FairWork Commission

DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch. 5, Item 6 - Review of all modern awards (other than modern enterprise and State PS awards) after first 2 years

Modern Awards Review 2012 - Road Transport (Long Distance Operations) Award 2010

(AM2012/39 and others)

Road transport industry

SENIOR DEPUTY PRESIDENT HARRISON SYDNEY, 2 JUNE 2014

Modern Awards Review2012 - two year review of all modern awards - Road Transport (Long Distance Operations) Award 2010.

[1] This decision concerns a review of the *Road Transport (Long Distance Operations) Award 2010*[1] (the Award) under item 6 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act).

The applications

[2] The following applications to vary the Award were filed with respect to this review and were referred to me for consideration:[2]

- AM2012/5 - the Long Haul Drivers Association Inc (LHDA);
- AM2012/39 - the Australian Road Transport Industry Organisation (ARTIO);
- AM2012/138 - Australian Business Industrial (ABI);
- AM2012/116 - the National Road Transport Operators Association (NatRoad);
- AM2012/188 - the Transport Workers' Union of Australia (TWU or the union); and
- AM2012/223 - the Australian Industry Group (Ai Group).

Unless I refer to a particular party, I will refer to those organisations that represent the interests of employers as "the employers".

[3] LHDA and ABI withdrew their respective applications and ARTIO partially withdrew its claim. The TWU had applied to insert a passenger allowance and two-up driving allowance in the Award. Both of these claims were withdrawn by the union. Consequential amendments sought by the parties based on these claims were not pursued. Part of NatRoad's application was referred to a Full Bench of the Fair Work Commission (the Commission) constituted to deal with superannuation provisions across a range of modern awards.

The background to the applications

[4] These matters were listed for conference on several occasions.[3] Many of the matters raised by the applications were able to be resolved. My chambers published a number of drafts of the Award over the course of these conferences, each reflecting the applications, or parts thereof, that were pressed by the parties and the most recent draft wording proposed. Generally this wording was supported, in principle, by the employers. A schedule identifying the parties pressing for particular variations and those opposing the variations was also distributed. I issued statements and directions on 20 May 2013[4] and 15 October 2013[5], outlining the matters that remained in dispute. Submissions and evidence were filed by the parties and the following issues which were not agreed proceeded to a hearing:

- a new clause 4.2 which concerns the coverage of the Award and its interaction with the *Road Transport and Distribution Award 2010*[6] (RT&D Award) and a related variation to clause 10.2;
- a new clause 10.3 which would introduce part-time employment provisions into the Award. Several consequential amendments would flow from this;
- a new clause 11.4 which would introduce an entitlement to a means of travelling home or the reimbursement of costs reasonably incurred where an employee is terminated away from home base;
- variations to clause 14.2(c)(i) so as to rename the entitlement a travelling allowance and specify what that entitlement covers; and
- variations with respect to ordinary hours of work, the calculation of ordinary time earnings and superannuation contributions to be made by an employer.

[5] This decision deals with the above matters and also refers to a number of variations that will be made to the Award which the parties agreed and I have decided should be reflected in the determination I issue.

[6] At the hearing, Mr A Howell, of counsel, appeared on behalf of the TWU, Mr P Ryan appeared on behalf of ARTIO, Mr B Ferguson appeared on behalf of Ai Group, Mr A Spottiswood appeared on behalf of NatRoad, Ms S Haynes and Mr L Izzo appeared on behalf of ABI, and Ms J Light appeared on behalf of the Australian Federation of Employers and Industry (AFEI).

[7] Written submissions were filed by each of the parties that appeared at the hearing and by Followmont Transport Pty Ltd and the LHDA. Ai Group relied on statements of Ms Julie Toth, the Ai Group's Chief Economist, and Ms Neisha Webster in respect to her time as National HR Manager with Border Express Pty Ltd (Border Express). Neither witness was cross examined. A statement of facts agreed between all of the parties was also tendered during the proceedings.

The legislative provisions

[8] Item 6 of Schedule 5 to the Transitional Act provides:

> **"6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years**
>
> **(1)** As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWA must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.
>
> **(2)** In the review, FWA must consider whether the modern awards:
>
> **(a)** achieve the modern awards objective; and
>
> **(b)** are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

(2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent FWA from reviewing 2 or more modern awards at the same time.

(3) FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate to remedy any issues identified in the review.

(4) The modern awards objective applies to FWA making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.

(5) FWA may advise persons or bodies about the review in any way FWA considers appropriate.

(6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of FWA) has effect as if subsection (2) of that section included a reference to FWA's powers under subitem (5)."

[9] Section 134 of the *Fair Work Act 2009* (the Act) sets out the modern awards objective:

"*What is the modern awards objective?*

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***."[7]

[10] The approach to be taken to the conduct of the two year review and its scope was considered by a Full Bench of the Commission in the *Modern Awards Review 2012* decision (June 2012 Decision).[8] Its observations have been frequently cited and applied in various decisions.[9] For the purposes of the matters before me, I adopt the following observations made in that decision:

"**[33]** We are satisfied that s.138 is relevant to the Review. The section deals with the content of modern awards and for the reasons given at paragraph [25] of our decision it is a factor to be considered in any variation to a modern award arising from the Review. We also accept that the observations of Tracey J in SDAEA v NRA (No.2), as to the distinction between that which is "necessary" and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138.

...

[39] Section 159 deals with the variation of a modern award to update or omit the name of an employer, an organisation or an outworker entity. Section 160 provides that the Tribunal may vary a modern award to "remove an ambiguity or uncertainty or to

correct an error". The powers in ss.159 and 160 are exercisable on application or on the Tribunal's own initiative.

[40] There is a degree of overlap between the matters to which ss.159 and 160 are directed and what might be regarded as "anomalies or technical problems" within the meaning of subitem 6(2)(b) of Schedule 5. But in some respects the terms of subitem 6(2)(b) are more limited in that it directs attention to whether modern awards "are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process". [Emphasis added] Hence the "anomalies or technical problems" referred to are those which have arisen from the Part 10A process. Sections 159 and 160 of the FW Act are not so confined.

[41] In the event that the Review of a modern award identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in the award, and there is some doubt as to whether the matter falls within the scope of subitem 6(2)(b), then the Tribunal may exercise its powers under ss.159 or 160, on its own initiative. Of course interested parties should be provided with an opportunity to comment on any such proposed variation.

...

[82] The starting point in our consideration of this issue is to construe Item 6 according to the language of the provisions, having regard to their context and legislative purpose. The context includes the legislative history.

[83] As to the historical context the award modernisation process was conducted by the AIRC under Part 10A of the former WR Act. The process took place in the period from April 2008 to December 2009 and was conducted in accordance with a written request (the award modernisation request) made by the Minister for Employment and Workplace Relations to the President of the AIRC. The award modernisation process was completed in four stages, each stage focusing on different industries and occupations. All stakeholders and interested parties were invited to make submissions on what should be included in modern awards for a particular industry or occupation. Separate processes, including variously, the provision of submissions, hearings and release of draft awards, were undertaken in respect of the creation of each modern award to ensure parties were able to make submissions and raise matters of concern relevant to particular awards. By the end of 2009 the AIRC had reviewed more than

1500 state and federal awards and created 122 industry and occupation based modern awards.

[84] The award modernisation request and variations were issued in accordance with s.576C of Part 10A of the WR Act. Part 10A was repealed on 1 July 2009 (Item 2 of Schedule 1 to the Transitional Provisions Act). Despite that repeal, Part 10A was preserved by Item 2 of Schedule 5 to the Transitional Provisions Act in order to allow the award modernisation process to be completed. The award modernisation process required by Part 10A of the WR Act has been completed.

[85] Two points about the historical context are particularly relevant. The first is that awards made as a result of the award modernisation process are now deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Provisions Act). Implicit in this is a legislative acceptance that the terms of the existing modern awards are consistent with the modern awards objective. The second point to observe is that the considerations specified in the legislative test applied by the Tribunal in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective which now appears in s.136.

...

[88] These policy considerations tell strongly against the proposition that the Review constitutes a "fresh assessment" unencumbered by previous Tribunal authority.

[89] In circumstances where a party seeks a variation to a modern award in the Review and the substance of the variation sought has already been dealt with by the Tribunal in the Part 10A process, the applicant will have to show that there are cogent reasons for departing from the previous Full Bench decision, such as a significant change in circumstances, which warrant a different outcome.

...

[99] To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a

"high threshold" for the making of variation determinations in the Review, as proposed by the Australian Government and others.

[100] The adoption of expressions such as a "high threshold" or "a heavy onus" do not assist to illuminate the Review process. In the Review we must review each modern award in its own right and give consideration to the matters set out in subitem 6(2). In considering those matters we will deal with the submissions and evidence on their merits, subject to the constraints identified in paragraph [99] above."

[11] I turn now to deal with each of the proposed variations to the Award.

Clause 3.1 - Definition of fatigue management rules/regulations

[12] The parties agree that a definition be inserted in clause 3.1 for "fatigue management rules/regulations". Recognition of these requirements in this industry makes it appropriate for the Award to define this term. The variation should be made. The term will be defined as meaning "Commonwealth, State or Territory laws controlling driving and working hours of heavy vehicle operators or fatigue management".

[13] I should note that originally the definition was sought as part of the proposal for a two up driving operation to be introduced. As I have earlier noted, this was not pressed as part of this review. Nonetheless, the parties supported the definition being introduced into the Award. I note that a definition in the same terms is contained in the RT&D Award and given the relationship which exists between the two awards it is appropriate each contain the definition. I also note that a related matter, a Fatigue Management Plan, is referred to in clause 13.5. The existence of this clause also makes it desirable the definition sought, and agreed, be included in the Award.

Clause 4.2 - Coverage

[14] The Award and the RT&D Award are the principal awards applying to employers and employees in the road transport industry. The RT&D Award deals with potential overlap between the two awards at clause 4.2, in these terms:

"**4.2** This award does not cover employers and employees covered by the following awards:

...

- *Road Transport (Long Distance Operations) Award 2010* whilst undertaking long distance operations;
- *Transport (Cash in Transit) Award 2010*; and
- *Waste Management Award 2010*."

[15] The coverage of the Award is set out in clause 4. Clause 4.1 states:

"**4.1** This industry award covers employers throughout Australia in the private transport industry engaged in long distance operations and their employees in the classifications listed in Schedule A—Classification Structure to the exclusion of any other modern award."

[16] The coverage clause does not refer to the RT&D Award. The parties agree that some employers in the road transport industry conduct businesses that involve both long distance operations and other transport operations. It was also agreed that there are employees who perform long distance operations as well as driving duties that would not form part of a long distance operation, as defined by the Award.[10] Ai Group seeks to vary the Award so that it makes clear that when an employee engaged under its terms is required by an employer to perform work that is not a long distance operation; the RT&D Award covers such work. It proposed that this could be achieved by inserting a new clause 4.2 as follows:

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

[17] Ai Group submits that its application seeks to remedy a technical problem or anomaly arising from the Part 10A award modernisation process (Part 10A process).[11] The *Transport*

Workers (Long Distance Drivers) Award 2000[12] (LDD 2000 Award) contained the following provisions at clause 5: (underlining added)

> "**5. INCIDENCE AND AREA OF OPERATION**
>
> **5.1** This award shall apply to interstate operations within the Commonwealth of Australia and to long distance operations within the States of Queensland, South Australia, Tasmania and Victoria.
>
> **5.1.1** The terms and conditions of this award shall apply to employees engaged on long distance operations and shall continue to apply whilst an employee is so engaged or whilst the employer continues operations within the industry as defined.
>
> **5.1.2** An employee who is engaged to perform driving duties under another award as well as interstate or long distance driving duties under this award may be transferred from either one of these duties to the other, and in such cases they shall be given, where possible, 24 hours notice of the employer's intention to transfer the employee except in special circumstances where a lesser period of notice may be given. An employee transferred to interstate or long distance driving, as defined, shall be employed under the conditions prescribed by this award."

