



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)
Passenger Vehicle Transportation Award 2010**

**(ODN AM2008/51)
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Sydney

10.08 AM, MONDAY, 6 MARCH 2017

PN1

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, we should start with the appearances.

PN2

MR M GIBIAN: Yes, may it please the Commission, Gibian, I appear for the Transport Workers' Union. I imagine I require permission. I don't think I have appeared in this aspect of the proceedings previously.

PN3

MR B FERGUSON: As the Commission pleases, Ferguson, initial B, for the Australian Industry Group.

PN4

MR R CALVER: If the Commission pleases, Calver, initial R, from the National Road Transport Association.

PN5

MR P RYAN: If the Commission pleases, Ryan, initial P. I seek leave to appear for the Australian Road Transport Industrial Organisation.

PN6

MR B CROSS: If the Commission pleases, Cross, initial B. I appear for Truck Moves Australia Pty Ltd, Quick Shift Vehicle Relocations Pty Ltd and Vehicle Express Pty Ltd. I understand permission has been granted for those parties to be legally represented previously.

PN7

MS K THOMSON: If it please the Commission, Thomson, initial K, for ABI New South Wales Business Chamber.

PN8

SENIOR DEPUTY PRESIDENT HAMBERGER: And in Melbourne?

PN9

MR W FRIEND: If the Commission pleases, Friend, initial W, with Mr Dowling. We're seeking permission to appear for the SDA. Can I say that we've got two screens here and one of them is just showing us ourselves rather than the Bench, so - - -

PN10

SENIOR DEPUTY PRESIDENT HAMBERGER: We'll see if we can do something about that.

PN11

MR FRIEND: Thank you, your Honour.

PN12

MR A DENTON: If the Commission pleases, Mr Denton, initial A, appearing on behalf of Coles.

PN13

SENIOR DEPUTY PRESIDENT HAMBERGER: Can I just ask if there are any objections to all the people who need permission being given it? Can I just indicate, I think, that given the potential complexity of this matter all those who sought permission to represent their clients or parties who have sought permission to be legally represented are granted permission. So we just need to clarify what we're going to be doing: my - I just want to confirm that the witnesses that are going to be needed - so let me know if I've got this wrong - so from the TWU Mr Anderson, Mr Bird, Mr Coghill and Mr Fear. That's right, just those?

PN14

MR GIBIAN: I understand those are the only witnesses who are required for cross-examination.

PN15

SENIOR DEPUTY PRESIDENT HAMBERGER: None of the others need - all right. Then, now, Mr Bradac and Mr Whitnall, you're going to require them?

PN16

MR GIBIAN: Yes.

PN17

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. There is going to be an issue about - then Mr Foenander from Coles. So there's no other witnesses that are required for cross-examination, are there? Are there? All right, good, got those on our list. Now, there's an issue - there's been a flurry of emails I think over the weekend, really, about the issue of when we deal with Mr Bradac and Mr Whitnall and I suppose consequently Mr Foenander so I think you wanted, Mr Cross, you wanted - well, hang on. We did talk, it's true, on the dimension about maybe being able to deal with Mr Bradac and Mr Whitnall this afternoon. Perhaps before I do hear from you, Mr Cross, I might just ask Mr Gibian - you want to be able to deal with them tomorrow?

PN18

MR GIBIAN: Yes. Look, we just need more time to absorb the hundreds of pages that we received on Thursday afternoon. There are people who want to tell me things that we should ask these witnesses who we haven't had the opportunity to go through that process. We did have dates set down all week, of course, which are obviously a small proportion of which is going to be used. We're content for any other day this week as well but we think we can probably do it by tomorrow, if that can be arranged, but this afternoon just doesn't give us the opportunity to look at that material in any depth or talk to anyone else within the organisation.

PN19

SENIOR DEPUTY PRESIDENT HAMBERGER: Now, Mr Cross - yes.

PN20

MR CROSS: Yes, just four points I'd wish to make on this because there is a difficulty with any other times other than today for my witnesses. Firstly, I would note what your Honour has observed in relation to what was discussed on Friday regarding when my witnesses would be required. Unfortunately, based on those

discussions my witnesses have arranged their affairs. They're not available, they have appointments tomorrow, they're interstate on Thursday and Friday. The evidence and submissions from my clients were filed in accordance with directions about midday on Thursday so, with respect, we question whether there's been an insufficient time to deal with those materials. Lastly, we note that whatever my witnesses wish to say - the two witnesses - would come as no surprise to either TWU or Mr Gibian, because of course Mr Gibian has cross-examined them in the Federal Court.

PN21

There is a scope within which the parties agitate in relation to my client.

PN22

SENIOR DEPUTY PRESIDENT HAMBERGER: Just, can I say - Mr Whitnall, what is his position? Is he the owner of Truck Moves?

PN23

MR CROSS: Yes.

PN24

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, and is he based here in Sydney?

PN25

MR CROSS: Yes.

PN26

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, and Mr Bradac - remind me again what's - - -

PN27

MR CROSS: He's based in Wetherill Park. He's the general manager of Truck Moves.

PN28

SENIOR DEPUTY PRESIDENT HAMBERGER: Did you want to say anything, Mr Gibian?

PN29

MR GIBIAN: Only that there's a lot of new material: there's all these worksheets in relation to the work of the particular witness who the TWU put statements on from. I mean, I acknowledge that the statements were filed in accordance with the directions that were made by the Commission but nonetheless, we've received hundreds of pages of material and had really no time to deal with it. The Truck Moves can hardly say that - it was aware that the matter was set down for the whole of this week and it can have been under no misapprehension that the matter was - that their witnesses were definitely going to be dealt with on the Monday at any time leading up to this week.

