Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Road Transport and Distribution Award 2010 &

Road Transport (Long Distance Operations) Award 2010

(AM2016/32)

5 March 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/32 *ROAD TRANSPORT AND DISTRIBUTION AWARD 2010 & ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD 2010*

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes these submissions in reply to the material advanced by the Transport Workers' Union (**TWU**) in support of their proposed variations to the *Road Transport and Distribution Award 2010* (**RT&D Award**) and the *Road Transport (Long Distance Operations) Award 2010* (**LDO Award**).

2. Ai Group does not support any of the TWU proposed variations.

3. These submissions address our concerns regarding the following claims:

    - The proposed inclusion of a new definition for the word 'driver' in clause 3.1 of the RT&D Award.

    - The proposed variation to clause 27 of the RT&D Award relating to ordinary hours of work and overtime payments.

    - The proposed variation to clause 13 of the LDO Award to include a new pick up and drop off allowance and the various consequential amendments.

4. As a preliminary matter of relevance to the review of the awards the subject of these proceedings we note that there appears to be a degree of overlap between the proposed variation to clause 27 of the RT&D Award and the claim for "pick up and drop off allowance" in the LDO Award. Both claims appear, to an extent, intended to regulate the payment for driving work that is undertaken by a driver outside of the context of a long distance operation and therefore outside the coverage of the LDO Award.

2. THE STATUTORY FRAMEWORK AND THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

5. The TWU's claims are being pursued in the context of the 4 yearly review of modern awards (**Review**), which is being conducted by the Fair Work Commission (**Commission**) pursuant to s.156 of the *Fair Work Act 2009* (**Act**).

6. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

7. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at ss.134(1)(a) – (h).

8. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.

9. We later address each element of the modern awards objective with reference to the unions claims for the purposes of establishing that, having regard to s.138 of the Act, the claims should not be granted.

10. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*[1] provides the framework within which the Review is to proceed.

11. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> [23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed

[1] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[2]

12. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> [24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[3]

13. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

> [25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> [26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
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> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally

[2] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[4]

14. In addressing the modern awards objective, the Commission recognised that each of the matters identified at ss.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net": (emphasis added)

[36] … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.[5]

15. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

"… a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action."

16. Accordingly, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

[5] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

probative evidence demonstrating any factual propositions advanced in support of the claim;

- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;

- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

17. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

> [8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[6]

18. The unions' claims conflict with the principles in the *Preliminary Jurisdictional Issues Decision* and accordingly the claims should be rejected.

[6] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

3. THE PROPOSED NEW DEFITION OF 'DRIVER' IN THE RT&D AWARD

19. The TWU have proposed that a definition of the word "driver" should be included in the RT&D Award. The award does not currently contain a definition of the word "driver". The proposed provision is cast in the following terms:

> Driver means an employee who is engaged to drive a rigid vehicle, a rigid vehicle with trailer combinations, an articulated vehicle, a double articulated vehicle and/or multi axle platform trailing equipment. A Driver may also undertake non-driving duties or other tasks in connection with driving the vehicles described in this definition including loading and unloading of vehicles; consolidating goods, wares, merchandise or other materials for loading; refuelling a vehicle; operation of on-board computer equipment; routine vehicle inspections; washing or cleaning of vehicles; basic vehicle maintenance tasks; and log book maintenance and other paperwork associated with the driving task.

20. The TWU have not expressly sought to vary the coverage of the RT&D Award. Their claim would however have the potential effect of indirectly altering the instrument's coverage. This appears to be their intended objective. Nonetheless, in considering the merits of the claim, and in particular whether the specifically proposed variation is *necessary*, the Full Bench should not lose sight of the fact that what they are actually seeking is the insertion of a new definition within the award. The inclusion of a definition for a word that deviates from the plain and ordinary meaning of that word has ramifications for any award clause that contains the term.

21. The word 'driver' or (drivers) appears in the following award provisions:

- Clause 3
    - Within the definition of aerodrome attendants there is a reference to "motor boat drivers"
    - Within the definition of "driver sales person"
    - Within the definition of "loader"

- Within the definition of “motor driver’s assistant”

- Clauses 16.3(d)(i) and 16.3(d)(ii), which relate to the eligibility of drivers to a dangerous goods allowance

- Clause 22.4(d), which sets specific arrangements for drivers employed at a fish, fruit or vegetable store

- Within numerous classification provisions for transport workers contained in Schedule C. In this regard we note that the classifications that contain the word “driver” are not limited to what might be considered ‘typical’ vehicles. There are also classifications covering drivers of specialised vehicles such as:

    - Concrete mixers

    - Oil tankers

    - Fork lifts

    - Mobile cranes

    - Gantry cranes

22. The arguments advanced by the TWU in support of the variation are essentially as follows:

- The work performed by a driver extends to non-driving tasks.

- There has been some historical recognition of the arbitral history underpinning or connected to the RT&D Award that drivers perform work beyond mere driving functions.

- It is common for modern awards to contain classifications that reference detailed descriptions of the type of tasks, level of responsibility and degree of autonomy required.

- It will assist in achieving the modern awards objective, particularly the objective of ensuring that the awards system is simple and easy to understand (s.134(1)(g)) and the considerations identified in s.134(1)(da) pertaining to the payment of additional remuneration for the working of overtime, unsocial, irregular or unpredictable hours .

- That it is warranted given the standard award term dealing with overlapping award coverage.

23. None of the arguments advanced warrant varying the award in the manner proposed. We contend that that the TWU has failed to make out a merit based case justifiying the variation.

24. In short, Ai Group opposes the variation for the following reasons:

- A definition of the word "driver" is not necessary, in the sense contemplated by s.138.

- The specific proposed definition is not appropriate given the manner in which the word driver is actually used within the award. Deviating from the ordinary meaning of the word "driver" has the potential to alter the operation of numerous award clauses that contain the word driver in unintended and potentially unforeseeable ways.

- The amendment has the potential to disturb existing award coverage and/or to create uncertainty as to the application of potentially overlapping awards.

- There is no evidence of any actual problem with the operation of the current award that would warrant a variation.

- A proper evidentiary case justifying the particular proposed definition has not been made out.

- The variation is contrary to the "…need to ensure a simple, easy to understand, stable and sustainable modern award system" (s.134(1)(g)).

The proposed clause is not necessary

25. The TWU has made no serious effort to establish why *all* of the terms of the proposed variation are necessary. At best they sought (inadequately in our view) to address, as a general proposition, the merits of including a reference to drivers performing non-driving duties. Plainly not all of the duties identified in the claim will be performed by all drivers. Nor are all of the duties that many drivers in the industry perform captured. Consequently, there is no apparent reason why the Commission can conclude that the particular duties that have been selected by the union are necessary.

26. The nature of the classification structure in the award is the key reason why the proposed definition is not *necessary*. As identified by the TWU, the "driver classifications" contained in the award are, generally, defined by reference to vehicle type, gross vehicle mass, gross combination mass, carrying capacity or lifting capacity. They do not attempt to further describe the duties ordinarily undertaken by employees in the particular classifications. The fundamental purpose of the classification structure is to establish the basis upon which differential wage rates are to be applied. The structure does this in a very simple and easy to understand manner.

27. There is no reason for the Full Bench to conclude that the current classification structure is giving rise to any difficulties or complication in practice. No evidence of any problems has been advanced. The classification structure is, on its face, one of the simplest and easiest to apply in the entire award system.

28. The variation will likely make the classification structure less simple and easy to understand. In circumstances where a driver of a particular vehicle covered by the structure (such a driver of a forklift) does not perform the various duties identified in the claim it may give rise to uncertainty as to whether or where they properly fit within the classification structure and, in turn, the award's coverage. A consideration of s.134(1)(g) weighs against granting the claim

29. There is no force to the argument that the proposed amendment should be made because it is common for awards to set classifications by reference to a detailed description of the types of tasks, level of responsibility and degree of autonomy required.[7] Such classifications operate in an entirely different manner to the classification structure in the RT&D Award. The unique nature of the work undertaken by 'drivers' covered by the RT&D Award and the fact that the wage structure has been developed to reflect the driving of different vehicles (and has likely involved associated considerations related to matters such as the differential value of work involved in the driving of such vehicles) negates any *necessity* for the structure's contemplation of duties. There are cogent reasons for maintaining longstanding classification structure contained within the award even if it is of a different nature to that contained in some other awards.

