FAIR WORK COMMISSION

4 yearly review of modern awards – Transport Industry Awards

Matter No. **AM2016/32**

RE ***Road Transport and Distribution Award 2010***

SUBMISSIONS IN REPLY FOR THE TRANSPORT WORKERS' UNION OF AUSTRALIA

INTRODUCTION

1. These submissions endeavour to summarise the submissions of the TWU in reply to submissions filed by Coles, the SDA, the AI Group, Australian Business Lawyers, Natroad and ARTIO in relation to the Road Transport and Distribution Award ("the RT&D Award").

DRIVER DEFINITION

2. Coles, the SDA, the AI Group, NatRoad, Australian Business Lawyers and ARTIO make submissions in relation to the TWU's proposal to insert a definition of "driver" in clause 3.1 of the RT&D Award. The TWU's application is supported by ARTIO subject to a submission in relation to the precise wording of the variation. Australian Business Lawyers profess not to have any philosophical objection to the insertion of a driver definition, but assert it not to be necessary. The application is opposed by Coles, the SDA and the AI Group.

3. In reply to those submissions, the following issues appear to arise:

    (a) Whether the proposed variation would ensure that the award is simple, easy to understand, stable and sustainable for the purposes of s 134(g) of the Act?

    (b) Whether the proposed variation would create unnecessary overlap between modern awards?

    (c) Whether the proposed variation seeks to relitigate issues determined in proceedings involving the TWU and Coles in the Federal Circuit Court and Federal Court?

(d) Whether there are reasons to alter the terms of the proposed variation to address the concerns raised in relation to the precise wording used?

4. Firstly, it is appropriate to note at the outset that none of the submissions dispute that drivers falling within the classifications set out in Schedule C to the RT&D Award commonly perform duties of the type or contest the evidence put forward by the TWU. Subject to some issues raised by ARTIO and Australian Business Lawyers as to the drafting of the provision, no party has suggested the proposed provision is not accurate. The other parties, for their own reasons, ask the Commission not to accurately record the duties of employees covered by the Award

5. The TWU submits that it would self-evidently assist in making the RT&D Award simple and easy to understand if, like most other modern awards, the award in fact described the nature of the duties capable of being performed by persons working within the classifications in the Award. It would clearly assist employers and employees to understand and apply the Award if it set out the type of duties which are, or may be, carried out by the classifications contained in the Award. Indeed, above suggesting that the variation is not necessary, no other submission appears to dispute this proposition.

6. Secondly, the submission that the proposed variation will produce unnecessary overlap between modern awards is misconceived. The RT&D Award already covers persons employed as drivers whether or not their employer is principally engaged in the transport industry. Clause 4.1 provides that the RT&D Award covers employers in the road transport and distribution industry. The definition of the “road transport and distribution industry” in clause 3.1 extends to:

> ***road transport and distribution industry*** *means:*
> *(a) the transport by road of goods, wares, merchandise, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock, including where the work performed is ancillary to the principal business, undertaking or industry of the employer;*
> *…*

7. Accordingly, to the extent that drivers are employed in industries covered by other modern awards, the potential for overlap already exists. With respect to the General Retail Award, the overlap was recognised by the Full Federal Court which found that the employment of online delivery drivers fell comfortably within the road transport and distribution industry, was transport of the requisite kind and was ancillary to the principal business of Coles: *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* (2014) 245 IR 449 at [22]-[23].

8. The proposed variation would, rather, assist in resolving instances of overlapping modern award coverage by clearly setting out the nature of the duties undertaken by drivers in the RT&D Award. In circumstances in which the standard award clause dealing with overlapping modern award coverage calls for an assessment of the most appropriate classification to the work performed by an employee and to the environment in which the work is performed, the failure of the RT&D Award to articulate the duties commonly undertaken by drivers impairs the proper application of the Award.

9. Thirdly, the application to vary the RT&D Award does not seek to relitigate issues determined in judicial proceedings involving the TWU and Coles. However, the decision of the Federal Circuit Court did reveal weaknesses in the drafting of the RT&D Award. The Federal Circuit Court, in particular, regarded the only task as falling within the RT&D Award as being the "delivery-driving tasks" because of the failure of the Award to set out the nature of the duties commonly performed by drivers. There is no dispute in these proceedings that drivers commonly perform non-driving duties or that the RT&D Award and predecessor instruments were developed on the basis that non-driver duties were undertaken by transport workers falling within the coverage of the RT&D Award.