[18] It is clear that clause 5 acknowledged that work performed by an employee may be covered by another award, depending upon the nature of the work. The absence of such a provision in the Award, in its submission, has disturbed the relationship that existed prior to modernisation between the predecessors to the two modern awards. It was submitted that there was no evidence before me of any problems arising under the LDD 2000 Award as a result of clause 5. Ai Group also argued that due to the similarity of the classifications in the Award and the RT&D Award, the coverage of a driver could not necessarily be determined based on the classifications in either of the awards.

[19] Ai Group submits that the interaction between the awards was not a matter considered by the Australian Industrial Relations Commission (AIRC) when the Award was made. In any event, it relies on the view expressed by the Fair Work Ombudsman (FWO) as evidence of cogent reasons for revisiting any earlier determination of the issue.[13] In correspondence to Ai Group, dated 4 September 2013, the FWO stated that in its view, an employee covered by the Award is likely to remain so covered in the event that the employee performs a trip that would not be considered a long distance operation. This advice also forms the basis for a finding that the Award should be varied so as to remove an ambiguity, uncertainty or error. There was an ambiguity or uncertainty as to whether an employee can be covered by the RT&D Award while performing a trip that is not a long distance operation.

[20] Clauses 13.2, 13.3 and 13.4 of the Award were also referred to. They contain rates of pay for employees engaged in a long distance operation. Thus, Ai Group submits, the Award does not provide for rates of pay where an employee is performing a trip that is not a long distance operation. In its submission, it is not appropriate that long distance driving rates be applied to the performance of local work. This may, for example, give rise to circumstances where a driver is paid on a cents-per-kilometre (c.p.k.) basis for a metropolitan trip that could involve significant time spent in heavy traffic.[14]

[21] Ai Group submits that the variation is necessary to ensure that the Award provides a fair and relevant minimum safety net (s.134(1)), promotes flexible modern work practices (s.134(1)(d)), and is simple and easy to understand (s.134(1)(g)).

[22] AFEI and NatRoad supported the submissions of Ai Group. ARTIO submits that the variation sought specifically addresses circumstances where an employee is required to perform local trips, often involving multiple pick-ups or drop-offs, immediately before or after a long distance operation. It submits that the Award should allow for such trips to be covered by the RT&D Award.

[23] The TWU opposes the application. It submits that the coverage of the Award was considered by the AIRC in its April 2009 decision when it decided that a separate award

would be created for the long distance sector. About this issue it notes the following passage of that decision:

> "**[181]** The TWU submissions about this award both before and after the exposure draft were that long distance driving should not be paid by reference to cents per kilometre driven and that there was no justification for a separate modern award applying to long-distance operations; they should be contained in the RT&D Modern Award. The union made no submissions about the provisions contained in the exposure draft. Each of the employers maintained that a separate award should be made and the cents per kilometre method of remuneration, as well as other methods of remuneration that had always been in the award, should continue. We have not been persuaded to incorporate long-distance operations into the RT&D Modern Award. The long distance sector of this industry has been regulated federally for many years under a separate award and we accept the submission of the employers that it should continue to do so. As indicated in the Commission's 23 January 2009 statement, in the event there are some legislative provisions that impact on the method of remuneration contained in this award we shall revisit those provisions."[15]

[24] The TWU submits that the variation proposed undermines the conclusion reached by the AIRC as it allows "flip-flopping" between the two awards.

[25] The TWU draws a distinction between the proposed variation and the effect of clause 5 of the LDD 2000 Award. It submits that clause 5 operated only where an employee was engaged to perform driving duties under another award as well as under the long distance award. That is, where an employee was employed to perform both local and long distance work. Additionally, the TWU highlighted that clause 5 of the LDD 2000 Award also required (where possible) for the employee to be given 24 hours notice of the transfer of duties.

[26] The TWU noted potential practical difficulties that may arise if the application were granted, such as the assessment of when an employee is "temporarily required" to perform long distance operations and the calculation of leave entitlements. It argued that in the

absence of a complete evidentiary case regarding the operation of the industry, I should not revisit the coverage of the two awards in this review.

Conclusion - Coverage

[27] I am persuaded, with some minor provisos, to make the variation sought. I do not agree with the TWU that this issue was addressed by the Full Bench when the Award was made. The principal argument there ruled upon was whether there should be one or two awards. Allied to that was an argument that c.p.k. payments should not be included in any award. The need for the retention of a provision like that in clause 5 of the LDD 2000 Award does not appear to have been raised. That award acknowledged employees could transfer between it and a local award. There was no definition of "local award" but I assume it envisaged the several state awards which operated in the private road transport industry. Provided the local award was one under which the employee was engaged to perform driving duties a transfer between the two awards was envisaged. Here, the Ai Group proposal identifies the transfer will be between the RT&D Award and the Award only. There was no submission or evidence of any difficulties arising from the LDD 2000 Award provision. The agreed facts support the need to make clear the interaction between the two awards in circumstances where operators undertake work, and employees perform work which is covered by both awards. For many years the LDD 2000 Award provided in clause 20.4 for an allowance in the event an employer required a local driver to "temporarily transfer to duties covered" by the LDD 2000 Award. A similar allowance is now contained in the Award. It is clause 14.1(c)(i). That deals with the employee who transfers from local to long distance work. The Ai Group proposal will recognise the opposite, an employee who transfers from long distance to local driving duties. It is important to note that this only relates to driving duties. As I have earlier commented, I do not agree with the TWU that this particular issue was addressed by the Full Bench in its April 2009 decision. In any event, the variation sought will not change the fact that the Award will continue to be the only award which covers long distance operations.

[28] I am persuaded, for the reasons advanced by the employers, and Ai Group in particular, that the variation should be made. I make two further comments. I have adopted

the Ai Group proposed wording which includes the phrase "temporarily required by their employer to perform driving duties." The phrase used in the clause providing for an allowance to be paid to an employee transferring from the RT&D Award to the Award is when the employee is "required by the employer to temporarily transfer to duties...". Some consideration should be given by the parties as to whether the wording of all clauses dealing with the transfer between the two awards should use the same terminology. In the settling of the determination they may wish to address this matter. The TWU may wish to include a provision which is similar to that in clause 5.1.2 of the LDD 2000 Award so that, where practicable, an employee is to be given at least 24 hours notice of a transfer. The draft determination which will issue at the same time as this decision does not currently have such a provision. I leave it to the TWU to indicate if its inclusion is sought.

[29] In the event the TWU identifies evidence of the type of "flip-flopping" it submitted may occur, and which gives rise to some unexpected practical problem or highlights a misuse of the provision, the wording of the clause may need to be revisited. If necessary, this could be addressed in the 4 yearly review of the Award.

Clause 10.2 - Full-time employment

[30] Clause 10.2 of the Award defines full-time employment. It reads as follows:

> "**10.2 Full-time employment**
>
> A full-time employee is an employee engaged by an employer to perform long distance operations for an average of 38 ordinary hours per week over a four week period."

[31] Ai Group seeks to delete the words "to perform long distance operations" from the clause on the basis that the words are superfluous. It submits that it is sufficient for a full-time employee to be defined as one who is engaged for an average of 38 hours per week etc, without identifying the activities in which they are engaged. Ai Group submits that the deletion of those words is necessary to achieve the modern awards objective as it will make the Award simpler and easier to understand.[16]

[32] Additionally, Ai Group submits that the words give rise to a technical problem or anomaly that is capable of being remedied in this review. As set out at paragraph [14], the RT&D Award excludes from its coverage an employee performing a long distance operation. Ai Group submits that an employee temporarily transferred in those circumstances under the Award would not fall within the definition of a full-time employee as currently defined. That is, an employee in those circumstances would not be engaged to perform a *long distance operation* for an average of 38 ordinary hours per week.

[33] The employers support Ai Group's position. The TWU opposed the deletion of the relevant words however no submissions were made about this matter. I have decided to make the variation sought for the reasons given by the Ai Group. It is also consequential on the variation to introduce a new clause 4.2.

A new clause 10.3[17] - Part-time employment

[34] Under the Award, an employee can be engaged on a full-time or casual basis. Ai Group applied to insert a new clause 10.3 in the Award, which would provide for part-time employment. The employers agreed upon and proposed the following wording:

> "**10.3 Part-time employment**
>
> **(a)** A part-time employee is an employee who is employed for less than 38 ordinary hours of work per week.
>
> **(b)** Before a part-time employee commences work, an employer and employee shall reach agreement on the number of ordinary hours the employee will be employed each week. This agreement must be recorded in writing.
>
> **(c)** A part-time employee will be entitled to the benefits of this award on a pro-rata basis which is proportionate to the number of ordinary hours which have been agreed under clause 10.3(b) relative to 38 hours per week.

(d) A part-time employee may be offered additional work outside of the ordinary hours of work agreed under clause 10.3(b)."

Several consequential amendments would flow from the proposed new clause were it to be granted.

[35] Ai Group submits that the provision sought is a term which, consistent with s.139(1)(b), may be included in an award. It is about a type of employment. It submits that the inclusion of part-time provisions in the Award was not the subject of specific determination by the AIRC during the Part 10A process. In any event, it argues that there are cogent reasons for varying the Award as sought. Ai Group submits that the operation of, and amendments to, s.65 of the Act provide such a reason. Section 65 is a provision of the National Employment Standards (NES). It entitles an employee to request a change in working arrangements in certain circumstances. When the Act came into operation, s.65(1) read as follows:

"65 Requests for flexible working arrangements

Employee may request change in working arrangements

(1) An employee who is a parent, or has responsibility for the care, of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:

(a) is under school age; or

(b) is under 18 and has a disability.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work."

[36] Ai Group submits that in practice, the application of this provision involved requests made by employees for part-time work. As a result of the absence of part-time provisions, the Award has not been operating effectively or without technical problems or anomalies arising from the Part 10A process; nor has the Award provided a relevant safety net for the purposes of the modern awards objective.[18]

[37] The *Fair Work Amendment Act 2013* repealed s.65(1) and replaced it with the following provisions, which came into effect on 1 July 2013:

> **"65 Requests for flexible working arrangements**
>
> *Employee may request change in working arrangements*
>
> **(1)** If:
>
> **(a)** any of the circumstances referred to in subsection (1A) apply to an employee; and
>
> **(b)** the employee would like to change his or her working arrangements because of those circumstances;
>
> then the employee may request the employer for a change in working arrangements relating to those circumstances.
>
> Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.
>
> **(1A)** The following are the circumstances:
>
> **(a)** the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
>
> **(b)** the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
>
> **(c)** the employee has a disability;
>
> **(d)** the employee is 55 or older;
>
> **(e)** the employee is experiencing violence from a member of the employee's family;
>
> **(f)** the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.
>
> **(1B)** To avoid doubt, and without limiting subsection (1), an employee who:
>
> **(a)** is a parent, or has responsibility for the care, of a child; and
>
> **(b)** is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child."

