TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT SAMS
COMMISSIONER LEE

s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2016/32)

Road Transport and Distribution Award 2010
Road Transport (Long Distance Operations) Award 2010

Sydney

10.41 AM, THURSDAY, 23 MARCH 2017

PN1

SENIOR DEPUTY PRESIDENT HAMBERGER: I don't think we need to take the appearances again. I don't know if there have been any discussions between the parties as to what order they want to be heard.

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MR GIBIAN: I had some brief discussions just now. We're, for the union's part, consent to deal with the issues on an issue by issue basis if that's - I mean subject to what the Bench might think. I think we're trying to be accommodating to the people who have travelled from interstate to allow them to leave. It appears to me it might be sensible as well to focus on one issue at a time.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Right.

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MR GIBIAN: But subject to what the Bench might think - - -

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SENIOR DEPUTY PRESIDENT HAMBERGER: So what would you propose to do - - -

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MR GIBIAN: I think so far as the parties the first issue would be the driver definition issue because that concerns the concerns of - Coles and SDA are solely related to that issue, as we understand it.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Why don't we at least deal with that issue discreetly and that will allow those people then to I guess depart.

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MR GIBIAN: Yes.

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SENIOR DEPUTY PRESIDENT HAMBERGER: The other one I suppose would be the - - -

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MR GIBIAN: The vehicle relocation issue I think is - - -

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SENIOR DEPUTY PRESIDENT HAMBERGER: Exactly.

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MR GIBIAN: - - - Mr Cross is waving at us, is solely here for that issue, so I'm content to deal with that after that if that's convenient.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. Then I think we can deal with everything else probably together. So in terms of the driver definition I guess you go first.

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MR GIBIAN: Yes. Well, obviously we've filed some submissions earlier on, whenever that was in January. We've provided some submissions in reply on Tuesday, I think. There were not directions for that to occur but it just in preparation for today seemed it would both abbreviate what I need to say orally, and also assist the other parties knowing what I was going to say in reply to the submissions we received shortly before the hearing on the previous occasion.

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Obviously enough we rely upon those submissions and the first issue that's dealt with in both the initial submissions and the reply submissions is the driver definition issue. Obviously as the Full Bench will appreciate what's proposed is to insert an addition definition which endeavours to describe the duties that may be required of persons employed in or performing work in one or other of the driver definitions, which are set out in schedule C to the award.

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The proposal has excited opposition from particularly Coles and the SDA, and I think joined by some of the industry groups. That opposition is advanced, notwithstanding the fact that there doesn't seem to be any dispute that subject to some reasonably minor issues in terms of drafting, but in fact drivers properly falling within the classifications of the award do commonly, or may commonly perform duties in addition to simply driving a vehicle. Or that the award at present doesn't, in any clear way at least, describe what those duties may be or indicate the scope of the duties that might be performed in the classifications which are referred to as simply as a driver of a vehicle of various types.

PN17

It appears that the parties opposing the variation, as I say, subject to a couple of matters of detail of drafting, would seek to continue the present position in which the award does not in a clear way describe to employers and employees who are covered by its terms, and parties required to deal with its application the nature of the duties that are properly falling within the classifications under the award. That is, in the union's submissions, an unsatisfactory circumstance.

PN18

Indeed, the opposition appears - the opposition to the award in fact describing the duties appears to have a degree of hypocrisy about it, in that presumably the industry bodies, at least who have members who are employers covered by this award, would seek to continue a situation which those employers could direct their employees to perform duties, other than who were employed as drivers, to perform duties other than simply driving the vehicle, but don't wish the nature of those duties to be described in any way in the award.

PN19

Now I don't think I probably need to go to the terms of the award but as the members of the Full Bench will be award, the classifications referred to in clause

15 to the award are set out either in schedule B in relation to distribution facility employees, or schedule C in relation to transport worker classifications. As been noted in the written submissions, schedule B, to the extent that it deals with distribution facility employees, sets out in a manner which is common in many other modern awards, various skills and duties which fall within the various classifications in the distribution facility employee classifications, and the type of duties and responsibilities encompassed by those roles.

PN20

Schedule C, on the other hand, derived as it is from the historical transport awards simply describes the positions in very encrypt terms; the general hand, loader, courier and then driver of various types of vehicles, and as the Full Bench knows the classifications distinguished depending upon the type of vehicle that is operated by the driver in question. Without going that further step and describing the type of duties that might be encompassed within those roles.

PN21

The propositions that the union advanced in support of the variation are in short that firstly, drivers covered by the award commonly do perform at least some tasks in addition to simply driving the vehicle are necessarily so, and we've endeavoured to describe those duties in the terms of the variations that are proposed. Again, as I note, I don't think there's any dispute about that as a matter of fact.

PN22

Secondly, with the performance of non-driving tasks has been - to some extent at least, has been recognised in the development of transport awards historically, which have contributed to the making of the modern award, The Road Transport and Distribution Award, particularly the prior federal transport award. Again that doesn't seem to be a matter which is the subject of any dispute in the submissions which have been advanced.

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The third proposition is that the proposed variations would bring - would seek to do what most other modern awards to; that is to in fact describe the duties falling within the classifications in the award, and indeed bring it in line with the classifications - to some extent at least within the manner in which the classifications of distribution centre employees are described within the award, setting out as they do the types of duties and skills required.

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The fourth proposition is that the proposed variation is necessary to ensure that the award is simple and easier to understand and apply. It may have been considered sufficient historically in the respondency based federal awards to merely record the classifications as driver, and perhaps everyone understood what the work of a driver customarily entailed. It's, the union would submit, no longer appropriate given the operation of modern awards across industry applying to employers and employees generally, both in the transport industry but also to employers who employ drivers to undertake a transport function where the employer has some other principal business, and that it be appropriate that the

award on its face make clear the type of duties that are comprehended by the classifications contained within the award.

PN25

The fifth point that we've advanced is that the driver definition setting out the duties of drivers is necessary to assist in the proper application of the provision dealing with overlapping awards, and the standard clause is dealt with in the Road Transport and Distribution Award at clause 4.8, providing as the Full Bench know that where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and the environment the employee normally performs the work.

PN26

The proper application that that provision requires, in the union's submission, that a proper comprehension of the type of duties which are to be performed in the classifications covered by the award. It's not the only thing to be considered; the work environment and the like is part of that assessment, but the nature of the work performed by the employee and its appropriateness to the classifications contained in the award is part of the assessment when the Commission's called upon to determine that question of appropriateness.

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Now that concern has - and we don't shy away from saying there isn't, apart from the proceedings in the Federal Court involving Coles and the delivery drivers that it undertook, that it employs to undertake deliveries of Coles online grocery deliveries. Now that's received a somewhat hysterical reaction in the submissions of both Coles and the SDA. What we'd say about that is firstly, even if what the union was endeavouring to do was to seek a different outcome with respect to that particular class of employees, there's nothing with that. It is the distinction between the arbitral role of the Commission and the judicial role of interpreting an award makes it quite proper for the Commission if it believes it appropriate to vary an award to ensure that it operates in a manner which is satisfactory and consistent with the modern award objective, if it's been interpreted by a court in a manner which the Commission does not think achieves those outcomes.

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I've referred in the reply submission to re Brack, another High Court case which dealt with that precise circumstance where there was a judicial interpretation of a shift allowance provision, which the then Brack C in terms that perhaps went beyond what the court considered appropriate, that said it was inconsistent with the intention of the Commission in making the award, and the parties' intention in having that provision incorporated in the award and determined that the operation of the provision as interpreted by the award was unsatisfactory and varied the award to address that situation.

PN29

There's nothing wrong with that, in principle, being an approach the Commission is invited to take. However, we've not taken that approach. We've not decided - we've not asked the Commission to vary this award or indeed the retail award in a manner which would lead to any different outcome. What we have said is that

those - and we don't shy away from saying - is that those proceedings revealed that the overlapping award provision would be assisted by - and the application of that provision would be assisted by the award on its face reflecting the nature of the duties which fall within the driver classifications in the award. Which as I say don't appear to the subject of any factual dispute. The decision particularly of the Federal Circuit Court disclose that the absence of a description of those duties has the potential to distort the application of the overriding provision dealing with a circumstance in which more than one award applies. At paragraph 35 of - I'm sorry, paragraph 17 of the initial submissions filed in January I've extracted part of the decision in the Circuit Court which noted in part that:

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In respect of the Transport Worker Grade 2 classification, no detail is provided around the type of tasks associated with that classification. Moreover, the indicative job title of driver (covers only one component of the wide range of tasks performed by CSAs) -

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which is what Coles calls its deliver drivers -

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and this component is in any event covered by the Retail Employee Level 1 classification.

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In paragraph 18 I've referred to the footnote to the Circuit Court decision at that point, and can I just - I think my friends bundles of authorities. I wasn't going to take the Full Bench to the case, but can I just read what the court said. It said that:

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Silence within the Transport Worker Grade 2 classification in respect of non-driving tasks as particularly notable when compared to the classifications of distribution facility employees level 1 and 2, also found within the Road Transport Award. These classifications go into some detail regarding the general warehouse duties in a distribution centre in addition to driving duties. That the Transport Worker Grade 2 contains no equivalent detail around non-driving tasks suggests that the classification is intended to cover employees that are employed to provide driving services only.

PN35

Now that's the - now no one says that that's true. No one says that in fact drivers are only employed to drive a vehicle but we have the hypocrisy of parties coming and telling the Commission that the award shouldn't accurately describe what drivers are in fact - maybe the type of duties that drivers may be required to perform as part of the classifications within the Road Transport and Distribution Award. No one ones here and says no, it's not true, that drivers would be involved in consolidating goods, loading and unloading, vehicle inspections, paperwork and the like. No one says a driver can only be required to drive a vehicle, but there is resistance to the award accurately describing for the assistance of all parties and indeed for courts and tribunals applying the award, the duties that properly fall within those classifications. We do find that somewhat mystifying.

PN36

I do emphasise that, as I say, the type of work performed is not the only element considered in the standard award provision dealing with application of the - dealing with overlapping award - the circumstances of overlapping awards, and how any future instance in which there would be a question about the overlap between the Transport and Distribution Award and some other award, it will have to be determined on the facts of any particular case, including the work performed and the environment in which it's undertaken. But the proper and appropriate application of that provision would be assisted by the Road Transport Award properly describing or providing some appropriate indication of the types of duties that fall within the classifications of drivers under that award.

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To the extent that the submissions of the other parties suggest that the variation that's proposed would produce unnecessary overlap between awards, that's simply a misconceived submission. The overlap exists. At present we - the proposed variation seeks to assist in resolving that overlap in an appropriate way, properly informed by an understanding of the nature of the duties that drivers may undertake.

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As the members of the Full Bench would know, the definition of the Road Transport and Distribution industry contained within clause 3.1 of the award extends to a circumstance in which a business in engaged in the transport by road of goods, wares et cetera, and anything else, whether or not or sorry including where the work performed is ancillary to the principal business undertaking or industry of the employer. That is, to the extent that there's a retail operation in Coles' case or a manufacturer or a mine or whatever, to the extent that it engages in the transport of goods et cetera, by road and employs drivers to do that work, it will fall within the coverage of the Road Transport and Distribution Award.

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Now there may be some other award which is also available. Clearly the Full Bench when it made the Road Transport Award as the - in the award modernisation process regarded it as likely to be the principal transport award and indicated that other awards containing transport classifications were relatively few. But to the extent that there are driver duties capable of being performed under other awards, the overlap already exists. The proposed variation will not enlarge or alter the coverage of the Road Transport Award. It would simply assist in informing an assessment where that's required to be undertaken of the appropriate classification for a particular worker if more than one award is capable of applying to that employee.

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To the extent - there seemed to be two parties, I think Australian Business Lawyers and ARTIO raised questions about the drafting of the provision. ARTIO's concerned there appeared to be a question as to whether or not a list of non-driving tasks was non-exhaustive. That was certainly our intention and the use of the word "including" was intended to achieve that outcome. As we've said in the reply submissions, ARTIO raise a couple of other types of duties and we don't in principle have any objection to those being included.

PN41

Australian Business Lawyers raised a concern about whether the type of vehicles that were mentioned in the proposed definition encompassed all the types of vehicles that are referred to in schedule C to the award, are contained in the Transport Worker classifications. Again, that was the intention and notwithstanding what Australian Business Lawyers said, we think that that's achieved. That is to the extent that it's said, we didn't mention cranes, for example. A crane's either - a mobile crane's either a rigid vehicle or an articulated vehicle, depending on the circumstance but we've suggested some wording that could remove any doubt about that if that there be a concern of a lack of clarify in the definition that we have proposed.

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I think unless there's any further that's what I propose to say on that issue.

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DEPUTY PRESIDENT SAMS: What's put against you is that there's no evidence of any actual problem with the way the award's operating now. Speaking for myself, really it seems to me that the strongest point you've got is really the canvassing of the matter in the Federal Circuit Court in the Coles case.

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MR GIBIAN: Yes.

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DEPUTY PRESIDENT SAMS: But beyond that there's nothing in front of us that would warrant the change, is there?

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MR GIBIAN: Well, in terms of evidence perhaps it's a difficult matter to put evidence on but we think that look, firstly the way in which the Circuit Court approached it was clearly to regard a driver as only involved in driving, in a manner which is not, as I say, no one contends is a correct statement of the scope of duties that that type of employee would perform. We think the Commission can - if a court can read the award in that way, we think that it would be plain in the inference that can be drawn that employers and employees out in industry who, including employers who are not necessarily principally involved in transport, who are required to apply this award would not necessarily be able to - and without knowing the history of the Transport Award would be able to read it, and readily comprehend the type of duties that fall within the transport classifications.

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As I say, perhaps that's a difficult matter to call clear evidence upon but we think it's apparent on the face of the award frankly.

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DEPUTY PRESIDENT SAMS: Right. My point - there's no evidence of a litany of disputes in this place, for example, difficulties with the application of this provision is there?

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MR GIBIAN: Nothing that I can point to, no.

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DEPUTY PRESIDENT SAMS: No.

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MR GIBIAN: Ms Carr's pointed out that the evidence in some way goes to an increased likelihood that drivers will be called upon to perform a wider range of non-driving tasks, and that's something that has increased over the years and perhaps calls for the issue of the appropriate clarification of duties to be reassessed. As I say, the award modernisation adopted the approach which has existed historically in the transport industry federal awards, and as I say whilst that might have been considered appropriate and sufficient in the circumstances of the modern awards as they existed historically, we think that the modern award system requires greater clarity in terms of the type of duties to be undertaken, or that may be undertaken by classifications within the award and that it's plainly necessary to achieve the award objectives that that be done.

PN52

I mean if it's not done then the question will be well what - if the union's asked about - by a member as to whether they can be directed to perform some other task as to what the union's supposed to say about that if the award doesn't clarify the situation.

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SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you, Mr Gibian. Mr Felman.

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MR FELMAN: No, I think - - -

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SENIOR DEPUTY PRESIDENT HAMBERGER: Right, Mr Friend.

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MR FELMAN: I'm outranked.

PN57

MR FRIEND: Can I - I didn't realise there would be some time pressures today. We've prepared a short outline of the oral submissions which once we got the reply submissions became a little bit longer, so I ask the Commission not to be daunted by it but I should be able to move through it fairly quickly. We've also provided to members of the Bench copies of the authorities that are referred to in our main submission, but I won't be taking you to those. Don't think I'm going to spend a lot of time reading cases. We've said what we want to say about that in the written submissions.

PN58

The SDA opposes the introduction of this new definition of driver in the award and there are three reasons that we've set out in the submissions. We say it does

nothing to ensure that the award is simple and easy to understand. In fact it makes it ambiguous and uncertain - and I'll come back to that and explain it. Secondly, it creates an overlap between two awards where none currently exists. Thirdly, and we say the real reason for this application by the TWU, is an inappropriate attempt to revisit issues already determined by the courts.

PN59

Now as we said in paragraph 4 of this short outline, quoting from the penalty rates decision, the task is to decide whether a particular award achieves the modern awards objective. If it doesn't they need to vary it so that it only includes terms that are necessary to achieve the modern awards objective. We've referred to a lot of other passages in the relevant cases about the application of these principles to this task that's confronting this Full Bench.

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We've had very little from my learned friend in any of his written submissions and almost nothing in his oral submissions today dealing with those issues. What part of the modern awards objective is not being achieved? Why is it necessary - it's not sufficient simply to say it's necessary. There's been no explanation as to why it's necessary that this change be introduced to achieve the modern awards objective. He made the submission that well, back when awards were respondency based you probably didn't need anything other than driver as exists in the current award and that's why it was maintained as the method of designated drivers in the modern award.

PN61

Firstly, we know from the penalty rates' decision at paragraph 111 that we should assume that the modern award we're dealing with met the modern awards objectives when it was made. Secondly, this award is in a sense respondency based because it deals with the particular industry, employers engaged in a particular industry. There's no significant change there that there needs to be some more expansive definition of driver.

PN62

Can I then turn to the three issues that we deal with. Ambiguity. The only evidence that the TWU has presented in support of this application is evidence about the range of duties that drivers generally do. It's true, that's not contentious. Drivers often do things other than just driving the truck. One would have assumed that that has to be case. You don't stop getting paid because you've got out of the truck to go and do something else briefly; maybe loading it, maybe filling it with petrol. Of course those are part of the duties of a driver and everyone would have and we would submit always has understood that those would be part of the duties of a driver.

PN63

Indeed, where is the evidence that there's a problem? Where is the evidence that people don't know what's covered? There's nothing. My learned friend Mr Gibian says it would be difficult to present that evidence. It's hard to understand on what basis such a submission could be made. If there is a difficulty one would expect there to be evidence of it.

PN64

If there is a difficulty you don't fix it by putting in a provision such as this. Can I ask the Commission to turn to the proposed variation, if it's convenient. It's contained at paragraph 23 of our submissions filed on 2 March.

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DEPUTY PRESIDENT SAMS: Is it the same as the proposed draft determination?

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MR FRIEND: Yes.

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DEPUTY PRESIDENT SAMS: Yes.

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MR FRIEND: Continuing:

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Driver means an employee who is engaged to drive a rigid vehicle -

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or various other types of vehicles. This is the first part of the definition. Driver means an employee who is engaged to do one of these things, drive one of these vehicles. Now you either fit that description or you don't. If you fit that description you're a driver, if you don't fit it, you're not a driver.

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It then goes on to say:

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A driver may also undertake non-driving duties.

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Now as we read it, that's any duties that are not driving or other tasks in connection with driving the vehicles described in the definition. Then we have including a whole lot of other tasks. The first point about that last part of the definition, including all these other tasks is as has been said this morning, it's not exhaustive, so what does it tell us? It tells us that some tasks are in but other tasks might be too. So if you come to the award and read this and say well I'm not doing any of those things; loading or unloading et cetera, but I still might be a - they still might be driving tasks.

PN74

How does that help us understand what a driver does? Of course it's not limited because the TWU doesn't want to limit the expansiveness of the definition that they're putting forward. But once they do this, it doesn't achieve anything other than create questions and issues. It also has a very broad expanse by referring to any non-driving duties, any whatsoever. It makes no distinction in respect to how much driving a driver has to do. If you're engaged to drive a vehicle then you're a driver and you might also perform other tasks. So you might be engaged to drive

a vehicle a day a week but you're a driver and the other four days, on one argument, you're performing other tasks but you're still a driver. All this does is create confusion and uncertainty in relation to a situation where we would submit there is no confusion or uncertainty now.

PN75

The submissions filed by NatRoad at paragraph 71 and following raise some sound points, we would submit, about the propensity for the definition to create confusion for a number of other awards where the term "driver" is used. Nothing's been said about that by the TWU in response. ABI and the New South Wales Business Chamber note that the absence of the definition of driver at 2.1 has not caused any significant issue with the operation of the award, or the understanding of it over the past six years. They then at paragraphs 2.4 to 2.14 raise some important points about ambiguity and incompleteness of the definition which we respectfully adopt.

PN76

The TWU in dealing with this point in its reply submissions filed on Tuesday seek to mischaracterise the ground. They suggest at paragraph 4 that those parties like my client who oppose the variation are asking the Commission not to accurately record the duties of employees covered by the award. But the proposed variation does not accurately record the duties of drivers. Everything hinges first upon an employee being engaged as a driver and the variation then gives some examples of somethings a driver can do, but not all of them. We would submit that it seems accepted on all sides that drivers must perform ancillary duties, that's very common in the way awards operate. Setting out some of them but not mentioning others simply creates confusion and ambiguity.

PN77

The second point is overlap. This is different to the points raised by NatRoad at 71 to 74 which I've already referred to. From the point of view of my client, the interest in relation to this arises particularly in respect of overlap with the General Retail Industry Award. It's been made very clear through this case that the question of demarcation between those two awards in respect of a large group of employees has been resolved. We know what the answer is. The Full Federal Court has told us what the answer is. There's no evidence of that problem existing anywhere else, so we have a stable, certain situation arising from a judicial consideration of these two awards.

PN78

What the TWU wants to do is throw something else in and make it different, and they acknowledge that it makes it different and that it creates an issue. At paragraph 19 of their primary submissions they say:

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The TWU does not suggest that the insertion of a definition properly reflecting the duties undertaken by a driver will necessarily produce a different outcome to the assessment of which classification is most appropriate, having regard to the work undertaken by the given class of employees.

PN80

That's customer service agents (indistinct).

PN81

Well, what they're saying there is it doesn't necessarily make a difference but it might. So what's the outcome? The outcome is from being in a position where we know how the two awards interrelate, how it works, we'll end up in a position where we don't know. Overlap will be created, more confusion created and one has to ask how could it possibly be said that that promotes the modern awards objective. It's the very antithesis of the way the modern awards objective should be applied, in our submission.

PN82

We come to the third point. Attempt to circumvent the Full Court. We do say that the real reason behind this application is an attempt to revisit the Full Court decision. Coles in their submissions at 26 to 33 have raised points about the TWU's attempt to modify the definition of driver or include a definition in awards over a number of years, unsuccessful attempts. We respectfully adopt what the TWU - sorry, what Coles says about that.

PN83

The TWU's reply really is focused on Re Brack. Well, there's no debate about Re Brack. Re Brack is a case about the difference between judicial power and arbitral power. Of course this Commission has the power to arbitrate or to make a decision which is different to the existing decision and changes the situation that exists as a result of the Full Federal Court decision. If it is so minded it has that power. The real question is whether it should, and Re Brack tells you nothing about that.

PN84

In the absence of something compelling, such that existed in Re Brack, where the Commissioner said well, the court's got it wrong. What we all knew when we were sitting around this table was it is supposed to offer it in this way. What he might have perhaps said was that the words used by the Commission didn't accurate reflect their intention but whichever way you cut it, there was a reason to do what he did to make an award which was inconsistent with the finding of the court. To change things to more accurately reflect what he contended in the first case.

PN85

There's nothing here like that. There is no reason here, other than we're told repeatedly it would be better if it more accurately reflected what drivers do, but in fact only some of what drivers do, and we won't tell you what the rest is because that might narrow something down. This is, we would submit, nothing more than another example of the TWU's pursuit of what Bull C called this idée fixe concerning this issue. It should also be rejected.

PN86

There was one final point. On a number of occasions, at least two during his submissions my learned friend accused my client and others of hypocrisy. We'll take that as a rhetorical flourish but it really is an accusation that should be levelled the other way. There are two awards for review before the Commission

here; this award and the Road Transport Long Distance Operations Award. The long distance award uses exactly the same methodology to describe classifications and drivers as in a distribution award. In other words, if there's a problem for the distribution award, there's a problem for the long distance ward. Every argument that's been raised by the TWU about the distribution award would equally apply to the long distance award. There's no application to vary the long distance award.

PN87

How can those things sit together? That shows, in our submission, that the application has been brought for the in effect ulterior purpose of dealing - of getting around the Full Court decision. In our submission, it should be rejected. Unless there's anything further, those are the submissions of the SDA.

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SENIOR DEPUTY PRESIDENT HAMBERGER: No, thanks very much.

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MR FRIEND: Thank you.

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SENIOR DEPUTY PRESIDENT HAMBERGER: I think you get to go next.

PN91

MR FELMAN: Your Honours, I have a folder of authorities to hand up. I apologise for burdening you with more paper. Your Honours as will be clear no doubt from our submission that we Coles oppose the draft determination attached as TWU-1, that is the definition of driver within clause 3 of the Road Transport and Distribution Award 2010, and we have filed and served submissions dated 2 March 2017 to set out our position and obviously I don't propose going through that in detail, other than develop the three reasons that we say this variation will be rejected by this Full Bench.

PN92

The first is one that my friend, Mr Friend, said that this is an attempt to re-litigate issues between the TWU and my client, and I'll develop that briefly. The second is that it undermines the modern award objective in section 134(1)(g), which is to avoid unnecessary overlap but more importantly to ensure a simple, easy to understand stayable and sustainable modern award system. We also set out some other modern award objectives in our submissions that are undermined. I don't propose going through them in any detail, they're set out in the submissions.

PN93

The third reason is that since the Road Transport and Distribution Award was originally made by a Full Bench of this tribunal, nothing has changed that warrants a change in the definition or in addition to the definition of driver. All that has changed is that the TWU has lost a truck load of litigation against Coles and wants a second bite at the cherry. That's basically admitted. I don't think there can be any dispute that that - - -

PN94

MR GIBIAN: That's ridiculous.

