DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

Four yearly review of modern awards
(AM2016/32)

ROAD TRANSPORT AND DISTRIBUTION AWARD
[MA000038]

ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD
[MA000039]

Road transport industry

SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT SAMS
COMMISSIONER LEE SYDNEY, 6 JULY 2017

Four yearly review of modern awards - proposed substantive variations to the Road Transport and Distribution Award 2010 [MA000038] and Road Transport (Long Distance Operations) Award 2010 [MA000039].

[1] This decision concerns several proposed variations to the *Road Transport and Distribution Award 2010*[1] (the Road Transport Award) and *Road Transport (Long Distance Operations) Award 2010*[2] (the Long Distance Award) as part of the four yearly review of modern awards conducted by the Fair Work Commission (the Commission) in accordance with s.156 of the *Fair Work Act 2009* (Cth) (the FW Act).

The proposed variations

[2] Both the Transport Workers' Union of Australia (the TWU) and the Australian Industry Group (Ai Group) (together the applicants) filed proposed variations. The TWU proposed three variations to the Road Transport Award and three to the Long Distance Award, two of the latter being related. Ai Group proposed three variations to the Road Transport Award, two of which are related.

TWU proposed variation (TWU-1) to the Road Transport Award: definition of 'driver'

[3] Clause 3.1 of the Road Transport Award sets out definitions of various terms within the award. The TWU filed a draft determination (TWU-1) seeking to insert the following definition of 'driver':

> ‘**Driver** means an employee who is engaged to drive a rigid vehicle, a rigid vehicle with trailer combinations, an articulated vehicle, a double articulated vehicle and/or multi axle platform trailing equipment. A Driver may also undertake non-driving duties or other tasks in connection with driving the vehicles described in this definition including loading and unloading of vehicles; consolidating goods, wares, merchandise or other materials for loading; refuelling a vehicle; operation of on-board computer equipment; routine vehicle inspections; washing or cleaning of vehicles; basic vehicle maintenance tasks; and log book maintenance and other paperwork associated with the driving task.’

TWU proposed variation (TWU-2) to the Road Transport Award: definition of ‘road transport and distribution industry’

[4] ‘Road transport and distribution industry’ is currently defined in clause 3.1 of the Road Transport Award as follows:

> ‘**road transport and distribution industry** means:
>
> (a) the transport by road of goods, wares, merchandise, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock, including where the work performed is ancillary to the principal business, undertaking or industry of the employer;
>
> (b) the receiving, handling or storing of goods, wares, merchandise, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise in a distribution facility;
>
> (c) the storage and distribution of goods, wares, merchandise, materials or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock where the storage and distribution activities are carried out in connection with air freight forwarding and customs clearance;
>
> (d) the wholesale transport and delivery by road of meat from abattoirs, slaughterhouses, and wholesale meat depots;
>
> (e) mobile food vending;
>
> (f) the cartage and/or distribution, in tankers, of petrol or bulk petroleum products (in the raw or manufactured state) from refineries, terminals or depots of oil companies and/or distributors; the cartage and/or distribution on road vehicles of packaged petroleum products (in the raw or manufactured state) from refineries, terminals or depots of oil companies and/or distributors and the transport and/or distribution of petrol and petroleum products (in the raw or manufactured state) for distributors of oil companies or for contractors or subcontractors to such distributors;

(g) the road transport of crude oil or gas condensate;

(h) the transport on public roads of milk and cream in bulk, and the transport, vending and distribution of milk, cream, butter, cheese and their derivatives (including fruit juices, yoghurt and custard); and/or

(i) the cartage by road of quarried materials.'

[5] The TWU filed a draft determination (TWU-2) seeking to insert a new sub-clause (j) that reads:

'(j) the distribution and/or relocation by road of new or used vehicles as described in the classifications within this award where the vehicle itself is required to be driven from one location to another for the purposes of delivery and/or relocation of the vehicle.'

TWU proposed variation (TWU-3) to the Road Transport Award: overtime

[6] Clause 27 of the Road Transport Award deals with the payment of overtime rates and related entitlements. The TWU filed a draft determination (TWU-3) seeking to insert a new sub-clause 27.8 that reads:

'27.8 Where an employee who ordinarily performs work under another award is temporarily required to engage in work covered by this award [he or she] 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 [sub-cl] 27.1 of this clause.'

TWU proposed variation (TWU-5) to the Long Distance Award: Fatigue Management Plan

[7] Clause 13.5(a)(iii) of the Long Distance Award currently reads:

'**13.5 Rates of pay—hourly driving method**

(a) An employee engaged in a long distance operation may be paid for the driving component of a particular journey by means of an hourly driving rate for the relevant grade [of] the vehicle. The hourly driving rate may only be applied as follows:

…

(iii) where the employer has an accredited Fatigue Management Plan in place, the hourly rate may be used to calculate a trip rate for any journey by multiplying the hourly rate by the number of driving hours specified in the FMP for that journey. For the purposes of this clause accredited Fatigue Management Plan means any program which is approved under an Act of a Commonwealth, State or Territory parliament for the purposes of managing driver fatigue.'

[8] The TWU filed a draft determination (TWU-5) seeking to replace the current clause 13.5(a)(iii) with the following:

> '(iii) where the employer has an accredited Fatigue Management Plan in place, the hourly rate may be used to calculate a trip rate for any journey by multiplying the hourly rate by the number of driving hours specified in the FMP for that journey. For the purposes of this clause accredited Fatigue Management Plan means any program which is approved under an Act of a Commonwealth, State or Territory parliament for the purposes of managing driver fatigue. **A copy of the FMP for that journey must be provided to the driver.**' [our emphasis]

TWU proposed variations (TWU-6 and TWU-7) to the Long Distance Award: pickup and drop-off allowance

[9] The TWU filed two draft determinations (TWU-6 and TWU-7) seeking to give effect to its proposal to insert a new pickup and drop-off allowance into the Long Distance Award. Draft determination TWU-7 proposes to insert a new clause 13.7 as follows:

> '**13.7 Pickup and Drop-off allowance**
>
> (a) Where an employee engaged in a long distance operation is required to pick up or drop off at two or more locations at the principal point of commencement or principal point of destination, the employee must be paid an hourly rate for all additional hours worked calculated by dividing the weekly award rate prescribed by clause 13.1 by 40 and multiplying by 1.3 (industry disability allowance).
>
> (b) 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, the employee must be paid an hourly rate for all additional hours worked calculated by dividing the weekly award rate prescribed by clause 13.1 by 40 and multiplying by 1.3 (industry disability allowance).'

and consequentially renumber the remainder of clause 13.

[10] Draft determination TWU-6 proposes to insert a new clause 13.3(d)(ii) to expressly create an obligation to pay the proposed new allowance, as follows:

> '(ii) the pickup and drop-off allowance as prescribed by clause 13.7;'

and consequentially renumber the remainder of cl 13.3(d).

Ai Group proposed variations to the Road Transport Award: higher duties and meal allowance

[11] Clause 19 of the Road Transport Award currently reads:

‘**19. Higher duties**

Where an employee is required to perform 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.’

[12] Ai Group proposes to replace it with the following:

‘**19. Higher duties**

19.1 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 that they perform for more than 2 hours.

19.2 This clause will not apply to an employee performing driving activities associated with the parking, refuelling or movement of vehicles at a depot, yard, garage or similar site.’

[13] Ai Group also seeks to vary clauses 26.3 and 16.4(e) of the Road Transport Award, dealing with the provision of a meal allowance. Clause 26.3 currently provides:

‘**26.3 Meal allowance**

(a) 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.