The potential to disturb coverage of multiple awards

30. It is obvious that the TWU is primarily pursing the variation for reasons associated with the coverage. The claim is, as other parties have alluded to, an attempt to achieve an outcome which they have been unable to achieve through separate litigation associated with the award coverage of delivery drivers engaged by Coles.

31. However, even the TWU appear uncertain as to the impact of the variation in this narrow context. They relevantly submit:

> The TWU does not suggest that the insertion of a definition properly reflecting duties undertaken by a driver will necessarily produce a different outcome to the assessment of which classification is the "most appropriate" having regard to the work undertaken by any given class of employee. However, the TWU submits that the RT&D Award should contain an appropriate description of the duties which drivers are commonly called upon to perform…[8]

32. Given the proponent of the proposed variation cannot even definitively identify the consequences of the variation for award coverage in the context of drivers working for Coles, it would be reckless for the Full Bench to visit such potential uncertainty upon the broader industry by granting the claim. Such a change is

[7] TWU submissions at paragraph 12

[8] TWU submissions at paragraph 19

squarely inconsistent with the necessity for the award system to be simple and easy to understand.[9]

33. Attached at Annexure A is a document identifying modern awards that Ai Group contends cover employees performing driving functions. We do not suggest that it is necessarily exhaustive. Nor have we undertaken a detailed analysis of the potential overlapping coverage of these instruments and the RT&D Award. Nonetheless, given an award variation that alters the classification structure of the RT&D Award could be argued to impact upon coverage of any award that it overlaps with, and in particular the manner in which clause 4.8 of the RT&D Award is applied, the Commission should not grant any variation unless the impact of the change is clear and justified. This cannot be achieved by considering the application of the RT&D award in isolation. In this regard we note that the onus for setting out the justification for the claim rests solely with the TWU, yet they have made no attempt at considering the potential impact of the change on the coverage of other awards.

34. Disturbing existing award coverage is contrary to the need to maintain a *stable* modern award system (s.134(1)(g)).

The evidence advanced in support of the claim

35. The TWU have not advanced evidence that could satisfy the Commission that the particular definition it has proposed is appropriate.

36. As already observed, in the Preliminary Jurisdictional Issues Decision, the Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence. We nonetheless emphasise the Full Bench's determination that:

> …where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and <u>be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.</u>

[9] S134(1)(g)

37. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

> [8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.

38. We do not here suggest that all claims advanced in the context of this Review must be supported by evidence. However, the nature of the change and merits based case pressed by the TWU is such that they rest upon, or give rise to, a number of factual considerations that necessitate the union mounting a proper evidentiary case. Not the least of which is the question of whether the proposed definition is even properly reflective of the work undertaken by all 'drivers' covered by the award and whether the award is actually operating in some deficient manner in practice.

39. The evidence led by the union is largely advanced from an extremely limited number of employees who have a worked for a relatively small number of employers. Several of the witnesses are covered by enterprise agreements. It cannot be said to establish the nature of work undertaken by drivers engaged by employers operating 'road transport businesses' more broadly.

40. Moreover, the work undertaken by the witnesses cannot be assumed to be reflective of the work undertaken by drivers engaged by the diverse array of employers that fall within the coverage of the RT&D Award. We note in this regard that the award applies to employers that perform transport functions as

an ancillary part of their business. There is no evidence of any such employees that has been advanced.

41. Similarly, it has not been established that the proposed definition is in any way reflective of the work undertaken by drivers of specialised vehicles such as concrete mixers, oil tractors, fork lifts, mobile cranes or gantry cranes. No evidence pertaining to the work undertaken by 'drivers' in these classification has been advanced.

42. The evidentiary case advanced simply does not establish that the specific tasks identified in the TWU proposal are reflective of the tasks undertaken by all or even most drivers engaged under the RT&D Award. The claim should fail on this basis alone.

43. At paragraph 19 of the TWU's submissions, it baldly asserts that the absence of express recognition in the RT&D Award of the non-driving tasks undertaken by drivers inhibits the capacity of employers, employees and courts to properly assess the appropriateness of the classification in the RT&D Award. The submission should be given no weight. It is entirely unsupported by probative evidence.

44. At best, the TWU proposal is a 'solution looking for a problem'. In reality, it amounts to little more than a blatant attempt to skew the application of clause 4.8 of the instrument so that the coverage of the RT&D award prevails over other instruments.

45. However, the variation also risks having the reverse effect in circumstances where an employee currently covered by the RT&D award may not perform the various TWU identified duties. In such circumstances the variation could give rise to arguments that the classification is not appropriate.

46. The Full Bench should not be persuaded to grant the proposal given the paucity of the evidentiary case advanced.

4. TWU PROPOSAL TO VARY CLAUSE 27 OF THE RT&D AWARD

47. The TWU have proposed that the following clause be inserted into the provisions of the RT&D Award:

> Where an employee who ordinarily performs work under another award is temporarily required to engage in work covered by this award shall have the hours worked under both awards count towards the ordinary hours of work. Any hours performed outside of the combined ordinary hours of work shall be paid in accordance with 27.1 of this clause.

48. The clause only applies in circumstances where an employee who "ordinarily performs work under another award is temporarily required to perform work under the RT&D Award." It is likely that in many cases the other award will be the LDO Award, although the union has not identified whether or not it is only work under the LDO Award that will be caught by the clause.

49. In terms of its substantive effect, the clause requires that:

- "all hours worked under both awards count towards the ordinary hours of work" (emphasis), and
- that any hours performed outside the combined ordinary hours of work shall be paid at the over-time rates specified in clause 27.1.

50. The clause appears to be intended to affect the manner in which ordinary hours may be arranged and recognised under the RT&D award. That is, it appears to potentially require that hours worked under another award that might not be considered ordinary hours under the RT&D (or indeed even under the other instrument) should be considered ordinary hours. The obvious objective behind the union's claim is to increase the circumstances in which overtime penalty rates are applicable.

Practical difficulties associated with the proposal

51. There are a number of difficulties or uncertainties that flow from the wording and nature of the proposal. One such issue is that the clause requires that *all* hours worked under another award are required to be counted as ordinary

hours under the RT&D award. Consequently, there is no requirement that the work performed under the other award must have been worked within the same 'work cycle'[10] over which the employer would calculate ordinary hours under the RTD Award. Consequently, it is entirely uncertain which hours worked under the award that is not the RT&D Award should be counted for the purpose of the clause. Is it the hours worked during the last week, the last month or the last year that count?

52. Another difficulty with the proposal is that the LDO Award does not prescribe a separate payment for all hours 'worked' but instead provides for payment by reference to the driving and loading and unloading activities performed. The CPK rates under the award are calculated to compensate for "extra responsibilities" or duties that may be performed.[11] Consequently, employers will not keep a record of all hours that might be 'worked' as not all work attracts a separate payment.

53. The proposal operates on the assumption that an employer will be aware of the actual hours spent performing driving work under the LDO Award. In practice, many employers will not know or be able to verify, with certainty, the precise hours or times at which a long distance driver is working. A driver remunerated under the CPK method is not paid by reference to the time they work and as such the payroll systems of many employers do not record such matters. Nor have all employers implemented technology or systems that will reliably measure such matters. It must be remembered that long distance drivers can work for several days without returning to their 'home base' and many will have a large degree of control over precisely when they perform their work.

54. There is no obligation under the *Fair Work Regulations 2009* that would require that a record of the driving hours (or hours of work more broadly) performed by an employee be kept if the employee is paid pursuant to the LDO Award.

