

Australian Industry Group

Application to vary the Vehicle Repair,
Services and Retail Award 2020

Submission
(AM2021/4)

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Ai
GROUP

AM2021/4 - APPLICATION TO VARY THE VEHICLE REPAIR, SERVICES AND RETAIL AWARD 2020

1. Introduction

1. The Australian Industry Group (**Ai Group**) files this submission in response to the [Directions](#) issued by the Fair Work Commission (**Commission**) on 5 March 2021 and the matters raised in the [Statement](#) published by the Commission on 11 February 2021 (**Statement**).
2. The Statement refers to [Correspondence](#) received by the Commission on 22 January 2021 (**Correspondence**) from HR Legal raising issues pertaining to the age at which certain employees in the fuel retailing sector receive adult rates under the *Vehicle Repair, Services and Retail Award 2020* (**Vehicle Award**).
3. Specifically, the Statement notes ambiguities within the Vehicle Award regarding whether full and part-time roadhouse attendants, driveway attendants and console operators commence receiving adult rates of pay at the age of 20 or 21.
4. The junior rates for full and part-time roadhouse attendants, driveway attendants and console operators are contained in clauses 16.6(a) – 16.6(d). These provisions expressly provide junior rates for such employees up to and including the age of 20. Confusion has arisen with respect to how these provisions interact with:
 - Clause 2 which defines an ‘adult roadhouse attendant’ as an employee of 20 years of age or over;
 - Clause 27.3 which provides separate rates for casual junior roadhouse attendants, driveway attendants and console operators up to and including the age of 19 only;
 - Clauses B.3.4 and B.3.5 which summarise the rates of pay for full and part-time junior roadhouse attendants, driveway attendants and console operators but which fail to include the rates mandated under cl. 16.6 for 20 year old juniors; and

- Clauses B.3.1 – B.3.3 which define full and part-time adult roadhouse attendants, driveway attendants and console operators as being “20 years and over”.
5. The confusion which arises as a result of the ambiguity concerning the correct rates to provide to roadhouse attendants, driveway attendants and console operators is inconsistent with the modern awards objective to provide a fair and relevant minimum safety net of terms and conditions, taking into account, inter alia, the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia. This necessitates the Commission making appropriate variations to the Award which confirm that full and part-time roadhouse attendants, driveway attendants and console operators receive junior rates as currently reflected in clauses 16.6(a) – 16.6(d).

2. Differing threshold for casual versus permanent Roadhouse Attendants, Driveway Attendants and Console Operators

6. Minimum rates of pay are contained in clause 16 of the Vehicle Award. Minimum weekly rates for unapprenticed juniors up to and including the age of 20 are calculated either as a percentage of the Level 1 rate in clause 16.6(a) or a percentage of the Level 4 rate in clause 16.6(c).
7. The classifications of unapprenticed juniors which receive junior rates calculated on the Level 1 rate are listed in cl. 16.6(b) and include:
- Driveway attendant; and
 - Roadhouse attendant, required to cook takeaway foods.
8. The classifications of unapprenticed juniors which receive junior rates calculated on the Level 4 rate are listed in cl. 16.6(d) and include:
- Console operator

