

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Road Transport (Long Distance
Operations) Award 2010
(AM2014/196 & AM2014197)

22 NOVEMBER 2016

Ai
GROUP

**4 YEARLY REVIEW OF MODERN AWARDS
AM2014/196 & AM2014/197 ROAD TRANSPORT (LONG
DISTANCE OPERATIONS) AWARD 2010**

1. The Australian Industry Group (**Ai Group**) provides these submissions in response to the submissions in reply filed by the Transport Workers Union of Australia on 22 February 2016.

Response to TWU submissions regarding interested parties' views on part-time employment in the long distance sector

2. At paragraphs 5 to 9 of its reply submissions the TWU portrays a misleading picture of acceptance by parties with an interest in the *Road Transport Industry (Long Distance Operations) Award 2010* ("the LDO Award") of the proposition that part-time employment is inherently inappropriate to the operation of the long distance sector.¹
3. Contrary to the union's submissions, the availability of part-time employment in the long distance sector has long been widely supported by relevant interested parties.
4. The availability of part-time employment was sought by NatRoad during the Part 10A Award modernisation proceedings. Although the Award ultimately made by the AIRC did not include part-time provisions, we note that there does not appear to have been any detailed submissions in support of the proposal. Nor do the merits of the proposal appear to have been properly ventilated in the course of the proceedings or necessarily considered by the Full Bench.

¹ TWU Submission of 22 February 2016

5. In the course of the 2 Year Review of Modern Awards Ai Group advanced a claim for part-time employment to be included in the Award. The claim was unanimously supported by other major associations representing employers and appearing in the proceedings. These included:
- ATANSW (the peak trucking industry body for NSW, which is now known as Road Freight NSW)
 - NatRoad (A national industry association with a membership of operators in the Road Transport Industry);
 - The Australian Federation of Employers and Industries;
 - Australian Business Industrial (ABI); and
 - Australian Road Transport Industrial Association (ARTIO).
8. The proposal was also supported by a number of individual employer parties that wrote directly to the Commission. A copy of this correspondence is attached as annexure 1.
9. In the context of the 2 Year Review the uncontested evidence of Neisha Webster, a former HR Manager of a large Road Transport Business (Border Express), referred to support for part-time employment in the sector within Border Express and amongst the group of transport business forming the policy council of ATANSW. A copy of the witness statement admitted into evidence in the 2 Year Review is attached at annexure 2.
10. Notwithstanding the TWU's now strident opposition to the introduction of part-time employment in the long distance sector, it adopted a very different line in the context of the 2 Year Review. Relevantly, the transcript of those proceedings reveals that Counsel for the TWU then submitted:

“PN358

That's not bleating, your Honour. It goes to whether or not your Honour can be satisfied that it is necessary to impose part-time work in this industry in order to provide fair and relevant minimum conditions of employment. I should address one matter which was raised against us. The union is not opposed absolutely to the concept of part-time work in this industry. I suspect, although I have no specific instructions in this connection, that it may advance a case about that at the four-year review, when a full and proper evidential analysis of the industry can be undertaken - including in relation to work value considerations, and probably of course not limited to that.”

(Emphasis added)

6. Indeed, even Senior Deputy President Harrison, who was long the Head of the Commission’s Transport Industry Panel observed in her decision in the 2 year review of the Road Transport Industry Award that the insertion of part-time employment provisions in the award, “...is a matter which, in my opinion, should be considered in the context of the 4 yearly review of the Award...”²
7. It is clearly misleading for the TWU to now suggest that;

*“ the Commission and interested parties who have appeared in proceedings concerning awards applying to long distance road transport have consistently regarded part-time employment provisions as inappropriate to the operations of the sector.”*³
8. The key barriers to the implementation of part-time employment in the 2 Year Review were disagreement over the proper form of award provisions facilitating it, and the perceived narrow scope of the 2012 award review. Neither of these matters need prevent the Commission from now varying the award to permit part-time employment given:

² [2014] FWC 329 at 66

³ TWU Submission of 22 February 2016

- The scope of the Four Yearly Review is broader than the 2 Year Review; and
 - The Commission is not bound by the form of the proposed variation claimed and as such can vary the award to permit part-time employment through some other form of variation to that claimed, should it form the view that additional safeguards are necessary.
9. We submit that the time has come for the Commission to determine a manner in which part-time employment can be accommodated within the long distance sector of the road transport industry. This Award Review is the appropriate vehicle for such a variation.
10. If the TWU submissions in the 2 Year Review were genuinely put, it would have been open to them to advance an alternate proposal regarding part-time employment in the context of this Review. Ai Group has, at all times, been keen to work constructively with the union to identify measures that might facilitate the introduction of part-time employment in a manner that alleviates some of the TWU's concerns. It is regrettable that the union has instead adopted a position of blanket opposition to the Ai Group proposal; a proposal that is advanced with the genuine intent of benefiting both employers and employees in the industry.

Criticisms of the manner in which the clause would operate

11. At paragraphs 17 to 23 of its submission, the TWU identifies what it perceives to be difficulties with the operation of Ai Group's proposed clause.
12. At paragraph 18 the TWU correctly observes that the central feature of the variation sought by Ai Group is that a part-time employee will be engaged to work less than 38 hours per week and that a maximum number of ordinary hours of work will be set at the time of engagement.

13. The TWU goes on to allege that:

“The concept of a maximum number of ordinary hours of work is incapable of sensible application in the context of an award, which does not provide for time based-payments or any additional discrete payment for hours worked in excess of an employee’s ordinary hours.”

14. It is impossible to reconcile this submission with the reality that the LDO Award currently specifies a maximum number of ordinary hours of work for both casual and full-time employees.

