



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**SENIOR DEPUTY PRESIDENT HAMBERGER  
DEPUTY PRESIDENT SAMS  
COMMISSIONER LEE**

**s.156 - 4 yearly review of modern awards**

**Four yearly review of modern awards  
(AM2016/32)  
Passenger Vehicle Transportation Award 2010**

**(ODN AM2008/51)  
[MA000063 Print PR988774]]**

**Sydney**

**10.02 AM, TUESDAY, 7 MARCH 2017**

**Continued from 6/03/2017**

PN307

THE SENIOR DEPUTY PRESIDENT: Good morning. I think we're hearing from Mr Foenander first. I think that's what we agreed, is that right?

PN308

MR DENTON: Yes, Your Honour. Yes. Thank you, Commissioner. Can we deal with Mr Foenander. If I could – prior to calling Mr Foenander, also note the other statement filed on behalf of Coles, that a Mr Chris Gardner – I understand he's not required for cross-examination - - -

PN309

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN310

MR DENTON: I'd seek that his statement be tendered.

PN311

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. So well call Mr Gardner's statement C1.

**EXHIBIT #C1 STATEMENT OF CHRISTOPHER GARDNER**

PN312

MR DENTON: Thank you. I call Mr Foenander.

PN313

THE ASSOCIATE: Please say your full name and address?

PN314

MR FOENANDER: Bradley Shane Foenander, (address supplied).

**<BRADLEY SHANE FOENANDER, AFFIRMED [10.03 AM]**

**EXAMINATION-IN-CHIEF BY MR DENTON [10.03 AM]**

PN315

MR DENTON: Thank you, Mr Foenander. I'll ask you to state for the transcript again, your full name?---Bradley Shane Foenander.

PN316

And your business address?---800 Toorak Rd in Hawthorn East.

PN317

And your occupation?---I'm the head of Operations Development at Coles.

PN318

Thank you. Now Mr Foenander, you have signed a witness statement for the purpose of this proceeding?---Yes, that's correct.

\*\*\* BRADLEY SHANE FOENANDER

XN MR DENTON

PN319

I'll ask that a copy of that be handed to you. Mr Foenander, you have before you a statement dated 2 March 2017 which is 18 paragraphs long and three pages?---That's correct, yes.

PN320

Are the contents of that statement true and correct?---That's correct, yes.

PN321

Are there any additions or amendments you wish to make to that statement?---No.

PN322

I tender that statement, Commissioner.

PN323

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. Mr Foenander's statement, C2.

**EXHIBIT #C2 STATEMENT OF BRADLEY SHANE FOENANDER  
DATED 02/03/2017**

PN324

MR DENTON: Thank you, Mr Foenander, if you'd just wait there, you'll have a few questions coming to you.

**CROSS-EXAMINATION BY MR GIBIAN**

**[10.05 AM]**

PN325

MR GIBIAN: Thank you, Mr Foenander. My name is Mark Gibian, I'm appearing for the Transport Workers' Union. Can you both see and hear me?---I can. It's a little bit hard to hear you.

PN326

Is that any better?---That's better, thank you.

PN327

All right. If you have any difficulty, just let me know. Mr Foenander, just in relation to your role with Coles, you've said you started in 2012 as the Delivery Manager, E-Commerce, is that correct?---That's correct, yes.

PN328

And I take it, prior to that you were not employed by Coles, at all? That is a completely separate business?---That's correct, yes.

PN329

Was the delivery manager, E-Commerce, was that also concerned with the Coles online operation?---That's correct, yes.

PN330

And you subsequently became the Head of Operations of Coles Online in 2015?---Head of Operations Development, yes.

\*\*\* BRADLEY SHANE FOENANDER

XXN MR GIBIAN

PN331

Sorry, Operations Development, I'm sorry. And you describe that as managing the "central functions," in inverted commas. I take it that means, not the store operations or the deliveries made from stores, is that right?---So not the people in the store, themselves.

PN332

Yes, all right. But you say you have some knowledge of both the work of the drivers making the Coles online deliveries and, I take it, of the industrial regulation of those employees, that is, the enterprise agreements and the like, that applied to them in the past?---Yes, correct.

PN333

Can you just tell me, and some of this slightly predates your time, I think, but can you just tell me if you can confirm this history. The Coles online deliveries were up until about two thousand and – or at some time during 2010/2011, outsourced to transport companies?---Yes, I wasn't at the company but I believe that to be correct, yes.

PN334

That is, I think it was mainly Linfox but other transport companies were engaged and the drivers employed by those companies undertook the deliveries?---I'm not sure of the companies that were engaged.

PN335

But you understand that that's the way it operated until around 2010/2011?---I believe so, yes.

PN336

And Coles subsequently insourced, or commenced to directly employ drivers to do that work?---That's correct, yes.

PN337

They're what's referred to, by Coles at least, as Customer Service Agents?---Yes.

PN338

You've said in, and this is in paragraph 8C of your statement on the second page that – you refer to a decision of the Federal Circuit Court, do you see that?---Yes.

PN339

And you say you agree with findings of fact made in that case and refer to particular paragraphs of the judgment?---Yes.

PN340

Do you also agree with the finding of the Federal Circuit Court that the principal purpose and the primary and substantial aspect of the employment of the customer service agents was to load and drive a truck and deliver goods?---That the primary purpose was to deliver the goods to the customer, yes.

\*\*\* BRADLEY SHANE FOENANDER

XXN MR GIBIAN

PN341

Well, to load and drive a truck and deliver goods?---Sorry, can you repeat the question?---Do you also agree with the finding that the Federal Circuit Court made that the primary purpose, or the substantial aspect of the employment of the customer service agents as Coles calls them, is to load and drive a truck and deliver goods?---I agree with the Federal Circuit description of the duties of a CSA.

PN342

Right, okay, and including the part that I've just quoted to you?---I don't recall the specific wording of that part but I agree that the primary purpose is to deliver orders to a customer.

PN343

At their home or business?---At their home or business address, yes.

PN344

You've said in paragraph 13 of your statement that Coles' CSA employees are currently governed by the general Retail Award and not any Coles' enterprise agreement, do you see that?---That's correct, yes.

PN345

Now there's a bit of history to that, I think as most people know. The history is that Coles has had, at least in the last ten or 15 years, enterprise agreement's applying to its employees?---I'm not aware of the history of Coles' enterprise agreements but I believe so.

PN346

When I asked you about whether you were aware of the enterprise agreements, do you have some knowledge of the history of the instruments that are governing Coles' employees?---From my time at Coles since 2012, yes.

PN347

Well, at least since 2012, I think the structure has been that there has been a general shops agreement negotiated primarily with the SDA, I think. Is that right, is that your understanding?---That is my understanding.

PN348

I think there were separate agreements for meat employees for some period of time, in various states, do you understand that?---I'm not sure about departments outside of Coles Online so I'm not entirely sure how the meat agreements are dealt with or structured.

PN349

Does it ring a bell if I tell you that the main shops agreements were made in 2008, 2011 and then another one in 2015?---That does ring a bell, yes.

\*\*\* BRADLEY SHANE FOENANDER

XXN MR GIBIAN

PN350

And if I suggested to you that those agreements, without going to the detail, made changes to the award provisions that would otherwise apply with respect to hours of work and penalty rates?---I'm not quite sure what you mean, sorry.

PN351

That is, the agreements did not simply reflect the award requirements with respect to penalty rates and overtime and hours of work, but made changes to those as Coles thought appropriate to its business, or don't you know?---I'm not aware of that.

PN352

All right. I think when Coles first began to directly employ drivers to undertake Coles Online deliveries, I think the 2008 agreement was then in operation. I think this would have overlapped your time with Coles to some extent, at least. Are you aware that when the 2011 main shops agreement, if I can refer to it in that way, was made – Coles made a decision to exclude the drivers referred to as Customer Service Agents from the coverage of that agreement?---I'm not aware of the specifics of the decision but I am aware that they were excluded.

PN353

And there was subsequently, and this proceeded after you commenced employment with Coles, at least, to be a bargaining process for a separate agreement to apply to those drivers?---Yes, that's correct.

PN354

That wasn't ultimately made, no such agreement was ultimately made, is that correct?---That's correct, yes.

PN355

Rather, when the bargaining occurred for a new agreement in 2014/15, Coles decided to include the drivers in the main agreement?---That's correct, yes.

PN356

Now as we know, the 2015 agreement was ultimately found not to pass the better off overall test, and is no longer in operation, is that your understanding?---Correct.

PN357

And Coles, I think, refused to give any further undertakings to rectify those deficiencies, and informed its employees as to the arrangements that were going on, to go forward, are you aware of that?---I wasn't a party to any of those decisions but I'm aware that there was some comment from Coles.

PN358

Are you aware that subsequent to the 2015 agreement being found not to pass the better off overall test, Coles communicated that it would maintain the existing rates of pay?---Yes.

PN359

Base rates of pay, I should say. Yes?---Yes, that's correct.

\*\*\* BRADLEY SHANE FOENANDER

XXN MR GIBIAN

PN360

And would honour pay rises due in 2016, at least?---I don't recall what the agreement was in relation to pay rises.

PN361

All right. And inform the drivers, at least, that they'd now be covered by the retail award, including with respect to penalty rates?---That's correct, yes.

PN362

So are we correct in understanding that for the drivers, the present situation is that they are maintaining the – or Coles is maintaining the base rates of pay that were contained in the 2015 agreement?---The CSA's are on the same base rate of pay that they were on when they were removed from the agreement, yes.

PN363

Yes, or that were contained in the 2015 agreement, no longer in effect, do you agree?---Yes.

PN364

And is your understanding that they're above the base rates in the Retail Award?---Yes, that's correct.

PN365

Is your understanding that they're above the base rates for the classification in the Road Transport & Distribution Award?---I'm not aware of the base rates, the specific base rates in the Road Transport Award.

PN366

So where in your statement you've indicated that you've referred to differences between the Retail Award, that analysis didn't extend to looking at the rates, is that right?---So the focus was on the impact to the operations, predominantly in terms of how the operations were carried out and the hours that the CSA's work.

PN367

That is, the analysis that you've recorded in paragraphs 15 and 16 of any differences that might affect Coles between the Retail and the Road Transport Award, didn't extend to looking at the rates, is that right?---So I am aware that there are differences but I'm not aware of the specific rate differences.

PN368

Can you just answer my question. The analysis that you engaged in for the purposes of this statement, comparing the Retail and the Road Transport Award, you didn't look at the rates, is that right, for the purposes of that analysis?---I didn't look at the rates.

PN369

In any event, we'd be right in understanding, would we, that the present situation is that Coles is paying the base rates contained in the no longer effective 2015 agreement and applying penalty rates provisions to the drivers, at least, under the Retail Award?---That's correct, yes.

\*\*\* BRADLEY SHANE FOENANDER

XXN MR GIBIAN

PN370

So for example, for drivers who commence prior to 7 am, they would be paid over time for those rates, would they?---Yes, correct.

PN371

Would we be right in assuming that Coles, at least with respect to the drivers, intends to endeavour to negotiate enterprise agreements in the future?---I – that's not something that I'm responsible for. I - - -

PN372

You don't know or not know?---I don't know at the moment, no.

PN373

All right. Nothing further.

PN374

SENIOR DEPUTY PRESIDENT HAMBERGER: Does anybody – nobody else wants to cross-examination Mr Foenander, so – is there any re-examination?

PN375

MR DENTON: No re-examination, your Honour.

PN376

SENIOR DEPUTY PRESIDENT HAMBERGER: Okay, thanks very much, Mr Foenander, you're excused and free to go.

**<THE WITNESS WITHDREW**

**[10.17 AM]**

PN377

MR DENTON: Commissioner, that's all the evidence of Coles. I just wanted to know, while I'm on my feet, I understand there were some discussions yesterday as to the return dates for closing submissions in this matter. It was Coles' strong preference that the existing return dates be maintained. I understand that that will be the case.

PN378

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN379

MR DENTON: That it's on the 23 and 24 March. I just want to take the opportunity to flag that Coles does have some availability issues on the 24th and it would be Coles' preference to be on on the 23rd. I understand the estimate for the oral submissions would be somewhere between half an hour or an hour. I'm not sure whether the Commission intends to make any - - -

PN380

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, I mean it's unlikely we'd go to the 24th anyway, I'd say.

PN381

MR DENTON: Yes, all right.

\*\*\* BRADLEY SHANE FOENANDER

XXN MR GIBIAN

PN382



SENIOR DEPUTY PRESIDENT HAMBERGER: But we haven't cancelled the 24th. I think we agreed on that.

PN383

MR GIBIAN: We'd have no difficulty if Coles have some time on the 23rd, anyway.

PN384

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, so if we, when – we'll make sure. We'll just have to make sure on the day. So we're not changing the dates.

PN385

MR DENTON: Yes.

PN386

SENIOR DEPUTY PRESIDENT HAMBERGER: And I'm sure we can accommodate you on the 23rd.

PN387

MR DENTON: Thank you. Thank you, Commissioner.

PN388

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN389

MR DENTON: In that case then I'd ask to be excused for the - - -

PN390

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes. Yes, you're excused.

PN391

MR DENTON: As the Commission pleases.

PN392

MR DOWLING: Your Honour, might I rise at the moment. It's Mr Dowling here for the SDA, from Melbourne. I might ask that we be excused, also. The evidence dealing with the driver amendment for the Road Transport & Distribution Award is the only part that impacts upon my client, so we might ask to be excused. But can I also raise, for our part, if the matter extends to the 24th our preference is that the part that is confined to the definition of "driver," being the only part that affects us, be it possible for the accommodation of all of the parties and the Commission, be dealt with also on the 23rd? Otherwise - - -

PN393

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, we'll do our best, I think but – but I couldn't guarantee that but I – I think it's likely that's what will happen.

PN394

MR DOWLING: Thank you, Your Honour.

PN395

SENIOR DEPUTY PRESIDENT HAMBERGER: So you're excused.

PN396

MR DOWLING: Thank you, Your Honour.

PN397

SENIOR DEPUTY PRESIDENT HAMBERGER: So we now have Truck Moves.

PN398

MR CROSS: Yes. And just for completeness, your Honours, Commissioner, I note I appear for Truck Moves Australia Pty Ltd, Quick Shift Vehicle Relocations Pty Ltd, and Vehicle Express Pty Ltd.

PN399

SENIOR DEPUTY PRESIDENT HAMBERGER: So Truck Moves & Others.

PN400

MR CROSS: May it please. Which does then bring me to the first of the three statements upon which we seek to rely upon, which there's no cross-examination sought, being the statement of Don Clayton - - -

PN401

SENIOR DEPUTY PRESIDENT HAMBERGER: We'll call Mr Clayton's statement, despite the fact that it's not only Truck Moves, I appreciate, but we'll still call it TM1.

PN402

MR CROSS: TM1, may it please.

