IN THE FAIR WORK COMMISSION

AM2019/23 and AM2020/2

Road Transport (Long Distance Operations) Award 2010 (the Award)

Reply Submissions of the National Road Transport Association (NatRoad)

Introduction

1. These reply submissions are filed on behalf of the National Road Transport Association (**NatRoad**) in response to the Directions dated 8 January 2020 in AM2019/23.[1] We note that in correspondence uploaded to the Commission's website[2] it is recorded that "the Deputy President has made the decision to list these matters concurrently, with both matters to adhere to the Directions issued in AM2019/23 (meaning the Directions in AM2020/2 have been vacated)."[3]

2. NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from subcontractors to large fleet operators, general freight, road trains, livestock, tippers, express, car carriers, as well as tankers and refrigerated freight operators. NatRoad has circa 1,300 members Australia wide.

3. We oppose the applications made by Mr Trevor Warner (AM2019/23) and Ms Brenda McKay (AM2020/2). In so doing, we raise some threshold issues in this submission as well as make arguments concerning the reason that the variations to the Award sought are not necessary to achieve the modern awards objective. Whilst we are sympathetic to some of the complaints made by the applicants, the proposed variations would cause many additional industry problems rather than solve any current problems.

Standing

4. The applicants' standing to make the applications is at best unclear, noting that under column 2 of item 1 of s158(1) *Fair Work Act, 2009* (the Act) they must be an employer or an employee covered by the Award.

5. Mr Warner in his Form F46 initiating application[4] implies standing as an employer covered by the Award per the response to 1.2 of that form. But in his submission

[1] https://www.fwc.gov.au/documents/documents/awardmod/var010110/am201923-dir-080120.pdf
[2] https://www.fwc.gov.au/documents/documents/awardmod/var010110/am201923-20202-amended-dir-180220.pdf
[3] Ibid
[4] https://www.fwc.gov.au/documents/documents/awardmod/var010110/am201923-application-161219.pdf

Filed By:	The National Road Transport Association
Address:	Level 3, Minter Ellison Building, 25 National Circuit, Forrest, ACT, 2603
Email:	richard.calver@natroad.com.au
Telephone:	(02) 6295 3000

dated 28 February 2020[5] he indicates two matters that do not show the necessary coverage, and which appear contradictory. At the first paragraph of numbered section 3 of that submission he says: "The Applicant has been employed as a Long-Distance Truck Driver for some 15 years and has travelled in excess of 3 million kilometres." At the fourth paragraph of the same section of the submission he mentions his "experience of driving and employing drivers in a Human Resource role, as well as fleet operations…" So, from these parts of the applicant's submission he may either be making the application as an employer or as an employee.

6. Having said that, at numbered section 6 of the submission he indicates: "The APPLICANT has been employed by various companies who from time to time, provided a Road Transport service to TOLL IPEC, STARTRACK EXPRESS and DIRECT EXPRESS FREIGHT." Further at numbered section 27 of the submission Figure 4 is presented as a redacted, copy pay slip of the applicant for payment made on 20 February 2020. We note that on the authority of *Broomhall*[6] a complete pay slip or other proof should be presented to the Commission in order that standing may be established i.e. that the applicant is an employee covered by the Award. We would seek further clarification of his standing to bring the application.

7. The submission[7] of the second applicant, Ms Brenda McKay, is the same as that of the first applicant's in most respects. It indicates at the first paragraph of numbered paragraph 3 that she "has been employed as a Long-Distance Truck Driver for some 25 years, both here in Australia & abroad in New Zealand and has travelled in excess of 5 million kilometres." At numbered section 3 she indicates her experience "driving and employing drivers in an Operations Management role, as well as fleet operations…" At numbered section 6 of her submission she says: "The APPLICANT has been employed by various companies who from time to time, provided a Road Transport service to TOLL IPEC, STARTRACK EXPRESS, AUSTRALIA POST and XL EXPRESS." However, unlike the first applicant's submission there is no evidence of a pay slip, redacted or otherwise, and Ms McKay's standing to bring the application is therefore unclear. We would seek further clarification of her standing to bring an application. Again, we suggest a pay slip, unredacted, be provided to the Commission or other proof given.

Nature of the Application(s): Ambiguity in the Award? The First Variation

8. The applications are made under section 158 of the Act whereby the applicants are applying for the making of a determination varying the Award pursuant to section 157 of the Act. This is the case despite references to "an ambiguity" allegedly being cured by making the relevant determination (section 160 has not been invoked). NatRoad submits that in fact if the application were to be granted in respect of the first variation greater ambiguity would be created and that no ambiguity currently exists.