[38] Ai Group submits that these provisions give rise to a significantly broader entitlement to request flexible working arrangements. Further, s.65(1B) provides an express legislative right to request part-time work in certain circumstances. It submits that this is a cogent reason for varying the Award as sought. It was also submitted that these legislative amendments reflect general community expectations regarding access to flexible working arrangements and part-time employment. In its submission, I cannot be satisfied that the Award is providing a relevant safety net when it undermines those expectations.

[39] Ai Group submits that due to the absence of part-time provisions, the Award is failing to achieve the modern awards objective and the variation sought is necessary, as required by s.138 of the Act. It submits that the Award is failing to provide a fair and relevant minimum safety net to employees who seek to work part-time, such as older drivers, women with caring responsibilities, and employees suffering from an illness or disability who are unable to access the benefits of part-time employment. In relation to older drivers, Ai Group relies on Ms Webster's evidence regarding the employment practices of Border Express, where most employees were between 55 and 65 years of age. She deposed that Border Express commonly agreed to part-time arrangements with employees engaged under the RT&D Award, to accommodate a desire to work fewer hours as they approached retirement but this same arrangement could not be entered into with long distance drivers.

[40] The parties agree that some employees in the industry are subject to personal circumstances which prevent them from working in a full-time capacity.[19]

[41] Ai Group also relies on a report prepared by Ms Julie Toth, Ai Group's Chief Economist. Ms Toth's report is based on the Australian Bureau of Statistics (ABS) Labour Force Australia data series. The data provided relates to the road transport industry generally, which includes road freight transport, passenger bus transport, and taxi services. Workforce participation of men, women, and older persons in the industry is detailed. I will not refer to all of the statistics and a summary is adequate.

[42] In August 2012, across the transport, post and storage industry, 14.1% of employees were aged 60 and over and 25% were aged 55 and over. Road transport employees constitute 40% of that industry. As a comparison, it was noted that 9% of all employed persons were aged 60 and over and 17% aged 55 and over.[20]

[43] In the workforce generally, an increasing rate of part-time employment is evident in employees aged 45 and over. In road transport, 20.9% of employees worked part-time in August 2013, a proportion which has shown a slow trend upwards since 1985. At this same time only 14.3% of employees were female compared to 45.7% of the total workforce. The workforce participation rates for male and female workers were also addressed as were the possible reasons for a fall in those rates in some groups.

[44] Ai Group also referred to a report titled "*Employment Outlook for Transport, Postal and Warehousing*" published by the Department of Education, Employment and Workplace Relations. The report deals with 14 sectors of the transport, postal and warehousing industry, one of which is road freight transport. It is based on ABS Labour Force Survey data. The report states that the age profile in the industry is skewed towards older workers. 20.9% of persons employed in the industry are aged 55 and over, as compared to 16.2% in all industries combined.[21] An Industry Skills Council report titled "*Transport and Logistics Environmental Scan 2013*" was also relied on to show that the logistics management, road transport and warehousing sector is skewed towards an older age group and that an aging workforce and a lack of new entrants have contributed to labour shortages.

[45] In determining whether the Award is achieving the modern awards objective, Ai Group pointed to the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)), the likely impact of the variation sought on business (s.134(1)(f)), and the likely impact on employment growth, inflation, and the national economy (s.134(1)(h)). It submits that each of these considerations support the inclusion of part-time provisions in the Award.

[46] Ai Group submits that casual employment arrangements are not an appropriate substitute for part-time provisions, as a casual employee may not be available when an

employer requires work to be performed. Additionally, the employer must pay a premium to casual employees. In her statement, Ms Webster stated that the vast majority of long distance drivers employed by Border Express were engaged on a full-time basis. This was the preference of the employer due to change-over arrangements and the regular nature of the work. Engagement of permanent employees, rather than casuals, also enabled effective fatigue management and greater reliability.[22]

[47] The parties agreed that part-time provisions are implemented under enterprise agreements in this sector.[23] Ai Group points to the absence of any evidence of abuse of such enterprise agreement provisions. The parties also agreed that many employers covered by the Award employ less than 20 employees and do not employ dedicated human resources personnel.[24] Ms Webster gave evidence regarding the difficulties associated with undertaking enterprise agreement negotiations. Specifically, she referred to the time spent negotiating with a geographically diverse workforce and the expenses incurred in obtaining professional assistance in preparing an enterprise agreement.[25] On this basis, Ai Group submits that the absence of part-time provisions should not be left to be addressed in enterprise agreements. The difficulties of engaging in enterprise negotiations are particularly acute for small business.

[48] ARTIO supports Ai Group's application and submissions. It submits that in practice, work is undertaken on a part-time basis by casual employees under the Award however those employees are not entitled to the benefits of permanent employment.[26] ABI also supports the application made by Ai Group. It submits that the variation is consistent with the need to promote social inclusion and promote flexible modern work practices (ss.134(1)(c) and (d)). It argues that the Award must provide a relevant safety net and that the absence of part-time provisions from predecessor awards should not of itself preclude the grant of the application. It highlighted that the Award is one of only six modern awards that do not contain part-time provisions.[27] AFEI supports the submissions of Ai Group and ABI.[28]

[49] NatRoad said it had conducted a "short three day survey" of its members. It said it showed 75% of the 101 responses received were of the view that their business would benefit

from the inclusion of part-time provisions in the Award and 50% of employers had previously received requests from their employees for part-time working arrangements.[29]

[50] The TWU opposes the insertion of part-time provisions in the Award on the basis that the application falls beyond the scope of this review. It submits that the absence of part-time provisions is not the result of an anomaly or technical problem arising from the Part 10A process. Part-time work was raised by parties before the AIRC during that process however a decision was made by the Full Bench to not insert part-time provisions. The TWU submits that there is no evidence before me of a material change in the industry since the Award was made, and that the application invites a fresh assessment of the AIRC's determination.

[51] The TWU refuted Ai Group's submission that the current Award is inconsistent with s.65 of the Act. It submits that flexible working arrangements can be facilitated through other means such as an individual flexibility arrangement about when work is performed, under clause 7.1(a) of the Award, or through casual employment.

[52] It submits that there is a presumption that the terms of the current Award are consistent with the modern awards objective,[30] and that Ai Group has not established that the variation is necessary, as required by s.138 of the Act. The TWU submits that a proper evidentiary case has not been made out by the employers. The employers have not advanced probative evidence in support of the variation sought.

[53] In assessing whether the Award provides a fair and relevant minimum standard, the union submits that the atypical nature of the industry must be taken into consideration. The union submits that the provision of casual employment under the Award provides and promotes flexible work practices and the efficient and productive performance of work. The nature of the industry, in its submission, does not lend itself to the flexibilities otherwise available, which enable a balance between work and caring responsibilities. It points to a lack of evidence before me regarding any adverse impact upon employment growth, inflation, and the national economy. It argues that the absence of part-time provisions encourages collective bargaining an objective in s.134(1)(b) of the Act.[31]

[54] The union submits that the evidence of Ms Webster reflects the approach taken to arrangements for work of only one employer. Further, its age profile does not reflect the transport sector more generally. It argues that this evidence is not a sound basis upon which to revisit types of employment under the Award.

[55] As to the evidence of Ms Toth, the TWU submits that general labour force statistics do not provide material support for the insertion of part-time work provisions. Ms Toth's report does not distinguish between the long distance sector and the industry more generally. It also highlighted data indicating employment in the transport, post and storage industry grew by 29.2% in the year to August 2013. Over a longer period, it noted the growth of part-time work in the industry since 1985, despite the absence of part-time employment provisions in the Award.

[56] The TWU points to the absence of evidence regarding how changeover arrangements would be implemented if part-time arrangements were made. It submits that consideration has not been given in these proceedings to the appropriate protections and entitlements that may be necessary under the Award for part-time employees, or to the operation of the remuneration structure. Work performed under this Award may be remunerated according to the kilometre driving method, as per clause 13.4. The rate payable per kilometre is inclusive of an industry allowance and an overtime allowance. These allowances were established in the absence of part-time provisions in the Award and, in the TWU's submission, it cannot be assumed that this remuneration structure is consistent with part-time work.

Conclusion - Part-time employment clause

[57] This Award and the LDD 2000 Award have not contained part-time engagement as a type of employment. The predecessor to the LDD 2000 Award was the *Transport Workers' (Long Distance Drivers) Award 1993*[32] (the 1993 Award) and it did not contain such a clause.

[58] In 2000, I was required to review the 1993 Award as part of the requirements of the then *Workplace Relations and Other Legislation Amendment Act 1996*. One employer association had initially sought to introduce a part-time clause. Subsequently, the parties

agreed that the industry, and its activities, did not indicate that part-time employment was appropriate. This was noted in my decision and I did not place any such clause in the award made as a result of that review.[33]

[59] The only other occasion to my knowledge when the issue arose was in the context of making the Award. At the commencement of the process some parties sought a part-time clause to be in the modern award for the long distance sector of the industry.[34] However, subsequently no evidence was filed, and very little was said in support of that position. The Full Bench did not comment on the issue when publishing the exposure draft in which draft there was no part-time clause. As is apparent from its reasons, it largely accepted the employers' submission that a separate award should be made for the sector and that such an award should be largely based on the terms of the LDD 2000 Award.[35]

[60] I have given earnest consideration to the submission about whether the absence of a part-time clause denies an employee rights which are given by s.65 of the Act. In this respect, I note that Ai Group indicated it was at least arguable the absence of such a provision made the Award incompatible with the right to request certain flexible working arrangements as envisaged by s.65. The other employers adopted Ai Group's submission about this issue and did not make any further submission about the proper construction of s.65. The TWU did not engage in argument about the proper construction of s.65 submitting only that sufficient flexibility could be found in casual employment, a flexibility arrangement, or granting leave without pay. Although not without some reservations, I am not persuaded by the Ai Group's submission.

[61] An employee in circumstances as identified in s.65(1A) may request a change in working arrangements under s.65(1). Nothing in the Award compromises that right. The more difficult issue arises in respect of the particular employee in the circumstances referred to in s.65(1B) that is the parent returning to work, who may request to work part-time to care for their child. Under the Award, the employer will be able to allow that employee to work fewer or different hours than they had prior to the birth or adoption of a child but arguably, would still be obliged to engage them either on a full-time or casual basis. In my opinion, a request to work part-time is not necessarily the same as a request to be engaged as a part-time

employee. An employer may, through the use of an individual flexibility arrangement achieve the desired end. From a practical perspective in this sector of the industry, the occasions upon which an employee in circumstances referred to in s.65(1B) will seek to work part-time are likely to be few. To vary the Award to introduce for the first time part-time employment for all purposes is not something I am persuaded to do in this review, unless I am compelled to do so. I think it likely an employer covered by the Award could identify one or other of the grounds in s.65(5A) as to why it had reasonable business grounds to refuse the request. I particularly also note that the reasonable business grounds are not limited to those set out in s.65(5A). It would be at least arguable the constraints in the Award provide a reasonable business ground. I accept though this construction means although an employee in circumstances referred to in s.65(IB) could request to work part-time that will inevitably not be accommodated by an employer. Without more assistance with the proper construction to be placed on s.65, and its interaction with the terms of the Award, I am not persuaded by this ground to introduce part-time employment into the Award.