**EXHIBIT #TM1 STATEMENT OF DON CLAYTON**

PN403

MR CROSS: I tender and read that statement. The second statement upon which we seek to rely and upon which we understand there is some cross-examination sought, is that of Mr John Bradac, B-r-a-d-a-c.

PN404

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, so do you want to call Mr Bradac?

PN405

MR CROSS: Yes.

PN406

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN407

THE ASSOCIATE: Please state your full name and address.

PN408

MR BRADAC: John Bradac, (address supplied.)

**<JOHN BRADAC, AFFIRMED**

**[10.21 AM]**

**EXAMINATION-IN-CHIEF BY MR CROSS**

**[10.21 AM]**

PN409

MR CROSS: Just as a matter of housekeeping, your Honours and Commissioner, I think page 3 of Mr Bradac's affidavit in the Federal Court, which is the substance of his statement before this Tribunal, may not be included in your Honour's copies.

PN410

SENIOR DEPUTY PRESIDENT HAMBERGER: So - - -

PN411

MR CROSS: I took you before to a page of the document.

PN412

SENIOR DEPUTY PRESIDENT HAMBERGER: No, that's right. Thank you. I think you're probably right.

PN413

MR CROSS: Yes. So if I can just hand up copies which have been hole-punched that may be inserted.

PN414

Mr Bradac, you are the General Manager of Truck Moves?---That is correct.

PN415

And you've prepared a statement for these proceedings?---Yes.

PN416

That annexes your affidavit in the Federal Court of almost exactly a year ago?---That's correct.

PN417

Are the contents of that statement and the annexed affidavit true and correct?---Yes, they are.

PN418

We tender that statement, and read it.

PN419

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, Mr Bradac's statement is TM2.

**EXHIBIT #TM2 STATEMENT OF JOHN BRADAC**

PN420

SENIOR DEPUTY PRESIDENT HAMBERGER: Do you have an objection?

\*\*\* JOHN BRADAC

XN MR CROSS

PN421

MR GIBIAN: I just wish to make an observation, I'm not sure it's an objection. Mr Bradac, in his short statement in these proceedings annexes the statement that is said to have been filed and tendered in the Federal Court proceedings but there were parts of it that were in on fact read or relied upon in the Federal Court proceedings, which were at paragraphs 23 to 26, and 29 to 32. Now if he wants to adopt them in these proceedings, I suppose he can but what he's said in paragraph 1 of his statement is not entirely accurate.

PN422

SENIOR DEPUTY PRESIDENT HAMBERGER: All right.

PN423

MR GIBIAN: I just wish to make that observation.

PN424

MR CROSS: We press those paragraphs.

PN425

SENIOR DEPUTY PRESIDENT HAMBERGER: You do want to include it?

PN426

MR CROSS: Yes.

PN427

SENIOR DEPUTY PRESIDENT HAMBERGER: Mr Gibian.

**CROSS-EXAMINATION BY MR GIBIAN**

**[10.23 AM]**

PN428

MR GIBIAN: Thank you. Yes, Mr Bradac, now you described yourself as the General Manager of Truck Moves, is that right?---That is correct.

PN429

Mr Whitnall describes himself as the owner and director. What's the sort of management relationship between you and Mr Whitnall?---Mr Whitnall is my boss.

PN430

Your boss?---Yes.

PN431

All right. But he is also, in a day to day sense, involved in the business?---Not in the day to day sense, but we speak every day.

PN432

Yes, so he's not involved in the day to day sense, but you speak every day?---Yes.

\*\*\* JOHN BRADAC

XXN MR GIBIAN

PN433

All right. And I think you've been with the company since 2014?---That's is correct.

PN434

And you've set out your other employment history. Now you've made some observations both about the work of drivers employed by Truck Moves, and drivers more generally in what you described as the freight industry, that's correct?---Correct.

PN435

And I'll try and ask you this in a sort of general way. The first think you say, and this really is commencing at paragraph 11 on page 3 of the statement in the Federal Court, I should say, the annexures of the statement in these proceedings, is in relation to training?---Yes.

PN436

Do you see that?---Yes.

PN437

In paragraph 12 you refer to, or you indicate that drivers working in the freight industry are required to undertake significant training in order to ensure compliance with three different types of regulation, do you see that?---Yes, I can.

PN438

The first of those that you refer to in little (a) is the Heavy Vehicle, National Law, and Heavy Vehicle Regulations, do you see that?---Yes.

PN439

The Heavy Vehicle National Law also applies to Truck Moves' business, at least where it's moving trucks over, I think, 4.5 tonne in gross vehicle mass, I that right?---That is correct, yes.

PN440

And I assume Truck Moves trains its employees in respect of the obligations under the law and the regulations in that respect?---Of course.

PN441

SENIOR DEPUTY PRESIDENT HAMBERGER: What proportion of the trucks that you move would be in that category?---Well, to move any truck, if I may, if you move any truck in Australia you fall under those regulations, whether you're in the freight industry or not in the freight industry, so any truck that we move must adhere to the fatigue management rules and regulations of the company, is one of them.

PN442

But the specific Heavy Vehicle Regulations?---Yes. That encompasses fatigue management, that encompasses log books and those sort of things, so any vehicle over 12 tonne or higher in GVM requires a logbook, whether you're in the freight industry or outside.

\*\*\* JOHN BRADAC

XXN MR GIBIAN

PN443

Yes. What I'm not quite clear of, is there actually any significant difference between what training – if you just talk about paragraph 12 - - -?---Yes.

PN444

The type of training that your drivers need, compared to drivers working in the freight industry?---In paragraph 12, no, your Honour.

PN445

MR GIBIAN: And sorry, 12 little (b) you refer to the Occupational Health & Safety Legislation, do you see that?---Yes.

PN446

And that applies to, well, all employees, indeed, but including Truck Moves?---Yes, of course it does.

PN447

And the third thing you refer to is, and I'm sorry, I take a back step – I assume you have some regime for training your employees with respect to occupational health and safety obligations?---Yes, that's correct.

PN448

The third(sic) is environmental laws. Now I assume it has some application to your business, at least, so far as any spillages of fuel or oil or matters of that nature - - -?---Yes.

PN449

That may arise, correct?---That's correct.

PN450

And as I understand it there are, although this is perhaps separate an aspect of environmental laws, vehicles that are moved by Truck Moves that are the subject of dangerous goods regulation?---Correct. A very small percentage but yes.

PN451

Yes. It does happen, and I think you advertise for and recruit drivers who have dangerous goods licences?---Yes, we don't actually move product, we just – they're empty, so there's gas inside them.

PN452

Yes?---But that still qualifies.

PN453

Yes, and they are still subject to those regulations?---Correct.

PN454

And you ensure that your employees are trained in or appropriately qualified to deal with such a situation?---Correct.

\*\*\* JOHN BRADAC

XXN MR GIBIAN

PN455

In paragraph 13 you list various types of training that drivers, in what is more broadly described as the freight industry might undertake, do you see that?---Yes, I do.

PN456

If I could just ask you in a general way, you'll agree with me that the type of training that a particular driver would undertake, depends upon the type of work they undertake, the type of vehicle they're involved in, the type of freight, if any, that they're carrying?---Yes, I would say including the freight that they're carrying.

PN457

Yes. Well, that is, they may – in this list that you've provided, some drivers may do all of it, some may do some of it, and not others, correct?---Yes, our drivers don't.

PN458

Well, we'll come back to that but - - -?---Yes, okay.

PN459

Drivers in the freight industry, generally speaking, may do all of those types of training - - -?---Yes.

PN460

Or may do some only of them, correct?---Yes, that's correct.

PN461

That would depend upon the type of work they're engaged in, the type of vehicle they're driving, whether it has equipment attached to it or not, what kind of goods or materials they're carrying?---Yes.

PN462

Truck Moves, I take it, provides training to its drivers, at least in relation to, as we've already discussed, fatigue management, and other heavy vehicle regulations?---Yes.

PN463

In relation to the safe operation of different types of vehicles?---Correct.

PN464

In relation to fuelling, refuelling and fuel handling?---Yes.

PN465

Vehicle checks and roadworthiness issues?---Yes. Yes, they do a visual check.

PN466

Yes, well do you train them in that?---Yes, they have a book that they go through and we train them in that book.

\*\*\* JOHN BRADAC

XXN MR GIBIAN

PN467

And safe driving practices and safe driving distances?---Yes.

PN468

Use of trade plates?---Correct.

PN469

In terms of the work that's undertaken, if I can then, and I think you really deal with this in paragraphs 14 to 16, I suppose, in relation to drivers in the freight industry more generally, perhaps if I can ask you more generally again, the precise tasks that are undertaken by a driver in the, what you'd describe more generally as the freight industry, will depend upon, again, the type of vehicle they're engaged in, the type of work they do, the type of materials they cover?---Correct.

PN470

Correct?---Yes.

PN471

That is, you're not saying that each of these tasks is done by all drivers? Some will do some, and others will not, correct?---Correct.

PN472

All right. And you then deal from paragraph 19 with work performance by Truck Moves employees, do you see that?---Yes.

PN473

And some of those tasks are the same as those undertaken by drivers – some of those are the same in the list that you've provided in paragraphs 14 to 16, correct?---Yes, some are the same.

PN474

But some are missing, correct?---Correct.

PN475

In paragraph 25 on page 8 of your statement, you say that there is no classification for paying drivers when they are not driving, but rather being ferried between jobs, do you see that?---Yes, I do.

PN476

You're referring there to the Road Transport & Distribution Award?---Yes.

PN477

Yes. You say in paragraph 20-30 that you've reviewed the classifications in the Road Transport & Distribution Award, do you see that?---Yes.

PN478

You understand that the Road Transport & Distribution Award provides for hourly rates of pay?---Yes.

\*\*\* JOHN BRADAC

XXN MR GIBIAN

PN479



Is it your understanding that the hourly rates of pay only apply to a driver when they're actually behind the wheel of a moving vehicle?---Yes, but also including freight, when they're moving freight around.

PN480

I see. So your understanding is that a driver is only entitled to be paid the rates, the hourly rates of pay, in the Road Transport & Distribution Award when they're actually behind the wheel of a vehicle?

PN481

MR CROSS: Objection, your Honour. It's completely contrary to the answer to the last question.

PN482

SENIOR DEPUTY PRESIDENT HAMBERGER: Sorry, that - - -

PN483

MR CROSS: It is completely contrary to the answer to the last question and it's not - - -

PN484

MR GIBIAN: It's exactly the answer he gave - - -

PN485

MR CROSS: No the answer to the last question dealt with driving and also dealing with freight. That was the answer. It was a complete mischaracterization of what the witness has just - - -

PN486

MR GIBIAN: That's just false.

PN487

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, he's asking a question. No, can you ask the question? You can ask the question.

PN488

MR GIBIAN: Yes. So your understanding is, you understand that the old award provides for hourly rates of pay?---Correct.

PN489

And overtime and the like but - - -?---Yes.

PN490

A time based payment, correct?---Yes, correct.

PN491

And is it your understanding that the award only provides that those hourly rates of pay be paid when a driver is actually behind the wheel of a vehicle and actually carrying freight? Is that your understanding?---Yes.

\*\*\* JOHN BRADAC

XXN MR GIBIAN

PN492

And that's the basis upon which you say in paragraph 25 and 26 that – of the observations you make in paragraph 25 and 26 of your statement, is that right?---Yes.

PN493

So if a driver, leaving your drivers to one side, if a driver in some other aspect of the transport industry is required to wait at a particular location at the direction of their employer for a vehicle to be loaded or because of some delay of some nature, you're understanding is they're not entitled to be paid the hourly rates of pay for that time?---That's right, if they're in the transport industry, I believe they will be paid.

PN494

Perhaps I need to go back a step. Is it your understanding that, as you just said, the hourly rates of pay in the Road Transport & Distribution Award are only payable when the driver is actually behind the wheel of a moving vehicle, carrying freight, is that your understanding?---No. They're paid hourly rate while they're driving the vehicle.

PN495

Yes?---Yes.

PN496

So your understanding is, if they're not actually driving the vehicle but say they're waiting for a vehicle to be loaded or – at the direction of their employer, then they would not be entitled to be paid those hourly rates of pay?---No, sorry, they will be entitled to be paid an hourly rate under the award.

PN497

So even though they're not driving at that time, you understand that the Road Transport & Distribution Award would provide for payment for that time?---Yes.

PN498

All right. And if a driver in any other kind of transport business is required by their employer to travel to a location to rendezvous with a vehicle in order to take over the operation of that vehicle, is your understanding they'd be paid for that time under the Road Transport & Distribution Award?---Yes.

PN499

You then go on to refer in paragraph 28, to the transport worker classifications in the Road Transport & Distribution Award referring to the GVM, gross vehicle mass, of a vehicle?---Yes.

PN500

And some of them differentiate between the different grades, on the basis of the gross vehicle mass of the vehicle?---Correct.

\*\*\* JOHN BRADAC

XXN MR GIBIAN

PN501

You seem to suggest that this would present some difficulties for Truck Moves business, is that what I understand you to say?---That is correct.

PN502

The gross vehicle mass, am I correct in understanding, is the maximum operating weight of the vehicle when loaded?---Yes, that's on the compliance plate of the vehicle.

PN503

Yes, that is, the gross vehicle mass of the vehicle is specified by the manufacturer at the time of manufacture?---No. It's specified when it comes into the country and put on by the person who ADR's the truck. So when vehicles come in from overseas and we pick them up from the wharf there are no compliance plates attached to the vehicle.

PN504

Well, the vehicle mass, gross vehicle mass of a vehicle is required to be recorded on an identification plate, which is a metal plate, or I think it can be an adhesive - - -?---Yes, that's correct.

PN505

Label, affixed to the vehicle, correct?---Yes, that's correct.

PN506

And that's an obligation placed upon the manufacturer?---That is also correct.

PN507

Yes, all right. Can I just show you this document, and I can provide copies for the Bench, as well. This is an Australian Government circular - - -?---That's correct.

PN508

In relation to identification plates and of the supply to the market of vehicle plates, do you see that?---Yes, I do.

PN509

Are you familiar with this document?---Not in its entirety, no.

PN510

Not in its entirety. Tell me if you need time to read it but will you accept from me it requires a manufacturer to ensure that an identification plate is affixed to a vehicle?---That is correct.

PN511

Yes, and if you just see there's various content – I mean, there's formats that are required to be used, as well?---Yes, I see that.

PN512

But at the bottom on page 3 there's a heading towards the top of the page, "Layout and formatting of plates"?---Yes.

\*\*\* JOHN BRADAC

XXN MR GIBIAN

PN513

And it sets out both aspects of the layout and content, do you see that?---Yes.

PN514

Right at the bottom of the page it says - 5.3, refers to the variable information marked on the approved plate?---Yes, I see that.