9. The applicants wish to vary two provisions of the Award.

10. The first variation proposed is to change the definition of "loading and (sic) unloading"[8] in clause 3.1 of the Award. The variation would change what is a perfectly clear

[5] https://www.fwc.gov.au/documents/documents/awardmod/var010110/am201923-sub-tw-280220.pdf
[6] https://www.fwc.gov.au/documents/decisionssigned/html/2013fwc7458.htm
[7] https://www.fwc.gov.au/documents/documents/awardmod/var010110/am201923-sub-individual-280220.pdf
[8] The term used in clause 3.1 of the Award is "loading or unloading".

definition, particularly in the light of *Laycock v J&C Independent Carriers P/L,*[9] to a term which, we submit, defies its ordinary meaning. In that case, the Federal Circuit Court (followed by the Federal Court on appeal) made three clear findings on the meaning of the term "loading or unloading" in the Award thus:

- Loading and unloading is the physical act through mechanical or other means of using physical effort to take a load from a truck or unload an item from a truck.[10]
- Opening and closing curtains on a truck are not loading or unloading; and
- Strapping and other load restraint is not necessarily part of loading but could be part of unloading if carried out by a person who goes on to unload the truck.

11. The variation would distort the meaning of what is otherwise a clear term by defining the process of loading or unloading inclusively as "all non-driving activities." This is counterintuitive bearing in mind the nature of the required physical act reinforced by the case law. The wording of the proposed variation then lists eight inclusive elements, one of which is to "be on call or to Assist (sic) a third party to load or unload freight." Conflating being "on call" with the physical act of loading or unloading is a logical disconnection of some magnitude. The term is of itself ambiguous in that the question arises as to whether the definition would intend to cover "on call" or call back matters (a matter already covered at clause 13.2(d) of the Award) or being on call to assist a third party to load freight. If the latter how that would be measured is muddy and the wording to achieve that aim absent.

12. The proposed variation sits oddly in the Award because the Award's structural elements revolve around payment for driving time as defined in Clause 3.1 inclusive of ancillary tasks (e.g. as described at clause 14.1(a)(ix)) and loading or unloading, underpinned by a minimum payment regime set out in clause 13.1. Having a rest break (which is specifically excluded from the definition of driving time) is clearly a non-driving activity so the proposed variation makes no sense as the possibility arises that the variation would contradict that exclusion from the notion of driving time: resting is obviously a non-driving activity. The crux of the matter is that driving and loading or unloading are currently clearly defined and when neither of these activities is undertaken, the long distance driver is given the opportunity to rest.

13. Rather than cure any ambiguity the definition strays well beyond the ordinary and judicially defined meanings of the term "loading or unloading." In so doing, it offends against two important principles. The first arises from the observations of French J in *Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*[11]:

    The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being

[9] [2018] FCCA 6 12 February 2018 and on appeal at *Laycock v J & C Independent Carriers Pty Ltd* [2019] FCA 1060 (9 July 2019)

[10] Cited with approval on appeal above note 9 at para 16

[11] [2006] FCA 813; 153 IR 426

construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction.[12]

14. The ordinary meaning of the term "loading or unloading" cannot logically encompass everything other than driving, and the clash between that term and potential payment for rest breaks that are specifically excluded from the definition of "driving time" has already been mentioned above. Accordingly, the second principle arises from the element of the modern awards objective that says that awards should be "simple" and "easy to understand" (s.134(1)(g)), touched on again below. The definition that forms part of the first variation would create many problems in practice, undermines the ordinary and judicially defined meaning of the Award term "loading or unloading" and introduces a potential clash with another definition in the Award that of "driving time." It directly contradicts the basis for existing remuneration as expressed in what is encompassed by the industry disability allowance at clause 14.1(a) of the Award and hence would provide remuneration where the Award already contemplates that compensation has been provided. In essence, the seemingly simple means of solving a somewhat difficult-to-understand problem (especially as articulated in the submissions of the applicants) would create many more problems than it is painted as solving.

15. This variation is proposed as a means to overcome an alleged ambiguity somehow linked to the five cases cited by Mr Warner at numbered section 2 of his submission, a proposition that is not argued let alone sustained. This is explained thus by the applicant in terms that are confused, mere assertion: "The cases cited show a clear ongoing concern for Drivers who are performing their scheduled duties and remuneration is not occurring, due to this ambiguous definition of Loading and Unloading."[13] In fact the cases cited present a consistent and reliable legal interpretation regarding the remuneration structure of a long distance driver that should not be lightly set aside, certainly not on the incorrect basis that they comprise a body of jurisprudence that creates and compounds an alleged ambiguity. The authorities actually clarify the definition of loading or unloading, as expressed earlier.