15. The Ai Group proposal provides for the determination of the ordinary hours of work for part-time employees because this is a necessity given the operation of s.147 of the Act. Moreover, it is necessary in order to ensure the proper operation of NES entitlements that operate by reference to an employee’s ordinary hours of work and a basis for the operation of the minimum fortnightly payment provided by the award.

16. At paragraph 19 of its submissions the TWU speculates that an employee could be engaged to work 20 hours per week but an employer could nonetheless request or require the employee to perform long distance operations involving 40, 50 or even 60 hours per week, and that no additional payment would be required by reason of the employee working in excess of his or her maximum number of ordinary hours per week. In response we note that Ai Group’s proposal does not enable an employer to require an employee to work more than the agreed hours of work. Moreover, if such additional hours are worked the employee will receive additional payments, albeit at the same rate.

17. Further, the NES protects an employee from being required to work an unreasonable number of hours. This protection operates, for a part-time employee, by reference to the employee’s ordinary hours of work. An employee cannot be required to work additional hours beyond an employee’s ordinary hours of work in a week unless the requirement is reasonable. The

employee is empowered to refuse additional hours if they are unreasonable.⁴ The TWU submissions appear to simply overlook the NES.

18. Secondly, the TWU's criticisms could also apply, to an extent, to full-time employment or casual employment. Employees engaged in these types of employment could also work 40, 50 or even 60 hours without any additional penalty rate applying. No party contends that this outcome is unfair. It is unclear why a different approach should be taken in relation to part-time employees.
19. The Ai Group proposal does not provide employers with a capacity for an employer to force an employee to accept part-time work. The arrangements can only operate where they are desired by both parties. The Commission should seek to facilitate the implementation of such mutually beneficial arrangements, not prohibit them. The object of the Act is to provide a balanced framework for, "...*cooperative and productive workplace relations*."⁵
20. The TWU criticisms also overlook the reality that part-time employees would be paid rates that include compensation for the working of overtime, regardless of the fact that they may never work overtime as currently understood under the term of the award. They receive this payment for each hour worked (provided that they earn more than the minimum fortnightly payment). Consequently, on one view, the proposed provision would operate in a particularly generous manner for those employees who never work more than 38 hours per week.
21. A central tenant of the TWU's opposition appears to be an assumption that a part-time employee who works more than their agreed ordinary hours will be disadvantaged.⁶ However, many existing awards do not require that part-time employees who work outside of their regular or agreed hours be paid overtime rates. One example of an award that fits into this category is the *Wine*

⁴ ss.62(1) & 62(2)

⁵ Section 3

⁶ For example, see paragraph 40 of the TWU submission

Industry Award 2010.⁷ There is no fundamental reason why a part-time employee who works more than their agreed hours of work, but less than the ordinary hours of work of a full-time employee, should always receive an additional penalty payment.

22. At paragraph 21 the TWU raises a concern that employees could be offered part-time work on a “take-it-or-leave-it basis.”⁸ They assert that the industry is one in which many employees are likely to be in a poor bargaining position. There is no evidence to substantiate the TWU’s concerns. Rather, the well-known phenomenon of persistent driver shortages experienced by the industry suggests that there is little substance to the TWU’s submission.
23. Nonetheless, if the Commission is concerned about the need to protect new employees, it could vary the award to provide that part-time employment is only available upon conversion from another type of employment with an employee’s employer. That is, it could provide that part-time employment is only available to existing employees. It could even provide that conversion was only available at the employee’s election. These measures would mitigate the risk that the arrangement could be abused. Nonetheless, Ai Group is not convinced that such safeguards are necessary and as such we have not drafted a proposal incorporating them.

TWU criticism of Ai Group reliance on bargaining outcomes

24. At paragraphs 29 and 30 of its submission the TWU addresses the analysis of bargaining outcomes attached to Ai Group’s initial submission.
25. We accept that the precise degree of actual part-time employment that occurs in the sector cannot be established by reliance upon the research that we have undertaken. Nonetheless, it does establish that it is widely permissible.

⁷ See cl 12

⁸ TWU submission of 22 February 2016

26. It also establishes that many employers and employees are themselves not opposed to the availability of part-time employment in the sector. The TWU is itself commonly involved in negotiations for enterprise agreements that permit part-time employment.⁹
27. The availability of part-time employment provisions within enterprise agreements also suggests that the sector is conducive to part-time employment.

Response to TWU submissions regarding the evidentiary case presented

28. In the context of the casual and part-time employment common issues proceedings the Commission has received a raft of evidence that unions have collectively sought to rely upon in support of the proposition that permanent employment is, in various respects, a preferable mode of employment to casual employment.
29. Ai Group does not accept that casual employment is illegitimate, and indeed it provides vital flexibility to employers and employees. Unions have argued that more restrictions should be placed on casual employment, and it is completely incongruous for them to oppose the significant barrier to permanent employment in the long distance transport industry constituted by the current unavailability of part-time employment.
30. Regardless, we note that there are inherent merits associated with the facilitation of part-time employment within the Australian workplace relations system. Such merits are apparent from a consideration of the relevant legislative scheme, the historical development of part-time provisions within the award system and broad trends in the structure and nature of the Australian workforce. We contend that there is sufficient material before the Full Bench to enable Ai Group's application to be granted.

See annexure B for a copy of the statement

31. The merits of part-time employment were considered in detail in a recent Decision of a Full Bench of the Commission to vary the *Fire Fighting Industry Award 2010* as part of the current Award Review proceedings (the Fire Industry Award Decision).¹⁰ Ai Group contends that the context underpinning the claim to vary that award and the issues that now fall for consideration by this Full Bench are analogous in many respects.