(b) An employee required to commence work two hours or more prior to the normal starting time must be paid the amount specified for a meal allowance in clause 16—Allowances.’

[14] Ai Group proposes to replace it with the following:

‘**26.3 Meal allowance**

(a) An employee required to work overtime for two or more continuous hours after working ordinary hours 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.

(b) An employee required to commence work two hours or more prior to the normal starting time must either be supplied with a meal by the employer or paid the amount specified for a meal allowance in clause 16—Allowances.’

(c) An employee will not be entitled to a meal allowance if they are provided with 24 hours’ notice of the requirement to work more than 2 hours of overtime or to commence work two or more hours prior to their normal starting time.’

[15] Clause 16.4(e) of the Road Transport Award currently reads:

‘**16.4 Expenses incurred in the course of employment**

…

(e) Meal allowance

Where clause 26.3 applies an employee must be paid a meal allowance of $15.26.’

[16] Ai Group seeks to replace that with the following:

‘The amount that must be paid as a meal allowance referred to in clause 26.3 is $15.26.’

The hearings

[17] Directions were issued for the filing of evidence and written submissions. Hearings were held on 6, 7 and 23 March 2017. Beside the applicants, the following other parties participated in the proceedings:

- Australian Business Industrial (ABI) and the New South Wales Business Chamber (NSWBC);
- the Australian Road Transport Industrial Organisation (ARTIO);
- Coles Supermarkets Australia Pty Ltd (Coles);
- the National Road Transport Association (NatRoad);
- the Shop, Distributive and Allied Employees Association (SDA); and
- Truck Moves Australia Pty Ltd (Truck Moves), Quick Shift Vehicle Relocations Pty Ltd (Quick Shift) and Vehicle Express Pty Ltd (together Truck Moves and others).

[18] The TWU tendered:

- a witness statement of Tracey Carrington, who recently resigned as a truck driver for Toll Pty Ltd and previously worked for Orion Transport, in both cases contracting with Woolworths;[3]
- a witness statement of Charles Nichols, a truck driver employed by Toll IPEC;[4]
- a witness statement of Mitchell O’Brien, a truck driver employed by SCT Logistics;[5]
- a witness statement of Dennis Mealin, a truck driver employed by Oz Wide Heavy Vehicle Deliveries;[6]
- a witness statement of Glen DeClase, former Human Resources Manager for Prixcar;[7]
- a witness statement of Lyle Fear, a grade 4 driver employed by Richers Transport Pty Ltd;[8]
- a witness statement of Daryl Coghill, an official of the Victorian/Tasmanian branch of the TWU;[9]
- a witness statement of Max Bird, a truck driver employed by Greenfreight;[10]
- a witness statement of Garry Anderson, a truck driver employed by Visy Logistics 2;[11]
- a circular issued by the Administrator of Vehicle Standards titled ‘Identification Plates and Approved Supply to the Market Vehicle Plates’;[12]

- an extract from Truck Moves' website;[13]
- a copy of a services agreement between Truck Moves and one of its clients;[14]
- a copy of an advice from the Fair Work Ombudsman to Truck Moves;[15] and
- a copy of the employment checklist that Truck Moves gives its employees.[16]

[19] NatRoad tendered a witness statement of Dr Brent Davis of the Australian National University.[17]

[20] Coles tendered:

- a witness statement of Christopher Gardner, Partner, Seyfarth Shaw Australia;[18]
- a witness statement of Bradley Foenander, Head of Operations Development at Coles Online Pty Ltd.[19]

[21] Truck Moves and others tendered:

- a witness statement of Don Clayton, Director and owner of Vehicle Express Pty Ltd;[20]
- a witness statement of John Bradac, General Manager of Truck Moves;[21] and
- a witness statement of Matthew Whitnall, Director and owner of Truck Moves.[22]

[22] Mr Fear, Mr Coghill, Mr Bird, Mr Anderson, Mr Foenander, Mr Bradac and Mr Whitnall were cross-examined.

Evidence and submissions

TWU proposed variation (TWU-1) to the Road Transport Award: definition of 'driver'

[23] The TWU submitted that:

- inserting its proposed definition of 'driver' in the Road Transport Award will recognise the fact that employees '*are regularly called upon to undertake non-driving duties*';[23]
- the definition will help to make the award simple and easy to understand (which is part of the modern awards objective[24]);
- it will also enable employers to more accurately determine which classification (whether in this or another award) is '*most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work*';[25] and
- the proposed variation will also make the level of detail in the classification descriptions in Schedule C of the Road Transport Award more consistent with those in Schedule B, which relates to distribution facility employees.

[24] Ms Carrington, who was not required for cross-examination, gave evidence that in her work for Toll Pty Ltd and Orion Transport, she delivered groceries ordered online via Woolworths to customers. She described the breadth of non-driving duties she had to perform, including checking the tyres, water level and temperature of the truck before departure, loading the groceries onto the truck and checking that the right number of crates

had been loaded, filling out paperwork, scanning the crates using the provided Mobile Data Terminal (MDT) to electronically record what had been loaded, entering other delivery data, liaising with Woolworths' customer service team, cleaning and refuelling the truck, and completing online training courses.[26]

[25] Mr Mealin, who also was not required for cross-examination, gave evidence that in his role as a driver, he would often have to perform non-driving tasks including vehicle checks, refuelling, completing paperwork, placing trade plates onto vehicles, hitching trailers and tying down loads.[27]

[26] Mr Nichols was also was not required for cross-examination. He gave evidence that his role as a driver for Toll encompassed several non-driving duties, including vehicle checks, loading the truck, operating the MDT to identify freight and notify the customer that a delivery is on its way, refuelling, liaising with customers, completing deliveries on foot, ensuring loads are properly restrained, cleaning the trucks and attending training and toolbox meetings.[28]

[27] Mr O'Brien, who also was not cross-examined, gave evidence that in his role as a driver for SCT Logistics, he mainly completed deliveries in the Perth metropolitan area. He would occasionally go to Wagin (a 420-kilometre round trip from the depot) and/or pick up freight. He stated that his duties were similar each day, including checking proof of delivery documents, vehicle checks, attaching the trailer and checking that the trailer is correctly loaded and restrained, before starting to drive. At his destination, he would open the trailer, complete paperwork, reload (if picking up freight) and then secure the load before heading on. He might make just the one delivery in a day if he was heading to Wagin, but might make more than four in a day if he was delivering palletised freight to Woolworths or Coles nearby. He said that relevant delivery paperwork was done manually because there had been too many issues with the electronic devices.[29]

[28] ARTIO supported the TWU's proposal in principle, but submitted that the definition should not be exhaustive, and that the clause should allow the included tasks to be varied at the workplace level.

[29] ABI and the NSWBC opposed this proposed variation because:

- it was unnecessary for the award's operation;
- it did not encompass all the vehicles the operation of which the award describes as 'driving' (e.g. motorcycles, mobile cranes and forklifts);
- driving should be recognised as the main task of drivers, but the proposed definition failed to make clear that the included non-driving tasks are ancillary or incidental to driving; and
- the list of non-driving tasks included in the definition should not be exhaustive, but the proposed definition does not specify whether it is.

[30] Ai Group opposed this proposal because:

- a definition of the word 'driver' was not necessary, in the sense contemplated by s.138 of the FW Act;

- the specific definition was not appropriate given the manner in which the word driver is actually used within the award. Deviating from the ordinary meaning of the word 'driver' had the potential to alter the operation of numerous award clauses that contained the word 'driver' in unintended and potentially unforeseeable ways;
- the amendment had the potential to disturb existing award coverage and/or to create uncertainty as to the application of potentially overlapping awards;
- there was no evidence of any actual problem with the operation of the current award that would warrant a variation;
- a proper evidentiary case justifying the particular proposed definition had not been made out; and
- the variation was contrary to the '*…need to ensure a simple, easy to understand, stable and sustainable modern award system*'.