[62] I turn next to the more general considerations as to whether this review is the occasion to introduce part-time as a type of employment.

[63] Accepting the employment shortage of skilled workers in this sector of the industry, the evidence was not sufficient to establish that part-time provisions will address this shortage by enabling employers to attract and retain skilled drivers who cannot work full-time. Nor do the two examples given by Ms Webster in her statement suggest that in either case, had there been a part-time clause in the Award, those employees would have been retained.

[64] The evidence that part-time employment provisions would promote social inclusion through increased workforce participation was not strong. In this respect I note the only witness evidence was that of Ms Webster and it was her opinion of what Border Express may have considered doing should part-time engagements be in the Award. Although a small number of employers sent a letter to either my chambers or to one of the employers I should indicate that without giving the TWU the opportunity to cross examine those employers or for me to understand their particular business and asserted needs for this form of employee engagement, the weight they can properly be given is not significant.

[65] To introduce part-time employment as a type of employment into this Award would be a variation of significance in this sector of the industry. In my opinion, the evidence to do so was not sufficient. I am not persuaded the Award is not meeting the modern awards objective. I am not satisfied that it is necessary to introduce part-time engagement into the Award in order to provide a fair and relevant minimum safety net of terms conditions of employment. I also note that it is acknowledged that there are enterprise agreements which provide for part-time work. I was not persuaded there are significant practical difficulties for employers pursuing this option should they wish to do so.

[66] I should observe that the opposition by the TWU to the proposed variation was on grounds relating to the inadequacy of the evidence and the narrow scope of this review. I do not understand the TWU to oppose part-time employment in this sector as a matter of principle. It is a matter which, in my opinion, should be considered in the context of the 4 yearly review of the Award. When doing so a number of matters will need to inform the terms of any part-time engagement clause. I refer to some of them.

[67] The definition of a part-time employee will need to be considered. It may well be adequate for the hours to be for a period of less than 38 ordinary hours per week however, in light of the type of driving activities covered by this Award, some averaging may be desirable. The minimum hours to be engaged needs to be considered. It is not unusual for such minima to be four hours. I note that in the RT&D Award that an employee must receive a minimum payment of four hours for each day engaged.[36] However, I note that a casual employee is to receive either a minimum c.p.k payment for 500 kilometres or eight hours at the hourly driving rate. Similar considerations will probably need to inform the minimum rate for a part-time employee. Consideration will also need to be given to whether it is appropriate they, like full-time or casual employees, must, at the commencement of employment be engaged on either the c.p.k or hourly basis and what is to be made of the fact both of these methods of payment have within them an overtime compensation of two hours in ten. There would also need to be further consideration whether a clause (d), like that in the Ai Group proposal, would be appropriate and how it would work when an employee is paid on a c.p.k basis.

[68] In light of my decision there is no need to address the various consequential amendments that would need to have been made.

Clause 10.3 - Casual employment

[69] Clause 10.3(a) defines a casual employee as an employee engaged as such and paid by the hour. Ai Group seeks to vary this clause on the basis that it contradicts clauses 10.3(b) and (c), which contemplate that a casual employee may be paid on a c.p.k. basis.

[70] The parties agree this variation should be made and it is appropriate to do so in the context of this review. I also agree with this proposal. Clause 10.3(a) will be varied so as to define a casual employee as an employee engaged and paid as such.

Clause 11.4 - A new clause - Termination away from home base

[71] The TWU seeks to insert a new clause which would be numbered clause 11.4. It would introduce an entitlement for an employee to be provided a means of returning to home base or reimbursement of the cost of fares reasonably incurred in returning home, where the employee's employment has been terminated away from their home base.

[72] The TWU submits that its application seeks to remedy an anomaly arising from the Part 10A process. The LDD 2000 Award contained a similar entitlement at clause 26:

> **"26. TERMINATION OF EMPLOYMENT AWAY FROM HOME BASE**
>
> When an employee's services are terminated away from the employee's home base, the employer shall provide the employee with the means of returning to home base or reimburse the employee the cost of any fares reasonably incurred in returning to home base."

The TWU argued that the proposed clause ensures that the Award achieves the modern awards objective by providing a fair and relevant minimum safety net. The current Award

may give rise to a situation where an employee is left at a remote or distant location without the means to return home.

[73] The TWU submits that the proposed clause is one that may be included in a modern award. It relies on various provisions of the Act in this regard. Firstly, it submits that s.139(1)(g)(i) provides that allowances, including those for expenses incurred in the course of employment, may be included in a modern award. Next, the union relies on s.55(4) of the Act which provides that a modern award may also include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES and terms that supplement the NES, but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the NES. In this regard, the union pointed to s.117 of the Act, which is a provision of the NES. Section 117 deals with requirements for notice upon termination of employment or payment in lieu thereof. The TWU submits that the clause sought is ancillary or incidental to the entitlement of an employee to be provided notice or payment in lieu upon termination, or it is ancillary to the right of an employer to dismiss an employee with or without notice consistent with the NES provisions in Division 11 of Part 2-2 of the Act.[37] It also submits that the proposed clause is an allowable term under s.142(1) of the Act. That provision enables the inclusion of a term that is incidental to a term that is permitted or required to be in an award and is essential for the purpose of making a particular term operate in a practical way.

[74] ARTIO supports the introduction of the proposed clause into the Award. It submits that a common sense and ethical approach should inform the inclusion of this provision, the application of which would generally be limited to instances of summary termination for serious misconduct.[38]

[75] Ai Group objects to the proposed clause on the basis that the Commission does not have power to include the term sought in the Award. It made no submission as to the merits of the clause. It submits that the entitlement does not fall within any of the matters about which a modern award may include a term under s.139(1). Specifically, s.139(1)(g)(i) allows the inclusion of terms dealing with an allowance that includes expenses incurred *in the course*

of employment. It was submitted that the clause sought relates only to expenses incurred *after* the conclusion of the employment relationship.[39]

[76] Ai Group rejects the submissions made by the TWU regarding s.55(4) of the Act. The entitlement sought to be inserted deals with transportation arrangements and the reimbursement of transport costs. Ai Group submits that this is not incidental or ancillary to s.117, which relates to notice periods or payment in lieu upon termination. Ai Group submits that it is not sufficient that the proposed clause 11.4 deals with termination of employment generally. To fall within the ambit of s.55(4), it must be incidental or ancillary to an entitlement arising under the NES. Further, s.117 does not give rise to an entitlement to all employees, as various exceptions apply to it under s.123.[40]

[77] With respect to s.142 of the Act, Ai Group submits that this provision allows a narrow basis upon which a term can be included in an award.[41] The TWU's application does not meet the requirements of that section.[42]

[78] ABI, AFEI and Nat Road supported Ai Group's submissions.

Conclusion - Termination away from home base

[79] I have decided to vary the Award to include the clause sought by the TWU. In my opinion, it is a clause which can be categorised as an allowance. I do not read the word allowances in s.139(1)(g) as being limited to the allowances identified in that clause. They are examples of allowances that can be included in an award. In any event, even accepting the Ai Group construction, it is upon a decision of an employer being made to terminate employment, whether it be summarily or upon notice, that the obligation in the Award crystallises. At that time, the contract of employment is still on foot. So too, would be the obligation that will be required by the proposed clause. In light of the fact employees are engaged in duties far away from their home base, it is a clause that is appropriate to ensure the Award operates as a fair safety net.

[80] To make it clear the obligation arises at the time the employer decides to terminate the employee's engagement, I have varied the wording of the clause in the draft determination for it to arise when an employer makes the decision. Although I can understand the view of NatRoad that it should not apply in circumstances where the termination has arisen due to serious misconduct by the employee concerned, I am nonetheless of the opinion the employee should be returned to their home base and the obligation to arrange for this to occur should be the employer's.

[81] I should observe that although I have not been persuaded by the following in reaching my decision on the Ai Group challenge to the proposed clause, I do note other modern awards contain a similar clause either in the termination of employment provisions of the award or in the allowances clause. I have not identified any arguments during the two year review of these awards challenging the power to include them in the award. In this regard I note the following awards and clauses; *Aircraft Cabin Crew Award 2010* - clause 15.4; *Marine Towage Award 2010* - clause 11.4; *Maritime Offshore Oil and Gas Award 2010* - clause 14.2(a); and *Ports, Harbours and Enclosed Water Vessels Award 2010* - clause 11.4.

Clause 13.1 - Alignment of classifications

[82] ARTIO sought to vary the Award so as to align the classifications with those contained in the RT&D Award. In its originating application, ARTIO submitted that the relevant pre-reform federal awards contained equivalent classification structures which aided in the calculation of an employee's wages and other entitlements. It suggested that this could be achieved in the Award by commencing the current classification structure at Grade 3 and renumbering the subsequent classifications accordingly.

[83] The parties ultimately agreed to insert a note at the conclusion of clause 13.1 of the Award which is intended to clarify how the alignment of the classifications. The note reads:

> "NOTE: The classification grades are different in the *Road Transport and Distribution Award 2010*. Grade 4 under this award is equivalent to Grade 6 under the *Road Transport and Distribution Award 2010*."

[84] I have decided the variation should be made. It will make the Award easier to understand particularly in circumstances, as have been earlier identified, where employees and employers undertake work covered by both this Award and the RT&D Award.

Clause 14.1(c)(ii) and (iii) - allowances

[85] Clause 14.1(c) lists certain allowances that are payable under the Award. The allowances in clause 14.1(c)(ii) and (iii) each refer to a percentage calculation by reference to "the standard rate per day or part thereof".

[86] The parties identified some difficulties that arise from calculating these allowances. In particular, given the low percentages of the standard rate to be applied, the amount payable to a casual employee per hour is particularly small in denomination. To meet a similar concern, variations were sought, and granted, to certain allowances payable under clause 16.1 of the RT&D Award.[43]

[87] I have decided it is appropriate in this review to delete the words "part thereof" from clauses 14.1(c)(ii) and 14.1(c)(iii).

Clause 14.2(c) - Living away from home allowance

[88] Clause 14.2 provides for various expense related allowances and reimbursements. One such allowance is payable under clause 14.2(c) where an employee is travelling on duty or on work and is unable to return home and takes their major rest break. The clause could be worded in clearer terms, however, the primary motivation for it to be varied was due to the manner in which it has been characterised by the ATO. The title of the clause has also, in ARTIO's submission, given rise to some confusion as the ATO regards a living away from home allowance as one that is paid where an employee is away for multiple consecutive nights, as opposed to being away from home for one night in isolation. ARTIO submits that the intention behind the clause is for the entitlement to cover accommodation and all incidental expenditure incurred by an employee in the relevant circumstances.[44]

[89] Several drafts of an alternative clause were addressed in conferences before me. The final terms of the clause were still being discussed when these proceedings were completed. At that stage, it appeared that while the TWU supported an ARTIO proposal, Ai Group and ABI had concerns regarding the revised wording of the clause. They did, however, accept that the title of the clause should be varied to read "Travelling allowance".