PN515

And it's required to meet the following and there's a number of different matters, and at the top of next page, page 4, the third entry is 5.3.4, the first of the GVM,

PN516

"Gross vehicle mass in kilograms of all vehicle categories, other than passenger cars, forward controlled passenger vehicles, off road passenger vehicles, motorcycles or mopeds and trailers"?---Yes, I see that, yes.

PN517

So that's a requirement upon the manufacturer of the vehicles?---That is correct.

PN518

Can I tender that document?

PN519

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, so the identification plates and approved supply to the market vehicle plates circular is TWU10.

**EXHIBIT #TWU10 IDENTIFICATION PLATES AND APPROVED SUPPLY TO THE MARKET VEHICLE PLATES CIRCULAR**

PN520

MR GIBIAN: And that was ten, was it?

PN521

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN522

MR GIBIAN: Thank you. And the identification plate permits anyone looking at the vehicle to identify the gross vehicle mass of the vehicle?---That is also correct.

PN523

Yes, and indeed licences, that is the licence required to be held by a driver of a particular vehicle, is also differentiated by the gross vehicle mass of the type of vehicle being driven?---Yes, as long as the axles are - - -

PN524

You're required to get a different type of licence, in part, depending up on the gross vehicle mass of the vehicle, correct?--- Yes.

\*\*\* JOHN BRADAC

XXN MR GIBIAN

PN525

And I assume Truck Moves ensures that its drivers, its employers, are - - -  
?---Always.

PN526

Have the correct licence for the type of vehicle they are driving, correct?---(No audible reply.)

PN527

Thank you, Mr Bradac.

PN528

SENIOR DEPUTY PRESIDENT HAMBERGER: Mr Cross?

PN529

MR CROSS: No re-examination thank you, your Honours, Commissioner.

PN530

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks, very much.

PN531

COMMISSIONER LEE: Just before you go - - -

PN532

SENIOR DEPUTY PRESIDENT HAMBERGER: Sorry, yes.

PN533

COMMISSIONER LEE: I just want to ask you about paragraph 27, where you talk about your drivers driving a wide variety of different vehicles over the course of their work day. You also say they spend significant amounts of time not driving, at all and I'm not so fussed about that, but you talk about them driving a two axle truck as an example, and then a concrete mixer that doesn't have a bowl at the back, then they may be transported to drive a bus, they may later drive a 3-axle truck. How frequent is that type of day where a driver would drive that many different types of vehicles, allowing for the fact, as we've just heard the evidence, that they have to have a particular licence to drive a particular GVM?---I understand your question.

PN534

Yes?---Very frequent. Most of our metropolitan drivers, which is the majority of our movements in our business, would do seven or eight movements a day.

\*\*\* JOHN BRADAC

XXN MR GIBIAN

PN535

Yes?---And it could range from taking vehicles off the wharf. A ship may come in and we have three days to get all the trucks off that shipment from overseas, because most trucks are now manufactured overseas. And most of those come in without compliance plates and they have to be taken to a place that ADR's and puts the Australian design rules on them, and we would ferry those back and forth all day from the wharf. We have little buses that run around and we pretty much have the majority of our workforce doing metropolitan moves for this reason, and moving trucks from body builders from the ADR place, to another body builder to

have a tailgate put on, then to another place to have a body put on, then another place to have a bull bar put on, and then back eventually to the dealer. Yes, it's very often.

PN536

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you. Anything arising?

PN537

SPEAKER: Nothing arising, your Honours.

PN538

MR GIBIAN: Can I just ask one question arising out of that?

PN539

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN540

MR GIBIAN: In terms of the allocation of tasks to a particular driver, obviously that's a matter that Truck Moves controls - - -?---Yes, that's correct.

PN541

And if it allocates a number of trips on one day to a particular driver and one of those trips involves a requirement to have a heavy combination licence, for example, then the driver to perform the duties on that day that Truck Moves has allocated to that driver, requires it to have an HC licence?---Yes. Yes.

PN542

Nothing further.

PN543

MR CROSS: Nothing arising.

PN544

SENIOR DEPUTY PRESIDENT HAMBERGER: No. Thanks. You're excused.

**<THE WITNESS WITHDREW**

**[10.42 AM]**

PN545

MR CROSS: Yes, your Honours, Commissioner, our last witness is Mr Matthew Whitnall, W-h-i-t-n-a-l-l.

PN546

THE ASSOCIATE: Please state your full name and address.

PN547

MR WHITNALL: Matthew Stan Whitnall, (address supplied.)

**<MATTHEW STAN WHITNALL, AFFIRMED**

**[10.42 AM]**

**EXAMINATION-IN-CHIEF BY MR CROSS**

**[10.42 AM]**

\*\*\* MATTHEW STAN WHITNALL

XN MR CROSS

PN548

MR CROSS: Your Honours, Commissioner, just as a housekeeping matter, there were two documents identified in Mr Whitnall's affidavit that were confidential. The first was at paragraph 100, then - unsurprisingly that it's confidential, a termination letter of a Queensland manager, and the second was at paragraph 121 which a commercial in-confidence contract. If I can provide, on that confidential basis, copies to the Commissioner and my learned friend of that document.

PN549

SENIOR DEPUTY PRESIDENT HAMBERGER: If there's no problems then I can make an order, yes. I will indicate that the - - -

PN550

MR GIBIAN: I'm happy to give it back straight away, to be honest.

PN551

SENIOR DEPUTY PRESIDENT HAMBERGER: So are you happy to just hand it back when - - -

PN552

MR CROSS: It may be that your Honours and - - -

PN553

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, I can just indicate that we'll keep it confidential.

PN554

MR CROSS: Yes.

PN555

MR GIBIAN: Yes, your Honour.

PN556

MR CROSS: May it please. I'll hand up four copies of each of those documents.

PN557

SENIOR DEPUTY PRESIDENT HAMBERGER: So we won't go putting it on the internet, et cetera.

PN558

MR CROSS: It's just that there's characterisation, particularly of the contract, in the affidavit and it will give comfort, I would hope, to the Commission.

PN559

So Mr Whitnall, you are the director and owner of Truck Moves?---Yes.

PN560

And you've prepared a statement for the purposes of these proceedings?---Yes.

\*\*\* MATTHEW STAN WHITNALL

XN MR CROSS

PN561

Are the contents of that statement true and correct?---Yes, they are.

PN562

I tender and read that statement.

PN563

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, so Mr Whitnall's statement is TN3.

**EXHIBIT #TM3 STATEMENT OF MATTHEW WHITNALL**

PN564

MR CROSS: May it please. Nothing further.

**CROSS-EXAMINATION BY MR GIBIAN**

**[10.44 AM]**

PN565

MR GIBIAN: I might have to take a look at those documents in a moment but – I don't seem to have had a chance, but I'll start the cross-examination.

PN566

Mr Whitnall, you describe yourself and the director and owner of Truck Moves, correct?---Correct.

PN567

And I think you heard me ask Mr Bradac, but are you involved in the day to day basis in the management of the business?---I'm not on site, and – no, I wouldn't say.

PN568

But you're closing involved, or not closely involved?---I own the business. It's a managed investment and – so I have an interest, and John and I - - -

PN569

I mean, do you – if there's an issue with a particular driver whose – if there's something, you might become involved in the discussions with that driver, or if you're just negotiating contracts with suppliers, or what's your degree – with customers, I'm sorry, what's your degree of involvement in the company?---Currently, I wouldn't be involved with drivers.

PN570

But you are involved with customers and clients?---Yes, periodically, yes.

PN571

Periodically, all right. And when you say you're not currently involved with drivers did you – in the past, were you involved with drivers?---Yes.

PN572

That is, in the past you had a more direct management role, is that right?---I was the Managing Director for 11 years.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN



PN573

All right, until when?---2014.

PN574

Until Mr Bradac started?---Correct.

PN575

You have referred in your statement to Federal Court proceedings in which Truck Moves was involved, correct?---Correct.

PN576

Now Truck Moves commenced those proceedings in the Federal Court?---Correct.

PN577

And it did so, I think you've said in earlier evidence, for two reasons, one that there was a decision of the Federal Circuit Court that had found that a business similar to Truck Moves was covered by the Road Transport & Distribution Award, correct - - -?---Sorry, could you ask the question again?

PN578

You're aware that there was a decision of the Federal Circuit Court in 2014 which found that a business very similar to Truck Moves was covered by the Road Transport & Distribution Award - - -?---Yes. In Melbourne(?), yes.

PN579

For its drivers, correct?---Yes.

PN580

Yes. Brady, I think it was called, correct?---Yes, Brady.

PN581

And that was one thing that prompted the company to commence proceedings in the Federal Court, correct?---My advice was that that would be the way to resolve the issue.

PN582

I think the other step that prompted Truck Moves to commence the litigation was that in correspondence, the Fair Work Ombudsman had indicated to Truck Moves that it believed it was covered the Road Transport & Distribution Award and required to adhere to the requirements of that award with respect to its drivers, correct?---I don't think so.

PN583

I can show you the – can I just have a moment?

PN584

DEPUTY PRESIDENT SAMS: I thought he said it was open to interpretation.

PN585

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN586

MR GIBIAN: I'm sorry?

PN587

DEPUTY PRESIDENT SAMS: I thought the Ombudsman said it was open to interpretation.

PN588

MR GIBIAN: In communications with this Commission or - - -

PN589

DEPUTY PRESIDENT SAMS: It's something I read. I - - -

PN590

MR GIBIAN: Yes. Well, I can – if I could just have a moment. Yes, so in your affidavit in the Federal Court proceedings, and I can show you it if you doubt it, it's an affidavit that was sworn by you on 25 November 2014, you said in paragraph 7 that "I make this application because, a), two complainants, the respondents in these proceedings, are arguing that the Road Transport Award applies to them; b), the Federal Regulator, the Office of the Fair Work Ombudsman has said to Truck Moves that the Road Transport Modern Award applies to it and suggests that Truck Moves compensates the complainants and its other drivers; c), the Federal Circuit Court in *Ruth v Brady Industries [2014]FCCA1435*, has held at 25 that the Road Transport Modern Award apply to a business similar to Truck Moves. Do you recall saying that in your affidavit?---I do.

PN591

So you now recall that the Office of the Fair Work Ombudsman did advise the company that it was covered by the Road Transport & Distribution Award?---Yes.

PN592

And required to remunerate and otherwise afford the conditions of employment under that Award to its drivers, correct?---Yes.

PN593

And as you go on to say in that affidavit, Truck Moves disagreed with that view and that's why the Federal Court proceedings were commenced, correct?---Yes.

PN594

But the position as at 2014, and – sorry, November of 2014, you made that application, the situation at that point in time was that there was a decision of the Federal Circuit Court that a business such as Truck Moves was covered by the Road Transport Award, correct?---The court made that decision, yes.

PN595

And the regulator in this area also expressed the same view, correct?---Correct.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN596

That was the situation that existed towards the end of 2014, which you endeavoured to, and ultimately did successfully upset in the Federal Court proceedings, correct?---Correct.

PN597

Which were decided – sorry, I don't have a date off the top of my head, I think towards two thousand and - - -?---The only thing I would add to my answer is that we'd had prior written advice that it didn't apply, in years prior from similar, not quite as high, regulatory bodies.

PN598

Yes, yes. You hadn't under the Modern Award system, had you, since 2010, correct?---No, no.

PN599

Yes. But I said, no prior advice that the Road Transport & Distribution Award didn't apply and you'd received express correspondence from the Fair Work Ombudsman asserting that it did apply to your drivers, correct?---Yes.

PN600

Yes. You've given some general evidence about the operations of Truck Moves' business. Basically, in a general sense, at least, a client of the company has a vehicle which is in one location, which it wishes to move to another location, correct?---An unregistered vehicle primarily, yes.

PN601

It has a vehicle in one location which it wishes to move to another location, correct?---Yes, correct.

PN602

Sometimes those are registered vehicles, sometimes they're unregistered vehicles, correct?---Primarily unregistered.

PN603

Yes, I know you keep saying that, but they're sometimes registered, sometimes unregistered, but it's a vehicle that wishes to be moved from one place to another place, correct?---The vehicle doesn't wish to be moved but the client wishes it to be moved.

PN604

The client wishes the vehicle to move, correct?---Correct, yes.

PN605

Thank you. And say that's a transport company that owns or is buying that vehicle, it could direct one of its own employee drivers to drive the vehicle from one place to the other, correct? That's one way it could get that task done?---Certainly, it could choose to do that, yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN606

A manufacturer or wholesaler of vehicles could employ its own drivers to drive a vehicle one place to the other?---Yes, it could do.

PN607

But you seek to intervene in that process and advertise yourself as a business that will instead undertake that task for it?---Correct.

PN608

And what Truck Moves will do is take possession of the vehicle and arrange for an employee driver to deliver it to the delivery location, correct?---Correct. But our service has primary been born servicing the trade of vehicles being bought and sold, both new and used. That's our primary customer base.

PN609

All right. We'll come back to that but the question I asked you was, the function that Truck Moves undertakes is to take possession of the vehicle and direct one of its employee drivers to drive that vehicle from the pick up location to the delivery location, correct?---In simplest terms, yes.

PN610

Sometimes – I mean, there are other aspects of the task that the driver undertakes and I'll come to that in a moment but in some situations the vehicle is moved directly from the pick up location to delivery address, correct?---Correct.

PN611

In other situations it's moved from the pick-up location to a depot operated by Truck Moves and stored there for some period of time, correct?---Correct.

PN612

And then moved from the depot to wherever the ultimate delivery location is, correct?---Correct.

PN613

Or maybe between depots of Truck Moves in different locations, as well?---Correct. That does happen, yes, correct.

PN614

All right. And I think you've said and agreed with me that the types of vehicles that are moved by Truck Moves, I think they include pre-registration but also registered vehicles, correct?---Correct.

PN615

And I think you've made the point that there's a wide variety of vehicles, heavy vehicles, buses, cranes, correct?---Correct.

PN616

I think ones with TV satellite dishes attached, cement vehicles with agitators, correct?---Correct.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN617

Sometimes the transport involves the moving of a trailer, as well as the vehicle itself?---Correct.

PN618

Sometimes the trailers move from the same pick-up location to the same delivery location, correct, affixed to the – attached to the vehicle, correct?---Yes, correct.

PN619

Sometimes the driver is required to go to one address to pick up the vehicle and then drive to another address and pick up the trailer, for the purpose of the operation that Truck Moves is engaged in?---Very, very rarely but yes, that's correct. That's occurred in the past.

PN620

All right. Can I just take you to your - - -?---I would just add to that answer if that's okay? Is that all right?

PN621

Yes – no?---Okay.

PN622

I think you've answered the question I asked you?---All right.

PN623

So that was the only question I asked you?---Thank you.

PN624

Can I just take you to your – you have a copy of your statement there?---I do.

PN625

I don't think you have the annexures, is that correct?---No. I'm sorry about that, yes.

PN626

That's all right. I'll get you provided in a moment with a copy of the annexures?---All right.