10. In any event, an application to the Commission to vary an award following a judicial decision is unremarkable and does not, and could not, involve an attempt to relitigate the issues in the judicial proceedings. In *Re Brack; Ex parte Operative Painters and Decorators Union of Australia* (1984) 51 ALR 731, for example, the Commission came to the view that an interpretation of an award by the Federal Court did not give effect to the actual intention of the award and varied the award to accord with his own view of that intention. The High Court

accepted that the Commission was entitled to vary an award in those circumstances and said (at 733):

> *What he did was to accept the Federal Court's interpretation and determine that the operation of the award provision, so interpreted, was unsatisfactory, having regard to the circumstances already mentioned.*

11. In this matter, the TWU does not ask the Commission to overturn the decisions of the Federal Circuit Court or Federal Court. The variation sought merely seeks to ensure that, if questions arise as to application of the RT&D Award in the future, they can be answered based upon a proper understanding of the type of work covered by the Award.

12. Finally, Australian Business Lawyers and ARTIO raise some questions as to the drafting of the proposed variation. Two issues appear to be raised. First, ARTIO suggests that it should be made clear that the list of non-driving duties is non-exhaustive. It is accepted that the list is non-exhaustive and the proposed variation as drafted refers to non-driving and other duties "including" the matters listed. The TWU has no in principle objection to the list of duties being extended to also refer to the matters referred to in paragraph 24 of ARTIO's submissions.

13. Second, Australian Business Lawyers suggest that the definition of "driver" could be read as not extending to all types of vehicles referred to in the classifications set out in Schedule C to the RT&D Award. That was obviously not the intention of the proposed variation. The reference to the driver of "a rigid vehicle, a rigid vehicle with trailer combinations, an articulated vehicle, a double articulated vehicle and/or multi axle platform trailing equipment" would appear to cover the types of vehicles referred to. If there be any doubt, the words "or other type of vehicle referred to in Schedule C" could be added to the first sentence in the proposed "driver" definition.

DEFINITION OF ROAD TRANSPORT AND DISTRIBUTION INDUSTRY

14. The proposal to amend the definition of the "road transport and distribution industry" contained in clause 3.1 of the RT&D Award to ensure it covers

employers and employees undertaking driving work in vehicle relocation is opposed by Truck Moves Australia Pty Ltd, Quick Shift Relocations Pty Ltd and Vehicle Expressed Pty Ltd ("Truck Moves"). In making the objection, the companies did not dispute the TWU's evidence or seek to cross-examine the witnesses for whom witness statements were filed.

15. The basis of the objection to the variation appear to be as follows:

    (a) The application was made "too late";
    (b) The RT&D Award was not designed or intended to cover vehicle relocation businesses;
    (c) The classifications and pay scale in the RT&D Award are inapplicable to vehicle relocation operations;
    (d) The RT&D Award cannot operate fairly as a consequence of the operation of clause 19 of the Award; and
    (e) The RT&D Award is not economic for vehicle relocation businesses.

16. None of those submissions could be accepted. Firstly, the submission that the application to vary the RT&D Award was made "too late" is without merit. The submissions of Truck Moves at paragraphs 20 to 25 suggest that a deliberate decision was made by the TWU in 2014 not to pursue a change to the coverage of the RT&D Award and, for reasons that are not clear, the Commission should not deal with the application made to vary the coverage of the RT&D Award following the decisions of the Federal Court in relation to Truck Moves.

17. The submissions ignore the circumstances that existed in 2014 and 2015. The circumstances were that the Federal Circuit Court had found in *Rooth v S Brady Industries Pty Ltd* [2014] FCCA 1435 that a business involved in vehicle relocation and its driver employees were covered by the RT&D Award. The Fair Work Ombudsman had also concluded that such a business was covered by the RT&D Award (Ex TWU13). The coverage of a vehicle relocation business was only brought into doubt by the decision of the Federal Court handed down on 2 October 2015 and was not resolved until determination of the appeal by the Full Federal Court on 10 June 2016.

18. Until at least the decision of the Federal Court on 2 October 2015, there was no basis upon which the TWU could have applied to vary the RT&D Award to

cover vehicle relocation businesses as the existing state of the law was that those businesses already fell within the coverage of the Award. Following the decision of the Federal Court and notwithstanding the pursuit of an appeal, the TWU gave notice of its intention to seek a variation to the coverage of the RT&D Award to address vehicle relocation businesses at a hearing on 7 October 2015 (that is, 5 days after the decision) and by correspondence dated 14 October 2015 (that is, within two weeks of the decision). The correspondence of 14 October 2015 set out the terms of the variation sought to the TWU as follows:

> *Insert a new subclause (j) to the definition of road transport and distribution industry as follows:*
>
> *(j) the distribution and or relocation by road of new or used vehicles as described in the classifications within this award where the vehicle itself is required to be driven from one location to another for the purposes of delivery or relocation of the vehicle.*

19. The TWU subsequently followed the directions issued by the Commission in articulating and providing particulars of the claim. Any criticism of the manner in which the variation was proposed is without substance.