[90] Ai Group, while sharing ARTIO's concerns regarding the unexpected taxation implications of the allowance, submits a cautious approach should be taken before any changes that could alter the character of the allowance. One such concern arises from a proposal to identify "meals" in the proposed clause. In this respect, Ai Group referred to decision of a Full Bench of the AIRC with respect to the LDD 2000 Award. In that decision, the Full Bench held that the disability allowance provided for in the award encompassed compensation for meals. On that basis, a decision granting the insertion of a meals allowance to the award was quashed.[45] Ai Group submits that to alter the entitlement without having regard to such subtleties could give rise to significantly greater obligations for an employer.[46] I am persuaded by the submissions of Ai Group that in this review the only variation that should be made is to the name of the clause to better reflect its purpose.

[91] There will be some consequential amendments to 13.3(d)(ii) and 14.3(b). In each of these clauses I will delete the words "living away from home" and insert "travelling". These may not be the only amendments related to this issue that should be made. The parties should ensure that the determination reflects all amendments which are consequential on the renaming of clause 14.2(c).

Miscellaneous variations

[92] I should refer to some other miscellaneous agreed variations. In each case I am satisfied the amendments would be consistent with achieving the modern awards objective. The amendments primarily go to the Award being simpler and easier to understand and the promotion of flexible work practices.

[93] Clause 14.2(c)(iii), refers to the calculation of "wages" and the parties agree that this should be varied to read "allowance".

[94] Clause 20.5 makes provision for rostered days off (RDOs). Clause 20.5(b) stipulates that RDOs must be taken in accordance with the roster but they may be accumulated and taken together, in order to meet the requirements of work.

[95] ARTIO has applied to vary clause 20.5(b) so as to make clear that accrued RDOs can be paid out where this is agreed to by the employer and employee. The parties generally agreed this amendment should be made. The only issue was the TWU's opposition to using the word "base" in the new wording. I have decided to amend clause 20.5(b) by the addition of the following at the end of the existing clause:

> "Alternatively, subject to mutual agreement in writing between the employer and an individual employee, any number of accrued RDOs may be cashed out at the time the employee accesses annual leave. Any payment for a RDO will be at 20% of the applicable minimum weekly rate."

Ordinary hours, ordinary time earnings and superannuation

[96] A suite of variations to the Award were sought by the employers relating to provisions regarding ordinary hours of work, the calculation of ordinary time earnings, superannuation contributions made by an employer, and the introduction of the term "base rate of pay". These applications appear to be brought forward in this review for two principal reasons. The first is the requirement under the Act that modern awards must include a term specifying ordinary hours of work, and the second, a ruling by the Australian Taxation Office (ATO) regarding the calculation of the superannuation guarantee for drivers who are remunerated on a c.p.k basis. I should refer to some background to these applications.

[97] The Part 10A process was undertaken pursuant to a written request under s.576C(1) of the *Workplace Relations Act 1996* (WR Act), made by the Minister for Employment and Workplace Relations to the President of the AIRC. The Consolidated Award Modernisation Request stated:

"**Interaction with the National Employment Standards**

...

Ordinary hours of work

46. Many entitlements in the NES rely on modern awards to set out ordinary hours of work on a weekly or daily basis for an employee covered by the modern award. The Commission is to ensure that it specifies in each modern award the ordinary hours of work for each classification of employee covered by the modern award for the purpose of calculating entitlements in the NES. The Commission is also to ensure that ordinary hours (or the process for determining ordinary hours) are specified for each type of employment permitted by the modern award (for example, part-time, casual). In the case of employees to whom training arrangements apply, the Commission should ensure that ordinary hours (or the process for determining ordinary hours) are specified for the purpose of calculating entitlements in the NES."

[98] Section 576J listed the terms which a modern award may include. Those terms included hours of work, overtime and penalty rates. These same terms were also set out in s.139 of the Act when it came into operation. The counterpart of paragraph 46 of the Ministerial request is s.147. It is in these terms:

"**147 Ordinary hours of work**

A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.

Note: An employee's ordinary hours of work are significant in determining the employee's entitlements under the National Employment Standards."

[99] Although paragraph 46 of the Ministerial request and s.147 are not in identical terms the obligation in each is the same. The requirement is for the modern award to specify or provide for the determination of the ordinary hours of work for each classification and each

type of employment provided for in the award. It is clear that "type of employment" would include full-time, part-time and casual engagements.

[100] The Award contains various references to ordinary hours of work. I refer only to those addressed by the parties in this matter.[47] Clause 10.2 defines a full-time employee as one who is engaged by an employer to perform long distance operations for an average of 38 ordinary hours per week over a four week period. I have earlier indicated that the words "to perform long distance operations" will be removed. Clause 13.1 sets out minimum weekly rates of pay for ordinary hours of work. Clause 20 is headed "Ordinary hours of work and rostering" and contains seven subclauses. Clause 20.1 deals with the scheduling of start times and the obligation of an employer to set a roster so an employee will know, so far as is practicable, the hours of duty they are required to perform. Clause 20.2 is titled "Hours of Work" and I should reproduce it.

"**20.2 Hours of work**

(a) Hours of work will be in accordance with Commonwealth, State or Territory Acts, as varied from time to time (including any subordinate regulations controlling driving and working hours of heavy vehicle operators).

(b) Subject to clause 20.2 hours of work will be as follows:

Except where driving hours have been delayed because of accidents or in circumstances over which the employer has no control, the employee must not work and the employer must not require the employee to work:

(i) more than a total of 120 hours in any fortnight exclusive of any unpaid intervals for meals; or

(ii) in any one day more than 12 hours, with a break of half an hour after each five and one half hours worked; provided that every employee must have 10 hours off duty immediately after the working period is completed.

(c) The roster of work must provide for no more than 120 hours to be worked in any fortnight."

Clause 20.3 deals with the requirement to work reasonable hours of work and the basis upon which an employee may refuse to work hours which are unreasonable. Clause 20.4 provides that time is to be computed by reference to either the roster or when an employee registers for duty until the employee is released from such duty. Clause 20.5 deals with rostered days off. The clause provides for an employee's entitlement to rostered days off as well as certain rules relating to the taking of such days. I note that clause 20.5(d) provides that employees must be paid for rostered days off at the rate prescribed by clause 13.1 which is the minimum weekly rates of pay for ordinary hours of work. Clause 20.6 deals with absence from duty and provides for the calculation of the deduction from an employee's pay for absences of a day or part of the day. This calculation is made by reference to the employee's average weekly wage rate. Clause 20.7 provides that a minimum of four hours calculated on the minimum weekly rate of pay is to be made to an employee called back after they had left the depot or home base.

[101] The Award does not contain a clause similar to that contained in the majority of modern awards which identifies the ordinary hours of work each week or the days of the week and the span of hours on those days on which they may be worked. Clause 22 in the RT&D Award is an example of such a clause.

[102] I now turn to the background to the applications which are related to the calculation of the superannuation guarantee for employees, particularly those who are remunerated on a c.p.k. basis under the Award.

[103] Clause 19 of the Award deals with superannuation. Clause 19.2 states that an employer must make such superannuation contributions for the benefit of an employee as will avoid the employer being required to pay the superannuation charge under the relevant legislation cited in clause 19.1. It is a clause in terms which are standard in many modern awards.

[104] The *Superannuation Guarantee (Administration) Act 1992* (SGA Act) deals with the calculation of superannuation contributions to be made by an employer. The superannuation guarantee is calculated by reference to an employee's ordinary time earnings, which is

defined by s.6(1) of the SGA Act. On 1 September 1995, the ATO issued advice[48] regarding the calculation of ordinary time earnings for employees covered by the 1993 Award,[49] which was the predecessor to the LDD 2000 Award. The advice stated that the ordinary time earnings of a long distance driver who was remunerated on a c.p.k. basis was to be determined by multiplying the weekly award rate of pay in the 1993 Award by 1.3, so as to take into account the industry disability allowance which was paid for all ordinary hours of work and then subtracting the overtime component incorporated into the weekly rate. This was 1.2 times the rate of pay.

[105] The SGA Act was subsequently amended. That amendment apparently came into effect on 1 July 2008. The ATO issued a Superannuation Guarantee Ruling in 2009, titled *Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages'* (2009 Ruling).[50] The 2009 Ruling dealt with the meaning of ordinary time earnings as defined by the SGA Act. In January 2013, the ATO sent correspondence to several employers in the long distance sector of the transport industry.[51] The letter was sent as a consequence of an audit conducted by the ATO which revealed that, in its' opinion, some employers in the industry were not correctly calculating the ordinary time earnings of their employees. The letter states that the advice provided to employers in 1995 was no longer correct. Referring to the 2009 Ruling, the letter states that the ordinary time earnings of a long distance driver is the amount paid under the hourly rate or the c.p.k method, including the industry disability allowance, but excluding the overtime allowance.

[106] The ATO has expressed the view that the Award does not define ordinary hours of work and observes that "there is no difference between the rates of pay for "ordinary" hours and other hours. Drivers are paid at the same rate for the first hour they drive (or the first kilometre they drive) and the last hour or kilometre. It goes on to say that where an award stipulates certain hours as ordinary hours, but there is no clearly definable difference in payment because the payment per unit of work performed remains the same outside those hours, all hours worked are included in the calculation of ordinary time earnings.[52]

[107] The impact of the ATO 2009 Ruling (the correctness of which I am advised has not been challenged in any court case) is such as to increase the superannuation contributions

required of employers in respect of their long distance drivers. The employers seek a number of variations to the Award which would go some way to address the consequences of that ruling.

[108] I turn now to summarise the variations sought. I will not refer to two variations initially sought by ARTIO to clause 3.1 to insert an ordinary time earnings definition and clause 19.2(b). These variations were not supported by all employers (and were opposed by the TWU). Each of these was withdrawn during the hearing.[53]

Clause 20.2 variations

[109] Ai Group applied to vary clause 20.2 to delete clauses 20.2(b) and 20.2(c). It argues that regulation of working hours and fatigue management should be left to legislation and regulation specifically tailored to address these issues. It submits that the Award gives rise to potential inconsistencies between its terms and that of such legislation. The TWU opposed the deletion of these clauses but did not make submissions in support of this position.

[110] Ai Group submits that clauses 20.2(b) and (c) are not necessary to achieve the modern awards objective, as required by s.138 of the Act, given the regulation of working hours under other regulatory schemes and the NES.[54]

[111] Ai Group points to s.62 of the Act, which is a provision of the NES. Section 62(1)(a) states that an employer must not request or require a full-time employee to work more than 38 hours in a week unless the additional hours are reasonable. A similar provision for employees who are not engaged on a full-time basis is in s.62(1)(b) where the reference is to the lesser of 38 hours or the employee's ordinary hours of work. By virtue of s.62(2), an employee may refuse to work unreasonable additional hours. Whether additional hours are reasonable or unreasonable is to be determined by taking into account the factors set out in s.62(3).

