



ARTIO

Australian Road Transport
Industrial Organisation

ABN: 63 734 697 902

AUSTRALIAN ROAD TRANSPORT INDUSTRIAL ORGANISATION

Respect, Respond and Represent

In the Fair Work Commission

Matter Nos: AM2019/23; AM2020/02

ARTIO Submission to the Fair Work Commission in Matters Nos: AM2019/23 and AM2020/02

The Application

1. At the outset, ARTIO notes that there have been two applications filed – one by Trevor Warner (AM2019/23) and a second by Brenda Mckay (AM2020/02) which, following Directions issued by Deputy President Sams on 19 February, 2020 will be heard concurrently.
2. ARTIO notes that there were 3 further submissions filed in support of this application, two by individuals – Russell Wattie and Roberto Alejandro Pajuelo Dodds – and the other by the National Road Freighters Association (NFRA), which is an unregistered body comprised of a diverse group of Drivers, Owner Drivers, Small Fleet Owners, Larger Fleet Owners and others with business interest in the Transport Industry. It is noted that Trevor Warner is an official of the NFRA.
3. With respect to the NFRA, it is not an organization as defined in the Fair Work Act 2009 and thus has no standing in this matter. Further, according to its own web-site it purports to represent Owner Drivers as well as Fleet Owners.
4. The Application seeks to vary the Road Transport (Long Distance Operations) Award 2010 (hereinafter referred to as the ‘LDO Award’) as follows:
 - “1. The Applicant seeks to vary Clause 3, Definition of “Loading and Unloading.”
OMIT;
tarping, installing and removing gates and operation of on-board cranes
INSERT;
All non-driving activities including but not limited to:

- [i] Complying with entrance and departure procedures at load or unload location.
- [ii] apply or release all load restraint devices, including gates and tarps.
- [iii] Operation of trailer curtains.
- [iv] Operation of forklifts, pallet jacks, winches and mobile cranes.
- [v] Be on-call or to Assist a third party to load or unload freight.
- [vi] Waiting time or Queuing time.
- [vii] Processing of freight documentation.
- [viii] checking vehicle weights on weighbridge.

2. The Applicant seeks to vary clause 14.2 C (i) – “Travelling Allowance”
OMIT;

“This will not be payable where an employee is provided with Suitable
Accommodation away from the vehicle.””

- 5. **ARTIO opposes both of these applications and seeks that these matters be dismissed on the papers.**
- 6. **In the alternative, ARTIO considers that these applications are effectively ‘work value’ claims made by 2 drivers, and should be processed and determined by a Full Bench of the Fair Work Commission under s. 157 of the Fair Work Act 2009.**

Background

- 7. The Australian Road Transport Industrial Organisation (ARTIO) is the only Industrial Organisation of Employers registered under the Fair Work Act 2009 which specifically represents employers in the transport and logistics industry. As at February 2020, it had around 300 members. These include the large multi-national transport companies down to the small family owned businesses that perform a large percentage of Australia’s freight task.

8. ARTIO operates as a federation with Branches in all States except South Australia. ARTIO and its Branches operate independently and in accordance with a common set of rules applying across the Organisation.
9. ARTIO Council, which has a representative from each State, meets on a bi-monthly basis to consider and discuss IR issues impacting the organisation and its members. Much of its day-to-day activities are carried out by the Branches, especially when dealing with operational IR issues. This submission is made on behalf of the Organisation and its Branches.
10. ARTIO has been closely involved, since its registration in 1984, with the LDO Award and its various predecessor awards of both the Conciliation and Arbitration Commission and the Australian Industrial Relations Commission.

Submissions

A. AM2016/32

11. ARTIO has been a direct participant in all major cases around the LDO Award, including the most recent Full Bench Decision [2017] FWCFB 1913 in AM2016/32 where the TWU sought several variations to the LDO Award including, amongst other matters:
 - a. The insertion of a ‘pick up and drop off allowance’ which was rejected by the Full Bench.

More specifically, the Full Bench stated in paras 92 to 103 the following:

“[92] It is clear from the evidence presented by the TWU that at least some long distance drivers undertake multiple pickups and/or drop-offs at either the principal point of commencement or destination of a long distance operation, as well as pickups and/or drop-offs between those two points. The TWU argues that drivers are not being properly compensated for these multiple pickups and drop-offs. In its view, these

pickups and drop-offs cannot be considered as part of a long distance operation, and should receive additional remuneration.