16. The alleged ambiguity is not properly explored but is in the mind of the applicants connected with alleged exploitation and unfairness in the industry which has been particularised by the applicants as applying to them and hence, again in their minds, to the road transport industry more generally. Any evidence as to the practices to which they allude, in themselves confusing, is at best hearsay and of little if any probative value despite the submission being largely evidence jumbled up with a mixture of assertion, personal experience and alleged problems confronted by the applicants. There is a mix of material that would be better expressed as evidence and matters that are purportedly argument. The manner in which practices are said to operate unfairly are not logically traceable to an ambiguity in the term "loading or unloading." They more stand as a re-agitation of litigation undertaken by the Transport Workers Union during the award modernisation process[14], a matter to which we will return below.

[12] Id at para 53

[13] Above note 5 at p3 numbered section 5

[14] [2017] FWCFB 1913

The Nature of the Applications: the Second Variation

17. The applicants seek to vary clause 14.2(c)(i) of the Award (cited as 14.2 C (i) in the submissions of the applicants). That provision is as follows:

    An employee engaged in ordinary travelling on duty or on work on which the employee is unable to return home and takes their major rest break under the applicable driving hours regulations away from home must be paid $40.44 per occasion. This will not be payable where an employee is provided with suitable accommodation away from the vehicle.

18. That provision is designed to compensate long distance drivers who are unable to return home when travelling on duty or on work and must take their major rest break away from home. The amount of $40.44 is currently payable as an allowance and is most likely to be paid where a driver sleeps in the cab of the truck.

19. That amount is not payable where an employee is provided with suitable accommodation away from the vehicle. The applicants wish to remove the last sentence of the current provision which contains this trigger for non-payment. The rationale for this proposed variation first appears to be that the long distance driver is not paid a meal allowance when the circumstances described in paragraph 18 above occur. Clause 14.1(a) of the Award indicates that the industry disability allowance compensates for "iv) necessity to eat at roadside fast food outlets." Further, where suitable accommodation is provided it will generally have crockery, utensils and dining facilities, as established in the Code of Practice discussed at paragraph 21 below.

20. Secondly, it appears that the applicants are giving evidence at numbered section 34 of the first applicant's submission and numbered section 32 of the second applicant's submission that a previous employer provided "totally unsuitable" accommodation. The applicants appear to be under a misapprehension that the alleged assertion of the employer set out at the relevant paragraphs concerning an absence of legal standards for suitable accommodation is correct. It is not. Those minimum standards are in place.

21. Safe Work Australia has published a model Code of Practice entitled *Managing the Work Environment and Facilities.*[15] Section 4.3 of that Code sets out standards relating to accommodation. This guidance follows the statement of the work, health and safety (WHS) legal requirement that, "A person conducting a business or undertaking who provides accommodation for workers and owns or manages the accommodation must, so far as is reasonably practicable, maintain the premises so that the worker occupying it is not exposed to health and safety risks." [16]

22. It appears therefore that the basis of the second variation is founded on an incorrect understanding of the law. Where practices are encountered that potentially breach the law, there are many avenues for pursuit of a remedy. The proposed variation therefore is a response to an alleged breach of the WHS laws rather than a logical outcome of a problem with the way the allowance currently operates. In fact, introducing the second variation would reduce the likelihood of long distance drivers

---

[15] https://www.safeworkaustralia.gov.au/system/files/documents/1702/managing_work_environment_and_facilities2.pdf

[16] Id at p 25

getting a good night's rest at suitable accommodation as they would more likely be asked to sleep in the truck given that the allowance would be payable where more comfortable and suitable accommodation would have previously been provided. On principles of logic, the incentive to provide that accommodation would be removed.

23. A further misapprehension is contained in the third paragraph of numbered section 33 of the first applicant's submission and the third paragraph of numbered section 31 in the second applicant's submission. The incorrect assertion is made that: "If the Driver operates a Fatigue Regulated Vehicle, as defined by the fatigue laws, the Driver is restricted from visiting supermarkets to buy food supplies."

24. In fact, the *National Heavy Vehicle Work and Rest Hours Exemption (Personal Use) Notice 2018 (No. 1)* provides up to an hour of additional work time to drivers under Standard Hours to use a fatigue-regulated heavy vehicle for permitted personal activities. Similarly, the *National Heavy Vehicle Work and Rest Hours Exemption (Personal Use – BFM and AFM) Notice 2019 (No.1)* applies to drivers under Basic Fatigue Management (BFM) and Advanced Fatigue Management (AFM) applies to drivers under BFM and AFM.[17] The use of a heavy vehicle to purchase food for consumption by a heavy vehicle driver would come within the terms of these notices.