[10] We here use the term 'work cycle' to reference the period overwhich ordinary hours may be averaged pursuant to the RT&D Award

[11] See clause 14.1(a)(ix)

55. There is certainly no evidence to establish that all employers that engage employees under the LDO Award are *able* to accurately record the actual hours worked by such employees. Such employees work remotely (often for large periods of time) and are not remunerated by reference to a time based system.

56. Of course, many employers will have practices in place that afford them a degree of oversight over the hours that drivers have indicated that they work for the purposes of implementing appropriate fatigue management practice. This may include inspecting a driver's work diary / log book or requiring the completion of 'safe driving plans'. However, even where this is the case, many of these employers will not have payroll systems in place that interact with such systems so as to facilitate payment by reference to hours driven or worked. There are also nuances associated with what may constitute 'work' for the purposes of an industrial instrument when compared to the concept of 'work' under regulation addressing fatigue management. Suffice it to say, measures such as work diaries or safe driving plans cannot readily be regarded as an acceptable basis for calculating award derived entitlements connected to hours worked.

57. If an employer was required to calculate the entitlements for an employee that performs work on long distance operation by reference to the time spent driving on that journey it would, in part, undermine the utility of the kilometre based remuneration structure and provisions providing for deemed distances and hours. This would constitute a significant regulatory burden and likely translate to additional employer costs.

58. The proposal would also give rise to potential complexities associated with how an employer would calculate an individual employee's superannuation entitlements. Deeming hours worked under another award to be 'ordinary hours', in circumstances when they may not otherwise have been considered ordinary hours, may alter an employer's superannuation obligations. Although awards can no longer define an employee's notional earnings base for determining their ordinary time earnings for superannuation purposes, an award prescribed definition of ordinary hours of work will impact upon whether

earnings that are connected to such hours of work attract superannuation entitlements. Accordingly, if an award were to deem hours worked under another award to be 'ordinary hours' (as the proposal appears intended to do) it may increase superannuation obligations. The TWU have made no attempt to explain or quantify the likely impact of the claim on such matters.

The TWU has not established that the proposed definition is *necessary*

59. At paragraph 51 of their submissions the TWU assert that there are practical problems that flow from the interaction of the RT&D Award and the LDO Award. More specifically they say that difficulties arise from the inclusion of clause 4.2 in the LDO award. Clause 4.2 states:

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

60. A major difficulty with the union's case is they have not advanced evidence that could reasonably satisfy the Commission that any real problems have arisen in practice. More importantly, they certainly haven't advanced evidence that would enable the Commission to conclude that the remedy to the purported problem that they have advanced is appropriate or necessary, as contemplated by s.138. The TWU has advanced very little evidence about what occurs in practice in relation to employees working under both awards.

61. The union's claim invites the Full Bench to make a major variation to the manner in which the transport industry is regulated in what amounts to a virtual evidentiary vacuum. Granting such claim would be squarely inconsistent with the approach to the conduct of this Review contemplated in the Preliminary Jurisdictional Issues Decision.

62. The evidence of relevance to this claim is summarised in the section below.

Mr Coghill

63. Mr Coghill is employed by the TWU as an organiser who covers the northern part of Victoria. His evidence cannot be viewed as reflective of practices across Australia.

64. The gravamen of his evidence of relevance to this issue is that he is aware that an unspecified number of unnamed companies that engage an unspecified number of unnamed drivers to perform long distance operations and to carry out local work in the same day. The evidence does not disclose whether modern awards apply to these employees or whether they might instead be covered by enterprise agreements. Indeed, we do not even know what industry their employers are engaged in.

65. At paragraph 13 the witness seeks to give hearsay evidence to the effect that some companies encourage drivers to not record local work in their logbooks. The evidence is based purely on discussions that the witness has had with unidentified employees and there are no details pertaining to the relevant companies provided. It should be given no weight.

66. At paragraph 13 the witness also makes the entirely unremarkable observation that, "…if a driver carriers out too much local work they are then unable to perform a long distance operation." The evidence does not disclose how many long distance operations any of the drivers referred to in the paragraph may have undertaken during the relevant fortnightly period. Consequently, the evidence provides no meaningful insight into the impact of a driver being permitted to undertake local work.

67. At paragraph 14 Mr Coghill asserts that some companies only pay a "base hourly rate" for the local work without paying overtime rates. However, we do not know who these companies are, what industry they are engaged in or even what this base hourly rate actually is. Nor do we have any idea of the broader terms and conditions afforded to employees by these unnamed employers.

Mr Bird

68. Mr Bird provides evidence of the manner in which he is paid by Greenfreight to perform a single long distance operation. This journey is only a 309 kilometre return journey. Consequently, even if it falls within coverage of the LDO Award by virtue of it being an interstate journey, it could not be said to be typical of the work undertaken generally by employees covered by the LDO Award.

69. The witness does not provide any details about his general work patterns or even the times at which the single long distance operation is generally performed. We do not know whether the long distance journey is the only long distance journey undertaken in the relevant week or fortnight. Nor are we afforded any insight into the manner in which ordinary hours are arranged at Greenfreight. Indeed, we do not even know the times at which the local work is undertaken. Given the absence of these kinds of details there is no capacity to determine whether the local work undertaken by Mr Bird could reasonably be argued to be performed outside of ordinary hours so as to entitle him to overtime.

70. The evidence at paragraph 20 pertaining to the local work involving a return journey from Barnawartha to Shepparton appears to be mere speculation about trips Mr Bird might perform rather than evidence about actual work undertaken. Relevantly, he talks about trips that he "…*could then do*…" after returning from the aforementioned interstate run. If this work is in fact undertaken, then it must be observed that there is an astonishing lack of detail in the material that has been advanced. The statement provides no indication as to the time at which such work is undertaken. Nor does it provide any indication as to how commonly Mr Bird undertakes work under both relevant awards during the same day. Consequently, the evidence does not establish that he works under both awards with any degree of regularity.

71. The evidence also fails to provide broader relevant contextual considerations, such as an explanation of whether the witness is expected or '*required*' to perform such work or whether he is merely suggesting that such work might be made available to him to perform should he so wish. There is certainly no evidence that Mr Bird is directed or coerced to undertake the local work.

72. A further difficulty with the evidence of Mr Bird is that it provides scant detail about his remuneration. We know that he is paid a trip rate for his interstate trip, but we do not know what this level of remuneration is for such a trip. There is no explanation of the manner in which the rate is calculated or of the amounts that are paid for trips. Nor do we know what remuneration Mr Bird is generally paid from week to week. While he attests to being paid the hourly rate under the RT&D Award, we have no idea as to what that rate is. Nor are we provided with sufficient information to identify it.

73. The evidence does not establish that there is any form of underpayment or non-compliance with the award. Employers are of course able to pay employees in a manner that deviates from that prescribed by the award provided that the relevant safety net obligations are met.

74. Given the numerous and significant deficiencies in Mr Bird's evidence it amounts to little more than an expression of his personal view that he should be paid overtime rates for local work. It is of very little, if any, assistance to the Full Bench.

Mr Anderson

75. Mr Anderson is covered by an enterprise agreement. As such, neither the RT&D Award or the LDO Award apply to him. This alone renders his statement of very limited relevance to the proceedings.

76. In effect, Mr Anderson indicates that Visy just pays an hourly rate for local work which he suggests, without providing any proper basis for his opinion, doesn't take into account that a driver "may" have already worked enough hours to attract overtime.

77. Mr Anderson's evidence fails to establish or provide a proper basis for determining a raft of matters that would be crucial to understanding the practices at Visy. These include:

    - The rate of pay provided by Visy for the performance of local work

- The pattern of hours worked by Mr Anderson or other relevant employees at Visy
- The enterprise agreement that covers Mr Anderson
- The nature of the work undertaken at Visy

78. Mr Anderson's evidence as to what rate he is paid for performing local work does not assist the Commission.

79. In summation, the evidence that the TWU have advanced does not provide a proper basis for granting the claim.

The Proposal is not "fair" as contemplated under s.134(1)

80. Even if it were established that there were difficulties associated with the interaction of the two awards (a proposition that we do not accept), it does not follow that the specific remedy proposed by the TWU is *necessary* to meet the modern awards objective. Instead, there may be merit in amending the respective awards to either address their interaction (as contemplated by Senior Deputy President Harrison in her decision in the 2 Yearly Review of the LDO Award[12]) in a manner that ensures that employees who only temporarily perform work under the RT&D Award are not eligible for the overtime rates contained in the RT&D Award. Ai Group has not advanced any such proposal as we are not convinced that, in reality, any practical problems have arisen so as to render such a provision *necessary*.

