referred to a Full Bench on 9 October 1998. The Full Bench referred both applications under s. 107 (10) of the Workplace Relations Act 1996 to Commissioner Foggo to provide a report to the Full Bench.
28. In handing down their decision the Full Bench made the following observations in relation to Matter C No 31111¹⁵.

[10]"It is recognised that, in relation to casual and penalty rates, the Award treats service station employees in a different manner to that which it treats other employees. Casual rates for service station employees are expressed in money terms rather than percentages. The percentage casual loadings elsewhere provided in the award do not apply to casual service station employees.

The penalty rates for weekend work [Clauses 20 and 21] and shift work [Clause 23] elsewhere provided in the Award do not apply to service station employees whether as casuals or otherwise. The penalty rates for overtime

¹³ SDA Submissions, paragraphs 21 to 38

¹⁴ AIRC VO19 Print S7227

¹⁵ Full Bench AIRC - rates of pay for driveway attendants, roadhouse attendants and console operators V0019 710/00 Print S7227

worked on public holidays differ as between service station employees and other employees. They do not apply to service station employees”.

The Full Bench dismissed both claims by determining that exceptional circumstances had not been established by the material and submissions relied on in the applications.

The Full Bench stated:

[17] Despite its thorough examination of the history of the Award, the SDA has not been able to direct us to any recorded explanation of the differences that exist between the casual and penalty rates of pay for these employees and the casual and the penalty rates of pay for other employees under the Award. Rather, the apparent dearth of such material has forced it to present a case based upon supposition and speculation”.

29. A copy of the Full Bench decision is attached and marked **MTAO 2”** (numbered attachments above are as referred to in the 13 May 2015 submissions of the Motor Trades Organisations)

Inequity, Ambiguity, Error: Past Cases

39. Paragraphs 43-49 of the SDA submissions dated 7 June 2016 deal with what the SDA alleges are issues of inequity, error and /or unfairness in relation to casual service station rates.
40. The Motor Trades Organisations refer to the Full Bench decision of 7 March 1996 (**Print 9796**), also referred to by the SDA submissions at paragraphs 44 to 45 of their submissions. The decision was in relation to applications by the SDA to adjust casual service station rates following the implementation of the 38 hour week. The SDA was successful in their applications.
41. In their concluding remarks, the Full Bench stated:

“We have decided to adopt and apply the hourly rates set out in exhibit SDA 7 in order to give effect to the applications.’ They further stated that ‘it is our view that the methodology adopted by the SDA in producing exhibit SDA 7 of recalculating casual rates on the basis of the traditional formula but with an adjustment to give effect to a 38 hour week more appropriately reflects the application of the 38 hour week to the relevant casual employees’.
42. An Order dated 7 May 1996 (**Print N1450**) was issued to give effect to that decision and a subsequent Correction Order of 24 May 1996 (**Print N 1895**) further increasing

those casual rates, presumably to reflect the previous third safety net adjustment operative from 27 March 1996. These were all processed on a consensual basis and based on calculations of the SDA.

43. If, as the SDA are suggesting, that the *'first anomalous and inequitous issue arose'* in the application to apply the 38 hour week to casual service station employees in their 1995 application, it was in fact the SDA's methodology and calculation of such rates that was adopted by the Full Bench at that time. One would imagine that any anomalous issue would have been addressed at that time.
44. To suggest that the Monday to Friday and Weekend and Public Holiday casual Console Operators/Roadhouse Attendants rates should have been linked with the Driveway Attendants rates would also be at odds with the views of the Full Bench in their decision of 4 September 1998 (Q5726) – as also referred to in the SDA submissions at paragraph 48 – that the rates of pay should be based on the rate payable to the equivalent permanent classification rate. The Motor Trades Organisations submit that not to do so would be illogical.
45. In other words, the casual rates Monday to Friday and at Weekends /Public Holidays for service station staff at Level 4 should be determined by reference to the permanent rate at Level 4 as set out and previously applied in the traditional formula and not by reference to a lesser classification at Levels 1 or 2.