[112] Ai Group notes that the NES had not come into operation when the Award was made. Section 134, however, requires the Commission to ensure that modern awards, *together with*

the NES, provide a fair and relevant minimum safety net. Ai Group submits that the NES adequately limits the maximum hours that an employer can require an employee to work.

[113] In the alternative, Ai Group seeks that the clause be varied such that clauses 20.2(b) and (c) apply only where there is no relevant regulation regarding driving and working hours. It referred to the terms of clause 29 of the LDD 2000 Award and highlighted differences in the wording of that clause to clause 20.2 of the Award. It indicated that clause 29.2 of the LDD 2000 Award had made clear that it was only to operate where federal or state legislation and regulations regarding driving and working hours of heavy vehicle operators was not applicable. The current opening words of clause 20.2(b) do not make this clear and a variation should be made. ARTIO and ABI supported the alternate position posited by Ai Group.[55]

[114] The TWU indicated it was not opposed to the variation of the clauses so that they reflect clauses 29.1 and 29.2 of the LDD 2000 Award.[56]

A new clause in clause 20 - Ordinary hours of work and rostering

[115] NatRoad seeks the insertion of a new clause, to be numbered clause 20.2, which provides for ordinary hours of work and the arrangement of those hours of work. The application was supported by the other employers. The proposed clause reads:

> **"20.2 Arrangement of ordinary hours of work**
>
> The maximum ordinary hours of work shall be an average of 38 hours per week, calculated over a period not exceeding 28 consecutive days. These may be arranged as follows:
>
> (a) 38 hours within a work cycle not exceeding seven consecutive days;
>
> (b) 76 hours within a work cycle not exceeding 14 consecutive days;
>
> (c) 114 hours within a work cycle not exceeding 21 consecutive days; or
>
> (d) 152 hours within a work cycle not exceeding 28 days."

[116] Ai Group submits that the variation is necessary to meet the requirements of s.147 of the Act. It also points to various entitlements that arise under the NES which are calculated by reference to ordinary hours of work. Although industry practice has been for such entitlements to accrue on the basis of 38 ordinary hours a week, in Ai Group's submission, this needs to be clarified. To this end, the variation sought rectifies a technical problem or anomaly arising from the Part 10A process. That is, it seeks to rectify the failure to include a clause in the Award as required by s.147 of the Act.[57]

[117] Ai Group submits that the phrase "ordinary hours of work", as used in s.147, is a distinct and long established concept in the context of industrial relations, which should not be displaced in favour of a suggestion by the TWU that a modern award must provide for the determination of the "regular, customary or usual hours of work" for each classification and type of employment. Ai Group relies on the Explanatory Memorandum to the *Fair Work Bill 2009*[58] in submitting that Parliament clearly intended that an award would set the ordinary hours of work for employees covered by it, which is a distinct concept from an employee's usual hours of work. To conflate the concept of ordinary hours and usual working hours would, in Ai Group's view, lead to untenable outcomes. It provided examples such as casual employees engaged on an "as needed" basis, who do not in fact have regular, customary or usual working hours. It relied on various authorities of the Courts and the AIRC in support of its submission that awards have long reflected the distinction between ordinary hours of work and an employee's usual hours of work and that an employee's ordinary hours of work are not dependent upon whether work performed outside of those ordinary hours is remunerated at a higher rate.[59] Therefore, Ai Group submits that the variation sought does not require reconsideration of the remuneration structure under the Award which, in any event, reimburses employees for overtime by way of an allowance. That allowance recognises a distinction between ordinary hours and overtime hours.

[118] Ai Group acknowledges that the current clause 20.2 deals with hours of work generally, however it does not distinguish between ordinary hours and overtime. The subclause, in effect, places restrictions on the number of hours that may be worked and the manner in which such hours of work may be performed. In Ai Group's submission, this does

not constitute a specification of ordinary hours of work for each classification of employee, as required by s.147.

[119] Ai Group referred to clause 10.2 which defines a full-time employee as one engaged by an employer to perform long distance operations for an average of 38 hours per week, over a four week period. It argues that the clause, at best, provides for ordinary hours of work for full-time employees but fails to provide for the determination of ordinary hours for other types of employment under the Award.

[120] Ai Group also cites the ATO's position, that the Award does not presently contain a definition of ordinary hours. This has given rise to a significant increase in superannuation obligations of employers covered by the Award. It submits that this issue is relevant to the review, as the Award itself imposes obligations on an employer to make superannuation contributions. Ai Group submits that the variation is necessary to ensure that the Award is simple and easy to understand and to ensure that the Award is not ambiguous or uncertain in this regard.

[121] NatRoad, ABI and AFEI support the submissions of Ai Group.[60] ARTIO also supports the proposed variation and submits that it is necessary to achieve the requirements of s.147. It listed the various NES entitlements that are calculated on the basis of ordinary hours of work and highlighted the importance of inserting the proposed clause 20.2 in the Award.[61] In ARTIO's submission, historically, the phrase "ordinary hours of work" has had a clear meaning in the industrial context; 38 ordinary hours of work per week. ARTIO also submits that the variation is necessary to make clear that rostered days off are accrued on the basis that an employee works 40 hours a week, thus accumulating two hours each week towards a rostered day off, as provided for in clause 20.6 of the Award.

[122] ARTIO made submissions regarding the ATO's 2009 Ruling and its 2013 letter. It submits that the ATO's interpretation of the Award will cost employers an additional $25 - $30 per employee, per week in superannuation obligations. The total superannuation guarantee payable per week would vary, thus creating difficulties for payroll personnel to

calculate the amount payable. It will be difficult to pass on the additional expense to customers.

[123] The TWU opposes the variation sought. It submits that the application falls beyond the scope of this review and that it gives rise to matters that would more appropriately dealt with during the 4 yearly review of the Award. The union submits that the employers have failed to displace the presumption that the Award is achieving the modern awards objective, nor have they established that the variation sought remedies a technical problem or anomaly arising from the Part 10A process. It submits that no suggestion has been made by the employers that their current concern regarding the inclusion of a clause that meets the requirements of s.147 was raised before the AIRC Full Bench when the Award was made. Clause 20 of the Award was drawn from clause 29 of the LDD 2000 Award.

[124] The TWU submits that the current clause 20.2 of the Award meets the requirements of s.147. It provides for the determination of the regular, customary or usual hours of work for each classification and type of employee covered by the Award. The atypical nature of this clause is said to reflect the atypical nature of the industry. The union links the c.p.k. driving method and the averaging arrangements that underpin the hours of work method of remuneration with the abandonment of the traditional dichotomy between ordinary hours and overtime. The TWU submits that this is reflective of the flexibility required in the long distance sector. It submits that I should not revisit the atypical hours of work scheme without properly considering the remuneration scheme under the Award, which has not been ventilated in this review.

[125] The TWU characterises the submissions of the employers as a complaint that arises from the impact of the peculiarities of the long distance sector in calculating the superannuation guarantee. However, those peculiarities have long been reflected in the Award and its predecessors. In its view, the asserted need for changes to the Award is solely driven by the ATO view as to the consequence of the applications of the relevant definitions under the SGA Act.

[126] In the TWU's submission, the Award cannot be said to be ambiguous or uncertain in this regard as it has not been put that the current clause 20.2 of the Award cannot be understood. That clause, in its submission, does what s.147 of the Act requires.

[127] The TWU points to the absence of evidence before me that the arrangement of ordinary hours contemplated by the proposed clause bares any resemblance to the usual or customary hours worked in long distance operations. It submits that the reality of work practices in the industry involve 50–55 hours a week, underpinned by fatigue management rules that aim to regulate these hours.

[128] The TWU submitted that employees are remunerated by certain rates (which it described as piece rates) while they are driving for each journey and for additional allowances for the performance of other work. The TWU submits that the accrual of entitlements under the NES is to be understood in this context. This submission was refuted by the employers. Ai Group submits the Award does not describe employees as pieceworkers or their being paid piece rates. In any event, it notes that the Award contains an hourly rate and provisions for employees to be paid by reference to hours of work. Ai Group submits that these arguments are irrelevant to the issues before me. That is, the need for the Award to comply with s.147 of the Act.

New clauses 13.4(c) and 20.4

[129] The next variations sought concern two new clauses to be inserted into clauses 13.4 and 20.4. Clause 13.4(a) provides that an employee covered by the Award may be paid for a particular journey by multiplying the number of kilometres travelled by the c.p.k. rate for the relevant vehicle. The subclause contains a c.p.k. rate for each classification under the Award. Clause 13.4(b) contains a table that shows agreed distances for various long distance journeys between certain centres. Where an employee performs a journey that is specified in that schedule, the distance travelled is deemed to be the number of kilometres indicated in the table.

[130] Ai Group seeks to insert a new clause 13.4(c), which reads as follows:

"All rates in paragraph 13.4(a) have been calculated based on the rates which are payable in respect of an employee's ordinary hours of work under subclause 13.1 and the industry allowance and overtime allowance referred to in clause 14. These amounts have been converted to a cents per kilometre rate based on an assumed average driving speed of 75 kilometres per hour. Accordingly, where an employee's ordinary hours of work are structured in accordance with [the proposed] paragraph 20.2(a), any amount which a full-time employee earns pursuant to paragraph 13.4(a) in any week which exceeds the amount specified in subclause 13.1 plus 30% (the industry allowance) will be a payment in respect of overtime."

[131] Ai Group also seeks the insertion of a new clause 20.4 as follows:

"All hours worked outside of the ordinary hours of work will be overtime and all payments made to an employee in relation to work performed outside of these hours will be a payment in respect of overtime. An employee may be required to perform a reasonable amount of overtime subject to the requirements of subclause 20.[X]."

[132] In its submission, Ai Group states that these proposed clauses are intended to clarify an employer's obligation in relation to superannuation. The variations highlight the distinction between payments made in respect of ordinary hours of work and payments in respect of overtime. This is consistent with the 2009 Ruling of the ATO in which it states that payments for work performed outside an employee's ordinary hours of work are not ordinary time earnings.[62] Ai Group emphasises that the variations sought do not seek to alter the amount payable for work performed during ordinary hours or otherwise. The insertion of clause 13.4(c) would ensure that the superannuation guarantee paid to an employee who is remunerated by the c.p.k. driving method and the hourly method is notionally the same.

[133] Ai Group submits that these variations are necessary to ensure that the Award is achieving the modern awards objective and it is operating without anomalies or technical problems arising from the Part 10A process. Specifically, it submits that the current Award is not simple and easy to understand in determining what constitutes an employee's ordinary

hours of work. The insertion of new clauses 13.4(c) and 20.4 are necessary to avoid significant cost increases to employers. Such cost increases may result in job losses in the industry, which would run contrary to ss.134(1)(c) and (h). It submits that the variations are also necessary to ensure that the Award does not contain errors and is not ambiguous or uncertain in its operation.

[134] ARTIO, NatRoad and AFEI support Ai Group's submissions.