32. In the Fire Industry Award Decision¹¹ the Full Bench observed;

[59] The existing part-time provisions in many modern awards have their genesis in the Stage 2 implementation of the 1994 *Family Leave Test Case*¹² decision. In that decision the AIRC considered the issue of inserting part-time work provisions into federal awards,¹³ noting that:

‘It is apparent from the evidence that part-time employees are an integral part of the labour force. Part-time employment is one of the ways in which families reconcile their work and family commitments. The evidence shows an employee preference for part-time work, particularly among women.’¹⁴

[60] The AIRC concluded that:

‘Upon application appropriate part-time work provisions should be inserted into awards which do not currently provide for part-time work. We have formed this view as a general proposition on equity and consistency grounds.’¹⁵

33. It is appropriate for the Full Bench to have regard to this historical endorsement of part-time employment by the AIRC and to adopt a consistently supportive view in relation to the introduction of part-time employment into modern awards that do not currently contain such provision. The “equity and consistency grounds” referred to by the AIRC would provide a salient justification for concluding that part-time employment represents an essential element of a “fair and relevant” minimum safety net, as contemplated by s.134(1) of the *Fair Work Act 2009*.

¹⁰ [2016] FWCFB 8025

¹¹ [2016] FWCFB 8025

¹² AIRC (1995), *Australian Liquor, Hospitality and Miscellaneous Workers Union & Others Personal/Carer’s Leave Test Case – Stage 2* (28 November 1995) 62 IR 48, Print M6700.

¹³ *Ibid* at p. 40.

¹⁴ *Ibid* at p. 42

¹⁵ *Ibid* at p. 41

34. The Full Bench in the Fire Industry Award Decision made a number of observations relating to the benefits of part-time work. These related, in particular, to the positive impact that the availability of this type of employment can have on workforce diversity and performance, as well as employee retention associated costs. Although the decision was related to the context of a different award to that which is the subject of the current proceedings, much of the Full Bench's reasoning and findings would be readily applicable to the context of almost any workforce or organisation. We accordingly set out below a particularly pertinent, albeit lengthy, extract from that decision¹⁶:

[130] Flexible employment arrangements – including the availability of part-time work – are an important element in creating a diverse workplace. As Ms Thomas – Acting Executive Director People Culture, CFA, put it:

'Based on my experience working in human resources for over 20 years, my assessment is that the ability to work part-time is important in a modern workplace because it promotes diversity in the workforce by allowing persons with particular needs (for example, those with parent/caring responsibilities, nearing retirement age or who are returning to work after injury) the ability to access more flexible working arrangements. These reasons supporting the availability of part time work apply as much to the CFA as any other modern-day employer.'

[131] The growing availability of part-time and flexible employment in Australia is associated with an increase in female labour force participation over the 2000s. Similar associations emerge in the international literature.

[132] The introduction of part-time employment in Victoria Police has also been associated with an increase in female operational employees. In 2000, Victoria Police employed 9,594 operational employees of whom 1,409 (or 14.69 per cent) were women. At that time there were 243 part-time employees. The incidence of part-time employment has grown steadily since, as has the number and proportion of female operational employees. As at 1 January 2016, Victoria Police employed 14,824 operational employees of whom 3,754 (33.91 per cent) were women, and 910 worked part-time.

[133] A number of the witnesses called by the Victorian Fire Services highlighted the benefits of providing access to more flexible working arrangements. Such arrangements could provide a more flexible transition to retirement; assist in caring responsibilities and facilitate a better 'work/life balance'. As Ms Schroder put it:

'As things currently stand in the MFB, there are a large number of firefighters who are close to retirement age due to major recruitment activity in the 1980s.'

¹⁶ [2016] FWCFB 8025

The ability to offer a more flexible transition to leaving the service might be very attractive to employees reaching retirement. It could also be beneficial to the organisation because the MFB would be better able to manage workforce planning and the loss of such extensive knowledge and skills would be more gradual, therefore lessening the potential impact on the organisation and our service to the community.

Other employees who may benefit from more flexible work options would be employees with small children, parents wishing to return from a period of parental leave, single parents and employees with responsibilities for the care of elderly parents.

Additionally of course it could also be attractive to firefighters who just wanted to achieve a better work/life balance.'

[134] Similar observations were made by Mr Werle.

[135] Ms Schroder's observations as to the *potential* benefits of providing more flexible working arrangements are consistent with the *actual* experience of organisations which have introduced such arrangements. In the course of his evidence Mr Leach dealt with the introduction of part-time work within Ambulance Victoria, noting that:

'While the majority of employees engaged on a part-time basis were women returning to work after a period of parental leave, part time arrangements were also utilised by employees who had ill family members or other personal circumstances and employees transitioning into retirement.'

[136] We accept that the variation of the *Fire Fighting Award* to permit part-time employment and more flexible rostering arrangements is likely to facilitate increased female workforce participation and hence promote gender diversity.

[137] Further, we accept the general proposition that workforce diversity has a positive impact on performance. As observed in the *Fire Services Review Report*:

'There is overwhelming evidence of the significant and positive contributions brought to an organisation by a diverse workforce'

[138] Similarly, as Mr Lapsley put it, on the basis of his experience in emergency management:

'Flexibility, whether it is reflected in work hours, location or other arrangements, makes organisations more sustainable and able to adapt to change. Importantly, it also enables organisations to attract and retain talent and build capability and a workforce that is able to work smarter and be more effective. It is critical to maximising productivity and building a high performance work culture.'