Rate Discrepancy: Casual Console Operator

46. In paragraphs 52 to 86 of their submissions the SDA outlined their arguments for the alleged error in casual Level 4 Console Operator /Roadhouse rate.
47. In examining the movement of all three categories of the casual fuel retailing rates it can be seen in fact that there has always been slight movement on the percentages based on the relevant full time rate and this is due to the rounding of the weekly rates in the formula to the nearest 10 cents. Given the various flat rate and percentage increases awarded in annual wage review decisions it is unsurprising that this would occur as relativities are continually disturbed and no longer reflect the relativities that originally existed. There will also be some compression of the relativities reflecting the flat money rises awarded over the years reducing the relativity of higher paid roles such as the Console Operator.
48. This can be easily seen in the relativities appearing in the Manufacturing and Associated and Occupations Award 2010 because that Award includes the original relativities in Schedule B. For example the current rate for the C10 is \$764.90 and this is a relativity of 100%. If you then look at the rate for the C8 the current rate is \$812.80. The relativity for C8 as contained in Schedule B is 110%. 110% of the C10 rate would be a rate of \$841.40. However, it is \$812.80 and this is the result of compression of the relativities as a consequence of flat money rises.

49. The SDA has much criticised the formula used over many years by the parties to adjust the rates. This is a nonsense. The formula is a simple way of maintaining the rates by applying the increase awarded in Annual Wage Reviews based on the movement of the weekly rate of pay for Level 1 for Driveway Attendants, Level 2 or 4 for Roadhouse Attendants and Level 4 for Console Operators. The Motor Trades Organisations have included the explanation of the formula at paragraph 46 of its submission of 13 May 2015. It is a simple mathematical formula to maintain the precise movement in the weekly rate of pay for the relevant level.
50. So any calculation of casual rates that is based on the previous and current rates at Level 4 as per the traditional formula, is likely to be affected by the changes in relativities between those rates over the years. That does not mean an error has occurred, just as there is no error in the way the existing wage rates in Levels 1, 2 and 4 do not reflect the true relativities that previously existed.
51. As the Full Bench also indicated in its preliminary observations on the 4 year Review of Awards, the Commission must be satisfied that a determination varying a modern award is necessary to achieve the modern awards objective. And while it may be desirable to have calculations in percentages as exact or as close as possible, 'that which is desirable does not carry the same imperative for action'.
52. The SDA application is simply an application for increased casual penalties at Level 4 for service station staff, nothing more.
53. It is submitted that there is no error that has been perpetuated over the years. Any increase sought in the casual console operator & roadhouse attendant (Level 4) rates should be dealt with on work value grounds in accordance with S.157 (2) of the Fair Work Act 2009, as amended, and not under the guise of a s160 application to remedy an alleged error, that does not exist.

Draft Exposure Award dated 22 April 2016

54. The Motor Trades Organisations reply submission of 20 May 2016 expressed opposition to the proposed change to the casual rates for driveway and roadhouse attendants and console operators being expressed in terms of percentages. This way of presenting the penalty payments displayed the different loadings as being inconsistent. As we have indicated the differences do not reflect any error or ambiguity. There has been no discussion between the parties regarding an amendment to the current hourly rates, which reflect the historical position.
55. It is now a laborious process to work out the rates across the board having to find the minimum hourly rate and then load it by the relevant percentage leading to potential errors, including rounding errors. Having a set of hourly rates has served the industry well and eliminated errors.