81. The TWU proposal seeks to address what it perceives to be practical problems by implementing an award provision that would, at least superficially, operate in a very beneficial manner for employees but in an unfair manner for employers. This unfairness renders the proposal incompatible with the modern awards objective.

[12] [2014] FWC 3529 at 29

82. The modern awards objective is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the particular considerations identified in sections 134(1)(a) to (h).

83. In relation to the notion of fairness, as contemplated under s.134(1), we note the following observation of the Full Bench in the Penalty Rates Case:

> **[117]** First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. So much is clear from the s.134 considerations, a number of which focus on the perspective of the employees (e.g. s.134(1)(a) and (da)) and others on the interests of the employees (e.g. s.134(1)(d) and (f)). Such a construction is also consistent with authority. In Shop Distributive and Allied Employees Association v $2 and Under (No. 2)39 Giudice J considered the meaning of the expression 'a safety net of fair minimum wages and conditions of employment' in s.88B(2) of the Workplace Relations Act 1996 (Cth) (the WR Act). That section read as follows:
>
> > '88B Performance of Commission's functions under this Part …
> >
> > (2) In performing its functions under this Part, the Commission must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:
> >
> > (a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;
> >
> > (b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;
> >
> > (c) when adjusting the safety net, the needs of the low paid.'
>
> **[118]** As to the assessment of fairness in this context his Honour said:
>
> > 'In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. This must be done in the context of any broader economic or other considerations which might affect the public interest.'
>
> **[119]** While made in a different (albeit similar) statutory context the above observation is apposite to our consideration of what constitutes a '*fair* … safety net' in giving effect to the modern awards objective.[13]

84. Much of the evidence advanced by the TWU in relation to this claim suggests, notwithstanding its deficiencies, that employers do not provide overtime rates

[13] [2017] FWCFB 1001

to employees. Similarly, it is not apparent that the payment of such rates constitutes the practice adopted amongst major employers in the industry that have implemented enterprise agreements, but that are otherwise covered by the award.[14] Consequently, the TWU's proposed claim could significantly increase employment costs. This would be directly contrary to considerations arising from s.134(1)(f). To the extent that such costs might be passed on to the customers of transport companies, which include virtually all other industries and the broader community, the claim is contrary to a consideration of s.134(1)(h).

85. It is not possible for the Full Bench to properly assess the impact of the claim as the TWU, the proponent of the claim, has not advanced any evidence establishing how common it is for employers ordinarily engaged under the LDO award to temporarily transfer to duties under the RT&D Award. Nor have they advanced robust evidence about the impact of the award currently in operation or how it might operate if varied in the manner sought.

86. A further unfairness to employers is that the proposal results in employees being paid compensation for working overtime under both the LDO Award and RT&D Award. There is an element of unfair "double dipping" in the TWU proposal. This is because the driving rates contained in the LDO Award are calculated to include compensation determined on a notional basis for working overtime. These loaded up rates are paid for all hours worked, not just overtime.

87. It is not fair for employees ordinarily covered by the LDO Award to be paid a rate that compensates them for working overtime and to then be paid at overtime rates under the RT&D Award when effectively deemed to be working overtime under the TWU proposal. This would deliver such employees an unwarranted and significant windfall gain. It would deliver such employees a significantly higher level of income than would be available to employees that always work under the RT&D Award.

[14] See for example the cl.20.7 of the *STI Linehaul Long Distance General Drivers Enterprise Agreement 2016 w*hich was only recently approved by the Commission, [2016] FWCA 6866, and which covers Scotts Transport Industries Pty Ltd and describes the TWU as a party to the Agreement.

88. The TWU proposal also has the potential to discourage employers from utilising employees that ordinarily perform long distance work to perform local work. It would effectively impose a penalty on an employer that utilises their workforce in such a flexible manner.

89. It is entirely appropriate and indeed commercially sensible for an employer to use their workforce to perform both local and long distance work if it suits their operational requirements (although we note that there is no evidence before the Commission about how commonly this occurs). Award coverage should not be a factor that governs the type of work than an employee performs. To the extent that the proposed clause may dissuade or otherwise prevent employers from using employees ordinarily performing work on long distance operations to occasionally perform local work, it would be contrary to the need to promote flexible work practices and the efficient and productive performance of work (s.134(1)(d)).

90. The proposal would also likely have a disproportionally negative impact on smaller employers. Generally, large employers have the capacity for employees to work exclusively on either local or long distance work. Smaller employers do not have comparable level of numerical flexibility in their workforce. The proposed clause fails to acknowledge the special needs of small to medium-sized businesses. A key element the objective of the Act is the development of a framework for workplace relations that acknowledges such needs.[15] This object is relevant to the Full Bench's exercise of modern award powers in the context of this Review and weighs against granting the claim.[16]

91. It must also be observed that extent that proposal dissuades employers from using long distance drivers to occasionally also undertake local work, it would deny employees who may be happy to perform such work, and legally able to

[15] Section 3(g)

[16] 4 Yearly Review of modern awards – Fire Fighting Industry Award 2010 [2016] FWCFB 8025 at 16 -19

undertake it from a fatigue management perspective, the opportunity to earn additional income.

The relevance of s.134(1)(da)

92. At paragraph 62 of its submissions, the TWU simplistically asserts that the variation will assist in "…achieving the modern awards objective, in particular the objective of ensuring that the Award provides additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours (s.134(1)(da)). Ai Group disputes any contention that a consideration of the matters identified in s.134(1)(da) warrants the proposed variation.

93. The nature of section 134(a)(da) was considered in detail in the Penalty Rates decision.[17] Given, the section is relatively new had not previously been the subject of substantiative arbitral or judicial comment it is worth setting out their observations in full:

> **[187]** Section 134(1)(da) is a relatively new provision and one which did not exist at the time the modern awards under review were made. These provisions have not yet been the subject of substantive arbitral or judicial comment.
>
> **[188]** Five observations may be made about s.134(1)(da).
>
> **[189]** First, s.134(1)(da) speaks of the 'need to provide additional remuneration' for employees performing work in the circumstances mentioned in s.134(1)(da)(i), (ii), (iii) and (iv).
>
> **[190]** An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) requires a consideration of a range of matters, including:
>
> > (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
> >
> > (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and
> >
> > (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

[17] [2017] FWCFB 1001 at 188 to 203

[191] Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health and work- life balance, taking into account the preferences of the employees for working at those times.

[192] The expression 'additional remuneration' in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as 'ordinary hours', that is reasonably predictable hours worked Monday to Friday within the 'spread of hours' prescribed in the relevant modern award. Such 'additional remuneration' could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays. Alternatively, additional remuneration could be provided by other means such as a 'loaded hourly rate'.

[193] As mentioned, s.134(1)(da) speaks of the 'need' to provide additional remuneration. We note that the minority in *Re Restaurant and Catering Association of Victoria* (the *Restaurants 2014 Penalty Rates decision*) made the following observation about s.134(1)(da):

> 'This factor must be considered against the profile of the restaurant industry workforce and the other circumstances of the industry. It is relevant to note that the peak trading time for the restaurant industry is weekends and that employees in the industry frequently work in this industry because they have other educational or family commitments. These circumstances distinguish industries and employees who expect to operate and work principally on a 9am-5pm Monday to Friday basis. Nevertheless the objective requires additionalremunerationfor working on weekends. As the current provisions do so, they meet this element of the objective.' (emphasis added)

[194] To the extent that the above passage suggests that s.134(1)(da) '*requires* additional remuneration for working on weekends', we respectfully disagree. We acknowledge that the provision speaks of 'the *need* for additional remuneration' and that such language suggests that additional remuneration is required for employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv). But the expression 'the need for additional remuneration' must be construed in context, and the context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances.