[139] We also accept that the introduction of flexible working arrangements – including the availability of part-time work and more flexible rostering arrangements – is likely to assist in the retention of trained operational firefighters, with a consequent saving in employment costs. As Mr Buffone – Chief Office of the CFA – put it:

'It costs the CFA about \$120,000 to train a recruit firefighter. Recruits attend a 19 week course, and are then allocated to a platoon and a station. With each year of service, the value of that employee to the CFA increases. It is in the CFA's interest to retain as many employees as possible and the availability of part-time work would further that objective by providing a means for those who might otherwise cease employment with the CFA to continue in employment. For example, part-time work could be a valuable option for employees returning to work from injury, those struggling with mental health issues and those with family/carer responsibilities, all of whom may wish to continue working in an operational capacity but are unable to work full-time. Part-time arrangements may also benefit employees transitioning to retirement who may want to gradually reduce their hours of work over a period of time.'

35. In its consideration of specific elements of the Modern Awards Objective the Full Bench also held as follows in the Fire Industry Award Decision¹⁷;

[140] Returning to the s.134 considerations, we are satisfied that varying the *Fire Fighting Award* to permit part-time employment in the public sector (with other consequential changes) will:

- promote social inclusion through increased workforce participation, (particularly by women) (s.134(1)(b));
- promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)); and
- reduce employment costs (s.134(1)(f))

36. Ai Group contends that the same kinds of benefits identified by the Full Bench in the Fire Industry Award Decision could be expected to flow from the introduction of part-time employment in the long distance sector. Many of the findings of the Full Bench would be applicable to any workforce. Moreover the following challenges facing the long distance sector, the existence of which we do not envisage the TWU will seriously dispute, would reinforce the relevance of the Full Bench's observations to the context of the LDO Award:

- The workforce is currently overwhelmingly male dominated;
- The workforce is 'ageing' in the sense that it is increasingly made up of a significant proportion of relatively older employees that might reasonably be considered to be transitioning to retirement in the foreseeable future; and

¹⁷ [2016] FWCFB 8025

- There is a shortage of experienced and skilled drivers and a resulting necessity for the industry to attract younger employees.

Is the nature of long distance operations amenable to part-time work?

37. At paragraph 27 of its submissions the TWU seek to suggest that there are some peculiar operational requirements in the long distance sector that render it incompatible with part-time employment. They assert that:

“The Award only applies to employees engaged in long distance operations, that is, interstate operations or return trips of at least 500km. The nature of that work is not easily amendable to part-time employment.”

38. The TWU’s argument largely rests upon factual assertions not underpinned by any evidence. It should be given no weight.

39. Of course, the necessity to travel a long distance necessitates that an employee will not be able to perform a particularly short engagement. In some cases it may mean that an employee performs the work over two engagements or days.

40. Nonetheless, the nature of long distance operations does not prevent all employees from working less than 38 hours per week.

41. Not all long distance operations will see a driver performing work over multiple days. Many intrastate journeys will be undertaken on a single day. Even in the context of employees performing work in connection with interstate freight tasks, the use of changeover arrangements will mean that many drivers can return home at the end of a day’s work.

42. The TWU accepts that flexible working arrangements in this industry could extend to working a limited number of fixed days per week.¹⁸

¹⁸ Paragraph 37 of the TWU submissions

43. This approach identified by the TWU could provide a template for how part-time employment could work in this sector. That is, an employer and employee could agree on a number of days per week that the employee would be engaged to work. If necessary, the clause could require that the actual days be fixed and not just the number of days. Although, it is not apparent why this would be necessary given that such a requirement does not apply in context of full-time employment.
44. In order to establish that part-time employment is not appropriate in the long distance sector the TWU seeks to rely on the observation of the Commission in *Transport Workers (Long Distance Drivers Award) Award 1993 – re allowable matters*¹⁹ that:
- “It was agreed between the parties that the industry and activities covered by the 1993 award did not indicate that part-time employment was appropriate...”*
45. The purported views of the parties participating in award simplification proceedings some 16 odd years ago is of little relevance to the conduct of the current review proceedings. They should not be accepted as evidence of the relevant factual context. The weight that can be afforded to the views of such parties is significantly weakened by the changes to the award system since the time of that decision. As observed by the Full Bench in the Fire Industry Award Decision:²⁰

[103] In times past, awards – such as the Victorian Fire Fighting Industry Employees Interim Award 1993 – were made in settlement of industrial disputes and the respondent parties to such awards were the parties to the relevant industrial dispute. The nature of modern awards under the Act is quite different from awards under previous legislative regimes and they perform a very different function to that performed by awards of the past.

[104] Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, the purpose of modern awards, together with the National Employment Standards and national minimum wage orders, is to provide a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees (see ss 3(b) and 43(1)). Further, there are no named

¹⁹ T1098 {2000} AIRC 346 at 8.

²⁰ [2016] FWCFB 8025

respondents to modern awards. Modern awards apply to, or cover, certain persons, organisations and entities (see ss.47 and 48), but these persons, organisations and entities are not 'respondents' to the modern award in the sense that there were named respondents to awards in the past. The nature of this shift is made clear by s.158 which sets out who may apply for the making of a determination making, varying or revoking a modern award. Under previous legislative regimes the named respondents to a particular award would automatically have the requisite standing to make such applications; that is no longer the case.

[105] The shift in the nature and purpose of awards means that the weight to be given to the views of interested parties is, generally speaking, now less than it was previously. This is relevant because it is apparent from the award ultimately made by Hingley C that he must have attached substantial weight to the consent position put by the CFA and UFUA, given that he adopted the consent position put and that the Commissioner's decision and the transcript of the proceedings do not reveal any other basis for the retention of the prohibition on part-time employment in the public sector fire services. The significance accorded to the views of major parties is a relevant contextual consideration when determining the weight to be attached to the Commissioner's decision.