56. We note also that the percentage of a 170% loading for overtime work now appears in clause 23.4(c). The amount of 170% does not reflect the current hourly rate. For example, the overtime rate for a casual console operator 20 years and over is a combined amount of \$25.05 per hour Monday to Friday plus \$14.21 per hour when it is overtime. A total of \$39.26. Using the new methodology for overtime it works out as $\$19.10 * 170\% = \32.47 Monday to Friday.
57. Expressing the rates as a percentage of the relevant hourly rate will make it harder for the employer and employee to work out the applicable rates. The rounding of the hourly rate plus percentages rounded to only 2 decimal places, will not reflect the current rates of pay.
58. Another example is the adult driveway attendant rate is shown in clause 23.2 as $\$17.29 * 131.75\% = \$22.779575 - \$22.78$ rounded (current rate is \$22.77); Adult Console Operator $\$19.10 * 130.35\% = \$24.89685 - \$24.90$ rounded (current \$25.05).
59. If the percentage approach remains it will have the potential to create underpayment issues. It is a retrograde change that does not meet the modern awards objective as detailed at s134 (1) (g).

Motor Trades Organisations Summary

60. The Motor Trades Organisations submit that the SDA have in fact made similar unsuccessful attempts in the past to increase casual rates for service station rates at Level 4. The most recent attempt was in the Award Modernisation process where similar claims were put to the Full Bench and were rejected.
61. Nothing of any significance has occurred in the industry or in relation to the conditions under which service station staff work to warrant any departure from the status quo. The SDA claim is a claim to increase penalty payments for Level 4 service station staff and should be dealt with on a work value basis and not under a S 160 application.
62. Any increase to such rates will also have an adverse and major cost impact on smaller and independent service stations who are already experiencing extremely low fuel margins and trying to survive in an increasingly competitive environment. This point was raised in the **Affidavit of Antonio (Tony) Franza** which was admitted as evidence in the hearing before the Full Bench on 10 August 2015.
63. While major corporations are able to absorb additional costs, these smaller operators are being forced out of the industry through the increased competition between the major players and will have no alternative but to cut hours and in many cases jobs could be lost.

MTAO 1

Full Bench decision

V0019 Dec 710/00 Print S7227

C Nos 31111 & 31186 of 1998

**Rates of pay for driveway attendants, roadhouse
attendants and console operators**

311101998

Workplace Relations Act 1996

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION TO VARY AN AWARD

IN THE MATTER of the Vehicle Industry - Repair, Services and Retail Award 1983.

Application is made by the SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION to vary the abovementioned Award in the terms as set out below:

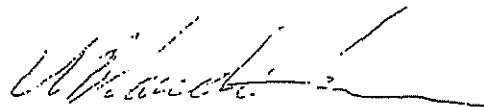
1. To increase the rates of pay for casual employees employed in the classifications of Driveway Attendant, Roadhouse Attendant (Level 2), Roadhouse Attendant (Level 4) and Console Operator, by removing the inequities inherent in the structure of the casual rates for each of the above classifications.
2. Any other consequential variations as deemed appropriate by the Commission.

Grounds In Support

1. The award provisions specifying the rates of pay for casual employees employed in the classifications of driveway attendant, roadhouse attendant (Level 2), roadhouse attendant (Level 4) and console operator (the casual rates) are inequitable.
2. The casual rates are expressed in dollars and cents and are in lieu of both:
 - (i) percentage casual loadings provided in the award; and
 - (ii) penalty rates for shift work, weekend work and public holidays elsewhere provided in the award.
3. The casual rates have been amended from time to time since 1970 through the use of a standard formula which move the casual rates proportionately with movement in the relevant classifications.
4. The standard formula operates so as to create and perpetuate inequitable outcomes for employees when compared with other casual employees and full-time and part-time employed under the award under rates other than the casual rates.

5. Particulars of the inequitable position flowing from the application of the standard formula to the casual rates, include, the following:
- (i) Whereas the general casual loading in the award has increased from 15% to 20% no corresponding increase has been incorporated into the casual rates.
 - (ii) Whereas the general shift penalties have increased by between 2.5% to 5% no corresponding increase has been incorporated into the casual rates.
 - (iii) Whereas the general casual loading for work on public holidays has increased from 120% to 170% no corresponding increase has been incorporated into the casual rates.
6. Such other grounds and reasons as the Commission deems just.

