

FAIR WORK COMMISSION

4 yearly review of modern awards – Transport Industry Awards

Matter No. AM2016/32

RE *Road Transport and Distribution Award 2010*

SUBMISSIONS IN REPLY FOR THE TRANSPORT WORKERS' UNION OF AUSTRALIA

INTRODUCTION

1. The Transport Workers' Union of Australia (TWU) makes these submissions in reply pursuant to the Directions for the Transport Industry Awards issued by the Fair Work Commission (the Commission) on 20 December 2016. The TWU opposes the variations to the *Road Transport and Distribution Award 2010* (the Award) as sought by the Australian Industry Group (AiGroup).
2. The AiGroup have proposed two variations to the Award. They argue that the variations meet the modern awards objectives. In the context of the Award Review, a party seeking variations to a modern award must advance a merit argument in support of the proposed variations. Where there are significant changes proposed, it must be supported by probative evidence.¹
3. The TWU submits that the AiGroup have failed to advance a merit based argument supported by probative evidence and have failed to demonstrate that the Award is not meeting the modern awards objective.

PROPOSED VARIATION TO CLAUSE 19 – HIGHER DUTIES

4. The AiGroup proposes to vary clause 19 to reduce the entitlement of employees in some circumstances in which they perform at a higher grade.
5. The AiGroup has failed to show that the current clause is failing to meet the modern awards objective, or cannot be understood, or is capable of more than one meaning, or was in some way an ambiguity, uncertainty or error flowing from the Part 10A Modern Award review process. Indeed this last submission

¹ S.156 – 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues; (AM2014/1) [2014] FWCFB 1788 at 60.3

could not be made given the clause was drawn from the *Transport Workers Award 1998*.

6. The AIG propose to restrict the payment of higher duties to employees in circumstances where they have not performed at a higher classification for more than 2 hours. The TWU submits that the reasons advanced by the AiGroup are misconceived and do not properly reflect the nature of the transport industry.
7. The Road Transport Awards are unique in that they adopt a classification structure based on types of vehicles rather than skills or competencies, although it is implicit in those classifications that different skills are required. The classification structure in the Award is referable to the type, model and class of vehicle that a driver may drive.
8. The AiGroup submits that an employee may be required to perform work in a number of classifications pursuant to the Award. Movement through the classifications can occur a number of times in any day or any other working period.
9. The Award does not prescribe the classification/grading of employees at the time of engagement. The type of vehicle being driven determines classifications contained within the Award. This feature of the Award has provided enormous flexibility to employers.
10. The AiGroup submit that the current higher duties clause in the Award is unusual in that it doesn't specify any particular amount of time. The current provision has served the industry for over 30 years and was not argued against by the AiGroup during the Award Modernisation process. During that process the AiGroup, at paragraph 448 of its 13 February 2009 submission, advocated for the higher duties provisions to apply to drivers covered by any majority award as contemplated by clause 4.4 of the Exposure Draft of the Award. The current submission is a significant departure from that position.
11. The current arrangements were a feature of the *Transport Workers' Award 1983* and have been in place for 30 years. The current arrangement provides flexibility to the employer, simplifies the calculation and understanding of

entitlements and is more likely to sit within the capabilities of computerised payroll systems.

12. The AiGroup characterises the current arrangement as a windfall for employees yet fails to support its submission with any costing's. The TWU submits that there are different scenarios where an employee may gain an entitlement to the payment of higher duties. These include drivers switching between vehicles to effect deliveries; drivers performing work in the yard, depot or garage or employees engaged solely for depot work who do not drive on public roads.
13. Before a cost analysis can be performed, the precise circumstances, to which the application relate has to be considered. For example, a grade 3 employee required to move a 4-axle bogie would have an entitlement to a higher duties payment of 60 cents per hour or \$4.56 per day. Hardly the windfall claimed by the AiGroup.
14. The TWU submits that the current provision is neither excessively generous nor unfair to employers. Employers reap the benefits of the flexibility of employees performing various classifications of work on any day.
15. The current clause may appear out of step with comparable provisions within other modern awards. However, the Awards cited at paragraph 23 of the AiGroup submissions provide for the classification of employees at the time of engagement, as do most modern awards. The Road Transport Awards do not.
16. The regular movement between classifications in the transport awards is a peculiar feature of some of the industry awards. Therefore, a comparison with all modern awards requires a disregard of the peculiarities in this industry and is not a comparison of like with like.
17. Following the 2012 Review the Award was varied to ensure that employees proceeding on annual leave are paid at the rate applicable to the classification of work the employee would have performed had he/she not been on annual leave. This variation was necessary as many employers were paying drivers at the standard rate for the purposes of paid leave.