[31] The SDA opposed this proposal, submitting that:

- rather than making the Road Transport Award '*simple*' and '*easy to understand*',[30] and far from being '*necessary to achieve the modern awards objective*',[31] the TWU's proposed variation would add ambiguity and uncertainty;
- if made, the proposed variation would create more overlap between the coverage of the Road Transport Award and the *General Retail Industry Award 2010*[32] (General Retail Award), which was undesirable, as the current coverage of the role Coles describes as a customer service agent (CSA), and arguably, therefore, delivery drivers employed by retail businesses more generally had been made clear by the Full Federal Court decision in *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd*[33] (*TWU v Coles*);
- even though the proposed variation '*more closely aligns*' the definition of 'driver' with the role of a CSA, the TWU itself acknowledged that it still may not change the award coverage of these drivers at all, in which case it is difficult to see what it would achieve; and
- the TWU was simply trying to obtain a result denied it by the Fair Work Commission, Federal Court at first instance and Full Federal Court by another means, which was an improper use of the four yearly review of modern awards.

[32] Coles opposed this proposal on the grounds that the TWU had failed to adduce evidence or put forward arguments which adequately demonstrated that the proposal was '*necessary*' in order to ensure that the Road Transport Award met the modern awards objective in s.134 of the FW Act.

[33] Mr Gardner, Partner, Seyfarth Shaw Australia, gave evidence concerning the litigation that led to the decision in *TWU v Coles* that Customer Service Agents (CSAs) employed by Coles as part of its online business were covered by the General Retail Award.[34]

[34] Mr Foenander, Head of Operations Development for the Coles Online business, gave evidence that if the TWU's proposed variation was granted, the TWU would likely reagitate the issue dealt with in *TWU v Coles* and once again seek to have CSAs covered by the Road Transport Award. This would have a significant impact on Coles' business as the hours of work arrangements under the Road Transport Award did not align with the retail operating

hours in Coles' supermarkets, the work performed by CSAs or customer demand for deliveries to occur outside business hours and on weekends.[35]

[35] NatRoad also opposed the proposal, submitting that it would '*cause havoc*' rather than simplifying the Road Transport Award or clarifying modern award coverage.[36] It submitted that the proposed variation would greatly expand the potential coverage of the Road Transport Award to include many employees who worked as drivers in an ancillary role in their primary industry, not just those working for retail businesses.[37]

TWU proposed variation (TWU-2) to the Road Transport Award: definition of 'road transport and distribution industry'

[36] The TWU submitted that:

- since drivers engaged by vehicle relocation businesses were currently not covered by any modern award, this proposed variation filled an '*unintended and inexplicable*'[38] gap in award coverage by bringing these employees under the most appropriate award to cover them, furthering the modern awards objective to provide a fair and relevant safety net of terms and conditions;[39]
- the work these drivers undertook was very similar to and regulated under much of the same legislation as that performed by drivers operating laden vehicles, who were currently covered by the Road Transport Award;
- at one point, even the Fair Work Ombudsman had advised Truck Moves that its business was covered by the Road Transport Award, and other employers in the vehicle relocation industry were already operating under that assumption;
- there was no indication that the Australian Industrial Relations Commission (as the Commission then was) made a deliberate decision to exclude such work from award coverage; rather:

  '…it is clear that the Commission intended that the RT&D Award be the principal award applying to driving work and that the Award would have broad application across the road transport industry and to driving work on an occupational basis.';[40] and

- extending coverage in this way would encourage collective bargaining[41] based on a reference instrument that would be more appropriate and reasonable.

[37] Mr DeClase, who was not required for cross-examination, gave evidence that Prixcar (a company of which he used to be the human resources manager) expanded its business in 2012 to include transporting new vehicles from the vehicle processing centres it already operated to customers. He explained that drivers might either drive trucks onto which the new vehicles had been loaded, or the new vehicles themselves. In either case, the drivers were paid different rates depending on the size of the truck they were driving, as prescribed in the applicable enterprise agreement. The new vehicles could be transported both locally and as part of a long distance operation; the pay rates in the enterprise agreement applying to these types of work were underpinned by the Road Transport Award and the Long Distance Award respectively. Mr DeClase gave evidence that Prixcar had thought these awards applied to its drivers and that it came as a shock to him when the Federal Court found that the operations of

its competitor, Truck Moves, were award-free. He described Truck Moves as '*undercutting* [Prixcar] *in prices and conditions*'.[42]

[38] Mr Mealin gave evidence about the work he had performed for various vehicle relocation businesses since March 2012, namely Truck Moves, Quick Shift and Oz Wide Heavy Vehicle Deliveries (Oz Wide). He said that in approximately three years of working for Truck Moves, he drove various sizes of vehicles and trailers to manufacturers, vehicle body builders and dealerships. He was paid an hourly rate for local driving and a trip rate for long distance operations. He believed these rates were based on the national minimum wage rather than any award. He did not receive payment for waiting or travelling time, despite frequently having to fly interstate. He would receive an allowance if transporting a trailer or driving a vehicle that required a dangerous goods licence.[43]

[39] Mr Mealin stated that when working for Quick Shift, the tasks were similar to his work for Truck Moves, but he received a flat hourly rate for all time worked and did not receive any allowances e.g. for transporting trailers.[44]

[40] Finally, Mr Mealin gave evidence that in his current job with Oz Wide, the work was similar, but the trip rates were better than those he received at Truck Moves and he also received an hourly pay rate for waiting time.[45]

[41] Truck Moves and others opposed the proposed variation, submitting that:

- the application in support of the proposal was late, and as a matter of fairness substantive issues of coverage should not be determined at such a late time;
- the application was not supported by persuasive evidence or submissions that warrant a change of coverage;
- the Road Transport Award was not suited to businesses like the business of Truck Moves and others; and
- the Road Transport Award was not the appropriate modern award to cover businesses like the business of Truck Moves and others.[46]

[42] Truck Moves and others further submitted that it would be erroneous and misconceived to place Truck Moves and other similar businesses within the freight and transport industry (and therefore within the coverage of the Road Transport Award) simply because its employees were drivers. There were fundamental differences between the freight and transport industry and the vehicle relocation industry. The proposed variation would be inconsistent with the Road Transport Award, create inequities, not promote productivity and economic growth and be burdensome and uneconomic for the employers.[47]

[43] Mr Whitnall gave evidence that businesses such as Truck Moves had always been award-free.[48] However, in 2014, a dispute arose with the Fair Work Ombudsman (FWO) about whether Truck Moves was covered by the Road Transport Award. The matter led to proceedings in the Federal Court. On 2 October 2015, the Federal Court declared that Truck Moves was not covered by the Road Transport Award and that from the period from 1 January 2010 it was required to pay in accordance with the national minimum wage order as in force under the FW Act.[49] On 10 June 2016, the Full Federal Court of Australia dismissed an appeal against that decision.[50]

[44] Truck Moves and others complained that the issue of coverage had only been referred to the current Full Bench some 34 months after the 4 yearly review had commenced. They submitted that the issue of coverage should have been pursued earlier, at the time the FWO had first identified the issue in 2014, and before other substantive issues relating to the Road Transport Award had been determined. This meant, they submitted, that they had not had a practical opportunity to become involved in the consideration of the terms of the Road Transport Award. As a matter of fairness, any change to coverage should be dealt with at the commencement of the next 4 yearly review, or some later opportunity.[51]