PN30

From what I understand - I wasn't present - but the directions hearing on Friday, we indicated that we would endeavour to look at the material in the course of Friday and endeavour to give an indication on Friday afternoon, which is what we did.

PN31

SENIOR DEPUTY PRESIDENT HAMBERGER: Look, we hear what you say, Mr Gibian. I also hear what you say, Mr Cross - but we think we should hear them tomorrow, your witnesses.

PN32

MR GIBIAN: May it please the Commission.

PN33

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks. Then I think following on from that, I think Coles wanted Mr Foenander to be dealt with tomorrow. Presumably that's not a problem, I can't see why it would be a problem.

PN34

MR GIBIAN: No.

PN35

SENIOR DEPUTY PRESIDENT HAMBERGER: So we'll deal with all the TWU witnesses today and then we'll deal with Mr Bradac, Mr Whitnall and Mr Foenander at 10 o'clock tomorrow.

PN36

MR CROSS: Your Honour, on that basis might I be excused for the day's proceedings?

PN37

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, yes.

PN38

MR CROSS: Before I do, would it be possible to agitate - I don't want to get into too much timetabling, your Honours, Commissioner - a time?

PN39

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, I imagine it would be 10 o'clock. I don't know which one you would want to do first and I don't know how long we're going to take. Have you got any feeling for that?

PN40

MR GIBIAN: Well, I imagine it's not entirely a matter for us. Mr Foenander, the Coles witness, will be relatively brief. So it might be convenient to deal with him first but I'm in the Commission's hands, obviously. Mr Whitnall will be somewhat longer, Mr Bradac relatively short.

PN41

SENIOR DEPUTY PRESIDENT HAMBERGER: Why don't we do, well, Foenander then Bradac then Whitnall? I mean, obviously we can't - you've heard

what's been said about - but obviously it's important that they're available. I think they all really need to be available tomorrow morning, yes. Okay, so what have we got first? Or do you want to deal with the - it's up to you if we deal with the statements for people who are not going to be required for cross-examination?

PN42

MR GIBIAN: Perhaps - in terms of the witnesses who are required, I'm sorry, Mr Fear is on the telephone and we do just have to give him, I think, five or 10 minutes' warning that we're going to call him. Maybe if we give him that warning now and then deal with the admission of the other statements and we might be able to deal with Mr Fear if that takes five or 10 minutes.

PN43

SENIOR DEPUTY PRESIDENT HAMBERGER: All right. We'll go slowly.

PN44

MR GIBIAN: If we twiddle our thumbs, if that's - - -

PN45

SENIOR DEPUTY PRESIDENT HAMBERGER: So somebody can let Mr Fear know.

PN46

MR GIBIAN: So I'll get Ms Carr to do that and, yes, as I say if there is some short delay in that we apologise but it's probably best to get him out of the way if he's on the telephone.

PN47

SENIOR DEPUTY PRESIDENT HAMBERGER: All right.

PN48

MR DENTON: If I could just take the opportunity to rise now, then, in relation to the ruling for Mr Foenander appearing first thing tomorrow morning; the Coles party is content with that. That's exactly what we sought so from Coles' point of view I'd seek to be excused until 10 o'clock tomorrow as well.

PN49

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, yes, that's fine.

PN50

MR DENTON: Thank you.

PN51

SENIOR DEPUTY PRESIDENT HAMBERGER: What should we do in terms of the people who aren't required for cross-examination?

PN52

MR GIBIAN: The order in which I've been provided with the statements - the first is Tracey Carrington.

PN53

SENIOR DEPUTY PRESIDENT HAMBERGER: So we'll call Tracey Carrington TWU1.

EXHIBIT #TWU1 WITNESS STATEMENT OF TRACEY CARRINGTON

PN54

MR GIBIAN: The next one in my bundle is Mr Nichols.

PN55

SENIOR DEPUTY PRESIDENT HAMBERGER: Mr who, sorry?

PN56

MR GIBIAN: Nichols.

PN57

SENIOR DEPUTY PRESIDENT HAMBERGER: So Mr Nichols is TWU2.

EXHIBIT #TWU2 WITNESS STATEMENT OF CHARLES NICHOLS

PN58

MR GIBIAN: Then Mr O'Brien - Mitchell O'Brien.

PN59

SENIOR DEPUTY PRESIDENT HAMBERGER: O'Brien - so the statement of Mr O'Brien is TWU3.

EXHIBIT #TWU3 WITNESS STATEMENT OF MITCHELL O'BRIEN

PN60

MR GIBIAN: The statement of Dennis Mealin - - -

PN61

SENIOR DEPUTY PRESIDENT HAMBERGER: I don't know if that was one that we - sorry. Mealin, sorry - I've got Dennis Mealin, that's what the problem is. Dennis Mealin - good.

PN62

MR GIBIAN: Yes.

PN63

SENIOR DEPUTY PRESIDENT HAMBERGER: So Dennis Mealin is TWU4.

EXHIBIT #TWU4 WITNESS STATEMENT OF DENNIS MEALIN

PN64

MR GIBIAN: Thank you, your Honour. There is a statement of Glen DeClase.

PN65

SENIOR DEPUTY PRESIDENT HAMBERGER: Glen DeClase - so the statement of Glen DeClase is TWU5.

EXHIBIT #TWU5 WITNESS STATEMENT OF GLEN DECLASE

PN66

MR GIBIAN: I will get Ms (indistinct) to confirm when she returns but I think that's the statements other than those that are required for cross-examination. Would it be convenient to mark the ones that are, at this point?