18. A consequence of adopting the AiGroup's variation to clause 19 may well result in disputes as to whether or not an employee met the minimum working requirement and, if required to drive four different vehicles in any day, difficulties in determining the appropriate rate of pay.
19. The existing provision has served the industry well for 30 years. The TWU is not aware of any disputation in relation to this clause prior to or post Award Modernisation.
20. Reliance on the *Transport Industry (State) Award* ignores the provisions of the *Transport Workers Award 1998* which was the primary predecessor award leading to the development of the Award.
21. The AiGroup acknowledges that employees covered by the Award may be determined as being low paid but that any consideration of their relative living standards and needs is negligible because the two-hour time limit is "very modest". A negligible decrease to the monetary entitlement of transport workers is, nonetheless, a decrease in the monetary entitlement and fails this aspect of the modern awards objective.
22. The AiGroup submission that the variation to clause 19 will incentivise the TWU to bargain over the higher duties provision is nonsensical, is a matter for the TWU and is rejected.
23. The AiGroup's submission addressing the need to promote flexible work practices and the efficient productive performance of work is not dependent upon a determination of clause 19. All employees are available to perform work at any level for which they have the skills and training. The suggestion that approval of the variation will incentivise employers to train and up skill employees is totally rejected. The reality in the industry is that employers have little or no interest in training and up skilling employees, particularly if the employer faces costs in rolling out such training.
24. The current provisions of clause 19 meets the objectives identified at s.134(1)(g) of the Act.

PROPOSED VARIATION TO CLAUSE 26.3 – MEAL ALLOWANCE

25. The AiGroup proposes to vary clause 26.3 to reduce the circumstances in which a meal allowance is paid. The reasons advanced by the AiGroup are rejected and simply seek to take away an entitlement that has existed for over 30 years.
26. The AiGroup has failed to demonstrate that the current clause is failing to meet the modern awards objective, or cannot be understood, or is capable of more than one meaning, or was in some way an ambiguity, uncertainty or error flowing from the Part 10A Modern Award review process. Indeed this last submission could not be made given the clause was drawn from the *Transport Workers Award 1998*.
27. The submissions by the AiGroup in relation to clause 26.3 are not directed to correcting ambiguities or technical problems, or indeed any other issue arising from the Part 10A process, but rather they seek a fresh assessment of the overtime meal allowance.
28. The proposed variation to 26.3(a) would have the effect of taking away the entitlement of a meal allowance for those employees who have worked their ordinary hours and may perform an overtime shift. If the variation were granted it would take away from these employees a current entitlement.
29. The AiGroup argue that the basis upon which the variation should be made is that an employee will have advance notice of the need to work. There is no basis for the assertion put forward by the AIG to support the variation.
30. Indeed the nature of the transport industry is that short notice is often given to drivers who are asked to perform an overtime shift. Drivers are often called at irregular hours, including the night before which would not give them sufficient time to prepare a meal for the overtime shift that they are being asked to work.
31. The AiGroup further argue that the structure of clause 26.3(a), when read as a whole, suggests that the proper interpretation of clause 26.3(a) is that it should only apply in the context of overtime worked immediately following the performance of ordinary hours of work.
32. There is no basis upon which this interpretation can be accepted. If the framers of the award had intended that be the interpretation the words “ordinary hours

of work” would have been inserted to reflect such an interpretation. There is no ambiguity, uncertainty or error so as to justify the award's variation.

33. The AiGroup further contend that the proposed variation 26.3(b) will align the provision with the terms of clause 26.3(a). This claim is rejected by the TWU. The span of hours in the Award are between 5.30 am and 6.30 pm. The hours of work for shift work enable employers to start shift workers at various times within the shift.
34. The nature of the industry is such that drivers could potentially commence work at 4.30 am if on day shift or earlier if the facilitative provisions are used. Given these times it is highly unlikely that a meal would be able to be provided by an employer.
35. The AiGroup propose an additional sub-clause 26.3(c), which will have the intended effect of removing the entitlement to a meal allowance in circumstances where an employee has been provided with “significant advance notice”². The reasons advanced by the AiGroup are that employees have the opportunity to bring in a meal when they have been provided with notice and it is an incentive for employers to provide employees with advance notice.
36. The TWU rejects these submissions and submits that the proposed variation is nothing more than an attempt by the AiGroup to remove an entitlement that has been in the award for many years.
37. There is no proper evidentiary foundation for a reassessment of clause 26.3 so as to impose a restriction on the availability of an overtime meal allowance for those employees who will be affected by the variation if granted, which would be the practical effect of the proposal.

CONCLUSION

38. The AiGroup have not made out their claim that the proposed variations are necessary to meet the modern awards objective. Rather, the AiGroup contend that employees are receiving generous windfalls, which seems to be the principal reason behind the proposed variations. Further, they have not presented any evidence in support of the considerations in section 134(1)(f) or

² Para 70 AIG submissions 13 January 2017

that there will be any positive impact on the matters identified in section 134(1)(h).

39. The AiGroup have not made out a merit case in support of the variations nor is there a proper evidentiary foundation for the variations. For the reasons outlined in these submissions, the variations proposed by the AiGroup should not be made.

Transport Workers' Union of Australia

Dated: 2 March 2017