THE UNION FOR WORKERS IN
RETAIL. FAST FOOD. WAREHOUSING.

Fair Work Commission

Award Review 2014

Vehicle Manufacturing, Repair Services and Retail Award 2010

AM2014/93

SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION

SUBMISSION IN REPLY

Casual Console Operator Rate and Casual Roadhouse Attendant (Level 4)

28 June 2016

1. Two submissions opposing the SDA application to increase the Casual **Level 4 console/roadhouse** have been made to FWC. The first was from the Motor Trades Organisation. The second was a late submission from the AiG.

2. The Motor Trades Organisation at PN 54-59 have made comments related to the exposure draft. They do not relate to this application. These comments will be addressed by the SDA in a short separate submission.

3. In this SDA submission (as per previous submission) where the term **Level 4 console/roadhouse** is used it will refer to a roadhouse attendant primarily required to cook other than take away meals and a console operator.

4. The Motor Trades Organisation have not engaged in the debate about the correct construction of the formula. For a party so heavily invested in the "traditional formula", this is surprising.

5. Their arguments basically are:
    a. The SDA has run this case before.
    b. Rounding of rates to 10cents and compression of the classification relativities causes the difference.
    c. The award was made in 2009 and that the FWC will 'proceed on the basis that prima facie the modern award being reviewed is achieved the modern award objectives at the time it was made'[1]

6. The arguments 3a and 3b are completely false and are explained below in this submission.

7. The argument of 3c is examined later in this submission to show that there is fundamental problem that undermines a 'prima facie' stance being maintained.

8. The AiG submission tries to argue that the application cannot be dealt with under Section 160. Further it states the SDA 'takes issue with the application of the 'traditional formula''.[2] The AiG clearly has misunderstood the SDA submission and missed the fundamental point which is that the foundation of the current casual Level 4 console operator was faulty.

[1] Print 2014 FWCFB 1788 17 March 2014 PN603
[2] AIG submission 24 June 2016, PN 14

9. There has been no criticism of the SDA's method and formulation of the calculation showing mathematically the occurrence of the error and a method to correct it. The SDA has always been correct in past applications on the mathematic construction regarding the traditional formula.

Has this application been made before?

10. The simple and correct answer is no. This application has never been made before. This is a statement the SDA makes categorically.

11. The Motor Trades Organisation try and paint other previous positions and applications of the SDA as being the same or similar. Their attempt is to say the SDA has done this before in the Award Modernisation process and in matters C No. 31111 of 1995 and C No. 31186 of 1998. This is mischievous.

12. In Award Modernisation, the SDA sought to extend a "24 hour rate" to permanent employees so that a service station would either use a system of "24 hour rate" for all employees or the more standard (usual) approach for all employees. The SDA didn't examine the basis of the 'traditional formula", it sought a restructure of applying 24 hour rates to permanent and casual employees which was not accepted by AIRC. The SDA submission of this is at Attachment "A" for ease of accessibility, which clearly shows the above point. *(esp PN 98 -100*) The Motor Trades Organisation is cheeky in selectively quoting out of context that submission. That proceeding did not examine the issue between casual driveway rates and casual console operator rates, so it is unrelated to this application.

13. The application of the C No. 31111 of 1995 sought to align casual service station employees to rates payable to other casual employees. This did not examine the issue between casual driveway rates and casual console operators, so it is unrelated to this application.

14. The application of C No. 31186 of 1998 dealt with permanent employees service station rates and is clearly not an examination of the casual rates, so again it is unrelated to this current application.

15. No application that the SDA has ever made has examined this particular casual rate difference between driveway attendants and console operators. Further no other party including the Commission has made such an examination or application.

16. This is the first time this difference has become apparent to the SDA. It is now also a difference the current Full Bench has noted and sought from the parties an explanation.

Prima facie and Award Modernisation

17. The issue of the casual Level 4 console/roadhouse not being paid the same percentage loading as the other two casual service station employees has never been identified as an issue. As such, the acceptance "prima facie" that the previous award rates were prima facie correct, can now be shown to be false and incorrect.

