



Motor Trades Organisations

Application to vary the

Vehicle Repair, Services and Retail Award 2020

**Submission
(AM2021/4)**

16 April 2021

AM2021/4 – Section 160 of the Fair Work Act 2009 (Cth) – Commission acting on its own initiative – Vehicle Repair, Services and Retail Award 2020

SUBMISSION ON BEHALF OF THE MOTOR TRADES ORGANISATIONS

1. This submission has been prepared by and is filed on behalf of the Victorian Automotive Chamber of Commerce (VACC), the Motor Traders' Association of NSW (MTANSW) and the Motor Trade Association of South Australia and Northern Territory (MTASANT) and the Motor Trade Association of Western Australia (MTAWA), (collectively, the Motor Trades Organisations), as an interested party pursuant to the [Directions](#) issued by the Fair Work Commission (the Commission) on 5 March 2021.
2. The Motor Trades Organisations are grateful for the opportunity to make submissions on this matter, as it has provided an opportunity to look at the issue, including the history of the roadhouse attendant definition, on a stand-alone basis for perhaps the first time in the history of the *Vehicle Repair, Services and Retail Award 2020* and its predecessors (the Award).
3. For the reasons set out below, the Motor Trades Organisations submit that pursuant to section 160 of the *Fair Work Act 2009*, the following variation be made to the *Vehicle Repair, Services and Retail Award 2020* (the 2020 Award):

- a. Amend the definition of adult roadhouse attendant in clause 2 of the 2020 Award, by deleting the words “adult” and “of 20 years of age or over” as follows:

~~adult roadhouse attendant~~ means an employee ~~of 20 years of age or over~~ employed in a roadhouse, snack bar, kiosk or restaurant being part of or operated as an integral part of an establishment falling within the area of this award.

Or, in the alternative, delete the definition of adult roadhouse attendant in its entirety.

- b. Amend B.3 at *Schedule B - Summary of Hourly Rates of Pay* of the 2020 Award to reflect the minimum rates for junior 20 year old full-time and part-time employees in the classification of console operators, driveway attendants and roadhouse attendants provided at clause 16.6 of the Award:

- (i) Delete the words “(20 years and over)” from the definition of full-time and part-time adult in B.3.1, B.3.2 and B.3.3 at Schedule B:

Full-time and part-time adult ~~(20 years and over)~~ console operators, driveway attendants and roadhouse attendants

- (ii) Insert junior rates for full and part-time 20-year-old Roadhouse Attendants, Driveway Attendants and Console Operators in B.3.4 and B.3.5 at Schedule B.

Background

4. Special arrangements in relation to casual driveway attendants and casual roadhouse attendants were first introduced in the *Vehicle Industry Repair, Services and Retail Award 1970* (the 1970 Award)¹. These arrangements reflect both the unique operating conditions applying to employees working in the fuel retailing essential service area, and the fact that a high

¹ [134 CAR 313](#), cl. 6(f)(iv).

proportion of employees engaged as driveway attendants, roadhouse attendants and console operators are employed on a casual basis – an arrangement that has long been recognized as being “... relevant to the industry and suitable to both the employees and employers”².

5. These special arrangements included a specific rate of pay for casual driveway attendants and roadhouse attendants who were aged 20 years or over, with sub-clause 6(f)(iv) of the 1970 Award which provided that:

“A casual employee of 20 years of age or over employed as a driveway attendant or a roadhouse attendant shall be paid as follows:

Monday to Friday - \$1.30 per hour (except in Queensland where it shall be \$1.20 per hour).

Saturday, Sunday or Holiday - \$1.70 per hour.