PN95

MR FELMAN: Well, it's clear - it's not ridiculous because it's clear and it's not been denied that this issue fixes a problem that the TWU had in its litigation. Nowhere have they ever said look, we'll accept this scenario and move onto other things. It just hasn't been said in the face of clear allegations by the SDA and Coles that this is what it is attempt to do. Nowhere has the TWU said not true, we're not going to do that and indeed Mr Foenander, a witness for Coles, actually said I think this is going to be - result in a re-litigation of these issues, and he was not cross-examined on that point. That was an opportunity for the TWU to say no, no, no, that's not right, and how do you know that? What basis do you have to say that? Not a word. He was cross-examined on some other points, I might add.

PN96

I'll develop those submissions briefly. In relation to the attempt to re-litigate issues that have already been determined, it's worth going through what they were actually to substantiate the position - the point that I made that this is going to result in re-litigation. You see the litigation arose out of negotiations between Coles and the TWU for an enterprise agreement, and what happened was that there was a dispute at the outset between what was the appropriate modern award for the purposes of the BOOT.

PN97

Obviously, the TWU said it was the Transport Award and Coles said it was the Retail Award. In the end, there was no negotiated position. No agreement could be reached and so Coles made an application to the Commission to deal with this issue and at around the same time the TWU made a claim in the Federal Circuit Court for underpayments. They lost that case in the Federal Circuit Court and the Full Court of the Federal Court and straight after that, they made an application for a scope order in relation to the negotiation of an enterprise agreement.

PN98

Those proceedings took over three years to be determined. Now there is still no enterprise agreement between the TWU and Coles, and realistically it's an absurdity to say that when that negotiation recommences, if it ever does, and this definition changes, that there's got to be a re-agitation of what is the most appropriate award, and the TWU will be entitled to say we're not interested in what the Full Court of the Federal Court said about that because the award's changed now. Start again, let's have another fight.

PN99

There's no bar to the TWU bringing another underpayments claim because they don't have to say we don't have to worry about what's the award that covers these guys and females, because the definition's changed. Again, there will be nothing to change - to prevent them from bringing another scope proceeding. We could end up with three more years of litigation, and it's an absurdity to say that's not going to happen. Certainly, the TWU haven't gotten up and said don't worry about that, it's not going to happen, and they could have. If my friend wants to in reply get up and say that then he should, fine. He's obviously not going to.

PN100

What is clear is that what's going on here is that this amendment is desirable to the TWU, there's no question about it, but it's not necessary. The courts have and the Full Bench has drawn the distinction between those two concepts. Picking up on what the Commissioner said, there's no evidence that it's necessary. There's a lot of evidence that it's desirable and I don't think that can really be disputed but nothing that says it's necessary. That's the test that this Full Bench needs to apply.

PN101

The second point I want to make is the point in relation section 134(1)(g). I adopt and pick up my learned friend's point for the SDA that this will create unnecessary reopening of the issue of overlap, not that there already isn't an overlap, there is, but it re-agitates the issue about the application of clause 4.8 of the Road Transport Award which deals with the manner in which that overlap is dealt with, and as I've already made pretty clear, we think that will undermine the stability of the modern award system.

PN102

Another point that I want to make about the simplicity of the award system and how this definition actually creates an inconsistency and a complexity, and that is this. Could the Commission please have the draft - I think you've got presumably the draft determination. If I could take the Commission to schedule C of the Road Transport and Distribution Award, page 55 of that document, which is schedule C. It will be necessary to look at that, your Honours, to - - -

PN103

DEPUTY PRESIDENT SAMS: Where do we find that, just remind me?

PN104

MR FELMAN: The Transport Award?

PN105

DEPUTY PRESIDENT SAMS: Yes.

PN106

MR FELMAN: I'm not sure where - I'm not sure where there is in a court - there's no court book or - - -

PN107

SENIOR DEPUTY PRESIDENT HAMBERGER: Right.

PN108

MR FRIEND: It's the award under review.

PN109

MR FELMAN: It's the award that's under review.

PN110

DEPUTY PRESIDENT SAMS: I know that.

PN111

MR FELMAN: I can hand up - - -

PN112

DEPUTY PRESIDENT SAMS: I'm just asking for ease of reference where - - -

PN113

MR FELMAN: Sorry, your Honour?

PN114

COMMISSIONER LEE: It hasn't been filed to my knowledge.

PN115

MR FELMAN: It hasn't been filed, that's strange. I mean, all right.

PN116

COMMISSIONER LEE: You might have thought we would go and find one.

PN117

DEPUTY PRESIDENT SAMS: Clause?

PN118

MR FELMAN: Page 55, your Honours. It's schedule C which is the classification structure setting out the rates of pay. First, I want to go to the definition in the draft determination, and just the first sentence really:

PN119

Drivers means an employee who is engaged to drive -

PN120

and then there's a definitive set of vehicles, it doesn't say vehicles including, and it doesn't end with "or others". It's a definitive set:

PN121

rigid vehicle, a rigid vehicle with trailer combinations, an articulated vehicle, a double articulated vehicle and/or multi-axle platform trailing equipment.

PN122

Clearly, if you don't drive one of those vehicles you are not a driver for the purposes of this definition. You're not because it's exhaustive, right. But let's have a look at some of the classifications in the Road Transport Award.

PN123

Transport Worker Grade 3, this is page 55. I'll just wait for his Honour to - you've got it.

PN124

DEPUTY PRESIDENT SAMS: Yes.

PN125

MR FELMAN: Yes. Driver of a forklift. Well, how does that marry with the definition of driver. That is limited to the driving of certain vehicles. It's inconsistent. Driver of a concrete mixer classification 3. Again, classification 4, driver of a forklift. Driver of a straddle truck, I'm not to be honest exactly sure what that is. Driver of a concrete mixer classification - - -

PN126

MR GIBIAN: Rigid vehicle. It's a rigid vehicle.

PN127

MR FELMAN: It might be rigid vehicle, so then that can be struck off what I'm saying.

PN128

MS CARR: They're all rigid vehicles.

PN129

MR GIBIAN: They're all rigid vehicles.

PN130

MR FELMAN: But there's confusion. Well, I'm not sure that a forklift is a rigid vehicle and that's obviously something that hasn't been explored, there's no evidence about that. The point is it creates confusion and you'll end up - my friend wants to say something, I'll sit down. Do you want to - - -

PN131

MR GIBIAN: No, go on.

PN132

MR FELMAN: Thanks.

PN133

SENIOR DEPUTY PRESIDENT HAMBERGER: You'll get your chance, Mr Gibian to reply.

PN134

MR GIBIAN: Indeed. Indeed.

PN135

MR FELMAN: I'll keep quiet when you do. A mobile crane, now they may be, they may not be but you're going to end up with on this definition potential fights about this classification and definition. There's no definition of what a rigid vehicle is. There's no attempt to do so. Now obviously that can be fixed but what it shows is that the TWU are not interested and have not turned their mind to the simplicity of this award. It's ill-conceived this definition and I'll pick up again what the SDA's senior counsel said about that.

PN136

It just illustrates further the lack of thought that's gone into this definition, and similarly at paragraph 12 of the submissions of the TWU set out that:

PN137

It's common for modern awards to set classifications by reference of a detailed descriptions of the type of tasks -

PN138

and again I pick up what senior counsel for the SDA said if it was so common, why didn't they attempt to introduce it into one of the other awards that's before this Full Bench? But I won't develop that because it's already been dealt with.

PN139

The third point is this; nothing has changed since the making of the initial award by this Commission in [2009] AIRCFB 345. The TWU had a go there, and this is important. They had a go. This issue was dealt with. They had a go before the Full Bench of a proposal for a classification structure based on five transport worker grades, and they had non-driving duties in there. This is set out at paragraph 27 of our submissions.

PN140

You'll see at paragraph 29 of the submissions that was rejected by a Full Bench of this Commission. What has changed that or what has occurred that ought to make this Full Bench change its mind about why that ought to not now be rejected. Now it's obviously in a slight different form. I'm not saying they've picked up this exactly but it's the sort of thing that they were trying to do. They were trying to put it there in the classifications. Now they're saying they want it in the definition. What's changed? There's certainly no need for the definition in terms of fixing wages. I mean the actual - the 1959 decision referred to by the TWU makes it clear that in determining the classifications, in determining rates of pay, the types of duties performed by these drivers are taken into consideration. It's going to do nothing to help that.

PN141

What ended up happening was that the Full Bench adopted the classification structure in the Transport Workers Award 1998. Clause 15 of that document had a classification structure which set out various grades determining rates of pay, again primarily based on the nature of the vehicle that was driven. Why should there be a departure from the basis of that decision? Importantly, there's no suggestion that the nature of the duties performed by drivers has changed during that period.

PN142

On the TWU's own evidence, they've pretty much been like that for a while, a long while. So it's not as if the duties have changed. They were the same as they were when the Full Bench made its original decision, and that's critical. Nothing has changed to warrant the Commission to adopt a view that it's necessary to vary the award.

PN143

I very, very briefly want to just take your Honours to a small passage in Re Brack of the High Court. I agree with senior counsel for the SDA about how this decision is very, very different. It dealt with a section of the Conciliation and Arbitration Act that the decision of a court upon an application is final and conclusive and binding, and then the issue was does the variation trigger that? I would have said no but in terms of the way in which the Commission departed from the Federal Court's decision, I note that at page 119 of the industrial relations reports the High Court said this:

PN144

The manner in which Brack C's decision is expressed that is different from the Federal Court is a regrettable and surprising reluctance to accept the authority of a judicial interpretation of an award.

PN145

So it's one thing to say but they did it Brack under a different provision, but that was criticised by the High Court. Ultimately it found that section 110 was not inconsistent with what the Commissioner did, but it was frowned upon. Unless the Full Bench have any questions, I've nothing further.

PN146

SENIOR DEPUTY PRESIDENT HAMBERGER: No, thanks very much. Does anyone else want to be heard on this before we go back to Mr Gibian?

PN147

MR CALVER: Your Honour, I might just talk about the evidence. Most of my submissions will be in relation to that when it comes to other matters and particularly in respect of what Dr Davis has noted that leads into what Mr Friend has kindly pointed to in the NatRoad submissions.

PN148

If I could ask the Full Bench to go our submissions of the 2 March, and attached to that is a report by Dr Davis where there is a quantitative and qualitative survey which we undertook because we don't conduct litigation without knowing what our members think. In relation to that matter, it goes on page 4 to his conclusions about what the qualitative material he received in relation to the notion of this definition of a driver amounted to. He notes that:

PN149

Participates generally regarded the TWU's proposed definition for drivers largely just reflecting the duties currently being performed by a competent driver.

PN150

SENIOR DEPUTY PRESIDENT HAMBERGER: This is page 4 of this statement or page 4 - - -

PN151

MR CALVER: No, your Honour, if you have a look at the submission attached to it is Mr - sorry, Dr Davis' witness statement and then he's marked his reports, his CV BD-1. He's marked the quantitative survey BD-2 and he's marked the qualitative survey BD-3.

PN152

SENIOR DEPUTY PRESIDENT HAMBERGER: Right.

PN153

MR CALVER: I was taking you to page 4 on BD-3, the top part of that there. Does that assist, your Honour?

PN154

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN155

MR CALVER: So as I said, Dr Davis notes that:

PN156

Participants generally regarded the TWU's proposed definition of a driver as largely just reflecting the duties currently performed by a competent driver.

PN157

That proposition links with our contention, the NatRoad contention that nothing, nothing has been placed before this Commission that shows the ordinary usage of the term "driver" should be replaced by a definition that will do no more than open up separate litigation.

PN158

Dr Davis then notes:

PN159

However, some participants were concerned that formalising the definition of a driver in the award may be overly descriptive –

PN160

To which we accedes –

PN161

and create obligations on employers to ensure drivers are trained for many or all of the identified tasks. There was apparent confusion on the part of some interviewees as to why this change was necessary.

PN162

The same confusion that reigns in this room today. So rather than those propositions that Dr Davis has made in BD3 being a derogation from what Dr Davis referred to as an initial conclusion that Members would not have a difficulty with the definition of driver, we see these conclusions as reinforcing that the proposed variation is not necessary to achieve any of the modern award objections. Instead it would detract from simplicity, add unnecessary regulation.

PN163

Rather than, as the TWU says, in paragraph 8 in its reply submission, the lack of the definition being an impairment to a proper application to the award, the lack of a definition is critical for the proper operation of the award and to the proper operation of a very large number of other awards. It's that latter point that we articulate in our written submission, particularly at paragraph 71 and following, that Mr Friend kindly referred to. That proposition is that all of the awards that are mentioned in attachment A to our submission don't have a formal definition of driver, and so to actually put a formal definition of driver into the Road Transport and Distribution Award will compound problems with overlapping award coverage rather than assist the process. In short, this claim is a coverage claim dressed up as a definitional issue. If it pleases the Commission.

PN164

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you, Mr Calver.

PN165

MR SCOTT: We've got a few hangers on. Thank you, your Honours. My clients, Australian Business Industrial and the New South Wales Business Chamber filed submissions on 2 March. Does your Honours have a copy of that? I can hand one up if you don't.

PN166

SENIOR DEPUTY PRESIDENT HAMBERGER: No. Yes, we've got it.

PN167

MR SCOTT: Thank you. Those submissions in reply have been referred to by both the TWU and the SDA. In short, and the Commissioner articulated this in a question to Mr Gibian, my client's position is that there's no evidence of a problem and therefore on that basis the variation sought by the union is not necessary. Notwithstanding that to assist the Commission we've articulated a couple of drafting suggestions, if I can call them those, and I note that the TWU, in their most recent submission, appear to have no opposition to that. Our submissions are relatively confined on this point, so unless your Honours have any particular question that I can assist with I wasn't intending to make any further submissions?

PN168

SENIOR DEPUTY PRESIDENT HAMBERGER: No. No, that's okay. Yes, thank you.

PN169

MR SCOTT: May it please.

PN170

SENIOR DEPUTY PRESIDENT HAMBERGER: Mr Ferguson?

PN171

MR FERGUSON: Thank you, your Honour. I'll be very brief. The Ai Group has filed submissions which addressed this in January. We dealt with this issue at paragraphs 19 to 46 of those submissions, and I won't elaborate or cover any of that material in detail. But I just want to respond to one point that seems to have arisen from the TWU's submissions. They seem to proceed on the basis that there's no dispute about the factual accuracy of the tasks that they identify in the proposed definition. Now, we don't accept that those specific duties or tasks that they identify do accurately reflect the tasks or duties that are undertaken by drivers generally or certainly not all drivers covered by this award.

PN172

I think, in saying that, the Full Bench should be mindful of the fact that this award covers a very broad range of employers. It's not just traditional transport companies. It's businesses that perform transport tasks as an ancillary part of their undertaking of business. But it also covers a diverse range of drivers. Now, Coles has taken the Full Bench to the classification structure so I won't, but the thing to bear in mind is it covers drivers of forklifts, drivers of concrete mixers

and so forth. Now, I don't think you could be satisfied that all of those specific duties that they have now sought to suggesting necessarily should be inserted in the award are relevant to those sorts of drivers, and they're certainly not relevant necessarily to forklift drivers, so it really does beg the question is this just introducing, by using the vehicle of a definition, to introduce this change, is this just introducing extra confusion into the award and that would, of course, be magnified where there is potentially overlapping of award coverage.

PN173

Forklift drivers are in many awards. Now, it raises the question that if the forklift driver doesn't do all of those new duties, are they still properly covered by this award or should the other award take precedence? This is all a product of the vehicle that they've used to introduce this change, the definition clause. The word driver is used for more than just drivers of trucks in the traditional sense, and we say that really they haven't established that specific definition that they propose is necessary, and that's the test. They need to establish that all of the terms in that definition are necessary for inclusion in the modern award in order to ensure that the modern award meets the modern awards objective, and on that basis we say the claim should be rejected, as well as for all the other reasons we've identified in detail, and I won't take people's time. That's all unless there are further questions.

PN174

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you, Mr Ferguson. That's everyone bar Mr Gibian. Just - - -

PN175

MR RYAN: Just, your Honour, from Melbourne.

PN176

SENIOR DEPUTY PRESIDENT HAMBERGER: I'm sorry.

PN177

MR RYAN: We're still here.

PN178

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, sorry. Sorry, Mr Ryan.

PN179

MR RYAN: So that's Paul Ryan from the Australian Road Transport Industrial Organisation simply to indicate that RTO generally supports the concept of inserting a definition. But, as has been indicated by Mr Gibian, on behalf of the union, we would seek to ensure that any list is not exhaustive and can be varied, increased, specified at a particular workplace. That's the key because it's the duties will vary between different transport companies and different workplaces, and if we are going to go down this track then we would certainly insist that there needs to be the ability to deal with those issues at the workplace level to determine precisely what a driver does.

PN180

I just make the next observation that the award has clearly defined an articulated vehicle and a double articulated vehicle. Basically any other vehicle is a rigid

vehicle, whether it be a straddle truck, a forklift, or whatever it might be. That's simply the nature of the construction of those vehicles. So always happy to take the Coles advocate down and show them what a straddle truck is if it helps them understand what they're dealing with. If the Commission pleases.

PN181

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, we may want to take you up on that offer actually.

PN182

DEPUTY PRESIDENT SAMS: Mr Ryan, if you say, as you say in your submission, that it needs to include other tasks relevant to the workplace, how do you say the definition should be expressed? Have you provided a draft?

PN183

MR RYAN: No, we haven't, your Honour. I can't see who was asking that. No, we haven't, your Honour, but it simply needs to be structured in such a way so that it is not an exhaustive definitional list.

PN184

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, that's not difficult. Mr Gibian?

PN185

MR GIBIAN: Yes. As I indicated, as is indicated in the reply submissions, we didn't intend it to be an exhaustive definition and we think the drafting already achieves that, but if there be some adjustment to reflect that we wouldn't oppose that. Can I just deal perhaps with Mr Ferguson and Mr Calver first of all. In relation to Mr Ferguson's submissions about some kind of factual dispute, we do know that seemed to be advanced in the absence of any evidence or in the cross-examination of the TWU's witnesses, but perhaps more tellingly it appeared to proceed on a misapprehension as to the meaning of the proposed definition to be inserted. All it seeks to record is that a driver may perform additional non-driving duties. It doesn't suggest that each and every driver will perform each and every duty and no reasonable reading of the words used would suggest that either, and indeed, you know, drivers may or may not be involved in loading and unloading their vehicles depending on the type of operation that they're engaged in. No one seems to dispute though that some drivers are engaged in that kind of work, and indeed the award is prefaced that other provisions such as allowances are prefaced upon them, the fact that they may well occur, so we don't really understand either the concern that Mr Calver expressed that the proposed variation will lead to drivers having to be trained in each and every task that it might be – I mean, that just seems to be, with respect, a baseless concern.

PN186

We do note that, to the extent that any real reliance be placed upon Dr Davis's survey of Nat Road members, the quantitative results seem to indicate that respondents accepted that we were accurately describing, in fact, do and there didn't seem to be any, other than this concern about having to train people in tasks that they don't actually do, which we think is a misguided concern, the respondent,

so far as Dr Davis reports, that at least the respondents accepted that this was an appropriate reflection of what drivers in fact do do or may do.

PN187

If I can return then to the top of the submissions. My learned friend of the SDA suggested that notwithstanding the change to the structure of modern awards, that the Road Transport and Distribution Award remains a respondency based award because it's based upon an industry and that, with respect, is not capable or at least akin to a respondency based award and it's not capable of being married with the definition of the road transport distribution industry in clause 3.1, page 8 of the award which, as I said in my earlier submissions, extends to the transport of goods, et cetera by road even where the work is performed ancillary to the principal business undertaking or industry of the employer, that is, it's not limited to businesses that are engaged in transport as the principal aspect of their business, Toll or Linfox, but extends to any type of business that engages in the transport of goods by road even if ancillary, so it may be a very minor part of the business that is concerned with the transport of goods, et cetera by road, but if persons are employed within the classifications under the award to perform that type of work then they will be covered by the award. Those employers and indeed their employees may not be, and indeed are not likely to be, familiar with the history of transports awards in a manner which would allow them to immediately understands the scope of duties that might be required or may commonly be undertaken by a person employed in the classification described simply as a driver of a particular type of vehicle.

PN188

As to the terms of the proposed definition, there was, again, some criticism of the list of duties being non-exhaustive, and I just note in that respect that these submissions appear to be advanced in the absence of any constructive approach to assisting the Commission with the matter in which any deficiencies which were identified in the wording proposed by the TWU might be addressed. It's merely a - - -

PN189

DEPUTY PRESIDENT SAMS: Leave it out.

PN190

MR GIBIAN: Sorry?

PN191

DEPUTY PRESIDENT SAMS: Leave it out.

PN192

MR GIBIAN: Yes, we understand that they are approaching the matter purely on the basis of being negative and not endeavouring to assist the Commission or the parties in any way, but to the extent they've made submissions that no change should be made, we understand. But to the extent this criticism of the wording it would be of assistance to all if there be a constructive approach to suggesting as to how those alleged deficiencies could be addressed. To the extent there's an assertion that there's some deficiency by reason of inserting a list of indicative tasks, well, that's a deficiency which is in many, and indeed perhaps most awards

that provide in the classification a list of indicative tasks that might be performed, usually on a non-exhaustive basis, and I did have the retail industry award here which no doubt is close to the heart of Coles and the SDA which contains non-exhaustive lists of jobs and duties that are capable of being performed within particular classifications, and I don't know that they made application to vary the award in this part of this review, so retail employee level 1 includes a list of some 20-odd types of duties and incorporates an employee performs one or both of those including any work incidental or in connection with those tasks. So the concept that there be some fatal flaw by reason of providing indicative non-exhaustive lists of tasks is, with respect, not capable of being accepted having regard to that being a common feature of classification descriptors.

PN193

To the extent it was suggested that the proposed variation would increase or cause overlap in awards, it simply doesn't. The overlap exists to the extent that driving duties are covered by any other award. The Road Transport Distribution Award applies to the transport of goods by road, et cetera, and a person employed to undertake driving duties, even where ancillary to the principal business of an employer, and that was very deliberately done by the Full Bench in the award modernisation process because it regarded this award as the major award to cover employees, not merely on an industry basis but on an occupational basis; persons performing work driving, performing transport functions as a driver of a vehicle, so the overlap exists. As I said in my earlier submissions, we think that employers and employees and indeed courts and tribunals should be assisted by the award in fact describing the duties which might fall within the classifications which, as I say, don't appear to be subject of any dispute.

PN194

To the extent that both Mr Friend and Mr Felman referred to Re Brack Mr Friend said that the conclusion of the Commission in Re Brack the court got it wrong. Although it was somewhat colourfully expressed, the High Court read the reasons of the Commission as not coming to that conclusion at all. It was accepting the court's determination as to the meaning of the existing award but deciding that the operation of the award so interpreted was unsatisfactory for industrial reasons and that the award should be varied to alter its operation.

PN195

As I said, we're not endeavouring to do that. What we take from the Federal Court proceedings though is that the failure to describe the duties that might fall within the driver classifications inhibits the proper application of the standard clause dealing with the circumstance of an employee covered by more than one award. We don't seek to – we could have – asked the Commission to vary the retail award to exclude the particular of employees that were subject of those proceedings, so they don't apply to that award and they already are covered by the Road Transport and Distribution Award as the Full Federal Court found. But we didn't adopt that approach but we do think, particularly when one looks at the passages that I've referred to in the Federal Circuit Court decision, that it is plain that simply reading the word "driver" is ambiguous and it would be, and everyone accepts, it would be wrong to read that word as meaning the driver only does driving work, which is what the Federal Circuit Court appeared to understand

from that term, and if the court can misunderstand then we think employers and employees across the industry who would be covered, including employers were not principally engaged in transport should have some assistance in understanding the scope of duties that would be covered by the award.

PN196

Mr Friend also referred to the long distance award and the fact that we haven't separately sought a variation to insert the similar addition in the long distance award. I mean, look, that's a matter that we can consider and perhaps the Commission could consider. We think the potential for overlap would be a lot less in the long distance award because long distance operations are by and large conducted by transport operators and we don't have this issue with other businesses conducting long distance operations in the same way, and there's a lot less likely to be this issue in that instance, but, as I say, we wouldn't think there would be any problem with the insertion of a similar definition in the long distance award.

PN197

Mr Felman's submissions asserted very boldly that there would be some re-litigation of the issue in relation to delivery drivers engaged by Coles. We know of no intention to do so. We cannot rule out what the union will do or will not do in the future, but we think, unless there be some change to that operation, it would be very unlikely there would be some re-litigation of that issue. If there be some change to the way in which the work performed or something to that nature then the issues may re-emerge.

PN198

As to the scope of the past litigation there were Federal Court proceedings in relation to the award application. Mr Felman referred to scope order proceedings which followed. Can I just note these scope order proceedings have nothing to do with award coverage and they do not depend upon the question of which award applied to the relevant class of employee. They turned on the appropriateness, given the history of regulation, of the employees being covered by the same agreement as job assistance and the like within supermarkets.

PN199

To the extent that there was a suggestion that Coles has still not reached an enterprise agreement, made an enterprise agreement covering these relevant employees; well, it did make an enterprise agreement covering these employees in 2015. It was though ultimately found not to pass the BOOT, as everyone knows, and Coles was unwilling to give undertakings to satisfy the requirement that the employees be treated at least consistently with the Retail Award; these and other employees be dealt with consistently with the Retail Award and as we understand it Coles is currently refusing to negotiate any further enterprise agreements to cover this group of employees. So that's hardly something that can be put at the door of the TWU.

