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)

22 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 response to the submissions in reply advanced by the Transport Workers' Union (**TWU**) and Australian Road Transport Industrial Organisation (ARTIO) in opposition to the Ai Group proposals to vary the higher duties and meal allowance provisions of the Road Transport & Distribution Award 2010.

2. HIGHER DUTIES PROVISIONS

2. ARTIO or the TWU advanced any persuasive arguments warranting the rejection of the claim the claim. In short, their key arguments appear to be:

- The existing provision has operated for a long time under one of the predecessor awards to the modern award.[1]
- That the classification structure of the award or the nature of the industry somehow justifies the retention of the relatively unusual higher duties provision.[2]
- That the proposal might give rise to disputation or difficulty in its implementation.[3]
- That no figures or estimates of the savings that could be achieved have been provided.[4]

[1] TWU submission in reply at paragraph 19 and 20; ARTIO submission at paragraph 6

[2] TWU reply submission at paragraphs 7-10, 15 and 16

[3] TWU submissions in reply at paragraph 18 ; ARTIO submissions at paragraph 8.

[4] TWU submission in reply at paragraphs 11 and 13; ARTIO submission at paragraph12

- That a negligible decrease to monetary entitlements of transport workers fails the, "…aspect of the modern awards objective" that speak to the needs of the low paid.[5]

- That the proposal will not incentivise employers to train and up skill workers because, "…*employers have little or no interest in training and up skilling employees, particularly if the employer faces costs in rolling out such training."*[6]

3. None of these assertions are particularly persuasive. They fall well short of warranting rejection of the modest claim advanced by Ai Group. Many of the arguments are either speculative or rely on factual assertion unsupported by evidence, and should be given no weight.

4. The submissions of the parties are addressed in more detail in the section below.

REPLY TO THE ARTIO SUBMISSIONS

5. ARTIO's opposition to the claim appears, in part, to be based on a misunderstanding of the way the award works. At paragraph 6, ARTIO rightly contends that current higher duties provision has operated on the basis that, "…*where an employee works for any particular time on a particular day in a higher grade of vehicle then that employer is entitled to be paid at the higher rate of the whole day."* At paragraph 7 ARTIO submits that, "employer(s) and employee(s) understand that the driving of a vehicle on a public road is remunerated at the higher level if it occurs at any time." We understand that ARTIO believes that 'driving duties' do not attract the application of the higher duties clause if they are not performed on a public road because a relevant licence is not required. This understanding is implicit in the reference to a 'public road' in the ARTIO submissions.

[5] TWU submissions in reply at paragraph 21

[6] TWU submission in reply at para graph 23

6. In part, the Ai Group proposal is directed at ensuring that employees performing certain routine driving work on private property, rather than public roads, does not attract the higher duties clause. Although the ARTIO opposes the Ai Group application, we understand that the ARTIO believes (wrongly in our view) that the outcome we are trying to achieve in this regard is already applicable under the award's current terms.

7. There is no reference to a "public road" in the classification structure or higher duties provisions contained within the RT&D Award. Nor is the classification structure connected to possession of a particular licence (although, unrelated to the operation of the award there may be legal requirements related to the possession of such licences in order to undertake driving work on public roads). Neither the operation of the classification structure or, more importantly, the higher duties provisions is dependent upon a driver performing work on a public road.

8. ARTIO's understanding of the award also appears inconsistent with the views of the TWU. At paragraph 12 the TWU submits, "…there are different scenarios where an employee may gain an entitlement to the payment of higher duties. These include drivers switching between vehicles to effect deliveries; drivers performing work in the yard, depot or garage or employees engaged solely for depot work who do not drive on public roads."

9. Both ARTIO and the TWU rely heavily on the proposition that the current provisions have been a feature of certain predecessor awards for a long period. At paragraph 6 of their submissions in reply, ARTIO assert that the provision has "…been applicable since the Transport Workers Award 1983…". The ARTIO submission overlooks the fact that there were a raft of predecessor instruments to the RT&D Award 2010 and that not all predecessor instrument contained higher duties provisions that operated in the same manner as those contained in the RT&D Award. Moreover, neither ARTIO or the TWU point to any significant arbitral history justifying the current award terms or to establishing that they have been subject to detailed scrutiny by the Commission

or its predecessors. This undermines the weight that can be afforded to such a historical context.