Provided that for any hours worked in excess of 8 per day or 40 per week such an employee shall be paid an additional 70c per hour”. [emphasis added]

With the exception of ‘vehicle salesman’, all other casual employees (including driveway attendants and roadhouse attendants aged under 20 years), were paid in accordance with sub-clause 6(f)(ii) of the 1970 Award which provided that:

“A casual employee other than a vehicle salesman, a driveway attendant of 20 years of age or over or a roadhouse attendant of 20 years or over for working during the ordinary hours prescribed by sub-clause (a) of clause 18 of this award shall be paid per hour 1/40th of the weekly rate prescribed by sub-clauses 8, 10 or 13 of this award as the case may be for the work he or she performs plus a loading of 15 per cent in lieu of annual leave, sick leave, compassionate leave and holidays...” [emphasis added]

6. In contrast to these special rates for casual driveway attendants and roadhouse attendants aged 20 years and over, the rate of pay for weekly hire driveway attendants and roadhouse attendants was determined by clause 13 of the 1970 Award, which provided minimum weekly hire wage rates for unapprenticed juniors, up to and including 20 years of age, based on the relevant ordinary weekly (adult) wage³.
7. Whilst the 1970 Award was subject to private arbitration, with the transcript of proceedings confidential, it is clear from subclause 6(f)(iv) that there was a deliberate intention to treat casual driveway attendants and roadhouse attendants aged 20 years or over, differently to other employees with regard to wage rates. It is equally clear from sub-clause 13(a) that there was no such intention with respect to weekly hire driveway attendants and roadhouse attendants, which provided that a 20-year-old received 87.5% of the applicable adult roadhouse attendant or driveway attendant rate (in line with other classifications under the 1970 Award).
8. Given the distinctive nature of the service station sub-sector, it is unsurprising that the focus of the industry parties has always been on maintaining special arrangements for casuals when it has come to issues relating to driveway attendants, roadhouse attendants and console

² [P4839](#), p.24.

³ [134 CAR 313](#), cl. 13(a)(i).

operators. As previously noted by a Full Bench, it is a well-established and recognised feature of the Award, which has now been in place for over 50 years:

*“It is recognized 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...”*⁴ [emphasis added]

9. However, just as important in relation to the present matter, is the fact that the ‘non-special’ wage rate arrangements in regard to junior weekly hire driveway attendants, roadhouse attendants and console operators have also been a continuing feature of the Award. That is, a 20-year-old weekly hire roadhouse attendant received 87.5% of the adult rate back in 1970 – and has continued to do so throughout each and every subsequent iteration of the Award – i.e. 1974⁵, 1976⁶, 1980⁷, 1983⁸, 2002⁹, 2010¹⁰ and 2020¹¹.

Definition of roadhouse attendant – the genesis of the error

10. Whilst no definition of driveway attendant is provided in the 1970 Award (or in any successor award), clause 38(x) defined roadhouse attendant as:

*“an employee **20 years or over** employed in a roadhouse, snack bar, kiosk or restaurant being part of or operated as an integral part of an establishment falling within the area of this award.”* [emphasis added]

11. Whilst it is understandable that given the special arrangements provided under clause 6(f)(iv) of the 1970 Award that specific reference is made to “20 years or over” in the definition, the Motor Trades Organisations submit that it was likely to have been a drafting error that arose from a misunderstanding relating to whether employers were prohibited in some jurisdictions from employing an employee as a roadhouse attendant under the age of 20. In support of this view is the fact that roadhouse attendants were: firstly, expressly defined in the 1970 Award (when driveway attendants were not); and secondly, not included in the ‘junior to adult’ ratio provisions that applied to driveway attendants and lubrication attendants at sub-clause 13(c)(3) of the 1970 Award:

“
Proportion
(c) (i) *The proportion of unapprenticed male or female juniors who may be employed by an employer shall be as follows:*

...
*(3) Driveway attendants and/or lubrication attendants—
Two juniors to one adult
three juniors to 2, 3, 4 or 5 adults
four juniors to 6, 7 or 8 adults and thereafter, one additional junior to each three or fraction of three adults working on a site at any one time.”*

⁴ [S7227](#), [10]

⁵ [156 CAR 522](#), cl. 13(a)(i)

⁶ [181 CAR 125](#), cl. 13(a)(i)

⁷ [246 CAR 21](#), cl. 13(a)(i)

⁸ [H5658](#), cl. 13(a)(i)

⁹ [PR931545](#), cl. 13(a)(i)

¹⁰ [PR988987](#), cl. 33.7(a) and (c)

¹¹ [PR716697](#), cl. 16.6(a) and (c)

Ultimately, regardless of the reasoning which lead to the drafting error, the inconsistency of the roadhouse attendant definition with other provisions of the 1970 Award is clearly evident by sub-clause 6(f)(ii) and clause 13, which both made provision for the employment of roadhouse attendants under the age of 20 years.