The need to encourage collective bargaining – s.134(1)(b)

46. At paragraph 33 the TWU wrongly asserts that Ai Group accepts that the current provisions of the LDO Award encourage enterprise bargaining and that the variation sought would reduce the incentive to bargain.
47. Ai Group's original submission speculates that the absence of part-time provisions could encourage parties to engage in enterprise bargaining. This is, of course, possible. Nonetheless, to be clear, Ai Group doubts that there is widespread pursuit of enterprise bargaining in the long distance sector based solely on a desire to facilitate part-time employment. There is no evidence of this.
48. Moreover, we suggest it would be unrealistic to assert that enterprise bargaining would deliver the widespread availability of part-time employment across the industry. Securing the availability of part-time employment is not a matter which will necessarily be easily achieved through bargaining, even by a motivated employer or employee.
49. The availability of part-time employment is a matter that will undoubtedly be of interest to some employees or potential employees. This is likely to include

groups of employees that constitute a minority of the sector's workforce, such as some women.

50. The fact that a majority of employees may not have a direct interest in the availability of part-time employment under the LDO Award is not a basis for the Full Bench to reject Ai Group's claim. The popularity or otherwise of particular provisions is relevant to whether the inclusion of such terms would encourage enterprise bargaining. If the availability of part-time employment is only a concern for the minority of employees in an industry it cannot be expected that this issue alone will be a meaningful catalyst for enterprise bargaining.
51. Leaving this matter to bargaining subjects those employees who may be particularly desirous of part-time employment to the tyranny of the majority. Such an outcome is not only inherently unfair, but not likely to translate to increased levels of bargaining.
52. The context of Ai Group's claim is analogous to that considered by the Full Bench in its decision to include part-time employment in the Fire Fighting Industry Award 2010 as part of this Review.²¹ In taking into account s.134(1)(b) the Full Bench there observed;

"[1142] At present, the Fire Fighting Award does not permit part-time employment in the public sector. The relevant enterprise agreements permit part-time work, with the agreement of the UFUA. It seems to us that varying the Fire Fighting Award to permit part-time employment (with some consequential changes to rostering provisions to facilitate such employment) will encourage collective bargaining in respect of this issue. The current award terms provide little incentive for the UFU A to bargain in respect of this issue - it can simply rely on what is effectively an award prohibition on part-time employment in the public sector. Accordingly, we are satisfied that varying the Fire Fighting Award in the manner described will encourage collective bargaining', within the meaning of s.134(1)(b)."

47. The Commission should adopt a comparable approach to the consideration of Ai Group's claim. Granting the claim would encourage the TWU to bargain over the inclusion of part-time employment provisions. This could include encouraging them to seek additional protections for their members, if they

²¹ [2016] FWCFB 8025

perceive that this would be desirable. A consideration of s.134(1)(b) is a matter that weighs in favour of granting the proposal.

Need to ensure a simple, easy to understand, stable and sustainable Modern Award System – s.134(1)(g)

53. At paragraph 43 the union repeats its assertion that the inclusion of provisions founded on a “maximum number of ordinary hours” for a part-time employee are confusing and difficult to apply to the nature of long distance work and the payment arrangements contemplated by the award. There is no basis for this.
54. The notion of a maximum number of ordinary hours already operates successfully in the context of casual and full-time employees. Such employees can similarly be paid on a cents per kilometre basis and, of course, they also perform long distance work.
55. There is no substance to the union’s objection. The union instead appears to be attempting to use these proceedings as a forum for voicing its opposition to the use of the cents per kilometre remuneration method.
56. The remuneration structure contained in the LDO Award is longstanding and of critical importance to the sector. It is not a matter that any party is attempting to change through this Award Review. If the Full Bench forms the view that the availability of part-time employment is a necessary part of a fair and relevant safety net, the challenge before the Commission is to consider how part-time employment can be accommodated within such a system.
57. There is no conceptual reason why the LDO award’s remuneration system cannot apply to part-time employees. It is simply the case that such employees will be guaranteed a reduced minimum fortnightly payment and they will have a reduced number of ordinary hours. There is nothing inherently complex about this.

58. The submissions of the TWU also overlook the need to consider whether the *system* is simple and easy to understand.²² They instead merely focus on the operation of the terms of the LDO Award in isolation.
59. Employers may currently employ drivers under the *Road Transport & Distribution Award 2010* on a part-time basis. Those drivers may of course be required to perform work on a long distance operation. Where this occurs, the employee becomes covered by the terms of the LDO Award, by virtue of the terms of the instruments' respective coverage provisions. However, in such circumstances the employee would not meet the definition of either a full-time or casual employee under the LDO Award. This creates an anomaly that would not arise if part-time employment was permitted under the LDO Award.
60. Introducing part-time employment into the LDO Award would result in a greater alignment of conditions between the instruments. In so doing it would make the system simpler and easier to understand.

Conclusion

61. Ai Group remains of the view that the proposed award variations represent an appropriate mechanism for the facilitation of part-time employment under the LDO Award. Nonetheless, should the Full Bench have any reservations or concerns about the specific form of the proposal we have advanced it should, given the nature of this Award Review, indicate a provisional view that it is appropriate that the award be amended to enable part-time employment and give consideration to a further process for finalising the terms of the actual variation.

²² As contemplated by s134(1)(g)

From: [Michael Kennedy - Tantusk P/L -](#)
To: [Chambers - Harrison SDP](#)
Subject: FW: Email Fair Work
Date: Wednesday, 25 September 2013 2:12:00 PM
Attachments: [Fair Work.pdf](#)

Dear Senior Deputy President Harrison,

Please find attached a statement with respect to your review of the long distance Award.