PN67

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, let's deal with them as they come, I think. We'll talk about the weather in the meantime.

PN68

MR CALVER: Your Honour, did you want to mark - - -

PN69

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, why don't we do that?

PN70

MR CALVER: - - Dr Davis's statement, perhaps.

PN71

SENIOR DEPUTY PRESIDENT HAMBERGER: So Dr Davis - NatRoad1.

EXHIBIT #NATROAD1 WITNESS STATEMENT OF DR BRENT DAVIS

PN72

MR CALVER: Thank you, your Honour.

PN73

MR GIBIAN: Can I just say, in relation to that we may have something to say about what weight if any can be attached to - - -

PN74

SENIOR DEPUTY PRESIDENT HAMBERGER: Sure, but we can deal with that in submissions.

PN75

MR CALVER: Your Honour, we did in our submissions raise some objections to the evidence but we'll deal with that in our submissions as well - - -

PN76

SENIOR DEPUTY PRESIDENT HAMBERGER: All right.

PN77

MR CALVER: - - unless the Bench otherwise determines, if it please the Commission.

PN78

SENIOR DEPUTY PRESIDENT HAMBERGER: No, I think we should deal with that in submissions.

PN79

MR CALVER: Thank you.

PN80

SENIOR DEPUTY PRESIDENT HAMBERGER: So these are submissions as to weight, right? Yes, yes.

PN81

MR CALVER: Well, and to exclusion but the obvious point about the Commission not being bound by the rules of evidence I assume will proceed.

PN82

SENIOR DEPUTY PRESIDENT HAMBERGER: Okay.

PN83

MR CALVER: Thank you.

PN84

MR GIBIAN: All right, I think we might have to wait a few minutes to call Mr Fear, so my apologies for that but I think that's probably the most expeditious course.

PN85

SENIOR DEPUTY PRESIDENT HAMBERGER: How long is he going to be? We can adjourn or sit here.

PN86

MR GIBIAN: If we sit - 10.30 by that clock, I think that would be safe.

PN87

SENIOR DEPUTY PRESIDENT HAMBERGER: We'll just adjourn until 10.30.

PN88

MR GIBIAN: Thank you.

SHORT ADJOURNMENT

[10.22 AM]

RESUMED

[10.35 AM]

PN89

MR FRIEND: Your Honour, before Mr Fear is sworn can I just make an application; if I could be excused from further attendance today?

PN90

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, that's fine.

PN91

MR FRIEND: Thank you.

PN92

THE ASSOCIATE: Please state your full name and address.

PN93

MR FEAR: My name is Lyle Keith Fear, (address supplied).

<LYLE KEITH FEAR, AFFIRMED [10.36 AM]

EXAMINATION-IN-CHIEF BY MR GIBIAN [10.36 AM]

PN94

MR GIBIAN: Thank you, Mr Fear. My name is Mark Gibian. I'm appearing for the Transport Workers' Union in this matter. Can you hear me okay?---Yes, I can hear you. Thank you.

PN95

Thank you. Mr Fear, you've just given your full name and address for the record. Just for the record you're a driver employed by Richers Transport?---Yes. That's correct.

PN96

Based out of the Brisbane depot?---Yes. That's correct.

PN97

You've made a statement for the purposes of the award review proceedings dated 18 January of this year. Do you have a copy of that with you?---Yes, I do.

PN98

I tender that statement.

PN99

SENIOR DEPUTY PRESIDENT HAMBERGER: So Mr Fear's statement is TUW6.

**EXHIBIT #TUW6 WITNESS STATEMENT OF LYLE KEITH FEAR
DATED 18/01/2017**

PN100

MR GIBIAN: Mr Fear, you'll be asked some questions by some other individuals, I think, Mr Ryan from RTO is going first, is the plan?---Yes.

PN101

So he will be the next voice you hear. Thank you, Mr Fear?---Okay.

CROSS-EXAMINATION BY MR RYAN [10.37 AM]

PN102

*** LYLE KEITH FEAR

XN MR GIBIAN

*** LYLE KEITH FEAR

XXN MR RYAN

MR RYAN: Mr Fear, can you hear me all right. My name is Paul Ryan from the Australian Road Transport Industrial Organisation?---Yes, I can hear you.

PN103

Thank you. In your statement you describe a journey that you do on a particular day which seems to run for 15 hours or so; is that correct?---Yes. That's correct.

PN104

How far is that journey – how many kilometres do you travel?---From Brisbane to Bundaberg is just over 300 and something kilometres I think, off the top of my head. Nearly 400 kilometres.

PN105

So the whole day is a 400 kilometre journey?---Yes, up there and then back to Brisbane again, so three or 400 kays back as well.

PN106

So the journey is from Brisbane to Bundaberg?---To Bundaberg.

PN107

Then you - - -?---And Bundaberg back to Brisbane.

PN108

Explain to me what you do in Bundaberg, Mr Fear?---I usually deliver either Coles or Woolworths groceries to the shops. We normally unstrap them, back them on to the dock, the doors open, and then we have – we usually go off for our break while they unload. By the time they've unloaded it our break is up, and we can come back and close up.

PN109

So you drive from Brisbane to Bundaberg. Then you go to one supermarket, two – how many supermarkets?---Depending on the load planned, sometimes one, sometimes up to four.

PN110

Up to four supermarkets?---Yes, coming - - -

PN111

That would take – go on, sir?---Each one will take about – it's only one or two pallets 15 minutes at each shop, so that's a full load could take up to half an hour to unload.