[45] Mr Whitnall gave evidence that Truck Moves was not in the business of delivering freight or goods. Its employees simply drove unladen vehicles from one location to another. Most often, but not always, the vehicles driven by Truck Moves were new 'cab chassis' only and had no way of towing a trailer or carrying any load, as they were on the way to be manufactured, have bodies attached, or were being moved between dealerships and locations.[52] Mr Whitnall agreed during cross-examination that the work might involve moving a trailer as well as the vehicle itself.[53]

[46] Mr Whitnall said that Truck Moves engaged drivers as casual employees. It paid the employees slightly above the National Minimum Wage Order, plus a 25% casual loading.[54]

[47] According to Mr Whitnall's evidence, the role of the drivers was to drive the vehicle from one location to another. The task of driving the vehicle was the same regardless of the type of vehicle being driven. The drivers were not involved in any freight handling, such as loading or unloading.[55] Since there was no manual labour or freight handling involved, the role suited drivers who were older and semi-retired or had pre-existing injuries.[56]

[48] Truck Moves drivers might drive up to six classes of vehicle over an eight-hour shift, and could be involved in both long and short distance operations, sometimes both on the same day.[57] Mr Whitnall outlined a long list of duties (such as vehicle maintenance, checking or restraining loads etc.) that he said drivers were not required to undertake. He said that the role performed by Truck Moves drivers was far less demanding and involved significantly less responsibility than employees in the freight and transport industry covered by the Road Transport Award.[58]

[49] During cross-examination, Mr Whitnall agreed that drivers are usually required to travel to the pick-up location, liaise with the customer representative in relation to the pick-up of the vehicle, conduct a vehicle inspection and safety check, complete pre-trip documentation, attach trade plates and travel guards, as appropriate, ensure the trailer is properly secured (where one is involved), adhere to safe driving techniques, be properly familiar with heavy vehicle laws and regulations and fatigue management techniques and on occasions refuel the vehicle.[59]

[50] Mr Bradac, General Manager of Truck Moves, annexed the statement he gave in the Federal Court proceedings referred to at [43] above to his statement in these proceedings.[60] He outlined the differences between the duties of a driver driving a laden vehicle, and those of Truck Moves' employees. His evidence in this regard was similar to Mr Whitnall's. Under cross-examination, Mr Bradac confirmed that the training Truck Moves' employees received

in relation to heavy vehicle, workplace health and safety and environmental legislation would not be significantly different to that undertaken by what he described as 'freight industry' employees, that is, employees driving laden vehicles.[61] He also clarified that he was not claiming that all freight industry employees performed all the duties he listed, nor was he claiming that all of Truck Moves' employees perform all the duties he attributed to their role.[62] He further confirmed he understood that employees covered by the Road Transport Award are paid for all time worked, not just the hours spent physically driving a vehicle, and that they receive different rates of pay depending in part on the gross vehicle mass of the vehicle being driven.[63] Finally, Mr Bradac confirmed Truck Moves' employees always had the correct class of licence for the vehicle(s) they drove.[64]

[51] Mr Clayton, who was not required for cross-examination, gave evidence that his business (Vehicle Express) had always operated on the basis that it was award-free. It operated overwhelmingly along the same lines as Truck Moves. All its drivers were over 55 years of age and were, in his words, unable to work in the road transport and distribution industry or were semi-retired. The duties of his employed drivers were '*significantly and fundamentally different to the duties of drivers in the transport industry with responsibility over freight and goods*'.[65]

[52] NatRoad supported the submissions of Truck Moves and others in relation to this proposed variation.[66]

TWU proposed variation (TWU-3) to the Road Transport Award: overtime

[53] In support of this variation, the TWU submitted that:

- the proposed new cl 27.8 remedies '*practical problems*' created by the insertion of cl 4.2 of the Long Distance Award, which provides:

  '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.';

- it clarifies what is meant by 'ordinary hours of work' for the purpose of applying the overtime provisions in the Road Transport Award; and
- recognising extended hours worked by a single employee under both the Road Transport Award and Long Distance Award in this way will further that part of the modern awards objective set out in s.134(1)(da) of the Act by providing additional remuneration for overtime.

[54] Mr Anderson gave evidence that the rates of pay paid by his current employer, Visy Logistics, when he performed 'local' work after completing a long distance operation failed to '*take into account the fact that a driver may have already worked enough hours to attract overtime if they were being paid correctly under the [Road Transport] Award*'.[67] In contrast, he said, the original owners of what was now Visy Logistics, Phillips Transport, paid him what he described as the '*correct*' rate – time and a half for the first two hours of overtime and then double time thereafter. However, under cross-examination, he clarified that both

Phillips Transport and Visy Logistics had enterprise or other collective agreements in place that applied to him at the relevant times, and therefore he was not paid directly under the Road Transport Award.[68]

[55] Mr Bird gave an example of work he performs under the Road Transport Award after having completed a long distance operation (Barnawartha, VIC to Wagga Wagga, NSW). He is currently not paid overtime rates for the 'local' work, despite working 12-13 hours in total for the day.[69]

[56] Mr Coghill gave evidence that in his role as a union organiser, he had had discussions with many drivers who would regularly perform 'local' work and long distance operations in the same day. These drivers would be paid the '*base hourly rate*' under the Road Transport Award for the former, despite the total hours worked in a day ranging from 12 to 16.[70] Under cross-examination, he said that approximately 70% of the drivers he had spoken to would work this amount.[71]

[57] Ai Group opposed this proposal,[72] submitting that:

- the proposed wording could potentially 'catch' employees who ordinarily perform work under an award other than the Long Distance Award, and it is not clear whether this is the TWU's intention;
- it is not clear over what period (e.g. a standard work cycle, or a week) hours worked under the 'other' award would need to be counted towards ordinary hours for the purposes of paying the proposed allowance under the Road Transport Award;
- the variation would be difficult to effect in relation to employees who are ordinarily paid on a cents per kilometre basis rather than by reference to hours worked;
- it is not clear how the variation would change employers' obligations under superannuation legislation;
- the TWU's evidence does not demonstrate that the proposed variation is necessary to meet the modern awards objective, nor is it sufficient to enable the Full Bench to understand how common it is for employers to direct their employees to perform 'local' work after completing a long distance operation;
- the proposal is unfair because employees working under the Long Distance Award already receive an overtime component rolled up into their rate of pay, but those hours would be credited as ordinary hours again if the TWU's proposed variation were made, leading to '*double dipping*';[73]
- if the proposed variation were made, it would likely dissuade employers from using their workforce flexibly to perform both long distance and local work, and would disproportionally disadvantage small businesses, as well as employees who might be willing and able to do the work to earn additional income; and
- the proposed variation cannot truly be justified under s.134(1)(da) of the Act (which addresses the need to provide additional remuneration for overtime, unsocial hours etc.).

[58] ARTIO opposed this proposal on this basis that rates of pay under the Long Distance Award already incorporate a notional overtime component of 20%; accordingly, it submitted, the hours should not then be recounted as ordinary hours under a different award.

[59] NatRoad also opposed this proposal, submitting that:

- the TWU's proposal only arose because a different but related variation had been rejected in 2012 before Senior Deputy President Harrison;
- currently, the interaction of the Road Transport Award and Long Distance Award is clear; making the proposed variation will muddy the waters and impose a greater and unreasonable regulatory burden on employers;[74]
- the existing award provisions already adequately compensate employees who transfer between the two;
- the rates of pay in the Long Distance Award already incorporate an overtime component; therefore the TWU's proposed variation would involve '*double counting*' of hours worked and be difficult to put into practice fairly;[75] it was certainly perceived as such by some employers surveyed by NatRoad's witness, Dr Davis;[76] and
- the evidence tendered is insufficient to support the proposed variation.

