

IN THE FAIR WORK COMMISSION

TO VARY A MODERN AWARD AM2019/23 and 2020/2

ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD 2010 (THE AWARD)

In reply to All Submissions

By TREVOR WARNER (APPLICANT)

Introduction

Firstly, I wish to point out that NATROAD have often publicly stated "NATROAD will oppose any cost increases to its members." The Applicants believe this Application is not an extraordinary increase to costs, but an Application to bring fairness to transport workers in the Long-Distance driver's sector.

The submission from NATROAD continues to maintain the definition of "Loading and Unloading" to only a specific task of "placing or removing" goods using hydraulic equipment. This meaning is consistent with current Long-Distance Award, which is to physically remove/replace Gates, Tarps and to operate a forklift, pallet jack or mobile crane.

This may have been the case back in 1993, which the TWU Submission alludes to. but the concept of creating a Modern Award, is to make it relevant to modern industry practices.

Whilst the Applicant agrees with the literal and judicial terminology as outlined by NATROAD, the duties performed by a LD driver covered by the Award, extends beyond this meaning and/or task. Clause 20.4 of the Award defines time (work time) as commencing from the time of roster to "when the driver is released from duty".

It therefore becomes clear between driving duties and to when the driver is released from duties, contains additional duties other than driving and loading/unloading.

These duties would be performed by a driver who is covered by the Local Award and would be remunerated for all the performance of these duties under that Award.

The Fair Work Act 2009 requires a Modern Award to provide fair and equitable remuneration for the same duties performed by an Employee (be that higher or lower duties.)

By opposing this Application, all parties inherently supporting an inequality of remuneration for employee's covered by the Road Transport (Long Distance Operations) Award 2010

1/ To address concerns raised by NATROAD in Paragraph 5. regarding Standing on this matter.

The Applicant is an Employee under the ordinary meaning as in under s.12 of the FWAct2009

The Modern Award applies to the Applicant as under s.47 of the FWAct2009

As such the Applicant has Standing as provided for by s.158 of her FWAct2009

The Applicant has been employed as a Long-Distance driver and paid by the Km rate since 1995, as such, has been covered by this Modern Award since that time.

Briefly during the period of 2012-2013, The Applicant was moved from Driving duties to General Operations and Depot Manager for the same Employer, with a Salary wage arrangement.

In this role, I had hire and fire responsibilities.

Since mid-2013, The Applicant then returned to driving duties and wages returned to being paid by the Kilometre rate under the Road Transport (Long Distance Operations) Award 2010.

It is irrelevant to this matter who the current Employer is and is Covered in the relevant Award. A more recent redacted Payslip has been provided, demonstrating I am an Employee and paid by several features unique to the Road Transport (Long Distance Award) Award 2010.

If your Honour wishes for a unreacted Payslip, I would be happy to forward this privately to their Chambers.

Refer Annexure A - Payslip

2/ In paragraph 6 NATROAD alleges a clear definition exists.

The ambiguity now exists that due to modernising of the Industry, the entire process of removing or placing freight on or off a vehicle is now going unremunerated.

The definition of Loading and Unloading has not changed since pre- 2000. Even as far back as 1995, when I entered this industry, we were using Gates, Ropes, Tarps and using forklifts, in which we were paid for all time by the hour.

Now the transport equipment has evolved, we are most often not allowed to operate forklifts or mobile cranes, even with the correct licence and site inductions.

NATROAD are suggesting that simply because we do not operate hydraulic lifting equipment, Long Distance drivers should not be paid for ALL other additional duties performed outside of driving and operating hydraulic lifting equipment?

3/ NATROAD has seized upon a belief that Long-Distance Drivers receive the Industry Disability Allowance which has the ancillary duties included in this 30% Allowance.

This is an argument where the TWU has failed to correctly address during the most recent 4yr Annual Award review. Admittedly they did raise an Extra Allowance for Loading and Unloading.

In TWU v Linfox (C2019/2029) this revealed in much greater detail, to the precise reason why further information may have assisted Mr Gibian to achieve a successful outcome.

The analysis of the TWU v Linfox 2020 case, does not take into account the variation in types of shift work performed by all Long-Distance Drivers. A Long-Distance driver working weekends and night shift should only be entitled to the same rate of pay as a Long-Distance driver on weekdays on day shift is inconsistent with all other Awards and even the Road Transport and Distribution Award 2010. In no other Modern Award would this be acceptable, as weekend work and Night shift work attracts additional penalty rates...

The opposing parties to this Application are suggesting, Long Distance drivers should be a national exception and be denied night shift and weekend penalty rates, if the many hours of work performed in not remunerated as raised in the Application.

4/ The cents per kilometre rate may, in some circumstances, adequately provide for a similar wage to a weekday day shift worker on hourly with Overtime. However, it in no way compensates the Long-Distance driver for shift and weekend penalty rates PLUS the Industry Disability AND all duties ancillary to the current definition of Loading and Unloading.