[93] It should be noted that cl 13.6 already provides an allowance for loading and unloading, based on the time taken to perform such duties, with a minimum payment of one hour loading and one hour unloading per trip. This is not limited to requiring payment in circumstances where such work is undertaken at a principal point of commencement or a principal point of destination.

[94] It should also be noted that where an employee who has undertaken a long distance operation subsequently performs additional driving work unrelated to that operation, such as delivering different freight, such work is not part of a long distance operation and is therefore not covered by the Long Distance Award.

[95] 'Long distance operation' is defined in the Long Distance Award as: '...any interstate operation, or any return journey where the distance travelled exceeds 500 kilometres and the operation involves a vehicle moving livestock or materials whether in a raw or manufactured state from a principal point of commencement to a principal point of destination. An area within a radius of 32 kilometres from the GPO of a capital city will be deemed to be the capital city.'

[96] An 'interstate operation' is defined as: '...an operation involving a vehicle moving livestock or materials whether in a raw or manufactured state from a principal point of commencement in one State or Territory to a principal point of destination in another State or territory. Provided that to be an interstate operation the distance involved must exceed 200 kilometres, for any single journey. An area within a radius of 32 kilometres from the GPO of a capital city will be deemed to be the capital city.'

[97] There is nothing in the definition of 'long distance operation' to imply that an operation will only involve one pickup and one drop-off. For a journey to constitute a long distance operation, it must (at least) involve moving livestock or materials from a principal point of commencement to a principal point of destination. That does not mean the journey might not involve picking up or dropping off at more than one location. Indeed, that possibility is implicit in the use of the word 'principal', which implies that there might be 'secondary' points of commencement or destination.

[98] The Long Distance Award has an unusual remuneration structure, reflecting the particular circumstances and needs of the industry. Long distance drivers are not necessarily remunerated for the driving component of their work on the basis of the actual time taken. Instead, they are paid either on the basis of the kilometres travelled (the kilometre driving method) or by the hourly driving method.

[99] In relation to the kilometre driving method, the Long Distance Award contains a schedule of agreed distances for most journeys between capital cities (excluding Canberra). Where an employee performs a journey specified in the schedule, the number of kilometres is deemed to be the number indicated in the schedule for that journey. The award then sets out the minimum cents per kilometre that must be paid for each grade of vehicle.

[100] Two things should be noted about the kilometre driving method. First, the number of kilometres in the schedule is unlikely, in most cases, to represent the exact number of kilometres actually driven. In some cases, the number of kilometres driven would be fewer (though in other cases it could be more). Secondly, if the journey involves a significant diversion to make a pickup or drop-off along the way, such that it changes the nature of the journey, then it would be more appropriate to use the actual kilometres driven rather than the agreed distances in the schedule.

[101] Under the hourly driving method, a driver may be paid for the driving component of a particular journey by means of an hourly driving rate for the relevant grade. As with the kilometre driving method, there is a schedule of agreed driving hours for most journeys between capital cities. The minimum hourly driving rate is calculated by dividing the minimum weekly rate prescribed by cl 13.1 by 40, and multiplying by 1.3 (industry disability allowance) and 1.2 (overtime allowance). Where the journey is not listed in the schedule, payment is to be for the actual hours worked. Alternatively, the number of hours contained in an accredited FMP can be used.

[102] The proposed variations would provide that where an employee engaged in a long distance operation is required to pick up or drop off at two or more locations at the principal point of commencement or principal point of destination, the employee must be paid an hourly rate for all additional hours worked (calculated by dividing the weekly award rate prescribed by 40 and multiplying by the industry disability allowance). Where an employee is required to pick up or drop off at a location en route between the principal point of commencement and principal point of destination, the employee must similarly be paid an hourly rate for all additional hours worked.

[103] The current remuneration structure has been contained in federal awards since at least 1993. These ‘trip rates’ strike a balance between the needs of employers and employees – giving employers a degree of certainty in tendering for work, and for employees in knowing what they will be paid. There is no need to calculate the exact number of kilometres driven, nor time taken, for each journey. In some cases, employees will be advantaged by the way the schedule operates; in other cases, there could be some advantage to the employer. We do not consider that the proposed variations should be made without a thorough reassessment of the schedules and the way in which they operate. No party sought such a wholesale reassessment and we do

not have the evidence before us to conduct such an exercise. In these circumstances, we decline to make the proposed variations.” (underling added)

12. The conclusion reached above, whereby the Full Bench determined that there was insufficient evidence to make the variations sought by the TWU, applies to the current applications.
13. There is no evidence put forward, other than a few anecdotal observations made by the Applicants and a couple of supporters, to enable a ‘wholesale reassessment’ of the operation of the LDO Award in accordance with the direct and specific conclusion reached by the Full Bench in AM2016/32.