PN200

As to the drafting of the provision, Coles has latched on to, I think, something that Australian Business Lawyers says to the types of vehicles which are referred to in the proposed definition. As I said in my earlier submissions we think that the

types of vehicles that were mentioned were rigid vehicles and we don't think there would be any difficulty in that respect, and note what Mr Ryan, from RTO, has said in that respect.

PN201

Finally, in terms of what was sought in the award modernisation process, what was sought in the award modernisation process by the TWU was not a description of duties of drivers to expand the definition of the driver classifications in that way; it was to seek quite a different classification structure, in part, referring in a different way to the duties performed by the various proposed classifications. Now, that was not accepted by the Full Bench on the award modernisation process, but it was not anything like what is being proposed now. We're not seeking to disrupt the classification structures; we are merely seeking to have the description of the duties provided which, as I say, appears uncontroversially to be an accurate reflection of duties that might be performed by persons within those classifications. Unless there's anything further those are the submissions.

PN202

SENIOR DEPUTY PRESIDENT HAMBERGER: No. Thanks very much, Mr Gibian. I think that deals with that matter, so it - - -

PN203

MR FRIEND: May we be excused, your Honour.

PN204

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN205

MR FRIEND: Thank you.

PN206

SENIOR DEPUTY PRESIDENT HAMBERGER: Those who were only interested in that matter can be excused. There's probably a bit of room for reshuffling now. So we're now going to deal with the proposed addition of a new sub-clause in the definition of the industry.

PN207

MR GIBIAN: Yes. The vehicle relocation issue.

PN208

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN209

MR GIBIAN: The Truck Moves appear to have invented a new word, "drive away industry" which I'd never heard before. I'd never heard indeed before the submissions in this case, but the early litigation didn't seem to raise that term, but anyway maybe it's just been invented, who knows.

PN210

So the second issue that the TWU raised in relation to the Road Transport and Distribution Award concerns an application to vary the definition of the Road

Transport and Distribution Industry to include the distribution and relocation of new and used vehicles in the manner described in the proposed definition. The issue has arisen in the manner which will be plain from the submissions that have been filed, that is, that the issues arose as to the proper payment of the number of drivers engaged in by operators involved in vehicle relocation in the kind of 2012/2013 period.

PN211

The Fair Work Ombudsman advised that it was of the view that the Road Transport and Distribution Award did apply to those operators. A decision of the Federal Circuit Court in 2014 found that a business of this nature was within the Road Transport and Distribution industry as defined in the award and its employees engaged as drivers would be covered by that award. Truck Moves then pre-emptively launched litigation, or brought by the union, but a union member was in his individual capacity proceeded against, because he complained about his pay in the Federal Court which was something which caused him some concern, and ultimately Truck Moves were successful in convincing the Federal Court and the Full Court that its business did not fall within the road transport and distribution industry as it is defined in the award, and the upshot is that professional and skilled drivers are award free and that they are paid by Truck Moves at least. Other businesses do pay in accordance with the award and have enterprise agreements which were underpinned by the award but businesses such as Truck Moves appear to pay their drivers solely in accordance with the Federal minimum wage without any other protection, and that circumstance, in the union's submissions failed to provide a fair or relevant safety net of conditions for these categories of employees.

PN212

The first proposition that we've advanced is that the exclusion of this class of driver from any modern award coverage is anomalous and, as I've said, fails to ensure a fair and relevant safety net consistent with modern award objectives. All other professional drivers of vehicles, it appears, will be covered by some modern award or other, now most by the Road Transport and Distribution Award, and it is, as I've said, anomalous that these drivers have none of the protections of the modern award system. Even if a driver was engaged in relocating a vehicle, other than by an employer of this type, they would be covered by one award or another, that is, it seems to be accepted if a transport company, Toll or the like, needs one of its vehicles moved from Sydney to Melbourne and it directs one of its drivers to do that work they would be covered by the Road Transport and Distribution Award for the purposes of that work within Sydney or whatever the situation may be. By way of outsourcing operation, that kind of operation is, it appears from the evidence, sometimes undertaken by a business involved in vehicle relocation. If a vehicle has to be moved from the wharf to a retailer or wholesaler in Western Sydney or something, the manufacturer or the wholesaler could employ a driver to undertake that work. If they did so they would be covered by the vehicle and manufacturing et cetera award most likely. What's more, if the vehicle was transported not by being driven, but by being - - -

PN213

COMMISSIONER LEE: I didn't understand that point. What was the basis for that proposition? The manufacturer would be most likely covered?

PN214

MR GIBIAN: Yes, there are classifications within the Vehicle Manufacturing Award - - -

PN215

COMMISSIONER LEE: Under that award. All right.

PN216

MR GIBIAN: - - -that would, if the manufacturer directly employed a driver to relocate the vehicle.

PN217

COMMISSIONER LEE: Sorry, I misunderstood. By virtue of the Vehicle Manufacturing Award. All right.

PN218

MR GIBIAN: I'm sorry. It appears that, well, at least so far as Truck Moves describes its business, it contracts with either manufacturers or wholesalers or transport companies or the like to transport a vehicle from one place to another place. Now, clearly that could be insourced activity. If the manufacturer or the wholesaler directly employed a person to do that work that person would be covered by an award.

PN219

It may be that there would be an overlapping award issue in relation to whether the appropriate award was the Vehicle Manufacturing Award or the appropriate award was the Road Transport and Distribution Award. Both would potentially, it would seem to us, cover the driver, but they'd be covered by one or the other however that matter was resolved. As I say, it is, in the union's submissions, entirely anomalous that because of, what is essentially, an outsourcing operation that the safety net appropriate for employees of this type be evaded, and that's arisen because of the litigation in the Federal Court, and been identified, and it should be addressed.

PN220

I was also going to say that if a vehicle was transported from one place to another, not by being driven but by being towed or placed on the back of a car carrying the vehicle, the driver of that vehicle would also be obviously enough covered by one of the transport awards in undertaking that work. So there seems to be no logical reason why the appropriate minimum safety net conditions in the transport award would not apply to these drivers.

PN221

We do submit that it appears, at least in Truck Moves' case, that a significant part of what it regards as its business is its capacity to pay lower rates of pay than the direct employees of the transport business or a manufacturing business would be able to be paid; that merely paying national minimum wage fails to set a fair and relevant safety net. It fails to set wages which recognise the skill, responsibilities

and qualifications required for the work involved; it fails to set wages which distinguish between different classifications and skill and qualification levels appropriate for different classifications of drivers, that is, a driver of a large mobile crane who's required to operate that vehicle for the purpose of relocating it would receive the national minimum wage in the same manner as the relocation of a family sedan vehicle, which, consistent with the longstanding transport awards would be assigned different classifications because of the skills and responsibilities and qualifications required for that work under the various transport awards.

PN222

It also fails to ensure that there are any provisions governing hours of work, at least beyond the NES maximum hours standard, no overtime or penalty rates payable for unsociable or long hours, and we do note the evidence of Mr Mealin, who was not cross-examined, about the large number of hours that he undertook, and we note that, at least in Truck Moves' case it appears that even the minimum wage may not be being afforded in the sense that the evidence of Mr Whitnall was that trip rates were paid for longer trips in circumstances where there's no legal authorisation for that and no sensible method upon which the business could be sure it was in fact paying even the minimum wage for each hour in fact worked by the employee in undertaking that work. Those facts underline the importance of the appropriate minimum award safety net applying to drivers engaged or employed by this type of business.

PN223

The second proposition we've advanced is that the extension of the coverage to ensure that it applies to professional drivers engaged in vehicle relocation is consistent with the objective that was stated by the Full Bench in the making of the transport award upon the award modernisation process. It's plain and I don't need to read it but I've extracted in the written submissions that the intention of the Commission was that the Road Transport and Distribution Award be the general transport award applying in an occupation basis to persons engaged in transport work, and that, while there are some other awards which have transport functions in them, that they be relatively small in number and that this be the main transport award. I can't say that in the award modernisation process there was specific reflection upon this type of vehicle relocation business either in a positive or negative sense, that is, either to say it should be included or it should not be included, but it is consistent with the objective of the Commission in making this award for it to apply and in an appropriate occupational sense to professional drivers including those engaged in this type of work.

PN224

The third proposition that we have advanced is that the employees, on the evidence, are professional drivers with appropriate licences, skills and experience to operate the various types of vehicles they are called upon to operate in the course of their employment. I've referred to the evidence which sets out that, well, in Truck Moves' case in particular that it advertises its business as having unique and highly skilled professional drivers operating its vehicles, seeks out experienced drivers in the way it advertises the position; it's job application process asks drivers to set out their experience in the transport industry driving

various types of vehicles. It's plain that the skills, experience and qualifications that those drivers have will generally have obtained in work in what is unarguably the transport industry are sought after and being used in their work in this type of business. They are subject to the same type of licensing requirements and regulation in the heavy vehicle national law for example and there is simply no reason why the employment conditions with drivers not be covered by an appropriate modern award and this is the appropriate modern award.

PN225

To the extent that it's suggested that the work of a driver engaged by a vehicle relocation business is different from other drivers in the transport industry, the highest the submissions seems to reach is that the driver may not do everything that some other drivers in the transport industry do, and, with respect, that doesn't provide any reasonable basis upon which the award, as a whole, should not operate with respect to these employees, that is, and I think we've already had this discussion today, the case with other drivers within the transport industry as well, that is, you take loading or unloading; some drivers are engaged in that activity; others the vehicle is loaded or unloaded by persons other than the driver. That fact, some drivers use loading or unloading equipment on the back of vehicles, some don't; some drivers are involved in vehicles carrying dangerous goods, et cetera, some are not; none of that is a reason as to why the award would not apply, and neither would it be a reason why these drivers are not properly covered by the award.

PN226

There is a protestation that the award would operate, in the case of Truck Moves business at least, on an unfair basis because of the operation of clause 19 of the award, which I think we're dealing with in a separate variation. The clause 19, as the Members of the Full Bench will know, it deals with higher duties and provides that in circumstances in which an employee performs two or more grades of work on any one day the employee is to be paid the minimum wage for the highest grade for the whole day. It appears to be suggested that that would operate unfairly with respect to Truck moves because it may direct its employees to drive a number of different types of vehicles on a particular day.

PN227

As I've said in the reply submissions, the union doesn't regard that as at all unfair. That is a feature of other drivers within the transport industry too, that is, they may be directed to drive one or more types of vehicles on a particular day falling within different grades under the award and clause 19 reflects the long-established mechanism by which that circumstance is dealt with, that is, that the employee is to be paid the highest grade for that day.

PN228

Ultimately, and I think Mr Whitnall and Mr Bradac for Truck Moves accepted, it's ultimately a matter for the employer as to how it directs its employees to perform work, but if it directs an employee to perform work which involves operating a vehicle which brings the driver within grade 9 in the classification structure then the driver is required to possess the skills, qualifications, licences, et cetera to perform that work on that day. That's as a consequence of the direction that the

employer has made as to the work that that worker is to perform and there's nothing unfair at all in the operation of clause 19 in that context.

PN229

What's more the protestations of Truck Moves in particular, with respect, lack any serious credibility. If it was a responsible employer which accepted appropriate safety net standards ought apply then it might have come forward and said, "Look, the award can apply but we think this, this and this change or specific provision ought be made for it to operate appropriately for our business", and, look, many awards do and the Transport and Distribution Award does contain some specific provisions which alter the operation of certain clauses for businesses of particular types. There's different spans of hours provisions for certain businesses and about milk delivery and newspaper delivery and matters of that nature. If an employer came to the Commission and said, "Look, we think this, this and this adjustment ought be made, we can have argument, I mean, we might not agree, but we could have an argument about whether the suggested adjustment was appropriate". What we have here is businesses simply coming forward and saying, "We want to continue to have no modern award standard at all apply to us", and continue to pay no more than the national minimum wage without any overtime or penalty rates, rather than seeking to engage constructively with the operation of an appropriate award safety net standard.

PN230

DEPUTY PRESIDENT SAMS: I don't think that's entirely fair, Mr Gibian. It does foreshadow that if the Full Bench decides that this aspect of the industry should be covered, that it requests to be further heard about the transitional arrangements and any specific conditions applicable to it. One doesn't normally set out in a secondary submission, or alternative submission, those arrangements without seeing how the first one goes. You wouldn't do that.

PN231

MR GIBIAN: I don't know. I might do, I might not. It would depend on the circumstance, but, look, we don't have any suggestions as to any particular adjustments it would wish to make. It simply says that it shouldn't be subject to any award safety net regulation at all.

PN232

DEPUTY PRESIDENT SAMS: One of the concerns, I might say from my own part has some legitimacy, is that it has existing contracts based on existing arrangements; significant contracts.

PN233

MR GIBIAN: Yes.

PN234

DEPUTY PRESIDENT SAMS: What do you say about that?

PN235

MR GIBIAN: I don't think the union would be, in principle, opposed to hearing submissions about transitional arrangements. I mean, the only evidence about existing contracts was one contract which it entered into, which it entered into

knowing, I mean, a short time ago, knowing that this issue was very much before the Commission, so perhaps we're not terribly sympathetic to the evidence of the only contract that's in fact referred to in that category but that's an issue that would not be dealt with by way of the award not applying, but it would be dealt with by way of appropriate transitional arrangements.

PN236

COMMISSIONER LEE: Probably in a similar vein that you'd agree, wouldn't you, that the – again, let's just say the award was to apply, this particular issue about the nature of the business did stand out for me, and that was the evidence around the, or fact, that these vehicles are empty. You know, it is the transport of the vehicle per se. They're not loaded. It's got a different character. That tended to feed into the clause 19 problem as I recollect it, so you were less likely to be in the normal situation where you've got this truck for the day; you're going to load it up; you're going to drive around a particular truck. You might drive a number of vehicles because the job's different; the job is not about loading and unloading; it's about just getting them around. If the award was to apply, you'd concede that that would have to be subject to some consideration; would you not?

PN237

MR GIBIAN: We don't suggest that the Commission should not consider it. We don't, at least on the submissions which have been advanced today, think that that circumstance is unique to this kind of business, that is, other drivers are directed to drive a number of different types of vehicles on a particular day, and indeed that's precisely what clause 19 is there for. If this business says that it's more likely to happen than would frequently occur , then that's something that you can say, I suppose. As I say, it's still a situation in which the company decides, by the direction it gives to its employees, what work it requires that employee to do on a particular day.

PN238

It gives the job sheet - and that's the evidence - a job sheet as to the work that that worker is required to do on a particular day, and if that work includes work at a particular grade, then the longstanding provision has been that that be the grade - the highest grade be the one that be paid for the entire day.

PN239

And we don't think that that is unfair because it arises from the direction that the employer makes as to the work to be performed and the skills and qualifications required to undertake that work. But if that's a matter that the Commission wishes to hear further from, we can make further submissions on that point, of course.

PN240

The fourth point we've made is the evidence is that some other employees, at least, have been operating on the basis that the award did apply. Indeed, that was the view of both the Fair Work Ombudsman and the Full Circuit Court, until the Federal Court came to a different view.

PN241

And finally, we think that even aside from the variation being necessary to ensure that there is a fair and relevant safety net of conditions for these employees, that

other aspects of the modern awards objective would be assisted; and relevantly, we've referred to there being a simple, easy to understand, and stable modern award system, and also encouraging collective bargaining.

PN242

And it may be something we would say about, if there was to be specific needs of this, then the way in which the Act, generally speaking - as I say, the award does make some different provision for operators in some different business.

PN243

But generally speaking, the way in which that issue would be dealt with in accordance with the Act is by there being a collective bargaining process if it is said that the employer wishes, for the needs of its individual business, to alter the operation of particular aspects of the award; but that is, primarily at least, to be dealt with by way of collective bargaining process; and that this variation would indeed encourage that process, rather than by some alteration of the minimum conditions that are generally applicable to drivers engaged in various different types of industry. I think those were my submissions on that point.

PN244

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you, Mr Gibian. Mr Cross.

PN245

MR CROSS: Thank you, your Honours, Commissioner. Your Honours, Commissioner, we rely on the detailed submissions dated 1 March 2017 prepared by my instructing solicitor. They are of a most comprehensive nature, and provide detailed footnotes of all of our evidence. What I want to focus on today particularly is the evidence that flowed in the proceedings and highlight certain parts - just certain parts of those submissions.

PN246

One thing I think that would be of assistance to the Commission is to actually see the two Federal Court decisions that have been so often referred to. I provide copies of each of those decisions. One thing I should address right at the outset, too, is who I appear for, because I appear not just for Truck Moves, but also for Quick Shift Vehicle Relocations and Vehicle Express Pty Ltd.

PN247

My learned friend, in his oral submission today, has taken some focus on Truck Moves, but of course one can't go past the evidence of Mr Clayton. It was a relatively brief affidavit, but it adopted all of Mr Whitnall's evidence, and he was not challenged on any of that - in other words, Mr Whitnall - to a large extent. And so for it to be characterised in any way that what we are putting is limited to Truck Moves would certainly be quite incorrect.

PN248

Also one matter that I wasn't going to address, because of the quite comprehensive detail it was addressed in our written submissions, was the issue of timing and fairness that we raise from about paragraphs 15 of our submissions through to paragraphs 40, but it has certainly come to the fore in what has fallen in my

friend's oral outlined today, saying that Truck Moves hadn't suggested responsible amendments.

PN249

Of course we would accept some of the observations from the Bench as to the obvious process that would normally be followed, but of course it does bring into play the lack of procedural fairness, and that's something that one doesn't want to bash on about in this tribunal, but as we put at paragraph 35 of our submission, putting the cart before the horse.

PN250

We were denied, because of the timing of the application, of being involved in all of the review process until quite a late stage; as it has been characterised, putting the cart before the horse, at paragraph 35. To now put against us - my three clients - that we should also now be somehow - there should be some approbation because we haven't been responsible in proposing alternatives, merely highlights the temporal unfairness that has been visited upon all of my clients.

PN251

I don't want to put anything further in relation to it, but it has brought to the fore once again the issues regarding the ordinary conduct of award modernisation is it affects people, and the position it has placed my clients in.

PN252

Be that as it may, the primary focus of the consideration in relation to my clients must be section 134 of the Act. There are three paragraphs at section 134 that we will be focusing on as matters that must be taken into account. The primary is of course paragraph (e):

PN253

The principle of equal remuneration for work of equal or comparable value.

PN254

But addition will be paragraph (c):

PN255

Social inclusion through increased workforce participation.

PN256

And paragraph (f):

PN257

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

PN258

But as I note, the principal provision we will be relying on is paragraph (e). Now, the nature of the industry was of course of some focus before the Federal Court. My friend has taken some delight in our characterisation, as it has been for months, as it being the drive-away industry.

PN259

But what is quite clear is that it's quite different to the Road Transport and Distribution Award industry, and any assessment of paragraph (e) of section 134(1) effectively involves what people as old as myself might remember, being the old work value cases that were used to run. The onus, as we will note, is on the TWU to show effectively work Value equivalence to the Road Transport Award, and it's quite clear on the evidence that there is no equivalence.

PN260

In our submissions - and I will take the Bench to paragraphs 42 and 43 of our submissions, commencing on page 7, because they're instructive as to an indication of exactly what industry we're dealing with here. At 42.1 we note:

PN261

> *It is a business that involves small businesses that are focused primarily on one stream of business, namely ferrying vehicles.*

PN262

It was put today by my friend that there were other companies, but of course other companies that not pay the award; but of course the evidence is only one company, being PrixCar, and PrixCar, the evidence is clear, is not a participant that solely operates in the drive-away industry, they operate in primarily other parts of the industry. They have mistakenly - possibly stupidly - considered themselves covered by the award and adopted from Toll - and this is the evidence - adopted from Toll an enterprise agreement that had an incorrect basis. Well, that's a problem for them.

PN263

But of course the evidence is also quite clear - the unchallenged evidence of Mr Whitnall's affidavit - who in fact disses a participant who preys in the driveway industry as a loss leader. So to say that they are a participant who pays the award - and the indication was that they were somehow disadvantaged by doing so - is certainly not in fact what the situation is on the ground. At paragraph 42.2:

PN264

> *The businesses are not involved with freight or goods.*

PN265

Now, your Honours and Commissioner will see in the Federal Court decisions that there was still an issue as to possibly a 1 per cent, a confusion as to whether they could have actually been freight or goods; but of course the evidence in these proceedings, and I draw the bench's attention to paragraph 654 - and this was cross-examination of Mr Whitnall - was that there has never been a freight contract raised.

PN266

Whereas this was the subject of some challenge in the Federal Court, it's fair to say on the evidence of Mr Whitnall, he was not challenged on this point. The issue of whether in fact freight was carried was not an issue in these proceedings. And it's quite clear on the unchallenged evidence, there is no freight.
Paragraph 42.3:

PN267

The businesses use trade plates, which prohibit the transport of freight and goods.

PN268

That was another matter that was not challenged. But it also then raises the particular nature of the industry, the insurance consequences of the use of trade plates. That was at paragraph 1051 of the transcript, I think, on a question from Lee C that related to how in fact insurance occurred. The Bench will recall the evidence as to the broader nature of the insurance that participants in this industry have to undertake, as opposed to participants in the road transport industry. Paragraph 42.4:

PN269

The vehicles that are relocated are, almost always, pre-registered and partially built.

PN270

42.5:

PN271

The businesses do not own the vehicles being relocated.

PN272

42.6:

PN273

The clients of businesses are not necessarily freight or transport industry.

PN274

There was some attempt to direct Mr Whitnall to some proposition that Toll was some major client, but he was quite clear in his evidence they were a client but not the major client. In fact, one of the major clients was Daimler, for whom, on a confidential basis, the contract was provided to the Full Bench, which clearly showed, the evidence, had the insurance consequences of that contract, quite distinct from the standard terms on a web site. The consequences of the matters outlined in those paragraphs, 42.1 to 42.6 were that:

PN275

The participants in the drive-away industry have an economic disadvantage compared to the freight and transportation industry as to how it might charge and the taxation benefits it can obtain.

PN276

The particular passages of the transcript that I would draw your Honours' and Commissioner's attention to are paragraph 654 where, on a question from your Honour the Senior Deputy President to Mr Whitnall.

PN277

It was exploring the issue as to the distinction from the Road Transport Award - and this is a thread that also came through at transcript paragraph 713 and

paragraph 951, was that whereas a participant in the Road and Transport Award, when moving a truck - and the example of Toll was given - can use that truck to transport goods, and so mitigate the cost of whatever they're doing and make money out of whatever they're doing and get an economic advantage of the driver they're paying to - most probably - load and unload the truck as well as drive it; and the driver who drives through the night - clear evidence we don't do that; the driver who sleeps in the truck - clear evidence that never occurs in the case of my clients. But they can take those steps to get the economic advantage from that truck; there's absolutely no way any of my clients have any such economic advantage because they're in a different industry. And because they're in a different industry the Road Transport and Distribution Award is completely inapplicable to them.

PN278

At paragraph 43 my learned instructing solicitor has made observations in relation to employees. Once again this is without question, but it goes to paragraph (c) of section 134(1), social inclusion and workforce inclusion. It's clear that experience or background in freight or transport is not a prerequisite. I'm going to take the Bench to the advertisements because they're telling. It's not a prerequisite, but of course if you're going to drive a truck, you will need a licence; and if you have experience, that might be good. You need a heavy vehicle licence. You undertake far less training.

PN279

The evidence of Mr Bradac can't be overlooked - because it was primarily unchallenged - with his vast experience in the transport industry. One looks at the initial paragraphs of his statement and they read as his CV, of decades of experience in very senior levels in road transport and distribution; and he gives clear explanation as to the tasks ordinarily performed by drivers under the award, and those few that are actually performed by the drivers who work for my clients, and there is quite a distinction.

PN280

The employees are prohibited from transporting freight or goods, and they don't perform the array of tasks; as I've noted, they don't do night work, that's at paragraphs 746 and 770 of the transcript. Certainly arising again from an observation from your Honour the Commissioner today, there is the question of what is a standard day. This is where the first judgment, single member of Rares J in the Federal Court, in addition to the evidence in these proceedings, is instructive. If I can take the Bench to that decision from-paragraph 25.
His Honour noted:

PN281

Mr Whitnall described the typical work that a driver would perform on any given day. On occasion, the driver could perform short and long distance operations on the same day. Often, a driver would drive a vehicle between the two locations and would be driven by a taxi or Truck Moves' shuttle vehicle to and from those locations.

PN282

I note and I interpose the evidence was that Truck Moves has 14 shuttle buses that it operates for this particular purpose. Then one sees the evidence that was accepted of the typical day of one of the particular persons who are operating in this industry and were the subject of these proceedings, and it echoes, in fact, the evidence that was elicited at the conclusion of Mr Whitnall's evidence, particularly on questioning by Lee C in the evidence; the many jobs, to and fro, different sized vehicles, short jobs that occur during a day.

PN283

Paragraph 26 then goes to the proportion of a day spent driving, as opposed to shuttling, and one can see the percentages are almost on all fours with the percentages noted in Mr Whitnall's statement in these proceedings. And from the sixth line:

PN284

Mr Zader spent about 50 per cent of each working day ferrying vehicles and I infer that so did Mr Simmonds other than when he was driving the shuttle vehicle.

PN285

So that about 50 per cent of the day driving, 50 per cent of the day shuttle. Paragraph 27 deals with the loaded issue, which I note has disappeared in these proceedings, but even on the evidence in this matter it was noted that of 62,600 jobs - and this is from line 6 of paragraph 27 - only 26 occasions had "loaded" appeared; and some lack of explanation was certainly the case. What one gleans from that is the quite distinct nature of the drive-away industry from the road transport and distribution industry.