Dated this 5th day of March, 1998



IAN J. BLANDTHORN
National Assistant Secretary
Shop, Distributive and Allied
Employees' Association
5th Floor, 53 Queen Street
Melbourne Vic 3000
Phone: (03) 9629 - 2299
Fax: (03) 9629 - 2646

To the persons and organisations party to the abovementioned dispute.

Your are hereby notified that the abovementioned application will be heard

at

in the State of at [am/pm]

on the day of1998,

before the Industrial Relations Commission (.....)

and that you may appear and be heard at the time and place so fixed.

DATED this day of 1998.

DEPUTY INDUSTRIAL REGISTRAR

31186 of 1998

Workplace Relations Act 1996

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICATION TO VARY AN AWARD



IN THE MATTER of the **Vehicle Industry - Repair, Services and Retail Award 1983.**

Application is made by the SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION to vary the abovementioned Award in the terms as set out below:

1. To increase the rates of pay for driveway attendants, roadhouse attendants and console operators working on Saturdays, Sundays, Public Holidays or when working overtime (the penalty rates).
2. Any other consequential variations as deemed appropriate by the Commission.

Grounds In Support

1. The penalty rates in the award are less than the rate for other award classifications at those respective times.
2. The payment of lower penalty rates to driveway attendants, roadhouse attendants and console operators than to other equivalent classifications is inequitable.
3. This inequity is unjust.
4. An increase in these rates will remove the inequity.
5. Such other grounds and reasons as the Commission deems just.

The applicant seeks to have this matter joined with C. No 31111 of 1998.

Dated this 10th day of March, 1998

IAN J. BLANDTHORN
National Assistant Secretary
Shop, Distributive and Allied
Employees' Association
5th Floor, 53 Queen Street
Melbourne Vic 3000
Phone: (03) 9629 - 2299
Fax: (03) 9629 - 2646

Workplace Relations Act 1996

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

In the matter of an Application by Shop, Distributive and Allied Employees' Association to vary the Vehicle Industry - Repair, Services and Retail Award 1983

and

In the matter of an Application by Shop, Distributive and Allied Employees' Association pursuant to Section 107 of the Workplace Relations Act 1996 to have the Application to Vary an Award referred to a Full Bench of the Australian Industrial Relations Commission

Application is made by the Shop, Distributive and Allied Employees' Association (the Association) to have the Association's application to vary the Vehicle Industry - Repair, Services and Retail Award 1983, which application is attached, dealt with by a Full bench because the subject matter of the application to vary the Vehicle Industry - Repair, Services and Retail Award 1983 is of such importance that in the public interest it should be dealt with by a Full Bench.

Grounds in Support

1. The application seeks to vary the existing award provisions relating to penalty rates.
2. The penalty rates in the award would, consistent with the Safety Net Review April 1997 (Print 1997), constitute the safety net.
3. The application to vary is an application to vary above the safety net and pursuant to Principle 3.3 of Print P1997 of page 103, application must be made pursuant to Section 107.
4. The Association has sought, through its application to vary in this matter, to consolidate a series of actions and applications that have been underway or are contemplated in relation to rates of pay for driveway attendant, roadhouse attendants and console operators.
5. An application has been made in C. No 31111 of 1998 to vary the award to correct another aspect of the inequitable position of driveway attendants, roadhouse attendants and console operators.

To the persons and organisations party to the abovementioned dispute.

Your are hereby notified that the abovementioned application will be heard

at

in the State of at [am/pm]

on the day of 1998,

before the Industrial Relations Commission (.....)

and that you may appear and be heard at the time and place so fixed.

DATED this day of 1998.