[195] Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a 'relevant consideration' in the *Peko-Wallsend* sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

> 'To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant'.

[196] Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the

s.134 considerations. The Commission's task is to take into account the various considerations and ensure that the modern award provides a 'fair and relevant minimum safety net'.

[197] A further contextual consideration is that 'overtime rates' and 'penalty rates' (including penalty rates for employees working on weekends or public holidays) are terms that *may* be included in a modern award (s.139(1)(d) and (e)); they are not terms that *must* be included in a modern award. As the Full Bench observed in the *4 yearly review of modern awards – Common issue – Award Flexibility* decision:

> '… s.134(1)(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime and may be distinguished from the terms in Subdivision C of Division 3 of Part 2-3 which *must* be included in modern awards…'

[198] Further, if s.134(1)(da) was construed such as to *require* additional remuneration for employees working, for example, on weekends, it would have significant consequences for the modern award system, given that about half of all modern awards currently make no provision for weekend penalty rates. If the legislative intention had been to mandate weekend penalty rates in all modern awards then one would have expected that some reference to the consequences of such a provision would have been made in the extrinsic materials.

[199] Third, s.134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working arrangements fall within the scope of the descriptors in s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.

[200] Fourth, s.134(1)(da)(ii) is not to be read as a composite expression, rather the use of the disjunctive 'or' makes it clear that the provision is dealing with separate circumstances: 'unsocial, irregular or unpredictable hours' (emphasis added).

[201] Section 134(1)(da)(ii) requires that we take into account the need to provide additional remuneration for employees working in each of these circumstances. The expression 'unsocial … hours' would include working late at night and or early in the morning, given the extent of employee disutility associated with working at these times. 'Irregular or unpredictable hours' is apt to describe casual employment.

[202] Fifth, s.134(1)(da) identifies a number of circumstances in which we are required to take into account the need to provide additional remuneration (i.e. those in paragraphs 134(1)(da)(i) to (iv)). Working 'unsocial … hours' is one such circumstance (s.134(1)(da)(i)) and working 'on weekends or public holidays' (s.134(1)(da)(iii)) is another. The inclusion of these two, separate, circumstances leads us to conclude that it is not necessary to establish that the hours worked on weekends or public holidays are 'unsocial … hours'. Rather, we are required to take into account the need to provide additional remuneration for working on weekends or public holidays, irrespective of whether working at such times can be characterised as working 'unsocial … hours'. Ultimately, however, the issue is whether an award which prescribes a particular penalty rate provides 'a fair and relevant minimum safety net.' A central consideration in this regard is whether a particular penalty rate provides employees with 'fair and relevant' compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.

[203] For completeness we note that the Australian Chamber of Commerce and Industry (ACCI) and ABI drew attention to the fact that s.134(1)(da)(iii) speaks of 'working on weekends' and does not distinguish between Saturdays and Sundays and submit that:

> 'It is noteworthy that the FW Act does not prescribe that Sundays are to receive an increased loading. Instead, section 134(1)(da)(iii) accords Saturdays and Sundays equal treatment by referring to both days as the "*weekend*".
>
> Unless there is an evidentiary basis that justifies providing employees working Sundays with increased remuneration, employees working weekends should all be treat in the same manner. There is nothing contained within the modern awards objective that would suggest a different approach.'

For our part we do not think that any particular significance attaches to the reference to 'weekends' in s.134(1)(da)(iii), rather than 'Saturdays and Sundays.' It cannot be reasonably inferred that the use of the word 'weekends' manifests a legislative intention that there be no distinction between the level of additional remuneration provided for Saturday and Sunday work. Any additional remuneration provided for Saturday or Sunday work in a particular modern award will depend on the circumstances and merits in each case.

94. The evidence advanced does not establish the extent to which there are drivers, who ordinarily perform long distance operations, that are engaged to perform local work during hours that would be considered unsocial, irregular or unpredictable. Nor does it address, in any meaningful way, the impact of working at such times or on such days on the employees concerned. Accordingly, it does not enable consideration of the factual matters identified by the Full Bench in the Penalty Rates Case as being a necessary part of an assessment of 'the need to provide additional remuneration to employees working in the circumstances identified in s.134(1)(da).

95. Regardless, in response to the TWU submissions we again reiterate that employees 'ordinarily' engaged under the LDO award do receive additional remuneration in consideration of the necessity for overtime work through the loaded up driving rates.[18] We also note the driving rates under the LDO Award are loaded up to include an industry disability which, as identified in clause 14.1 of the LDO Award, compensates for matters including:

- Shiftwork and related conditions

[18] Cl.14.1(b)

- Necessity to work during weekends
- irregular starting and finishing time

96. In the Penalty Rates Case the Full bench accepted that "additional remuneration" as contemplated by s.134(1)(da)could be in the form of a loaded rate.[19]

97. A consideration of s.134(1)(da) does not dictate or require that employee access to penalty rates should be enhanced in the manner proposed by the TWU.

5. THE PROPOSED PICK UP AND DROP OFF ALLOWANCE – PROPOSED NEW CLAUSE 13 of the LDO AWARD

98. The TWU have proposed the inclusion of two new subclauses in clause 13 that are intended to require the payment of a new "pickup and drop off allowance". The new clauses are in the following terms:

(a) Where an employee in a long distance operation is required to pick up or drop off at two or more locations at the principal point of commencement or the principal point of destination, the employee must be paid an hourly rate for all additional hours worked calculated by dividing the weekly award rate prescribed by clause 13.1 by 40 and multiplying by 1.3 (industry disability allowance).

(b) Where an employee engaged in a long distance operation is required to pick up or drop off at a location on route between the principal point of commencement and principal point of destination, the employee must be paid an hourly rate for all additional hours worked calculated by diving the weekly award rate prescribed by clause 13.1 by 40 and multiplying by 1.3 (industry disability allowance).

[19] 2017] FWCFB 1001 at 192

99. It appears that the proposed clauses are intended to afford employees an additional hourly payment in circumstances where they pick up or deliver freight at two or more locations. The clauses contemplate that such work could occur either at the principal point of commencement or destination, or on route between these points.

100. it is not entirely clear from the TWU's submissions and the evidence whether they believe that an employee performing such work is actually performing a long distance operation, although it appears they believe that they are not. The extent to which the work contemplated by the proposed provisions can be undertaken part of a 'long distance operation' appears to be contentious.

101. Ai Group contends that the TWU claim rests upon a misunderstanding of what constitutes a "long distance operation" under the LDO Award. Work involving making additional pick-ups or drop offs while transporting freight on route between a principal point of commencement *may* form part of a long distance operation. The number of 'pick-ups or drop offs' is not determinative of whether an employee is performing work on a long distance operation. However, where an employee who has undertaken work on a long distance operation subsequently (or previously) performs driving work unrelated to such an operation, such as delivering freight different freight, such work is not "…on a long distance operation"[20] and consequently not covered by the LDO Award.

102. In this regard the TWU claim case raises three threshold matters for consideration;

i) Whether the LDO Award applies to an employee performing driving duties that do not form part of a 'long distance operation' (and consequently whether it can or should regulate payment for such duties).

ii) The extent to which the work contemplated by the proposed clauses can be part of a long distance operation?

[20] Claus e 4.2 of th e LDO A ward

iii) The extent to which the LDO Award should be considered to already provide appropriate remuneration for the work contemplated by the proposed clauses.

Coverage of the LDO Award

103. The coverage clause of the LDO award states as follows:

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

104. The central factor determining whether the award applies is whether the employer is engaged in long distance operations. Of course, many employers undertake a mixture of long distance operations and local work. Clauses 4.2 and 4.8 of the LDO Award, together with clause 4.2 and 4.8 of the RT&D Award set out the interaction of the two instruments.