PN112

So you spend about two to three hours driving around Bundaberg making deliveries; am I understanding your answers correctly?---About an hour – hour-and-a-half, yes.

*** LYLE KEITH FEAR

XXN MR RYAN

PN113

An hour to an hour-and-a-half. Then you go somewhere else, reload?---So, basically back to Maryborough or back to Tuan to re-load the trailers and then back down, deliver that on the way in. That could be one or two drops.

PN114

My understanding is that you're paid for that under your enterprise agreement which is the Richers Transport Proprietary Limited Enterprise Agreement 2013?---Yes, we get paid trip money and then pick up allowances, and if we get held up for too long, if it's over two hours, then we get per hour after that paid to us, but it's only what a pick up would be.

PN115

So can you explain to me how you get paid the trip money? Is it for - - -?---Trip money is sort of a trip from Brisbane to Bundaberg, back to Brisbane and then each additional pick up and drop is paid at, I think, it's \$20 at the moment at every drop.

PN116

So you were paid a trip amount. Is that based around an hourly payment?---Not that I can work out. From GPO to GPO, from post office to post office I think is how they work it, and that's - - -

PN117

No, Mr Fear, what I'm - - -?--- - - -what I've been told.

PN118

Okay. Mr Fear, what I'm asking you is how is that trip rate calculated? Is it based on the kilometres travelled or is it based on the hours taken?---I think it's based on the kilometres travelled.

PN119

Because in my reading of the – and unfortunately I'm sure he doesn't have a copy of the enterprise agreement with him?---No, I don't.

PN120

Which was attached to your statement and marked LF1, but it doesn't talk about, nowhere can I find where it talks about payment on a cents per kilometre basis. It talks about payments which are indicative of standard trips. So you believe you're paid on a cents per kilometre basis, Mr Fear?---As far as I know, yes, but that was in the EBA. That's what I'm led to believe.

PN121

You do receive additional payments if you - - -?---For pick-ups and drops.

PN122

For pick-ups and drops, and if you're engaged in loading or unloading?---That's engaged in unloading or loading. That's our – what we get paid.

PN123

Mr Fear - - -

*** LYLE KEITH FEAR

XXN MR RYAN

PN124

DEPUTY PRESIDENT SAMS: Is this schedule in the agreement that you're referring to?

PN125

MR RYAN: Yes. Yes, Deputy President. Mr Fear, could you give us an indication of how much you earn in a week? It doesn't have to be - - -?---It varies every week but around about \$1100 in the hand after tax.

PN126

So before tax that's about 15-1600 I'm presuming?---Roughly, yes.

PN127

Okay. Each day you would do a similar route?---Each day, yes, similar route. Maybe not as far sometimes, other times further.

PN128

You work about 14 or 15 hours each day?---Yes, correct.

PN129

Do you have basic fatigue management accreditation or training, Mr Fear?---Yes, we do.

PN130

Are you given a copy of your fatigue management plan?---Yes, we do have one but it's very vague in the way it is set up from the new one, but they have got one.

PN131

You are given a copy of that?---Yes.

PN132

Do the hours worked equate to the hours you're paid?---Sometimes, sometimes not, because depending on what you are doing, some days you can get held up for hours at end at the port, and you don't earn as much as if you would do if you're doing a lot of pick-ups.

PN133

So if you're held up somewhere you're not paid?---Yeah, you're not paid until after two hours - which is there's the two hours - then every hour after that we get paid but most times you're there for two hours on the - and you're stuck and you've got to unload it so we don't get any extra.

PN134

So there is some waiting time built in to your trip rate of payments?---Yes. I believe so.

PN135

Okay, Mr Fear I have no further questions. I believe Mr Calver will ask you some questions now.

*** LYLE KEITH FEAR

XXN MR RYAN

PN136

MR CALVER: No, given that I was just merely seeking to establish that the work of Mr Fear was covered by an enterprise agreement and that the trip rates were covered by Schedule 3. I have no questions for this witness.

PN137

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. So anyone else? No. No one else. Mr Gibian.

RE-EXAMINATION BY MR GIBIAN

[10.46 AM]

PN138

MR GIBIAN: There was only one matter, Mr Fear. It's Mr Gibian for the Transport Workers Union again?---Yes.

PN139

You were asked some questions about the trip to Bundaberg and, in particular, whether you delivered to one, two or more supermarkets in Bundaberg and I think you said "Sometimes one. And sometimes up to four." Do you recall that?---Yes, that's correct.

PN140

You were then asked how long the delivery times take and I think you said - you mentioned both 15 minutes and up to an hour for a full load?---Yes.

PN141

I just want to ask did you mean an hour if you're delivering to one location and it's all been - - -?---If it's one location?

PN142

MR CROSS: I object to that. It's just leading.

PN143

MR GIBIAN: Well, I can ask him what he meant?---It can take anything between 30 - - -

PN144

I'm sorry, Mr Fear. I'll go back a step. In what circumstances does it take 15 minutes for the delivery to be made?---That's if we've only got one or two pallets to come off. That either takes 10 to 15 minutes.

PN145

And in what circumstances might it take an hour?---It's a full load to come off, depending on the shop and how much we have got on for them.

PN146

And are there ever delays at the supermarket?---Occasionally there's - there can be delays if there's one or more trucks there. So on the same - from our company - because there's usually three trucks go into one shop when it's busy.

*** LYLE KEITH FEAR

RXN MR GIBIAN

PN147

And you were then asked some questions about the trip rates - the trip rates that you're paid for - the work that you do. Has the company explained to you how the trip rates are calculated?---No, they only say from GPO to GPO. That's what they tell us at the time.

PN148

Thank you, Mr Fear.