PN286

It was put again today that that's just a managerial issue. That's something that my clients are just going to have to put up with, but the evidence of Mr Whitnall in proceedings was that they can't. They can't run their business and have to accommodate the vagaries of clause 19 of the award. It's not in the nature of their industry. It doesn't even suit their insurance requirements, which undoubtedly they have; but they simply cannot schedule their work in such a way as to accommodate it.

PN287

But one telling nature of the employees in this industry - and we note it at paragraph 43.11 of our submission, but it's certainly fleshed out in Mr Whitnall's evidence - and if I could take the Bench to Mr Whitnall's statement, and it's annexure MW4, which is at page 35 of Mr Whitnall's statement.

PN288

COMMISSIONER LEE: Can I just ask you about that decision of Rares J, that example you gave where you refer to that evidence of Mr Zader at paragraph 25. So basically each time he's driving a cab chassis truck, so he's being paid, that doesn't give any issue in terms of clause 19, he's just going to get paid that same rate.

PN289

MR CROSS: No, but the evidence of Mr Whitnall in both his statement and in the evidence before your Honours was in relation to the different vehicles that might occur. And of course there's no detail here in relation to the size of the vehicle or whatever, but there was certainly evidence - there are two limbs here on this point: firstly that throughout a day a driver can drive anything from the spectrum of size of vehicles that would fall into various classes between MW2 and 5.

PN290

COMMISSIONER LEE: Yes, I understand that. I understand that, you don't need to repeat that. All I'm just pointing out that in respect of that particular paragraph he seemed to be driving a cab chassis. Now, I might be missing something, but it seems to me that that doesn't give any particular difficulty, he was just driving - sounds like he was driving a similar sort of vehicle, just they were different ones. Doesn't give any particular concern about the application of the award.

PN291

MR CROSS: I don't think, from what's recorded there - and it was Mr Whitnall's evidence, not Mr Zader's - but it doesn't record any ability - - -

PN292

COMMISSIONER LEE: Sorry, yes.

PN293

MR CROSS: - - - I don't mean to correct, it's just I noted that for clarification, Commissioner. But it doesn't really give us any assistance in understanding how we might work between particular classifications as to how they might relate to what he did on that day. What it does show is the short nature of the trips in different vehicles that might be different sizes or different classifications. And that was the evidence in the proceedings, that that does occur. What I was drawing the Bench's attention to was page 35 of Mr Whitnall's statement, which - - -

PN294

DEPUTY PRESIDENT SAMS: This is the job advertisement?

PN295

MR CROSS: Yes, it's a job advertisement. Now, what this goes to - and of course the evidence in the transcript from Mr Whitnall was the average age of employees of truck movers is in the high 50s. This is this issue of increased workforce participation and social inclusion. Particularly, of course, when one looks at the first ad, it says:

PN296

Suit semi-retired. No lifting, no loading, no unloading, no freight -

PN297

which is entirely consistent with the evidence. From the fifth line:

PN298

Pre-existing injuries are accepted. Semi-retired, over 50 very welcome to apply.

PN299

I will put it to this Bench that I would bet that this Bench has never seen a job advertisement that is seeking and welcoming injured people, people over 50 being very welcome to apply. Now, my learned friend might say: well, this is the only one that says pre-existing injuries are accepted; but of course every other job advertisement that's listed here is encouraging semi-retired people, noting that there's no lifting required, there's no freight; noting the specific nature of this industry; and making sure that the injured workers in this injury that one would think should be looked after and should be engaged to the level of their abilities, are being so engaged.

PN300

In fact, of course the evidence of Mr Whitnall from paragraphs 51 to 56 particularly of his statement fleshed that out, the unchallenged evidence in relation to the age and the infirmity, if one might put it that way, of the people that work for him; and, in fact, even that his grandpa's truck relocators is another competing business in Brisbane.

PN301

This is an industry that is specifically suited towards caring for injured workers; caring for older, semi-retired workers who are at least looking to work and use their driving licences; and it's an industry that involves not just drivers, but of course, as was noted, was started by ex-policemen, it involves people from all various forms of occupations. So we would say that when one looks at those submissions, it's abundantly clear that what we're dealing with is workers who are quite distinct from the road and transport and distribution industry and a business that's quite distinct.

PN302

It's the TWU's case. They need to bring probative evidence and persuasive submissions to support a variation. I note that in the four-yearly review of modern awards preliminary jurisdictional issues decision, which your Honour the Senior Deputy President was on, there was of course observed at paragraphs 23 and 24 what must be advised, the merit argument that must be advised to support a variation. That was also noted in our submission at paragraph 49.4. There has been an absolute failure by the TWU in this case to present any merit-based submission or any evidence to support a variation.

PN303

It has been put that Mr Mealin gave evidence - and Mr Mealin wasn't cross-examined - and it has been put at paragraph 14 of the reply submission that we didn't dispute Mr Mealin. Well, of course that's absolutely false because that would be to disregard, of course, the evidence of Mr Whitnall from paragraphs 90 to 100 of his statement. It starts at page 20. If I could just take your Honour to those passages.

PN304

Whereas Mr Mealin's evidence was vague in the extreme, what Mr Whitnall did was go to extraordinary detail to provide this Commission with the facts, rather than "and an example, I remember once something might have occurred" - to the extent of annexing the 273 job sheets of Mr Mealin. Every job sheet he ever performed is included in his statement, and there was no challenge whatsoever in relation to that evidence.

PN305

Of course what Mr Whitnall did was analyse that evidence; for example, at paragraph 93 of his statement, and provide percentages to this Full Bench in relation to what in fact the work of Mr Mealin involved, et cetera; that waiting time was in fact paid, and that's at paragraph 95; and MW12, which I note is at page 284 of that particular statement.

PN306

He dealt with the issue of de-gassed dangerous vehicles, which was an issue that the Bench questioned on two occasions, at paragraph 450 and 842 of the transcript, and explained exactly what that situation involved, which was of course that there was no gas, but circumstances that there might be the slightest chance of a particle of gas in there required that certain licences be obtained. But it certainly wasn't a case of somebody transporting dangerous goods.

PN307

And so what we have in the question of proof is the vague, glossing evidence of Mr Mealin, placed against the detailed analysis of Mr Mealin's actual employment contained in Mr Whitnall's statement. So it is the submission of my clients that there has been a complete failure by the TWU to discharge the onus that they have in relation to this award modernisation process. Is that a convenient time?

PN308

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. I think we might break for about an hour. We might just break there and return at 2 o'clock.

PN309

MR CROSS: May it please.

LUNCHEON ADJOURNMENT [12.59 PM]

RESUMED [2.02 PM]

PN310

SENIOR DEPUTY PRESIDENT HAMBERGER: Mr Cross.

PN311

MR CROSS: Thank you, your Honours. It has been put that some veiled criticism of our approach to the Federal Court to clarify the issue as to award coverage, and of course there can be no question as to the bona fides of any party approaching the Federal Court to seek an interpretation of an award. And of course that interpretation, even on appeal, was that the subject award did not apply to us.

PN312

What, importantly, was the focus of the Federal Court - and it's quite clear from Rares J's decision at paragraph 53 - was the keywords of the award being "the transport by road of goods". That was the key issue. And of course, quite clearly it was found that an award of that nature did not apply to my clients' - plural - work.

PN313

It really did point out a matter that I've gone to already, which is that we are in a completely different industry. I had referred your Honours, Commissioner to the evidence of Mr Bradac, and I should have gone, I think just briefly, into a little bit more detail. I noted effectively the CV of Mr Bradac, that's at paragraph 7 of his statement and it outlines what can only be described as substantial experience in the industry, particularly in the road transport and distribution industry.

PN314

He then notes in paragraphs 11 to 18 exactly what is involved in the freight industry and what duties are involved for freight drivers. And then quite clearly and quite specifically outlines for the benefit of the Bench at paragraphs 21 and 22 what the duties of Truck Moves drivers are at paragraph 21, and what they're not required to do; the distinguishing factors, the many distinguishing factors at paragraph 22 of his statement.

PN315

And he also then goes on, helpfully, with his great experience, to outline that, "Wider classification and pay structure does not suit", and that is from paragraph 24 to 31 of his statement. I won't read those paragraphs, but they are compelling evidence from a seasoned practitioner in the industry.

PN316

Our submissions also clearly outlined the bases in relation to it being a different industry at paragraphs 84 and 85 of our submission; classifications and pay scale is at 88 to 95 of our submission; and the issue of clause 19, paragraphs 97 to 102.

PN317

There was some criticism in my friend's submission that there's no fair and reasonable safety net applying to any of my clients' employees. Now, that of course is absolute false. There is the safety net of the minimum wage that applies to those employees. It's not unusual for employees to be award free, and we've outlined that clearly at paragraph 46 of our submission.

PN318

But it's also - and it was quite incorrectly put - that it was a significant part of our business that we pay lower rates. Now, that stood in stark contrast to in fact the evidence that your Honours and Commissioner heard, and in fact the evidence that you, Senior Deputy President, sought from Mr Whitnall.

PN319

That was particularly at paragraph 687 of the transcript where on the encouragement of your Honour Mr Whitnall specified exactly how it had occurred in relation to a contract reacting to Toll - who is not a major client, but client

nonetheless - and what had occurred when a particular distribution manager had sought to try and do some work in-house, as opposed to using specialist truck movers; and the evidence was that after five moves out of 25 they realised that it wasn't suiting their business model and they reverted back to Truck Moves.

PN320

But the basis upon that move, and it's at - certainly at the third-last line of paragraph 687, was the timely fashion that they could put them into service, not the cost, because of course, as I've laboured, there are completely different economic situations applying to each particular industry. But what was the factor was that the Specialist Truck Movers could do it in a timely fashion.

PN321

That's an interesting example, then, to use to say if the TWU is successful in what they seek to do to my clients, it will in fact put my clients at a significant economic disadvantage because then they will be paying the extra rates. Now, depending on the size of the vehicle it might be 8 per cent more or 11 per cent more, and that is outlined at paragraph 125 of Mr Whitnall's statement, the exact figures.

PN322

But without an ability to carry freight, without an ability to disperse the cost; with the additional insurance issues that arise in relation to my clients; they will be performing the same trip for the same rate of pay, they will be put at a significant economic disadvantage. That would be the natural result of what is sought, and that would be completely contrary to the requirements of section 134.

PN323

In conclusion, your Honours, Commissioner, the application by the TWU must fail. It failed in their onus of proof. There has been absolutely no basis put upon which there would be an inclusion of my clients', as required by the amendments sought, to have the Road Transport and Distribution Award apply to them.

PN324

In fact, my client is actively promoting the engagement of particular employees in the industry - in their industry: social inclusion, increased workforce participation; and any roping in, as we might term it, would have a significant effect on the business, employment costs and regulatory burden, and would be completely contrary to section 134 of the Act. May please the Commission.

PN325

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks very much. Yes, Mr Gibian. Nobody else is seeking to be heard.

PN326

MR GIBIAN: No one else wants to say anything? Firstly, there seemed to be two primary bases of my learned friend's submissions. The first seemed to be an assertion that the company is not - his clients are not in the transport industry and therefore the award shouldn't apply to them.

PN327

For the reasons that I explained in the early submissions, we think the distinction between both the work undertaken and the nature of the business is overstated in my learned friend's submissions, and that the work is substantially similar to work undertaken by drivers elsewhere in the transport industry, and indeed that is reflected in the fact that they recruit people employed in the transport industry.

PN328

But in any event, the submission is founded upon a misconceived basis, and that is that there is some limit on it, intentionally in the award upon some limited industry basis, to its application. That is quite wrong. The award - and I've referred in the earlier matter that I addressed to the definition of the road transport industry as extended to:

PN329

Transport of goods, wares, et cetera, and anything whatsoever, including where and ancillary to another principal business.

PN330

So it's not limited to transport companies. I won't ask the members of the Bench to turn it up, but within the bundle of authorities that Mr Felman handed up for Coles, there was the award modernisation decision, the second one of which under tab 2, it's [2009] AIRCFB 354 at paragraph 171, the Full Bench in dealing with the Transport and Distribution Award said:

PN331

Even though the RT&D Modern Award is an industry award it is clear that the practical effect of the various existing private transport awards it encompasses is that they operate by reference to a structure of types, models and classes of vehicle and, it follows, to the driver of those vehicles thereby having occupational coverage.

PN332

So the intention is that it have occupational coverage. So even if one were to accept what my learned friend says on behalf of his clients, it's based on a false premise that the Road Transport and Distribution Award is intended to be limited to Toll or Linfox or some specialised transport company.

PN333

It's not, it applies also on a general occupational basis to persons performing driving functions, and there's really no basis upon which it could possibly have been established that this one class of professional driver would for some reason be excluded from modern award coverage, unlike any others. It is an anomaly and ought be addressed; and an anomaly which has recently arisen as a result of the Federal Court proceedings.

PN334

The second primary basis upon which my learned friend addressed in his submissions was section 134(1)(e) of the Act, which requires the Commission to have regard to:

PN335

The principle of equal remuneration for work of equal or comparable value.

PN336

That term is defined in clause 12 by reference to section 302(2), which defines equal remuneration for work of equal or comparable value as meaning:

PN337

Equal remuneration for men and women workers for work of equal or comparable value.

PN338

I think the workers in these industries are primarily men, but there's certainly no suggestion of that issue arising in the present context, or evidence of it. That has no relevance in the present situation. To the extent that it was suggested that there were issues in relation to the engagement of older drivers or drivers with injuries, or the like; with respect, that's entirely irrelevant to the issue.

PN339

If this business runs a viable business, then one really asks whether it's appropriate that a driver with an injury or an older driver ought not be paid a reasonable sum for the work that he or she performs, which has been set recognising the work of transport workers, consistent with the transport industry modern award. If the award applies, there's nothing stopping the business continuing to employ, to the extent it does so, older workers or workers with existing industries[sic] and that really is a furphy, with respect.

PN340

It was suggested that the question of - that a number of distinguishing features of the businesses - which, as I say, doesn't really answer the question that arises - but it was said by my learned friend that the issue of carrying loads and the like was no longer pressed. Can I just say from paragraph 19 of his statement Mr Mealin - whose statement was admitted as exhibit TWU4 - gave evidence of having driven loads for Truck Moves. He was not required for cross-examination on any of that evidence, and we assumed it was not disputed.

PN341

My learned friend referred to the insurance consequences for its business. Can I just note - and this arose in the cross-examination of Mr Whitnall as well - that the standard terms of Truck Moves, at least, were that the client is required to maintain insurance for the vehicle. Mr Whitnall said in some instances they're unable to achieve their standard terms with some of their clients, but that seemed to be the height of it. There was no evidence outside of that business.

PN342

There was reference to the decision of Rares J in [2015] FCA 1071, particularly at paragraphs 25 and 26. Can I just - that's summarised in the evidence of Mr Whitnall in relation to what he derived to be the work of Mr Zader. Can I just note - and this is really for a point of clarification - that there are set out some distances and times in the extracted part of the affidavit of Mr Whitnall in paragraph 25 of the Federal Court decision.

PN343

Can I just note that, as is acknowledged by his Honour in the judgment, that the distances and times were derived from Google Maps, they weren't suggested to be the actual times worked by Mr Zader.

PN344

To the extent that some reliance was placed upon what is said at paragraph 26 - that is, the extent to which a driver is actually behind the wheel, or what proportion of the day the driver is actually behind the wheel - again, that is not a matter that distinguishes these drivers in any radical way from other persons. That is, a courier driver who spends time getting parking, getting out of the vehicle, loading, unloading, will not be behind the wheel 90 per cent or 100 per cent of his or her day at work.

PN345

It's common for drivers to spend time waiting, completing paperwork, loading or unloading, or whatever it might be; duties in the course of his or her employment; and to say that the driver is literally behind the wheel 50 per cent of the working day, as I say, does not distinguish the drivers engaged by this type of business from many others and does not provide any basis upon which the award would not be apt to apply.

PN346

And Mr Bradac's evidence seemed to be that he understood that Transport and Distribution Award would not apply or not provide for payment for any time that a worker was not actually physically driving the vehicle, and that's just wrong. So to the extent that the objection was based upon that kind of a hypothesis, it is without foundation.

PN347

SENIOR DEPUTY PRESIDENT HAMBERGER: Would it create difficulties - just working out what you should be paying them if they're hopping - especially as they're going in and out - it's not like a courier, they would be - well, sometimes, at least, it seems - going from different types of vehicles. I know the award deals with the issue of people driving more than one vehicle in a day - a different type of vehicle in a day - but nevertheless, these people appear to be, on the evidence, doing that quite a lot, and that the periods in between - there are significant periods in between actually driving a vehicle, and it could be moving between different types of vehicles. Does that create particular challenges in working - - -

PN348

MR GIBIAN: I think your Honour is pointing to a difficulty with Mr Ferguson's proposed amendment, but leaving that to one side, there's no - first, there are two issues, really: one is that Mr Bradac seemed to raise some issue that the award wasn't apt to apply because for some periods of the day the drivers - the Truck Moves employees aren't physically driving a vehicle. Now, that's just false - - -

PN349

SENIOR DEPUTY PRESIDENT HAMBERGER: Sure. No, no, obviously they get paid - - -

PN350

MR GIBIAN: They get paid an hourly rate of pay for time worked if they're waiting around or being transported somewhere at the employer's direction.

PN351

SENIOR DEPUTY PRESIDENT HAMBERGER: It's more of what they would get paid. I'm not suggesting they wouldn't get paid.

PN352

MR GIBIAN: As to what they would be paid, clause 19 makes clear that they're paid the hourly rate for whatever the highest classification of work they're required to perform in that day for the whole time. So there's no basis of any difficulty working out what the rate is on that day, and that applies to the whole of the work time, and that's - - -

PN353

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN354

MR GIBIAN: There's no difficulty. And the simplicity of that is, as I say, relevant to what Mr Ferguson will have to say.

PN355

MR FERGUSON: I will see what I can do.

PN356

MR GIBIAN: Indeed.

PN357

MR FERGUSON: Getting in early.

PN358

MR GIBIAN: Indeed. Well, it was raised, so. As to - my learned friend just recently after lunch referred to the Federal Court's decision and the consideration of whether the business involved the transport of goods, et cetera. Can I just note that the Full Court particularly in its decision noted that this matter was to come before the Commission for variation to address the circumstance that had arisen, and recognised that entirely that's a matter for the Commission.

PN359

I can tell the Bench that during the hearing the members of the Court directly raised the issue as to, "Well, why aren't you just pursuing this as a variation?" And we said, "Well, we are, actually. If this goes against us, we've already given notice that we propose to address it in that way", and the Court very directly raised that that was an appropriate way to address the question. So obviously that's a matter for the Commission to consider.

PN360

As to whether there's a -that it was a significant part of the business of Truck Moves in particular that they were able to pay the rates that they do, I just note

that - this is the footnote at paragraph 45 on page 8 of Mr Whitnall's statement, exhibit TM3 - where he said that:

PN361

If we are covered by the RT and D Award, like these freight companies are so covered, there will be little or no incentive or reason for them to engage Truck Moves. As a result, the employees we employ will be unable to work.

PN362

And really, upon being quizzed, Mr Whitnall was unable to point to anything other than that they were able to pay lesser rates of pay. If they provided a more timely service or some more specialised tailored service that other companies find useful to engage; well, they can do so covered by the RT and D award.

PN363

If it's just - if the only advantage their business purports to provide is that drivers who would, if they were employed by other employers, be covered by modern award standards, are not, then it's an evasion of the safety net that the modern award system has endeavoured to create, which should not be permitted to continue. That really is the merit argument, and it's clearly established on the evidence, with respect.

PN364

And finally, as to the suggestion that there's some economic disadvantage suffered by Truck Moves or the other clients that are my learned friend's clients, all the vehicle relocation - if the variation is made as was sought, other vehicle relocation businesses will be also covered. There will be no disadvantage competitively other than that would otherwise apply.

PN365

I mean, if other businesses operate more efficiently or if transport companies don't find it economic to outsource these operations, well, that's just the operation of a free market. They should not obtain an economic advantage solely by paying rates of pay which are below the modern award safety net that would otherwise apply to these drivers if they were engaged by other businesses.

PN366

And if that's the only - and I noticed it's denied, that that's the advantage that they seek - but if that's the only advantage they obtain, then they shouldn't be permitted to continue to obtain it.

PN367

MR CROSS: Might I just correct one transcript reference and give you the actual reference?

PN368

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN369

MR CROSS: It was put that there was some reliance on footnote 2, and the concession that it was in relation to that rates of pay was the only benefit or the only - - -

PN370

MR GIBIAN: I didn't say there was a concession, I said that it was really unable to name anything else.

PN371

MR CROSS: I'm just drawing the Bench's attention to paragraph 653 where he clearly gives (indistinct) evidence to that asserted - - -

PN372

SENIOR DEPUTY PRESIDENT HAMBERGER: Okay. Thanks very much. Mr Cross, I think that finishes this matter, so if you want to be excused, then that's fine.

PN373

MR CROSS: May it please. Thank you.

PN374

SENIOR DEPUTY PRESIDENT HAMBERGER: Mr Gibian, can we deal with everything else all in one go, as it were?

PN375

MR GIBIAN: Yes, absolutely.

PN376

SENIOR DEPUTY PRESIDENT HAMBERGER: Obviously there are your applications, and also AiG's, but if you could deal with it all together.

PN377

MR GIBIAN: I might deal with AiG's in reply, if that's - - -

PN378

SENIOR DEPUTY PRESIDENT HAMBERGER: Have you - but I don't want to have to - - -

PN379

MR GIBIAN: The three remaining issues, if I can recall what they are, for us is - there's one further variation to the Transport and Distribution Award relating to overtime payments for employees who I think we pejoratively called flip-flopped between the two awards; and there are two with respect to the Long Distance Award dealing with provision of the fatigue management plan and the pick up drop off allowance matter. So if I deal with those in turn.

PN380

The overtime provision that we seek to have dealt with in the Road Transport and Distribution Award endeavours to address the circumstance in which a person ordinarily performing work covered by another award - and we're principally dealing with a circumstance in which the Long Distance Operations Award would otherwise apply to them, but the primary work that the employee is temporarily

required to engage in work covered by the Road Transport and Distribution Award; and in that circumstance, to ensure that if the person is performing work outside the range of - the number of ordinary hours in total, whether under the RT and D Award or the Long Distance or another award, then all of those hours are to be taken into account in determining whether a person has an overtime entitlement.

PN381

That application is made, and the context for it is clause 4.2 of the Long Distance Award, which was put in in the two-yearly review, which provides that:

PN382

The Long Distance Award does not cover an employee while they are temporarily required by their employer to perform driving duties which are not a long distance operation, provided the employee is covered by the Road Transport and Distribution Award.

PN383

The factual circumstances, I think will be clear, that we're seeking to address is a circumstance in which a driver does a long distance operation, and upon returning from the long distance operation, is then directed to do local work not involving a long distance operation for some additional time on the same day. The example I've given in the reply submissions is a driver who does a 10-hour operation involving a long distance operation, returns to the depot, and does two hours of a local delivery or a number of local deliveries, as the case may be.

PN384

Given clause 4.2 of the Long Distance Award, the last two hours will be paid under the Road Transport and Distribution Award, not under the Long Distance Award. There might be a question about the proper application of the award as it currently applies, but we think the award should make clear that the two hours at the end, the local work, are overtime because the person has already worked 10 hours on that day, or if they have already worked a collection of hours which would, under the Road Transport and Distribution Award entitle them to overtime pay, and that failure to so make clear fails to ensure a reasonable and fair safety net, and to provide for additional remuneration for overtime or unsocial work.

PN385

SENIOR DEPUTY PRESIDENT HAMBERGER: So if they did and eight hour long distance drive and then did two hours locally, they wouldn't get overtime. Is that right?

PN386

MR GIBIAN: No, they would. They would.

PN387

SENIOR DEPUTY PRESIDENT HAMBERGER: Because?

PN388

MR GIBIAN: The provision that we've drafted, the intention of it is that whatever hours were worked under the Long Distance Award would be, once the person

flips over to the Transport and Distribution Award, be counted as part of their ordinary hours.

PN389

SENIOR DEPUTY PRESIDENT HAMBERGER: I understand that.

PN390

MR GIBIAN: So whatever the application of the overtime provision in the award - - -

PN391

SENIOR DEPUTY PRESIDENT HAMBERGER: That's what I was asking you, is how would it work. When would overtime kick in?

PN392

MR GIBIAN: I'm sorry?

PN393

SENIOR DEPUTY PRESIDENT HAMBERGER: When would overtime kick him in that scenario?

PN394

MR GIBIAN: Consistently with clause 27 of the Road Transport and Distribution Award, if the amount of time worked - so it's worked outside the ordinary hours - - -

PN395

SENIOR DEPUTY PRESIDENT HAMBERGER: So which clause is it again? It's clause 27.

PN396

MR GIBIAN: Yes, clause 27 deals with overtime. And then the ordinary hours are as set out in clause 22.

PN397

SENIOR DEPUTY PRESIDENT HAMBERGER: I'm just trying to understand. If you worked - so your example was if you drove for 10 hours on a long-distance under the Long Distance Award and then just stopped, you wouldn't get any extra overtime, you would just get what you get paid for the 10 hours.