105. Clause 4.2 of the LDO Award narrows the application of clause 4.1. It provides:

> **4.2** The award does not cover an employee while they are temporarily required by their employer to perform driving duties which are not on a long distance operation, provided the employee is covered by the *Road Transport and Distribution Award 2010* while performing such duties.

106. Clause 4.2 of the RT&D Award contains a reciprocal provision:

> **4.2** This award does not cover employers and employees covered by the following awards:
>
> - Mining Industry Award 2010;
> - Road Transport (Long Distance Operations) Award 2010 whilst undertaking long distance operations;
> - Transport (Cash in Transit) Award 2010; and

- Waste Management Award 2010.

107. The effect of the above provisions is that an employee performing work on a long distance operation is not covered by RT&D Award while performing such work and an employee performing work that is not part of a long distance operation is not covered the LDO Award while performing such work, provided that they are covered by the RT&D Award.

108. The short point that flows from the above analysis is that it is not appropriate for the LDO Award to set rates of remuneration for driving duties that do not form part of a long distance operation because employees performing such duties will be covered by the RT&D Award at the relevant time.

The extent to which the work contemplated by the proposed clauses can form part of a long distance operation?

109. The wording of the proposed clauses indicates that the entitlement arises "where an employee engaged on a long distance operation is..." required to either undertake multiple pick-ups between the principal point of de (i.e. on route) or at the pro (we presume they mean either prior to departing from the principal point of commencement or after arriving at the principal point of destination. although the is not specified in the wording). That is, the clauses appear to operate on the assumption that the kind of work contemplated by the clauses can be done in the course of a long distance operation. In this regard there is a tension between the wording of the provision and the submissions advanced in support of it.

110. At paragraph 14 the TWU indicate that they have proposed the insertion of the new clauses to "…*make clear that employees should be appropriately remunerated for work that does not form part of a long distance operation*." This suggests that they do not believe that the work contemplated by the proposed clauses is part of a long distance operation.

111. Paragraphs 23 to 25 reveal that the TWU contend that the definition of what constitutes a "long distance operation" should be construed in a very narrow manner. Relevantly, at paragraph 23 they say;

The reference to a "principal point of commencement" and a "principal point of destination" in the definition of a long distance operation contemplates that journeys are from one location (i.e. a depot or pick up place) to another location (ie another depot or drop off place).

112. However, to complicate matters further, there appears to be some confusion even within the TWU submissions as to whether the work contemplated by the proposed clause forms part of a long distance operation. At paragraph 16 the TWU submit:

"The TWU proposes to insert the new subclauses to ensure that the Award makes appropriate remuneration for employees who perform duties that do not form part of a long distance operation, or are required to drop off at locations between the principal point of commencement and the principal point of destination." (emphasis added)

This appears to suggest an acceptance that work involving a drop off at locations between the principal point of commencement and the principal point of destination could form part of a long distance operation.

113. Ai Group does not accept what we understand might be the TWU's narrow view of what constitutes a long distance operation as correct. We develop this point in paragraphs 115 to 130.

114. Regardless, to the extent that the TWU is seeking to afford employees performing work which might not constitute a long distance operation a new entitlement, their proposal is fundamentally flawed. Clause 4.2 of the Award has the effect of removing such work from the coverage of the LDO Award (assuming the employee is covered by the RT&D Award). Consequently, on one view, the award cannot set a rate of remuneration for that work, as employees performing that work are not covered by the award. However, even

if we are wrong in that regard (or the difficulty can be overcome through alternate drafting), the proposal runs the risk of resulting in a level of unfair double dipping as the employee would have an entitlement under both the LDO Award and the RT&D Award in relation to the same work.

The meaning of the term 'long distance operation' under the LDO Award

115. Central to the consideration of the claim advanced by the TWU is the meaning of the term "long distance operation" within the LDO Award. That definition is as follows;

> **Long distance operation** means any Interstate operation, or any return journey where the distance travelled exceeds 500 kilometres and the operation involves a vehicle moving livestock or materials whether in a raw or manufactured state from a principal point of commencement to a principal point of destination. An area within a radius of 32 Kilometres from the GPO of a capital city will be deemed to be the capital city.

116. An "interstate operation", as referred to in the definition of a long distance operation is also a defined term:

> Interstate operation will be an operation involving a vehicle moving livestock or materials whether in a raw or manufactured state from a principal point of commencement in one State or Territory to a principal point of destination in another State or Territory. Provided that to be an interstate operation the distance involved must exceed 200 Kilometres, for any single journey. An area within a radius of 32 kilometres from the GPO of a capital city will be deemed to be the capital city.

117. As already identified, the LDO Award does not apply to an employee performing driving duties that are not part of a long distance operation, provided that the employee is covered by the RT&D Award.

118. The TWU have not proposed a variation to the meaning of Long Distance Operation as utilised within the LDO and RTD Awards. The extent to which the definition of the term long distance operation may or may not be appropriate is not a live issue in the context of the proceedings. Instead, the TWU have advanced a claim for a discrete additional entitlement.

119. It appears that the TWU believes that an employee performing work on a long distance operation can only drive between two points. Relevantly the TWU submit as follows;

"The reference to a principal point of commencement and a principal point of destination contemplates that journeys are from location (i.e. a depot to another location (i.e. another depot or drop off place)."[21]

120. Although considering the interpretation of an enterprise agreement approach the following observations of the Full Bench in *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Ltd*[22] are of relevance to the interpretation of awards:

> **[19]** The general approach to the construction of instruments of the kind at issue here is set out in the judgment of French J, as he then was, in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* 16 (*Wanneroo*):
>
> "The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to '...the entire document of which it is a part or to other documents with which there is an association'. It may also include '... ideas that gave rise to an expression in a document from which it has been taken' - *Short v FW Hercus Pty Ltd (1993)* 40 FCR 511 at 518 (Burchett J); *Australian Municipal, Clerical and Services union v Treasurer of the Commonwealth of Australia* (1998) 80 IR 345 (Marshall J). " 17
>
> **[20]** To this we add the oft-quoted observations of Madgwick J in *Kucks v CSR Limited* 18 that a narrow pedantic approach to interpretation should be avoided, a

[21] TWU submissions of 19 January at 23

[22] [2014] FWC FB 7447

search of the evident purpose is permissible and meanings which avoid inconvenience or injustice may reasonably be strained for, but:

". . . the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning." 19

121. A consideration of the ordinary meaning of words of the LDO Award does not provide a proper basis for the TWU submissions.

122. To meet the definition of a long distance operation the relevant work must involve a vehicle moving livestock or materials from a principal point of commencement to a principal point of destination. That is, a long distance operation must include within its scope the activity of moving freight between two principal points but it need not be limited to the transportation of items between such points. However, a vehicle on a long distance operation can transport items between more than one pick up or drop off destination without rendering the work that is undertaken as fall outside of the definition of a long distance operation. This could occur where part of the load is not transported the entire way.

123. In support of our contention we note that the definition of a long distance operation contemplates an operation that "involves" a vehicle undertaking the specified work. The Macquarie dictionary defines the word 'involve' as;

"1. to include as a necessary circumstance, condition, or consequence; imply; entail. 2. To affect, as something within the scope of operation. 3. To include contain or comprehend within itself or its scope."

124. The use of the work "involve" in the definition of a long distance suggests that a long distance operation must include the performance of the work contemplated in the definition, but it does not mean that the operation must only constitute or comprehend within its scope the performance of such work.

125. Moreover, the references to a "principal point of comment" and a "principal point of destination" suggests that there may be more than one point of commencement or destination. The Macquarie dictionary defines the word principal, when used as an adjective, to mean;

"1. first or highest in rank, importance, value, etc.; chief; foremost."

126. There would be no need for the award to include the term "principal" if there was only ever one point of commencement or destination in a long distance operation,

127. In practical terms, this means that a vehicle can, in the course of a long distance operation, also pick up and deliver freight along the way, provided there is a principal point of commencement and destination. However, a vehicle that undertaking a series of unrelated trips involving the carriage of different freight during the course of a day could not be said to constitute a "long distance operation" even if exceeded 500 Kilometres.