PN627

In paragraph 44 you give some indication of the range of industries of Truck Moves services, do you see that?---Number?

PN628

Forty-four on page 8?---Forty-four, yes.

PN629

Well, 43, 44 and 45, do you see that?---I do.

PN630

And in paragraph 45 you say that most of Truck Moves' clients are not in the freight and transport industry, do you see that?---I do.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN631

But then in the second sentence that where the client is in the freight and transport industry, Truck Moves provide the service that is ancillary to that industry, do you see that?---Yes. I do.

PN632

And you give the example that Truck Moves relocates assets?---Yes.

PN633

By "assets," I take it you mean vehicles?---Yes.

PN634

For divisions of Toll, Linfox and Patrick's?---Yes.

PN635

Do you see that?---Yes, I do.

PN636

And as I suggested to you – well, you understand that Toll, Linfox and Patrick's employ their own drivers for the purpose of their business, correct?---The purpose of their business is to relocate freight, yes.

PN637

Well, you understand they have employed drivers who drive trucks for a living?---Yes, I do.

PN638

And one way in which, if they have an asset, a truck, which is in Melbourne that they want to move to Sydney, is to direct one of their drivers to do that work, correct?---I don't know but I would assume that they could do that if they chose.

PN639

Yes. Well, you don't doubt that - - -?---I'm sure it happens.

PN640

If Toll had a truck that was in Melbourne that it wanted moved to Sydney, it could direct one of its employee drivers, subject to fatigue regulations and the like, to drive it to Sydney, correct?---My understanding is that they generally use their – they've got a pool of workers on light duties and that sort of thing, and they do utilise them sometimes.

PN641

Can you just answer the question I asked you, which was - - -?---I did.

PN642

MR CROSS: The witness was answering the question.

PN643

MR GIBIAN: Do you understand - - -

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN644

MR CROSS: He should be allowed to answer the questions. That would be most helpful.

PN645

MR GIBIAN: Do you understand that one way in which Toll could move a truck from Melbourne to Sydney, if it had a vehicle that it needed to use in Sydney that was in Melbourne, is to direct one of its employed drivers to drive the vehicle from Melbourne to Sydney, correct?---Yes, as I said.

PN646

It's not a complex proposition. Now you'll see you added a footnote, footnote 2, to the third sentence in paragraph 45, do you see that?---Yes.

PN647

It appears at the bottom of the page, do you see that?---Yes.

PN648

And there you've said that if you were covered by the Road Transport & Distribution Award like these freight companies are so covered, there will be little or no incentive or reason for them to engage Truck Moves, do you see that?---I do.

PN649

And that as a result, the employees that you employee would be unable to work, do you see that?---I do.

PN650

What you mean by that is that instead of engaging Truck Moves, that Toll or Linfox or Patrick's are more likely to direct their own drivers to undertake that task, is that right?---Most probably.

PN651

Yes, but what – it's your - - -?---I don't know. I can't answer for them.

PN652

It's your sentence. I'm asking you what you meant in the footnote that you've added at the bottom of page 8 of your statement. You say that if you were covered by the Road Transport & Distribution Award there'd be little or no incentive or reason for them to engage Truck Moves, correct?---Yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN653

What you mean by that is that the incentive that they have now, or reason that Toll or Linfox or Patrick's have now to engage Truck Moves, is that Truck Moves is not covered by the Road Transport & Distribution Award and able to pay lower rates of pay?---Incorrect. I would disagree with that. What I mean is that our services are a standalone vehicle ferrying service and it's far more efficient for us to do it with a pool of drivers that are, you know, of the demographic and age, that are so willing and it's not in the interests or the efficient operation of a freight business to pull a driver out of a contract or to have drivers just waiting around,

being paid freight industry rates, should there happen to be a vehicle being relocated from one place to another.

PN654

SENIOR DEPUTY PRESIDENT HAMBERGER: So how would things change if you were covered by the Road Transport & Distribution Award?---What it does is, it changes our base labour cost significantly, and where Tolls have a – well, I mean, it's a multi-billion dollar business and they can – and they have drivers that they can move around within their business and offset that cost. We have no other service that we provide. The other thing is that we don't have any economic possibility of moving the vehicle, whereas Tolls could send one of their drivers, but they would load the vehicle and they would charge, say, ten different customers for the freighting of whatever it was under their contracts or the transport operations, whereas that's not a service that we offer. We've never raised a freight contract – sorry, an invoice to move freight, ever in the whole time I've owned this business. It's just not the – not what we do.

PN655

Sure. Just, so I'm just – but you said it would increase your base labour cost, so I'm just saying, because in what – can you just explain on that a bit?---Well, they're paid under the National Minimum Wage Order, and trip rates for long distance and hourly for local. If we – if the rates of pay change then – to be the same as a freight business, we have no way of recovering that additional cost, as if a - - -

PN656

What do you estimate the increase in the rate would be, the base rate?---I've talked about it a little bit in the statement but - - -

PN657

Yes. Can you just take me to that?

PN658

DEPUTY PRESIDENT SAMS: You say they're slightly above the minimum rate, what do you mean by, slightly above?---Just a couple of cents. We just round up.

PN659

I see.

PN660

SENIOR DEPUTY PRESIDENT HAMBERGER: So you've got it in here, just (indistinct) but - - -

PN661

MR GIBIAN: Paragraph 125, your Honour?---125.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN662

Page 26?---The economic availability of the vehicles is just not present for what we do, because our customers, although Mr Gibian and the TWU are soft of focused in on three of our, you know, 500 customers, the other ones are involved



primarily in the manufacturing trade, importation and sale of vehicles, and it's much more efficient for a truck dealership to not send out its salesforce, sort of, to a wayward station or to get a bull bar fitted and – they're employed to serve trucks and service their customers, as an – well, I can't term – customer-facing person in those businesses, and we would be more of a business to business type of service. Sorry, to your question, 125?

PN663

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes?---Now this is – these changes are just the base line, so on top of that, of course, is workers' compensation, payroll tax, there's a 23 per cent - - -

PN664

It's calculated on that basis, yes. All right?---Further on-costs that we would have to absorb, as well. Does that answer the question?

PN665

Yes, thanks.

PN666

THE WITNESS: It has a big impact.

PN667

MR GIBIAN: Can I take you back to page 8 of your statement?---Yes.

PN668

I was asking you about the first sentence in point 2 on page 8, at the bottom of page 8, do you recall that?---Yes.

PN669

And in answer to that question you started hypothesising about whether or not it would be efficient for Toll to get one of its drivers to direct one of its driver to drive a truck from Melbourne to Sydney. Do you recall giving that evidence?---Yes.

PN670

Do you recall that a few questions before that you said you couldn't comment on their businesses, and - one way or the other. Are you able to comment on their businesses, or not?---It depends what the question is.

PN671

Well, the - - -?---Do I know they exist?

PN672

What you've said in paragraph – in the first sentence of the second footnote at the bottom of page 8, is that if you, as Truck Moves, is covered by the award there'll be little or no incentive or reason for them to engage Truck Moves, correct?---Yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN673

What's what you're saying? And what would change, you explained, in answer to the question by Senior Deputy President Hamberger, was that your wage cost would increase if you were covered by the Road Transport & Distribution Award, correct?---That's part of the answer, yes.

PN674

Yes. And I think you mentioned there might be changes, flow on changes, to worker's comp and the like but it's the wage cost that will change. That's what would change if the Road Transport & Distribution Award applies to your business, correct?---That's, again, one part of the change that – yes.

PN675

Well, when you were asked by Senior Deputy President Hamberger what would change you said, "our base wage would increase," correct?---Correct. He asked me - - -

PN676

That is the change, correct?---Yes.

PN677

And it's that change that you were referring to in the first sentence of the second footnote when you say, "If we are covered by the Road Transport & Distribution Award. That is what would change, is the base wage rates, correct?---Yes.

PN678

And that change, that is the change in the base rates would, you say, mean that there would be little or no incentive or reason for freight companies such as Toll, Linfox or Patrick's, to engage Truck Moves, correct?---In isolation, yes. That's what I'm saying.

PN679

That's what you say there, isn't it?---Yes, of course.

PN680

Yes?---Yes.

PN681

And do we understand from that, that you understand that Toll, Linfox and Patrick's, and other companies of that nature, at least, engage Truck Moves because it's able to pay its driver less than they are able to pay their drivers under the award or enterprise agreement that apply to their businesses? Or don't you know?---You said, "do we understand?" Sorry, can you just ask the question again?

PN682

Yes. You've said that if you were covered by the Road Transport & Distribution Award there'd be little or no incentive or reason for companies such as Toll, Linfox or Patrick's to engage Truck Moves, correct?---Correct.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN683

And what would change, you've said, if the Road Transport & Distribution Award did apply, is that there'd be an increase in wage rates, correct?---Correct.

PN684

And do we deduce from that, that you understand that Toll, Linfox and Patrick's use Truck Moves because it is able to pay its drivers less than they are able to pay the drivers that they directly employ under the enterprise agreements or Road Transport & Distribution Award that apply to their business?---No.

PN685

All right. So when you say that there would be little or no incentive, or reason for companies like that to engage Truck Moves if you were covered by the Road Transport & Distribution Award, we don't understand that to mean that the incentive, or the reason is the lower wage rates?---As I said before, it's part of it. We provide a service that they don't, and they can't – a level of service that they can't match.

PN686

Yes?---So it's not just about the cost of the service provision. And I can cite an example if that so helps.

PN687

SENIOR DEPUTY PRESIDENT HAMBERGER: Could you? Could you?---Yes. So the contract – one of the contracts that you have up there is from Daimler, which is our major client and we've been doing their work for a long time and we've re-tendered and re-won that work, I think, four times. One of their customers is Tolls and by default, we're their sole provider for getting their product to market for Daimler, so Mercedes Trucks, Freightliners, Fuso, that sort of thing. Tolls asked – sorry, Tolls had a National Fleet Manager who insisted that we, as Truck Moves, did not move their vehicles, that their vehicles would only be allowed to be moved by Toll vehicles, so utilising their market power or however you want to describe that, and we were not removed but we were set aside and significant pressure was put onto the Fleet Manager that this would occur. So Tolls sent some of their own drivers and some of their own vehicles and that sort of thing, to start moving these vehicles that had to travel from, from memory, from Melbourne to Perth, and there was about 25 of them, so it was a big loss for us, small business. After about five deliveries they realised that they couldn't provide the service that we could, within their own network of branches and divisions and the Branch Managers and Division Managers required these vehicles to be delivered in a timely fashion so that they could put them into contracts and that sort of thing, so the work actually came back to us and we fulfilled the rest of those deliveries.

PN688

So you're saying it's not just the wage rates - - -?---No.

PN689

It's the service, because you provide a specialised service?---To the trade.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN690

MR GIBIAN: You said in answer to that question and in answer to earlier questions that you were able to provide a specialist stand-alone service, correct?---Correct.

PN691

If the Road Transport & Distribution Award applied to you, you would still be able to provide a specialised, stand-alone service, correct?---(No audible reply.)

PN692

You would just have to pay slightly higher wage rates to the drivers that you employ, correct?---It – it – what it would do is – sorry, just ask the question again?

PN693

You've described Truck Moves as providing a stand-alone, specialised service in moving vehicles, correct?---For the trade, yes.

PN694

And you've described an example of a company that thought that it would be better for you to do it for them than for them to engage their own drivers, correct?---Tolls.

PN695

Yes, and Tolls, if it was employing its drivers to do that work, would have to pay them in accordance with an enterprise agreement that applies to their - - -?---I don't know.

PN696

You don't know?---I don't know what they're paying but - - -

PN697

At least, under the Road Transport & Distribution Award, you would understand?---If they're in the freight industry, then yes.

PN698

Do you know whether Tolls is in the freight industry?---I would assume they are.

PN699

Yes. You described yourself as, and having the benefits of a specialist stand-alone service, correct?---A special?

PN700

Specialist stand-alone service that is able to provide, you hope, a good service to clients, correct, because you are specialised and stand-alone, correct?---Yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN701

If the Road Transport & Distribution Award did apply to your business, nothing in the Road Transport & Distribution Award would require you to cease being a

specialised or stand-alone service, correct? You would just have to pay some higher wage rates, correct?---We would have to pay if it was found to be, yes.

PN702

But it wouldn't otherwise require you to stop being a specialist stand-alone service, providing the services that you do to industry, correct?---I – the outcome of that would have a big impact on whether we could or not. I – from what we understand, we would have to seek alternate ad services, change – modify what we're doing.

PN703

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, just on that, I mean, apart from the wage rates, the base wage rates that apply to the classifications in the Road Transport & Distribution Award, is there anything else about the award, as the company applies, that would create difficulties for you running the service like that, apart from that issue? I understand that issue but are there any other issues?---If I can speak freely?

PN704

Yes, please do?---The thing is that the TWU is obviously agitating for change to have us included in the industry. We've maintained an successfully proved that we've never been in the freight industry. Our customers don't ring us and ask us to move freight. There's never a discussion about how many pallets can you carry, or what - - -

PN705

Sure?---You know, the nature of the workers that we hire are semi-retired, older workers who are looking for a job that's very straight-forward and simple. And if we receded out of what we're doing, providing our service, the people in our business would not go back – would not go into the freight industry. They would probably go back and work inside, I don't know, a truck dealership or something.

PN706

Yes. Yes. That's not quite the question that I'm asking though?---Sorry. I'm sorry.

PN707

What I'm trying to do is get – is try to get you to help me. I mean, in terms of the – I mean, I understand your point that you can pay – because you're not covered by the award you can pay a lower wage rate, you're paying basically the national minimum wage plus a few cents?---Yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN708

And obviously if you were under the Road Transport & Distribution Award you would have to pay the minimum wage rates for the relevant classification, I get that. Is there anything else about the award that doesn't – that would create problems from the point of view of the business?---Yes, so that the – the way that the award is structured and the driver in a shift has to – you have to pay the

highest rate for whatever the highest vehicle is, that's very problematic. Just by way of helping understand our industry as opposed to their industry - - -

PN709

Because, what, because you - - -?---Yes.

PN710

They change so often, is that - - -?---Well, the trade plates. So a truck dealer, when it obtains a trade plate to move unregistered vehicles around, and it may have two or three of them, if can obtain insurance for a certain number of moves and it can specify the vehicles and that sort of thing. When we go to apply for trade plate insurance for the trade plates that we have, we can't specify – we don't know which vehicle we're going to move tomorrow, who the driver is, where it's going to go, so we're – we need to offer that flexibility. It's the same way the classifications – we take a high level of insurance that covers everything that may come to us, and so we offset that by a flat fee to the customer, and the wages is, you know, a flat rate, as well. If we have to try and forecast what vehicles and then thus what our labour costs are going to be every day, we couldn't operate. We just couldn't work it out. The drivers would have to – I mean, I just don't know how they would expect us to - - -

PN711

DEPUTY PRESIDENT SAMS: So the differences between a number of classifications and what attracts to that in terms of carriage and - - -?---Yes.