25. If the applicants want to change the Award to provide more specific provisions about meals then this variation is unrelated to that issue and the evidential foundation for any relationship between suitability of payments for meals and the current amount of the travel allowance is insufficient to found a variation of any kind. This is especially the case given the likely adverse consequences for the interests of those the applicants purport to represent were the variation to be introduced.

Other Submissions: NRFA

26. The National Road Freighters Association Inc (NRFA), of which the applicant is a member, has lodged a submission dated 23 February 2020.[18] The NRFA states that the application is supported "in its entirety." Much of the NRFA submission is fluff, particularly the rhetoric about "wage slavery" which seems gratuitous.

27. The NRFA provides one main argument supporting "this application." We assume the NRFA mean the first variation. NRFA indicates that there is an inequality between long distance drivers and those drivers paid under the *Road Transport and Distribution Award 2010* (Distribution Award). The NRFA invokes s134(1)(e) and asserts: "Currently long-distance drivers are not paid for work performed before and after their long-distance trip."

28. The assertion made was at the nub of recently reported litigation referred to by the applicants as fomenting the alleged ambiguity in play[19]. Beaumont DP in *TWU v Linfox*[20] said:

---

[17] The personal use exemption is explained here https://www.nhvr.gov.au/safety-accreditation-compliance/fatigue-management/personal-use-of-a-fatigue-regulated-heavy-vehicle

[18] https://www.fwc.gov.au/documents/documents/awardmod/var010110/am201923-sub-nrfa-260220.pdf

[19] *TWU v Linfox* [2020] FWC 489

[20] Ibid

While the TWU has argued that the term 'a long distance operation' only involves moving freight to and from one location, its meaning is of such import that the dropping of freight to multiple locations on a journey, is envisaged. This type of work does not appear far removed from moving trailers to different parts of a customer's site for the purpose of unloading. However, that such work is related to the long distance operation, would appear, from what the Full Bench has had to say on the subject, to be dependent on whether the moving of those trailers is additional driving work related to the long distance operation. The Full Bench in the Four Yearly Review of the Long Distance Award 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.[21]

29. NatRoad submits that the applicants and the NRFA have misunderstood the unique interaction between the Award and the Distribution Award, touched on in the quotation in the last paragraph. The awards operate to cover drivers and could both apply to work undertaken that involves a long distance operation and then local work or vice versa. In addition, the assertion of alleged inequality made in the NRFA submission is based on the hourly rate calculations made by the applicants in highly particular circumstances that relate solely to the applicants. There is no broad comparison of alleged inequities that provides an evidentiary base to support a proposition that there is unequal remuneration for the same work when workers covered by the two awards are considered. In fact, the point is missed: the awards are complementary to an extent not otherwise encountered in the modern award system and the allegations about inequality appear not to comprehend that point.

30. The Distribution Award's coverage is excluded per clause 4.2 where employees are covered by the Award "whilst undertaking long distance operations." Therefore, the Distribution Award applies unless a long-distance operation is undertaken. A driver's contract of employment could be supported by the minimum conditions of either award dependent on distance driven, including in the same pay period. It is the interaction between these two awards that is at issue given the unique interdependency that these awards possess in the modern award system.

31. The phrase "whilst undertaking long distance operations" is able to be ascertained via two definitions contained in both the Distribution Award and the Award (clause 3.1 of both). The first is the definition of a long distance operation:

long distance operation *means 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*.

And as modified by:

interstate operation *will be 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*

[21] Id at para 89

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.

32. A long distance operation is therefore one which exceeds 500 kilometres from a principal point of commencement to a principal point of destination or an interstate journey in excess of 200 kilometres.

33. The two Awards are structured so that overlap between the two awards is contemplated and compensation adjusted accordingly. There is recognition in the Award for transfer from the Distribution Award to the Award per the allowance in clause 14.1(c)(i). By reason of clause 4.2 of the Award it "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" so long as the employee is covered by the Distribution Award.

34. NatRoad contends that the current arrangements under the two awards provide for appropriate remuneration when there is a transfer between the awards or where work should be conducted under the coverage of each award sequentially, as appears to be the case where additional work at the end of a long distance journey is required. First, the transfer from the Distribution Award to the Award attracts an allowance that is 1.24% of the standard rate. Secondly, under the Award the employer is required to nominate whether the employee is to be paid via a cents per kilometre method or the hourly award method.

35. The hourly driving rate under the Award includes an industry disability rate and an overtime allowance, the latter per clause 13.5(b) of the Award. These two components are also incorporated into the cents per kilometre rate: see clause 14.1(b) Award. Under the Award both methods of payment do not depend on the time worked by an employee for their operation. But it is equally clear that there is an overtime allowance built into the Award's payment terms which does not appear to have been taken into account by the applicants or the NRFA.