TWU proposed variation (TWU-5) to the Long Distance Award: Fatigue Management Plan

[60] The TWU submitted that this variation will enable employees who are paid a 'trip rate' for a particular long distance operation pursuant to cl 13.5(iii) of the Long Distance Award to understand the basis on which that pay is calculated, because the Fatigue Management Plan (FMP) contains relevant details of the operation, such as the estimated total duration of the trip, breaks, time allocated for non-driving work and the number of kilometres to be travelled.

[61] Mr Bird gave evidence that he did not know whether a previous employer had paid him in accordance with award rates because he never received a copy of the relevant '*safe journey plan*'.[77] Under cross-examination, Mr Bird stated that this is what another previous employer, K & S, had called the document it provided him. He also said this was an accredited FMP under the relevant legislation. However, he did not agree they were necessarily different names for the same type of document. He further stated that he had not undergone fatigue management training and was not on an FMP with his current employer, Greenfreight.[78]

[62] Under cross-examination, Mr Fear gave evidence that he had received fatigue management training and had been given a copy of his FMP. However, he said that the indicative hours in the FMP did not always match the actual time taken for a given trip, because of the multiple pickups and drop-offs he might have to make.[79]

[63] Ai Group opposed this variation,[80] but did not provide detailed submissions as to why.

[64] ARTIO supported this proposed variation.

[65] NatRoad opposed this proposed variation, claiming it was an attempt to reintroduce safe driving plans which were required under the now-repealed *Road Safety Remuneration Act 2012* (Cth) and would be '*administrative overkill*', imposing an unacceptable burden on employers.[81] Dr Davis' evidence was that '*NatRoad members indicated they either oppose… or are highly critical* [of the proposed variation]'.[82]

TWU proposed variations (TWU-6 and TWU-7) to the Long Distance Award: pickup and drop-off allowance

[66] The TWU submitted that like TWU-3, these proposed variations also rectify '*practical problems*' that have arisen as a result of the insertion of the current cl 4.2 of the Long Distance Award. They ensure that drivers are remunerated for additional work at the start or end of a long distance operation that does not form part of that operation, or work performed that requires the driver to add another stop (at which 'local' pickups or drop-offs are required) between the operation's principal point of commencement and the principal point of destination. The TWU described such additional work as '*a misuse of the definition of a long distance operation*'.[83]

[67] The TWU further submitted that the introduction of a pickup and drop-off allowance as proposed will help ensure that the Long Distance Award is '*simple and easy to understand*'[84] by clarifying that

- multiple pickups and/or drop-offs at either the principal point of commencement or destination of a long distance operation; and
- pickups and/or drop-offs between those two points

do not form part of that operation.

[68] Mr Anderson, Mr Bird, Mr Coghill and Mr Fear all gave evidence in support of the proposition that such work is currently being performed but not expressly and/or completely paid for. For instance, Mr Anderson gave evidence that he receives a flat dollar amount for an additional pickup and/or drop-off, but that this does not necessarily account satisfactorily for the time taken or extra kilometres travelled to perform that work.[85]

[69] Mr Bird gave examples of times when he had to deviate from the main route between the principal points of commencement and destination (Sydney and Melbourne respectively) to pick up or drop off freight at Hallam and Port Kembla. He stated that he was not paid for the additional time taken or kilometres travelled as a result of this deviation.[86]

[70] Mr Coghill gave evidence that he was aware of '*a number of companies*' operating within the geographical area he covered as a union organiser that paid a set 'trip rate', regardless of whether the driver was required to make multiple pickups and/or drop-offs at either end, or deviate from the standard route to complete a pickup or drop-off.[87]

[71] Mr Fear stated that he received a fixed pickup/drop off allowance pursuant to the *Richers Transport Pty Ltd Enterprise Agreement 2013*, regardless of how long it took him to pick up and/or drop off goods. He gave evidence that he would regularly have to make multiple pickups and/or drop-offs in what is considered a single trip, despite it not being '*a*

direct route from A to B'.[88] For example, he recently made a trip that involved stopping at Gympie, Maryborough, then heading back to Gympie, before proceeding to Imbil, Kunda Park and Brisbane. His work also involves loading and/or unloading at each stop. Under cross-examination, Mr Fear added that he thought the trip rate he received was calculated on a cents per kilometre basis, but appeared not to be entirely sure. He also indicated that he received separate payment for waiting time, but only once it exceeded two hours; that is, the trip rate effectively incorporates up to two hours' waiting time.[89]

[72] Mr Nichols gave evidence that the time required for pick-ups and deliveries in his role varies depending on how much freight is involved.[90]

[73] ABI and the NSWBC opposed this proposal on jurisdictional grounds. Specifically, they submitted that since the TWU is contending that the pickups and drop-offs currently being performed should not be regarded as forming part of a long distance operation, but the award currently provides that employees are covered by the Road Transport Award when performing work that is not a long distance operation, inserting the proposed pickup / drop-off allowance would have no practical effect, as employees would not be covered by the Long Distance Award when performing that work. They further submitted that if the fundamental issue is that employers are misunderstanding or misusing the definition of '*long distance operation*', then the focus of any variation should be on amending that definition.

[74] Ai Group also opposed this proposed variation. It submitted that:

- the TWU's own submissions appear confused as to whether the work addressed by the proposed variation does or does not form part of a long distance operation; Ai Group contends that the work may form part of a long distance operation in certain circumstances and that '*the number of "pick-ups or drop offs" is not determinative of whether an employee is performing work on a long distance operation*';[91]
- if it does not, then the proposed new clause would never operate to provide employees with the allowance intended, because the coverage clauses provide that those employees are covered by the Road Transport Award and not the Long Distance Award when performing work that is not part of a long distance operation;
- the Long Distance Award already adequately compensates employees for all work actually performed; in particular, it should be noted that cl 13.6 does not limit payment for loading or unloading duties to times when these duties are performed at the principal point of commencement or destination, so employees should be paid for such duties even if they are performed at multiple locations;
- the wording proposed is deficient because it does not specify to which hours the '*additional hours*' are additional;
- as pointed out in responding to TWU-3, payments on an hourly basis will be difficult to implement in relation to employees who are paid on a cents per kilometre basis, as the employer may not be able to identify precisely how many hours have been worked; and
- the TWU's evidence is insufficient to support the making of the variation.

[75] ARTIO did not support this proposal either. It submitted that the use of the phrases '*principal point of commencement*' and '*principal point of destination*' would encompass additional pickups and/or drop-offs at either end of the trip, within reason, because the award does not say that the locations are the '*sole'* or '*single*' point of commencement or destination. It further submitted that the proposed variation is really an additional hourly rate of pay rather than an allowance, and as such should be dealt with as a work value claim under s.157(2) of the Act.

[76] NatRoad also opposed this proposal.[92] It submitted that:

- there was no evidence of work value reasons supporting the addition of the allowance, which is effectively an entitlement to an additional hourly rate of pay (though it conceded that allowances were not expressly included in the statutory definition of minimum modern award wages);
- Dr Davis' evidence[93] indicated that employers might confuse the proposed pickup / drop-off allowance with the existing loading / unloading allowance;[94]
- the proposed variation's reference to the allowance being payable 'for all additional hours worked' is unclear because it does not specify to what those hours are additional; and
- as ABI and the NSWBC also pointed out, if the TWU is contending that the pickups and drop-offs are outside the definition of 'long distance operation', then the proposed variation will have no work to do, because employees would be covered by the Road Transport Award when performing that work.