PN712

Haulage and weight, tonnage - - -?---Yes.

PN713

And just one classification that you have, is that the point?---Yes. Yes. We just – we don't charge differently for different vehicles. If it's a ute or a Kenworth prime mover going from somewhere across town, the customer is charged the same rate and the driver is paid the same rate, because it's a – it's – if we have to then work out six different classifications, and then if it had a – if it had a crane on the back we'd have to pay a crane allowance, even though we're not engaged to operate the crane, but under the award we may have to pay an allowance because it's got a – or a – you know, it just becomes very, very complicated and unworkable. Because it's not structured for what we do.

PN714

SENIOR DEPUTY PRESIDENT HAMBERGER: Thank you.

PN715

MR GIBIAN: Are you aware that in transports companies that drivers could drive different types of vehicles on the same day, the courier companies or – do you have any knowledge of that, or you just don't know?---(No audible reply.)

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN716

And you're aware that the award makes specific provision for that circumstance to apply in the transport industry, generally - - -?---Yes, I - - -

PN717

And how employees are to be paid in that circumstance, correct?---In the freight industry?

PN718

You're aware that clause 19 – you refer to it in your statement, clause 19 of the award addresses specifically a situation in which on one day, a driver drives more than one type of vehicle, are you aware of that?---Yes.

PN719

And contemplates that that is something that will happen in the road transport industry, correct?---Yes.

PN720

And sets how an employee is to be paid in that circumstance, correct?---Yes.

PN721

Now can I ask you about the wage rates that you do pay. As you've noted, you set those out in paragraph 125. You say you pay \$22.15 per hour and that's for all drivers, is it?---Yes.

PN722

And you say that's to its casual drivers. All the drivers are employed as casuals, are they?---They are.

PN723

Yes, with no guarantee of work?---That's correct.

PN724

And the \$22.15 is calculated by multiplying \$17.70, which is the national minimum wage, correct - - -?---Yes.

PN725

Together with the compulsory standard 25 per cent casual loading, correct?---Correct.

PN726

And so to reach \$22.15. When you said there's rounding up, is there some rounding up in the 15, is there, between 14 and 15, is that right, cents?---If that calculation is accurate to the percentage then I might have made a mistake, so - - -

PN727

So you think it's exactly the minimum wage plus the compulsory casual loading?---Yes.

PN728

Right, and leaving junior rates and special rates aside, you understand that that is literally the lowest rate of pay capable of being paid to any employee in Australia for casual work?---Yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN729

And you understand that the national minimum wage is an hourly payment, compulsory hourly payment?---Yes.

PN730

It must be paid for each hour worked by an employee?---Yes.

PN731

And in relation to – I think you've said that there's no – you know, that all the drivers are casual. You've attached – sorry, I might give you the annexures. Sorry, I don't think he has his annexures and – sorry about that. They're not stapled so we might just have to put them in front of you and turn them over if that's - - -?---Okay.

PN732

A practical way of doing it. You've included an employment contract, or a letter of offer of employment which the company uses. It's MW8. There are stamped page numbers but mine seem to be cut off, if my learned friend can help.

PN733

MR CROSS: Fifty-nine.

PN734

MR GIBIAN: Fifty-nine, I think. I'm not sure whether yours has page numbers attached to it or not?---Which item was it, sorry?

PN735

It's MW8?---Eight.

PN736

Perhaps if I can approach, your Honour – I'm sorry, yes. Does the copy at the Bench have page numbers?

PN737

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN738

MR GIBIAN: Yes. I think the copies we received seem to have had those cut off, but anyway, it's page 59?---Yes.

PN739

You'll see that the employment is described as an offer of casual employment with Truck Moves as a driver and it's subject to the following conditions, do you see that?---Yes.

PN740

And the second heading in the left-hand column is casual employment, do you see that?---Yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN741



And it notes that the driver "is employed on a casual basis and as such, Truck Moves is under no obligation to provide you with any number of shifts, hours or jobs," do you see that?---I do.

PN742

I take it, Truck Moves doesn't either guarantee that any particular work will be provided, or any minimum shift length, is that right?---Correct.

PN743

And the remuneration is then set out to be an hourly rate which, I'm not sure where - this has \$19 handwritten on it, but anyway, that was the rate at the time that this was produced, correct?---Yes.

PN744

Or as you understand, at least?---Yes.

PN745

You understand this to be the standard type of employment agreement used by Truck Moves?---It is.

PN746

And it then says – well, firstly with respect to the hourly rate of \$19, I take it that's now \$22, you say, that rate is paid for all hours worked? That is, there's no overtime or penalty for night work or if an employee works over 38 hours a week?---They don't do night work, but yes, there's no overtime.

PN747

No overtime regardless of the situation, correct?---Yes.

PN748

And then under the heading, or next to the heading, "Remuneration," it describes local work as being within 150 kilometres of the GPO, do you see that?---I do.

PN749

And then it indicates that the driver will be paid various trip rates, inclusive of any casual loading for casual and interstate trips, do you see that?---I do.

PN750

That the company does move vehicles, well, both to country locations and interstate, more than 150 kilometres from the GPO?---Yes.

PN751

And in that event the company doesn't pay the minimum wages and hourly rate of pay but just pays a trip rate. That is, a lump sum for the trip?---It does, plus any waiting time or any delays.

PN752

Well, it pays a lump sum for the trip, correct? That is, what's the Sydney-Melbourne trip rate?---The base – the base rate, yes, is a trip – a set trip rate.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN753

That is, it's a lump sum of money not calculated by reference to a number of – the number of hours in fact worked by the employee on taking that trip, correct?---It's loosely worked out on the time it would take.

PN754

You say you calculate what you think the time taken would be and that's how you work out the trip rate, is that right?---Correct.

PN755

But you don't pay a different trip rate depending upon the hours actually required on a particular occasion, is that right?---Different – sorry, say that again?

PN756

That is, you pay the trip rate for, say, a Sydney or Melbourne run, correct?---Yes.

PN757

That's the rate that's paid, correct?---Yes.

PN758

All right. And you referred in an early answer to waiting time. You'll see there's no reference in this contract to – this is the standard contract, to any payment for waiting time, do you see that?---I do.

PN759

And by waiting time, you mean some unexpected delay, if the vehicle is not ready to be picked up or if a return flight's delayed, or something of that nature, is that what you're referring to?---Yes. It's – or a - - -

PN760

Yes?---Yes.

PN761

All right, and that's something that is a discretionary matter the company assesses each time a claim is made, is that right?---It is, yes.

PN762

That is, the driver would have to make a claim and the company decides on the discretionary basis whether it will pay that on any particular occasion, correct?---Yes.

PN763

If you'd just go back to the text of your statement, if you still have that. You could probably close that bundle if that's the most convenient course for you?---Okay.

PN764

But keep it with you, if you can try and do so?---Yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN765

DEPUTY PRESIDENT SAMS: This provides for overnight allowances, is that common?---Is that common for?

PN766

Well, this contract that is at page 59, refers to overnight allowances?---Yes, we pay every time there's a trip that includes overnight.

PN767

Is that common?---Yes, every time.

PN768

Right?---Sorry, common as in - - -

PN769

SENIOR DEPUTY PRESIDENT HAMBERGER: Is it common for people to stay overnight, or is it – you pay them on all the contracts but - - -?---Sorry - - -

PN770

DEPUTY PRESIDENT SAMS: That's what I meant?---We would – we would complete, perhaps, a hundred – anywhere from 70 to a 100 interstate long distance trips in a week and they would all involve an overnight component. We also provide the drivers with a credit card in their name and there's a very strict policy that they can't be driving from sunset until sunrise. So there's no night work. And we pay for the hotel. And they're not allowed to sleep in the trucks, it's just – they're new trucks.

PN771

MR GIBIAN: Well, firstly, they're not all new trucks, are they? That's some of your work. Other work is existing vehicles that are being relocated for some reason, correct?---Yes.

PN772

Back in your statement, I just want to take you to paragraph 68 on page 13 - - - ?---Yes.

PN773

You say there that as a practice, drivers are not required to drive at night, do you see that?---I do.

PN774

And you refer to the credit card arrangement that you just mentioned, do you see that?---I do.

PN775

You then say in the fifth line of paragraph 68 that standard hours at Truck Moves are usually eight hours a day, do you see that?---I do.

PN776

And you acknowledge that applies for extended driving hours under the national heavy vehicle laws?---I do.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN777

Yes. Now when a driver is doing an interstate or longer trip where an overnight stay is required, are they literally required to stop driving after eight hours?---Sorry, can you just ask the question again?

PN778

You've said in the fifth line of paragraph 68 that standard hours at Truck Moves are usually eight hours a day, do you see that?---Yes.

PN779

If a vehicle is being located from Sydney to Perth, is the driver meant to stop driving literally when he – usually he, but he or she finishes eight hours?---No. They would adhere to whatever the standard hours of a – under the terms of their log book.

PN780

So after 12 hours?---Yes, with the breaks.

PN781

Assuming they're then required, as they would be, to stay overnight, you say the practice is not that they sleep in the truck, is that right?---Absolutely.

PN782

That they'd have to find a town or somewhere where they could stay, is that right?---Correct.

PN783

And on that day, assuming they'd driven 12 hours, would they be paid \$22.15 by 12 hours, is that right?---It would work back to that. That's a trip rate.

PN784

All right, so they'd just be paid for the trip, plus the \$35 or whatever it was for the overnight?---\$45 if they're going to Perth.

PN785

Sorry?---We pay a higher – slightly higher amount because hamburgers are \$20 and hotels are more expensive and – everything's more expensive once you get out into the more isolated part of Australia, so that's why in the contract it says, "35 or 45."

PN786

Yes, it says, "35 per night, or 45 for extended or remote trips approved by Truck Moves"?---Yes, so Perth, we consider to be a remote trip. It's not a – it's not a frequent one, yes.

PN787

All right, so you'd pay \$45. And out of that \$45 the driver is required to pay their meals and things like that?---Yes, it's a tax free amount, yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN788

But it's meant to cover their expenses occasioned as a result of being away from home, correct?---Yes.

PN789

That is, they receive no additional remuneration for the fact that they're away from home and unable to see their family or participate in social events for that period of time?---The other things that they do, but no, I understand that it's not technically in the remuneration, is that they would receive the – they would receive frequent flyer points for the flights, because it's booked in their name and they would also, often if they're purchasing a motel or if they have to purchase fuel they might use their own Flyby's card or something like that, but I understand in the context here that we're talking about – not about that other sort of remuneration.

PN790

So the answer to my question is that they don't receive any additional remuneration for the fact that they're away from home and unable to participate in their social events or see their families and the like?---The trip rate, plus the overnight allowances - - -

PN791

And the overnight allowances, as I say, is intended to cover expenses that they wouldn't have incurred unless they were there, correct?---Yes. The – correct, yes. The company pays for their accommodation in every instance, as well.

PN792

Yes. Now generally the company employs drivers with experience in the Transport Industry, or endeavours to?---Not entirely, but some of them have been in the transport industry.

PN793

Can I just show you a couple of documents now. Do you recognise this as the Truck Moves' website?---I do.

PN794

And you, or the company, produces this website and makes it available in order to accurately reflect the business that it – the services it provides, correct?---I do.

PN795

And without wishing to describe it or to read it all, you'll see in the right-hand column on the first page that I've handed to you, there's a heading, "Professional Commercial Vehicle Relocation Services," do you see that?---I do.

PN796

Which indicates that Truck Moves offers professional driveway services "to fit the unique needs of each of our customers," do you see that?---I do.

PN797

And the first two, ASX 2000 listed companies, do you see that?---I do.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN798

The website indicates that the company offers driveway services to ASX listed companies, as well as small and medium companies with a team of uniquely experienced professionals, do you see that?---I do.

PN799

Yes. And they're the drivers you're referring to, correct, for providing those services?---Well, it's partly the drivers. It's also the Operations management.

PN800

Yes. Well, including the driver, do you describe them as a uniquely professional team, correct?---No. I – professional drivers - - -

PN801

Uniquely experienced professionals, correct?---Uniquely experienced professionals?

PN802

Yes?---Well, that it encompasses everybody in the business.

PN803

Yes, including the drivers, correct?---yes.

PN804

What proportion are the drivers, of your employees?---Eight-five per cent.

PN805

Yes, thank you. Can you turn over the page then? I think it's double-sided so on the back, do you see that?---Yes.

PN806

You've got that?---Yes.

PN807

You'll see in the left-hand column of the start of the top of that page, you'll see that the website records that "our process for screening and contracting drivers is extensive," do you see that?---I do.

PN808

"But we don't think it's smart to cut corners when it comes to who handle your trucks," do you see that?---I do.

PN809

And you say that the "drivers must meet high standards for safety and ongoing compliance, every time they deliver your truck, including vehicle checks and fit for duty sign-offs," do you see that?---I do.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN810

For the purposes of delivering to those promises to conduct an extensive screening and contracting process, the company endeavours to, does it not, employ drivers

with experienced driving the range of vehicles that the company transports?---Not primarily, no. This – if I can talk to this document, because I created this and wrote all the content, so – some of this is - - -

PN811

Can you just – this is the website of the company?---Yes.

PN812

The company intends it to be accurate, and doesn't intend to mislead anyone on its website, does it?---Correct.

PN813

And it describes itself as conducting "an extensive screening and contracting process for drivers," correct? Is it accurate that that's what it does?---Yes.

PN814

Yes?---In the terms of our business, yes.

PN815

Yes, "in order to employ drivers who have the skills and experience to handle the trucks of your clients safely," correct?---Yes, that's correct, yes.

PN816

And in part, what you look for there is drivers with experience in the transport industry, correct?---We don't seek them out.

PN817

Can I tender that document, first of all?

PN818

SENIOR DEPUTY PRESIDENT HAMBERGER: I think this is TWU11.

PN819

MR GIBIAN: Thank you.

**EXHIBIT #TWU11 DOCUMENT DEPICTING COMPANY WEBSITE OF TRUCK MOVES**

PN820

MR GIBIAN: Can I show you another document.

PN821

DEPUTY PRESIDENT SAMS: Mr Whitnall, you say you have 93 casual drivers. How many employees do you have in total?---About a hundred and – 105. There's about ten administrative and operational people around the country.

PN822

Thank you.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN823

MR GIBIAN: Now this is vehicle delivery driver employment checklist used by the company, as I understand it, when it employs drivers?---Yes.

PN824

Do you recognise this document?---I do.

PN825

And I take it, it's something that is intended to be completed by drivers when they're seeking employment with the company, correct?---It is.

PN826

Yes, and is used for the company for that purpose, correct?---Yes.

PN827

And you'll see that the various details are required to be completed on the front page, do you see that?---Yes. I do.