[135] ABI submits that the proposed clause 13.4(c) should be inserted as it clearly explains that the overtime allowance is incorporated in the per kilometre rates. It pointed to clauses 14.1(a) and 14.1(b), which explicitly state that the rates per kilometre are inclusive of the industry disability allowance and the overtime allowance, as confirmation of this.[63] It submits that the interpretation by the ATO of the Award represents a windfall gain to employees who are paid on a c.p.k. basis and creates an inequitable outcome for those employees as compared to drivers who are remunerated on an hourly basis.[64]

[136] I have earlier referred to the grounds which the TWU objected to all of the variations which related to ordinary hours of work and directly, or indirectly, concerned the calculation of superannuation payments. In short it objected to the insertion of the proposed clauses on the basis that these matters fall beyond the scope of the two year review. It submits that the ATO's position regarding the calculation of ordinary time earnings is neither ambiguous nor uncertain. It is a consequence of the definition of ordinary time earnings in the SGA Act. In any event, the issue of adjusting or simplifying superannuation calculations is not a matter for the Award or the review. The variations sought are not necessary to ensure the Award is meeting the modern awards objective.

Clause 13.1 - Base Rate of Pay

[137] The next variation sought is to clause 13.1 which sets out the minimum weekly rates of pay for ordinary hours of work. Ai Group seeks to amend the clause such that the rates of pay are described as "minimum weekly *base* rates of pay". The phrase "base rate of pay" is defined by s.16 of the Act. Ai Group seeks the variation so as to ensure that the terminology

used in the Award is consistent with the framework of the Act. It submits that an employee's base rate of pay is an important consideration arising under the Act as it is the minimum amount that an employee is to be paid while on annual leave, personal/carer's leave, compassionate leave and while undertaking jury service. Consistency in the language used in the Act and in the Award would, in Ai Group's submission, make the Award simple and easy to understand. It submits that the variation is therefore necessary to achieve the modern awards objective.

[138] Ai Group submits that this was not a matter that was considered during the Part 10A process. It submits that the variation would ensure that the Award is operating effectively, without technical problems or anomalies arising from that process.

[139] Ai Group's submits that the rates contained in clause 13.1 are the employee's base rate of pay as those rates are payable to an employee for their ordinary hours of work. The additional components payable under clauses 13.3, 13.4 and 13.5 are separately identifiable amounts and therefore do not form part of the base rate of pay. The employers support Ai Group's position.

[140] The TWU opposes the introduction of the word "base" into clause 13.1 and also the associated variations to other Award clauses. It submits that an employee's ordinary hours of work are not to be identified as being those for which an employee is paid the base rate of pay. Rather, the starting point is to ascertain an employee's ordinary hours of work. The base rate of pay is that which is paid for those ordinary hours. It is that base rate of pay that then informs the amount payable for leave entitlements arising under the NES.

Conclusions - Ordinary hours and all related provisions

[141] In this review I have been conscious of the peculiarities of the provisions of this Award. They have been tailored to suit the atypical circumstances of this sector of the road transport industry. The Award does not contain the usual types of hours clauses and associated overtime or penalty clauses. There is no span of hours, nor any identification of any particular days of the week when ordinary hours will be worked. There is no overtime

clause, nor any provisions for loadings, or penalties for working particular shifts. These peculiarities have also been in the predecessor awards covering this sector of the transport industry. The remuneration for driving either by reference to hours or to a c.p.k. method does not vary by reference to the day of the week or time of the day driving is undertaken. I exclude from this observation the particular additional penalties that are payable when work is undertaken on a public holiday.

[142] Where an employee is engaged an employer must nominate whether the employee is to be paid pursuant to a c.p.k. method or an hourly method. If no method is nominated the c.p.k. method applies.[65] The c.p.k rate includes an industry disability allowance of 1.3 times the ordinary rate and an overtime allowance of 1.2 times the ordinary rate which takes into account an overtime factor of two hours in ten.[66] In the case of an employee engaged on the basis of an hourly driving method clause 13.5 provides that the minimum hourly driving rate: "is calculated by dividing the minimum weekly rate prescribed by clause 13.1 by 40, and multiplying by 1.3 (industry disability allowance) and 1.2 (overtime allowance)."

[143] An employee engaged in loading or unloading duties is to be paid for such duties at an hourly rate which clause 13.6(a) provides is to be calculated "by dividing the weekly award rate prescribed by clause 13.1 x 40 and multiplying by 1.3 (industry disability allowance), provided that a minimum payment of one hour loading and one hour unloading per trip must be made where such duties are required." As an alternative to this method of payment an employer and employee may enter into a written agreement for a fixed allowance to be paid.

[144] The employers sought to retain all of the above provisions during the Part 10A process. The TWU's primary concentration in the Part 10A process was that no separate award for the long distance sector should be made. An additional argument was that regardless of whether there would be one or two awards, in no case should there be a c.p.k. method of remuneration. The Full Bench concentrated on these issues and ruled that there would be two awards and that the award covering the long distance sector would contain a c.p.k. method of remuneration. The issue of ordinary hours was barely addressed and I was not taken to any submission where a party suggested the terms of the exposure draft did not

comply with the requirement of the Ministerial request in so far as it addressed how an award should deal with ordinary hours. To my knowledge, until this review the issue has not arisen.

[145] Ordinary hours of work are not contained in the NES. A number of the NES entitlements however are calculated on the basis of, or are referable to, ordinary hours. The ordinary hours for an award or enterprise agreement covered employee are to be contained in those instruments. For an employee who is not covered by an award or enterprise agreement s.20 of the Act defines what the ordinary hours of work for those employees will be.

[146] I agree with the Ai Groups' submission about the meaning of the term "ordinary hours of work" in "industrial parlance". The manner in which that term has developed and been understood in awards does not suggest it is synonymous with what an employee's usual or regular hours may be. In this respect, I do not agree with the TWU submissions. The first question for me in this review is whether the Award contains a provision in terms required by s.147 of the Act. As I have earlier noted, that section requires the Award to contain such a provision for each classification of employee and each type of employment provided for in the Award. In my opinion, the Award does not contain such a provision.

[147] I have closely considered each of the clauses which, in the TWU's submission, meet the requirements of s.147. The definition of a full-time employee is the closest provision which goes someway to that end. It is desirable that the hours there referred to should be reproduced in that part of the Award titled "Hours of work and related matters". To do so will aid the Award being simpler and easier to understand. For casual employees the ordinary hours of work are not currently specified. The roster requirements only relate to the hours of duty an employee is required to perform not the ordinary hours. In any event, the roster sets those hours "only as far as practicable." There is no certainty in that provision. The provisions of clause 20.2 go to either identifying the fact that where there is applicable legislation then hours of work (as opposed to ordinary hours of work for any employee) will be in accordance with that legislation. I do not read that clause as identifying the ordinary hours for each type of employee covered by the Award. Clause 20.2(b) sets the maximum hours an employer can ask an employee to work. It also provides that an employee must not work more than the maximum hours there identified. Those hours are also subject to the

proviso relating to delays due to accidents and circumstances over which an employer has no control. The clause provides no certainty about what the ordinary hours may be. Nor does it, in my opinion, provide for the determination of the ordinary hours of both full-time and casual employees. It sets a ceiling for the hours that may be worked over the periods identified in subclauses (i) and (ii). There is nothing in the remaining subclauses of clause 20 which can be considered as addressing the identification of the ordinary hours of employees. Those provisions give an entitlement to rostered days off and establish conditions upon which they are to be given and paid.

[148] In my opinion the Award does not contain a clause as required by s.147.

[149] The next issue is whether, in this review, I should vary the Award to provide for the ordinary hours of work for the classifications and types of employees referred to in it. Having found that the Award does not contain a clause as required by s.147, I do not think delaying consideration of this requirement to the 4 yearly review of this Award is a course properly open to take. In my opinion, it is open to find that the Award does contain an anomaly and/or a technical problem that arose from the Part 10A process. The provisions of the Award, now having been the subject detailed submissions (none of which were made during the Part 10A process), does not meet the requirements of s.147. I note that s.138 provides that a modern award must contain terms it is required to include and s.147 is one such term. That requirement of itself would justify the variation I proposed being made now. Had it been necessary to do so I would have decided to exercise powers under s.160 to vary the Award to remove the uncertainty about whether the Award contains a provision in terms required by s.147 of the Act. The availability of that course in the context of this review was a matter discussed with the parties in conferences.

[150] Having made the above finding, I have decided to only insert into the Award the minimum required to comply with s.147. For reasons largely consistent with the TWU submissions, I am not persuaded this review is the occasion to embark on what is, in effect, a wholesale change to the provisions of the Award. To make the many other variations sought to the hours provisions and identify hours which will be taken to be ordinary hours and those which will be taken to be overtime hours is a fundamental change to the structure of the

Award. It should not be done on the basis of a consideration of some only of the provisions of the Award. Consideration should also be given to payment methods and their quantum, provisions deeming the hours and kilometres associated with a journey, and the methodology of arriving at those outcomes. A reconsideration of the NES and the Award provisions and current legislative regulation of driving hours would also be necessary. It may well be appropriate to revisit the interaction with the RT&D Award and ensure the manner in which an employee is to be paid is clear when they transfer from one award to the other. Such an exercise may also require consideration to be given to orders made by the Road Safety Remuneration Tribunal.

[151] I have decided to insert a new clause into the Award, which is currently proposed to be clause 20.1(a), which will provide that the ordinary hours per week will be an average of 38 calculated over a four week period. This is consistent with the definition of a full-time employee. The definition will identify ordinary hours for all employees and will be applicable to employees in each of classifications in the Award. The new clause should read as follows:

> "The ordinary hours of work shall be an average of 38 hours per week, and may be calculated over a period of four weeks."

I should indicate that it may have been preferable to change the reference to the period over which hours may be averaged to 28 days. I have chosen four weeks in this new clause for consistency with the full-time employee definition. In the event the parties agree each clause should refer to 28 days then the variation would reflect that terminology.

[152] I turn to the Ai Group application to vary clauses 20.2(a), (b) and (c). The primary application is to delete the clauses and not replace them. The alternative is to amend them to reflect the provisions contained in the LDD 2000 Award. The TWU opposes the first application but does not oppose the second. There was no agreement amongst the employers about Ai Groups' primary application. There was agreement to the alternative.

[153] Ordinary hours are not to be conflated with maximum weekly hours. The latter topic is addressed in the NES at ss.62 and 63 of the Act. I have had considerable difficulty deciding how to best deal with this matter. On the one hand there is a prima facie case that setting, as clause 20.2(b) does, the maximum working hours there is a clash with s.62 of the Act. It is unlikely it was intended that a modern award could, in effect, dictate what would be the reasonable additional hours for the purposes of ss.62(2) and 62(3). I am also concerned that the grounds upon which an employee may assert as unreasonable, any hours they are required to work, are not the same as the grounds set out in s.62(3). Some are, but that section provides grounds additional to those in clause 20.3 of the Award. Against these concerns is my reluctance to remove just this clause of the Award without it being clear what the consequences are for the application of the rest of the provision of the Award and the practical impact on this sector of the industry which has worked under these provisions for many years.

[154] It is with considerable reservation I have decided to adopt the alternative position put by the employers and not opposed by the TWU.

[155] The provisions of clause 20.2 should be considered again either within the context of the 4 yearly review, or on an application to vary the Award as may be consistent with the Act. The coverage across States and Territories of the National Heavy Vehicle Law may then be addressed and also any relevant order of the Road Safety Remuneration Tribunal. Further consideration should be given to the interaction with s.62 of the Act and whether the current clause can give rise to two different outcomes as to whether additional hours requested (or, in terms of the Award, required) of an employee may be unreasonable, depending on whether legislation is applicable or not.