10. At paragraph 12 ARTIO notes that the Ai Group has not provided any figures, or estimates, of what savings could be achieved by the variation. This kind of evidence is not required to establish that the proposed term is necessary. In paragraph 269 of the Penalty Rates Case, the Full Bench the identified the following proposition as being applicable to the Commission's task in the Review:

"Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstance it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contested should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence."[7] (emphasis added)

11. The extent of any saving that would flow from the variation will be dependent upon the individual circumstances of employers. Given factors such as the breadth of employers covered by the award, and the different practices and operational modes that they employ, it is not feasible for the Ai Group to identify the actual savings that will flow from the award variation. Regardless, the macroeconomic benefits of the proposed variation do not need to be specifically quantified for the nature of the potential benefits of the clause to individual employers to be appreciated. These will of course on to the broader economy.

12. Regardless**,** it is not necessary for the Full Bench to be armed with such information to conclude that the proposal has sufficient merit to warrant an award variation. Ai Group contends that a clause that operates without any restrictions on when a higher duties provision applies is inherently unfair to

[7] [2017] FWC FB at 269

employers. It is clear on the face of the existing higher duties clause that it operates in an unfair manner.

REPLY TO TWU SUBMISSIONS

13. At paragraph 10, the TWU submit that the current higher duties provision was not argued against in the part 10A Award Modernisation process and that we advocated for the higher duties provisions to apply to drivers covered by any majority award as contemplated by clause 4.4 of the Exposure Draft of the Award. In reply we would observe that an industrial association such as Ai Group is not prevented from changing its views as to the relative merits of a provision over time. Indeed, the evolution of organisation's position in relation to an award clause is entirely appropriate in circumstances where industry has made it aware of unforeseen difficulties flowing from a provision. We advance our claim in this context. Of course, the relevant consideration for the Full Bench is not whether the views of an industrial association regarding the merits of a clause have varied over time, but rather whether the claim is appropriate having regard to the current statutory regime.

14. Regardless, in considering what weight should be afforded to the part 10A proceedings we also note the following comments of Watson VP in his decision in concerning the review of the Stevedoring Industry Award 2010[8] and relating to the conduct of the award modernisation process (emphasis added):

> **[73]** As a result of the award modernisation process, approximately 1,560 federal and state awards were reviewed over a period of about 18 months and replaced by 122 modern awards by the award modernisation Full Bench of which I was a member. A further 199 applications to vary modern awards were made during this period. It is clear from any review of the process that the objects of rationalising the number of awards and attempting to balance the seemingly inconsistent objects of not disadvantaging employees and not leading to increased costs for employers attracted the vast majority of attention from the parties and the AIRC. <u>It was clearly not practical during the award modernisation process to conduct a comprehensive review of the industrial merit of the terms of the awards</u>. Matters that were not put in issue by the parties were not subject to a merit determination in the conventional sense. Rather, terms were adopted from predecessor awards that minimised

[8] [2015] FWC FB 1729

adverse changes to employees and employers. As the Full Bench explained on a number of occasions, the general approach was as follows: 7

"[3] In general terms we have considered the applications in line with our general approach in establishing the terms of modern awards. We have had particular regard to the terms of existing instruments. Where there is significant disparity in those terms and conditions we have attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit. We have considered the impact of the provisions based on the information provided by the parties as to current practices."

[74] Hence it is important to note the limited nature of the task undertaken by the award modernisation Full Bench. It is also important to note the scope of the review now being undertaken. The scope for review will indicate the nature of a case that will need to be run to justify a change to an award provision.

15. It cannot be said that there was such a detailed consideration of the current higher duties provision in the Part 10A process so as to weigh heavily in favour of the Commission now not altering the clause that flowed from that process.

16. At paragraph 17 the TWU refer to an award variation made during the 2012 Review to the annual leave provisions of the instrument. They make the bald assertion that "…*the variation was necessary as many employers were paying drivers at the standard rate for the purposes of leave.*" It is unclear why the TWU refer to this provision. Its relevance to the current claim is unclear. Regardless, the variation was made in the absence of any relevant evidence. In the 2012 review a number of variations were made to the road transport awards following an extensive conferencing process patiently facilitated by SDP Harrison, with a view to productively addressing various perceived anomalies in the award. The fact that this change was made speaks to the pragmatic willingness of the parties and Commission to support a proposal that had, on its face, inherent merit, even absent an evidentiary case. A similar approach should be adopted in relation to the current Ai Group claims. The factual assertion that many employers were paying employees at the standard rate is not accepted by the Ai Group.