PN828

And then the second page that I've handed you is, I think it's slightly different, but very similar to the contract that was annexed to your statement in these proceedings?---Yes.

PN829

Do you see that?---I do.

PN830

The third page is various personal contact details required to be inserted, do you see that?---Including Frequent Flyer Number, yes, I see that.

PN831

And on the fourth page there's a refer to driver history, "Driver history," do you see that?---I do.

PN832

On the fifth page, I'm sorry they're not numbered, but there's a table, do you see that?---I do.

PN833

And it's headed, "Do you have experience in operating the following," do you see that?---I do.

PN834

There's various types of vehicles, do you see that?---I do.

PN835

And the driver is asked to note whether they have or have not had experience with a particular vehicle, and if so, if they have, how many years of experience they've had with that particular type of vehicle, do you see that?---Yes, I do.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN836



Below the table you ask the details of whether there's a dangerous goods licence required, whether they have a dangerous goods licence required?---Yes. I do.

PN837

Sorry, I'll withdraw that – whether they have a dangerous goods licence, do you see that?---I can follow you, yes.

PN838

Because that would be useful in your business?---Periodically.

PN839

Yes, it would be useful in your business?---Periodically, yes.

PN840

Yes, and indeed, you advertise jobs requiring a dangerous goods licence?---We have done.

PN841

And then the second question underneath the table refers to an N - - -

PN842

SENIOR DEPUTY PRESIDENT HAMBERGER: Sorry, so can I actually - why would you need a dangerous goods licence if you're – you're not transporting goods, are you?---If I can speak freely again? There's a – the customers that we work with, again are in the manufacturing and trade, so – there's a business called Liquip, which is a business that is engaged in – if you've ever been at the airport and you see the vehicles that are parked under the plane's refuelling, pump – very technical vehicles, a lot of those are manufactured in Queensland by a business called Liquip. They also make pressurised vessels, for want of a better word, for the petroleum and gas industry, and in order to meet the, probably Australian Design regulation for the vessel on the back of the vehicle, they have to pressurise them within their facility.

PN843

Right?---Now what that does is, it leaves a very small amount of vapour, when then basically makes it a dangerous goods, and load.

PN844

So they're essentially empty - - -?---It's a vessel perhaps for L-gas but it's, at this stage it's a purple and white cab chassis, Isuzu, with a white bottle on the back. No logos, no livery, nothing, but it's been pressure - - -

PN845

It's not full of gas?---No, no, no. It's been pressure tested.

PN846

Right?---But there's a minute amount of gas or vapour left in the vehicle that is deemed to be considered still a dangerous goods.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN847

So you need a dangerous goods licence?---Yes, it just - - -

PN848

I understand. Thanks.

PN849

MR GIBIAN: The second question underneath the table on the fifth page of this document refers to an MSIC licence?---Yes.

PN850

Do you see that?---Yes.

PN851

That's a – it's a Maritime Security - - -?---Yes, so do you understand - - -

PN852

I'll just ask you the questions?---Yes.

PN853

SENIOR DEPUTY PRESIDENT HAMBERGER: I don't know whether it - - -  
?---The Maritime Security - - -

PN854

MR GIBIAN: Identification papers?---Yes.

PN855

Sorry, I was missing the "I"?---It's in order to access wharves, yes.

PN856

So in order to access the wharf you need a licence for security purposes, obviously?---Yes.

PN857

Which is issued by the Australian Commonwealth Government?---They've actually contracted that out to various people but yes, it has to go to Federal Police, at least.

PN858

Anyway, it's like the licence you have at an airport in order to access the secure areas of an airport - - -?---Yes.

PN859

Except for a port, correct?---Correct.

PN860

All right, and the reason why you were asking all these questions about which types of vehicles that the applicant has driven in the past, is because that is useful experience for your business, correct?---Yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN861

Now you've annexed to your statement, as well, and it's MW4, which I think commences at p.35, some job advertisements. I might approach again, if that's acceptable.

PN862

MR CROSS: Page 35, your Honours, Commissioner.

PN863

MR GIBIAN: Yes. Unfortunately, he doesn't have page numbers. These are some job advertisements, do you see that?---I do.

PN864

What you're advertising for is a truck driver, do you see that?---Yes.

PN865

And I think you've particularly – and you've referred to injured or semi-retired drivers, do you see that?---I do.

PN866

That is, people with experience, as you understand it?---Yes.

PN867

DEPUTY PRESIDENT SAMS: I don't like the "over 50" reference.

PN868

SENIOR DEPUTY PRESIDENT HAMBERGER: Does that mean you're semi-retired if you're over 50 or?---I didn't write the ad.

PN869

MR GIBIAN: I didn't write the add, your Honour.

PN870

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN871

MR GIBIAN: Mr Whitnall can answer to that.

PN872

SENIOR DEPUTY PRESIDENT HAMBERGER: No, that's all right, you don't have to answer?---The average age of our workers is in the high fifties.

PN873

Yes.

PN874

MR GIBIAN: And you understand those people to be in the main, people who have worked in the transport industry in the past, correct?---No, not – not entirely.

PN875

In the main, I said?---What does that mean?

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN876

Do you understand mostly that those – what you're advertising for here on the page 35, is for – particularly, you've referred to "semi-retired, aged drivers," do you see that?---Yes.

PN877

You're referring to people, and seeking to attract people who have worked in the – as drivers who are now, whether they've reached the age that others do, would regard themselves as in a semi-retired state, is that right?---Yes, but not necessarily from the transport industry. The business was actually started by retired police who, as it happened back then, were not granted, but they also had truck licences. A lot of fire and emergency service people, ex-army, people like that, as well as from the transport industry.

PN878

In any event – the advertisements go on and refer to so on, on page 37 for example, there's a requirement there to have a MSIC, so the Maritime Security Identification Card. Do you see that?---Yes.

PN879

On page 39, there's an advertisement again in Brisbane, the second dot of point of which requires an HC, so a heavy combination trailer licence or hire. Do you see that?---I do.

PN880

That is a person – you're only seeking to employ someone who already has a heavy combination licence, correct?---Yes, we do get approached by a lot of people from New Zealand, looking for us to sponsor them, as well as a lot of people where English is not their first language, looking to come to Australia that have that same licence.

PN881

Yes, can you just concentrate on the question I ask you. The question I asked you is, that this ad is only going to accept someone who already has a heavy combination licence, correct?---Yes.

PN882

That's what it's saying, correct?---Yes, we do hire people without that licence, but yes, in this instance, correct.

PN883

Someone reading this ad would not apply unless they had a heavy combination licence, correct?---They still apply.

PN884

Well, only if they can't read it correctly, because what you're saying here is that you require a heavy combination licence or hire, correct?---Correct, that's what it says.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN885

And that they are MSIC qualified and have dangerous goods qualified, correct?---Correct.

PN886

In relation to the work that the drivers perform, the drivers are required to travel to the pick-up location initially, correct?---Correct, if the vehicle is not already - - -

PN887

At the depot?---Yes.

PN888

Liaise with the customer in relation to the pick-up of the vehicle?---A representative of the customer.

PN889

Yes. They've got to talk to someone in order to pick the vehicle up and get the keys and the like and find out where it is and the like?---The sales department are usually the ones organising the move, but we'll talk to someone out the back.

PN890

They're required to conduct a vehicle inspection and safety check?---Yes.

PN891

Complete pre-trip documentation?---Yes.

PN892

Attach trade plates and travel guards as appropriate?---Yes.

PN893

To the extent a trailer is involved, attach and ensure the trailer is properly secured?---Yes.

PN894

They are then, obviously driving the vehicle on public roads and required to adhere both to the road rules, but also safe driving techniques, safe driving distances and the like?---Yes.

PN895

And to be properly familiar with heavy vehicle laws and regulations, fatigue management requirements?---Yes.

PN896

They may need to refuel the vehicle during the trip?---Yes.

PN897

At least a longer trip, correct?---Yes, running out of fuel is not a good customer service, so yes indeed.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN898

Deliver to the delivery destination and liaise with the customer at that end as well?---Yes.

PN899

Complete appropriate delivery documentation?---Yes.

PN900

They may be required to conduct – either at the pick up or delivery locations, some kind of safety induction or matter of that nature?---Very rare, but yes.

PN901

You've given some evidence in relation to, or to the effect that the business is a competitive one, correct?---Yes.

PN902

By that you mean there are other companies that provide a similar service to your own?---Yes there are.

PN903

You understand that if the Road Transport and Distribution Award were extended to cover businesses such as your own, it would cover competitors that you have as well?---If that was the finding, then I would hope that that was the case.

PN904

Well you describe your competitors as conducting the same kind of business as yours, correct?---I would assume that it's quite similar, yes.

PN905

You commenced proceedings in the Federal Court because there was a decision of the Federal Circuit Court in relation to another business which you apprehended to be very similar to your own, correct?---Yes.

PN906

You don't have difficulty in apprehending what type of business your competitors conduct, do you?---From the outside looking in, it's very similar, as I said.

PN907

That's your understanding, correct?---Yes, correct.

PN908

If the award was extended to cover your business, it would cover your competitors as well, correct?---I would assume so.

PN909

You would not be, in that respect, placed in any disadvantage with respect to your competitors, correct?---As long as it was enforced.

PN910

DEPUTY PRESIDENT SAMS: Where does your company sit in the current market?---We would be the largest from what we can gather.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN911

MR GIBIAN: In your statement and here I'm referring to paragraph 104, you respond to the statement of Mr DeClase, his evidence in relation to PrixCar?---Yes.

PN912

Is PrixCar a company that you regard as a competitor?---I do now, yes.

PN913

You say that in the second sentence that you're not aware you are undercutting PrixCar. Do you see that?---I do.

PN914

You're aware that what Mr DeClase says in his statement, having read it, is that they pay in accordance with the Road Transport and Distribution Award?---Does he say that? I don't think he said that, he just assumed that we - Truck Moves did. I can't quite remember.

PN915

I'm sorry, they pay in accordance – I'll withdraw the previous question – in accordance with an enterprise agreement underpinned by the Road Transport and Distribution Award, to be correct. Well you read the statement of Mr DeClase, didn't you. You responded to it here?---Yes.

PN916

Do you recall that he says local drivers are paid at rates set out in an enterprise agreement which is underpinned by the Road Transport and Distribution Award. Do you recall seeing him say that?---Yes.

PN917

But you say that your experience – the evidence is in the last sentence of paragraph 114, your experience of PrixCar is undercutting Truck Moves. See that?---I do.

PN918

Even though on your understanding that PrixCar pay in accordance with an enterprise agreement underpinned by the Road Transport and Distribution Award, you say they're able to charge lower rates, do you, than you are, even though you pay the national minimum wage. Is that right?---Correct.

PN919

You'll agree that if that's true, that's not something which is produced by the Road Transport and Distribution Award. That is, it's able to do it notwithstanding what must be higher wage costs, correct?---Correct. I think the grocery stores call it loss leaders or some sort of thing like that.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN920

Well, to the extent a business wishes to engage in a loss in order to undercut your costs, that's something you can do regardless of whether you're covered by the

Road Transport and Distribution Award or not?---That's a risk of being in business.

PN921

Yes. Sorry, you said it's a risk of being in business?---It can be a risk.

PN922

You've given some evidence and I might need a short adjournment to look at that contract but I'll just ask you a question initially. Paragraph 121 you refer to having entered into – signed a significant new contract in June 2016. You see that?---122?

PN923

121, page 25?---Yes.

PN924

That's something that occurred in June 2016, is that right?---Yes.

PN925

In June 2016 – sorry, going back a step, the Transport Workers Union informed this Commission, as part of the award review process in October of 2015, soon after the first decision in the Federal Court, that it proposed, in the course of this, or it foreshadowing an intention to seek a variation to the coverage of the Road Transport and Distribution Award in relation to businesses such as your own, correct?---Yes.

PN926

So, you were aware from that time that that was the intention of the Transport Workers Union?---Yes.

PN927

Also, there was an appeal from the decision of Rares J at first instance in the Federal Court, correct?---Correct.

PN928

Any decision that you made in relation to entering new contracts in June 2016 was made with the knowledge that the issue of the coverage of the Road Transport and Distribution Award was to be raised with this Commission in the course of the Award review process, correct?---Yes.

PN929

If you can just go back slightly in your statement to page 24. You make there some observations about the Road Transport and Distribution Award from paragraph 112. Do you see that?---I do.

PN930

Firstly, in paragraph 113, you say that drivers will drive – I take it mean 'may' drive different vehicles in a day. Do you see that?---They do drive, yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN931



Well, they don't always. Sometimes they only drive one vehicle in a day, don't they?---No.

PN932

Do you want to look through all of the job sheets of Mr Mealin - - -?---I'm sorry, my mistake.

PN933

Who only ever drove one vehicle in a day, am I correct?---Sorry, I confused myself. Correct.

PN934

Yes. So, you mean 'may' drive different vehicles in a day, in the first sentence of paragraph 113, do you see that?---Correct.

PN935

You then refer to clause 19 of the award. Do you see that?---I do.

PN936

You understand that clause 19 of the award makes provision for the circumstance of an employee driving different types of vehicles, correct?---It does.

PN937

I think – I already asked Mr Bradac these questions and he agreed, but it's up the company as to how it allocates the jobs to particular drivers, correct?---Correct.

PN938

As to which drivers are allocated to drive which kind of vehicles on a particular day?---Yes, primarily. Some of the more senior drivers might adjust things during the day, but yes, that's correct.

PN939

If they adjust things in a manner that you don't like, then that's a matter that can be corrected by the company, correct?---As long as the customer service, you know, is still occurring the way the customer likes it.

PN940

If you're happy with it, then that's fine?---Yes.

PN941

If you're not, then no doubt you'll correct it, correct?---Correct.

PN942

In paragraph 115, you say something about the basis or the transport companies can gain advantage from larger vehicles. Do you see that?---From?

PN943

In paragraph 115, you see that?---From low - - -

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN944

Just read what you said in 115?---You want me to read out?

PN945

No, no, just to yourself. Do you recall what you said in that paragraph?---Yes, I do.

PN946

You then contrast that with Truck Moves which you say – firstly in the second last line on page 24, you say that Truck Moves cannot, as it's simply supplying labour to drive an unladen vehicle. Do you see that?---I do.

PN947

Firstly, Truck Moves doesn't regard itself as a labour hire agency, does it?---No, no way.

PN948

It provides a service of taking possession of a vehicle and transporting that vehicle from one location to another, perhaps via a depot, correct?---Not transporting, but ferrying, or whatever.

PN949

Well, moving from one place to another place, which you say isn't transporting, correct?---Correct.

PN950

You then say at the bottom line of page 24, I should say, that there is no economic advantage based on the size of the vehicle being drive. Do you see that?---Yes.

PN951

Do we understand that really to mean that Truck Moves charges the same price for an individual who wants to move a family sedan car from Sydney to Melbourne, as it does to Toll if it wants to move a B-double heavy rig?---Yes.