Kind regards,

Michael Kennedy
Managing Director
Tantusk Pty Ltd



MJ & SL Kennedy

OVERNIGHT EXPRESS SPECIALISTS

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Thursday, 19 September 2013

Senior Deputy President Harrison
Fair Work Australia

Dear Senior Deputy President Harrison,

I am writing with respect to the Modern Award review of the Road Transport (Long Distance Operations) Award 2010 and in particular the industry proposal to have a part time employment clause inserted into the Award.

I own and operate a medium size transport business that incorporates both local and long distance operations on the east coast of Australia. I have been in business for 13 years and support the application by NatRoad to have a part time employment clause in the Award. My reasons for supporting the application include the additional flexibility that such a clause will provide to my business and to employees.

It is my view that to meet the changing demographics, availability and lifestyle choices of drivers the long distance transport industry needs to provide the same range of employment conditions that are available to operators under the Road Transport and Distribution Award. The incorporation of a part time employment clause would remove the current anomalous situation for employers that combine both local and long distance work. Additionally, part time work would increase the pool of available drivers in an industry that is increasingly finding it difficult to find drivers to employ.

Yours faithfully


Michael Kennedy
Managing Director



From: [Erin Hallcroft](#)
To: [Chambers - Harrison SDP](#)
Subject: Long Distance Award Employer Statement
Date: Wednesday, 25 September 2013 2:10:38 PM
Attachments: [DOC250913-25092013144647.pdf](#)

Dear Senior Deputy President,

I wish to provide the attached statement for you to consider.

Geoff Crouch
Managing Director
Ron Crouch Transport

Senior Deputy President Harrison
Fair Work Commission

chambers.harrison.sdp@fwc.gov.au

Dear Senior Deputy President Harrison,

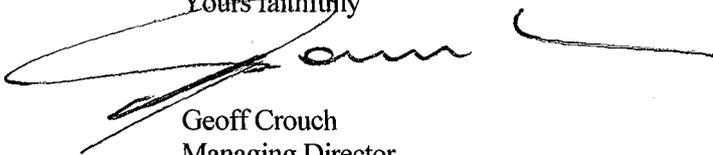
Road Transport (Long Distance Operations) Award 2010

I have been following the progress of the Modern Awards review process and in particular the long distance Award and wish to comment on the insertion of two clauses:

- (a) **Ordinary Hours of Work** – having been an operator of a large family owned transport business for 35 years, I was concerned when the Australian Tax Office amended a ruling on what is considered Ordinary Times Earnings in the long distance sector. The effect of this decision was to effectively up to double the cost of superannuation for operators. I understand that the proposed Ordinary Hours of Work clause that may be inserted in the Award will cause the ATO to revisit their decision. Accordingly, I wish to support the insertion of an ordinary hours of work clause in the Award being the only Award that I am aware of that does not comply with the Fair Work Act in this regard in the hope that the ATO will reconsider a position that disadvantages long distance operators.
- (b) **Part time work** – Like many transport operators in regional areas our company often has a need to be able to offer part time work to long distance driver that can benefit both parties. I have a number of drivers that have enquired re part time work that I cannot offer at present. The ability to offer this would enhance my business where smaller contracts may require service on a less than full time basis and there are drivers that wish to reduce their work time for family or other reasons that are in accord with our business being able to offer more employee friendly work options.

Your consideration of my statement in any further review of the Award would be appreciated. I have also attached two statements from amongst my current employees who support the option of part time work.

Yours faithfully

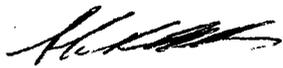


Geoff Crouch
Managing Director
Wednesday, September 25, 2013

12/9/2013

To whom it may concern,

I am employed as a long distance driver by Ron Crouch Transport and support the application by Nat Road to have a part time employment clause inserted into the Road Transport (long Distance operations) Award as part of the modern award review process. I believe that the provision of this clause would provide me ~~with~~ with flexibility in my employment without sacrificing my rights to award base provisions and other entitlements. The clause would be consistent with the part time employment clause in the Road Transport and Distribution Award that allows flexibility for older drivers in particular.



ALAN WELLS
13 TUCKER ST.
WARREN WARREN.
NSW 2650.

To whom it may concern,

I am employed as a long distance driver by Ron Crouch Transport. I support the application by NatRoad to have a part time clause added to the Long Distance Road and Transport award.

I believe this cause will be of benefit to all drivers who are employed under this award, by providing flexibility in employment options while maintaining all relevant entitlements.

A handwritten signature in black ink, appearing to read 'D. Thompson', with a long, sweeping flourish extending upwards and to the right.

David Thompson

13 Inglis St
Wagga Wagga
NSW 2650

IN FAIR WORK AUSTRALIA

2012 Award Review

Matter No: AM2012/39 and others – Applications for review of the Road Transport (Long Distance Operations) Award 2010

WITNESS STATEMENT

I, Neisha Webster, of _____ say as follows;

Experience & Background

1. I am currently employed as the Workforce Planning Manager at Murrumbidgee Local Health District. I commenced this role in March 2013.
2. Prior to my current role I was employed by Border Express Pty Ltd (“the Company” or “Border Express”).
3. I initially joined the Company in November 2007 as a HR Officer. I subsequently progressed to the positions of Senior HR Manager, National Human Resources Manager and National Manager – People & Culture. I resigned from Border express in March 2013.
4. Throughout my time with Border Express I had direct involvement in developing the business’s human resources policies and strategies. I also had involvement in the day to day human resources or industrial relations issues that arose. In particular I oversaw and implemented various strategies related to the recruitment and retention of drivers. This included conducting interviews with potential candidates as well as either conducting or receiving reports on exit interviews with employees leaving the business.