17. At paragraph 47, Ai Group contends that a practical benefit of the proposed amendment is that it would reduce the extent to which the higher duties clause

would discourage employers from training drivers. It would remove a cost based disincentive to employers permitting employees to drive higher classification vehicles for relatively short periods training related purposes such as gaining experience operating such vehicles. Member concern relating to this issue is, in part, why Ai Group is pressing this claim. For example, it has been suggested to us by industry that it is useful to allow drivers to perform short periods of work driving larger vehicles than they may ordinarily drive in order to enable them to build their confidence or skills before the employee is utilised to perform more arduous work in such vehicles.

18. In response to the Ai Group submission the TWU contend that, "*The reality in the industry is that employers have little or no interest in training and up skilling employees, particularly if the employer faces costs in rolling out such training." Ai Group a*grees that the costs of rolling out training often influences an employer's preparedness to undertake training of employees. The change we propose will remove a disincentive for employers permitting drivers to perform short periods of work in vehicles covered by higher classifications for training purposes. To the extent that it might consequently result in the 'up-skilling' of drivers it will promote flexible work practices and the efficient and productive performance of work (s.134(1)(d)).

19. Both the TWU and ARTIO raise the suggestion that there may be some difficulty or potential for disputation associated with identifying whether employees have worked for the requisite two hours in a particular vehicle in order to qualify for the higher duties allowance. We reject such speculation and note that there is no evidence in support of it. As we have already established, most modern awards that contain a higher duties clause have such restrictions and no party has pointed to any difficulty with their operation. A similar provision was also contained in the Transport Industry (State) Award. There is simply no reason to conclude that the characteristics of employers or employees covered by the RT&D Award are such as to warrant a different approach.

20. In a similar vein, the TWU point to the absence of a necessity to appoint an employee to a classification under the award as justifying the retention of the

current provision.[9] This flexibility contained within the current classification structure is important and reflects the generally accepted proposition that drivers do perform work of different classifications. Nonetheless, the flexibility does not undermine the merit of imposing some modest restrictions on when the higher duties provisions apply. The proposal has been drafted in such a manner as to recognise that an employee will not necessarily have a permanent classification. Moreover, Ai Group is not proposing a clause that would see an employee not be paid at the higher rate of pay for the actual time worked in the higher duty (such as that contained in clause 30.2 of the NSW Transport Industry (State) Award).

21. In a somewhat feeble attempt to suggest a deficiency in the Ai Group proposed clause the TWU speculate that the clause may well result in difficulties in determining the appropriate rate of pay if a driver were to drive four different vehicles in the one day.[10] However, no explanation has been provided as to why such difficulties would arise. Under the Ai Group proposal an employee would simply be paid at the rate applicable for the highest classification of work performed for at least 2 hours. It is not a complex or difficult clause to apply.

22. Finally, we submit that the TWU's bald assertion that the current arrangement relating to higher duties "…is more likely to sit within the capabilities of computerised payroll systems"[11] is baseless and can be given no weight.

3. MEAL ALLOWANCE PROVISIONS – Reply to the ARTIO and TWU Submissions

23. Both ARTIO and the TWU oppose the Ai Group proposed variations. We address the detail of their submissions in the section below. As an overarching observation, we submit that there is little persuasive reasoning to their opposition. The submissions of the respective organisations struggle to rise

[9] See for example paragraphs 14 to 16 of the TWU submissions in reply

[10] TWU submissions in reply at paragraph 18

[11] At paragraph 11

above mere opposition to the prospect of a less generous provision being inserted into the award.

24. The central argument advanced by ARTIO in support of their position is the contention that it will reduce the income of many drivers (they baldly assert by $75 per week) and thus make it more difficult to attract them to the industry or to ensure they perform over-time work.[12] No evidence is called in support of these factual assertions. The submission amounts to a contention that the allowance should be retained as a form of additional remuneration for drivers performing over-time work to attract drivers to the industry.

25. The TWU similarly complains that the Ai Group proposal seeks to remove an entitlement.[13] Neither the TWU or ARTIO appear to contend that the clause, if amendment as proposed, would fail to provide adequate compensation for costs necessarily incurred as a consequence of working over-time. They simply oppose the implementation of a less generous entitlement. This is not a valid objection.

26. It is not appropriate for a meal allowance to be used to supplement the minimum wages set by the award for some irrelevant purpose. It is an expense related allowance and, within the award system, such allowances are generally paid in recognition of the need to purchase a meal whilst unexpectedly performing work. If the necessity to incur such an expense is removed, by the provision of advanced notice of such over-time work, so is the *necessity* for the allowance to be paid.[14] The Ai Group proposal properly aligns the award's provisions with the reality that not all overtime work in the road transport industry is unexpected or unanticipated by an employee. Not all overtime requires the purchase of a meal.