18. Prima facie is a term derived from Latin, meaning 'at first look or on its face'.[3]

19. The *Collins Concise Dictionary Australian Edition (1987)* defines Prima facie as:

> *Prima facie: adv. At first sight; as it seems at first.*
>
> *Prima-facie evidence: n. Law. evidence that is sufficient to establish a fact or to raise a presumption of the truth unless controverted.*

20. A prima facie position only remains until or unless there is contrary evidence. The SDA has detailed the material and evidence that shows there is evidence pointing to an error, undermining the prima facie position taken by the AIRC in 2009. This material has not been demonstrated to be incorrect in any manner. It has not been contradicted by any opposing party.

21. The SDA believes it has demonstrated that the acceptance of the previous award rates (eg before the modern award) is undermined as the foundation where the casual console rate was set, initially as an interim measure, was incorrect.

22. With a foundation being incorrect, anything that is built upon it is also unreliable and incorrect. In this case the error is perpetuated. As such the prima facie position has to be revisited and reanalysed which has occurred in the SDA submission.

[3] http://dictionary.law.com prima facie: (pry-mah fay-shah) adj. Latin for "at first look," or "on its face," referring to a lawsuit or criminal prosecution in which the evidence before trial is sufficient to prove the case unless there is substantial contradictory evidence presented at trial. A prima facie case presented to a Grand Jury by the prosecution will result in an indictment. Example: in a charge of bad check writing, evidence of a half dozen checks written on a non-existent bank account makes it a prima facie case. However, proof that the bank had misprinted the account number on the checks might disprove the prosecution's apparent "open and shut" case

23. As to paragraph 43 of the Motor Trades Organisation submission, in 1995 the "casual console rate" had been operating on an interim basis, on a formulation devised by Watson DP *(as he was then),* based on the traditional formula. The interim rate had been operating only for a year.

24. The knowledge the SDA and other parties including the AIRC had on the operation of the formula was limited. As previously explained in earlier submissions, the setting of the interim rate was incorrectly set and has never been re-examined. No party, either Union, employer or Commission, has had knowledge of the error.

25. The issue of whether the Commission can revisit a previous decision that has operated for many years has not prevented the AIRC overturning such decisions in this previous award, 10 years for the 38 hour week case, 30 years for the casual roadhouse attendant case. Length of time does not overcome an error. Similarly, it does not justify an error's continuance.

26. When the casual roadhouse rate was recalibrated by the SDA's application (AIRC Print Q5726), the % above the level 2 rate was the same as the % above the full-time driveway rate.

27. The argument raised by the Motor Trades organisations of either rounding or compression of relativities causing the difference between Level 1, Level 2 and Level 4 casual rates is simply wrong. One thing the traditional formula is unaffected by is compression of classification relativities. The traditional formula maintains a % above the base rate (or ratio). The traditional formula in a calculation uses only the fulltime and casual rates applying at the same classification level.

28. The only slight variation that occurs in looking at the SDA 'ratio' is with rounding to the nearest cents (or 10 cents for full-time) and this produces a very slight fluctuation of between 0.01 or 0.05 in the % ratio. It does not cause the large differences of 0.6% or 1.4% between the casual Level 4 rate and either of the casual level 1 or 2 rate.

29. The argument advanced by the employers is implausible and shows that in reality, they do not have a mathematical understanding of the formula and its implications. The SDA does have and has shown the mathematical approach and understanding which has led to the identification of errors and correcting them in the past. The SDA has applied the same methodology and approach in this application.

30. The AiG claim at paragraphs 14 and 15 of its submission is a complete misunderstanding of the SDA position. The purpose of the ratio the SDA calculates is not to have a different approach than using the traditional formula. The ratio is a measure that illuminates where an issue has occurred. This is the same measure that previous Full Benches of the AIRC have accepted to reveal errors. (38 hour week case and casual roadhouse attendant case).

31. The mistake or error has been shown by the SDA to have occurred in the insertion of the interim rate in 1994 AIRC proceedings before Watson DP (*as he then was*). This has then been perpetuated over time with the use of the traditional formula.

32. None of the employers have taken issue over the mathematical explanation provided by the SDA regarding the 1994 insertion of the rate. No employer admits that a fault or error at the start in 1994. The employers apparently regard the examination as some magic maths the SDA has used.