A Long-Distance driver who works dayshift, weekdays and doesn't perform any duties related to the freight loaded on their vehicle, may generously benefit from the Km rate.

However, this is an exception to what I have experienced since 1995.

In TWU v Linfox (C2019/2029) there is no association made between day shift weekday drivers paid cents per kilometre to Afternoon shift, Night shift and Weekend work and the associated Nationally recognised Penalty rates.

5/ The Applicant does understand why the km rate was introduced for the Driving component only. I recall my former Employer at the time, who shifted Long-Distance drivers from Hourly with Overtime, to cents per kilometre rate.

This was primarily due to drivers exploiting the system and prolonging their journey. That Km rate covered the journey, but the Long-Distance drivers back then, still used older equipment and got paid to attend to Gates, Tarps and operating forklifts.

The Applicant accepts the Km rate gave the Employer a fixed cost to calculate cartage rates, but this was only ever intended for the Driving component of the Journey. The current interpretation of Driving Time along with all ancillary duties still being performed, the Modern Award has not been amended accordingly to ensure all duties performed in this modern environment are remunerated.

6/ In NATROAD submission paragraph 11. It is inferred that any variation would make the Award unclear, where a clear definition exists and is based on Caselaw. This is not correct.

The case law consistently uses the same outdated and incomplete meaning of Loading and Unloading. As such Applications seeking a remedy for unpaid performance of duties continues to fail. Employers will continue to use this ambiguity to engage drivers to perform duties without proper remuneration. As in paragraph [23] by the Applicant Trevor Warner, where only 434kms was completed in a 17hr shift and continues to create an inconsistency outlined para [12]

[cl. 20.4 Time must be computed from the time the employee is rostered or registers for duty, whichever is the later, and until the employee has been effectively released from duty.]

This lack of recognition for total duties performed, erodes the hourly rate to well below the amounts provided for each specific duty in the LD Award.

7/ In paragraph 14. And 15. of the NATROAD submission, referring to “ordinary meaning” What needs to be understood here is that within the Long-Distance driver’s duties, is basically 3 tasks. 1/ Driving 2/ Loading and Unloading 3/ off duty.

This is what is reflected in the National Heavy vehicle Work Diary, which is a legal requirement under the Heavy Vehicle National Law 2012. The Long-Distance driver is either working or not working. Unless the driver is Off duty, they are legally working.

The ordinary meaning of “Loading and Unloading” in the transport Industry involves All duties that are not driving.

The cents per Kilometre rate was never intended to replace the hourly with overtime rate and leave the Employee worse off. Respectfully the Award does create some Agreed Schedules in which to operate. but abuse of unpaid Loading and Unloading has been an unintended consequence.

The cases cited may have returned a different outcome, had the ordinary definition of Loading and unloading been different.

8/ Paragraph 16. Of the NATROAD Submission, alludes to this Application being one of a personal remedy for the Applicants and “the evidence is jumbled”

We are truck drivers, not Solicitors or Barristers. The Fair Work Commission should be available to all persons, not just those who can afford Legal representation.

One Applicant, Trevor Warner is a TWU member and did approach the TWU on this matter.

Despite private conversations, the TWU chose to file their submission essentially in opposition.

The TWU and other past Applicants and Litigants in the Cited cases, seeking a remedy for the same issue should state that is an Industry wide issue. For most Transport companies who do not provide a P.U.D team to handle freight at the completion of the Long-Distance Journey, the Long-Distance driver is expected to complete the freight pickup or delivery at the other end. Remuneration for this was intended to be provided for by cl. 20.4 of the LD Award.

9/ Transport Workers Union Reply

As this Reply did not address any of the arguments put forward in the Submission, I request it be dismissed.

The TWU mentions "Owner Drivers". The Modern Award does not cover Individual Owner Drivers. It is the Individual Owner Drivers responsibility to tender for work, at a price which they believe is sufficient to cover all legal requirements in providing a transport service. The Owner Driver is in full control of pricing and operating their business legally, the Employee does not! and as such, relies upon the Modern Award to provide a minimum safety net for wages.

Additionally, if the Owner Driver is an employee of a company operated by a related person. The Modern Award would cover the driver, but the onus to operate the business in accordance with all laws, still remains with the Employer and should be treated like any other Employer regardless of the number of Employee drivers.

10/ reply to Submission by ARTIO

Yes, The Applicant Trevor Warner is an official in the NRFA as the Queensland delegate. Members of the NRFA have indicated to me, the same concerns the Applicant has and that is reflected in their Submission in support.

11/ in Paragraph 11. of the ARTIO submission, they mention the TWU failed attempt to implement a pickup and drop-off Allowance.