PN149

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks very much, Mr Fear. You're excused now. You can continue on. Thank you.

<THE WITNESS WITHDREW

[10.48 AM]

PN150

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, who's next?

PN151

MR GIBIAN: We were going to call the witnesses in Melbourne. Obviously, Mr Coghill first.

PN152

THE ASSOCIATE: Please state your full name and address?---Daryl John Coghill, (address supplied).

<DARYL JOHN COGHILL, AFFIRMED

[10.49 AM]

EXAMINATION-IN-CHIEF BY MR GIBIAN

[10.49 AM]

PN153

MR GIBIAN: Thank you, Mr Coghill. I'm Mr Gibian, obviously appearing for the Transport Workers' Union. You can hear and see me?---Yes.

PN154

You've just given your name and address for the record. You're an organiser with the Victorian and Tasmanian Branch of the Transport Workers' Union?---Yes.

PN155

And you've made a statement for the purposes of the award review proceedings dated 12 January of this year. Do you have a copy of that with you?---Yes.

PN156

In the witness box with you?---No.

PN157

Can I ask you to - well, it may be of assistance if you go and recover that?---I have it now.

*** DARYL JOHN COGHILL

XN MR GIBIAN

PN158

Yes, thank you. I tender that statement.

PN159

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, so Mr Coghill's statement is TWU7.

**EXHIBIT #TWU7 WITNESS STATEMENT OF DARYL JOHN
COGHILL DATED 12 JANUARY 2017**

PN160

MR GIBIAN: Thank you, Mr Coghill. I think Mr Ryan again is going to ask you some questions.

CROSS-EXAMINATION BY MR RYAN

[10.50 AM]

PN161

MR RYAN: Hi, Mr Coghill, you can see me?---Yes, I can.

PN162

Thank you. In your witness statement you talk about long - this is in paragraph 14 - 13 and 14 - where drivers perform a long-distance operation and in carrying out local work is that some companies only pay a base hourly rate for the local work. Are you familiar with the Transport Workers Long Distance Operation Award?---Reasonably well.

PN163

Are you familiar with how the cents per kilometre formula is calculated?---Yes.

PN164

And are you aware that included in that cents per kilometre rate is an overtime component?---Yes.

PN165

So whilst people are being paid on a cents per kilometre basis they are already receiving an overtime component is that correct?---Yes. Twenty percent, yes.

PN166

So 20 percent or two hours in 10?---Yes.

PN167

So how would it be fair to calculate - to use an overtime component and then say you just count that as ordinary hours?

PN168

MR GIBIAN: Well, I object to that. I mean that's really a question for the submissions in the case rather than for the asking an individual from the union. He is an organiser of the union but nonetheless it's really a question of submission for the Commission.

*** DARYL JOHN COGHILL

XXN MR RYAN

PN169

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, I agree.

PN170

MR RYAN: You say in paragraph 15 that "My experience are from discussions with drivers hours worked in the range from 12 to 16 a day." How often does that occur?---Very regularly.

PN171

So would those drivers have basic accredited fatigue management?---Some do and some don't. Some companies operate and drivers operate on still standard hours.

PN172

And on the standard hours you're saying these drivers are working for 12 to 16 hours a day?---In some cases, yes.

PN173

And is that legal?---No.

PN174

So the system is flawed and you're suggestion to fix the system is to pay them more money.

PN175

MR GIBIAN: I think the same objection should be noted.

PN176

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. I agree.

PN177

MR RYAN: All right. I withdraw that question - - -

PN178

MR GIBIAN: We've known it's Mr Coghill's - - -

PN179

MR RYAN: I withdraw that question, Mr Coghill. What percentage of those drivers do you think work the 12 to 16 hours per day?---I'd say approximately 70 percent.

PN180

Thank you. No questions.

PN181

MR CALVER: I have no questions for this witness.

PN182

MR RYAN: Thank you, Mr Coghill. I have no further questions.

*** DARYL JOHN COGHILL

XXN MR RYAN

PN183

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks. Anyone else? Did you want to - - -

PN184

MR GIBIAN: Nothing arising.

PN185

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you, Mr Coghill. You're excused and free to go.

<THE WITNESS WITHDREW [10.54 AM]

PN186

MR GIBIAN: I can't remember which order we said we were going to deal with them. Bird - next - Mr Bird.

PN187

THE ASSOCIATE: Please state your full name and address?---Maxwell Noel Bird, (address supplied).

<MAXWELL NOEL BIRD, AFFIRMED [10.55 AM]

EXAMINATION-IN-CHIEF BY MR GIBIAN [10.55 AM]

PN188

MR GIBIAN: Thank you, Mr Bird. My name's Gibian. I'm appearing for the Transport Workers' Union. You've just given your full name for the record and you're currently a driver employed by Greenfreight?---That's correct.

PN189

And you've made a statement for the purposes of the proceedings of three pages and 22 paragraphs dated the 15 January of this year?---Yes.

PN190

You have that in front of you?---Now, I do.

PN191

I tender that statement, your Honour.

PN192

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, so Mr Bird's statement is TWU8.

EXHIBIT #TWU8 WITNESS STATEMENT OF MAXWELL NOEL BIRD DATED 15/01/2017

PN193

MR GIBIAN: I think Mr Ryan's going to - sorry, Mr Calver is going to ask you some questions from Nat Road.

*** MAXWELL NOEL BIRD

XN MR GIBIAN

CROSS-EXAMINATION BY MR CALVER

[10.55 AM]

PN194

MR CALVER: Good morning, Mr Bird?---Good morning.