128. For completeness, we note that at paragraph 24 of their submissions the TWU assert that, "…the Award and its predecessors contemplated transport operations where goods and materials were transported from one transport hub to another within the meaning of a long distance operation...". No justification for this submission is provided and Ai Group has been unable to identify any arbitral history associated with the development of such predecessor instruments which would support it. In any event, the relevance of such a history to the interpretation of the current award is similarly not addressed. The submission should be given no weight.

129. What flows from the above analysis is that *part* of the work contemplated by the union's claim can squarely fall within the definition of a long distance operation. However, some of the work that appears to be contemplated by the claim (based on the evidence advanced) falls outside of what can be performed on a long distance operation and is instead covered by the RT&D Award.

130. To the extent that the work falls within the coverage of the LDO Award, Ai Group contends that it is already compensated for under the award's current remuneration structure. Moreover, we contend that the proposed amendment to that structure is inherently problematic and unjustified. In order to demonstrate these points, the next section considers the award's current remuneration structure.

The LDO Award's remuneration structure

131. The LDO Award has a remuneration structure that is, in certain respects, unlike any other within the award system. It reflects the unique circumstances and needs of the industry.

132. Clause 13.1 sets minimum weekly rates for ordinary hours of work. The award does not set hours rates of pay (apart from where an employee is undertaking driving or loading and unloading work, as defined).

133. Clause 13.2 establishes an entitlement to a minimum fortnightly payment for full-time employees, provided the individual is ready willing and able to perform duties covered by the award. This entitlement applies regardless of whether the employee is actually required to perform such duties. That is, the entitlement is not depended upon the employee actually having undertaken sufficient work to entitlement them to this amount. In effect, the clause provides a level of security of earning to employees that underpins the elements of the remuneration structure that is contingent upon the actual work undertaken.

134. Clause 13.2 (in conjunction with clause 10.3(d)) also provides for minimum payments per engagement for causal employee. Clause 13.3(c) provides for additional payment for employees held on call in circumstances where they have earnt more than the minimum fortnightly payment and clause 13.2(d) provides a rate of pay that applies in circumstances where an employee is travelling by sea or rail in Company with a vehicle "…on a long distance operation."

135. Clauses 13.3 to 13.6 effectively set the minimum rates of pay for all driving work. A driver is required to be paid pursuant to either a minimum cents per kilometre rate ("CPK rate") or a minimum hourly rate, as nominated by the employer, for all driving work undertaken. The default method that must be applied is the CPK rates.

136. The award also prescribes an additional payment that applies for loading and loading work undertaken by the driver[23] and for the payment of various other allowances.[24]

137. In the sections that follow we identify the manner in which the driving rates apply. It is important to appreciate that these are loaded rates that already include an industry allowance in compensation for the various matters identified in clause 14.1 and an over-time allowance identified in clause 14.1(b). The industry disability allowance compensates for the following matters:

(i) shiftwork and related conditions;
(ii) necessity to work during weekends;
(iii) lack of normal depot facilities, e.g. lunch room, wash rooms, toilets, tea making facilities;
(iv) necessity to eat at roadside fast food outlets;
(v) absence of normal resting facilities and normal bed at night;
(vi) additional hazards arising from driving long distances at night and alone;
(vii) handling dirty material;
(viii) handling money;
(ix) extra responsibility associated with arranging loads, purchasing spare parts, tyres, etc;
(x) irregular starting and finishing times; and
(xi) work in rain.

The manner in which CPK rates apply (cl.13.4)

[23] Claus e 13.6

[24] Claus e 14

138. Clause 13.4 specifies the method of applying the CPK rates. Clause 13.4(a) provides:

> a) An employee engaged in a long distance operation may be paid for the driving component of a particular journey by multiplying the number of kilometres travelled by the cents per kilometre rate for the relevant vehicle, subject to clause 13.4(b).

139. The effect of cl. 13.4 is that all kilometres driven must be paid for, unless clause 13.4(b) applies.

140. Clause 13.4(b) provides:

> (b) Schedule of agreed distances
>
> The following schedule shows the agreed distances for long distance journeys between the listed centres. Where an employee performs a journey and that journey is specified in this schedule, the number of kilometres is deemed to be the number indicated in the schedule for that journey …

141. Clause 13.4 subsequently sets out a table identifying major freight corridors and listing the number of kilometres ("the agreed distances") for such journeys. The clause has the effect requiring that the number of kilometres specified within the table are deemed to be the number of kilometres travelled when calculating an employee's payment for the journey. That is, the employee is paid by reference to these deemed kilometres and not the actual kilometres driven.

The manner in which hourly driving rates apply (cl.13.5)

142. Clause 13.5 specifies the manner in which the hourly driving rates must be applied. It states;

> 13.5 Rates of pay—hourly driving method
>
> (a) An employee engaged in a long distance operation may be paid for the driving component of a particular journey by means of an hourly driving rate for the relevant grade the vehicle. The hourly driving rate may only be applied as follows:
>
> (i) where the journey to be performed by the driver is listed in the schedule in clause 13.5(c) the number of driving hours for that journey is deemed for the

purposes of this award to be no fewer than the number indicated in the schedule for that journey; or

(ii) where the journey to be completed is not listed in clause 13.5(c) payment must be for actual hours worked and must not be pursuant to a trip rate which provides for a fixed amount per trip; or

(iii) where the employer has an accredited Fatigue Management Plan in place, the hourly rate may be used to calculate a trip rate for any journey by multiplying the hourly rate by the number of driving hours specified in the FMP for that journey. For the purposes of this clause accredited Fatigue Management Plan means any program which is approved under an Act of a Commonwealth, State or Territory parliament for the purposes of managing driver fatigue

143. The effect of cl 13.5 is that where a driver performs a journey other than one listed in cl 13.5(c), or in circumstances where clause 13.5(a)(iii) applies, they will be paid for the actual hours worked. This will be so regardless of the whether there have been required to pick up or drop off freight at a location between the principal point of commencement and the principal point of destination or at the principal point of commencement or drop off.

144. Where a journey is listed in clause 13.5(c) and an employee is paid by the hourly driving method an employee must have their payment calculated based on the number of driving hours specified in the clause.

Payment for loading and unloading duties (cl.13.6)

145. The award also requires that employees are paid for loading or unloading duties:

13.6 Loading or unloading

(a) Where an employee is engaged on loading or unloading duties, that employee must be paid for such duties at an hourly rate calculated by dividing the weekly award rate prescribed by clause 13.1 by 40 and multiplying by 1.3 (industry disability allowance), provided that a minimum payment of one hour loading and one hour unloading per trip must be made where loading and/or unloading duties are required.

(b) As an alternative to clause 13.6(a), where there is a written agreement between the employer and the employee a fixed allowance based on the hourly rate in clause 13.6(a) may be paid to cover loading and unloading duties, provided that such written agreement is attached to the time and wages record.

146. Clause 13.6(a) requires payment for all loading and/or unloading duties. This is not limited to requiring payment in circumstances where such work is undertaken at a principal point of commencement or a principal point of destination. Accordingly, it cannot be asserted than an employee doing multiple pick-ups or deliveries is not already appropriately remunerated for the loading and unloading component of such work.

147. Clause 13.6(b) does permit, by agreement, that a fixed allowance may be paid in lieu of the amount referred to in clause 13.6. The TWU have not proposed to delete this provision and the evidence does not establish that the clause is being utilised inappropriately.

148. The salient point that arises from the above analysis of the remuneration structure is that in most instances the LDO Award already requires payment for all actual work undertaken.