36. The Award sets out in clause 20.1(a) that the ordinary hours of work shall be an average of 38 per week and may be calculated over a period of not more than 28 days.

37. The Award contains proscriptions about hours of work. These must be worked in accordance with fatigue management rules per clause 20.2(a) or in accordance with clause 20.2(b). For example, one element of clause 20.2(b) limits the number of hours in a day which a driver may work to 12. It requires 10 hours off duty immediately after the working period is completed. These numbers sit oddly with some of the assertions made by the applicants relating to hours worked.

38. The latter point reinforces that many of the allegations which form the bases of the applicants' submissions as supported by the NRFA could have formed individual legal challenges to the way in which the Award and the Distribution Award operated in the particular circumstances and whether or not they were correctly applied. An example of this is where the first applicant asserts in the second paragraph on page 10 of his submission that: "The driver discovered a flat tyre and drove to the tyre shop from 10:45am to 11:15am and had a 30 min rest. The LD Driver was not paid separately for this breakdown." First, the driver had a rest and was therefore perhaps not paid on that basis. But, in any event, we refer to clause 22 of the Award which says:

An employee must be paid for all time up to a maximum of eight hours in any period of 24 hours at the rate prescribed by clause 13.1 where a long distance operation is delayed because of breakdowns or impassable highways. Provided that the employee must take all reasonable steps to minimise the period of delay.

39. In this context if a heavy vehicle through a tyre failure **"**suddenly ceases to function" i.e. breaks down, payment should be made where the requisite delay is demonstrated to the employer.

40. Similarly, if NRFA members have evidence of conduct which they believe to be unlawful, comprising for example evidence of the alleged "wage slavery" made in the NFRA's submission, then there are a number of ways in which those matters can be brought to the courts. This is not the appropriate forum to deal with those issues.

Submission of Russell Wattie

41. Mr Wattie lodged a submission dated 21 February 2020[22] in support of the application. He characterises the application relating to the change in definition of loading or unloading as removing "a legislated right for employers to not pay work (sic) for work performed by workers covered by this Award." In support of that proposition and of the first variation he compares the definition of work for fatigue purposes with alleged non-payment for work as set out "in the application."

42. It is difficult to know what the work that is allegedly unpaid comprises as set out in the applications, as previously indicated. If at the end of a long distance journey a driver is not released from duty and is required to perform tasks, then the work required to be undertaken is covered by the Distribution Award at the hourly rates there set out. For example, if a driver is unable to rest for the two hours mentioned at page 8 of the first applicant's submission (pending some sort of formal release by security guards?) but is required by the consignee and therefore the employer to conduct local work, then payment under the Distribution Award should be sought. But the facts are unclear. How is the driver required and by what instrument to assist the forklift driver? Why is security guard clearance required? Why hasn't a safety zone under the WHS laws been established so that the driver is in a position of safety and/or able to rest whilst the physical act of loading or unloading occurs?

43. The definition of work under the fatigue laws is highly relevant to the Award as indicated above at paragraph 37. But the listing of the tasks under the question "What is work time?" does nothing to advance the proposition that all non-driving tasks should be included in the definition of "loading or unloading" pursuant to the first variation.

44. Mr Wattie also mentions instructing another on the loading or unloading of a truck as a task that is not remunerated. But this is a matter specifically covered by clause 14.1(a)(ix) that is "extra responsibility associated with arranging loads" is compensated for under the industry disability allowance.

45. The assertions made by Mr Wattie about fatigue are incorrect. There are duties that specifically apply to fatigue regulated heavy vehicles. Most fatigue management requirements in that context are covered under Chapter 6 of the HVNL. It aims to

[22] https://www.fwc.gov.au/documents/documents/awardmod/variations/am201923-20202-sub-tw-210220.pdf

safely manage the fatigue of drivers of fatigue-regulated heavy vehicles while they are driving on a road (s 220 of the HVNL). Otherwise, general WHS safety duties apply to all heavy vehicle drivers and the PCBU that employs them or contracts them. Neither the specific HVNL duties or the more general WHS duties depend on recording tasks that are alleged not to be paid work. That is not a consideration in assessing whether a driver is impaired by fatigue, inclusive of the fact that if a driver reports for work fatigued then that driver should not drive a heavy vehicle.

46. In respect of his support for the second variation, it appears Mr Wattie has confused payment of the travelling allowance with the more general Living Away from Home Allowance (LAFHA) which he refers to. That is an allowance paid directly by an employer to an employee in order to compensate the employee's additional non-deductible expenses and in respect of other disadvantage caused by working away from their usual place of residence to do their job. In essence, travel allowances are considered to be assessable income and PAYG withholding may apply. Any expenses incurred on meals and incidental expenses may be deductible against the allowance if certain criteria are met. LAFHA allowance, however, is subject to Fringe Benefits Tax (FBT) and is non-assessable, non-exempt income. We believe that Mr Wattie is confusing the fact that an employer may not include some allowances on an employee's income statement or payment summary, such as the travel allowances paid under the award, with LAFHA. But in short that part of his submission is irrelevant to the current proceedings.