20. Furthermore, the decision of the Full Federal Court in *Zader v Truck Moves Australia Pty Ltd* [2016] FCAFC 83 expressly acknowledged any variation to the coverage of the RT&D Award was a matter for the Commission. The Full Court said (at [41]):

> *Although it is understood that the question as to the coverage of cl 4 of the Road Transport and Distribution Award has been raised with the Fair Work Commission as part of its four yearly review being undertaken pursuant to s 156 of the Fair Work Act, what action the Commission may take to vary cl 4 remains a matter for it to determine. It remains open to Mr Zader (and perhaps other employees in the same position) to make an application pursuant to s 157 of that Act but, again, that remains a matter for Mr Zader and those advising him to pursue if they see fit.*

21. Secondly, the submission that the RT&D Award was not designed or intended to cover businesses involved in vehicle relocation does not advance its

argument. The contentions contained at paragraphs 85 to 86 of Truck Moves' submissions do little more than observe that the RT&D Award refers in various clauses to "goods", "loading" or "unloading". The fact that the RT&D Award covers work involving transportation of goods and other materials does not suggest that it is not capable of appropriate application to vehicle relocation businesses.

22. For example, Truck Moves refers to allowances for which provision is made in clause 16 of the RT&D Award for involvement in carting, loading or unloading particular types of goods or materials. The fact that an allowance is payable in circumstances of the carting, loading and/or unloading dirty material, for example, says nothing about whether the RT&D Award can sensibly apply to vehicle relocation than it does as to whether the Award is capable of application to cartage of material which is not "dirty material".

23. In making the RT&D Award, the Commission made clear that the Award was intended to have broad application to driving work. For example, in the *Award Modernisation – Statement* [2009] AIRCFB 50, the Full Bench said (at [98]):

> ***[98]*** *The RT&D Modern Award covers the road transport and distribution industry as defined in the exposure draft. The definition is broad and is intended to incorporate the scope of the pre-reform Transport Workers Award 1998 (Transport Workers Award) and NAPSAs operating in each state as the general industry transport award. It also incorporates the transport activities previously covered by freight forwarding, petrol and petroleum products, crude oil and gas and quarried materials awards. These are a subset only of the sectors covered by the exposure draft and the parties should give close consideration to the definition of the industry.*

24. Truck Moves points to no instance in which the Commission has considered the application of the RT&D Award to vehicle relocation businesses and determined the Award should not apply. The application of the reasoning of the Full Bench during the award modernisation proceedings would lead to the conclusion that the RT&D Award should apply to professional drivers working in vehicle relocation.

25. Thirdly, the submission that the classifications and pay scale in the RT&D Award are not appropriate to vehicle relocation work proceeds on a misstatement of the nature of the work of drivers more generally in the transport industry. The submissions advanced at paragraphs 88 to 94 of Truck Moves' submissions amount to little more than an assertion that the drivers it employs may not perform each and every task which might be performed by a driver in the transport industry. In this respect, drivers employed by Truck Moves or other vehicle relocation businesses are in no different position than other drivers in the transport industry.

26. The evidence of the TWU's witness, Mr Mealin, makes clear that, in addition to the core task of driving, drivers employed in vehicle relocation undertake many of the same duties as other drivers employed in the transport industry, including vehicle checks, refuelling, placing trade plates and hitching trailers (Ex TWU4). The evidence of Mr Bradac similarly makes clear that Truck Moves' drivers undertake many of the duties of other drivers and skills of other drivers including having knowledge and training in fatigue management and safe operation of vehicles, completing paperwork, undertaking vehicle checks and are exposed to the same regulation under the National Heavy Vehicle Law (Ex TM2).

27. The height of the submission appears to be that drivers employed by Truck Moves might not perform each and every function conceivably undertaken by a driver in the transport industry. All drivers in the transport industry are in the same position. As Mr Bradac acknowledged in his oral evidence, a driver more generally in the transport industry may perform some but not all of those tasks. For example, whilst some drivers may be directly engaged in loading and unloading or use of equipment on the truck, others will not. The classifications and pay scales will nonetheless have application to those drivers and can appropriately apply to drivers employed in vehicle relocation.