PN952

It charges exactly the same prices regardless of the skills of the driver that's required to drive the vehicle, or the type of vehicle involved?---Yes.

PN953

I mean, look I think that's something we might have to check on your website, but we'll see what we can do. Yes, or the production of documents. But, in any event, to the extent that's the situation, that's something that Truck Moves has chosen to do, correct?---Yes, correct.

PN954

Paragraph 116 you say that you don't obtain benefits from tax deduction and depreciations of costs from owning a leasing vehicle. Do you see that?---That's correct.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN955

That's because it doesn't incur the cost of owning, albeit leasing vehicles, correct?---Correct. The only vehicles that we own are I think 14 shuttle vehicles, mini buses, that sort of thing, for ferrying the drivers from place to place to make the service efficient, so the driver is not left waiting catching taxis and trains and that sort of thing.

PN956

To the extent you say the company is disadvantaged by not obtaining tax deduction or depreciation costs, it's because it doesn't incur the costs, correct? Leaving the mini buses to one side?---Yes, correct. We have no economic benefit of driving the vehicle from point A to point B, other than the service of ferrying it for the owner of the vehicle.

PN957

In paragraph 117 you refer to insurances, do you see that?---I do.

PN958

Is it correct to say that the conditions of service used by Truck Moves is that the – sorry, if I could just have a moment – is that the customer or the client is required to comprehensively insure the motor vehicle of item that's being moved, correct?---In our terms and conditions, yes.

PN959

That is, you don't take out insurance on the vehicle, that's required to be done by the client?---As a standard practice, we encourage or we direct the customer to at all times have insurance for their own vehicle, but under the contracts that we sign with some of these other customers, we have to provide the insurance. Not in every instance.

PN960

Do you want me to show your standard conditions, or what you describe as your standard conditions?---Well, that's what I was just explaining. As a general set of conditions, that's correct, but customers will, during the course of a negotiation, require that we provide insurance and we obtain that insurance and we provide them with certificates of currency and we can provide you with correspondence to that effect – the majority of our customers, actually. It would be nice if they covered the insurance.

PN961

Your standard conditions of service – tell me if you need to familiarise yourself with them. Your standard conditions of service require the customer to warrant, with respect to each motor vehicle that at the date the motor vehicle is collected by you, the motor vehicle or item is, and will be comprehensively insured by you while we perform the services and insurance cover extends to drivers and other personnel provided by us to perform services?---That is our standard term.

PN962

It's also what it says on your website, isn't it?---Correct.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN963

That that is the service that you provide, correct? That is what you require in order for someone to use your services, correct?---Not in every instance, no.

PN964

Well, it's what is says on your website?---Okay, I'm telling you what actually happens. Customers will - - -

PN965

You agree with the question I asked you.

PN966

MR CROSS: He answered the question. I would ask my friend not to continue speaking over him. He was answering a question.

PN967

WITNESS: I can explain it Mr Gibian.

PN968

MR GIBIAN: The question I asked was whether that is the condition which is recorded on their website. Do you know that? That was the question I asked. He was not answering that question?---Again, yes, that's our standard conditions.

PN969

Can I show you the website?---I'm not sure. Sorry, I don't understand; you're asking me if we have insurance – that's our standard conditions, and I'm saying yes.

PN970

I'm asking whether you know that on your website what it says is, you warrant in respect – under terms and conditions of service, that you advertise to the public at large and your clients, that you warrant in respect of each motor vehicle that is the subject of an order, that at the date the motor vehicle is collected by us, the risk in the motor vehicle or item remains with you while we perform the services and the motor vehicle or item is, and will be comprehensively insured by you while we perform the services and that the insurance cover extends to drivers and other personnel provided by us to perform the services?---Yes.

PN971

That's what it says on your website advertised to the public, correct?---Yes.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN972

SENIOR DEPUTY PRESIDENT HAMBERGER: But are you saying that in practice, when you negotiate with clients quite often, you end up covering the insurance costs. Is that what you're saying?---Yes. Especially for the larger – the majority of the moves that we do, the customers just wouldn't work with us, if we didn't provide some level of insurance cover. Smaller competitors, I know, who are perhaps ex-employees of a truck dealership, they retire, they go home, their wife often says what are you doing here and so they go back to their former employer and say, look, can I deliver trucks? Can I wash them, can I take them to the weighbridge, that sort of thing? And they utilise the insurance of that truck

dealership. If we come in as an outside party, they require that we have insurance. But we, in the first instance, would say you know, at all times, just as a general business practice, you should always maintain insurance. Sometimes vehicles that we deliver to auctions may still have a number plate or what appears to be a valid registration sticker, but we don't know if it is or not, so we utilise a trade plate to cover the registration and the insurance.

PN973

MR GIBIAN: Everything you've said there is inconsistent with your standard conditions of service and the way the business advertises itself on its website, correct?---

PN974

SENIOR DEPUTY PRESIDENT HAMBERGER: Honestly, I think we just dealt with this?---Yes.

PN975

MR GIBIAN: I just need a couple of minutes to look at this contract document that we were provided with.

PN976

SENIOR DEPUTY PRESIDENT HAMBERGER: How much longer do you think you are going to be?

PN977

MR GIBIAN: Not very much longer.

PN978

SENIOR DEPUTY PRESIDENT HAMBERGER: We'll just have like a five-minute break.

PN979

MR GIBIAN: Can I ask for 10, if that's not stretching the friendship.

PN980

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, all right.

PN981

MR RYAN: Your Honour, could I be excused please. I've got to catch a plane back to Melbourne.

PN982

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN983

MR RYAN: Thank you.

**SHORT ADJOURNMENT**

**[12.07 PM]**

**RESUMED**

**[12.23 PM]**

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN984

MR GIBIAN: Thank you. I think there was just a couple of – I think the contract that was provided was provided as if it was part of the affidavit or statement.

PN985

MR CROSS: It had been excluded on the basis of its confidentiality, but we provided it to the Bench and to my learned friends.

PN986

SENIOR DEPUTY PRESIDENT HAMBERGER: I mean, it won't get published, obviously and probably the easiest thing is – I mean I don't know, if we just don't refer to it by name – but you can ask questions about it.

PN987

MR CROSS: It would be convenient to mark it just for clarification.

PN988

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, what should we call it. I'll mark it as TW12. This is the Truck Moves Services Agreement with Client.

**EXHIBIT #TWU12 TRUCK MOVES SERVICES AGREEMENT  
WITH CLIENT**

PN989

MR GIBIAN: I don't need to ask you, Mr Whitnall, I don't need to ask you about it in detail, but that's the document that sets out the expectations of this particular client of Truck Moves and the services it will provide?---Can you just show me the front cover, just to – yes, that's the contract that's provided to us.

PN990

You agreed to it and signed it?---Yes, we did, yes.

PN991

It sets out the legal obligations and expectations of the client, who I won't name of Truck Moves, and the services that it provides?---Yes, it does.

PN992

The other document that was provided was a letter of termination of a particular individual, signed by Mr Bradac, I think and which you refer to in paragraph 100 on page 22 of your statement, and in which you refer to the branch manager having been dismissed. See that?---I do.

PN993

You say that the manager gave Mr Mealin extra work and as a result of that matter and others, you dismissed the branch manager. Is that right?---Yes.

PN994

I think Mr Mealin left the company in November 2014?---Right.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN995

Am I right in understanding that this manager was dismissed in March of 2016?---Yes. Mr Mealin left and worked for some other – two other similar businesses.

PN996

You understood he left in 2014 and this manager was not dismissed until 2016?---Correct.

PN997

But you still understand it was because of that matter, was it, following Mr Mealin?---Mr Mealin and others.

PN998

You just didn't act on it for 18 months or something?---I wasn't in the business. You'd have to talk to Mr Bradac.

PN999

There's two other things I wanted to ask you. One, you've referred to the mini bus, or having some mini buses, yes?---Yes.

PN1000

I take it you employ people to drive those mini buses, do you?---We do.

PN1001

Are they paid the national minimum wage as well?---Yes.

PN1002

Also engaged as casuals?---Yes.

PN1003

Are you aware that there's an award called the Passenger Transport Award?---I have heard of it.

PN1004

Have you obtained any advice about whether the Passenger Transport Award applies to people whose job it is to transport drivers from one location to another – I'll just finish the question.

PN1005

MR CROSS: I was just waiting; the question was getting to the end. Objection relevance.

PN1006

SENIOR DEPUTY PRESIDENT HAMBERGER: What is the relevance?

PN1007

MR GIBIAN: Well, we're trying to understand the business, but anyway – I'm happy to withdraw the question.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN1008

SENIOR DEPUTY PRESIDENT HAMBERGER: All right.

PN1009

MR GIBIAN: Secondly, I think I'll probably have to put it a bit more squarely to you. In relation to the trip rates for long – for interstate or longer work, you understand they're calculated on the basis of multiplying an estimated number of hours by the national minimum wage?---Yes.

PN1010

Can I just suggest to you, that where that's paid, you can't guarantee that the company is in fact, complying with the requirements of the national minimum wage for that rate to be paid for each hour worked by the employee?

PN1011

MR CROSS: Objection – relevance again.

PN1012

SENIOR DEPUTY PRESIDENT HAMBERGER: No I think – if this about the people we're talking about. I think you should ask the question.

PN1013

WITNESS: Could you just ask the question again, please.

PN1014

MR GIBIAN: I fully understand. I'll start with the first question again. You understand that the trip rate is calculated by multiplying the national minimum wage by an estimate of to how long a particular trip should take?---Yes.

PN1015

That trip may take that time, or it may take longer, correct? Or it may take shorter, I suppose?---Yes.

PN1016

Could I just put to you that you can't guarantee that in respect of that trip, that in fact, the company has complied with the requirement of the national minimum wage or to pay the minimum wage for each hour, in fact, worked by the particular employee?---I don't see why not. You're putting it to me that I don't - -  
-

PN1017

Let me ask the question. The actual hours worked may be greater than the estimate, correct?---Yes, that can happen.

PN1018

In which case, the estimate will have underpaid the driver because the driver will not have been paid for each hour worked, correct?---If there's additional time, then it's paid. If there's a delay, or something happens, a flat tyre or a - - -

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN1019



I asked you this earlier. All you referred to is waiting time, which you said was a discretionary issue for the company is there was some particular delay at pick-up or delay of a flight. I think they're the examples given in the notes – in the job sheets for Mr Mealin, correct?---I don't have the exact proportion of what is claimed and what is paid, but it would be extremely high. It's a discretionary amount, correct, yes.

PN1020

That is, there's no contractual entitlement to be paid anything about whatever the trip rate is, correct?---Well we do pay waiting time. I think that was in the contract.

PN1021

Well, it's not referred to in the contract, is it?---I thought it said it did.

PN1022

Well, I took you to it before, and it doesn't refer to it?---Sorry.

PN1023

If you want to look at it again, it's page 59 in the bundle that's next to you?---I'll assume if you're saying that's true, then yes.

PN1024

If there's just heavy traffic which means the trip takes a bit longer than the estimate, that's not waiting time, is it?---I can give you an example where that would occur. In Queensland - - -

PN1025

Can you answer my question? Waiting time, as you refer to it, was a reference to a circumstance in which there was some particular delay, correct? The examples that seem to be given in the job sheets of Mr Mealin, were where there was a delay in a return flight. That is, the flight was delayed so he was delayed coming back. Or if there's a delay in picking up the vehicle for some reason that's the client's fault, correct?---That's correct.

PN1026

If the driver is driving the vehicle, they're not waiting, correct?---Predominantly, no.

PN1027

Well, not predominantly. If the driver is driving the vehicle, and it just takes longer to drive because of traffic or whatever other reason, the driver is not waiting, are they? They're driving the truck, correct?---Yes, that's correct.

PN1028

Waiting time would not be an appropriate payment for that driver to claim, if the driver is driving the vehicle the entire time, correct?---Correct.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN1029

I suggest to you again, you cannot guarantee that the company is in fact even complying with its requirements under the national minimum wage order by paying trip rates, rather than actual hour rates of pay in accordance with the national minimum wage order, correct?---I would have to look at it, but I would suggest that we pay the correct amount.

PN1030

I did just want to tender the letter that was referred to at the start of Mr Whitnall's cross-examination, that is the advice from the Fair Work Ombudsman to the effect that they were covered by the Road Transport and Distribution Award just to ensure that there was no lack of clarity on that.

PN1031

DEPUTY PRESIDENT SAMS: Have we got that?

PN1032

SENIOR DEPUTY PRESIDENT HAMBERGER: I don't think we've got it.

PN1033

MR GIBIAN: No, I did want to tender it, because I asked him and he equivocated on the point. I think he ultimately agreed that in fact, they'd received that advice. I do only have one copy I'm afraid.

PN1034

DEPUTY PRESIDENT SAMS: Mr Gibian, my understanding was that there were differing views, where I thought I read it. I wasn't going mad, and I am over 50. I got it from your own submissions at paragraph 28, where you say that Truck Moves question of its application of the award, has been the subject of differing advice from the Fair Work Ombudsman. That's what I had read and that's what I was referring to.

PN1035

MR GIBIAN: Yes, well. Frankly I can't recall what we were referring to there, although the second sentence in that paragraph says the evidence put forward by Truck Moves in the Federal Court proceedings, included that the Fair Work Ombudsman had advised that the RT&D Award applied.

PN1036

DEPUTY PRESIDENT SAMS: Yes, that's that bit.

PN1037

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, there are no objections – are there any objections to this being - - -

PN1038

MR CROSS: I haven't seen it. The only objection is on the ground of relevance. What can it – certainly the witness was asked about this, but what's the relevant to the determination of this Tribunal?

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN1039

MR GIBIAN: The witness has somewhat equivocated on the points, so it should just be put before the Commission to correct – to ensure that the record is accurate. But, can I say, we are criticised in the submissions that Truck Moves has put before the Commission for not raising this matter earlier, in circumstances in which the established law, until October of 2015 by a decision of the Federal Circuit Court and the advice of the Fair Work Ombudsman, was that this business was already covered by the Road Transport and Distribution Award in which circumstances, there was no need for us to apply for any variation to cover this business.

PN1040

We are criticised for waiting until two weeks after the Federal Court decided to the contrary, to approach the Commission and tell it that we propose to – and that's the relevance of it.

PN1041

SENIOR DEPUTY PRESIDENT HAMBERGER: We'll allow that document to be tendered. TWU13 then. It's the Fair Work Ombudsman advice.

**EXHIBIT #TWU13 FAIR WORK OMBUDSMAN ADVICE**

PN1042

SENIOR DEPUTY PRESIDENT HAMBERGER: We never marked the employment checklist. I don't think anyone asked me.

PN1043

MR CROSS: It wasn't sought.

PN1044

SENIOR DEPUTY PRESIDENT HAMBERGER: Do you want that to be?