47. Similarly, the allegation that casual drivers are being underpaid is irrelevant, albeit a matter that should be taken up in other forums.

Submission of Roberto Alejandro Pajuelo Dodds

48. Mr Dodds has made a submission dated 25 February 2020[23] in support of the application.

49. Paragraphs 3 to 10 set out Mr Dodd's employment history. These paragraphs contain allegations of non-payment for, for example, loading or unloading. They relate to alleged lack of compliance with Award provisions rather than to the terms of the variations.

50. Paragraph 11 of the submission sets out the definition of loading or unloading. Paragraph 12 sets out the definition of work in s 221 of the HVNL. That definition is used for the purposes of Chapter 6 of the HVNL not for industrial relations purposes save as discussed earlier in this submission. That definition does not connect with any arguments made by Mr Dodds.

51. Paragraphs 13-15 of the submission emulate the arguments of the applicants in that the cases cited are argued somehow to connote a level of unfairness in the definition of loading or unloading in the Award. They do not. They follow a consistent pattern of interpretation. The emphasis Mr Dodds places on *Laycock,* discussed above, is correct especially as it was confirmed on appeal to the Federal Court.

52. Paragraphs 16-22 of the submission contain what Mr Dodds labels as "analysis". He indicates that there is often considerable waiting time for a long distance driver when a

[23] https://www.fwc.gov.au/documents/documents/awardmod/var010110/am201923-sub-individual-260220.pdf

load is delivered. The question of whether a driver covered by the Distribution Award or by the Award should undertake loading or unloading work misunderstands the relationship between the two awards. They are complementary, not opposing. There is also the assertion that drivers paid under the Distribution Award are paid more as a matter of course when nothing before the Commission indicates that to be the case. The argument about complementarity made earlier is not canvassed.

53. Paragraphs 23 to 27 deal with the second variation. My Dodds outlines his understanding at paragraph 25 that "an employer can now negate all travel allowance IF they provide any kind of roof on their drivers' heads and nothing else." We have dealt with a similar allegation earlier and that is not a correct assertion. There again seems to be a confusion between LAFHA and the travel allowance under the Award.

54. Mr Dodds' submission does not address the modern awards objective and is largely concerned with pointing out issues of alleged non-compliance that are best directed to other forums.

Award Modernisation Process

55. Granting either of the variations would be inconsistent with the balance struck recently by the Commission in the process of examining the Award during the recent award modernisation process. That process entailed an in-depth look at the Award via litigation, including Full Bench consideration of a number of TWU claims[24], so that the Award includes terms only to the extent necessary to achieve the modern awards objective. It must be noted that following an intensive period of exploration of this matter, the new Award will commence operation from 4 May 2020.[25]

56. Arising from the Full Bench's consideration of the remuneration structure of the Award, the Full Bench indicated that rather than adding an hourly rate for additional work as then proposed by the TWU the following considerations should apply:

> *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.*[26]

57. This is relevant to the current application because the first applicant, for example, at numbered section 13 of his submission invokes the deemed distance issue discussed in the above extract as part of the unfairness that he perceives. The Full Bench has provided a "gateway" for further consideration of the issue of the relevant schedules but the current application is not about that matter.

---

[24] Above note 14

[25] https://www.fwc.gov.au/documents/awardsandorders/html/pr716686.htm

[26] Above note 14 at para 103

Meeting the modern awards objective

58. Notwithstanding the process of award modernisation that now nears finality, the Act sets out matters that are required in order for a substantial award variation to be granted.

59. S. 157(1)(c) sets out that the consideration in varying a modern award is "if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective."

60. The requirements of s.138 must also be met: " A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective."

61. The Full Bench in the *4 Yearly Review - Preliminary Jurisdictional Issues* Decision[27], identified the following considerations regarding s.138, which are relevant to applications pursued outside of the 4 Yearly Review as in the current instance:

> *To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations…*[28]

62. In the present matter no evidence is directed to these matters. The submissions barely touch on the relevant considerations. That is a matter which should lead to the dismissal of this application on the papers. Per *Re Security Industry Award*[29] the threshold for making a sufficient case for an award variation is usually that the applicant "advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes."[30]

63. The same authority indicates that "such evidence should be combined with sound and balanced reasoning supporting a change."[31]