28. Many of the aspects of the work of a driver emphasised by Commissioner Austin in *Transport Workers (General) Award 1959* (1959) 91 CAR 344 are applicable to the work of drivers employed in vehicle relocation. For example, Commissioner Austin referred to the responsibility of drivers of the vehicle and for maintaining a schedule of work away from direct observation by the employer (at 5), carrying out all aspects of the employment singly (at 6), direct

contact and interaction with clients (at 6) and problems associated with the stress and tension of driving work (at 7).

29. The work of drivers employed in vehicle relocation appropriately fits within the work covered by the RT&D Award. This is further reflected in the fact that Truck Moves deliberately advertises for persons with transport industry driving experience and skills for its operations and advertises itself on its website as having "a team of uniquely experienced professionals" and that its services are provided only by "highly experienced drivers" (Ex TWU11). When seeking new drivers, Truck Moves invites applicants to record their transport industry experience driving various types of vehicles because (obviously) it is relevant to the work of drivers employed by Truck Moves (Ex TWU14).

30. Fourthly, Truck Moves submits that the RT&D Award is not capable of fair application to a vehicle relocation business because of the operation of clause 19 of the Award. The submissions of Truck Moves at paragraphs 99 to 102 suggest clause 19 operates unfairly because its drivers may be called upon to drive more than one type of vehicle in a day. The submission could not be accepted. Any driver covered by the RT&D Award may be directed to drive more than one type of vehicle in a day. Clause 19 reflects the long-standing position that, if the employer directs an employee to perform work involving two or more grades of work on the one day, the driver is to be paid the minimum wage for the higher grade.

31. As was acknowledged by Mr Bradac and Mr Whitnall in their evidence, it is a matter for the employer to direct the performance of work of the drivers. If Truck Moves, for example, directs its driver to drive a double articulated vehicle up to 53.4 tonnes GCM on a day, it has required that worker to have the licences and skills to perform work on that day at Transport Worker Grade 7. It is entirely fair and reasonable that, if the driver is required to undertake work at Grade 7 on that day at the direction of his or her employer, the driver be paid at that grade.

32. Fifthly, it is submitted at paragraphs 104 to 109 of Truck Moves' submissions that that the RT&D Award is not economic for vehicle relocation businesses. This submission reveals the true reasons for Truck Moves' objection to award coverage. Upon being questioned, Mr Whitnall was unable to identify any clear basis upon which the application of the RT&D Award would interfere with Truck

Moves' business other than it would prevent it continuing to pay very low rates of pay to its drivers without penalties or overtime rates.

33. In his statement (Ex TM3). Mr Whitnall recorded at paragraph 125 that drivers employed by Truck Moves are paid the national minimum wage without any shift penalties or overtime rates. That is, its drivers receive the lowest rate of pay capable of being paid to employees in any job in Australia. Furthermore, it is likely that drivers are underpaid even against the national minimum wage because, without any legal authorisation, Truck Moves pays "trip rates" on long distance trips based on, it is claimed, an estimate of hours of work.

34. It fails to provide a fair and safe minimum safety net of conditions for skilled and qualified employees involved in a well-recognised and award-covered type of work at the minimum rates in the national employment standards which fails to reflect the skills, experience and qualifications required for the work and distinguish between the skills and qualifications required for the work performed by an individual employee. The evidence demonstrates that Truck Moves endeavours to employ persons who may be susceptible to exploitation, including drivers with workplace injuries. The need to ensure a fair and relevant minimum safety net demands that drivers be covered by the appropriate modern award.

35. Truck Moves also pays no overtime rates or shift penalty rates in circumstances in which the uncontested evidence of Mr Mealin was that his work involved unsocial hours, interstate trips and weekend work. Section 134(da) of the Act requires the Commission to take into account:

> *(da) the need to provide additional remuneration for:*
>
> *(i) employees working overtime; or*
>
> *(ii) employees working unsocial, irregular or unpredictable hours; or*
>
> *(iii) employees working on weekends or public holidays; or*
>
> *(iv) employees working shifts; …*

36. The need to provide additional remuneration for overtime, unsocial, irregular or unpredictable hours, weekends and public holidays and shifts supports the extension of the RT&D Award to drivers employed in vehicle relocation.

37. Mr Whitnall's evidence (paragraph 45) disclosed that its business seeks to undercut wage rates paid to drivers employed by transport companies. If employed by a transport company, a driver would be covered by the RT&D Award even if involved in relocating a vehicle. If manufacturers or wholesalers of vehicles directly employed drivers to relocate vehicles, the drivers would be covered by the *Vehicle Manufacturing, Repair, Services and Retail Award*. It is antithetical to the concept of a fair and relevant safety net for an outsourcing operation to avoid award coverage simply by shifting the employment of the driver to a specialist vehicle relocation business.