PN398

MR GIBIAN: Well, one - yes - - -

PN399

SENIOR DEPUTY PRESIDENT HAMBERGER: And then if you worked 10 hours - - -

PN400

MR GIBIAN: - - - under the Long-Distance - I'm sorry, your Honour.

PN401

SENIOR DEPUTY PRESIDENT HAMBERGER: No, go on.

PN402

MR GIBIAN: Under the Long-Distance Board, of course, the rates are not time-based rates, the employees - - -

PN403

SENIOR DEPUTY PRESIDENT HAMBERGER: There are time-based rates, aren't there?

PN404

MR GIBIAN: There's a mixture, but none of them are strictly time-based in the sense that they provide an hourly rate for all time worked.

PN405

SENIOR DEPUTY PRESIDENT HAMBERGER: You gave me the example of you drive for ten hours and then do two hours - - -

PN406

MR GIBIAN: If the driver was being paid on the cents per kilometre method, then they are not being paid for ten hours at an hour rate, as it were. They are being paid based upon that. If they have been paid by the hourly method, again, the hourly method only applies to driving hours and sometimes it's deemed driving hours.

PN407

SENIOR DEPUTY PRESIDENT HAMBERGER: They drive for ten hours under the long distance. I mean, accepting that they are not actually paid - let's say they are actually paid for a trip rate but it takes ten hours to do.

PN408

MR GIBIAN: Yes, yes.

PN409

SENIOR DEPUTY PRESIDENT HAMBERGER: They stop work. There is no overtime because my understanding is, tell me if I have got this wrong, there is kind of in the calculation of the trip rate there is a component built in for overtime.

PN410

MR GIBIAN: Yes.

PN411

SENIOR DEPUTY PRESIDENT HAMBERGER: If their long distance journey took them eight hours and then they stopped, you know, they got to the end of the long distance journey and then they did two hours locally, would they get overtime? I mean, if you can answer this, would they get overtime for those two hours?

PN412

MR GIBIAN: I mean, it actually depends on the work beyond that day, so, I'm not sure I can quite answer it in that way.

PN413

SENIOR DEPUTY PRESIDENT HAMBERGER: So, it's not a daily? Don't you get overtime after a certain number of hours a day? Sorry, I mean, I'm not that familiar with the award that I can off the top of my head or else I wouldn't ask. Yes, so, the ordinary hours must not exceed eight hours per day.

PN414

MR GIBIAN: Yes. So, yes, in excess of - - -

PN415

SENIOR DEPUTY PRESIDENT HAMBERGER: So, presumably if you work past that, you get overtime.

PN416

MR GIBIAN: Yes.

PN417

SENIOR DEPUTY PRESIDENT HAMBERGER: If you're just a local driver. Yes, if you only do that locally. So, do you understand the question I am putting to you?

PN418

MR GIBIAN: I do, yes. So, they would under our - - -

PN419

SENIOR DEPUTY PRESIDENT HAMBERGER: Get overtime.

PN420

MR GIBIAN: They would get overtime in that circumstance, yes.

PN421

SENIOR DEPUTY PRESIDENT HAMBERGER: Right, okay. Is that inequitable or not? I mean, I am not saying it is, but I'm just saying you have got those two examples. You have got the guy who drives for ten hours long distance, finishes, goes home. You have got another person who drives for eight hours and then does another two hours under the local award, gets paid overtime for the last two hours under your proposal.

PN422

MR GIBIAN: Yes.

PN423

SENIOR DEPUTY PRESIDENT HAMBERGER: I am not saying it is inequitable, but that's the kind of - - -

PN424

MR GIBIAN: What is put against us is the rates in the long distance award are said to - and there is some mystery as to how they are calculated.

PN425

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN426

MR GIBIAN: Are said to, according to the award, contain a component for overtime.

PN427

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN428

MR GIBIAN: Our answer to that is that the component for overtime and the long distance rates, whether they be the hourly drive method or the cents per kilometre, are to compensate for work under that award and that award only and that it's spread. So, in the sense that if someone works 14 hours, they don't get any more overtime rate under the long distance award.

PN429

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN430

MR GIBIAN: If they work eight hours, they have an overtime component even if they haven't worked overtime. It's an averaging process under that award which consistent with - and, look, there's arguments about the merits of those methods, obviously.

PN431

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, yes.

PN432

MR GIBIAN: But leaving that to one side, the way in which those methods of payment have operated over many years is that kind of averaging basis and that it provides compensation for that work that is done by the rates method. And if you're going to have a cents per kilometre rates method, you have to have some way of averaging it all out and working out what is the appropriate rate per kilometre for a particular type of vehicle. It doesn't compensate for additional work is then over and above that performed once the person returns to the depot if they are then directed to do local work. To take one case and say - - -

PN433

COMMISSIONER LEE: That's not right. Your quibble is that they're paid at ordinary rates because the clock starts again, isn't it?

PN434

MR GIBIAN: That's the way it's being treated, I think.

PN435

COMMISSIONER LEE: Yes, yes.

PN436

MR GIBIAN: Yes. If the person has already worked eight hours or more doing long distance operation and they come back and for the same employer are then directed to do additional work, that should be paid at overtime rates. That's the sole answer. And it's not compensated by what the person has been paid for their long distance rates because the long distance rates are not time based, they are

based upon a process of arriving at either a cents per kilometre or an hourly driving rate which is said to overall compensate for the work under that award which may include some overtime component or not.

PN437

14.1(b) of the long distance award purports to say that the rates per kilometre are inclusive of an overtime allowance of 1.2 times the ordinary rate which takes into account an overtime factor of two hours and ten at double time. That's the way in which it is said to have been undertaken. But the person gets the same cents per kilometre rate whether they work 16 hours, if that's permissible under the driving arrangements, but 16 hours or five hours. I mean, that is it is not attached to any particular period of time working.

PN438

You can't say that on one day because the long distance trip, if it was capable of being done in six hours on a 500-kilometre return journey, that the person has in some way been overpaid. That would be an entirely incorrectly way to look at it because there is some overtime component because it's an overall rate taking into account a whole range of matters which are, according to the determinations the Commission has made over time, said to be appropriate for that work. It does not compensate for the additional work, any additional work, of a local type which is subsequently undertaken by the driver.

PN439

If they have then worked hours which are in excess of the amounts which would entitle them under the Road Transport and Distribution Award to overtime, then they should receive overtime for those amounts - those periods.

PN440

COMMISSIONER LEE: While your answer to his Honour's question and the example, to the extent it relies on 22.3, clause 22.3, it is relatively straight forward leaving aside arguments about whether or not there is actually a record of how many hours the long distance driver actually drove for. So, setting that aside, other than that it is relatively straight forward. What I am really grappling with is that's only one circumstance in which overtime is attracted for work done outside of ordinary hours because it has paid for all work done outside ordinary hours pursuant to 27.1. You have also got 22.1 which has got all the various cycles. How is this going to work in reference to that?

PN441

MR GIBIAN: Yes. No, I understand the question. I think we were focussed upon the day issue because it is something that arises on a day that is where the person returns from returns from a long distance operation and is then directed to do local work rather than on an overall basis.

PN442

COMMISSIONER LEE: Your intent then is just for an overtime provision only for hours worked in excess of eight hours in a day.

PN443

MR GIBIAN: Look, I think that was the example. I mean, look, that was the circumstance that we were thinking of, I think. Let me just - we'll just consider that as to whether there are other circumstances, but certainly that was the primary issue that we were - or the factual circumstances.

PN444

DEPUTY PRESIDENT SAMS: Mr Gibian, what would happy if the extra work required straddles another period where penalties might otherwise apply, like Saturday or Sunday?

PN445

MR GIBIAN: They would be paid that already, I think. If they had switched to the Road Transport and Distribution Award, they would already get whatever shift penalty.

PN446

DEPUTY PRESIDENT SAMS: Just the penalty, yes, yes.

PN447

MR GIBIAN: They would get whatever shift penalties that would otherwise apply. I think that's right. So, it's really a question as to the overtime issue that's been raised. So, yes, if the additional hours were in a period for which a penalty would be payable then they would get that penalty.

PN448

The issue, and Commissioner, you have raised it in relation to the recording of hours. I mean, look, this is an issue that is constant that's been raised. I mean, drivers are required to keep a record of work time, not just driving time, work time and the heavy vehicle regulations contain a definition of work encompassing loading, unloading and, indeed, any other activity. So, they are required to keep a record of work time and rest time for the purposes of complying with that regulation and we would be alarmed if employers weren't ensuring that that occurs.

PN449

The situation that the union is faced with in these kind of matters is when it raises issues about safety and requirements for regulation about recording of hours and the like, we are told that they do report hours and everyone knows when people are working or not and when it comes to paying people for hours, they say they have no idea how many hours drivers are working. We think that if employers don't have mechanisms of finding out when their drivers are working, they are not operating appropriately in compliance with their obligations.

PN450

The third issue in respect of this matter that is raised is that it was dealt with in the two yearly review. We don't think that's right. What was dealt with in the two yearly review was AI Group's application to include 4.2 in the long distance award to allow the flipping out, as it were, and not the consequences of it. We will just have a think about the question, Commissioner, you have raised about the average weekly hours.

PN451

In relation to the long distance award, there were two matters. The first is an application for a variation to add in a requirement at clause 13.5(a)(iii) to require provision of access to a fatigue management plan where that is relied upon as a method of payment. Perhaps, no doubt, the members of the Full Bench are familiar with it. But the rates of pay under the long distance award are either a cents per kilometre rate or the kilometre driving method or the hourly driving method. Even where the hourly driving method is used, there are agreed hours of driving time. That is not actual driving time, much less actual working time to which the rates are attributed and the agreed driving hours are set out in subclause 13.5(c).

PN452

13.5(a)(iii) allows for any journey, the hourly driving method to be applied to the number of hours specified in a fatigue management plan which is approved under state or territory or Commonwealth legislation. So, rather than either the actual driving time or even the nominated driving times in the award, an employer is able to pay the hourly driving method by reference to the number of hours it is said a journey will take in an appropriate form of fatigue management plan.

PN453

The only thing that we have asked, I mean, I think the union has a number of concerns about this process, but all we are asking for at present at least is that the drivers are provided with a copy of a plan which has to exist in order for this provision to be applied to the person's payment. It seems it is entirely straight forward that if a person is being paid on this basis that they should have an opportunity to know the basis upon which they are being paid for starters. But also be equipped with the information if they think the fatigue management plan is unreasonable or unachievable for some basis that they would have information at least to enable them to discuss that with their employer or to challenge it if it be appropriate. We should have thought that that would be uncontroversial. The opposition from that road seems to be based upon the hypothesis that the union is trying to achieve something else other than the simple words that we have sought to be inserted in the award.

PN454

The second issue in relation to long distance award is the pick-up and drop-off allowance. It seeks to insert a new provision providing for payment of an hourly rate where an employee engaged in a long distance operation is required as a part of that long distance operation to pick-up and/or drop-off at a number of different locations which will lead inevitably to a greater period of time than the agreed driving hours or a longer distance than the agreed driving distances which are set out in clause 13 of the award.

PN455

In that respect, can I just note that the definition of a long distance operation which refers to the movement of livestock or materials of a requisite distance from a principal point of commencement to a principal point of destination. It may be that there are operations that are purportedly long distance operations which we would say are not, in fact, long distance operations because they involve pick-up and delivery from an array of different locations which defy the definition of a

long distance operation because they don't involve a principal point of commencement and a principal point of destination.

PN456

But it is also possible to conceive of circumstances in which there is - and the example we have given is if there is two pick-up locations in Sydney, so if materials - if something - if goods are picked up in Botany and then in Minchinbury and then once the truck is full it travels to Brisbane, it would be said that that is a long distance operation. But the payment that the driver would receive for that trip, according to the agreed driving distances, would be 950 kilometres if they are paid in the rate per kilometre method in clause 5.4(b) or a period of 11.6 hours if they are paid on the hourly driving method.

PN457

13.5(c), those either distances or times don't take account of what would be a very large period of time in the example that has been given most likely of picking up from the two locations within Sydney and that the agreed distance is the agreed distance from Sydney to Brisbane, not involving any substantial trip within Sydney. And that the rates, if applied to that scenario, either the cents per kilometre or the nominal hourly driving method would not provide any remuneration for the additional time and distance and work involved in the multiple pick-up locations within Sydney prior to the transit to Brisbane and there ought to be payment for those periods.

PN458

We have given the evidence as to the fact that these types of operations occur and, as we say, are plainly not adequately or appropriately remunerated in accordance with the existing payment structures provided in the award.

PN459

To the extent there is criticisms of the evidence on the basis that some of the employees were covered by enterprise agreements, we don't think that makes their evidence less relevant in the sense that it gives evidence as to the nature of the operations that transport providers engage in. To the extent that those types of payments are permissible under enterprise agreements, it is because they were, presumably, able to pass the better off overall test having regard to the structure of the award as it presently exists. As I say, we think to provide a fair and relevant safety net that payment for any additional work involved in those scenarios ought be provided for and we have endeavoured to craft a provision which would have that effect.

PN460

Unless there is anything further, I think those are the additional issues. To the extent that we need to address AI Group's variations orally, we will do so in reply, if that is convenient.

PN461

COMMISSIONER LEE: Can I just ask you - - -

PN462

MR GIBIAN: I'm sorry, Commissioner.

PN463

COMMISSIONER LEE: - - - AIG's submissions in reply, 5 March, paragraph 114.

PN464

MR GIBIAN: Paragraph 114?

PN465

COMMISSIONER LEE: Yes. For myself, I found that kind of rather compelling. I am just wondering what your view on it is.

PN466

MR GIBIAN: The union would be very happy if a long distance operation was limited to a trip from one point and delivery at another point and that anything outside of that was not a long distance operation, the union would be perfectly happy and, indeed, that would be the effect of, in essence, what the variation we are seeking.

PN467

COMMISSIONER LEE: That is what you were trying to remedy, is it, about the uncertainty about where it starts and ends?

PN468

MR GIBIAN: All the other parties, I think, AI Group, NatRoad, ARTIO, have all said "principal point" doesn't mean one. It could mean more than one point of commencement. And if that's right, then part of a long distance operation could be, they say at least, as I say, starting in Botany, picking up goods there, driving to Minchinbury, picking up more goods there and then driving to Brisbane. If they say all of that is a long distance operation, then we think there has to be additional remuneration for the first part of that operation because it is not remunerated by the 950 kilometres of the cents per kilometre rate. That is a trip straight from Sydney to Brisbane.

PN469

If what happens is that at the end or before a long distance operation the employee performs entirely separate local work, which was the overtime issue that we were raising, entirely separate local work, well, we agree with that Mr Ferguson said in that respect. That is, they would become part of the Transport and Distribution Award for that purpose and be paid under that award. So, we accept that our variation is unnecessary to that situation and, as I say, if everyone accepted that the long distance operation only started when the driver got to Minchinbury and that the previous work was covered by the Transport and Distribution Award, well, we would be happily with that scenario.

PN470

COMMISSIONER LEE: That resolves the problem, yes.

PN471

MR GIBIAN: Yes, we would be perfectly with that scenario, yes. And, in a practical sense, that's the effect of the variation we have sought in the sense that the hourly rates would be the same.

PN472

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you. I think Mr Ferguson is next.

PN473

MR GIBIAN: Yes.

PN474

SENIOR DEPUTY PRESIDENT HAMBERGER: Hang on, just wait. So, did you want to be heard next, Mr Ryan?

PN475

MR RYAN: Yes, if that would please the Commission and the my colleagues.

PN476

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, no, that's fine, yes.

PN477

MR RYAN: I am a little bit lonely down here at the moment, your Honour.

PN478

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN479

MR RYAN: ARTIO has participated fully in the 2008/9 exercise in creating the new modern awards. We have also participated fully in the two year review and we have been involved in this exercise since it commenced in 2014. We represent the hire and reward sector of the industry. Those operators who essentially perform the transport tasks. We do not represent manufacturers or retailers or farmers or mining companies. We simply advocate for the trucking operators, both those who do local work under the Road Transport and Distribution Award and those who do long distance work under the Long Distance Operations Award.

PN480

We have read and considered the submissions lodged in the last couple of days by the TWU and the Australian Industry Group. Our members understand the current awards and would seek to avoid continual change in the structure and operation of these industrial instruments. As my colleague from the Australian Industry Group emphasises in his reply submissions, the industrial award system has changed since I commenced where we had respondents and interstate disputes. That is fine, but it seems to our members that continual change increases the red tape and cost of doing business and can create additional disturbance and disputes at the workplace.

PN481

Mr Ferguson says: "Go out and enterprise bargain on the higher duties allowance or on the meals allowance." That is fine in theory, but can be expensive and painstaking in fact. If we omit a phone number on a form or making a type mistake on a form then the process must be restarted.

PN482

DEPUTY PRESIDENT SAMS: Not anymore. It is not likely to be anymore.

PN483

MR RYAN: We would hope so, Deputy President. When this four yearly award exercise commenced in 2014, we had about 44 issues across the industry awards where change was sought. That has been reduced to five by the TWU and two by the Australian Industry Group. Those sought by the TWU in the long distance award are drivers have access to and be provided with a copy of an accredited fatigue management plan under which they drive. ARTIO supports that whole heartedly. It is nothing to do with safe driving plans. It is to do with an accredited fatigue management plan existing under relevant law and if a driver is to be paid on that, he is entitled to have a copy of that, in our view.

PN484

The pick-up and drop-off allowance or, in the transport terminology, the PUD allowance, ARTIO opposes it in its current format, but could see some support if it was altered to allow further efficiency and flexibility to an employer engaged in the long distance industry. This may include specifying the number of PUDs allowable in conjunction with a trip, removing any uncertainty.

PN485

To my knowledge, the current wording of principal point of destination - principal point of commencement to principal point of destination has never been tested. If it was intended by the award makers that there only be a single point of commencement, they would have used the term "single" or "sole". They did not. They used the word "principal".

PN486

In terms of the definition of "road transport industry" which has sort of been and again, ARTIO neither supports nor opposes that claim. In terms of the overtime provisions that the TWU is seeking to insert into the Road Transport and Distribution Award, ARTIO does not support it in its current format. It may do so with appropriate amendments recognising that the CPK or hourly driving rates include a notional overtime component of two hours in ten. So, if a driver was to drive a long distance for six hours on the balance of a return trip and then work local another four, he or she has already been paid an overtime component, two hours in ten, and that goes to some of the questions that were raised by the Bench earlier.

PN487

In terms of Mr Gibian's analysis that the CPK rate or hourly rates are not time based, I would point the Bench to clause 13(5)(b) of the Road Transport Long Distance Award which explains how the minimum driving rate is calculated by dividing the minimum weekly rate by 40 and multiplying by 1.3 which includes and industry disability allowance and then 1.2 which includes the overtime allowance. That is spelled out clearly in 13(5)(b).

PN488

What is not spelt out clearly in the award, but those of us who have been around a long time are well aware of, and you could call it secret transport business if you like, but the kilometre divider is 75. So, if you divide any of those hourly rate

listed in 13(5)(b) by 75, you will end up with the kilometre rates. That is the notional speed that has been accepted in this Commission for the purposes of determining what a cents per kilometre rate is. So, it is not a piece rate as some people would argue. It is clearly based around a notional speed and that is calculated from a time based payment system.

PN489

It is important that that formula be understood and it has never been inserted. The 75 has never been inserted into the award because there has been the ability in the past for enterprise agreements where evidence is led that the average speed might be 78 or 82. But over time, when I first started in this particular industry it used to be 57 kilometres an hour, then it went to 65 and it went to 75 with the making of the 2000 Long Distance Drivers Award.

PN490

The Australian Industry Group seeks to amend the Road Transport and Distribution Award to amend two current provisions. One is the higher duties clause. This is well understood in the industry and to my knowledge, I am not aware of any dispute being brought to this tribunal or its predecessors for resolution about how it operates. It is black and white. Let's not make it a grey area and open up potential disputation.

PN491

I note the advice on our views from Mr Ferguson in paragraph 6 of his reply submissions and various other comments made throughout that document. Secondly, the payment of the meal allowance would not be required if an employee is notified the day prior of the requirement work overtime. Yes, Mr Ferguson or the AI Group is correct, it is an expense allowance. But the employer can meet their award obligation by providing a meal and this does occasionally occur.

PN492

ARTIO notes the Australian Industry Group's analysis of the old New South Wales of whom at least one member of this Bench is well familiar with. At paragraph 33, the Australian Industry Group detailed the old New South Wales State Award provision which indicated that the meal allowance wasn't payable if notified on the previous day or earlier. It was a well-accepted practice in the New South Wales transport industry to advise all employees at the start of the year that overtime will be required to be worked every day and a meal allowance was very rarely paid.

PN493

Again, the Australian Industry Group in paragraph 29 suggests that this should become an enterprise agreement matter.

PN494

Interestingly, the New South Wales rates were also much higher than those in the Federal system and the classification structure was also more generous and the Transport Industry State Award, if you were a Grade 6 under the Federal system, you were a Grade 7 in the New South Wales Award and about $45 per week more

generous earnings was applicable. But the Australian Industry Group ignores this issues and simply cherry-picks to enable some penny pinching to occur.

PN495

ARTIO is concerned with recruiting and retaining staff and that is difficult on minimum rates. ARTIO urges the bench to maintain the status quo on both of these issues. In conclusion, I would say that ARTIO relies on this and its earlier submissions filed in these matters.

PN496

A couple of other points from Mr Gibian's submissions, that essentially a 500-kilometre return journey will take a minimum of eight hours at 75 kilometres per hour. A casual employee is guaranteed to drive for that period of time. And when we talk about a trip taking 16 hours or six hours, on basic driving rules, 12 hours is the maximum work time. If you have a fatigue management scheme in place, you can drive for a long period of time, up to 14 hours. But, essentially, the system is predicated on 12 hours and every driver must keep a work diary unless they, under the long distance award, every driver must keep a work diary.

PN497

Under the Road Transport and Distribution Award, a work diary is not required unless you travel more than a hundred kilometres from your base, but there must be some record of the amount of driving and working trips that are done and they are generally conducted by employees using run sheets. And, of course, those hours are recorded on the work diaries and they're subject to inspection by police forces, by roads and maritime services in New South Wales and VicRoads in Victoria to ensure that people are complying with those legal obligations.

PN498

The final observation I make is that the definition of a capital city for the purposes of the long distance award is within a radius of 32 kilometres of the GPO. So, technically that enables a diameter of 64 kilometres to be included as part of that capital city. So, a trip from Sydney to Melbourne can include a distance that is within 64 kilometres diameter wise, 32 kilometre radius of the GPO of Sydney to the GPO in Melbourne. So, somebody who goes from Minchinbury which is on the outskirts of Sydney to a suburb on the outskirts of Melbourne, very close to the northern boundaries, is doing far less than what is contained in the award. Somebody going from Botany to Dandenong South, which is from either end or the other end of the 32-kilometre radial spectrum, then they are still within that definition of what a long distance trip is.

PN499

It is important that that's been in there, the 32 kilometres, those of you who are around my age will realise that that used to be 20 miles in the old money, so that's where it comes from. If the Commission pleases, if you have no further questions and, if so, may I excuse myself?

PN500

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. Thank you very much, Mr Ryan, and you are excused. You're free to go.

PN501

MR RYAN: Thank you.

PN502

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you. Mr Ferguson.

PN503

MR FERGUSON: Thank you, your Honour. If I can deal firstly with the TWU's claims, starting firstly with I think what has been termed the overtime proposal. Obviously, we have filed comprehensive submissions in relation to all of these issues and we rely on that material. I am not intending to sort of narrow what I say there, but if I can come to the key points of our key concerns, if you will.

PN504

The proposal they advance is cast in the following terms. Where an employee ordinarily performs work under another award is temporarily required to engage in work covered by this award, shall have the hours worked under both awards count towards the ordinary hours of work. Any hours performed outside the combined ordinary hours of work shall be paid in accordance with clause 27.1 of this clause.

PN505

We raised questions about this would actually work in practice because we are baffled by what this actually requires and I must say it is deeply troubling that we have now almost fully argued this matter and counsel for the TWU still can't explain fundamental issues around how it works. Now, the obvious question is if all hours are to be counted, what hours are they? Are they the hours that were performed that day under the other award? Is it the hours that were performed that week, that month, that year? What do you have to do? Do you have to rely on the pay cycles under the two awards and it is entirely possible that an employer operating under both awards might be applying different arrangements for ordinary hours for the different workforces.

PN506

So, those sorts of very fundamental issues arise, but then that is not all of the problems that flow from that. The questions that then come to my mind is, well, what does this mean for superannuation obligations if now suddenly hours worked under an another award there might have been overtime hours are deemed, if you will, ordinary hours, does that mean that hours that wouldn't have or earnings that previously wouldn't have been ordinary time earnings for superannuation purposes now attract super? You are changing the character of those hours.

PN507

SENIOR DEPUTY PRESIDENT HAMBERGER: Can it go the other way?

PN508

MR FERGUSON: If they were overtime hours and they were performed under the long distance award, for example.

PN509

SPEAKER: No, they're not.

PN510

MR FERGUSON: Sorry?

PN511

SENIOR DEPUTY PRESIDENT HAMBERGER: I think it is more like if you do the extra hours at the moment, they're ordinary. If after a long distance journey you do work under the Road Transport and Distribution Award currently that's ordinary hours, what is being proposed it will become overtime hours. Super wouldn't be payable. Whereas presumably technically at the moment it is payable.

PN512

MR FERGUSON: Where an employee who ordinarily does work under another award is temporarily required to engage in work under this award, so, will have the hours worked under both awards count towards the ordinary hours of work.