64. No evidence has been adduced in this case (albeit the submissions of the applicant mix what would otherwise be evidence with supposed argument). No sound and balanced reasoning has been presented. Save for one mention of a modern award objective by the NRFA, the modern awards objective has not been addressed. Why the proposed variations to the Award would assist with it being a "fair and relevant minimum safety net of terms and conditions" as required by s 134 has not been argued. In this regard we note that fairness is to be assessed from the perspective of the employees and the employers covered by the relevant modern award.[32]

---

[27] [2014] FWCFB 1788
[28] Id at 36
[29] [2015] FWCFB 620
[30] Id at para 8
[31] Ibid
[32] Above note 27 at paras 117-119

Modern awards objective

65. Paragraph 134(1)(a), relative living standards and the needs of the low paid has not been argued by the applicants and is a neutral consideration.

66. Paragraph 134(1)(b), the need to encourage collective bargaining has not been argued by the applicants and is a neutral consideration.

67. Paragraph 134(1)(c), the need to promote social inclusion through increased workforce participation. The changes are painted as a means to assist the industry's driver shortage. For example, the first applicant in the fourth paragraph of section 3 of his submission says:

    It is accepted throughout the Industry that a driver shortage is occurring. In my experience of driving and employing drivers in a Human Resource role, as well as fleet operations, drivers were often deterred by the lack of remuneration for ALL duties performed.

68. NatRoad does acknowledge a heavy vehicle driver shortage.[33] That shortage is capable of being tackled in many ways. But there is no demonstrated evidence of a connection between either of the variations proposed with an effect on this industry problem. It is acknowledged that greater levels of remuneration would be payable by employers in the industry. There is a complete absence of an assessment of these additional costs by the applicants or by others in support. On their face they would be substantial.

69. NatRoad submits that the industry's employers have little capacity to pay for an open-ended, uncosted large amount for the expansion of remuneration for tasks that are already compensated for, as well as for payment of the overnight allowance where employers are currently providing overnight accommodation.

70. NatRoad notes that the applicants have not only sought to ignore a costing of any kind but have not addressed the industry's capacity to pay. An important characteristic of the hire and reward sector is that subcontracting plays an important role. Many of these subcontractors are owner-operators with no employees. Less than 0.5% of all operators own a fleet of more than 100 trucks, and 70% have just one truck in their fleet.[34]

71. The industry is highly competitive noting that in "2016-17, businesses in the broader Road Transport industry had a profit margin of 9.7%."[35] This margin is surprisingly high when compared with the lived experience of NatRoad members being that 2-3% profit margin is common, albeit not a sustainable level. This has translated to lower rates of capital expenditure than counterpart sectors overseas with the ANZ Bank noting in respect of 2017 that "capex/sales is remarkably correlated however

---

[33] https://www.natroad.com.au/news/natroad-highlights-heavy-vehicle-driver-skills-development

[34] http://www.truck.net.au/sites/default/files/submissions/DAE%20Economic%20benefits%20of%20improved%20regulation%20in%20the%20Australian%20trucking%20industry%20March%202019%20Final.pdf
At p 13

[35] Ibid

consistently 2 per cent less than larger global peers. This helps explain why Australia's average fleet age is more than twice as old as USA (14 years v 6.5 years)."[36]

72. Obviously in an industry that is highly competitive with tight margins capacity to pay is an issue. The proposed variations would act as a disincentive to the engagement of new staff, especially as the payments would be expected to be large, not allowed for in current contracts with customers and have the capacity to destroy already tight profit margins. Accordingly, the consideration required to be applied by s134(1)(c) weighs against the making of the proposed variations.

73. Paragraph 134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work is not in any way advanced. There are a number of areas where it is acknowledged by the applicants and those in support that the industry disability allowance already compensates for matters sought to be remunerated – the most obvious of which is at page 3 of the NRFA submission. This acknowledgment is then accompanied by the unhelpful comment: "We have included it here and are yet to work out which part of it allows for the endless hours of slave labour required by Long Distance Drivers."[37]

74. There is no evidence that the payments to be made will do other than compensate workers for tasks for which they are already compensated. Rather than unpack that proposition those in support of the application have made generalised statements about unfairness or have linked examples solely to their personal experience. In addition, how proper records of "all non-driving" time could be accurately kept and verified would be a task that is not at all traversed by the applicants. Hence the considerations mandated by s 134(1)(d) militate against making the variation proposed.

75. Paragraph 134(1)(da) sets out the need to provide additional remuneration for employees who work overtime, unsocial, irregular or unpredictable hours or employees working on weekends or public holidays or working shifts.