38. Finally, it is appropriate to observe that some other objections are referred to in the witness statements filed by Truck Moves which are entirely without foundation. Mr Bradac, in his statement (Ex TM2), suggests at paragraph 25 that there is no classification for paying drivers when not driving. Mr Bradac confirmed in cross-examination that he understood that the RT&D Award required payment only when a driver was physically driving a vehicle. That is simply wrong. Mr Bradac also asserts (paragraphs 28 to 29) that the RT&D Award could not have application to Truck Moves' business because the classifications refer to the GVM of a vehicle. The GVM of a vehicle is required to be assigned by the manufacturer and recorded in a plate or sticker permanently affixed to the vehicle (Ex TWU10).

OVERTIME PROVISIONS

39. The TWU's proposal to insert a new subclause in clause 27 of the RT&D Award to deal with circumstances in which a worker transfers temporarily from the LDO Award to the R&D Award is opposed by the AI Group, Natroad and ARTIO. The issues which appear to arise are:

    (a) Whether the variation seeks to reagitate issues raised on the two yearly review?
    (b) Whether employees performing work under the LDO Award are already compensated for overtime by the rates paid under that Award?
    (c) Whether it is possible for an employer to know the actual hours of work of an employee performing long distance operations?

(d) The relevance of s 134(1)(da) of the Act to the variation proposed by the TWU.

40. Firstly, the TWU is not attempting to reagitate matters determined by the Commission on the two yearly review. As noted in the TWU's earlier submissions, when inserting clause 4.2 in the LDO Award which permits an employer to temporarily require an employee to perform driving duties covered by the RT&D Award, the Commission expressly contemplated that any consequences of the provision could be considered as part of the 4 yearly review: *Modern Awards Review 2012 - Road Transport (Long Distance Operations) Award 2010* [2014] FWC 3529 at [29]. It is entirely appropriate for the application to be dealt with as part of the 4 yearly review.

41. Secondly, the AI Group, NatRoad and ARTIO point to the fact that the rates of pay in the LDO Award, whether the cents per kilometre or hourly payment method, purport to include an overtime allowance: see clause 13.5(b) and 14.1(b). It is suggested in the submissions (AI Group, paragraph 86 to 87; NatRoad, paragraph 106) that employees who are required to perform local work having already completed a long distance operation will have been paid compensation for any overtime performed as a result by reason of the rates paid under the LDO Award. That submission cannot be accepted.

42. The rates of pay under the LDO Award purport to provide compensation for overtime for a certain amount of work under the LDO Award. Clause 14.1(b) of the LDO Award, for example, provides:

> ***(b) Overtime allowance***
>
> *The rates per kilometre are inclusive of an overtime allowance of 1.2 times the ordinary rate, which take into account an overtime factor of two hours in 10 at double time.*

43. The payments under the LDO Award do not compensate for additional work an employee is required to undertake under the RT&D Award. For example, if a driver performs 10 hours work undertaking a long distance operation, he or she will have been compensated for having performed two additional hours for that work by the rates in the LDO Award. If the driver is then directed to perform two additional hours work undertaking local work covered by the RT&D Award and is paid only ordinary time rates, the employee will not have been paid anything

for the two hours of local work to compensate for the fact the he or she has already performed 10 hours work for the employer on that day.

44. Thirdly, it is faintly submitted by the AI Group and NatRoad that an employer will not have the means to ascertain the actual hours of work of an employee engaged in a long distance operation. The submission is without merit. The National Heavy Vehicle Law requires drivers to maintain a “work diary” recording all work time and rest time of the driver. “Work time” includes both driving time and other time spent engaging in other tasks relating to the use of the vehicle. It would be alarming if employers were actually coming before the Commission suggesting that they did not have means of knowing the hours of work of persons engaged in long distance transport operations.

45. Fourthly, s 134(1)(da) of the Act requires the Commission, in making or varying modern awards, to take into account “the need to provide additional remuneration” for employees working overtime, unsocial, irregular or unpredictable hours, weekends or public holidays and shift work. Whether or not the section requires a particular rate structure in all cases (*Penalty Rates Case* [2017] FWCFB 1001 at [187]-[203]), s 134(1)(da) is a consideration required to be taken into account which plainly supports the variation proposed by the TWU.

Transport Workers’ Union of Australia

Dated: 21 March 2017