- Roadhouse attendant, if engaged primarily to cook other than takeaway foods.
9. The tables containing the applicable minimum hourly and weekly rates for such employees provide that for an employee who is 20 years of age, the minimum weekly rate will be calculated at 87.5% of the relevant adult rate. It is apparent from these provisions that employees covered by clauses 16.6(a) – 16.6(b) receive junior rates of pay at the age of 20.
 10. Clause 16.1(a) of the Vehicle Award provides that the minimum hourly rates for casual driveway attendants, console operators and roadhouse attendants are set out separately in clause 27.3.
 11. Special provisions for driveway attendants, console operators and roadhouse attendants are contained in clause 27 of the Vehicle Award. Clause 27.3 specifies the minimum hourly rates of pay for adult casuals (cl. 27.3(a)) and junior casuals (cl. 27.3(b)). In contrast to the minimum junior rates provided in clause 16.6 for full and part-time employees, the junior rates for casual driveway attendants, console operators and roadhouse attendants in cl. 27.3(b) apply to employees up to the age of 19 only. No junior minimum rates are expressly provided in the award for casual driveway attendants, console operators and roadhouse attendants at the age of 20.
 12. The differing ages at which driveway attendants, console operators and roadhouse attendants commence receiving adult rates of pay, depending on whether an employee is permanent or casual, has its origins in early pre-modern awards covering the repair, services and retail sectors of the vehicle industry.
 13. The first dedicated award covering the repair, services and retail sector was an interim award made by the Commonwealth Conciliation and Arbitration Commission in 1968.¹ That award included a classification for a driveway attendant with associate rates of pay for adults contained in clauses 8 and 10. Junior rates were paid up to and including the age of 20 and were calculated as a proportion of the associated weekly wage for adults. The applicable percentage

¹ [125 CAR 977](#).

for a 20 year old was 86% for junior females (cl. 13(a)(i)) and 87.5% for junior unapprenticed males (cl. 14(a)). Clause 6(e)(ii) of the Award provided that a casual employee for working ordinary time shall be paid per hour one-fortieth of the weekly rate prescribed by the award for the work which he or she performs plus 15 per cent.

14. The 1968 Interim Award was replaced by the *Vehicle Industry—Repair Services and Retail Award, 1970 (1970 Award)*.² Clause 8(a) of this award included a minimum weekly rate of pay for adult males performing classifications that included 'driveway attendant' and 'roadhouse attendant'. Clause 13(a)(i) of the 1970 Award provided that the minimum weekly rate of wage for an unapprenticed junior employee would be a proportion of the equivalent adult rate (87.5% in the case of 20 year old employees).
15. Unlike the 1968 Interim Award, the 1970 Award had a far more extensive provision dealing with casual employees. Clause 6(f)(ii) provided a broad entitlement for casual employees to receive 1/40th of the appropriate weekly rate (including the junior rates mandated under cl. 13), plus a loading of 15 per cent in lieu of annual leave, sick leave, compassionate leave and holidays. However, this provision excluded driveway attendants and roadhouse attendants of 20 years of age or over. Such employees were paid a separate hourly rate which was not expressed as a proportion of the equivalent weekly rate (cl. 6(f)(iv)).
16. The 1970 Award was replaced by the *Vehicle Industry - Repair, Services and Retail - Award, 1976 (1976 Award)* which maintained the distinction between the ages when weekly and casual driveway attendants and roadhouse attendants received adult rates of pay that subsisted in the 1970 Award.³
17. On 1 February 1979, the 1976 Award was amended to include separate rates for driveway attendants whilst operating a self-service console.⁴ This included a variation which ensured that casual driveway attendants who operate a self-

² [134 CAR 313](#).

³ [181 CAR 125](#).

⁴ [216 CAR 656](#).

service console received junior rates up to and including the age of 19. The amendments did not alter the status quo whereby non-casual unapprenticed juniors received adult rates from the age of 21.

18. The distinction between when casual and weekly hire driveway attendants and roadhouse attendants received adult rates was maintained in the *Vehicle Industry - Repair, Services and Retail - Award 1980 (1980 Award)* and the *Vehicle Industry - Repair, Services and Retail - Award 1983 (1983 Award)*.⁵
19. On 11 January 1994, the Australian Industrial Relations Commission amended the 1983 Award to include a new 'console operator' classification.⁶
20. The *Vehicle Industry - Repair, Services and Retail - Award 2002 (2002 Award)* was made on 16 May 2003.⁷ Clause 6(f)(iv) of that award prescribed the same rate for casual driveway attendants, console operators and roadhouse attendants of 20 years of age or older with lower rates available to employees 19 years and younger. Clause 13(a)(i) prescribed rates for unapprenticed juniors including full and part-time driveway attendants, console operators and roadhouse attendants up to and including the age of 20 years.
21. The *Vehicle Manufacturing, Repair, Services and Retail Award 2010 (2010 Award)* maintained the distinction which had existed in pre-modern awards regarding the age at which casual and other driveway attendants, console operators and roadhouse attendants received adult rates. Clauses 33.7(a) and 33.7(b) contained percentage tables which included the applicable proportions of the relevant adult rates to calculate the minimum hourly rates for unapprenticed juniors. These clauses each ascribed a proportion of 87.5% of either the Level 1 or Level 4 rate for employees aged 20 years.