33. The SDA has not sought in this application to oppose the traditional formula. What the SDA seeks is redress of the foundation upon which the casual console rate commenced in 1994. The SDA has made a correction to that foundation rate[4] and then applied the traditional formula over the ensuing years.[5]

34. If the commencement point of a rate has a flaw in it, then it cannot be an appropriate condition for a Modern Award.

35. The SDA provided comprehensive submissions over 115 paragraphs and continues to rely upon these to support the variation sought.

36. Unlike the AIG conclusion at PN 19 of its submission, the SDA doesn't agree that the FWC can ignore correcting an error. To take this action undermines the very fundamental core of the FW Act and the principles all parties should abide by.

[4] See SDA submission 7 June 2016 PN 74 and 75 (and explanation PN66-73)

[5] See SDA submission7 June 2016 PN 85 and 86 and the attached tables page 7, where the recalculation of the level 4 rate is achieved using the traditional formula, after correcting for the error in 1994.

Attachment A

Extract from SDA submission on the RSR exposure draft 2009.

The Way Forward

91. The SDA has opposed having general and fuel retail covered by the Modern Vehicle Industry Award. Given the content of the exposure draft, the SDA can agree to having retail within the Vehicle Industry Award if the three anomalies corrected (Saturday, public holidays and Queensland casuals) as stated previously, and having the 24 hour rate addressed. The 24 hour rate is a contentious matter.

92. If the Commissioner decides that there should be a 24 hour rate, then that rate should be logical, fair, equitable and reliable.

93. The formulation used in the exposure draft is from the RS&R Award. It has been proved to be unreliable over the past ten years and remains inequitable, illogical and unjust. This is not a basis for a modern award.

94. The rate is inequitable and unjust in that it permits casuals to be employed at lower rates than permanents due to the penalties not being correctly reflected.

95. The supposed 24 hour rate arose from a time when 24 hour operations, 7 days a week work didn't exist.

96. Given the changes in society to a 24 hour service for petrol, then having a 24 hour rate should be adopted on appropriate principles. The aim of a 24 hour rate is for ease of administration (which is not a strong argument in the 21st century as opposed to earlier times given the computerisation of payroll systems).

97. The base principle for a 24 hour rate should be equity. This is for both the casual employee and equity between employee groups. The principle of equity for a casual is to consider the penalties that would have applied at the time of work. This is a levelling or smoothing of the penalties, not a reduction. This does mean the peaks and troughs in the rate over the various times are levelled out, meaning at some times the 24 hour rate is higher but at other times it is lower. It is a 'swings and roundabouts' approach. It should not be a means to undercut wages.

98. As a 24 hour casual rate results in the swings and roundabouts and lowers real rates, then another inequity can occur if both 24 hour rates and a standard penalty system is used in the same operation. The 24 hour rate will give a "higher" day rate but "lower" night rate when compared to the standard penalty rates. The same applies to Weekend and Public Holidays. If an operation can mix and match between standard and 24 hour rates, then a selection to minimise cost can and does occur. This is inequitable and unfair as the 24 hour rate lowers some rates and makes higher other rate as a swing and roundabout approach, mixing it with a standard rate removes the equity built into the rate. <u>The only logical, fair and equitable method is to have an operation either on standard rates or 24 hour rates, not a combination.</u>

99. E.g. Employ permanent day workers but casual night workers: day shift – 0% and a reduced night rate as it's a 24 hour rate. All swings to the employer, no roundabouts.

100. To overcome this major problem, an operation should either operate totally on a normal penalty system or on "24 hour" rate.

101. The modern award should introduce a 24 hour rates system as well as the penalty rate system and an employer can choose which to apply. Therefore a 24 hour permanent rate needs to be introduced.

102. To establish a 24 hour permanent rate, the penalties applied during the period must be considered and averaged out.

<u>Monday to Friday Permanent Employees</u>

103. 0% Day Shift, 18% afternoon and 30% night shift.

104. The penalty loadings apply for a "shift" not just for specific hours of work, but an approximation using the spread of hours can be made.