PN1045

MR GIBIAN: Yes, I do.

PN1046

SENIOR DEPUTY PRESIDENT HAMBERGER: The Employment Checklist will be TWU14.

**EXHIBIT #TWU14 THE EMPLOYMENT CHECKLIST**

PN1047

MR GIBIAN: That's the cross-examination, may it please.

PN1048

SENIOR DEPUTY PRESIDENT HAMBERGER: Is that the cross-examination? Thank you very much. Mr Cross.

PN1049

MR CROSS: Thank your Honours, Commissioner.

\*\*\* MATTHEW STAN WHITNALL

XXN MR GIBIAN

PN1050

MR CROSS: Mr Whitnall, you were asked a question in relation to heavy traffic and how that might relate to waiting time. You wanted to give a specific example. What was that specific example?---The specific example is – well there's many. It's a very common practice for us to pay drivers for delays and waiting time and that sort of thing. But specifically, there was roadworks in Queensland for a long period of time, north of Brisbane, and we had contracted rates with a customer, Volvo dealership in Townsville and also in Rockhampton. The drivers would inform us that there was extensive roadworks going on and they were delayed and that the rate for that trip until the roadworks were finished, needed to be adjusted and we did so, to their satisfaction.

PN1051

There are some questions about what your standard conditions on your website say in relation to insurance, and you've given an answer in relation to specific contracted – or contracts you have with companies. Can you advice the Bench of a specific example of an accident that occurred on the weekend, and how that impacted upon insurance and contractual details of insurance?---Yes. There was a vehicle accident in Melbourne, a prime mover was going around a round-about legally, and it was being followed by one of our chase vehicle to pick up the driver once he'd delivered it and a car came up the inside and made contact with the vehicle that we were in contract of which was being operated on the trade plate because it wasn't registered. Just a cab chassis, no turntable or anything like that. The driver of the vehicle that caused the accident, immediately made a \$1,000 cash offer to our driver to settle the matter. This is an approximately \$250,000 brand new prime mover and then proceeded, once he's understood who our client actually was, which was Daimler Somerton – proceeded to that place and offered them \$1,000 to make the matter go away. We politely declined, as did the client and subsequently got a quote for \$10,000 which is underneath our \$20,000 excess for the insurance policy that I was explaining earlier that we have to operate. We have had this happen before where somebody is either not insured or under-insured or just doesn't want to participate in rectifying the damage they've caused and it's – I mean, in my experience in this business it will be very likely our cost in excess of \$10,000. The customer will expect us to pay. It doesn't get covered by our insurance policy, so we just have to pay it.

PN1052

When you say the customer, could the Full Bench understand who the customer is?---Mercedes Benz Australia.

PN1053

What would Truck Moves – or what did Truck Moves make out of that job?---We charged \$85 for that delivery.

\*\*\* MATTHEW STAN WHITNALL

RXN MR CROSS

PN1054

You were asked at two different points of time in your cross-examination, in relation to – one was quite early and one was quite late. Earlier you talked of the

economic availabilities available to three different customers, which was Toll, Linfox and Patricks?---Yes.

PN1055

Then later, in your cross-examination, you were directed to paragraph 115 of your statement, where you were dealing with specific transport companies. This was in fact – sorry, I'll withdraw that. Where you noted "Employers in the freight and transport industry can charge in different ways, that can more easily cover the later costs under the RT&D Award. Could you explain to the Full Bench – well firstly, am I correct in understanding that reference to a term of economic ability or availability and section 115, am I correct, is that the same thing you're dealing with there, or are they separate concepts?---Yes. No, that's the same concept. That's it – just a terminology that we've adopted during having to - - -

PN1056

What do you mean by that particular concept of economic availability or what you describe at paragraph 115?---What I mean is that the vehicles that we – so, if a vehicle – if we're asked by a truck dealership to move a freight liner, prime mover from Sydney to Melbourne and that driver is on the highway and there is a Linfox or Patricks or – I forget the other name – vehicle in the next lane that's fully loaded, they've got the ability to recover the cost of running the vehicle and the higher labour cost by what they're carrying, what they're transporting. We have no such right or ability. Again, the vehicles are partially built, often cab chassis. That's the predominant thing. If they do have a body, it might not have curtains or doors or anything like that. It's not in commission, as it were, at that stage of its life. Once it's delivered to a fabricator, body builder or truck dealer or something like that, it's finished and then we may never see that vehicle ever again, until such time that one of our other customers, maybe a leasing business, or an auction rings and says we've got chassis number 123456, needs to get taken from a Toll yard or Linfox yard to Manheim Auctions at Altona, can you pick it up. We pick it up and it's had the stickers pulled off it and it's finished its working life in the transport industry. Does that explain? So, it's the comparison, what I'm saying is the comparison of two people driving a truck. One of them has all this benefit and the other one doesn't. So, it's quite disproportionate.

PN1057

Thank you. You were also asked directly relating to paragraph 104 of your statement about PrixCar under-cutting you?---Hmm mmm.

PN1058

How do they undercut you?---

PN1059

MR GIBIAN: I object to that. Well, I did ask about PrixCar, but I'm not sure how the witness could know how PrixCar undercut, that is what PrixCar do internally.

\*\*\* MATTHEW STAN WHITNALL

RXN MR CROSS

PN1060

MR CROSS: Well, in fact, the question was at paragraph 140, you say PrixCar undercut – yes. The question was then put, it wasn't produced by the award coverage because they mistakenly thought they were covered by the award. He said yes, but they were lost leaders and he was cut off in his answer, and I'm just seeking the full answer in that line of questioning.

PN1061

MR GIBIAN: He wasn't cut off.

PN1062

SENIOR DEPUTY PRESIDENT HAMBERGER: Anyway, I'll allow the question.

PN1063

MR CROSS: Could you explain to their Honours, and the Commissioner, what you mean by how you were undercut?---We weren't aware that PrixCar was in the same industry as us. We being John and I, went and approached the most senior managers in PrixCar and said that we'd like to perhaps form some sort of a service arrangement. After discussions, which we thought were confidential, we realised through our Brisbane manager, that PrixCar had approached one of our clients.

PN1064

MR GIBIAN: Can I just say that Mr Whitnall has said something like this, now I don't know people from PrixCar, but he's saying something about PrixCar's business practices and he's said in his statement, in a manner in which they have had no opportunity to respond to or even know about, frankly. I mean, I'm not sure how its relevant in any event.

PN1065

SENIOR DEPUTY PRESIDENT HAMBERGER: I said I would allow the question. I mean, I'm at a bit of a loss to work what the relevance is to be honest.

PN1066

MR GIBIAN: The only purpose of my question was that he understands that having read Mr DeClase's statement and Mr DeClase wasn't required for cross-examination about this, that PrixCar pay under the award – or an enterprise agreement underpinned by the award, so actually higher rates than the award. Nonetheless, he understands they are able to undercut him. If he wants to make allegations about PrixCar's conduct, frankly I don't think that's either relevant or proper in the current context in circumstance where PrixCar have had no opportunity to even know that this is to be said, and Mr DeClase was not required for cross-examination – not asked anything about it. We did put Mr DeClase's statement forward, so I think frankly, it's not relevant and it ought not be allowed in circumstances where PrixCar would not even be on notice of evidence that was filed last Thursday.

PN1067

DEPUTY PRESIDENT SAMS: But an example of the undercutting is in the evidence, in paragraph 109. So why?

\*\*\* MATTHEW STAN WHITNALL

RXN MR CROSS

PN1068

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, it is.

PN1069

MR GIBIAN: I only mean that he seems to be going on to say something that PrixCar undertook some kind of – at least, fast practice. I don't know that that's either relevant, but it seems to me to be not so.

PN1070

MR CROSS: Two matters arise. Firstly, the TWU say, look we don't have for PrixCar, we just turn up with a statement from their ex-HR Manager. Well, that's fine. It's certainly evidence that was led by the TWU.

PN1071

MR GIBIAN: What's wrong with that?

PN1072

MR CROSS: Just sit tight. Secondly, it does arise from the evidence of this particular witness, and it arises from the cross-examination. We're simply agitating this point because what will be put, no doubt from the questions that were put – what will no doubt be put is that there's no problem with being covered by the award because PrixCar made a big mistake and they thought they were covered and then adopted a Toll enterprise agreement and there should be no problem.

PN1073

But of course, what in fact has occurred, and what this witness has given evidence in relation to, is the conduct of PrixCar. That simply by being bound by an award, is no protection. I mean there can still be undercutting, notwithstanding that that award applies. We're simply ventilating that. It was directly addressed in cross-examination.

PN1074

SENIOR DEPUTY PRESIDENT HAMBERGER: I'm going to allow the question.

PN1075

MR CROSS: May it please.

PN1076

SENIOR DEPUTY PRESIDENT HAMBERGER: If you need to pursue this. Did you need to re-ask the question?

\*\*\* MATTHEW STAN WHITNALL

RXN MR CROSS

PN1077

MR CROSS: Unfortunately he was halfway answering the question, I think, you Honour?---I can try and keep it brief. We'd gone into some discussions with them. We knew that we could provide a service to their business and we were informed by our Brisbane manager that they were approached by one our clients in Brisbane and we gave a quote which we thought was very reasonable and market for what we do. We were informed some period later that PrixCar had

quoted a price that was just really low. Way below anything sort of market – I mean, it appeared to us quite obvious what was being attempted and then we found that to happen on several other customers, including the Volvo contract and anecdotally we know that they've not provided the service, although they priced us out of it. As we said before, that's a business risk, but they deliberately put a price in that cut us out of the service that we provide in favour of loading things onto the back of trucks and have continued to do that. That's their business choice.

PN1078

You were taken to some job ads that you annexed to your statement?---Mm.

PN1079

You've managed to offend at least two members of the Bench. But have you offended other people? Are there newspapers, for example, that have reacted to how you phrase your advertisements?---Yes, the Adelaide Advertiser. When I rang to place an ad in the old days when you rang up and they had a compositor or somebody in some system and they would type up the ad and tell you how many centimetres and what the costs were. I used the word retired, or semi-retired. It then must have gone to an editor and it was rejected as being discriminatory and they wouldn't let me run the ad with those words in it.

PN1080

Finally, you were asked a question by his Honour, the Senior Deputy President in relation to dangerous goods. You gave what you said was an example in relation to the specialised liquid vehicles?---Yes.

PN1081

You've also given an example at paragraph 96 of your statement?---Yes.

PN1082

Is that the same or a different example to the one that you gave his Honour?---That would be a different example.

PN1083

Nothing further.

PN1084

COMMISSIONER LEE: I'd like you to go to paragraph 113 of your statement. Got it? You'll see that four lines down it starts "In our business a driver may drive a vehicle in the higher classification for only one job and a short job and then drive vehicles in lower classifications for the rest of the day". You see that?---Yes.

PN1085

What's the typical duration of a short job?---15 kilometres.

PN1086

In time?---In time? 15 to 20 minutes.

\*\*\* MATTHEW STAN WHITNALL

RXN MR CROSS



PN1087

SENIOR DEPUTY PRESIDENT HAMBERGER: Anything else?

PN1088

MR GIBIAN: Just in relation to that, for a 15-kilometre job, the driver has to attend a site, liaise with the customer, conduct a pre-vehicle check, a safety check, complete documentation, locate the vehicle, get in the vehicle, drive the vehicle, do the same thing at the other end, that is check for any damage, complete the documentation at the other end, correct?---Correct.

PN1089

Can I suggest that that's not going to take 15 to 20 minutes? The whole process – the work from start to finish?---I'm sorry, the question was how long it takes them to drive.

PN1090

MR GIBIAN: No, that was not the question.

PN1091

COMMISSIONER LEE: I ask you in the context of your statement, where you refer to a short job, what is the typical duration of a short job and your answer was 15 to 20 minutes?---Yes, sorry.

PN1092

MR GIBIAN: That's not the entirety of the job. You're just referring to the driving aspect, correct?---Yes, sorry, my mistake. It would be half an hour. Longer in Melbourne.

PN1093

COMMISSIONER LEE: Including the factors that Mr Gibian has referred to?---Yes, longer in Melbourne. There's a particular geography there, where we actually have two driver teams because it's a big city. But also, that the dealerships are nothing like a transport freight yard, so the vehicles are often just lined up and they have the identification written in white text on the driver – it's a very quick process.

PN1094

SENIOR DEPUTY PRESIDENT HAMBERGER: Thanks very much Mr Whitnall. You're excused.

<THE WITNESS WITHDREW

[12.52 PM]

PN1095

WITNESS: Thank you.

PN1096

SENIOR DEPUTY PRESIDENT HAMBERGER: That's it? I think we can adjourn then until 23 March.

\*\*\* MATTHEW STAN WHITNALL

RXN MR CROSS

PN1097

MR GIBIAN: There was one other matter.

PN1098

SENIOR DEPUTY PRESIDENT HAMBERGER: Sorry, yes, right.

PN1099

MR GIBIAN: We were asked yesterday for a copy of the agreements relevant to Visy. I'm sorry, I'm just forgetting which witness that was relevant to, Mr Anderson yesterday, so we've got copies of those if that's convenient. I don't know whether I've got them or not, but I understand we're happy to provide those.

PN1100

MR CALVER: If it please, your Honour, it was Phillips agreement as well, given that the Phillips agreement was not on the website and there were five of them which could have applied – according to the website. So, if it's possible, I did send a request to the TWU in that regard.

PN1101

MR GIBIAN: I don't think we have a Phillips one, but we can see what we can do.

PN1102

MR CROSS: It's an old one, yes.

PN1103

SENIOR DEPUTY PRESIDENT HAMBERGER: So, it's not on the Commission website?

PN1104

MR GIBIAN: I don't know.

PN1105

MR CALVER: If it please, the comparison that was out of the witness' mouth was in respect of two enterprise agreements. It's pointless having just the one if we're looking at a comparative exercise. If it please.

PN1106

SENIOR DEPUTY PRESIDENT HAMBERGER: Could you do your best, Mr Gibian, to see if you can obtain it and supply copies.

PN1107

MR GIBIAN: Sorry, I misunderstood the request, we apologise. This is the general Visy agreement and a local agreement, that also applies, as I understand it at least.

PN1108

MR CROSS: I should note, that in our case generally, we rely on two decisions. One of a single member of the Federal Court and one of the Full Court. I don't know that it's been provided to the Bench, I don't have an instructing solicitor here.

PN1109

SENIOR DEPUTY PRESIDENT HAMBERGER: I think that's all right; we can all sleep. We can adjourn until the 23rd. Hold on please – can the parties have a discussion about the order? Who's going to go and what – hopefully we'll get it all done on that day, but can you see if you can agree on who goes first, second, etcetera, if that's possible.

PN1110

MR GIBIAN: We will.

**ADJOURNED UNTIL THURSDAY, 23 MARCH 2017**

**[12.55 PM]**

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