[156] I have redrafted the clause consistent with the alternative position put by the employers and agreed to by the TWU. The intention is to revert to wording similar to clause 29 of the LDD 2000 Award. The wording I propose is similar to, but not the same as clause 29, however my intention is not to alter the substance of it. The parties should consider it closely. In light of the various amendments to clause 20 the parties should consider the whole

of the clause closely. It may be some reformatting or renumbering of the sub-clauses would be desirable.

[157] I consider that clause 20.3 should be consistent with s.62(3). This can be achieved by either reproducing those grounds or for the clause to refer to that section. The draft determination currently lists all the factors in that section which are to be taken into account when determining when additional hours are reasonable or unreasonable.

[158] I ask the parties to consider and discuss renaming the title of clause 20.2 to better reflect matters addressed in the clause (and probably clauses 20.3 and 20.4).

[159] An agreed variation will be made to clause 20.5(a) (rostered days off) to insert the words "full-time" and "any" in the manner reflected in the 6 May 2013 draft. I note that with the exception of whether they should contain the word "base" a number of miscellaneous variations were agreed by all the parties. These relate to clause 20.5(b) (rostered days off) and the insertion of proposed new clauses 23.2(c) (payment for annual leave), and 24.2 (rate of pay for paid personal/carer's leave and compassionate leave).

[160] I wish to comment briefly on the TWU reference to pieceworkers and the suggestion employees remunerated by a c.p.k. method are being paid piece rates. If the TWU seriously contended that to be so, it is unclear why variations to the Award were not sought to reflect the requirements of ss.21 and 148 of the Act. No such application was made in the Part 10A process nor in this review. I was not taken to any proceeding or decision in which the TWU had before asserted, in the context of long distance drivers paid on a c.p.k. basis that, in terms of the Act, they were pieceworkers.

Clause 23.2 - Payment for period of annual leave

[161] Clause 23.2 of the Award provides for the calculation of the payment to be made for annual leave taken by an employee. Pursuant to this clause, an employee is entitled to a proportion of the applicable minimum weekly rate prescribed by clause 13.1 in accordance with the amount of leave taken and an additional loading of 30%. The parties sought to insert a new clause 23.2(c) which specifies that the relevant minimum weekly rate is that which is

applicable to the classification under which the employee would have worked had they not taken the period of leave. No opposition was raised to this variation and I have decided it should be made.

Clause 24 - Personal/carers leave etc

[162] Clause 24 of the Award provides that personal/carer's leave and compassionate leave are provided for in the NES. The parties sought to insert a new clause that specifies the rate of pay for a period of such leave. The employers proposed a new clause which would become 24.2 and be in the following terms:

> "The rate of pay for an employee who accesses a period of paid personal/carer's leave or compassionate leave must be a portion of the applicable minimum base rate prescribed by clause 13.1 which corresponds to the amount of leave taken. The applicable minimum base rate must be that applicable to the classification which the employee would have worked in had they not taken the period of leave."

[163] The variations will be made. However, I have deleted the word "base" from the new clause.

Clause 26.6 - Payment for public holiday

[164] Clauses 26.4 and 26.5 of the Award provide for additional payments to be made to full-time and casual employees for work performed on a public holiday. Ai Group sought to insert a new clause 26.6 which clarifies that the penalty rates provided for in those clauses apply only where the majority of the work undertaken by an employee on a particular journey or long distance operation is undertaken on a public holiday.

[165] Ai Group submits that the current Award entitles an employee to the penalty rate where only a small portion of the work undertaken is performed on a public holiday, giving rise to an anomaly. There was no objection raised to the variation sought. The application is granted in the terms sought.

Schedule A - Classification structure

[166] The TWU seeks to vary Schedule A of the Award by inserting the following classification description for a Grade 5 employee:

> "Driver of rigid vehicle and heavy trailer combination with GCM over 42.5 tonnes but not more than 53.4"

[167] The TWU submits that Schedule A of the Award does not contemplate a driver as described above. As a consequence, such drivers are presently not covered by the Award. The union submits that this is an anomaly that should be amended in this review. There was no opposition to this application. It is granted in the terms sought.

Date of operation of variations

[168] In relation to the variations to ordinary hours related matters Ai Group sought a retrospective date of operation for those variations to 1 January 2010.[67] That is, the date when the Award first came into operation. In light of the rulings I have made this consideration now only relates to the variation I refer to in paragraph [151] introducing a new clause 20.1(a) into the Award.

[169] Ai Group noted that in the Modern Awards Review 2012 decision the Full Bench observed that there was a broad discretion under sub-item 6(3) of Schedule 5 to vary an award in the manner it saw fit.[68] Although the date of operation of any variation made as part of a review is not referred to in the Transitional Act the same approach should be taken to that consideration as is reflected in ss.165, 166, and 167 of the Act. That is, a retrospective operation of a variation would only be granted in exceptional circumstances.

[170] Ai Group's justification for the date sought is to ensure the Award reflects what, in its submission, should have been contained in it so as to comply with s.147. It is clear however the primary justification is to address, by award regulation, what is described as "the risk,

uncertainty and numerous other adverse consequences flowing from the ATO's current interpretation of the provisions of the Award".[69] It is submitted that the costs for employers which would be incurred if the ATO interpretation is correct will be significant. These circumstances are said to be exceptional and justify a retrospective date of operation.

[171] The employers supported AIG's submission and made no additional comments about this issue. The TWU made no submission about it.

[172] I have noted that the employers do not concede the ATO 2009 Ruling to be correct however it does not appear to have been the subject of a challenge by any person. I am asked to grant retrospectivity on the basis I should assume it to be correct. The TWU does not appear to have ever raised any concern about the correctness of the way in which employers had calculated the payment to be made under SGA legislation until the ATO raised this issue in the context of its 2013 audit. In those circumstances the Ai Group may be excused for describing the union as to have now "opportunistically embraced" that interpretation.[70]

[173] I have earlier given my reasons for the variation I have been persuaded to make. It is solely as a consequence of my application of the requirements of s.147. My reasons for making the variation are not referable to achieving an outcome contrary to the view currently held by the ATO about what the superannuation guarantee payment should be for certain drivers covered by the Award. Whatever the correct calculation of a driver's ordinary time earnings may be will be as a result of the application of the definition/s in relevant superannuation legislation.

[174] I have decided that some retrospectivity to the date of operation of the variation to introduce a new clause 20.1(a) is justified. It should be to a date corresponding with the employers forming the view that the requirements of s.147 have not been met. That date is around the time the applications to commence this review were filed. I have decided this will be the first pay period on or after 19 March 2012. The date of effect should not impact either the method of accrual, or the amount of payment of annual leave. I do not understand it would do so on my reading of the NES, and clause 23.2 of the Award. If this was not the case I would put a condition on the order so as to not impact annual leave entitlements. In the

event there was some other Award leave entitlement that may be similarly affected, the parties should confer about that and any conditions that I may consider adding to the variation order.

[175] A draft determination will be issued at the same time this decision is published. The parties should consider closely the terms of the draft determination and ensure all necessary amendments are contained within it. Additionally, there has been some consequential renumbering to clauses which needs to be considered. The parties should confer with a view to reaching agreement on the terms of the determination. In this respect, I ask that they advise my chambers within the next three weeks as to the progress being made.

SENIOR DEPUTY PRESIDENT

Appearances:

S Haynes and *L Izzo* on behalf of the ABI

B Ferguson on behalf of Ai Group and NatRoad

P Ryan on behalf of the ARTIO

J Light on behalf of the AFEI

A Spottiswood on behalf of NatRoad

A Howell and *T Walton* on behalf of the TWU

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[1] MA000039.

[2] [2012] FWA 3514 at paragraph [9].

[3] 25 July 2012, 4 September 2012, 20 September 2012, 25 October 2012, 1 February 2013 and 17 May 2013, 10 October 2013, 12 November 2013.

[4] [2013] FWC 3136.

[5] [2013] FWC 7976.

[6] MA000038.

[7] Section 134(1)(da) had not come into operation at the time that this matter was heard.

[8] [2012] FWAFB 5600.

[9] See for example *Modern Awards Review 2012 - Penalty Rates* [2013] FWCFB 1635, *Modern Awards Review 2012 - Public Holidays* [2013] FWCFB 2168 and *Modern Awards Review 2013 - Apprentices, Trainees and Juniors* [2013] FWCFB 5411.

[10] Exhibit AIG1.

[11] PN132.

[12] AP805988CRV.

[13] PN178.

[14] PN168 - PN176.

[15] [2009] AIRCFB 345.

[16] PN181 - 182.

[17] If granted there would be a consequential variation - the current clause 10.3 would become clause 10.4.

[18] PN226.

[19] Exhibit AIG1.

[20] Exhibit AIG3, page 2.

[21] Exhibit AIG6, page 10.

[22] Exhibit AIG4, paragraphs 20 - 24.

[23] Exhibit AIG1.

[24] Exhibit AIG1.

[25] Exhibit AIG4, paragraphs 44 - 45.

[26] PN397.

[27] PN274 - 278 and Exhibit ABI1.

[28] PN296 - 297 and Exhibit AFEI1.

[29] Exhibit NatRoad2.

[30] *Modern Awards Review 2012* [2012] FWAFB 5600 at paragraph [85].

[31] PN354.

[32] Print K9314 [T0092].

[33] Print T1098 at paragraph [8].

[34] ARTIO, ABI, NATROAD.

[35] [2009] AIRCFB 345 at paragraphs [180] and [181]; [2009] AIRCFB 50 at paragraph [105].

[36] Clause 12.4(f).

[37] PN63.

[38] PN260 - PN262.

[39] PN108 - 111.

[40] PN100 - 107.

[41] *Modern Awards Review 2012 - Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [101].

[42] PN366 - 367.

[43] [2013] FWC 9805 at [19] - [21].

[44] PN434 and PN441.

[45] PR955321, [43] - [56].

[46] PN444 - PN445.

[47] Ordinary hours are also referred to in clauses 8.2, 14.2(e), 21.1 and Schedule B.

[48] Exhibit ARTIO3.

[49] Print K9314.

[50] SGR 2009/2.

[51] Exhibit AIG8.

[52] Exhibit AIG8, attachment 3.

[53] PN450 and PN 567.

[54] Exhibit AIG11.

[55] PN519 and PN522.

[56] PN487 - 488.

[57] Exhibit AIG11.

[58] See paragraphs 234 - 236 of the EM.

[59] Exhibit AIG11, pp.22 - 24.

[60] PN408, PN569 and PN573.

[61] PN550 - PN553.

[62] SGR 2009/2, paragraphs 41 - 42.

[63] PN570 - 571.

[64] Exhibit ABI1.

[65] Clause 13.3(b).

[66] Clause 14.1(b).

[67] Exhibit AIG1 paragraphs 4.66 - 4.69.

[68] [2012] FWAFB 5600 at paragraphs [112] - [115].

[69] Exhibit AIG1 paragraph 4.67.

[70] Exhibit AIG11 paragraph 110.