12. The Motor Trades Organisations note that viewed in isolation, the roadhouse attendant definition drafting error might appear inexplicable. However, when considered in context – i.e. the complexity of the Award proceedings of the time; the particular focus on special arrangements for casual roadhouse attendant and driveway attendant employees who were aged 20 years of age or over; and the breath of the matters arbitrated – such drafting errors are not unexpected. As the Motor Trades Organisations understand it, the transcript of the 1970 Award proceedings spans some 1000 pages.
13. Whilst, as private arbitrations, the transcripts of the 1970 Award and the *Vehicle Industry Repair, Services and Retail Award 1974* (the 1974 Award) proceedings are confidential, it is clear that both of the issues identified above were subsequently ‘fixed’ by Senior Commissioner Stanton in the 1974 Award. Specifically, the roadhouse attendant definition was amended to remove the reference to 20 years of age or over:

*“an employee employed in a roadhouse, snack bar, kiosk or restaurant being part of or operated as an integral part of an establishment falling within the area of this award.”*¹²

and subclause 13(c)(3) was amended to expressly provide for roadhouse attendants:

“
Proportion
(c) (i) *The proportion of unapprenticed male or female juniors who may be employed by an employer shall be as follows:*
...
*(3) Driveway attendants, lubritorium attendants and/or **roadhouse attendants**—
Two juniors to one adult
three juniors to 2, 3, 4 or 5 adults
four juniors to 6, 7 or 8 adults and thereafter, one additional junior to each three or fraction of three adults working on a site at any one time.”* [emphasis added]

14. In addition, specific junior casual roadhouse attendant and driveway attendant rates were also introduced (as a percentage of the 20 years and over rate) in the 1974 Award for 19-year-olds, 18-year-olds, and those aged 17 years and under¹³.
15. Unfortunately, the correction to the roadhouse attendant definition was short-lived, with the original 1970 Award definition being reinserted in the newly created *Vehicle Industry Repair, Services and Retail Award 1976*¹⁴ (the 1976 Award). Again, this appears to have been an unintended consequence of the decision to create a consolidated Award, consisting of an amalgam of the ‘best’ provisions of the 1970 Award and 1974 Award, without sufficient consideration given to how the provisions would operate as a whole. As a result, the 1976 Award includes a definition of roadhouse attendant that is at odds firstly, with the casual junior rates for driveway attendants and roadhouse attendants that had just been inserted;

¹² [156 CAR 522](#), cl. 41(y).

¹³ [156 CAR 522](#), cl. 6(f)(iv).

¹⁴ [181 CAR 125](#), cl. 44(z).

and secondly, the arrangements that applied to junior weekly hire employees (i.e. where a 20-year-old received 87.5% of the adult rate).

16. Significantly, the error appears to have had no real impact in practice, with the Motor Trades Organisations not aware of any evidence to suggest that employers ceased to employ roadhouse attendants under 20 years of age. One can only assume that the parties (and respondent businesses) were either not aware of the issue, or, simply applied the specific Award provisions relating to junior casual and weekly hire employees to the extent of any inconsistency with the definition.
17. The roadhouse attendant definition issue appears to have then laid dormant until a further attempt to fix the drafting error was made in 2012 by the MTANSW. As is clear from submissions made, the issue was seen to be one of a technical drafting error that needed amendment for consistency with the then current *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (2010 Award) provision relating to the aforementioned special arrangements that applied to casual driveway attendants, roadhouse attendants and console operators (the latter classification having been introduced in January 1994¹⁵):

“6. Although the parties have not had the opportunity to discuss the terms of our application the MTANSW has formulated its submission on the basis that there can be substantial agreement, given that the variation we have sought are limited to matters that are errors, omissions or ambiguities rather than substantive matters that will more properly be raised and determined as a part of the four yearly review...