⁵ [246 CAR 21](#), cl. 6(f)(iv) and 13(a)(i), [H5658](#), cl. 6(f)(iv) and 13(a)(i).

⁶ [L1086](#).

⁷ [PR931545](#).

22. Clause 36 of the 2010 Award prescribed payment of a proportion of the adult rate for casual employees up to and including the age of 19 years with the full adult rate being paid thereafter.
23. During the 4 yearly review of modern awards, the Commission dealt with a proposed variation by the Shop, Distributive and Allied Employees Association (**SDA**) to increase the rates for casual console operators/roadhouse attendants engaged to primarily cook other than takeaway meals. The application was brought on the basis that the percentage differentials between the hourly rates for the casual driveway attendant, roadhouse attendant and console operator did not align with the percentage differentials between the hourly rates for their permanent equivalents. The Full Bench examined the background to the development of the minimum rates for the relevant employees but declined to make a variation on the basis of the submissions provided by the SDA:⁸

[69] First, it is not possible to identify any rational basis for the casual rates for driveway attendants and roadhouse operators which were first added to the RSR Award in 1970 and upon which the whole structure of rates was consequently built. The history in this respect was described in an AIRC Full Bench decision of 7 March 1996 which dealt with an application to vary the casual rates as follows:

“BACKGROUND

The award prescribes casual wage rates in subclause 6(f). Paragraph 6(f)(ii) contains casual provisions which are common in awards of the Commission. They prescribe an hourly rate of the relevant weekly rate divided by the standard hours of work and relevant percentage loadings to apply at various time. These common provisions apply generally to casual employees in the award, other than in respect of driveway or roadhouse attendants, console operators or vehicle salespersons.

Casual conditions for vehicle salespersons are prescribed in paragraph 6(f)(iii) prescribing relevant weekly rate divided by the standard hours and relevant percentage loadings.

Paragraph 6(f)(iv), the relevant subclause within the applications, sets out a series of hourly rates for casual driveway/roadhouse attendants (sub-paragraph 6(f)(iv)(1)) and console operators (sub-paragraph 6(f)(iv)(2)).

The special casual provisions in relation to driveway and roadhouse attendants and console operators - with hourly rates directly prescribed - have their origin in 1970 proceedings before Senior Commissioner Taylor (transcript in tab 1, exhibit MTA 1).

⁸ [\[2016\] FWCFB 4418](#), [69] – [73].

The Senior Commissioner established specified hourly rates in an effort to provide clarity of award obligations, although the basis upon which the rates were established is not evident in the material before us.

The rates then determined for this limited group of casual classifications have been subsequently adjusted for wage increases by a simple formula of:

$$\begin{array}{rcccl} \text{Old Casual} & & \text{New} & & \text{New Casual} \\ \text{Hourly Rate} & \times & \text{Weekly} & = & \text{Hourly Rate} \\ & & \text{Rate} & & \\ & & \text{Old Weekly} & & \\ & & \text{Rate} & & \end{array}$$

The formula does not comprehend standard hours of work or any change to standard hours.

Standard hours of 38 were introduced into the award with effect from 1 October 1988 (39 hours) and 1 May 1989 (38 hours) through an order in Print H8305, giving effect to a Full Bench decision in Print H4166. The award variation was one of several arising out of Print H4166, giving effect to an agreement of the parties in respect of the March 1987 National Wage Case [Print G6800] restructuring and efficiency principle and standard hours of 38. The order in Print H8305, introduced standard hours of 38 in clause 18 for weekly employees and applied a 38 hour week to casual employees subject to paragraphs 6(f)(ii) and (iii). Whilst the hourly rate in paragraph 6(f)(iv) was altered in respect of wage rises arising from the structural efficiency principle, through other orders, no change occurred to the hourly rate to give effect to a 38 hour week.”