Day Shift	8 hours	(After 4.00 am but before noon)
Afternoon Shift	6 hours	(Afternoon but before 6.00 pm)
Night Shift	10 hours	(After 6.00 pm but before 4.00 am)
	24 hours	

105. Calculating for a weighted average 24 hour rate using the console rate, the individual rates need to be combined and divided.

	Rate x Hours	
Day	15.89 x 8	= 127.12
Afternoon	18.75 x 6	= 112.50
Night	20.66 x 10	= 206.60
	Total	446.22
Divided by 24		$ 18.59

106. Therefore the 24 hour **permanent rate for Monday to Friday is $18.59**. This is an equitable and logical rate.

Saturday

107. The same formulation can be used for weekends. With the Saturday anomaly corrected then Saturday work is:

Midnight – 6.00 am	50%	6 hours
6.00 am – Noon	0%	6 hours
Noon – Midnight	50%	12 hours
		24 hours

108. Again calculating for a weighted average 24 hour rate using the console rate, the individual rates need to be combined and divided.

	Rate x Hours	
Midnight – 6.00 am	23.83 x 6	= 142.98
6.00 am – Noon	15.89 x 6	= 95.34
Noon – Midnight	23.83 x 12	= 285.96
	Total	524.28
Divided by 24		$ 21.85

109. Therefore the **24 hour permanent rate for Saturday is $21.85**. This is an equitable and logical rate.

Sunday

110. **Sunday work** is already a flat 24 hour rate **of $31.78** for any of the 24 hours.

Weekend 24 hour Rate

111. For a weekend all up flat rate then the Saturday and Sunday 24 hour rates rate are combined and divided.

112. Saturday Rate plus Sunday Rate/2 = ($21.85 + $31.78)/2 = $26.82

113. Therefore the **24 hour permanent rate for Weekends is $26.82**. This is an equitable and logical rate.

Public Holidays

114. The issue of public holidays is a harder issue to address in forming a 24 hour rate. The current casual rate combines Saturdays, Sundays and public holidays together. This rate was set when work on Public Holidays in service stations was rare. Most petrol stations were not allowed to trade generally on most Public Holidays. Trade on Sundays was also restricted. Today trade is permitted on all days, including weekends and public holidays.

115. The number of public holidays is small compared to the Saturdays and Sundays. In a year there are roughly 104 Saturdays and Sundays (52 weeks x 2) with about 11 public holidays in a year. (This can be higher depending on State Legislation.)

116. By rolling a public holiday into a weekend rate, the significance of a public holiday is reduced, i.e. they are no different to any weekend.

117. This does not reflect the community view that public holidays are significant days. Governments at all levels legislate for these days as recognition they are special. Employers and employees know they are working on a day when many others are having the day off or receiving penalty rates.

118. The SDA's view is that given the significance placed on public holidays by everyone, they should not be combined into the weekend rate. This would result in three flat 24 hour rates, one for Monday-Friday, one for weekends and one for public holidays. This would be a simple, easy, fair and equitable system for everyone.

Casual 24 Hour Rates

119. The existing system of the 24 hour flat casual rates is inequitable. It has been corrected substantially over recent years by unions (all matters that were opposed by employers). However, the rates still remain inequitable.

120. One example is the rate for Monday-Friday has a 31% loading in total. Given that the casual loading is 25% there is only a 6% buyout for penalties. This 6% buy out is supposedly enough to cover the 30% night penalty. It is inadequate.

121. The casual 24 hour rates logically and equitably should be based off the 24 hour permanent rates. This would mean placing a 25% causal loading on to the permanent rates. The 25% is based off the ordinary rate.

122. This would mean a casual console loading of $15.89 x 25% = $3.97. Therefore the 24 hour rate Monday-Friday for a casual would be $18.49 plus $3.97 which is $22.46.

123. Similarly, the casual loading of $3.97 would be added to the 24 hour rate for weekends and public holidays.

Alternative 24 Hour Flat Rate for Casuals

124. 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 6.00 am-6.00 pm or 6.00 pm to 6.00 am respectively. Averaging the rates results in:

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

126. This is a lower rate 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 be treated in line with other casuals, then permanents should also be aligned in the areas of public holiday rates and Saturday morning.