149. Clause 13.4 already provides an obligation on an employer who applies the CPK rates to pay for all kilometres travelled as part of a long distance operation that does not involve a journey specified in clause 13.4(b). Conversely, 13.5 requires that all hours spent driving (even if there are multiple pick-ups and drop offs) must be paid at the applicable hourly rates. Consequently, in these circumstances there is no need for the employee engaged in a long distance operation to be paid additional hourly rates for driving work associated with undertaking additional "pick-ups or drop offs" as contemplated by either the proposed clause 13.7(a) or 13.7(b). Indeed, the clause would result in a level of double dipping in that an employee would be paid the hourly rate in addition to the driving rate already specified in the award.

150. Similarly, clause 13.6 already requires payment for time spent performing loading and unloading duties performed as part of a long distance operation.

151. Where an employee is paid pursuant to clauses 13.4(b) and 13.5(a)(i) ("the deeming provisions") for driving work their remuneration is not calculated by reference to the *actual* amount of work performed. However, there are sound justifications for the maintenance of these provisions. The TWU proposal would undermine the integrity of their operation by requiring the payment of an additional amount on top of that which be payable pursuant these provisions.

152. The deeming provisions provide a degree of certainty as to the labour costs associated with undertaking a long distance operation. This is important for various reasons, but particularly for the purpose of enabling road transport businesses to tender/contract for work. The highly competitive nature of the transport industry and the low profit margins achieved my many operators are notorious factors that the Commission must be conscious of in considering the TWU's claim. Such factors mean wide fluctuation in labour costs associated the performance of a transport task cannot be accommodated by many businesses in the sector.

153. There are also significant administrative benefits that flow from the use of the 'deeming provisions'. They significantly simplify payroll processes.

154. The provision also enables employees, the parties that represent them and the Fair Work Ombudsman identify what appropriate entitlement. In this respect the award is 'simple and easy to understand' and avoids disputation in relation to matters such as the precise amount of kilometres performed or time spent. It also assists in facilitating compliance with and enforcement of the award.

155. Similar deeming provisions have been adopted by employers using enterprise agreement, although in this context it is common for the number of deemed kms or hours to be amended to reflect the particular employer's operations or an otherwise agreed outcome.

156. In short, Ai Group contends that there is no deficiency in the Award's remuneration structure that warrants amendment.

Problems with the operation of the proposed clauses

157. The proposed clauses require that employee must be paid for all additional hours worked at an hourly rate. However, it is entirely unclear what hours should be taken to be the "additional hours". The clauses do not identify the point or time from which such hours are to be measured. It is particularly unclear how the clauses would be applied in the context of drivers paid pursuant to cpk rates rather than by reference to hours worked.

158. A second major problem is that the clauses requires a payment to be made based on an hourly rate. For the reasons identified earlier in these submissions, there are a raft of difficulties with simply assuming that employers in this industry can or should be expected to know or record the hours worked by employees that are paid by way of CPK rates.

159. The clauses would also potentially give rise to a level of 'double dipping.' As identified, unless a journey that a driver undertakes is one for which the award prescribes a deemed number of hours or kilometres, there is already an obligation for the employee to by paid the actual driving work performed and for the loading and unloading activities. Any *extra responsibilities* have been taken into account in the setting of the Industry Disability Allowance that forms part of the driving rates.

160. It is possible that employees paid pursuant to the deeming provisions may perform additional kilometres or hours to those specified in clauses 13.4(b) or 13.5(c) when performing the specified journeys. It is also possible that employees may perform the work in fewer kilometres or hours. This will be dependent, in part, upon matters such as whether the principal point of commencement or destination is closer or further away than the nominal measurement point that was utilised for setting the agreed distances and hours. Little evidence about the operation of the deeming provisions has been advanced and as such the Full Bench could not accept that any variation to award proving for some kind of supplementary payment, such as an additional pick-up and drop off allowance as proposed by the union, is warranted. It certainly could not be satisfied that it is necessary, as contemplated by s.138.

161. It is also likely that there have been developments since the 'agreed distances and hours' specified in the LDO Award were set that may mean figures constituting such agreed distances or hours are inflated in favour of employees. Such developments include improvements in road infrastructure and vehicle technology that may either provide for more direct routes or faster vehicle movements (i.e. trucks have become more powerful and, anecdotally, members advise that average vehicle speeds now well exceed the assumed average driving speed of 75km per hour that underpins the km rates in the award). A comprehensive review of contemporary circumstances underpinning the operation of the award's remuneration structure, were it to be undertaken, may in fact justify a reduction in some of the agreed and distances hours or driving rates.

162. We do not raise these matters as a basis for contending that Full Bench should implement any variation to the Award in relation to such issues. There is insufficient evidence before the Full Bench to warrant such a step being taken and we accept that, consistent with the approach identified in the Preliminary Jurisdictional Issues Decision, in the context of this review the Commission will proceed on the basis that the Modern Award achieved the modern awards objective at the time that it was made. However, we contend that it would be unfair to amend the remuneration structure in a piecemeal manner to address the union's concern over a particular idiosyncrasy associated with the operation of the award's remuneration structure (in order to benefit employees), without also considering such issues. What constitutes a "fair and relevant minimum safety net must be considered from the perspective of both employers and employees."[25]

The evidentiary case in support of the proposed claim

163. The evidentiary case falls well short of what could considered sufficient to ground a significant variation proposed by the TWU. The evidence that appears to be of relevance to this claim is addressed in the section below.

[25] Penalty Rates Case [2017] FWC FB 1001 at 117-119

Mr Fear

164. The LDO award does not apply to Mr Fear. He testifies that he is covered by an enterprise agreement and attests to being paid a trip rate pursuant to that agreement. He is also paid an allowance for each pick up and drop off. We do not know what the amount of the allowance that he actually receives is. Mr Fear indicates that the trips that he undertakes as a long distance driver involve pick up and drop off groceries or freight at a number of destinations.

Mr Anderson

165. It appears that the LDO Award does not apply to Mr Anderson. His evidence is that he is covered by an enterprise agreement. Mr Anderson does not however identify the agreement. His evidence as to what he gets paid does not provide any meaningful assistance to the Full Bench.

166. At paragraph 7 Mr Anderson provides evidence relating to the payment he receives for a single journey. However, this journey does not even appear to be a long distance operation.

167. At paragraph 8 Mr Anderson refers to a period of employment with “Patrick’s”. It is not clear from his evidence what the precise legal entity he worked for was. There are several major transport and logistics businesses that have Patrick in their name. Nor is it clear what industrial instrument applied to bis employment. Indeed, we do not even know what type of work he as performing or the dates during which he was so employed. His statement fails to provide any specific details about the amount that he was actually paid.

Mr Bird

168. Much of Mr Bird’s evidence relates to a period of employment with an unnamed employer. It is unclear why the witness or TWU have elected to omit this detail from the statement. No explanation for this has been provided the TWU. The decision to omit such details means that the employer parties cannot properly test this evidence of the witness. His evidence pertaining to this employer should be given no weight.

169. Mr Bird does not provide any details of the amount that he was paid by his mystery employer. Nor does he provide any details as to when he was employed by such an entity. Consequently, the statement provides no meaningful insight into what he was actually paid or whether he was employed pursuant to the LDO Award.

170. To the extent that Mr Bird provides evidence of his experience at Greenfreight, he fails to provide details of precisely what he is paid.

Mr Coghill

171. Mr Coghill is a union official employed by the TWU who only has coverage of geographical area in North Victoria.

172. Mr Coghill gives fairly generalised evidence about purported "issues" with the Long Distance Award based on, in part, discussions with unidentified and unnamed drivers.

173. In paragraphs 7 to 10 Mr Coghill describes the practices or work of various unidentified companies and drivers. He does so in an extremely generalised manner. While at paragraph 9 and 10 he makes reference to the payment of "trip rates" he provides no information as to whet such rates actually are. Given the nature of his evidence it cannot be tested by the employer parties and should be given no weight.

The Modern Awards objective

174. A consideration of the following matters specified in the modern awards objective would weigh against granting the TWU's claim:

- the need to encourage collective bargaining (s.134(1)(b));
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f);
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia…(134(1)(g)), and

- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy(134(1)(h)P.

Conclusions

155. For all of the above reasons Ai Group contends that the TWU claims should be rejected.