DEPUTY INDUSTRIAL REGISTRAR

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.113 applications to vary award

Shop, Distributive and Allied Employees' Association
(C Nos. 31111 and 31186 of 1998)

THE VEHICLE INDUSTRY – REPAIR, SERVICES AND RETAIL – AWARD 1983
(ODN C No. 01339 of 1974)
[Print H5658 [V0019]]

Various employees

Vehicle industry

SENIOR DEPUTY PRESIDENT WILLIAMS
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER FOGGO

MELBOURNE, 21 JUNE 2000

Rates of pay for driveway attendants, roadhouse attendants and console operators

DECISION

[1] This decision concerns two applications made by the Shop, Distributive and Allied Employees' Association (the SDA) to vary the Vehicle Industry - Repair, Services and Retail - Award 1983 (the Award) in relation to provisions applying to driveway attendants, roadhouse attendants and console operators (service station employees).

[2] Matter C No. 31111 of 1998 was lodged in the Commission on 5 March 1998 and is an application to increase rates of pay for casual service station employees employed in the classifications of Driveway Attendant, Roadhouse Attendant (Level 2), Roadhouse Attendant (Level 4) and Console Operator.

[3] Matter C No. 31186 of 1998 was lodged in the Commission on 10 March 1998 and is an application to increase penalty rates for service station employees working on Saturdays, Sundays, public holidays or when working overtime.

[4] In proceedings before Justice Munro on 28 April 1998, applications were made pursuant to s.107 of the *Workplace Relations Act 1996* (the WR Act) by the SDA for the matters to be referred to a Full Bench of the Commission.

[5] By decision dated 13 May 1998, the President granted those applications and referred the matters to a Full Bench as presently constituted.

[6] The applications came before the Full Bench on 9 October 1998. After hearing the parties, the Full Bench, pursuant to s.107(10) of the Act, directed Commissioner Foggo to provide a report to the Full Bench.

[7] Hearings proceeded before Commissioner Foggo on 27 October 1998 and 8 and 9 February 1999. There then followed a period of written submissions from both the SDA and the employers and, on 27 September 1999, Commissioner Foggo provided her report, a copy of which is annexed to this decision.

[8] The matters were then listed on 10 December 1999 for the purpose of allowing the parties to speak to that report. Owing to the illness of the representative of the SDA, that hearing was adjourned to 3 March 2000. At the completion of the hearing on that day, the Commission reserved its decision.

[9] The submissions of the parties are well canvassed in Commissioner Foggo's report and need not be reiterated in this decision.

[10] It is recognised that, in relation to casual and penalty rates, the Award treats service station employees in a different manner to that in which it treats other employees. Casual rates for service station employees are expressed in money terms rather than percentages. The percentage casual loadings elsewhere provided in the Award do not apply to casual service station employees. The penalty rates for weekend work [Clauses 20 and 21] and shift work [Clause 23] elsewhere provided in the Award do not apply to service station employees whether employed as casuals or otherwise. The penalty rates for overtime worked on public holidays differ as between service station employees and other employees.

[11] By its application in matter C No. 31111 of 1998, the SDA seeks to redress problems it alleges exist in relation to the casual rates payable under the Award to service station employees. It proposes that such problems be rectified by increasing the casual rates prescribed for these classifications.

[12] By its application in matter C No. 31186 of 1998, the SDA seeks to redress what it alleges are anomalies or inequities existing between service station employees and other employees in relation to penalty rates for weekend and public holiday work. It proposes that permanent service station employees be paid:-

- for ordinary hours worked between 6 a.m. and 12 noon on a Saturday at the ordinary time rate for work,
- for ordinary hours worked at all other hours on a Saturday, at the rate of time and one half,
- for ordinary hours worked on a Sunday, at the rate of double time,
- for ordinary hours worked on public holidays, at the rate of double time and one half, and
- for all overtime worked on public holidays, at the rate of double time and one half.

[13] Except in relation to the rate payable for ordinary hours between 6 a.m. and 12 noon, the SDA's proposed variations would bring the penalty rates payable to permanent service station employees into line with those payable to other permanent employees.