Ai Group proposed variations to the Road Transport Award: higher duties and meal allowance

[77] Ai Group did not lead evidence in these proceedings. In relation to its proposed higher duties variation, it submitted that:

- the current clause on payment for higher duties '*fails to strike a fair and relevant balance between the needs of employers and employees*'[95] because an employee may work for some nominal period in a classification attracting a higher rate of pay and thereby be entitled to payment at that higher rate for the whole day, despite the overall work value not justifying such payment;
- this is particularly nonsensical when the work performed may not even involve the provision of a road transport service, such as when an employee is moving vehicles within the employer's yard, not on public roads. The proposed new clause 19.2 would remedy this;
- the current clause is inconsistent with the majority of higher duties clauses in other modern awards, which most commonly require employees to have performed at least two hours' work at a classification attracting a higher rate of pay to be entitled to payment at that higher rate for the whole day; and
- the proposed new clause would further various aspects of the modern awards objective, in particular, promoting flexible work practices[96] by reducing the current '*financial disincentive*'[97] to let employees perform work spanning multiple classifications, which would particularly assist small businesses' productivity.

[78] ARTIO opposed this proposed variation. It submitted that:

- the proposed higher duties would impose a greater administrative burden because employers and employees would be in dispute about whether an employee had performed work within a higher classification for two hours and was therefore entitled to be paid at a higher rate;
- it is very unlikely that an employee would be directed to perform a delivery that took less than two hours altogether;
- the comparison to other modern awards is not valid because employees working under the Road Transport Award are subject to traffic and other conditions on the road, while office- or factory-based employees are not;
- the current provisions have not created any disputes of which ARTIO is aware and as such should not be changed; and
- Ai Group had not provided any quantitative evidence of savings that could be achieved by adopting its proposal.

[79] The TWU also opposed Ai Group's proposed higher duties variation. It submitted that:

- the variation should be refused because Ai Group has not supported its submissions with probative evidence;
- Ai Group has not shown that the current higher duties clause fails to meet the modern awards objective, or is otherwise ambiguous or uncertain;
- the current clause is long-standing, having been taken from the *Transport Workers Award 1998* and also a feature of the *Transport Workers Award 1983*, and has not caused any disputes since its introduction some 30 years ago;
- Ai Group cannot properly rely on the NSW *Transport Industry (State) Award* in isolation from those other awards;
- Ai Group did not argue against including the current clause during the Part 10A award modernisation process;
- the current clause already affords flexibility to employers, and the promotion of flexible work practices is not dependent on the proposed variation being made;
- Ai Group has exaggerated the additional wage costs which the current clause imposes on employers and not provided any figures in support of its position;
- the comparison to higher duties clauses in other modern awards is invalid because the Road Transport Award does not classify employees once at the time of engagement, but rather based on the vehicle driven at any given time;
- adopting Ai Group's version of the clause might lead to disputes about whether an employee had worked sufficient hours within a given classification to qualify for a higher pay rate and create difficulties in determining the applicable rate of pay;
- Ai Group's contention that its proposed new clause will give the TWU an incentive to bargain is '*nonsensical*'; and
- adopting the proposed variation would not encourage employers to provide their employees with further training, especially if it would cause them to incur costs.

[80] In reply, Ai Group submitted that:

- many of the submissions in response were '*either speculative or rely on factual assertion unsupported by evidence*';[98]
- ARTIO has misunderstood the way the current higher duties clause works, because implicit in its submissions is the assumption that employers need not pay a higher rate if the vehicle attracting that higher rate of pay is not driven on public roads; that is, ARTIO thinks that the situation Ai Group is seeking to avoid by proposing this variation is already avoided by the current clause's operation;
- the submission that the current clause is long-standing cannot validly be made in isolation from the fact that there were several predecessors to the Road Transport Award, the higher duties clauses of which did not all operate the same way as the current clause;
- the fact that Ai Group has not provided details of what savings might be made by adopting its proposed higher duties variation is not of itself a barrier to making the variation, because, as the Full Bench in the *Penalty Rates Case*[99] stated, '[s]*ome proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation*';[100]
- additionally, the extent of savings to be made will vary depending on employers' circumstances;
- it is irrelevant that Ai Group is now proposing variations to a clause to which it did not object during the Part 10A award modernisation process;
- it is unclear how the TWU's assertion that employers were paying employees the standard rate during annual leave prior to a variation to the annual leave clause of the Road Transport Award as part of the two year review of modern awards relates to the present issue; if anything, Ai Group's case is bolstered by the fact that that variation was made '*absent an evidentiary case*';[101]
- with respect to the TWU's submission that employers are disinclined to train employees if it will cost them more, Ai Group's proposed variation would remove the current cost disincentive to allow employees to drive vehicles that belong to higher classifications in the award;
- there is no evidence that disputes will arise regarding whether an employee has performed two hours' work at a higher classification should the proposed higher duties clause be accepted;
- the flexibility afforded by the current classification structure will not be significantly compromised by the proposed variation; and
- the TWU's submissions that the proposed variation would cause difficulty in determining the applicable rate of pay if an employee were to drive four differently-classified vehicles in a day and that the current clause's operation is more compatible with payroll systems are baseless and therefore should not be given any weight.

[81] In relation to its proposed meal allowance variation, Ai Group submitted that:

- the proposed variation to clause 26.3(a) would give effect to Ai Group's position that a meal allowance should not be payable (nor a meal provided) when an employee works an entire shift that is overtime, as opposed to overtime worked after already having performed ordinary hours, clarifying what it says is already implicit in the structure of the clause overall;

- the proposed variation to clause 26.3(b) clarifies and confirms that a meal allowance is also not payable if the employer provides a meal when an employee is required to commence work two or more hours prior to the normal starting time;
- the proposed new clause 26.3(c) removes the requirement for an employer to pay a meal allowance or provide a meal when the employee has been given at least 24 hours' notice of the requirement to work overtime, consistently with the analogous provision[102] in the *Manufacturing and Associated Industries and Occupations Award* and the former NSW *Transport Industry (State) Award*;
- the proposed new clause 26.3(c) thereby also gives employers an incentive to provide employees with notice that they will be working overtime, which in turn enables employees to better manage fatigue;
- the purpose of the meal allowance is to ensure that employees are not financially disadvantaged by having to buy a meal when working overtime rather than eating at home or bringing food from home, not the working of overtime in and of itself;
- while there was a variation proposed to clause 26.3 as part of the two year review of modern awards, it was focused on payment of the meal allowance when an employee had only worked a short amount of ordinary time, rather than the option to provide a meal instead of paying the allowance and/or removing the obligation to do either when the employee has received sufficient notice that s/he will be working overtime; therefore, the present issue was not fully considered as part of that review; and
- varying the Road Transport Award in this way would '*reduce employment costs and the regulatory burden*' on employers in furtherance of s.134(1)(f) of the Act.

[82] ARTIO opposed this variation. It submitted that:

- the entitlement to a meal allowance as currently worded is long-standing and well understood in the industry, and therefore should not be changed;
- varying the meal allowance in the way Ai Group seeks to do would mean many current employees are paid about $75 less a week, which would negatively affect the industry's ability to attract workers;
- the current clause does not oblige employers to provide a meal or pay the meal allowance if the overtime is worked other than at a time when a meal is '*required to be taken*'; and
- Ai Group has not provided any figures to suggest that employers would make savings were the proposed variation to be made.