76. The remuneration structure of the Award and the Distribution Award and their complementarity was given a great deal of scrutiny by the Full Bench during the award modernisation process. No evidence has been adduced or arguments made that in any way shows that the subject areas set out in this paragraph (da) are not adequately compensated, albeit the Full Bench left the door open for the agreed schedules to be re-examined per the extract from their decision set out above at paragraph 56. We also refer to the admission of the NRFA concerning the industry disability allowance, and the additional payments for overtime and the industry disability rate embedded in the remuneration structure of the Award. Given these factors, we submit that nothing in the applications made would invoke this provision. There is no evidence that there is a need for any additional remuneration. Hence, this provision militates against making the variation proposed.

77. Paragraph 134(1)(e), the principle of equal remuneration for work of equal or comparable value has been invoked by the NRFA. First, this paragraph requires the Commission to be minded of the equal remuneration principle which must be read to be the principle set out in Part 2-7; equal pay for men and women performing work of equal or comparable value, a matter not addressed by the applicants. Secondly, an

[36] https://infogram.com/road-transport-1hxr4z91p93y6yo

[37] Above note 18 at page 3

adequate explanation of any inequality in practice in the industry has not been demonstrated. Thirdly, the assertions in the NRFA submission and in the applicants' submissions about inequality are not substantiated by a lucid comparison. In that context in the next paragraph NatRoad provides a comparison which shows how a proper comparison of the way work is remunerated under each transport award should be approached.

78. A number of assumptions (emulating those of the applicants) which favour an outcome that shows more remuneration under the Distribution Award apply. Those assumptions are a non-shift work 6pm start. Hence, the overtime loading for those engaged under the Distribution Award is the critical factor. This example is not proffered to reinforce the applicants' stance but to show how the outcome of a preference for the Distribution Award, using the correct rates, may be manipulated as if an inequity arises. It does not. The circumstances in which a long-distance journey would commence at 6pm, we contend, would be limited. Plus, the regular engagement of a worker on a 6pm undertaking would generally mean that an employer would structure a shift system. The example further reinforces the lack of clarity in the applicants' submissions and reinforces the point about complementarity we emphasised earlier:

			75				$ 23.33	$ 35.00	$ 46.66	$ 16.25	$ 31.66
			KMS	CPK	Travel	Paid	Ord Hrs	150%	200%	Meal	Travel
18:00:00											
23:15:00	5:15	5.25	393.75								
23:30:00	0:15					5:30	0.5	2	3		
1:45:00	2:15	2.25	168.75								
2:00:00	0:15					0:15			0.25		
4:00:00	2:00	2	150			2:00			2		
4:15:00	0:15					0:15			0.25		
4:45:00	0:30	0.5	37.5			0:30			0.5		
5:00:00	0:15					0:15			0.25		
7:00:00	2:00	2	150			2:00			2		
14:00:00	7:00										
14:40:00	0:40	0.67	50			0:40			0.67		
			950	$0.4610	$40.44		0.5	2	8.92	2	1
				$437.95	$40.44		$11.67	$69.99	$416.21	$32.50	$31.66
					$478.39						**$562.02**

79. For the reasons provided this consideration weighs against making the proposed variations.

80. Paragraph 134(1)(f), the likely impact on business including productivity, employment costs and the regulatory burden weighs against the making of the proposed variations.

81. The additional payments sought by expanding the natural meaning of loading or unloading to all "non-driving" activities cannot be costed. But as an add on to the current remuneration structure would be likely to be substantial, particularly as these matters are generally already compensated for via the methods earlier outlined. There

would be increased costs to employers without any concomitant increase in output which would mean a negative impact on productivity and costs to business as outlined at paragraphs 70-72 above.

82. In addition, the second proposed variation could mean that the costs of having long distance drivers stay overnight would be increased unacceptably and where customer contracts would not accommodate such an increase, eating into the already slender industry profit margins.

83. The regulatory burden would be substantially expanded as employers would need to review existing employment contracts, existing commercial contracts, all policies and procedures, especially about overnight stays, and adjust their payroll systems. How they account for all other non-driving time would also be a regulatory burden given that save for the fatigue related hours considerations, the cents per kilometre rate of remuneration is the commonest form of remuneration in the long distance driving sector.

84. Paragraph 134(1)(g), the need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards, is a consideration that militates against the variations being made.

85. We have already addressed this consideration in respect of the first variation in paragraphs 14-16 of this submission. The second proposed variation brings major instability to the modern award system as it affects longstanding industry practice.

86. In addition, the first variation would provide overlap with the Distribution Award as the application to expand payment under the Award to all non-driving work misunderstands the complementary nature of the two transport awards.

Conclusion

87. In accordance with paragraph 4 of the Directions in this matter, NatRoad indicates a preference for this matter to be dealt with on the papers.

National Road Transport Association, 20 March 2020