[14] In essence, the SDA seeks support for these applications by an examination of the history of the Award and its predecessors. It contends that such an examination demonstrates that errors have occurred at various times which have undermined the role of the award as a safety net.

[15] We have carefully considered all the material that is now before us. We are unable to conclude *on the basis of that material* that any errors of the type alleged by the SDA actually occurred.

[16] The history of the Award is essentially one of consent. We agree with the employers' submission that, as the current provisions are almost entirely the product of consent arrangements, they should not be altered except in exceptional circumstances.

[17] Exceptional circumstances have not been established by the material and submissions relied on in these applications. Despite its thorough examination of the history of the Award, the SDA has not been able to direct us to any recorded explanation for the differences that exist between the casual and penalty rates of pay for these employees and the casual and penalty rates for other employees under the Award. Rather, the apparent dearth of such material has forced it to present a case based upon supposition and speculation.

[18] The mere fact that there are differences in casual and penalty rates of pay under the Award does not compel a conclusion that such differences must be abolished. No attempt was made to justify any increases on work value grounds. Nor was any attempt made to support a proposition that the work performed by service station employees is substantially identical to or comparable with the work performed by retail employees.

[19] In our view, in the absence of real evidence to the contrary, we must assume that the relevant award variations were correctly made.

[20] In the course of the proceedings before Commissioner Foggo, two additional matters were raised by the SDA, namely the abolition of State differentials in the rates of pay for casual service station employees and the application of the decision in the Public Holidays Test Case to the effect that where a casual employee works on a public holiday, the employee is entitled to be paid at the ordinary casual rate plus the applicable penalty rate.

[21] As to the first of these matters, there is no material before us which would allow us to form any conclusions as to the reasons for the continued existence in the Award of these differentials. The mere fact that such differentials have been phased out in respect to other employees covered by the Award does not without more evidence justify their abolition in respect to casual service station employees. We note that the SDA, in its written submission to Commissioner Foggo, expressed a willingness to enter into discussions with the employers about this matter. However, despite an undertaking to do so prior to the Full Bench reconvening, no such discussions had taken place prior to the hearing on 3 March 2000. The appropriate course, in our view, is for this matter to be the subject of discussions and negotiations at first instance between the SDA and the employers. Should the SDA then wish to vary the Award, by consent or otherwise, it should lodge a fresh application.

[22] We consider that the second of these additional matters should be dealt with in the same way. In so far as it could be viewed as forming part of the application in matter C No. 31111 of 1998, it appears to us to be intimately bound up with the reasons for the differential treatment afforded to casual service station employees by the Award.

[23] For the above reasons, the applications by the SDA are refused. We emphasise that we have reached this decision on the basis of the material before us. We do not perceive our decision as preventing the SDA from renewing its applications on the basis of different material and arguments.

BY THE COMMISSION:



Appearances:

S. Burnley and J. Ryan for the Shop, Distributive and Allied Employees' Association.

A. Sachinidis for the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia.

J. Forbes and K. Jenkins for the Victorian Automobile Chamber of Commerce, the Tasmanian Automobile Chamber of Commerce, the Motor Traders Association of New South Wales and The Motor Trade Association of South Australia.

R. Lemish for the Australian Industry Group.

S. Bradley for the Victorian Employers' Chamber of Commerce and Industry.

Hearing details:

1998.

Melbourne:

April 28 (Munro J);

October 9 (Full Bench);

October 23 (Foggo C).

1999.

Melbourne:

February 8-9 (Foggo C);

December 10 (Full Bench).