[83] The TWU also opposed this variation. It submitted that:

- Ai Group was '*simply seek*[ing] *to take away an entitlement that has existed for over 30 years*';
- Ai Group has not shown that the current clause fails to meet the modern awards objective, is otherwise unclear or discloses an error made during the Part 10A award modernisation process, and therefore the current clause should remain;
- it is part of the nature of the transport industry that employees are often asked to work overtime at short notice;

- Ai Group's submission that the structure of clause 26.3(a) in context implies that the allowance ought only to apply when overtime is performed immediately following ordinary hours has no proper basis, because the clause could easily have been drafted to make this explicit, but was not;
- the proposal to '*align*' clause 26.3(b) with clause 26.3(a) by allowing employers to provide employees who start two or more hours before the normal starting time with a meal in lieu of paying a meal allowance is impractical and will not achieve what Ai Group intends, because the actual starting time for these employees could fall so early in the morning that employers would not be able to provide a meal; and
- Ai Group has not made out an evidentiary case for what is effectively a removal of the meal allowance for certain employees.

[84] In reply, Ai Group submitted that:

- ARTIO and the TWU's objection to the proposed new clause appears simply to be based on the fact that it is '*less generous*' than the current one;
- the meal allowance is provided for a defined purpose that should not include supplementing the minimum wage *simpliciter*;
- it is important to remember that the modern awards objective prescribes that awards should provide a *minimum* safety net; if the proposed variation is made, employers and employees can still bargain for entitlements over and above that minimum;
- while the current clause has stood for 30 years, it has not applied across the whole industry for that whole time;
- neither objector has taken the Commission to a previous decision that positively details the industrial merit of the current clause;
- as submitted in relation to the proposed higher duties variation, no probative evidence is necessarily required in support of a variation that has prima facie industrial merit;
- its contention that the implicit intention of clause 26.3(a) is that a meal allowance need only be paid when the requisite amount of overtime is worked immediately after ordinary time (as opposed to when an employee works an entire shift that is overtime) is supported by the placement of the provision within a clause dealing with meal breaks rather than clause 16, which addresses all other allowances;
- the award does not elaborate on when a meal is '*required to be taken*', and thus ARTIO's view that this refers to usual breakfast, lunch and dinner times is not supported by the words of the award; rather, it makes sense that given the context of clause 26.2 (dealing with when meal breaks are to be taken), the phrase refers to the instances when an employee is entitled to a meal break;
- if this were not the case, then an employee working a shift that was all overtime but was shorter than five-and-a-half hours would get a meal allowance but not a meal break, which is illogical;
- ARTIO's submission that the meal allowance provision has been in place for 30 years is not entirely accurate, as the current wording is slightly different; and
- in any case, the wording of the predecessor *Transport Workers Award 1998* supports Ai Group's view that a meal allowance is payable when an employee is entitled to an overtime meal break.

Consideration

[85] The legislative context to the award review process was exhaustively discussed in the *Penalty Rates Case*[103] at [95]-[141]. We respectfully adopt the approach outlined in that decision.

TWU-1

[86] We do not intend to make the proposed variation contained in TWU-1. The TWU has failed to persuade us that it is desirable, let alone necessary, to insert the proposed definition of 'driver' into the Road Transport Award. No evidence was presented to us that the lack of such a definition has led to any particular difficulties for employers or employees covered by the award. We are also concerned that the insertion of the definition could have adverse consequences, especially as we are not satisfied that the proposed definition fully reflects the work undertaken by all drivers covered by the Road Transport Award. There is also a risk that the insertion of the definition could disturb existing award coverage, for no obvious benefit.

TWU-2

[87] We agree with the TWU's submission that the exclusion of drivers in the vehicle relocation industry from any modern award coverage is anomalous. This situation is inconsistent with the requirement to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. We also agree that the appropriate modern award to cover the employees in question is the Road Transport Award. However, we do consider that there is an arguable case that some of the provisions of the Road Transport Award should be modified in their application to this group of employees, having regard to the particular features of their work. There may also be a case for some transitional provisions to apply in extending the coverage of the Road Transport Award to the vehicle relocation industry, given that existing contracts would have been entered into on the basis of the current arrangements. We propose to convene a conference of interested parties to explore these issues further.

TWU-3

[88] We do see some merit in the TWU's proposal to require that an employee who works temporarily under the Road Transport Award (for example having just completed a trip under the Long Distance Award) should have the hours of work performed under the other award count towards the ordinary hours of work under the Road Transport Award. However, we do not think that the TWU presented sufficient evidence to demonstrate that the proposed variation is necessary to meet the modern awards objective. We are concerned that while the proposed change may solve one practical problem, it would create new ones. In particular, it is not clear over what period (e.g. a standard work cycle, or a week) hours worked under the 'other' award would need to be counted towards ordinary hours for the purposes of paying overtime under the Road Transport Award. On balance, we do not consider that the proposed amendment should be made.

TWU-5

[89] Under cl 13.5 of the Long Distance Award, where an employee has an accredited Fatigue Management Plan (FMP) in place, the hourly rate may be used to calculate a trip rate for any journey by multiplying the hourly rate by the number of driving specified in the FMP for that journey. The effect of proposed variation TWU-5 is merely that a copy of the relevant FMP for that journey should be provided to the driver. It is entirely unexceptionable to require that drivers who are paid on the basis of an FMP should have an opportunity to know the basis on which they are paid.

[90] NatRoad submitted that the expression '*for that journey*' in TWU-5 introduced an element of ambiguity, suggesting perhaps that there needed to be '*a safe journey plan for each journey undertaken*'.

[91] Accordingly, we consider that the proposed variation to the Long Distance Award should be made, but with a slight alteration to the wording so that it reads: '*A copy of the relevant FMP must be provided to the driver*.'

TWU-6 and TWU-7

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

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

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

[95] 'Long distance operation' is defined in the Long Distance Award as:

> '…any interstate operation, or any return journey where the distance travelled exceeds 500 kilometres and the operation involves a vehicle moving livestock or materials whether in a raw or manufactured state from a principal point of commencement to a principal point of destination. An area within a radius of 32 kilometres from the GPO of a capital city will be deemed to be the capital city.'

[96] An 'interstate operation' is defined as:

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

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

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

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

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

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

[102] The proposed variations would provide that where an employee engaged in a long distance operation is required to pick up or drop off at two or more locations at the principal point of commencement or principal point of destination, the employee must be paid an

hourly rate for all additional hours worked (calculated by dividing the weekly award rate prescribed by 40 and multiplying by the industry disability allowance). Where an employee is required to pick up or drop off at a location en route between the principal point of commencement and principal point of destination, the employee must similarly be paid an hourly rate for all additional hours worked.

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

Ai Group proposed variation to meal allowance provisions of the Road Transport Award

[104] We are not persuaded that the change proposed by Ai Group is justified. In particular, we agree with the TWU that the Ai Group has not made out a case for what is effectively a removal of the meal allowance for certain employees.

Ai Group proposed variation to higher duties provisions of the Road Transport Award

[105] Ai Group did not provide probative evidence to justify making the variation it proposes so that higher duties only apply if the employee performs a higher grade of work for a minimum of two hours. As such, there is no evidence to support the claim of Ai Group that the current higher duties clause fails to strike a fair and relevant balance between the needs of employers and employees. Nor was there evidence to support the claim that the proposed new clause will promote flexible work practices by reducing the current financial disincentive.

[106] Ai Group correctly notes that the need for probative evidence depends on whether the proposed changes are obvious as a matter of industrial merit. In the *Penalty Rates Case*, the Bench summarised the general propositions that apply to the Commission's task in the Review. This included the following:

> '2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and where feasible, probative evidence.'[104] (citations omitted)

[107] Having regard to the submissions advanced on the proposed variation to the higher duties clause, it is apparent that the change proposed would be significant and that the merit case is reasonably contestable. For example, ARTIO submitted that the current provisions had

not created any disputes of which they were aware and were concerned that the proposed clause would impose a greater administrative burden because it would lead to disputes as to its application.