Item 1 – Clause 3 – Definitions and interpretations

Amend the title of “roadhouse attendant” to read as “adult roadhouse attendant”.

7. *The previous award defined adult roadhouse attendant [sic] as an employee who is 20 years of age. The title of the award definitions incorrectly omitted the word adult. This was a drafting error over a number of years.*
8. *The amended definition is consistent with Clause 36 which sets out 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 “(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.”*¹⁶ [emphasis added]

It is again worth emphasising that whilst the proposed amendment succeeded in addressing the first issue identified above (i.e. that a casual roadhouse attendant could be employed under 20 years of age, consistent with subclause 36.2 of the 2010 Award), no consideration appears to have been given to the second issue of weekly hire employment, as the amended definition remained wholly inconsistent with sub-clause 33.7 of the 2010 Award in relation to weekly hire roadhouse attendants. It is clear that the focus has been solely on alignment with the casual provision.

¹⁵ [L1086](#).

¹⁶ MTA NSW, [Submission](#), 23 November 2012, [6]-[8]

18. The Motor Trades Organisations submit that it is also clear from that the Decision¹⁷ varying the 2010 Award to give effect to MTANSW's amended roadhouse attendant definition, that neither the applicants nor the Commission appear to have been cognisant that the amended definition was only 'correct' as it related to casual roadhouse attendants, and that it therefore remained a drafting error, inconsistent with sub-clause 33.7 of the 2010 Award:

“Technical variations

[10] *The majority of the variations proposed were of a technical nature and were aimed at correcting errors, omissions and ambiguities to ensure the appropriate interpretation of the Award.*

[11] *At the hearing of the applications, the applicants advised that they agreed with or did not oppose the following variations to the Award being made:*

1. *Clause 3 - insert the word “adult” before the words “roadhouse attendant”.*

It was agreed that this word was inadvertently left out. [Emphasis added]

19. It should be further noted that despite this amended definition further compounding the original drafting error, it again does not appear to have had any impact in practice. Once again, one can only assume that the parties (and respondent businesses) were either not aware of the issue, or, simply applied the specific award provisions relating to junior weekly hire employees to the extent of any inconsistency with the definition. Certainly, the advice provided by industry parties and the Fair Work Ombudsman clearly continued to provide that a 20-year-old weekly hire (full-time or part-time) roadhouse attendant received 87.5% of the adult rate.¹⁸
20. Given the above, the Motor Trades Organisations respectively submit that Senior Commissioner Stanton got the roadhouse attendant definition correct in the 1974 Award, and that the definition should be reaffirmed. Alternatively, the Motor Trades Organisations would recommend that the definition of (adult) roadhouse attendant be deleted altogether. In support of the alternative deletion option, it should be noted that the need to clearly signpost that a 20-year-old casual roadhouse attendant is entitled to the adult rate of pay is clearly provided for at sub-clause 27.3(a) of the 2020 Award, making a specific roadhouse attendant definition arguably redundant.
21. The Motor Trades Organisations submit that making the proposed change to the roadhouse attendant definition will ensure that for the first time since 1976, there is full consistency in the Award between the roadhouse attendant definition on the one hand, and the specific wage rate provisions and 50 years of application on the other.-

Schedule B – Roadhouse attendant definition drafting error gets compounded

22. Like previous Award proceedings referred to earlier in this submission, the 2014 4-yearly modern award review process that culminated in the creation of the 2020 Award, might also be described as a long and arduous affair for all concerned. Again, given the complexity of the

¹⁷ [\[2013\] FWC 3714](#)

¹⁸ See for example, historic [rates](#) provided by the Fair Work Ombudsman Pay and Conditions Tool.

matters dealt with through those proceedings, it is unsurprising that an attempt towards the end of the process to fix minor technical drafting errors, has instead served only to further exacerbate the roadhouse attendant definition error.