PN513

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN514

MR FERGUSON: I assume if the hours were overtime hours or not ordinary hours, if you will, under the long distance award, the intention is now they count towards ordinary hours, so that the employee is pushed into overtime rates more quickly.

PN515

COMMISSIONER LEE: That is not my understanding at least that you would count the - yes, as per his Honour's discussion earlier that the eight hours, we will call them nominal hours, leaving all those issues aside about the long distance award, that those eight hours are ordinary hours - same same - but then the next two hours that are worked under the Road Transport and Distribution Award are to overtime hours.

PN516

MR FERGUSON: It may be a problem that flows from the wording. I am looking at the wording set out in paragraph 44 of the TWU's submission which I understand to be the claim. And I may be wrong, but there is two things. The first sentence has the effect of requiring certain hours to count towards the ordinary hours of work. And then the second sentence says that hours performed outside the combined ordinary hours of work shall be pain in accordance with 27.1. So, you get paid the overtime rates, if you will, but I understood the first sentence to deem them effectively ordinary hours, both of the sets of hours.

PN517

What I am raising here is it really just makes no sense the way this clause actually works, because that's the second question: what does that mean for accrual of entitlements that are referrable to ordinary hours of work? Now, maybe I am not understanding it in the way they intended. I am just reading the words on the page and that is capable of being read multiple ways. But it just seems to us that it's very confusing.

PN518

DEPUTY PRESIDENT SAMS: If it is confusing to the industrial parties, God help what it is going to be like in the workplace.

PN519

MR FERGUSON: Yes, that is why I am suggesting we probably shouldn't put it in the award because it is a very difficult to read clause and, as I said, obviously counsel for the TWU couldn't answer fairly basic questions and we are now at the final stage of this matter and this should be concluded and simply rejected, in our view.

PN520

The other point we make is that there is an inherent unfairness in this because the hours that are worked under the long distance award do include a component of remuneration that is paid in compensation of overtime. Now, there is a myriad of different scenarios that could be used to explore this clause. But what you could have is a situation where an employee has worked under the long distance award for a number of hours, they have got an amount of compensation that is inflated to include payment for overtime, and then under this proposal, they then go and work extra hours and get paid at overtime rates.

PN521

That opens the door to an employee doing similar number of hours as an employee who has always worked under the ordinary hours under the local award getting a much higher level of remuneration because you would be getting overtime payments under both instruments and that is inherently unfair. It is unfair to those other employees, but it is extremely unfair to the employer who gets hit twice, if you will. So, quite clearly, we say that this wouldn't be part of a fair and relevant safety net because any assessment in that regard needs to take into account what is fair to the employer as well.

PN522

But the point I make is that we aren't convinced that this problem actually arises in practice all that often and we don't think that the evidence really does establish that it does. Now, much of the evidence is from employees that are covered by enterprise agreements and I don't think you can just say that is okay because we are just leading it as evidence about operational practices, because what is permissible under those enterprise agreements might colour the practices that the employer puts in place. If they have got extra flexibilities through their agreement and, presumably, as counsel for the TWU said, pass the BOOT, then they well may use those flexibilities. You can't rely on what those employees do to establish what the rest of the industry does.

PN523

I think when we tried to work through the evidence, and we have dealt with it in detail, really, it's of such paucity, it is lacking such detail around when the journeys were taken and so forth, it doesn't really provide any clear way of exploring whether or not this work would have ever been ordinary hours, for example, under the local award or whether it was actually performed outside the span of hours and so forth. All those sorts of issues just aren't clarified. So, really, we think the evidentiary case advanced doesn't even establish that there is a

problem in this industry. And I will say this, that the two awards have always interacted in one way or another for a long period of time and really there has never been a history of a problem being ventilated in the past that we are aware of that warrants this sort of issue being modified. And that was the position that we came to in the two yearly review and we don't think Full Bench should reach a different conclusion from that reached by Senior Deputy President Harrison at the time.

PN524

The other point I just respond to is the TWU, I think, criticised us for raising this question about whether employees in this industry really are aware of or can record the hours of work of the drivers. Now, I think they suggested that we faintly raised that. Let me clear, we are raising that as a very real concern. The reality of the matter is that where drivers are paid under the long distance award a CPK rate, the employer isn't going to necessarily be able to have an accurate record of every hour of work actually undertaken for those drivers.

PN525

Now, they are not going to have a system in place, an electronic system, if you will, for example, for monitoring those sorts of issues because they don't have to for payroll purposes. The drivers aren't paid by reference to their hours of work and under the regulation we can't see any requirement under a Fair Work regulation that would require the recording of those hours of work. Now, it is put that the employers should for the purpose of transport regulation be aware of those hours of work. Now, to the extent that that is true, that relies, and I think it is said to rely, on the completion of work diaries and so forth.

PN526

As high as that gets is they might have a record of what the drivers say they work. Now, they don't necessarily have a record or an ability to verify that that is completely accurate. Now, I don't raise that lightly because what we are doing here is setting a safety net that is payable based on those hours potentially. And if employers are dealing with a workforce that is remote, it is not easily monitored, it is not going to be easy for them or it is not, in our view, a safe basis to just rely on that sort of record that is provided.

PN527

I hear what the unions say that, well, employers in this industry claim that for safety purposes they know the hours, but then when it comes to payment, they don't. I mean, I am equally amused. I have spent countless days in front of the RSRT hearing the union and others say that there is massive falsification of work diaries and that that system is not enough. But then at the same time, they come here and say, well, the hours worked for payment purposes should be based on work diaries. And we just think that's not satisfactory.

PN528

But putting that aside, the bigger problem and the practical problem is this, and it arose in that jurisdiction as well, even if you are using work diaries, that is not going to talk to your pay roll system. So if you have got a pay roll system that is automated and is based or needs to monitor hours of work, run sheets and so forth

that a driver who may be away for many days or longer fill out and subsequently send back will then have to be translated into the pay roll system.

PN529

I would say that not all employers have that kind of capability and I don't have evidence of that but, of course, there is no evidence from the union about any of these things either. So, what I would say in that kind of evidentiary vacuum, this Full Bench couldn't entertain that sort of making a sort of proposal that would assume or adopting a proposing that would assume that an employer is aware of the precise hours worked.

PN530

That is all I was going to put on that point unless there were any further questions.

PN531

That takes me to the pick-up and drop-off allowance. Again, we have dealt with that fairly comprehensively in our submissions. And I don't want to go over all of that material, but again we say that there are real deficiencies in the clause that has been advanced and the clause is set out at paragraph 14 of the TWU's primary submissions. In effect, as I understand it, there would be an hourly rate that's payable for all additional hours worked and there are two scenarios. There is the scenario where there are multiple pick-up destinations or pick-up or drop-off locations or there is a proposal for it to apply where there are multiple pick-ups along the way, as such.

PN532

The problem that I see is it doesn't really explain how you calculate the additional hours. It doesn't say when the additional hours are triggered. The question that comes to mind is, additional to what? Now, it seems to be that today the intention may - it is apparent that the intention may be that it is additional to the deemed hours and so forth. But that wasn't clear at all in the face of the document and it is not clear in the claim. That is just bottled up, if you will, because quite clearly the proposal is completely deficient. If you put it in the award, I wouldn't have a clue how to calculate that and I don't see how any reasonable party could and that is the claim we are actually responding to and we have mounted a case in response to.

PN533

The other problem that strikes me in the wording of their proposal is that it is intended to operate by reference to the notion of work. Now, this is an award that remunerates drivers essentially by reference to driving and loading and unloading activities. Now, there is compensation for other responsibilities that is factored into the industry allowance that is set out in clause 14.1. That is just included in the rates, if you will, but there is not a separately identifiable amount that is payable.

PN534

So, our concern is that if this new hourly rate would attach to activities that are already compensated for in the industry allowance, those extra responsibilities such as arranging loads and so forth, there appears to be the potential for double dipping which is obviously unfair, in our submission.

PN535

I suppose the key or one of the other key arguments that we advance is that we say the remuneration structure in this award is already adequate and if I can step you through the structure in a limited way because we have gone into quite a bit of detail to explain how it works in our written submissions, but we say that it is apart from journeys that are covered by the deemed hours and deemed kilometres provisions, all hours worked or kilometres driven are actually paid for under the structure.

PN536

Similarly, all loading activities are actually covered under the remuneration structure. It doesn't matter if there are multiple pick-ups and so forth. You have to pay employees appropriately for the loading and unloading activities associated with those. There is a facilitative provision, in essence, that allows a deal to be struck around those things, but there is nothing unusual about that in awards and there is no complaint from the union that this is inappropriate.

PN537

As I said, and I have already alluded to it, there is an industry disability allowance which compensates for other responsibilities. Now, there is not a lot of guidance provided, of course, as to precisely what that includes. There is a few examples and then the words "et cetera". But I think we have to operate on the basis that prima facie this award is a fair and relevant safety net and there is nothing that has been advanced to really establish in a clear and carefully calculated way that any of the rates that have been calculated are inappropriate in this award. That sort of level of detail just hasn't been engaged in by the union.

PN538

The only possible situation where somebody conceptually might not be being paid for work performed is where they are paid pursuant to the clauses that provide for deemed arrangements, be it hours or kilometres. Now, the difficulty is, the TWU aren't seeking to throw out the deeming provisions. They are just wanting to have an extra provision put on top so that if ever the deeming provisions operate in a way that might be detrimental, in their view, to an employee, it gets topped up.

PN539

But, of course, they want to keep the deeming provisions and that's good because we say the deeming provisions are very important to industry and we go through in our submissions why they are important. They are a fundamental part of the remuneration structure. But no one is trying to get rid of it. The union aren't. They are just trying to cherry-pick a situation where if they think it could be detrimental then they should be topped up. But, of course, that's not the way it works. It strikes a balance between both the needs of employers and employees and it strikes a balance for what it is necessary for industry for all the reasons we say in there in terms of providing certainty to employees to contracting and certainty for employees as to what their entitlements and so forth are. And, to be frank, it provides a lot of ease in relation to payroll purposes. You don't have to go and calculate every single run down to the nearest kilometre.

PN540

We say what they are failing to acknowledge is this deeming provision in many ways will operate very favourably actually to employees. Take, for example, wherever you have got a pick-up destination, the depot, if you will, that is closer to the ultimate principal destination than the GPO, they are going to be being overcompensated in those sorts of situations. It is to a degree swings and roundabouts. And as Mr Ryan has alluded to, there is certain assumptions that are built in. There are assumptions that are built in about the number of hours that are taken to do certain journeys. There are assumptions that are built in about the number of kilometres and so forth, and there is an assumed speed.

PN541

It may well be put by someone like myself that over time that rate has gone up. It has crept up, as Mr Ryan says, and I will certainly tell you that employers tell us that 75 is too low and that a claim should be advanced to markedly increase that and reduce the rates. Now, equally, and that is a product of trucks becoming more powerful and so forth, the same way it has in the past. It is not like that process has just stopped. And, of course, there has been improvements in infrastructure as well, roads and so forth.

PN542

So, it may well be that there are some inaccuracies in that, but we don't have evidence before us, or this Full Bench doesn't have evidence before it to establish that that is necessarily the case to the extent that it warrants tearing apart this remuneration structure and no one is calling for that to happen. But what we say is deeply inappropriate is now to just try and cherry-pick one issue and to lay a new entitlement on top of all of that without looking at a wholesale assessment of the remuneration structure. And they haven't engaged in that sort of process and on that basis we say you can't be satisfied that the remuneration structure isn't operating very effectively and perhaps even favourably for employees because the case just hasn't been mounted.

PN543

Again, in relation to this claim as well, we still hold the same reservations about the extent to which employers can be satisfied that or can be aware of all of the hours worked for these employees who are working remotely and so forth and I won't repeat all of those comments. The same concerns apply and the same concerns about the administrative difficulties that flow from having to become aware of that would arise. Really, what the claim is doing is it just undermines the entire integrity or the utility of the deeming provisions and that is why we oppose that claim.

PN544

That is all I wanted to put in opposition to the TWU's claims. I don't know whether it is better to move on to my claims or just to allow us to firstly finish this matter.

PN545

SENIOR DEPUTY PRESIDENT HAMBERGER: Can you do your claims as well? I think it will work better that way.

PN546

MR FERGUSON: Yes. We have essentially proposed two sets of variations to the Road Transport and Distribution Award. The first set of amendments relate to the higher duties provisions which are contained in clause 19, and the second set relate to the proposed changes to the provisions governing meal allowances. That is clause 26 of the award. We have filed draft determinations on 21 December. We subsequently filed comprehensive submissions in support on 13 January. The claims were opposed by the ARTIO and TWU in written submissions and we have just yesterday filed submissions in response to those.

PN547

Again, we have drafted those carefully so I won't repeat all of them now and I want to make the point that I don't intend to narrow any of what I have put there by making shorter submissions today. But it might be convenient if the Bench has those submissions to hand. What I just want to do is touch upon some of the key arguments and explanation for the change and I will do that to some degree by reference to our submissions, starting with the submissions from 3 January - or 13 January, rather.

PN548

If I take the Bench to paragraph 3. I deal firstly with our higher duties proposal. Paragraph 3 sets out the current provision and it's short. I won't read it, but the clause essentially provides that where an employee is required to perform two or more grades of work on any one day, the employee is to be paid the wages of the higher grade for the entire day. Now, as we know, the classification structure is based to a large degree on the vehicles that someone drives. And what falls from that is that if somebody hops in a vehicle or operates a vehicle just for a very short period of time, even the space of just a few minutes, that is higher than - and that vehicle is larger or in the higher classification than what they were otherwise driving for the remainder of the day, they get a whole day's pay at that higher rate.

PN549

We say that that is profoundly unfair and the variation we seek to address is set out at paragraph 10 of those submissions. There is two limbs to the proposed clause, the first, 19.1 which says that the intention is that where an employee performs two more grades of work, they have to be performing the work for a particular higher grade for at least two hours to receive the higher full day's pay at the higher rate.

PN550

Obviously, our aim there is to just impose some sort of modest restriction on the way this clause operates in terms of slightly restraining the circumstances where this very beneficial arrangement would be applied. And the second limb of the proposed clause seeks to deal with the common scenario - - -

PN551

SENIOR DEPUTY PRESIDENT HAMBERGER: You think it is clear, assuming your amendment was made, that let's say you did drive a higher grade vehicle for, let's say, an hour and 45 minutes, that that hour and 45 minutes you would get paid that rate, the higher rate, for that vehicle?

PN552

MR FERGUSON: We say that that is clear from the structure of the award.

PN553

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN554

MR FERGUSON: We have only sought to limit the operation of the higher duties clause. If that is not clear, that is a deficiency from the structure the award and I - - -

PN555

SENIOR DEPUTY PRESIDENT HAMBERGER: It can be clarified.

PN556

MR FERGUSON: It could be and I hesitate to suggest this but it probably is being clarified through the exposure draft process. I just can't recall where that lands. If memory serves, that process has a provision where or they are rewriting the payment of wages provisions. I just am not sure where and I don't want to go down that path. But no one seems to disagree or quibble with the proposition that you get paid based on the truck you are driving.

PN557

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN558

MR FERGUSON: Everyone says that is a longstanding arrangement and we haven't sought to change that and I don't think we have through our drafting but, of course, the Commission is not - - -

PN559

SENIOR DEPUTY PRESIDENT HAMBERGER: No, but the implications would be different. At the moment, you get paid the same the whole day depending on what is the highest classification you have been working in. Under your model, you might drive for up to two hours and you wouldn't get paid that for the whole day, but I just want to be clear, you would say you would still get paid that for up to two hours.

PN560

MR FERGUSON: Yes, I was going to come to that and we say that that is what happens. Now, we haven't put that in.

PN561

SENIOR DEPUTY PRESIDENT HAMBERGER: But it doesn't happen because that is not how the award currently works. You get paid that for the whole day.

PN562

MR FERGUSON: I see what you are saying.

PN563

SENIOR DEPUTY PRESIDENT HAMBERGER: What I am saying is it - - -

PN564

MR FERGUSON: I see what you're saying and, I suppose, I don't want to take this much further, but you're right, the award deals with that situation now because of the higher duties provision anyway.

PN565

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN566

MR FERGUSON: So it doesn't necessarily need to say expressly - I'm just moving through to the payment of wages provisions to see whether that has a clause that basically says - - -

PN567

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, but what I'm saying is it doesn't really - oh okay.

PN568

MR FERGUSON: Do you see what I'm saying?

PN569

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN570

MR FERGUSON: I don't want to labour the point, but it has a clause that says you get paid based on the classification structure. It's not a problem, but that's neither here nor there in one sense, because of course the Full Bench isn't bound to grant a remedy precisely in the terms that we've (indistinct), and of course - - -

PN571

SENIOR DEPUTY PRESIDENT HAMBERGER: I was just giving you an opportunity to comment, that's all.

PN572

MR FERGUSON: Yes, which I was going to come to it if - if that is a serious deficiency, then we would not oppose something that makes clear that you still get paid, and it's our submission, as we say, that this is the way we see the clause works.

PN573

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN574

MR FERGUSON: So it's no secret. The union could have dealt with this at any time. There may be some merit in the interests of making it simple and easy to understand that we clarify as well that people get paid for the actual time worked based on whatever vehicle they're driving, but the higher duties provision only kicks in to deliver the day's pay when there's over two hours. In a sense - I am informed that at least one member's very familiar with the NSW system - it's akin to what applied there to a degree, or to an element of that clause, in that you have to get to more than two to get the day; less than two, you just get paid for the time spent in the higher classification. And look, that's not novel in the award system.

I mean, we've put the Manufacturing Award in here. That's essentially what that provision provides. It doesn't seem to be causing any difficulties. No one in these proceedings has raised any difficulties with the NSW State Award in terms of applying it and identifying how you pay people. So we would support a clause to that sort of effect. Really we're just trying to deal with this issue of people working a very short period of time and getting a whole day's pay at the higher rate.

PN575

I'll try and skip ahead a little bit, but we've looked at the award system; we've looked at higher duties provisions, and something like 96 clauses have higher duties provisions. I think it's 88 of them with a time-based restriction on that so that you have to work higher. Those that remain, probably not a coincidence that they're derived from former TWU transport instruments, but they're anomalous when you look at it that way, and it really is hard to see any justification for why this industry should have this much more generous provision. It might be said oh well it's a different industry, and, you know, true enough, there can be no one set of permutation award clauses that should automatically apply, but no one's actually explained why you have to have a different approach here; like, no one's actually, apart from just saying that they're different, pointed to any characteristics of employers or employees that justify retention of this anomalous provision, and it really would be very hard to sustain given that the major instrument that applied to NSW, the largest state I tend to suggest, didn't operate that way. It operated the way we're proposing, and no one's pointed to a problem. We say that there's merit in - it's hard to establish how it's necessary to meet the modern awards objective for the award to retain a clause that is as generous as this, given that it is so anomalous compared to the remainder of the system.

PN576

COMMISSIONER LEE: There's not really any evidence of a problem with the current regime, is there?

PN577

MR FERGUSON: Yes, but we don't say that it's a problem in a factual sense. We raise this as a merit-based argument. No, but - - -

PN578

COMMISSIONER LEE: How does that fit within their requirements to - so prima facie, the modern award that was made met the modern awards objective - how are we to just drive around that particular component for what we're required to have regard to?

PN579

MR FERGUSON: In the context of this review, a party advancing a claim needs to make the merit-based argument properly directed to the legislative framework and the relevant criteria, modern awards objectives and so forth. To the extent that they base that argument on factual propositions, they of course need to ground it in an appropriate evidence-based case. Where a claim is reasonably contestable, you might say that evidence needs to be advanced in support of that. We don't make this claim based on factual assertions. We make it based primarily on arguments about the merits of the clause that we're advancing in the context of

the scheme of the Act. We say on the face of the award the clause is unfair to employers, and it's unfair and difficult to substantiate how it could be fair when you put it in the context of the rest of the award system.

PN580

If you needed to advance evidence in support of every claim then I don't know how this Commission has been completely re-writing a swathe of work clauses with absolutely no evidence before it. I've been involved in virtually - or I maybe know is perhaps a little high but very little - I've been involved in almost - well most of those cases, and we've looked at the annual leave provisions being completely rewritten, admittedly at our claim, and we had some evidence, but not for all of the matters that were advanced. The award flexibility provisions have been completely rewritten. The Commission is currently going through a process of rewriting the payment of wages provisions. Perhaps I wasn't in those proceedings this morning, but that seems to be where we're heading, and, you know, there were apprentice provisions that were rewritten with no evidence advanced. It's wrong to say that it's an absolute requirement that you advance evidence. It depends on the nature of the claim, and we there set out the comments for the penalty rate - the Full Bench in the penalty rates decision that goes to that point and says the industrial merit in some matters will make it plain that a variation is warranted, and that's what we say.

PN581

We don't say here that the current provision isn't capable of being interpreted, and perhaps it's come to my attention more starkly than Mr Ryan's because my involvement isn't with NSW-based employees where there has been a change, and then he raised these very practical issues around what happens if you're moving a vehicle across the yard, and I don't think it would be seriously contested. From the TWU submissions they appear to accept that vehicles get moved across the yard and so forth. Everyone would know that happens, so you don't need to advance evidence of that because it's not disputed; it couldn't sensibly be disputed. But if that arises, people have queried well how could we have to pay a day's pay for that; it's ridiculous. But that's the reality of the way the award works on the face of it, and as I said to you, no one seems to be disputing that there is some need for people to perform short periods of work.

PN582

DEPUTY PRESIDENT SAMS: But if it is unfair now, why was it not unfair when it was reviewed previously, unless you can demonstrate there's been a change?

PN583

MR FERGUSON: You don't need to demonstrate in this review that there's been a change in circumstances to warrant the deviation to the award. The first point is this has no doubt had its origins under an entirely different statutory regime than the current regime, which has specific criteria that the Full Bench has to consider when determining whether a clause is necessary. That's the ultimate test, whether it's necessary to meet the modern awards objective, and we've mounted a case addressing those particular criteria. The fact that it's been in a play for a long time is a relevant consideration, but what weakens that consideration is I don't think

anyone's been able to point to any serious consideration of it by the Commission in terms of the merits of the claim.

PN584

DEPUTY PRESIDENT SAMS: But that only demonstrates the point. If it's always been unfair, why didn't somebody raise it?

PN585

MR FERGUSON: I've only worked in this realm so long. The point is the two-yearly review, and I could go on through this, people know what that process, the award modernisation process - and we've addressed it in our submissions - was a mammoth task. There just wasn't the capacity in that task to look at the industrial merits of every single clause in modern awards, and no one's pointed to any detailed consideration of this particular provision. So it has just been inserted into the award, in effect, we would say, because it was a product of predecessor instruments, and that was the approach. Again, in the two-yearly review I don't think there was any detailed consideration of this issue, so it falls for consideration now, and I think the penalty rates decision dealt with this issue as well. One doesn't need to establish that there has been any change in circumstances since the awards were first made to establish that a variation is warranted or necessary. If there has been a change in circumstances, that may well establish - and this is the submission we advanced and was accepted by the Full Bench - that may well establish that a change is warranted, but it isn't a condition precedent. You don't have to show that something has changed. This is just an issue that we've raised now, and it's been put in issue for this Full Bench.

PN586

DEPUTY PRESIDENT SAMS: But don't you criticise the union for it doing exactly what you're doing?

PN587

MR FERGUSON: There is a different situation, depending on the nature of the claim - there is, depending on the nature of the claim. And I understand this, and it's able to be put, but there is - there are some claims that are going to necessitate or evoke this Full Bench looking at factual considerations in order to satisfy themselves - - -

PN588

SENIOR DEPUTY PRESIDENT HAMBERGER: I suppose one problem - I mean, I don't have a problem with the basic principle, which is there are some variations that should be made and you don't need previous evidence to justify them, but in this case where you've not presented any evidence - I mean, you've presented an analysis of other awards and so, but you haven't presented any empirical evidence - it means we don't really know what the practical effect would be. We can speculate, as it were, but we don't really know how many people will be - we've got no idea of how many people will be affected, what will be the practical - I guess, that would be a worry.

PN589

MR FERGUSON: That's right, and look, it's not the first case.

PN590

SENIOR DEPUTY PRESIDENT HAMBERGER: True.

PN591

MR FERGUSON: And it's probably one of the smallest cases that we've mounted without significant evidence being advanced. It just isn't required all the time. The practical effect though is clear: it will just depend based on - on the face of it, it ought to be based on what classifications the drivers were doing. But you're right in that, absent evidence, we can't establish for you what impact that will have in terms of savings for the whole industry. We can't. We say you don't need to know that in order to be satisfied that a clause that operates in this matter is unfair, because on the face of it it's unfair for someone to get a day's pay at a higher rate for doing five minutes' work, and that's what the award requires. We haven't plucked the two hours from thin air. We've looked at what was common in the system and we've adopted a common, modest system; we haven't looked at the three or four-hour limitations, and no one's advanced any evidence to say that this is going to be a big problem, that there's going to be some actual difficulty imposed.

PN592

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, I think the onus is probably on you though more.

PN593

MR FERGUSON: I think we have the onus to the extent that evidence needs to be led, but if people say that it's a problem I think they say that there's some difficulty for low-paid workers. I may be mixing up my claims, but I'm not trying to squib that. In essence, we say that because of the merits of the case you don't need to be satisfied of all those issues, and even the Full Bench has said well, in the penalty rates case, where the merits can be reasonably contested, you should lead evidence if it's feasible. No one's going to be able to lead evidence about all those sorts of particulars across an industry as diverse as this where it might change from day-to-day. It's just not - it's not going to be feasible, and to say that we have to in order to mount a claim just throws up a bar that means this can never be addressed. I've probably taken that as far as I can, but the situation's not lost on me. It's just that we still say the clause is inherently unfair and should be addressed.