[108] We do not consider that the proposed change is obvious as a matter of industrial merit and therefore the proposal should be supported by probative evidence. In the circumstances, we are not satisfied that the current higher duties clause fails to meet the modern awards objective and we decline to make the proposed variation.

Conclusion

[109] The Road Transport Award will be varied by the addition of a new sub-clause added to the definition of 'road transport and distribution industry' in cl 3.1:

> '(j) the distribution and/or relocation by road of new or used vehicles as described in the classifications within this award where the vehicle itself is required to be driven from one location to another for the purposes of delivery and/or relocation of the vehicle.'

[110] A conference of interested parties will be convened to discuss whether any further modifications to the Road Transport Award should be made to accommodate the particular features of vehicle relocation work (including any appropriate transitional provisions).

[111] The following will be added at the end of cl 13.5(a)(iii) of the Road Transport Award:

> 'A copy of the relevant FMP must be provided to the driver.'

[112] No other variations to the Road Transport Award or the Long Distance Award will be made as part of these proceedings.

SENIOR DEPUTY PRESIDENT

Appearances:

M Gibian of counsel with *W Carr* for the Transport Workers' Union of Australia.
B Ferguson and *J Mandel* for the Australian Industry Group.
K Scott and *K Thomson*, solicitors, for Australian Business Industrial and the New South Wales Business Chamber.
P Ryan for the Australian Road Transport Industrial Organisation.
A Denton of counsel and *M Felman* of counsel with *K Anderson*, solicitor for Coles Supermarkets Australia Pty Ltd.
R Calver for the National Road Transport Association.

W Friend QC with *C Dowling* of counsel and *D Macken*, solicitor, for the Shop, Distributive and Allied Employees Association.
B Cross of counsel for Truck Moves Australia Pty Ltd, Quick Shift Vehicle Relocations Pty Ltd and Vehicle Express Pty Ltd.

Hearing details:

Sydney with video link to Melbourne.
2017.
March 6, 7, 23.

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1 MA000038.
2 MA000039.
3 Exhibit TWU1.
4 Exhibit TWU2.
5 Exhibit TWU3.
6 Exhibit TWU4.
7 Exhibit TWU5.
8 Exhibit TWU6.
9 Exhibit TWU7.
10 Exhibit TWU8.
11 Exhibit TWU9.
12 Exhibit TWU10.
13 Exhibit TWU11.
14 Exhibit TWU12.
15 Exhibit TWU13.
16 Exhibit TWU14.
17 Exhibit NatRoad1.
18 Exhibit C1.
19 Exhibit C2.
20 Exhibit TM1.
21 Exhibit TM2.
22 Exhibit TM3.
23 TWU submissions on the *Road Transport and Distribution Award 2010* (18 Jan 2017) [9].
24 *Fair Work Act 2009* (Cth) s.134(1)(g).
25 *Road Transport and Distribution Award 2010* [MA000038] cl 4.8.
26 Exhibit TWU1.
27 Exhibit TWU4 [23].
28 Exhibit TWU2.

[29] Exhibit TWU3.
[30] *Fair Work Act 2009* (Cth) s.134(1)(g).
[31] *Fair Work Act 2009* (Cth) s.138.
[32] MA000004.
[33] (2014) 245 IR 449.
[34] Exhibit C1.
[35] Exhibit C2.
[36] NatRoad submissions on the *Road Transport and Distribution Award 2010* (2 March 2017) [69].
[37] Ibid [71]-[78].
[38] TWU submissions on the *Road Transport and Distribution Award 2010* (18 Jan 2017) [31].
[39] *Fair Work Act 2009* (Cth) s.134(1).
[40] TWU submissions on the *Road Transport and Distribution Award 2010* (18 Jan 2017) [34].
[41] *Fair Work Act 2009* (Cth) s.134(1)(b).
[42] Exhibit TWU5 [18].
[43] Exhibit TWU4 [9]-[18].
[44] Ibid [27]-[28].
[45] Ibid [29]-[30].
[46] Truck Moves and others submissions on the *Road Transport and Distribution Award 2010* (2 March 2017) [2].
[47] Ibid [6]-[7].
[48] Exhibit TM3 [6].
[49] *Truck Moves Australia Pty Ltd v Simmonds* [2015] FCA 1071.
[50] Exhibit TM3 [8]-[13].
[51] Ibid [30]-[40].
[52] Exhibit TM3 [36].
[53] PN617.
[54] Exhibit TM3 [46]-[47].
[55] Ibid [48]-[49].
[56] Ibid [51]-[52].
[57] Ibid [62]-[63].
[58] Ibid [78].
[59] PN886-PN899.
[60] Exhibit TM2.
[61] PN437-PN454.
[62] PN469-PN474.
[63] PN475-PN500.
[64] PN523-PN526.
[65] Exhibit TM1.
[66] NatRoad submissions on the *Road Transport and Distribution Award 2010* (2 March 2017) [96].
[67] Exhibit TWU9 [11].
[68] PN248-PN253; PN276-PN285.
[69] Exhibit TWU8 [18]-[22].
[70] Exhibit TWU7 [15].
[71] PN179.
[72] Ai Group submissions in response to TWU draft determinations (5 March 2017) [47]-[97].
[73] Ibid [86].

[74] *Fair Work Act 2009* (Cth) s.134(1)(f).

[75] NatRoad submissions on the *Road Transport and Distribution Award 2010* (2 March 2017) [110]-[113].

[76] Exhibit NatRoad1 annexure BD-3 pp 7-8.

[77] Exhibit TWU8 [8].

[78] PN207-PN217.

[79] PN129-PN134.

[80] Ai Group submissions in response to TWU draft determinations (5 March 2017) [2].

[81] NatRoad submissions on the *Road Transport and Distribution Award 2010* (2 March 2017) [118]-[133].

[82] Exhibit NatRoad1 [18].

[83] TWU submissions on the *Road Transport (Long Distance Operations) Award 2010* (19 Jan 2017) [28].

[84] *Fair Work Act 2009* (Cth) s.134(1)(g).

[85] Exhibit TWU9 [6]-[8].

[86] Exhibit TWU8 [14]-[17].

[87] Exhibit TWU7 [7]-[10].

[88] Exhibit TWU6 [18].

[89] PN115-PN120; PN133-PN134.

[90] Exhibit TWU2 [20].

[91] Ai Group submissions in response to TWU draft determinations (5 March 2017) [101]

[92] NatRoad submissions on the *Road Transport and Distribution Award 2010* (2 March 2017) [134]-[150].

[93] Exhibit NatRoad1 annexure BD-3 pp 9-10; we note, however, that the TWU draft determination on which the survey questions were based is not the same one currently proposed: [17].

[94] NatRoad submissions on the *Road Transport and Distribution Award 2010* (2 March 2017) [140]-[143].

[95] Ai Group submissions on the *Road Transport and Distribution Award 2010* (13 Jan 2017) [9].

[96] *Fair Work Act 2009* (Cth) s.134(1)(d).

[97] Ai Group submissions on the *Road Transport and Distribution Award 2010* (13 Jan 2017) [46].

[98] Ai Group reply submissions on the *Road Transport and Distribution Award 2010* (22 Mar 2017) [3].

[99] [2017] FWCFB 1001.

[100] Ibid [269].

[101] Ai Group reply submissions on the *Road Transport and Distribution Award 2010* (22 Mar 2017) [16].

[102] MA000010 cl 40.11.

[103] [2017] FWCFB 1001.

[104] Ibid [269].