The TWU would have consumed considerable resources this matter and may have had a different outcome, if they presented a more detailed case, as the Applicants have in this matter.

In the cited paragraph from the Full Bench decision [2017] FWCFB 1913 in AM2016/32 Paragraph 94

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

What the Full Bench has clearly said, was if an Employee delivers different freight, they are not covered by the Long-Distance Award.

On the opposing side. If they deliver **the same** freight AND are not engaged in removing Gates, Tarps or using Hydraulic lifting equipment, they would remain covered by the Long-Distance Award, but would not be physically engaged in Loading and Unloading duties.

This is pivotal to our argument!!

In both these scenario's the employee/Long-Distance driver is engaged in some form of performance of duties, other than Driving. Yet the Full Bench has clearly stated, one employee is not covered, and one is covered.

One must be paid for those duties and one does not.

I will rephrase this another way;

If two Long Distance drivers completed a Long-Distance Journey of greater than 500kms. Then swapped Freight, (which can be as simple as unhitching one trailer and connecting to another loaded Trailer) resulting in delivering different freight. Then BOTH drivers are no longer covered by the Long-Distance Award and would be remunerated for those all duties provided for in cl. 4.2 of the LD award

“4.2 The award does not cover an employee while they are temporarily required by their employer to perform driving duties which are not on a long-distance operation, provided the employee is covered by the Road Transport and Distribution Award 2010 while performing such duties.”

If the Long-Distance drivers did not receive wages for these duties, they would have a legitimate argument for a remedy.

However, if the swapping of freight did NOT occur, those same drivers, performing the same duties, delivering the same freight from the long distance journey and potentially to multiple delivery points, WOULD NOT BE ENTITLED TO BE PAID THE HOURLY “Loading and Unloading” rate and that c.4.2 and c.20.4 would be silent.

12/ SARTA submission in paragraph 8. And 9. Raises this same issue. However, there is no confusion between the two Awards. As stated above in paragraph 11. The Full Bench [2017] FWCFB 1913 agreed, unless the Long-Distance driver delivers different freight, the Long-Distance Award applies.

There would be no change of Award, as provided for in cl. 4.2 of the Long-Distance Award. Even at paragraph [97] [2017] FWCFB 1913, it was stated there may be more than one pick up or delivery. This indicates an employee can be exploited to perform these duties, instead of engaging a different Employee under another Award.

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

13/ Paragraph 11, clearly shows the ambiguity the Applicants highlight in the Application. If this Application was successful, this ambiguity would no longer be in existence and all duties performed would be remunerated properly in accordance with the intended purpose of the Modern Award system. This simple amendment of Definition in cl. 3 of the Long-Distance Award provides for the remedy sort.

14/ In the ARTIO submission paragraph 20.
ARTIO refers to an EBA dispute over “loading and unloading”.
His Honour DP Beaumont, refers to the components of the Industry Disability Allowance;

14.1(a) Industry disability allowance

The rates per kilometre are inclusive of an industry disability allowance of 1.3 times the ordinary rate, which compensates for the following:

- (i) Shift work and related conditions;
- (ii) Necessity to work during weekends;
- (iii) Lack of normal depot facilities, e.g. lunch room, wash rooms, toilets, tea making facilities;
- (iv) Necessity to eat at roadside fast food outlets;
- (v) Absence of normal resting facilities and normal bed at night;
- (vi) Additional hazards arising from driving long distances at night and alone;
- (vii) Handling dirty material;
- (viii) Handling money;
- (ix) Extra responsibility associated with arranging loads, purchasing spare parts, tyres, etc;
- (x) Irregular starting and finishing times; and
- (xi) Work in rain.

DP Beaumont refers to cl. 14.1(a) (ix) as being broad enough to include waiting time for Paperwork and for loading and unloading trailers.

This may be suitable for Long Distance drivers who are rostered for day shift and Weekday shifts. The first two clauses in the Industry Disability Allowance say;

- (i) *Shiftwork and Related Conditions*
- (ii) *Necessity to work during weekends*

If these are regular and predictable shifts the *Road Transport and Distribution Award 2020 [MA000038]* which has recently been in force, but has not altered since the 2010 Award release, shows the following shift and weekend loadings;

22.3 Shift rates

For ordinary hours shiftworkers must be paid as follows:

Shift	% of the ordinary hourly rate
Afternoon shift	117.5%
Night shift	130%

AND

22.8 Work on Saturdays, Sundays or public holidays

(a) For work on a rostered shift, the major portion of which is performed on a Saturday, Sunday or public holiday, shiftworkers will be paid as follows:

Shift	Penalty rate Casual penalty rate	
	% of ordinary hourly rate	
Saturday	150	175
Sunday	200	225
Public holidays	250	275

If a Long-Distance driver regularly is rostered for these work times, the 30% Industry Disability Allowance will be deficient is compensating for what NATROAD, ARTIO and SARTA along with decades of Case law attempt to infer.