[70] In short, the Monday-Friday, weekend/public holiday and overtime rates for casual driveway attendants and roadhouse operators first established in 1970 did not have an explicable relationship to the permanent weekly rates for those classifications. They were subsequently simply adjusted by the same percentage as the permanent weekly rates. The Full Bench decision in 1996 identified the deficiency in that adjustment formula in that it had not taken account of the introduction of the 38-hour week (because it operated by reference to the weekly permanent rate and not the hourly permanent rate). Therefore it is not possible now to “unpick” the rates and work out what the correct casual loading on the permanent hourly rates should be, since the casual rates do not appear to originally have been calculated on that basis.

[71] Second, the SDA identifies the relevant “error” for the purpose of s.160 to have occurred in 1994 when the casual console operator hourly rate was first introduced. Immediately prior to this there was no separate hourly rate for casual console operators, but there was an hourly allowance for casual driveway operators who used a console. The SDA’s submissions assert that the new casual console operator was calculated by taking the casual driveway attendant hourly rate, adding the console allowance, and then increasing this amount by the percentage increase in the permanent weekly rate (in accordance with the traditional adjustment formula).

[72] We are prepared to accept that this was in fact how the new rate was calculated, although we have not been provided with any record of the proceedings which makes this clear. The SDA submits that this approach was erroneous because the console

allowance “did not have any factors of casual loading or penalty loading included but was applied to a rate that did have these factors in it”. It proposed an alternate calculation which, if used, would have avoided that difficulty.

[73] With respect to the SDA, this is not demonstrative of any error. It only demonstrates that a methodology was used which the SDA, with the benefit of hindsight, would prefer not to have been used. Nothing was placed before us to suggest that the AIRC did not intend to use that methodology, or that some mathematical error was made in calculating the rates in accordance with that methodology. We do not accept that disagreement - even a well-founded disagreement - with a previous decision concerning an award is sufficient to establish an error for the purpose of s.160. What is necessary is to show that some sort of mistake occurred, in that a provision of the award was made in a form which did not reflect the tribunal’s intention. There is nothing to suggest that this occurred here. Accordingly the SDA’s application under s.160 must be dismissed.

24. The discrepancy which emerged from the original 1970 Award has been maintained in the current Vehicle Award whereby casual driveway attendants, console operators and roadhouse attendants commence receiving adult rates at the age of 20 while permanent driveway attendants, console operators and roadhouse attendants receive adult rates from the age of 21, consistently with other unapprenticed juniors. Although the reasons for the distinction are not readily apparent from the decision making, the original 1970 Award and the difference may be considered anomalous, Ai Group is not currently proposing an alteration which would alter the status quo.

3. Clause 2 – Adult Roadhouse Attendants

25. Clause 2 – Definitions of the Award includes a definition of an ‘adult roadhouse attendant’. The definition does not indicate whether the qualifier ‘adult’ is intended to mark a distinction concerning the point at which such employees cease receiving junior rates of pay.
26. The definition provides that an adult roadhouse attendant means (emphasis added):

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

27. This definition should be amended to remove the age qualifier which is currently causing confusion as to the point at which roadhouse attendants receive adult rates of pay.
28. The term 'adult roadhouse attendant' does not appear in any other part of the award and the utility of the term is unclear. However, the definition is liable to confuse, considering the clear provision in clauses 16.6(a)-16.6(d) that for the purposes of minimum hourly and weekly rates of pay, full and part-time roadhouse attendants receive adult rates from the age of 21.
29. Clause 38 – Definitions of the 1970 Award included the following definition:

'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.
30. It is not apparent whether this definition imposed a limitation on the engagement of any roadhouse attendants under 20 years of age. However, the award provided specific rates of pay to casual roadhouse attendants and driveway attendants who were 20 years of age or older in cl. 6(f)(iv). If the 1970 Award allowed for the engagement of casual roadhouse attendants under the age of 20, it may be assumed that the minimum rate of pay applicable to such employees would be determined by the formula in cl. 6(f)(ii). For weekly hire roadhouse attendants, the rate of pay for 20 year old juniors would be calculated according to the percentages in cl. 13 which provided for junior rates up to and including the age of 20 years. If the 1970 Award allowed for the engagement of weekly hire roadhouse attendants under the age of 20, the applicable minimum rates of pay for such employees would also have been calculated as per the tables in clause 13.
31. Clause 44 of the 1976 Award included the same definition for a 'roadhouse attendant' as appeared in the 1970 Award. There is no reason to suppose that the junior rates applicable to unapprenticed junior weekly hire employees contained in cl. 13 would not have applied to 20 year old roadhouse attendants under this award.

32. On 11 April 1980, the Commission made the *Vehicle Industry - Repair Services and Retail - Interim Wages Award 1980 (1980 Interim Award)* which grouped the classifications in the Award (including roadhouse attendants) and assigned each a letter from A – H. Roadhouse attendants engaged primarily to cook other than takeaway foods were placed in group D.⁹ All other roadhouse attendants were assigned to group G. Clause 8(a) of the 1980 Interim Award included percentages used to calculate junior rates for weekly hire employees up to and including the age of 20. Clause 8(a)(i) and 8(a)(ii) confirm that the junior rates were applicable to the classifications in groups D and G.
33. The 1980 Award, made 6 months after the 1980 Interim Award, retained the grouping of classifications as well as the definition of a ‘roadhouse attendant’ which ostensibly restricted engagement to 20 years or older. For 20 year old weekly hire roadhouse attendants, the applicable rate of pay would be the junior rate calculated at 87 ½ % of the applicable adult rate pursuant to cl. 13(a)(i). If the 1980 Award is interpreted as permitting the engagement of roadhouse attendants younger than 20 years, the applicable rates for such junior weekly hire employees would also have been calculated according to the table in cl. 13(a). For casual roadhouse attendants, employees aged 20 years and over were provided with the same minimum rate as per cl. 6(f)(iv).
34. The definition of a ‘roadhouse attendant’ in the 1983 Award also indicated that the classification was restricted to employees 20 years and over. However, regardless of whether the engagement of roadhouse attendants under the age of 20 was restricted, the applicable rate of pay for a 20 year old weekly hire employee would be calculated at 87 ½ % of the relevant adult rate (cl. 13).
35. The 2002 Award and the first iteration of the 2010 Award each retained the old definition of a ‘roadhouse attendant’ while providing for non-casual unapprenticed juniors to continue receiving junior rates up to and including the age of 20.¹⁰

⁹ [236 CAR 119](#).

¹⁰ AP824308CAV cl. 38(ae), 13(a), PR988987 cl. 3.1, 33.7.

36. In the course of the 2012 review of modern awards, agreement was reached among interested parties that the word ‘adult’ had been inadvertently omitted from the definition of a roadhouse attendant.¹¹ As such, the word was included in the 2010 Award by a Determination issued by the Commission on 8 August 2013.¹²
37. The definition of an ‘adult roadhouse attendant’ remains in the Vehicle Award with the age qualifier restricting it to employees of 20 years of age or older.
38. Regardless of the initial intent behind restricting the definition of a ‘roadhouse attendant’ to employees 20 years of age or older in the 1970 Award, the longstanding status quo has allowed for non-casual roadhouse attendants aged 20 years to be paid junior rates. As such, the current definition is apt to confuse.
39. Taking into account the agreement reached between the parties in the 2012 review that the omission of the word ‘adult’ was accidental, it may be surmised that the current understanding is that roadhouse attendants may be engaged at less than 20 years of age. The age qualifier for an adult roadhouse attendant is inconsistent with the junior rates provided for 20 year old employees in clause 16.6 of the Vehicle Award.
40. Ai Group proposes the following definition to address the present confusion:

adult roadhouse attendant means ~~an employee of 20 years of age or over~~ a person 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.