B. Laycock v J & C Independent Carriers Pty Ltd [2018] FCCA 6

14. This case, heard by the Federal Circuit Court, concerned an application by a long distance driver, Mr Laycock, claiming an underpayment of around \$77K in non-payment of the ‘loading/unloading allowance’ for the period September 2010 to December 2014.

The issue for determination was:

When is a driver entitled to be paid the loading/unloading allowance under the Road Transport (Long Distance Operations) Award 2010 (LDO Award)?

Clause 13.6 of the LDO Award prescribes as follows:

“13.6 Loading or unloading

- (a) Where an employee is engaged on loading or unloading duties, that employee must be paid for such duties at an hourly rate calculated by dividing the weekly award rate prescribed by clause 13.1 by 40 and multiplying by 1.3 (industry disability allowance), provided that a

minimum payment of one hour loading and one hour unloading per trip must be made where loading and/or unloading duties are required.

(b) As an alternative to clause 13.6(a), where there is a written agreement between the employer and the employee a fixed allowance based on the hourly rate in clause 13.6(a) may be paid to cover loading and unloading duties, provided that such written agreement is attached to the time and wages record.

(c) A casual employee attending to the loading or unloading of the vehicles must be paid a loading of 25% in addition to the rates prescribed by this clause.”

The definition of loading/unloading is contained in Clause 3 Definitions and Interpretations and means:

“loading or unloading means being physically engaged in the loading or unloading of the vehicle and includes tarping, installing and removing gates and operation of on board cranes”
(underling added)

15. In this case the applicant’s argument centred on the proposition that the unlatching and opening of curtains on the truck that Mr Laycock drove and the application of, or removal of, restraining straps on loads of the truck by him, whether undertaken separately or together, was loading/unloading as contemplated by the LDO Award and, as such, gave rise to the entitlement to be paid the loading/unloading allowance.
16. Judge Driver found that an employee must be ‘physically engaged’ in loading/unloading to be entitled to be paid the allowance. His Honour accepted the evidence of the employer that the word ‘physical’ implies a physicality to the task that contemplated some reward for work performed above and beyond driving duties. His Honour found that:
 - opening and closing curtains is not loading/unloading and it should only be considered as something incidental to the loading/unloading tasks;
 - strapping and unstrapping is incidental to loading/unloading, and strapping is related to load security and the safe operation of the vehicle;

- loading/unloading is a physical act through mechanical (forklift) or other means of using physical effort to place a load on a truck or unload an item from a truck; and
- the removal of a light parcel, or jiffy bag, is a delivery and not contemplated as part of the physicality required by the definition of loading/unloading in the LDO Award.

17. The very clear decision in this case was that to be entitled to be paid the loading/unloading allowance an employee must be ‘physically engaged’ and this clearly means a level of physicality above and beyond clipping/unclipping straps or buckles and sliding curtains open or closed.

18. Applying Judge Driver’s reasoning to the present application makes it clear that all the tasks listed by the Applicant in paragraph 4 above do not fall within the definition of ‘loading/unloading’.

C. Transport Workers Union of Australia v Linfox Australia Pty Ltd [2020] FWC 489

19. This was a decision of the Fair Work Commission handed down on 31 January 2020 and concerned a dispute under the Linfox and the Transport Workers Union Road Transport and Distribution Centres Agreement 2018 (hereinafter called the ‘EBA’).

20. The EBA incorporated the terms of the LDO Award unless such terms were inconsistent with the EBA. In the decision, Deputy President Beaumont observed at paragraph 78:

“The phrase ‘extra responsibilities associated with arranging loads’ in cl 14.1(a) of the Long Distance Award is in my view, of sufficiently broad import to encompass waiting for paperwork and for trailers to be loaded and unloaded, in addition to coupling and uncoupling trailers in the yard, and oversize loads. On this basis, I find that the ‘cents per kilometre rate’ referred to in clauses 13.3 and 13.4 of the Long Distance Award, compensates the Drivers for the aforementioned extra responsibilities. Further, the requirement to attend toolbox talks, sits squarely within the remit of ‘shift work

and related conditions', or an '[e]xtra responsibility associated ... with pre and post-trip vehicle safety trips.'"