MTA0 2

SDA calculations for 24 hour rate for casuals

22 June transcript of proceedings

Stage 3 – Award modernisation process

SDA calculations for 24 hour rate

Console /Roadhouse to cook

	Adult	19yrs	18yrs	17yrs	16/u
Mon-Fri	\$ 18.59	\$ 13.94	\$ 11.62	\$ 9.30	\$ 8.83
Weekend	\$ 26.82	\$ 20.12	\$ 16.76	\$ 13.41	\$ 12.74
Pub Holiday	\$ 31.78	\$ 23.84	\$ 19.86	\$ 15.89	\$ 15.10
-250%	\$ 39.73	\$ 29.80	\$ 24.83	\$ 19.87	\$ 18.87
o/t additional per hour	9.010824	\$ 6.76	\$ 5.63	\$ 4.51	\$ 4.28

	Adult	19yrs	18yrs	17yrs	16/u
Mon-Fri	\$ 22.56	\$ 16.92	\$ 14.10	\$ 11.28	\$ 10.72
Weekend	\$ 30.79	\$ 23.09	\$ 19.24	\$ 15.40	\$ 14.63
Pub Holiday	\$ 35.75	\$ 26.81	\$ 22.34	\$ 17.88	\$ 16.98
250%	\$ 43.70	\$ 32.78	\$ 27.31	\$ 21.85	\$ 20.76
O/t	9.010824	\$ 6.76	\$ 5.63	\$ 4.51	\$ 4.28

Roadhouse

	Adult	19yrs	18yrs	17yrs	16/u
Mon-Fri	\$ 17.25	\$ 12.94	\$ 10.78	\$ 8.63	\$ 8.20
Weekend	\$ 24.89	\$ 18.67	\$ 15.56	\$ 12.45	\$ 11.82
Pub Holiday	\$ 29.50	\$ 22.13	\$ 18.44	\$ 14.75	\$ 14.01
-250%	\$ 36.88	\$ 27.66	\$ 23.05	\$ 18.44	\$ 17.52
o/t additional per hour	8.36325	\$ 6.27	\$ 5.23	\$ 4.18	\$ 3.97

	Adult	19yrs	18yrs	17yrs	16/u
Mon-Fri	\$ 20.94	\$ 15.71	\$ 13.09	\$ 10.47	\$ 9.95
Weekend	\$ 28.58	\$ 21.44	\$ 17.86	\$ 14.29	\$ 13.58
Pub Holiday	\$ 33.19	\$ 24.89	\$ 20.74	\$ 16.60	\$ 15.77
250%	\$ 40.57	\$ 30.42	\$ 25.35	\$ 20.28	\$ 19.27
O/t	8.36325	\$ 6.27	\$ 5.23	\$ 4.18	\$ 3.97

Driveway

	Adult	19yrs	18yrs	17yrs	16/u
Mon-Fri	\$ 16.74	\$ 12.56	\$ 10.46	\$ 8.37	\$ 7.95
Weekend	\$ 24.16	\$ 18.12	\$ 15.10	\$ 12.08	\$ 11.48
Pub Holiday	\$ 28.62	\$ 21.47	\$ 17.89	\$ 14.31	\$ 13.59
-250%	\$ 36.44	\$ 27.33	\$ 22.78	\$ 18.22	\$ 17.31
O/t	8.102132	\$ 6.08	\$ 5.06	\$ 4.05	\$ 3.85

	Adult	19yrs	18yrs	17yrs	16/u
Mon-Fri	\$ 20.32	\$ 15.24	\$ 12.70	\$ 10.16	\$ 9.65
Weekend	\$ 27.74	\$ 20.81	\$ 17.34	\$ 13.87	\$ 13.18
Pub Holiday	\$ 32.20	\$ 24.15	\$ 20.13	\$ 16.10	\$ 15.30
250%	\$ 40.02	\$ 30.02	\$ 25.01	\$ 20.01	\$ 19.01
O/t	8.102132	\$ 6.08	\$ 5.06	\$ 4.05	\$ 3.85

To add PH buyout console operator

PH in Wend	Rate	200% 11 PH	11PH/115
	15.89211	31.7842105	349.6263 3.040229
			\$3.04/hr