3. Schedule B - Summary of Hourly Rates of Pay

41. Schedule B of the Vehicle Award summarises the hourly rates of pay which are to be found in the body of the Award. Clause B.3 summarises the hourly rates of pay for full-time and part-time console operators, driveway attendants and roadhouse attendants. The headings in clauses B.3.1, B.3.2 and B.3.3 each commence (emphasis added):

¹¹ [\[2013\] FWC 3714](#), [11].

¹² [PR538947](#).

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

42. The headings in B.3.1 – B.3.3 fail to adequately reflect the extant minimum rates of pay for 20 year old full and part-time roadhouse attendants, driveway attendants and console operators in clauses 16.6(a) – 16.6(d).
43. Similarly, clauses B.3.4 and B.3.5, which contain tables intended to summarise the minimum rates of pay for full and part-time junior roadhouse attendants, driveway attendants and console operators include junior rates up to and including the age of 19 only. Clauses B.3.4 and B.3.5 fail to include the junior rates mandated under cl. 16.6 for employees aged 20.
44. The present inconsistency between cl. 16 and Schedule B of the Award was introduced in the course of the 4 yearly review. The inclusion of summary wage tables was intended to make awards easier to understand.¹³ As the title suggests, the purpose of the wage tables is to summarise entitlements derived from elsewhere in the Award rather than to alter or qualify those entitlements.
45. The first exposure draft of the Vehicle Award which included complete wage tables was published on [4 March 2016](#). This version of the exposure draft included junior rates for full and part-time junior console operators, driveway attendants and roadhouse attendants up to and including the age of 20 years in clauses B.3.4 and B.3.5. The qualifier “(20 years and over)” was also absent from the headings in clauses B.3.1 – B.3.3 which summarised the minimum rates for full-time and part-time adult console operators, driveway attendants and roadhouse attendants.
46. The alteration to the heading to the table in clause B.3.1 which indicates that adult rates are paid to full and part-time console operators, driveway attendants and roadhouse attendants from the age of 20 was introduced in the [13 February 2019](#) exposure draft This was followed by identical variations to the headings to clauses B.3.2 and B.3.3 in the [14 October 2019](#) exposure draft. The reason given

¹³ [2014] FWCFB 9412, [63].

for these changes in the table summarising the amendments is “Parties agreed changes”.

47. The 13 February 2019 exposure draft also removed the junior rates for 20 year old full and part-time console operators, driveway attendants and roadhouse attendants in clauses B.3.4 and B.3.5. Again, the reason given for the change in the table is “Parties’ agreed changes”.
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.
49. The abovementioned changes made to Schedule B in the 4 yearly review have introduced an inconsistency into the Vehicle Award. Variations are necessary to to ensure that the Schedule appropriately summarises the rates of pay for junior full and part-time roadhouse attendants, driveway attendants and console operators in cl. 16.
50. Ai Group proposes that the headings to clauses B.3.1 – B.3.3 be amended as follows:

B.3.1 Full-time and part-time adult (~~20 years and over~~) console operators, driveway attendants and roadhouse attendants—ordinary and penalty rates

...

B.3.2 Full-time and part-time adult (~~20 years and over~~) console operators, driveway attendants and roadhouse attendants—shiftwork penalty rates

...

B.3.3 Full-time and part-time adult (~~20 years and over~~) console operators, driveway attendants and roadhouse attendants—overtime rates

51. To resolve the present inconsistency in the Vehicle Award, junior rates for 20 year old full and part-time console operators, driveway attendants and roadhouse attendants should be re-inserted into clauses B.3.4 and B.3.5 consistently with the tables in clauses 16.6(a) and 16.6(c) of the Award.