PN195

Could you please turn to paragraph 8 of your statement?---Yes, I've got that.

PN196

You say there that you didn't know whether or not you were paid under the award is that correct?---Yes, that is very correct, yes.

PN197

Thank you. You do not know - you did not know if the hourly rate was calculated by reference to a fatigue management plan or some other method. Is that correct?---No, through our employer. No that's right.

PN198

Yes. Can I ask you to turn now, please, to paragraph 13 of your statement? Do you have that there?---Yes, I've got that.

PN199

Thank you. You say you believe the TWU application is from employers to provide a copy of the Fatigue Management Plan or a Safe Journey Plan, that's your understanding is it?---Yes, that's correct.

PN200

Right, thank you. Can I just get you then to look at paragraph 16 of your statement?---Yes, I've got that.

PN201

Do you allege a breach of the law against your former employer there?---That's correct.

PN202

What did you do about that breach? Did you complain to the TWU?---I - for starters I went through Fair Work Australia - - -

PN203

Yes?---And they wouldn't help me. I went through a Fair Work Commissioner. I had one - one that we went through we had an agreement at the end and after that agreement that employer still refused to pay what was in that agreement. So I had to go back through the Fair Work Commissioner. He couldn't help. That employer refused to talk to the Fair Work Commissioner so I had to go through legal circles and go through a solicitor to get that done again.

PN204

*** MAXWELL NOEL BIRD

XN MR GIBIAN

*** MAXWELL NOEL BIRD

XXN MR CALVER

MR CALVER: So you were paid?---I had an agreement paid. It was a part payment of that which I signed the agreement to finish that - finalise that.

PN205

But you were paid in accordance with the law in the end?---I was paid in accordance with that agreement. The money I was owed wasn't paid in full but I signed that agreement to finish that agreement off.

PN206

Yes. No further questions.

CROSS-EXAMINATION BY MR RYAN

[10.58 AM]

PN207

MR RYAN: Mr Bird, my name is Paul Ryan from the Australian Road Transport Industrial Organisation. I only have a couple of questions for you. In paragraph eight of your statement you talk about a Safe Journey Plan. Is that accredited under the Fatigue Management Laws?---That is, yes.

PN208

So you're given a copy of that regularly?---No. Not with that employer. I never seen one at all. The only time I saw that was with our contract worked through K & S. They give us that Fatigue Management Plan after we loaded for them.

PN209

Do you see an accredited Fatigue Management Plan and a Safe Journey Plan as being the same thing?---Ah - no.

PN210

Well, in paragraph 13 you talk about to provide a copy of the Fatigue Management Plan or Safe Journey Plan. But you see them as different documents?---The document was different with K & S. They had theirs. It was a Safe Journey Plan. That's what they called it.

PN211

And that's not an accredited Fatigue Management Plan?---I don't know what that plan is. That's the only thing we got was that Safe Journey Plan from K & S.

PN212

Have you done - - -?---That's the employer.

PN213

I'm sorry. Continue to - - -?---My previous employer never had one.

PN214

Do you currently work under an accredited Fatigue Management Plan?---No, I don't. I'm on standard hours.

PN215

You're on standard hours?---Yes.

*** MAXWELL NOEL BIRD

XXN MR RYAN

PN216

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

PN217

So you've never had the requirement to work under an accredited Fatigue Management Plan?---No.

PN218

No further questions. Thank you, Mr Bird.

PN219

MR GIBIAN: Nothing arising. Thank you, Mr Bird.

PN220

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you, Mr Bird.

PN221

DEPUTY PRESIDENT SAMS: Mr Gibian, is there any reason why Mr Bird's statement has gaps in some of the paragraphs?

PN222

MR GIBIAN: He's unable for reasons to do with the resolution of earlier - the matters involving that previous employer to name in the proceedings.

PN223

DEPUTY PRESIDENT SAMS: I see.

PN224

MR GIBIAN: That's the reason why it's omitted. I don't know that it's presented any difficulty for anyone.

PN225

DEPUTY PRESIDENT SAMS: I see. I'm just curious that's all.

PN226

MR GIBIAN: Yes.

PN227

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you, very much, Mr Bird. You're excused now.

<THE WITNESS WITHDREW

[11.01 AM]

PN228

MR GIBIAN: The third witness is Mr Anderson.

PN229

THE ASSOCIATE: Please state your full name and address?---Robert Garry Anderson, (address supplied).

*** MAXWELL NOEL BIRD

XXN MR RYAN

<ROBERT GARRY ANDERSON, AFFIRMED

[11.01 AM]

EXAMINATION-IN-CHIEF BY MR GIBIAN

[11.02 AM]

PN230

MR GIBIAN: Yes, thank you, Mr Anderson. You've just given your full name and address for the record and you're - just for the record you're a driver currently employed by Visy Logistics?---That's true.

PN231

And you have made a statement for the purposes of these award review proceedings. Two pages and 11 paragraphs dated the 17 January of this year and you've got that in front of you, have you?---Yes. I just would like to let you know that the \$28 rate for unloading - that should have been \$49.85 - I think - for two hours. And not per hour or one hour.

PN232

I think that you have just referred to the concluding part of paragraph seven on the first page of the statement. Is that right?---That's correct, yes.

PN233

And in the last sentence you said, "From memory the rate" - referring to an extra payment for drop-offs is \$28.00 and if you take three hours to unload it at the end of location you still only receive \$28.00 do you see that?---Yes, that's the - sorry -
--

PN234

So it should be \$49.85 for two hours, is that right?---That's correct.

PN235

If it takes more than two hours do you receive any more than \$49.85?---No.