5. I was also heavily involved in developing various initiatives aimed at promoting or facilitating employment opportunities for women in non-traditional roles within the business, including roles as drivers. I also played a significant role in the development and negotiation of any enterprise agreements put in place within the business.
6. Between 2010 and early 2013 I was also a participant in the industrial relations subcommittee of the ATA NSW. The ATA NSW is the peak trucking body in NSW. It has a membership of businesses within the Road Transport Industry. This includes Border Express. The subcommittee included representatives from various employers in the industry. It considers industrial relations issues affecting the industry in detail and reports to the ATA NSW's Council on such matters.
7. In my role with the ATA NSW I would discuss workplace relations issues relevant to the industry with both the manager of the ATA NSW and members of the ATA NSW, particularly the members that were a part of the ATA NSW's Council. This Council included representatives of various Road Transport businesses with operations in NSW. This ranged from businesses such as Toll to smaller family run businesses.
8. At the time I resigned from the ATANSW's Industrial Relations Subcommittee, the ATA NSW's Council strongly supported the Long Distance Award being amended to permit part-time employment. There was general consensus amongst the Council members that the availability of part-time work arrangements would be an important and necessary flexibility which would assist employers to attract drivers and to accommodate the needs of an aging workforce of drivers.
9. While employed by Border Express I was based primarily in the Albury office, although I would travel to other sites as necessary. I would often work closely with some of the other road transport businesses in the Albury area regarding common human resources issues that were relevant to all of us. For example, we would often discuss the impact of changes to the

legislation or the relevant Awards. I would also discuss the difficulties associated with recruiting skilled drivers with representatives of these businesses.

10. I have been exposed to the transport industry throughout my life. My family (grandparents & uncle) have a small operation in Albury offering local and on forwarding services along with some regular long distance work. I worked full time in the family business for approximately 3 years between early 2000 and 2003.

Border Express

11. Border express is a road transport business. It is involved in the transportation of palletised general freight.

12. It has operations based in most major capital cities in Australia and various regional locations. Its head office is in Albury.

13. At the time I left the business it employed approximately 750 people. The bulk of these are truck drivers.

14. I understand that the Modern Awards applicable to employees engaged by Border Express are covered by include the Road Transport & Distribution Award 2010; the Road Transport (Long Distance Operations) Award 2010; the Clerks – Private Sector Award 2010 and the Manufacturing Associated Industries and Occupations Award 2010.

15. The Company also had 8 enterprise agreements in place. These applied to various local drivers and yard staff around Australia.

16. There was no enterprise agreement applicable to the Border Express employees engaged as long haul drivers.

17. The bulk of Border Express's employees were covered by the Road Transport & Distribution Award 2010. However, at the time I resigned it

employed approximately 20 line haul Drivers under the Long Distance Award. These drivers were based in various locations around Australia.

18. Most of the line haul drivers were male and between the age of 55 and 65. Similarly, most of the employee drivers engaged by the Company fell within this age bracket.
19. Border Express utilised contract drivers or other road transport businesses engaging their own fleets to perform some long distance work. Often external contractors were used to perform work out of depots where there was not sufficient regular work available to appoint an additional full-time long distance driver. If the Company had been able to offer part-time employment to long distance drivers it would likely have sought to employ additional drivers to perform some of this work rather than subcontracting it out. This would have also been subject to other considerations such as whether there was appropriate company equipment available. Nonetheless I would have strongly recommended that, where possible, the business take this approach.
20. Almost all line haul drivers employed by Border Express were engaged on a full-time basis. At the time that I left there were only one or two casual employees utilised to regularly perform this kind of work.
21. The work performed by Border Express's line haul employees was generally stable and regular. Most of the drivers would typically perform the same runs from week to week. Although this can change, the drivers would generally work a fairly regular number of hours each week.
22. Some of the long distance work involved drivers taking their major rest breaks while away from home. However, the Company attempted to minimise this through the use of changeover arrangements where practical.
23. The Company's preference and practice was to engage permanent employees rather than casuals to perform long distance work. This was

largely a result of the regularity of the work. That is, the Company typically performed regular long distance work for customers. Accordingly it was preferable to have a stable arrangement in place where the company could rely on a particular driver being able to perform this work. This was particularly important where change-over arrangements were in place. If the Company engaged casuals there would be a risk that they may not be available when required.

24. A problem with relying on casual employees to perform line haul work was the risk that they would be more likely than permanent employees to resign in order to secure a permanent role elsewhere. This was a concern held by both myself and others within the management of the business.

25. Another reason for the Company's preference and practices relating to the use of permanent employees is the need to manage and minimise risks associated with fatigue in the context of long distance work. The management of fatigue is a major occupational health and safety risk associated with long distance work. There is a raft of regulation imposing obligations on the Company to manage such risks. By utilising permanent employees to perform regular long distance work the Company was able to put in place longstanding arrangements regarding the performance of such work. This enables employees to arrange their personal lives around these commitments so that they are better able to get appropriate amounts of rest in order to manage their fatigue.

Importance of for Part-time Employment Arrangements

26. The Road Transport (Long Distance Operations) Award 2010 does not provide for part-time employment. Accordingly Border Express did not have any line haul drivers employed on a part-time basis (i.e. employed for less than an average of 38 hours per week).