PN594

COMMISSIONER LEE: Sorry, can I - just to understand the clause proposed?

PN595

MR FERGUSON: Yes.

PN596

COMMISSIONER LEE: So 19.2, from looking at your paragraph 10, means that - I'm trying to work out how it works - so that excludes the operation of clause 19.1 for employees who are doing the parking/refuelling-type activities?

PN597

MR FERGUSON: Yes.

PN598

COMMISSIONER LEE: So then what do they get - what's their higher duties?

PN599

MR FERGUSON: If they were to perform work on a - sorry, I was going to leave that; I meant to come to that next.

PN600

COMMISSIONER LEE: Sorry, okay.

PN601

MR FERGUSON: No, I appreciate you raising it. There are two scenarios. Basically, we say that where a person performs any sort of higher duty for less than two hours, they shouldn't receive the allowance. We dealt with that.

PN602

COMMISSIONER LEE: Yes.

PN603

MR FERGUSON: The second is where somebody performs work, they're essentially moving a vehicle on private property, they shouldn't receive the higher duties. So they're not driving on the public road.

PN604

COMMISSIONER LEE: Yes.

PN605

MR FERGUSON: They shouldn't get it, and we say that's because that work - firstly, we say that work is of a lesser value from a work/value perspective. I know RTO seems to be of the view that the higher duties clause doesn't apply unless you drive on a public road, but we can't see it is in the classification structures that supports that, and I might be doing a disservice to my friend by simplifying things. There's no reference to public roads or licences or anything in the classification structure. It's just about driving a vehicle, and it was borne out of a really practical issue that came up and saying well do we really have to pay a higher duties allowance if someone moves a truck across a yard, and we say you shouldn't have to, and that deals with that situation. But that's not sufficient to deal with all of these issues, because it wouldn't cover, for example, a situation where a company might have a depot very close to another depot and they just move a truck from one premises to the next, because they're going to drive on a public road. So that's why we've gone for both limbs, because there are - - -

PN606

SENIOR DEPUTY PRESIDENT HAMBERGER: So if you were driving a big truck all day but within the depot, you know, from one end of the depot to the other, what would you get paid?

PN607

MR FERGUSON: I don't know if that fact actually arises, but the only - - -

PN608

SENIOR DEPUTY PRESIDENT HAMBERGER: But - - -

PN609

MR FERGUSON: - - - the only test from my perspective - sorry to cut you off - sorry - - -

PN610

SENIOR DEPUTY PRESIDENT HAMBERGER: But then if you're just talking about, you know, just hopping in a truck for a bit to refuel or to move it around, that's covered by the first bit of your proposed variation. What I'm trying to understand is what the second - the second bit is obviously somebody who's driving off the public road but for more than two hours; otherwise it doesn't matter, you don't need to have it.

PN611

MR FERGUSON: Yes.

PN612

SENIOR DEPUTY PRESIDENT HAMBERGER: So this must be somebody who's driving around for more than two hours, maybe quite a lot of the day, maybe all day?

PN613

MR FERGUSON: There was a degree to which this clause evolved out of a conferencing process, you remember there was - and there were different scenarios that we were trying to address that were raised with us?

PN614

SENIOR DEPUTY PRESIDENT HAMBERGER: Mm-hm.

PN615

MR FERGUSON: And to an extent one might go a long way in modifying our - if we get one - modifying the concerns we're trying to address in 19.2. In any event, it's just we obviously aren't certain as to which approach the Full Bench might be hopefully minded to adopt. The question you're asking is whether a person who just moves trucks around the yard, what would they get paid, and my mind goes to whether or not that falls within the original definition of a yard person and so forth. There's not much guidance provided there. I don't think it does.

PN616

SENIOR DEPUTY PRESIDENT HAMBERGER: Okay.

PN617

MR FERGUSON: They get paid, yes, but to the - 19.1 would go a long way to fixing that problem.

PN618

SENIOR DEPUTY PRESIDENT HAMBERGER: They would get paid something. That's good to know.

PN619

MR FERGUSON: I just don't think that happens, they actually do two - to be honest.

PN620

SENIOR DEPUTY PRESIDENT HAMBERGER: (Indistinct)

PN621

MR FERGUSON: That's what - I'm just, yes, answering the question.

PN622

SENIOR DEPUTY PRESIDENT HAMBERGER: Okay. So let's not worry about it. We'll worry about 19.1, the first one anyway.

PN623

MR FERGUSON: Most of our submissions go through the classification, modern awards objective and so forth. I won't take you through any of that. You've heard it before. That brings us to our second claim, which is the meal allowance claim. I'll take the Bench to clause 26 of the modern award.

PN624

SENIOR DEPUTY PRESIDENT HAMBERGER: So this is compensation for drivers in NSW who lost out on the higher rates of pay, so they get better conditions on the meal allowances?

PN625

MR FERGUSON: Yes. This is where we point out that the purpose of an expense-related allowance probably isn't to up the minimum rates of pay in an award, and we go through in our written submissions the principles around what minimum rates should compensate for as espoused by the - I think it was Ecorp(?) remuneration case, but that deals with Mr Ryan's helpful contributions. Expense-related allowances aren't for staff recruitment, staff retention purposes. They're not just for upping the rates or for compensating the poor souls from NSW. In terms of the clause, I think it's important to note to start with that the meal allowance provisions are in clause 26. That clause deals with breaks generally. Clause 26.1 deals with regular meal breaks, so during ordinary hours, if you will.

PN626

Clause 26.2 then deals with meal breaks after ordinary hours and before overtime hours. It's the overtime meal break that you might commonly find in awards. There were a number of changes to that provision in the two-yearly review of modern awards. The title was changed. I think, if memory serves, paragraphs 2.6(b) and (c) were changed and there was some controversy about what rate should apply to that meal break, and I think, Deputy President, that fell to a Full Bench on appeal that you presided on or were on, as I recall. But none of that's really relevant to the fact in issue here. What the point is is this provision deals with breaks that are afforded in effect for purposes of providing a meal to an employee when they're going to work two or more hours of overtime, and it's essentially in that regard a provision that's evolved out of a longstanding provision in the Transport Workers Award 1998, and in our submissions we set out that clause and we establish that there's no real change in the purpose of the clause.

PN627

26.3 then deals with meal allowance, and that then takes us to 26.3(a). The provision provides:

PN628

An employee required to work overtime for two continuous hours or more must either be supplied with a meal by the employer or paid the amount specified for a meal allowance in clause 16, allowances for each meal required to be taken.

PN629

There's a contest between the parties - and I'm conscious of the time, but - - -

PN630

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, well I was going to come to that. When it got to 4 o'clock I was going to see where we were at.

PN631

MR FERGUSON: I'll be quick. There's a contest between - although we're probably not going to get through every one, are we?

PN632

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, see how we go.

PN633

MR FERGUSON: The contest between the parties is to what that provision means. We say, in essence, that you only get the meal allowance in circumstances where you're effectively entitled to the overtime meal break in the preceding clause, and we say the support for that interpretation is in the structure of the award, in the text of the clause and in the history of the provision, if you will. In this regard, we say we don't think it's a coincidence that both 26.2 and 26.3 deal with the issue of entitlements to meals where employees are working overtime, that both deal with entitlement to meals more specifically where two continuous hours or more of overtime are being performed, and we don't think it's a coincidence that the meal allowance provision is contained in the breaks provision and not in the clause dealing with allowances. We say there is intended to be a connection between these two clauses, and of course we say the text that provides support for that is that in 26.3(a) you only get the allowance for each meal required to be taken.

PN634

There's no real guidance as to what "required to be taken" means, and I think Mr Ryan or RTO suggested it means well it depends what the time of day is. I draw from that that it's breakfast, lunch or dinner. We say the difficulty with that is reasonable minds might differ on what's breakfast time, lunch time, dinner time. The far more likely interpretation is that "required to be taken" is connected to the preceding clause, that you get it when you have a meal break, an overtime meal break, and that's what it used to be called if memory serves, but it's set out in our submissions. Of course that sort of approach is not novel in the award system. Again, take the Manufacturing Award: the meal allowance provision is expressly ref-linked to the overtime meal break clause, and we think that that's

what the words, "two continuous hours or more", and, "the meal required to be taken", were intended to capture, but we don't think it gets there clearly.

PN635

We say that there's potentially an ambiguity or uncertainty in relation to the way clause 26.3 actually operates, and that might warrant modification under section 160 of the Act, but you don't need to, because we say that you should vary the clause in the way that we contend in order to make it simple and easy to understand: to effectively apply (a) and ensure that (a) is modified so that you have to work two continuous hours or more after working ordinary hours, the way it does in 26.2. That is opposed. I think the others perceive that to be removing an entitlement, whereas we say it's just making the current entitlement clearer.

PN636

I might just take you quickly to paragraph 65 of our submissions because it sets out in tracked changes format what we're seeking to achieve. So it's at paragraph 65 of our 13 January submissions. The underlined words show what we're trying to interpret is after working ordinary hours. You can disregard the underlying words, "two or more." That was a product of an earlier draft and it's just there in error. That's the first claim we're advancing with relation to this clause, and that would have the effect of meaning that an employee who works an overtime shift on a Saturday or Sunday doesn't get a meal allowance, and we say that that's entirely appropriate because in those circumstances they're going to by necessity have been given some advance notice. And I think it's clear that in many awards - such as, we talk about the NSW award you get on the preceding day - that's sufficient. But in any event, we then seek a modification to 26.3(b), which basically affords an employer the ability to provide a meal to an employee rather than pay the allowance when they're called in early, and that's just trying to make the provision match up with (a), and I won't say more about that.

PN637

Probably the more important and more significant proposal that we're seeking is that an employee not be entitled to a meal allowance if they are provided with 24 hours' notice of the requirement to work more than two hours of overtime or to commence work two or more hours prior to their normal starting shift. In essence - and I won't go through all the arguments - we're saying if you're given advance notice, and 24 hours' notice is more than what a lot of awards require, you won't be put to the expense of purchasing a meal because one can be provided, and you won't incur the cost of a meal wasted at home, if one was prepared for you, because one won't be, and that's the traditional justification, we say, for these sorts of allowances. If you're not going to incur the expense it can't be necessary to meet the modern awards objective for there to be an expense-related allowance, and we say that's the flexibility that this affords in terms of delivering a saving to the employers, but also not putting anyone out of pocket, so to speak, from an employee's perspective because they're not incurring the expense. There's properly an expense-related allowance. This should be neutral for employees. And of course it has the positive effect for encouraging people to give notice to employees of overtime that will be worked, and that's to be endorsed, we say, because it will help employees - - -

PN638

SENIOR DEPUTY PRESIDENT HAMBERGER: At the beginning of the year. Sorry, I was - - -

PN639

MR FERGUSON: It's entertaining. I've never heard of that practice. I'll remember to advise people. But these provisions are not novel. We have sought something that's modest compared to what's in most awards, and sensible. In the transport industry, giving people notice of overtime is sensible for extra reasons. It will help people manage fatigue and so forth, and their other commitments in life. So Mr Ryan's submissions say that 50 hours is normal in this industry, that people know and expect to work that much. If that's the case, then this sort of provision seems completely apt. It's not just something where people are performing work on an ad hoc basis.

PN640

That's it. We've put other submissions - said other arguments in detail. I won't go through anything further, unless there are any additional questions.

PN641

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks very much. I don't want to sort of - I mean, obviously it would be nice to finish tonight - yes, everyone's nodding, that's good - I don't want anyone to feel that they're getting rushed and not get a chance to put what they want to say. I don't know, Mr Calver, how long you're proposing to go for? I think you're probably next.

PN642

MR CALVER: Yes. I've got some quite specific instructions about what I need to say about our survey and that might be a bit longer than I'd otherwise like, but I think if we sit to 5, your Honour, we could finish tonight.

PN643

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, Mr Gibian's still got to - I'm happy to sit to 5; I'm happy to sit beyond that. We might just have a five-minute break and then we'll come back.

PN644

MR CALVER: Yes, of course.

PN645

MR GIBIAN: I have some difficulties staying very late, I'm afraid, for personal reasons.

PN646

SENIOR DEPUTY PRESIDENT HAMBERGER: What's the latest you can go till?

PN647

MR GIBIAN: Probably 5, really.

PN648

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, we're still going to need a five-minute break, but we'll all talk about it.

PN649

MR GIBIAN: Of course. Yes, I wasn't suggesting not.

PN650

SENIOR DEPUTY PRESIDENT HAMBERGER: Okay.

SHORT ADJOURNMENT [3.55 PM]

RESUMED [4.02 PM]

PN651

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, Mr Calver.

PN652

MR CALVER: Thank you. I might start where Mr Ferguson left off. Most of my submissions relate to the evidence, and just to recap the tests that we're currently dealing with, there are as identified in the preliminary issues decision those variations, which are self-evident, those where subsequent decisions, and especially the decision of the Full Bench in the Social Service Industry Award, require evidence, and in paragraph 21 of our written submission we've highlighted the proposition that it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provision on employers and employees covered by it, and the likely impact of the proposed changes. The central proposition of my oral submissions that supplement our written submission of 2 March is that the evidence adduced by the TWU is completely inadequate to meet that test. Nothing changed in relation to that from the criticisms we made in our written submission following the calling of witnesses and the later cross-examination.

PN653

In that context we also wish to comment on the evidence that we have adduced, that of a Dr Davis. The survey report of Dr Brent Davis and its related materials is in evidence in these proceedings is NATROAD1. The TWU did not seek to cross-examine Dr Davis. His evidence was submitted and is submitted because of the way it shows that NatRoad only proceeds, as I mentioned before, as a member organisation if it's assessed how its members regard the issues and questions. It was proffered as expert evidence and that wasn't challenged. Unfortunately, as outlined in the written submissions of NatRoad on 2 March, particularly at paragraph 15, the cogency of Dr Davis's evidence is less than desirable because of the manner in which the TWU changed the case to answer from December last year to January this year. In that context, its use must be circumscribed, and I wish to put to the Full Bench the manner in which, and NatRoad would submit, the evidence should be used.

PN654

A number of matters dealt with in the quantitative report prepared by Dr Davis were rendered irrelevant given the change in the TWU's claims. There was a change from the draft determinations lodged on 21 December 2016, copies of

which I have asked your associate to provide to you and the Bench, your Honour, and they're with you with scrawled page numbers on them so that I can reference them a little later. NatRoad has provided the survey materials via Dr Davis and they're attachments to his witness statement dated 27 February, which is in turn attached to NATROAD1. The document Dr Davis marked as BD2 in his report is the quantitative survey results. On page 3 of BD2, Dr Davis notes that the content of the survey was structured against the draft determinations by the TWU, lodged with the Fair Work Commission, dated 21 December 2016. Regrettably, the TWU claim regarding fatigue management was the only claim to remain unchanged albeit subject to one issue that I will get to, and that's about the pick up and drop off allowance.

PN655

The report, BD2, by Dr Davis indicates at page 4 the propositions that he distilled from the industry or TWU claim that were then turned and to arrive at questions as part of the process of eliciting information. The four propositions were as I say, and are expressed at page 4 of BD2: the payment of an allowance to employees required to travel as a passenger, not proceeded with; the payment of an allowance to employees engaged in two-up driving where the employee's not driving, not pursued in these proceedings; the payment of an allowance to employees required to spend more than one hour waiting to effect pick up or drop off of a load, only partly proceeded in these proceedings but without the clear trigger of defining the payment as applying after waiting for one hour to pick up or drop off a load, and that clear trigger is something that is absent, as we note in our written submissions, absent completely from the manner in which the pick up and drop off allowance is currently expressed. It's expressed by way of additional hours, but as the AIG and ourselves have both pointed out in the written submissions, additional to what? There is no clear trigger as there was in relation to waiting for one hour. And finally, a requirement for employers to provide their drivers with a specific fatigue management plan - and I say these words with emphasis - for each journey, and that's a distinction that I'll come back to because I think, unless those words are emphasised, what counsel for the TWU has said is a misconstruction on our part. We submit it's not, because of the use of those words. What would be vindicated by the variation would be safe driving plans, rather than provision of a copy of a fatigue management plan, and there is a very large regulatory difference between those two concepts.

PN656

That latter point is pursued in these proceedings but, as I will come to explain, are misconstrued by both witnesses and by my friend, Mr Ryan, from RTO. The propositions that Dr Davis distilled from the draft determinations include expressing the pick up and drop off allowance is payable on a fixed basis. This derived from the TWU draft determination that was expressed as follows, which I note is at page 17 of the bundle of draft determinations, which I've got for you now. That page 17 is in my scrawl, your Honour, and it's where an employee is required to spend in excess of one hour waiting for pick up or delivery of a load and are not engaged in loading or unloading duties, that employee must be paid for such duties as an hourly rate, and then there's a calculation. So that clause is part of what can only be called a hodgepodge that the TWU initially proposed. There was to be a re-framing of the loading and unloading allowance. That

allowance was also to be re-framed around the idea of pick up and drop off being associated with loading and unloading, with a trigger for the payment of an hourly rate, as I said, when the driver was waiting for more than one hour to effect pick up or delivery.

PN657

So while the textural basis of the new clause relating solely to pick up and drop off was the same from December 2016 to January 2017, other provisions which would have restructured the allowances were dropped. The confusion with what is pick up and delivery and what is loading and unloading that dogs the current claim was for the purposes of simplicity in the conduct of the survey which we tailored. In short, there had to be a simple proposition for the purposes of the quantitative survey. That simplicity was not evidence in the December 2016 variations, and there is ambiguity within the terms of the current proposed variation that we pointed to in our written submissions, as has the AIG. Obviously that ambiguity could not and should not be conveyed by a social scientist in the conduct of a survey; hence he chose a simple proposition about the trigger being waiting for more than one hour for pick up and drop off.

PN658

The change in the case renders the material that was otherwise relevant to be irrelevant. This includes the material on the pick up and drop off allowance because of the way that Dr Davis framed the question around that clear trigger. Again, I emphasise that clear trigger is not present in the current drafting. The allowance would have been triggered where employees were required to spend more than one hour waiting to effect pick up or drop off of a load. As we say at paragraph 147 of the written submission, the proposed allowance is ambiguously worded. The trigger is not a simple matter like waiting for more than one hour. The trigger is some amorphous concept of additional hours. Additional to what?

PN659

It might be wrongly speculated, but the results from the survey helped the TWU. For example, with 56.8 per cent of respondents in favour of the TWU's claim for a pick up and drop off allowance is shown at page 17 of BD2, a matter mentioned by the TWU at paragraph 11 of its written submission in reply, but that cannot be the case. That cannot be relied upon, because as Dr Davis says at the bottom of page 17 after reporting that percentage and recording the limited opposition to the claim at only 21.4 per cent of our members, quote from Davis:

PN660

However, as noted in the caveat earlier these results should be treated with caution given the questions asked in the survey based on the TWU log of claims dated 21 December 2016 does not exactly match the amended claim made by the TWU dated 19 January 2017.

PN661

To be clear that NatRoad's not traducing our own survey work, we think that surveys are a fundamental element of what informs our own member base as to policies and what should inform the Commission about what an industry believes are appropriate safety net instruments. What we are doing is reinforcing some of the elements of the written submission. In that submission we indicate that the

survey results have been adduced because of the fact there's cogency and especially in some of the remarks about the matters before the Commission. In relation to pick up and drop off allowance, the trigger that Dr Davis used in the quantitative survey is not present in the manner in which he introduces the issue to the qualitative survey, so we can use the material in the qualitative survey in that respect. There is no clear trigger present in the material provided to those who took part in the qualitative work. In the quantitative work, the reliance on waiting time is the trigger, is the essential element missing from the variation before the Full Bench, a matter that I have emphasised somewhat.

PN662

If I can take the Full Bench to pages 9 to 10 of BD3, the qualitative report that's attached to NATROAD1, and it's marked - not sequentially, your Honour - it's marked with page numbers in respect of the individual reports. It is clear that the individual comments show the confusion between loading and unloading, and pick up and drop off, that we discussed in the NatRoad written submission at paragraph 143. The particular three comments that I'd like to emphasise that reinforce what we put in our written submission are: we already have a loading and unloading allowance which covers pick up and delivery. Second, it is unclear where the dividing line falls between loading and unloading, and pick up and delivery, a matter that might have been less amorphous if a clear trigger had been retained in the determinations currently before the Commission. Thirdly, it is not clear whether the TWU claim for pick up and drop off covers the waiting time. It doesn't under the terms of the current wording, but that is something that the members, if the claim had been sustained, might have instructed me to assist the TWU to advance. But that's not the case.

PN663

What does NatRoad then indicate to the tribunal about the work that's been submitted by Dr Davis? First, the quantitative survey retains relevance only in respect of the issues associated with safe trip plans, which must, and should be, distinguished from fatigue management plans, a matter not made plain in the TWU draft determination and a matter that is categorically different.

PN664

A provision which said that the fatigue management plan must be given to the employees so they understood the basis upon which the calculation was made would not be opposed, but what is being sought in TWU4 that is attached to the TWU submission calls for a great deal more. It calls for detail of the level that might have existed if the RSRT had still been in existence.

PN665

We also note the cogency of some of the remarks in the qualitative survey, three of which I have drawn to your attention. These comments helped us shape our arguments. For example, one member in relation to the fatigue management safe trip plans claim at page 11 of the qualitative survey says:

PN666

The TWU's fatigue management proposal is just the old RSRT through the back door.

PN667

That was not something that Dr Davis elicited from that member, that was a spontaneous, scientifically recorded response to the reading out of that claim. This is a matter we have argued at paragraphs 124 to 127 of the written submissions, so I won't go any further in that regard.

PN668

The TWU cannot argue that the survey material has any more weight than what Dr Davis himself indicates to the Commission in his statement and the report that it otherwise might possess. Dr Davis notes that the quantitative survey must be read subject to his caveats. We have reiterated that point in our written submissions, and I further underline that the quantitative survey has limited utility but is indicative regarding the proposed change to the provision dealing with trip rates and set by fatigue management plans. I again emphasise that distinction.

PN669

There is utility in the qualitative survey. The key messages that are presented at page 4 of BD3 are relevant, so what I would like to do, and it won't take me long, is to go to page 4 of BD3, highlight how they link with some of the bases of which we oppose the TWU claim and interpolate some remarks based on those.

PN670

In respect of the calculation of overtime, Dr Davis notes:

PN671

Participants generally were averse to the TWU proposal regarding overtime, raising serious doubts about how it would be operationalised.

PN672

A point emphasised by the AiG in their submissions. How it would work in practice was unclear to those people:

PN673

Several participants regarded the TWU proposal as a form of additional regulation, adding further strain to their business. However, several participants observed they were already making such payments, albeit informally over the award, raising the question of whether any new overtime payments would simply be absorbed into these payments.

PN674

That is obviously those of the kind where the evidence shows that some payments of this kind are made under enterprise agreements that came out in evidence.

PN675

These remarks show that the elements of NatRoad's concerns about how the proposed change would work in practice emanate from our member concerns. That is a practical illustration of the difficulty of operationalising that calculation that the Commissioner asked a question about to the TWU. That a number of members may already make payments which would provide additional benefits to employees above the award is irrelevant to whether the particular variation would advance the modern awards objective. It would not. The two awards' hours

provisions are not compatible. The TWU proposes and ignores that disjunction to the detriment of the modern award objectives.

PN676

Four, the imposition of the clause relating to overtime would be virtually impossible to calculate at an operational level. That is made clear when you look at the definition of "ordinary hours" under the Distribution Award and the way it can be averaged. What period would be referred to when you were trying to operationalise those ordinary hours after moving from the Long Distance Award where, in any event, a calculation had occurred which provided an overtime allowance to you? It's impractical and that is shown from our member remarks.

PN677

Next the pick-up and drop-off allowance. Dr Davis notes:

PN678

Participants were divided over the TWU proposal to introduce a pick-up and drop-off allowance, with several pointing out such a payment was appropriate when it reflected work done and/or they already made such payments to their drivers.

PN679

That again came out under evidence under enterprise agreements:

PN680

However, several participants pointed out such an arrangement would be difficult to implement, and cause added pressure to freight rates. One participant stated the loading/unloading allowance ostensibly covered pick-up and delivery and would find difficulty in distinguishing the two allowances.

PN681

Here is another example of the people who operate in the real world saying that they would not know how to operationalise the new pick-up and drop-off allowance and it is not sufficiently differentiated from the loading and unloading allowance that is already payable or - it's not an allowance - the moneys payable for loading and unloading.

PN682

There appears to be confusion about what would be paid for. The ambiguity in what is sought and some proper evidence on the part of the TWU as to what the problem is that is sought to be solved, evidence to that effect is missing from these proceedings. Whilst the TWU says in its written reply submission dated 21 March in this context that the proposed variation does no more than seek to address a deficiency in the application of rates of remuneration which has been identified in evidence, there is, in fact, no evidence of a relevant deficiency - none.

PN683

Fatigue management plans. Participants were highly critical of the TWU proposal according to Dr Davis.

PN684

SENIOR DEPUTY PRESIDENT HAMBERGER: Can I just be clear on this? The 13.5(a)(iii) currently has the first part. Isn't the only change - maybe I have got this wrong - the addition of the last sentence? So it's not saying anything - this is just one option for the way you can be paid, which is there now, it is not a new option, and it's not changing the way you're paid, it is merely saying - all it is adding is a copy of the FMP for that journey must be provided to the driver.