PN236

I'm not sure if a strict correct it would be replacing \$28.00 by \$49.85 for two hours I suppose.

PN237

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. But if you take three hours to unload at a location on the way you still only receive \$49.85?

PN238

MR GIBIAN: Yes.

PN239

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN240

MR GIBIAN: That's an accurate reflection of what you wish to say?---Yes.

*** ROBERT GARRY ANDERSON

XN MR GIBIAN

PN241

Yes?--- Yes, that's correct.

PN242

Thank you, Mr Anderson. I think Mr Calver is going to ask you some questions from Nat Roads?---No worries.

PN243

SENIOR DEPUTY PRESIDENT HAMBERGER: So Mr Anderson's statement is TWU9.

PN244

MR GIBIAN: I'm sorry. Thank you.

**EXHIBIT #TWU9 WITNESS STATEMENT OF ROBERT GARRY
ANDERSON DATED 17/01/2017**

CROSS-EXAMINATION BY MR CALVER

[11.04 AM]

PN245

MR CALVER: Good morning, Mr Anderson?---Good morning.

PN246

Richard Calver from Nat Road. You say in paragraph three of your statement that your employment is governed by an enterprise agreement. That's right, isn't it?---That's correct.

PN247

Yes. And at paragraph 10 of your statement you talk about an issue facing drivers under the two awards you mentioned there. That's correct, isn't it?---Yes.

PN248

Yes. But at paragraph 11 of your statement aren't you contrasting payment practises under one enterprise agreement with that of another? That is your enterprise - your employment was governed by Phillips Transport Enterprise Agreement and now your employment is governed by Visy Enterprise Agreement isn't that right?---No, the original owners were Phillips Transport and that was back in 1995.

PN249

Yes?---The current owner is Visy Logistics.

PN250

Yes?---And that's what I'm telling you.

PN251

But both your employment with Phillips was governed by the Phillips Transport Enterprise Agreement either of '96, '98 or 2001, wasn't it?---That's correct.

*** ROBERT GARRY ANDERSON

XXN MR CALVER

PN252

Yes. So when you say that you're looking at the two rates in paragraph 11, you're comparing the practises under two enterprise agreements aren't you?---Well, back then we used to get - when we had been to Melbourne and we had come home and we were on trip money for the first part of it - for the trip to Melbourne and return and then if they were busy in the yard we would be actually paid time and a half - double time - depending on how long you worked for the hours after you got home - where Visy don't pay that. They only pay a set rate because it was never in the EBA I don't think.

PN253

Yes. So we're not talking about the correct rate under the Award, are we, as you say in paragraph 11 but the rates paid under two enterprise agreements?---Yes, I suppose.

PN254

Yes, thank you. Yes, no further questions.

CROSS-EXAMINATION BY MR RYAN

[11.06 AM]

PN255

MR RYAN: Mr Anderson, my name's Paul Ryan from the Australian Road Transport Industrial Organisation and I just have a couple of questions. In paragraph six you talk about a truck driver performing a long distance operation under the award who drives from a principal point of commencement to a principal point of destination. What's your understanding of "principal"?---Well the depot from which the truck operates out of including Shepparton.

PN256

But is it your view that "principal" means "single"?

PN257

MR GIBIAN: I mean I object. I mean I don't know whether the witness is being asked to interpret the provision for the Long Distance Award or not but if that's the point of the question then the witness can hardly be asked that.

PN258

MR RYAN: Well, Mr Gibian he's put it in his statement that he's talking about a principal point to a principal point. I'm just asking.

PN259

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, you asked him what he means by "principal".

PN260

MR RYAN: What he means by "principal".

PN261

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. Do you want to do that?

*** ROBERT GARRY ANDERSON

XXN MR RYAN

PN262

MR RYAN: I just want to understand what you mean by "principal" in paragraph six of your statement - TWU9 - Mr Anderson?---Well, the "principal", I would assume that would be from the depot at Shepparton or the GPO at Shepparton to I think the award says the GPO of Melbourne being the principal destination.

PN263

In paragraph seven you say, for example, "If I do a return journey from Shepparton to Melbourne I received payment for 400 kilometres." How is that payment based?---That's just always been 400 kilometres.

PN264

So is it based around - - -?---From the GPO in Shepparton to the GPO of Melbourne I think is 195 or four kilometres and it's a round trip of 400 k's.

PN265

So are you paid on a cents per kilometre basis for that trip?---Well, they - Visy seems to calculate it out at 33 cents a kilometre but they have had an equation that was about three feet long and I don't know how they actually worked it out.

PN266

Your answers led to a little bit of mirth down here, Mr Anderson. Nothing wrong with that, sir. So if you were paid on a cents per kilometre basis is that under the Visy Enterprise Agreement?---They seemed to - well we were actually going through the EBA at the moment but they seem to - I don't know how they work it out either. It's - yes.

PN267

So for every kilometre you drive how much are you paid?---Well, it calculates out at 33 cents a kilometre which I'm pretty sure where the awards 41 point something.

PN268

So you're not paid on an hourly basis for any work you do?

PN269

---No. No. The unloads are an hourly basis 49.85 divided by four is 24 something or other and that's what we get to unload but that's about the only hourly rate we get.

PN270

So you get paid \$49.85 for every two hours then loading and unloading? Is that how it works?---We get it - we get a - two hours given to us to unload a B-double and two hours to reload a B-double. Now, if it takes you three hours well you still get two hours pay. If you go and do two drops then you get an extra 24 - half of that - 24 - whatever it is for every drop after that. Whether it takes you an hour, two hours, three hours.