27. In contrast, Border Express engages a number of part-time employees in other areas of its operations. This included employees covered by the Road Transport & Distribution Award 2010 and employees working in either a clerical or managerial capacity.
28. The Company commonly agreed to various part-time arrangements in order to accommodate the needs of individual employees or potential candidates for positions with Border Express. Such needs included situations where employees either wished to work part-time hours in order to balance carer's responsibilities or as a result of illness. In other cases it occurred in response to employees wanting to work reduced hours because they were approaching retirement. These arrangements were both beneficial to the employees concerned and also meant that the business was able to retain or attract skilled workers.
29. Not only did the Company agree to implement part-time arrangements at the request of employees, but it also actively pursued a targeted recruitment strategy of offering flexible work arrangements, such as part-time or job share arrangements, when trying to fill vacancies for transport workers. It would typically identify the availability of such arrangements on relevant job advertisements. When the Company advertised such options it was not unusual for potential candidates to identify that they would prefer part-time positions to casual employment. It was not possible to offer such arrangements to potential long distance drivers.
30. I recall that at the time I left the Company it was also developing a specific initiative aimed at promoting to its workforce the Company's willingness to consider implementing part-time arrangements in circumstances where employees were looking to transition to retirement. It was hoped this would assist in the retention of skilled workers who were likely to be considering retirement.
31. If there was the capacity to employ drivers on a part-time basis under the long distance award the Company would have advertised or promoted the

potential availability of part-time positions in order to enhance its effort to recruit drivers or to retain existing drivers. I would have strongly recommended pursuing these initiatives.

32. There is no inherent practical reason associated with the nature of the long distance work undertaken by Border Express employees which would have meant that it could not be performed by an employee engaged on a part-time basis. For example, it would have been possible for an employee to be engaged to just perform one or two runs a week in some circumstances. These kinds of arrangements could have been put in place if permitted under the long distance award.
33. The absence of part-time employment under the award meant that the business has a reduced capacity to offer people more flexible arrangements involving the working of less than full-time hours. At times this resulted in negative consequences for employees and the business.
34. In 2011 circumstances arose where a long serving Canberra based line haul driver employed by Border Express became seriously ill and ultimately had to have a leg removed. Following the operation his Doctor only cleared him to return to work for a limited number of hours each week. However, given the terms of the Award the Company understood that it was not able to offer him part-time employment performing long distance driving duties on an ongoing basis. The Company tried to accommodate his disability by investigating the viability of offering him part-time work performing local driving duties not associated with long distance operations but this was not medically feasible due to the need to enter and exit the vehicle more frequently when undertaking this type of work. The employee subsequently left the business due to his inability to return to full-time work.
35. Another situation arose in late 2011 where a long serving line haul driver suffered a heart condition. As part of his return to work his Doctor advised that he should only perform part time work. Unfortunately, the business was not able to accommodate this request given the inability to employ part-time

employees under the Award. The employee consequently took a combination of paid and unpaid leave until he was cleared to return to full time driving duties. This resulted in the employee exhausting all of his leave entitlements, including his entitlements to annual leave and long service leave.

Driver Shortages & Related Matters

36. Driver shortages were a persistent problem throughout my time with Border Express. It was often not possible to recruit sufficient staff. This was an issue throughout Australia. It was often particularly difficult to recruit B-double drivers. There were occasions when the Company advertised the availability of line haul driver positions but did not receive any suitable candidates.

37. Difficulties recruiting sufficient drivers had numerous negative consequences. It had an adverse impact on capital utilisation. That is, at times the Company had trucks sitting idle. In other circumstances it meant that there was pressure to ask existing drivers to perform significant amounts of work in order to make up for the shortages. Alternatively, it sometimes meant that work which the business would have preferred to perform in house had to be outsourced.

38. While I was with Border express issues such as an aging workforce and the difficulty attracting new employees contributed to the business recognising the need to look beyond the traditional workforce and draw recruits from a wider pool of potential employees. In particular there was a genuine commitment in the Company to encouraging more females into what have been traditionally male dominated areas of the Transport Industry.

39. In 2008 Border Express received a nomination for a “Business Achievement Award” from the Equal Opportunities for Women in the Workplace Agency. An article from Border Express’s employee newsletter relating to the

nomination and some of the business's efforts to promote employment opportunities for women in the industry is attached at annexure A.

40. One of the key recruitment and retention strategies in place at Border Express was the implementation of flexible working arrangements and job share opportunities. This was supported by the Company's Senior Management and Board as a way of removing barriers and encouraging more females into areas previously dominated by males, such as performing driving roles. It was also viewed as something that would be useful in accommodating the needs of an aging workforce. Unfortunately the Company's ability to offer or promote flexible arrangements to long distance drivers was limited by the inability to offer part-time positions.
41. If the Long Distance Award permitted part-time work it would have enabled the business to offer more flexible working arrangements to either exiting long distance employees or to potential candidates. This would have been something that Border Express would have utilised in an effort to improve driver recruitment and retention.

Enterprise Bargaining

42. Border Express is subject to a number of enterprise agreements. However, it does not have an enterprise agreement covering its line haul drivers.
43. Implementing an Enterprise Agreement ("EA") is not always an easy process.
44. EA negotiations can be very time consuming and expensive for an employer to undertake. This is particularly difficult where you are dealing with a geographically diverse workforce, such as the line haul drivers employed by Border Express.
45. Border Express is one of the largest Road Transport Businesses operating in Australia. Nonetheless, it often needed to obtain professional external

advice and assistance in relation to the making of enterprise agreements in order to ensure that the agreement was drafted properly and met the requirements of the legislation. This of course comes at a cost to the business.

46. Based on my experience in industry, and in particular my role with the ATA NSW, I am aware that many road transport businesses do not have any dedicated or specialised Human Resources Personnel. I am also aware that many road transport businesses are relatively small. Many employ less than 20 people.

[To be declared in the witness box]