23. This is evidenced by both the large number of amendments to the *Vehicle Repair, Services and Retail Award – Exposure Draft* first published on 15 October 2014, and by the fact that up until to [13 February 2019 amendments](#), Schedule B had provided for junior rates of pay for 20-year-old weekly hire (full-time and part-time) roadhouse attendants, driveway attendants and console operators in accordance with 50 years of Award history.
24. The Motor Trades Organisations note that the seemingly inexplicable removal of 20-year-old wage rates from the weekly hire junior rates of pay in Schedule B in the 13 February 2019 Exposure Draft amendment is referenced as “parties agreed changes”. The Motor Trades Organisations note that there were a number of technical drafting errors in Schedule B that were corrected by agreement of the parties prior to the publishing of the aforementioned amended Exposure Draft.
25. Specifically, as noted in the [Statement](#) published by the Commission in regard to the present matter, the 2016 AMWU submission provides a number of concerns that the Motor Trades Organisations raised regarding: incorrect reference to junior console operators as a Level 1 classification at B.3.4 and incorrect references to junior driveway attendants and roadhouse attendants cooking take away food as a Level 4 classification at B.3.6¹⁹. Whilst these concerns were addressed in the subsequent iteration of Schedule B – it is perhaps worth noting that the AMWU submission did not assert that the Motor Trades Organisations (or for that matter, the AMWU) had stated that 20 year old weekly hire roadhouse attendants, driveway attendants and console operators were entitled to the applicable adult rate.
26. Further, a close examination of the current iteration of Schedule B shows that it’s inconsistency with clause 16.6 of the 2020 Award is not intentional. That is, both B.3.4 and B.4.5 clearly state that the junior hourly rate is based on a percentage of the adult rate “in accordance with clause 16.6”. The Motor Trades Organisations submit that this is clear evidence of unintended drafting error, rather than any deliberate and considered ‘agreement’ between the parties.
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

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

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.

29. Again, it should be noted that despite this technical drafting error in Schedule B compounding the original roadhouse attendant definition error, it has not appeared to have had any impact in practice up until the matter was raised in [Correspondence](#) from HR Legal. Once again, one can only assume that the parties (and respondent businesses) were either not aware of the issue, or, simply applied the specific award provisions relating to junior weekly hire employees to the extent of any inconsistency with Schedule B. Certainly, the advice provided by industry parties and the Fair Work Ombudsman clearly continued to provide that 20-year-old weekly hire (full-time or part-time) driveway attendants, roadhouse attendants and console operators continue to receive 87.5% of the adult rate.²⁰
30. The Motor Trades Organisations submit that the current Schedule B technical drafting error, like the roadhouse attendant definition technical drafting error, can be easily rectified by returning to an earlier iteration – in this case, the earlier iteration of the [Exposure Draft](#) which reflects clause 16.6 of the 2020 Award, in providing a junior rate of pay for 20-year-old weekly hire employees in B.3.1 – B.3.3 of Schedule B.

Other Matters

31. The Motor Trades Organisations submit that the proposed amendments to the 2020 Award provided in this submission address all issues raised by the HR Legal that have given rise to the current application.
32. The Motor Trades Organisations are aware that some other parties may seek to press for other changes to the Award to address elements that they have concerns with. The Motor Trades Organisations note for example, that a concern relating to junior classification levels was raised. The Motor Trades Organisations submit that it is not aware of any error, ambiguity or lack of clarity regarding the junior classification levels.
33. The Motor Trades Organisations would therefore respectively submit that it is not an issue that properly falls within the scope of the matter currently before the Commission. As such, the Motor Trades Organisations are therefore opposed to any change being made in this regard.
34. The Motor Trades Organisations reserve the right to make further submissions in reply, should an interested party provide evidence in support of such a change.

²⁰ See for example, current [rates](#) provided by the Fair Work Ombudsman Pay and Conditions Tool.