*** ROBERT GARRY ANDERSON

XXN MR RYAN

PN271

So you don't get paid those extra kilometres if you drive to make additional drops but you receive the 49.85 or the 24 or \$25.00 whatever it is for that period of

time?---Per drop, yes. So if we drive from Shepparton to Altona which is - or Laverton in Melbourne which is about 200 kilometres but if you go - you get 400 k's but if you drive from Shepparton to Dandenong which is about another 20 or 30 kilometres you don't get any extra then.

PN272

And that's only - - -?---Probably up around - sorry?

PN273

Sorry, that's only your enterprise agreement?---Yes.

PN274

Okay. No further questions. Thank you, Mr Anderson.

PN275

SENIOR DEPUTY PRESIDENT HAMBERGER: Anything else, Mr Gibian?

RE-EXAMINATION BY MR GIBIAN

[11.11 AM]

PN276

MR GIBIAN: Yes, there was just one matter. You were asked - Mr Calver asked you some questions about paragraph 11 of your statement on the second page in relation to the arrangements prior to the company being taken over by Visy?---Yes.

PN277

And I think you said in answer to those questions that when you returned from a long - you were paid firstly - you were paid a trip - at that time for long distance work. Is that correct?---Yes. Well, we did our trip to Melbourne and home we would be paid a trip rate and then if we helped out in the yard because they were busy - where they had certain times a year - Christmas time we would be busy - so we would be paid when you got home from the time you started - time and a half - two hours and then double time after that. Or if we worked on a Saturday - or if we worked on a Saturday morning there'd be time and a half double-time or if you worked on a Sunday there'd be double-time.

PN278

Right. And in the first sentence at paragraph 11 you've said that Phillips Transport paid the drivers a correct rate under the RT&D Award when they carry out local work after the completion of a long distance operation. Was it your understanding that the rates that the time and a half and double time were - - -

PN279

MR CALVER: I object to that. It's clearly misleading.

PN280

MR GIBIAN: I'm asking the question which has alternatives attached to it that's not leading. Was it your understanding that the rates that you have just referred to - the time and a half and the double time were derived from the obligations under an enterprise agreement then applied or under any award then applied?

*** ROBERT GARRY ANDERSON

RXN MR GIBIAN

PN281

MR CALVER: Well, the question assumes the answer that the witness should give and therefore is highly leading. We object.

PN282

MR GIBIAN: So I gave him two options.

PN283

MR CALVER: Come on.

PN284

SENIOR DEPUTY PRESIDENT HAMBERGER: I will allow the question. So did you get the question? Yes, I think you'd better ask it again.

PN285

MR GIBIAN: You have just explained that when you did local work in the yard or on a Saturday morning you got paid at that time at least - time and a half or double time as appropriate?---Yes, that's correct. It was under they - I think they've got the yard - the blokes who work in the yard have their own agreement. It's not the long distance agreement. It's a local yard agreement and we would go over on to that agreement when we did work yard - - -

PN286

DEPUTY PRESIDENT SAMS: Are these agreements in the evidence, Mr Gibian?

PN287

MR GIBIAN: No. I don't think they are. Certainly not the older ones but I don't think even the Visy one is attached.

PN288

DEPUTY PRESIDENT SAMS: Can you provide them?

PN289

MR GIBIAN: Of course. Thank you, Mr Anderson.

PN290

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks very much, Mr Anderson. You're excused. Thank you. You're free to go.

<THE WITNESS WITHDREW

[11.14 AM]

PN291

SENIOR DEPUTY PRESIDENT HAMBERGER: So that's all the witnesses?

PN292

MR GIBIAN: Yes, I think so, your Honour.

*** ROBERT GARRY ANDERSON

RXN MR GIBIAN

PN293

SENIOR DEPUTY PRESIDENT HAMBERGER: That's good. So just before we adjourn did you want to say something?

PN294

MR GIBIAN: No.

PN295

SENIOR DEPUTY PRESIDENT HAMBERGER: Just before we adjourn - not everybody is here now of course but I guess we want to flag whether it would be possible to bring forward the dates for hearing of submissions. Those dates are set down but it was whether you would be able to do oral submissions I guess later this week rather than coming back and doing them on the 23 and 24 March. What's your view?

PN296

MR GIBIAN: Well, firstly, I don't think we'd need two days but I think we do need some time to consider the submissions. I mean all the parties are against us as is to be expected I suppose and we received all of their submissions at the earliest last Thursday and we received some more over the weekend as I understand it and I think that the Commission would be best assisted by us having some opportunity - - -

PN297

SENIOR DEPUTY PRESIDENT HAMBERGER: So you're saying just the 23rd? Is that what you're suggesting?

PN298

MR GIBIAN: Well, I can't imagine they'd take more than a day.

PN299

MR FENG: I don't think it likely.

PN300

SENIOR DEPUTY PRESIDENT HAMBERGER: What do you think Mr Ferguson?

PN301

MR FENG: I don't think it's likely to take more than a day. There just are quite a few parties and these matters - - -

PN302

SENIOR DEPUTY PRESIDENT HAMBERGER: I think maybe we should - well, why don't we leave it to 23rd and 24th. If it doesn't go to the 24th - - -

PN303

MR GIBIAN: I think that's a sensible course, yes.

PN304

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, just in case. You don't want to sort of lose your day and then find we need to find another day that would be awful.

PN305

MR GIBIAN: Okay.

PN306

SENIOR DEPUTY PRESIDENT HAMBERGER: So we'll leave it at this. So we'll adjourn until 10.00 o'clock tomorrow.

ADJOURNED UNTIL TUESDAY, 7 MARCH 2017

[11.16 AM]

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