21. Further, at paragraph 86, the Deputy President makes it quite clear that a 'long distance operation' goes beyond the driving component and that the LDO Award contemplates that such rates (cents per kilometre) compensate for work, which extends past the driving and movement of the vehicle.
22. In fact, even if the movement of trailers is 'additional work' which is nevertheless part of a long distance operation then the drivers are compensated for such work through the cents per kilometre (herein referred to 'cpk') or rates per kilometre payment.
23. In conclusion, the Deputy President states at paragraphs 97 and 98:

"However, having considered the evidence before me, the submissions of the parties, that the 'rates per kilometre' under the Long Distance Award are inclusive of an 'industry disability allowance' - which compensates for various conditions and responsibilities set out in cl 14.1(a) of the Long Distance Award, and the definition of 'loading and unloading' in that same Award, I am not persuaded that the Disputed Tasks constitute 'loading and unloading' work, and therefore do not attract the LHR.

Further, I do not consider that the circumstances so described to me by the witnesses would trigger the operation of cl 4.2 of the Long Distance Award, such that payment for the Disputed Tasks would need to be made in accordance with the *Road Transport and Distribution Award 2010*."

Travelling Allowance

24. The Applicants claim that travelling allowance should be paid irrespective of whether or not the employer provides suitable accommodation away from the vehicle.

25. This issue was the subject of much industrial litigation in the early to mid-2000s. In fact, the current arrangements were the subject of an Australian Industrial Relations Commission (AIRC) Full Bench decision (PR951827) which was handed down on 24 January 2006. This was an appeal from an earlier decision of SDP Harrison. (AW805988 PR951827)
26. This decision, which endorsed a 'consent agreement' reached between the major industrial parties – ARTIO, SARTA and the TWU – following Conferences chaired by Senior Deputy President Lacy. These conferences led to a 'packaged solution' which included the following:
- An increase in the living away from home allowance (LAFHA) of 33% from \$21 to \$28 (the LAFHA is now a 'travelling allowance') and also provided that a driver could claim additional funds in exceptional circumstances. This provision still exists in Clause 14.2 (c) (ii) of the LDO Award;
 - An increase in the leave loading payment from 17.5% to 30% so as to ensure that when an employee was on leave, the loading equated to the equivalent of the industry disability allowance;
 - Any issue or concern around 'suitable accommodation away from the vehicle' could be processed through the Settlement of Disputes clause;
 - A TWU claim for an additional week's leave would be withdrawn.
27. This decision implemented an agreed package, to resolve a difficult and long-standing claim, which was the subject of many hearings and conferences in the AIRC over several years.
28. These agreed arrangements should not be overturned, or otherwise disturbed, without any supporting evidence.

Conclusion

29. It is clear from the above decisions that the current payment scheme in the LDO Award, which has been in place for over 6 decades, commencing with the Transport Workers (Interstate Drivers) Award 1963, is well understood and structured to remunerate drivers for all work performed in conjunction with a 'long distance operation'.

30. The current Modern Award was made in 2010 and replaced the Transport Workers (Long Distance Drivers) Award 2000, which, in turn, followed on from various awards made in 1993, 1988, 1980 and the originating award from 1963.
31. The cents per kilometre payment methodology compensates drivers for long distance work. The cpk rate is a loaded rate which includes the 30% industry disability and a 20% overtime component which takes into account an overtime component of 2 hours in 10 at double time – Clause 14.1 (b) of the LDO Award.
32. These loadings provide a total loading on the ‘base’ award rate of 156% and ensure that long distance drivers are properly remunerated.
33. The amount of Travelling Allowance was set by a Full Bench of the Australian Industrial Relations Commission in 2006 after a lengthy review of evidence, including inspections and following a consent position by the major industrial players. This amount has been increased regularly in accordance with the ‘expense allowance’ principles and now rests at \$40.44 per occasion.
34. As part of that decision, the Full Bench determined that it would not be payable when ‘suitable accommodation’ was provided away from the vehicle. Nothing has changed since this decision to warrant a change to those conditions specified in the LDO Award.
35. ARTIO submits that the authorities and decisions referred to above are clear and direct in how the LDO Award operates and how drivers are remunerated.
36. Should the Commission decide that these applications should not be dismissed on the papers then ARTIO submits that the Applicants bear the onus of proof and need to produce a thorough reassessment of the schedules and the way in which they operate and provide evidence that would enable a total re-evaluation of the work value associated with driving on long distance operations.

ARTIO

March 2020.