If a Long-Distance driver only covers 500km per day, and indeed some EBA approvals show Albury to Melbourne as a Long-Distance Journey. The driver paid by cents per kilometre and spends a full 12hr shift during Afternoon shift and on Weekends is disadvantaged, over other Long-Distance drivers who would travel much greater distances.

15/ The current Grade 6 cents per Kilometre is 46.1 cents and is approx. 8hrs travel time and 4 hours allowed for Loading and Unloading for a weekday, daytime Employee;

Cents per kilometre

Albury to Wodonga return trip is 654km @ 46.1 cents/km = **\$301.49**

Daytime weekday, Hourly plus Overtime- (Road Transport and Distribution Award 2010)

7.6 hrs x \$23.33 =	= \$177.30
2 hrs x \$35.00 =	= \$70.00
2.4 hrs x \$46.66 =	= \$111.98
Overtime meal	= \$16.25

\$375.53

The above calculation DOES NOT take into account Shift Loading or Weekend Penalty rates.

If we were to add these other loadings into the above example, would only serve to exacerbate the gap between the two modern awards and further illuminate the exploitation occurring.

This example clearly demonstrates the Industry Disability Allowance cannot possibly compensate a Long-Distance driver for all duties performed.

His Honour DP Beaumont may not have erred in the decision, but I would suggest, the Applicant did not present the full facts.

16/ The fact these calculations clearly support the current unfairness between both the *Road Transport and Distribution Award 2010* and *Road Transport (Long Distance Operations) Award 2010*, surely supports our Application and highlights the blatant attempts of those opposing this Application to maintain this unfairness to enable the Employers to continue the subversion of the intent of the cents per Kilometre method and the exploitation of Long-Distance truck drivers.

Travelling Allowance

17/ I have used the most recent version of the Road Transport and Distribution Award 2020 to support Part 2 of our Application – Travelling Allowance

The language is clear and unambiguous that a driver covered by this transport award would receive both Accommodation AND meals. It is difficult for Employers to provide meals for Long-Distance drivers, therefore cash in lieu would be the obvious alternative.

The Applicants have not asked for extraordinary treatment and it is clear no other compensation has been provided for in the Award.

19.5 Expense-related allowances

(a) Travelling allowance

An employee engaged in travelling on duty, or on work on which the employee is unable to return home at night must be paid personal expenses reasonably incurred in travelling, of at least \$31.66 per day. Where an employer provides suitable accommodation and meals such allowance shall not be payable.

18/ This highlights the unfairness of the Long-Distance Award and we encourage the Commission to provide the remedy we seek, as per the Application.

Despite protests from all opposing parties, their opposite demonstrates their intention to only discriminate against drivers covered by the *Road Transport (Long Distance Operations) Award 2010* and not the drivers covered by *the Road Transport and Distribution Award 2010*.

Conclusion

19. ARTIO admits in their submission, that since 1963 the LD Award has been in place. In that time many components of that Award have been amended to keep up with the modernisation of the industry. NATROAD and SARTA continue to oppose any increased costs to transport operators.

This Application is now addressing an area in which all the above have subverted the reality of duties performed by the modern Long-Distance truck driver. These parties seem content for a relatively low paid employee to perform some remunerated duties and the balance to be performed for free. This Application must be approved in order to alleviate these very specific disputes in the cited cases.

The current definition is enabling Long-Distance truck drivers to be only remunerated for the work in the middle of the loading of, and the delivering of the same freight.

In reflection, it can't be imagined that any person in the legal profession would conduct a FREE consultation, charge for the court preparation, but also not charge for actual court time.

Then mount a defence to enforce this exact same scenario against Long-Distance truck drivers.

TREVOR WARNER

APPLICANT

25/5/2020

ANNEXURE A



Pay Slip For: Warner, Trevor Brian
 Classification:

Cheque No: 7383
 Payment Date: 7/5/2020

Annual Salary: \$0.00

Hourly Rate: \$0.0000

Pay Period From: 30/4/2020 To: 6/5/2020

GROSS PAY: \$2,340.00

Superannuation Fund: The Trustee for THE TANDV WARNER

NET PAY: \$1,790.00

DESCRIPTION	Kilometre	CALC. RATE	AMOUNT	YTD	TYPE
Kilometre Double	4,500.00	\$0.45	\$2,025.00	\$98,714.88	Wages
Meal Allowance/ Kilometre	4,500.00	\$0.07	\$315.00	\$15,389.50	Wages
Holiday Pay			\$0.00	\$4,199.76	Wages
PAYG Withholding			-\$550.00	-\$29,354.00	Tax
Holiday Leave Accrual	2.93			5.26	Entitlements
Superannuation Guarantee			\$222.30	\$11,238.88	Superannuation Expenses