PN685

MR CALVER: For that journey rather than a copy of the FMP, so that - - -

PN686

SENIOR DEPUTY PRESIDENT HAMBERGER: It is just - yes, go on.

PN687

MR CALVER: No, your Honour, no, no, pardon me.

PN688

SENIOR DEPUTY PRESIDENT HAMBERGER: So why is that - what is the problem? It is not suggesting you do anything different, is it?

PN689

MR CALVER: It is because it says "for that journey".

PN690

SENIOR DEPUTY PRESIDENT HAMBERGER: Just explain to me - presumably for a fatigue management plan - I am not that familiar with them - presumably they have to cover the relevant journey - I don't know if they can cover more than one journey, in other words, more than one route. Presumably, they would say, "This is what you have to do to drive that route safely." So if you drive between Sydney and Albury, let's just say, the fatigue management plan - you have to have a fatigue management plan if you are following this model for driving between Sydney and Albury.

PN691

MR CALVER: Yes.

PN692

SENIOR DEPUTY PRESIDENT HAMBERGER: Doesn't this just say, "If you're going to be driving between Sydney and Albury, you have to be given a copy of the fatigue management plan that relates to driving between Sydney and Albury"?

PN693

SPEAKER: If you are to be paid according to it.

PN694

SENIOR DEPUTY PRESIDENT HAMBERGER: If you are paid according to it.

PN695

MR CALVER: These are not the comments that I am putting, these are the comments from our members who confuse it, Your Honour, with a safe driving plan. One of the things that the words "for that journey" have invoked amongst

the people asked about this question is that they believe it is the reintroduction of those safe journey plans.

PN696

SENIOR DEPUTY PRESIDENT HAMBERGER: I get that, but what concerns me is have they just misunderstood the clause? I am not terribly worried - - -

PN697

MR CALVER: Yes.

PN698

SENIOR DEPUTY PRESIDENT HAMBERGER: If all they have done is misunderstand what is being proposed and got really upset about it but all they are upset about is something that is not actually what is being proposed, I am not sure I am terribly worried about it. I am struggling to see - I understand that some of them were upset and they think it's a reintroduction of the RSRT and the safe driving plan - I get that - but, in practice, is that what is being done?

PN699

MR CALVER: The fact that we are having, with respect, your Honour, a discussion about it means that that ambiguity that they isolate is there.

PN700

SENIOR DEPUTY PRESIDENT HAMBERGER: It doesn't look ambiguous. What is the ambiguity?

PN701

MR CALVER: Because of the words "for that journey, in respect of each journey". If it had said "for the journey to be travelled" or "the deemed journey" or if it used words that didn't say "that journey", which is the journey that they take on a basis which may change every day and what they were required to do under the RSRT was to have a safe journey plan for each journey undertaken, not the pro forma journey that is vindicated by the award. So that distinction is not made clear by those words "for that journey".

PN702

SENIOR DEPUTY PRESIDENT HAMBERGER: So it is those words "for that journey"?

PN703

MR CALVER: "For that journey."

PN704

SENIOR DEPUTY PRESIDENT HAMBERGER: Because you think it means you've got to have a separate plan every time they drive it?

PN705

MR CALVER: I don't know what it means, your Honour. I am saying that some of our members - - -

PN706

SENIOR DEPUTY PRESIDENT HAMBERGER: But they are not new; these fatigue management plans exist now, don't they?

PN707

MR CALVER: They do. What happens in some instances is that fatigue management plans are built around standard hours, basic fatigue management or advanced fatigue management. In advanced fatigue management and in the livestock fatigue management plans, there is a requirement for a safe journey plan unless the manner in which that is administered accommodates that requirement in some other way. In practice, safe journey plans can still occur, but they aren't at the level of prescription as existed when the RSRT was in place through its 2014 order, part of which has been replicated in our written submissions. What NatRoad is saying is that we are not sure what the TWU were getting at, but when you look at TWU4, at the level of prescription there, and when you look at it in the TWU's own document exhibited with its submissions and when you use the submissions - you can rebut it later - when you look at the use of the expression "that journey", in the minds of our members, alarm bells went off.

PN708

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, but if it said "A copy of the FMP that is relevant for the journey that they drive", or something?

PN709

MR CALVER: Wording that just required a copy of the FMP to be provided to the driver would not be opposed.

PN710

SENIOR DEPUTY PRESIDENT HAMBERGER: "The relevant FMP"?

PN711

MR CALVER: Yes, it would not be opposed.

PN712

SENIOR DEPUTY PRESIDENT HAMBERGER: All right.

PN713

MR CALVER: But what is opposed with some vehemence, and it was my duty to communicate, is that some members believe that if safe driving plans were reintroduced, they would be subject to a very unacceptable regulatory burden.

PN714

DEPUTY PRESIDENT SAMS: I am sorry, Mr Calver, just because some of your members have an adverse reaction to words doesn't make it cogent evidence.

PN715

SENIOR DEPUTY PRESIDENT HAMBERGER: I don't want to start a riot.

PN716

MR CALVER: Your Honour, I hear what you say and I respect those comments. They don't alter my instructions, though.

PN717

SENIOR DEPUTY PRESIDENT HAMBERGER: All right. But if it was you have to provide a copy of the relevant FMP to the driver, you don't have a problem with that?

PN718

MR CALVER: No.

PN719

SENIOR DEPUTY PRESIDENT HAMBERGER: All right, that is good to know.

PN720

MR CALVER: Because it says the FMP "for that journey", thus raising an ambiguity.

PN721

SENIOR DEPUTY PRESIDENT HAMBERGER: All right, I will hear what the TWU have to say on that.

PN722

MR CALVER: Yes. Thank you, it has been a very useful discussion.

PN723

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you.

PN724

MR CALVER: I will just quickly move to the TWU evidence then. I had a whole lot more about that, but I think that discussion has truncated the need for me to communicate it.

PN725

We continue to rely on our submission dated 2 March in relation to the evidence of Ms Carrington, Mr Nichols, O'Brien, Mealin and DeClase. Even though we are aware of 591 of the Fair Work Act, we think, on the basis of the material we have put in our written submissions, those statements should be either disregarded or given very little weight.

PN726

If I can then go on to the evidence of the witnesses in the order called. I will be quick. Mr Fear was first and his statement was marked TWU6. We deal with his statement at paragraphs 59 to 61 of the NatRoad written submission. Cross-examination emphasised the point made at paragraph 61 of the written submission that his evidence merely has relevance only to show a pattern of work to be governed by the Richers Enterprise Agreement. It has no relevance in the context of the broader claims made by the TWU.

PN727

We reinforce the point made at paragraph 142 of the NatRoad written submission that Mr Fear's evidence is that he is engaged in loading and unloading when he undertakes pick-ups and drop-offs. Clause 13.6 of the Long Distance Award has a regime for the payment of loading and unloading. No matter what gloss the TWU

counsel might attempt to put on the issue, for example where he asked Mr Fear about delays when unloading at PN146, the TWU has failed to distinguish pick-up and drop-off from loading and unloading.

PN728

That further reinforces the differences between the way the allowance was expressed in the Davis questionnaire and how its ambiguous terms now confound rather than clarify. In short, Mr Fear's evidence is irrelevant to practices other than at the company where he is employed.

PN729

Mr Coghill is next. His statement was marked as TWU7. We stand by the written submission. His evidence should be treated as if it were a TWU submission. It is speculative, unsubstantiated and, as pointed out at paragraph 140 of our written submission, reinforced the point made about the confusion between what is proposed by the TWU regarding a pick-up and drop-off allowance and payment for loading and unloading.

PN730

Mr Bird was next. His statement was marked TWU8. We rely on what we say about Mr Bird's evidence at paragraphs 47 to 53 of the written submission. Further, what he says about fatigue management should be heavily discounted given his testimony under cross-examination by Mr Ryan. At PN216 to 271 the following exchange occurs:

PN731

So have you ever done any fatigue management training?---No, I haven't.

PN732

So you've never had the requirement to work under an accredited fatigue management plan?---No.

PN733

His evidence in the context of fatigue management should be heavily discounted.

PN734

Mr Anderson was next and his statement was marked TWU9. He was the final witness called. We continue to rely on what was said at paragraphs 54 to 58 of our written submissions about his witness statement. We also note that the comparison that Mr Anderson makes in his witness statement at paragraphs 10 to 11 are irrelevant to these proceedings. He admitted at PN253 he was not talking about a practice under the award compared with what his current employer does, contrary to what he said in his witness statement; instead, it is a comparison of practices under two different enterprise agreements. It has no relevance to the example posed in paragraph 10 of his statement whatsoever.

PN735

In respect of each of its claims, the TWU has failed to adduce any evidence that the proposed variation would meet or advance the modern award objective. Its evidence is insufficient to show that there is a merit case to support any proposed variations. It fails the tests that we have established govern these matters, that is,

it fails the test of providing detailed evidence of the operation of the award, the impact of the current provisions of employers and employees covered by it and the likely impact of those proposed. For those reasons, the variations should all be declined.

PN736

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks very much, Mr Calver. Mr Scott?

PN737

MR SCOTT: I will endeavour to be as brief as I can, your Honours. In our submissions, which were filed on 2 March, those submissions dealt with two of the TWU's proposed variations. The first one was the definition of a "driver", which was dealt with this morning. The second one was the proposed pick-up/drop-off allowance. If I can just deal with that as quickly as I can.

PN738

My clients, as indicated in our submissions, are opposed to the proposed pick-up and drop-off allowance. We raised in our submissions what could be considered a jurisdictional concern in relation to the variation. That concern arose from the inherent confusion within the TWU's submissions of 19 January where, in their submissions, they essentially argued for an allowance to be inserted into the Long Distance Award to apply to work which, in their own submissions, said did not form part of the long distance operation. In our submissions, we identify that obviously there is a fundamental issue there, that you can't have an allowance in one award which does not actually apply to the work that it is purporting to regulate.

PN739

The jurisdictional issue has been advanced from the filing of our submissions, most notably, Mr Ferguson and Ai Group's submissions, and it is paragraphs 115 to 130 of the Ai Group's submissions which advance that. The TWU then filed more recent submissions and their reply submissions of 21 March, at paragraph 6, essentially accepted the jurisdictional concern that we raised, identified that it was accepted, but then indicated that the circumstance endeavoured to be captured by the variation arises where a driver is required to pick up or drop off at more than one location at the point of commencement or point of destination.

PN740

With respect to the TWU, their variation goes beyond that and the draft determination that they have filed has two subclauses, one which purports to apply where an employee 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 the principal point of destination, and then subclause (b) goes further and indicates that it applies where an employee engaged in a long distance operation is required to pick up or drop off at a location en route between the principal point of commencement and principal point of destination.

PN741

What we have is the TWU, in their initial submissions, talking about work which the allowance would cover which, in their own submissions, they indicated that

work did not form part of the long distance operation. You then have two months later, after my clients and Ai Group have indicated or raised the jurisdictional concern, the TWU then indicated that they considered that work did form part of the long distance operation.

PN742

In those circumstances, the Commission should exercise a degree of caution in considering inserting an allowance into an award which would apply to work where there is clearly an uncertainty as to whether the work is regulated by that award or another award.

PN743

Mr Gibian today, in his submissions, sought to clarify the union's position, but what Mr Gibian was unable to do was to articulate what work actually forms part of a long distance operation, and the transcript will show that Mr Gibian said it is possible to envisage a situation where pick-ups and drop-offs form part of a long distance operation, but it wasn't advanced any further than that. So, in our submission, it is an issue that remains unresolved. That, in essence, is our submission on the jurisdictional issue.

PN744

Turning beyond the jurisdictional issue in relation to the claim, my clients support the submissions of Ai Group in relation to the other problems, if you accept that there is no jurisdictional concern, and those other problems were, for example, the fact that the rates of pay in the Long Distance Award already factor in extra responsibilities through an industry allowance, and NatRoad's submissions as to the uncertainty as to how the allowance is operational in a practical sense. Those are my clients' submissions in relation to the pick-up and drop-off allowance.

PN745

Very briefly, on the overtime proposed variation, which has been described as the "flip-flop variation", my clients support the submission of Ai Group with respect to that variation and, with respect, the TWU, in their submissions today, and Mr Ferguson touched on this, the TWU is not quite sure how the variation is intended to operate, and that became apparent from questions put to Mr Gibian from the Bench. In those circumstances, Australian Business Industrial and the New South Wales Business Chamber are opposed to that overtime variation.

PN746

Those are my submissions, unless there's any further questions.

PN747

SENIOR DEPUTY PRESIDENT HAMBERGER: No, thank you very much. Mr Gibian?

PN748

MR GIBIAN: Can I just deal with the reply, first of all, and then briefly in relation to Mr Ferguson's submissions. Firstly, and perhaps dealing with them in backwards order, if that is sensible, in relation to the pick-up and drop-off allowance, what is called the jurisdictional objection, as articulated by ABL, it is not a jurisdictional objection at all, it would seem to me. The suggestion seemed

to be that - and I did discuss this previously - if the position of ABL is that any work involving additional pick-ups and drop-offs is covered by the Road Transport and Distribution Award, we would be extremely happy - we would be extremely happy - with that position and there would be no need for an additional allowance to be paid.

PN749

What employers are doing is, as the evidence indicates, asking a driver to start at a particular location in Sydney and pick up some cargo and drive to another location within Sydney and pick up more cargo, or Brisbane, as the case may be, and then drive to another location or to deviate from the route to drop off or pick up cargo en route and still call that all a long distance operation and pay according to the deemed number of kilometres or deemed driving hours involved.

PN750

Our preferred situation would be that any deviation from one point of commencement to one point of destination would be paid in towards the Road Transport and Distribution Award. We would prefer that to be the situation, but, to the extent that other parties say that the words "principal point of commencement" and "principal point of destination" allow a long distance operation to include a pick-up in Botany and a pick-up in Minchinbury and then a travel to Brisbane, then there has to be some additional payment because the deemed kilometres or the deemed time do not incorporate any remuneration for the additional work involved.

PN751

It was suggested that there was some swings and roundabouts involved in all of this and Mr Ryan referred to a potential 64 kilometre radius of the GPO. Whilst - - -

PN752

COMMISSIONER LEE: A 32 kilometre radius.

PN753

MR GIBIAN: Sorry?

PN754

COMMISSIONER LEE: A 32 kilometre radius.

PN755

MR GIBIAN: 32 kilometre radius, 64 diameter, yes, although that would take you out into the Pacific Ocean in Sydney's case, but there are some swings and roundabouts involved as if the pick-up location is at one end of the 32 kilometres or the other end of the 32 kilometres, none of that takes into account travelling from one end of the 32 kilometres to the other end of the 32 kilometres before you ever start your journey. None of that is taken into account in the swings and roundabouts and that's a situation that we are concerned about. If the drop-off location is in southern Brisbane, well, it's slightly shorter than 950 kilometres, potentially, if there's one drop-off location, but if there's a drop-off location west of Brisbane and north of Brisbane, then that's not a matter that is taken into account in the swings and roundabouts which, to some extent, are entailed in the

agreed driving distances or driving times. Whilst there are some swings and roundabouts involved, it does not take into account that element that we are concerned about.

PN756

Mr Ryan said something or made a submission which disputed what I had said to the effect that the rates in the Long Distance Award are not time-based. I accept they are based upon some kind of estimate of the amount of time or the amount of distance that is involved, but the point that I was making is they are not based on actual working time involved, and the estimate is based upon travelling from the GPO in Sydney to the GPO in Brisbane, not doing other additional drop-offs either on the way or before you commence that journey.

PN757

As to the submissions that were advanced by Mr Calver in relation to - I think we got to the end of the fatigue management plan issue.

PN758

SENIOR DEPUTY PRESIDENT HAMBERGER: Can I just be clear?

PN759

MR GIBIAN: We don't mind adjusting the wording, but we think our wording we wrote is completely clear, I have to say.

PN760

SENIOR DEPUTY PRESIDENT HAMBERGER: You would have a sort of standing fatigue management plan. You don't have a different one for every time you drive between Sydney and Albury, presumably; is that right or not? There would be a plan you have.

PN761

MR GIBIAN: The provision and the existing provision operates on whatever requirement of the State or Territory legislation under which the approved plan operates.

PN762

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, but do you know actually, there's this thing that - - -

PN763

MR GIBIAN: Yes, that's right, and we have adopted the word "journey" because that is the word that is already used in that provision as it currently exists. It says to calculate the trip rate for any journey by multiplying the hourly rate by the number of driving hours specified in the fatigue management plan for that journey. That is what it already says in the existing provision. I don't know whether the alarm bells rang in Mr Calver's members in relation to the existing provision because it already says "for that journey" in the existing provision in the first sentence as it currently exists. All we have said is the copy of the fatigue management plan for that journey must be provided to the driver, which is adopting exactly the same words that appear in the first sentence of the existing provision. I don't know what's wrong with it, frankly.

PN764

We included in the submissions an attachment TWU4, which is an example of a type of plan which satisfies one regulatory regime, for the purposes of indicating why it would be useful for the driver to have access to that plan, so that they can understand how they are remunerated for starters, and we will make comment upon it if that is appropriate or necessary. Nothing in the clause that is drafted requires that form to be used in all cases. The form that is required to be used will depend upon the State or Territory legislation that is applicable, but, as I say, the wording we picked up was the wording that is already in the existing provision.

PN765

Mr Calver also made some submissions which I think were really directed at the survey that Mr Davis undertook, but there seemed to be some criticism of not pressing a certain claim that was contemplated in relation to loading and unloading and that we amended the claim in relation to the pick-up and drop-off allowance, which is not right. The claim was the same, we just didn't proceed with an entirely separate claim at this point. We indicated we would consider proceeding with that at some later point when it is appropriate to do so, but there was no change to the particular provision that we sought in relation to the drop-off and pick-up allowance; we just didn't pursue an entirely distinct variation that was sought.

PN766

If the upshot of the submissions is we shouldn't rely on Dr Davis's survey, so be it, I suppose, but where there was no change to the pick-up and drop-off allowance claim, and the survey seemed to indicate that it was broadly supported by NatRoad members, well, that is what the survey seemed to say.

PN767

Finally, Mr Ferguson made some submissions in relation to both the overtime and the pick-up and drop-off allowance issues. In relation to the pick-up and drop-off allowance, there was reference to the loading and unloading allowance for which the Long Distance Award currently makes provision. Can I just emphasise that that allowance is, as it presently exists, for engaging in loading or unloading, so that is when the driver is actually physically participating in that activity. It is not for waiting and it is also not for the additional travel time or whatever is involved in multiple drop-offs and pick-ups within a long distance operation, if that is what is done. So, that doesn't address the issue and it's a distinct species of allowance; it doesn't address the difficulty that we have identified and which justifies that variation.

PN768

With respect to the overtime provision, I think I have said what I need to say about that, other than that Mr Ferguson again raised the spectre of employers not knowing how many hours of work are performed by their own employees undertaking long distance operations, and we would support what Mr Ryan had to say about that.

PN769

To the extent that Mr Ferguson says that there would be falsification of work diaries, with respect, that is not the basis upon which a decision should be made.

The proceedings that Mr Ferguson was referring to, particularly in the RSRT, where concerns about falsification of records has been raised and, indeed, evidence of that, and were directed also at owner-drivers, not at direct employees solely, presumably an employer that was concerned that that was occurring would take appropriate action and, in any event, has the capacity to direct the employee to report times and periods of work and, with respect, would be failing its own obligations if it did not know the hours of work that its drivers were performing.

PN770

Finally, in respect of the variations proposed by AiG, firstly, the higher duties provision, as the TWU said in the submissions that it filed on these issues, what is sought here is to upset very long-standing federal award provisions, which have not been previously controversial, that is, no issue was raised in the award modernisation or the two-yearly review in relation to these provisions, and also, in the absence of any evidence of any difficulty in application of those provisions, and it seems we can be criticised for not having adequate evidence, but AiG can have no evidence at all in relation to a proposed variation, and it seems to be a product of sifting through the award and therein to isolate provisions which are alleged by AiG to be overly generous in the minimum safety net standards.

PN771

It would constitute, potentially, a significant reduction in conditions and remunerations in the absence of any evidence. It would also seem to give rise to potential practical difficulties in application. One does wonder, for example, when the two hours starts and finishes in operating a particular vehicle. Does it start when you finish working on a previous vehicle? What if you're waiting for a vehicle to be loaded? Is that part of the two hours or not part of the two hours? If you're participating in loading - it does raise practical issues that the simplicity of the current provision would not raise, that is, there's no need to distinguish.

PN772

It may produce some incentives that might be perverse in particular circumstances. If a delivery to Parramatta, return from the City, has to be made that might take two hours or might take slightly longer or slightly shorter, the incentive of the employer would be to demand a faster trip in order to avoid a greater payment of higher duties for the day; the incentive on the employee might be to dawdle a little to try and get it over the two-hour mark, and all of that would seem to be an undesirable circumstance or an undesirable practical outcome of the variation that is sought in its practical application, again in the absence of any evidence about how these issues would be dealt with in practice.

PN773

I note that Mr Ferguson has said, in answer to a question from your Honour Senior Deputy President, that the intention was that the employee who works for an hour and 45 minutes at a higher grade would receive an hour and 45 minutes' pay at that grade. That doesn't seem to be - and obviously we accept that, obviously, the Commission can adopt different wording - but that doesn't seem to the effect of 19.1, as drafted, which says an employee who is required to perform two or more grades of work on any one day must be paid for the whole day the minimum wage for the highest grade of work they perform for more than two hours.

PN774

That would seem to - well, reading that, we thought "for the whole day", so if someone does, at level 6, work for most of the day and level 7 work - grade 7 work - for an hour, they will get level 6 for the whole day. That would seem to be the wording of it. If that is not the intention, the wording can be changed, I suppose, but I would have to say we read the drafting of the provision as it's drafted and the person in that situation would get, even for the hour, not the grade 7 rate and, indeed, that would be generally how higher duties provisions operate where there's a threshold time limit - a threshold time - a period to be passed.

PN775

To the extent it was said that there is no reasoning or no basis has been suggested why this award should operate in this way, a number of other transport awards operate in the same way and no applications were made to vary the higher duties provisions of those awards.

PN776

As we have said in the written submissions, the Road Transport and Distribution Award is somewhat different in that it doesn't have the requirement to have a base classification, that is, the pay rate depends upon - in vehicle cases, in driving cases at least - upon the type of vehicle driven from time to time, so it's not a situation in which the employee is guaranteed at all times grade 5 and then might get grade 6 or grade 7 if they happen, on a particular day, to work at a higher level. They can vary from day to day, depending what work they are allocated by the employer, and that would seem to be a distinguishing feature.

PN777

As I say, the simplicity, both as a matter of entitlement and as a matter of practical operation, would seem to favour the retention of the current provision, and that's leaving aside the absence of any evidentiary or other case for altering the existing long-standing Federal award arrangements.

PN778

As to the meal allowance, I don't think I really want to say anything to add to the written submissions, other than to support what Mr Ryan said in relation to that question. No case has been advanced for the alteration of the existing provisions in that respect.

PN779

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you. I think we can reserve our decision.

PN780

MR FERGUSON: Can we have two minutes, just two minutes? I will be brief.

PN781

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN782

MR FERGUSON: In relation to the issue around higher duties and the provision about people not being paid, or the potential of people not being paid at the higher

G rate for time so worked, I just - that's the issue about not being clear that people would be paid at the higher rate for the time they actually paid the higher driving classification. Our assumption had been that clause 15.2 of the award dealt with that issue, which provides that the minimum wage rates paid for full-time employees are set out below, and then it prescribes hourly rates for each classification. As I said, if memory serves, the exposure draft process is going to result in that sort of clause being developed further to make it clear that those rates would apply for ordinary hours of work, but I may be wrong. In any event, our intention has always been, and that is made clear in the submissions, that that is the way the clause would work, or the award as a whole would work, and we would not oppose some tweaking of the orders, and that can be dealt with in the settlement of orders process.

PN783

In relation to the other awards, it is put against us that we didn't raise this issue in the other transport awards, it is anomalous in other awards, potentially. We made the decision to raise it in this award because the issue is ventilated by members covered by this award and it didn't strike me as being automatically necessary that this issue needed to be dealt with in long distance, given the typically different nature of that work. As people might be away for much longer, they are less likely to be doing this sort of frequent switching between vehicles. In some of the other transport awards, to be frank, we have less of an interest than we do in these awards and, again, it wasn't raised as an issue, but, of course, it is put in issue and if the Commission forms the view it is a matter that should be dealt with elsewhere, it could be, the way many award variations have been pursued, but we are not asking for that in any sense.

PN784

In terms of the practical problems, they are all very creative by my learned friend. I don't think we are going to have people dawdling all over the place in order to get this. We anticipate that our members will expect more of their employees and they will deal with that in the normal way management deals with dawdling, and I'm sure TWU members wouldn't dawdle. We don't think there is any substance to that.

PN785

Again, the practical problems, they are just created and made-up problems. If someone is driving a different vehicle, that's when this will apply and the time will be recorded from when they are driving. That's the way the classification structure works, and we don't really think there's any merit to those sorts of issues. I won't take the evidence point any further.

PN786

SENIOR DEPUTY PRESIDENT HAMBERGER: Now we will reserve our decision.

ADJOURNED INDEFINITELY **[4.57 PM]**