[12] ARTIO submission at paragraphs 15 to 19

[13] See paragraphs 25, 28 and 24 of the TWU submissions reply

[14] We here refer to the consideration of whether a at term is necessary for the purpose contemplated by s.138

27. The Full Bench in the Equal Remuneration Decision 2015 observed the proper considerations governing the setting of minimum wages under the current statutory framework:

'We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for a 'fair minimum wages' is that the level of those wages bears a proper relationship to the value of work performed by the workers in question.'[15]

The Full Bench not refer to considerations relating to attracting and retaining employees.

28. We also emphasis that the modern awards objective speaks to the need to ensure that awards constitute a fair and relevant *minimum safety net* of terms and conditions of employment". Of course, individual employers may elect to pay employees additional amounts to attract and retain their services. The Ai Group proposal does not undermine this. Indeed, to the extent that driver shortages exist, many employers may be logically expected to pay such employee at above award rates if they have capacity to do so.

29. The proposal will similarly not prevent employers, employees and unions from bargaining for more generous meal allowance provisions; if that is what is truly valued by employees. The Ai Group proposal is entirely consistent with that element of the modern awards objective that speaks to the need to encourage enterprise bargaining. It is the role of awards to underpin enterprise bargaining.[16] This should entail, as far as possible, leaving room for bargain over entitlements that are not a necessary part of a fair and relevant *minimum* safety net.

30. The purpose of minimum awards is to set a safety net of minimum terms and conditions. The statutory scheme does permit awards to set market rates. It is not appropriate, as ARTIO appears to believe, for an award to set remuneration

[15] [2015] FWC FB 8200 at 272

[16] Penalty Rates Decision [2017] at 126

in one industry at a level that is higher than in others so as to attracting employees to that sector in preference others. Adopting this kind of flawed logic would fundamentally undermine the operation of the broader award system. It would simply lead to arguments that conditions in other awards should be similarly improved.

31. ARTIO contends that it is "…*well accepted within the road transport industry that an employee is expected to work around 50 hours per week to meet the transport task."* This suggests that employees are performing regular and anticipated over-time work. The submission further justifies our claim.

32. There is little industrial merit in a 'meal allowance' being routinely triggered in circumstances where it is "well accepted" that an employee will work around 50 hours a week. An employee should not receive such an allowance for performing their regular hours of work, even if they fall outside the award derived definition of 'ordinary hours'. It shouldn't be, or become, a quasi-part of their minimum rate of pay or compensation for working over-time. The meal allowance contained in the award is described as an 'expense related allowance' and shouldn't be payable when the necessity to in expense is removed by the employee being given advanced notice of the need to work over-time. We do not here say that employees shouldn't receive appropriate compensation for working over-time. That is the role of the over-time rates prescribed by the award and we have not advanced any claim to reduce such payments.

33. Another argument advanced in opposition to our claim is that the current clause has been around for almost 30 years. This argument overlooks the fact that the provision did not have universal application to the industry. For example, as identified in our original submissions, the NSW Transport Industry (State) Award only required that a meal allowance was payable when an employee worked for two or more hours after their normal starting time. Moreover, the allowance was not payable if the employee was notified on the previous day or earlier of the need to work the over-time.

34. Neither ARTIO (or the TWU) point to any arbitrated decision considering in detail the industrial merit or justification for the current provision. It may well be that this is the first instance in which the meal allowance provisions of the award have been the subject of detailed scrutiny by the Commission. The longstanding existence of the provision should not be given undue weight.

35. Regardless, the fact that a provision may have been a longstanding feature of awards established under previous legislative schemes is not an insurmountable hurdle to the variation of the provision. As observed by the Full Bench in the Penalty Rates Case:

> [128] We conclude our general observations about the modern awards objective by noting that the nature of modern awards under the FW Act is quite different from the awards made under previous industrial regimes. In times past awards were made in settlement of industrial disputes. The content of these instruments was determined by the constitutional and jurisdictional limits of the tribunal's jurisdiction; the matters put in issue by the parties (i.e. the 'ambit' of the dispute) and the policies of the tribunal as determined from time to time in wage fixing principles or test cases. An award generally only bound the employers, employer organisations and unions who had been parties to the industrial dispute that gave rise to the making of the award and were named as respondents. Modern awards are very different to awards of the past.
>
> [130] Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, the purpose of modern awards, together with the NES and national minimum wage orders, is to provide a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees (see ss.3(b) and 43(1)). They are, in effect, regulatory instruments that set minimum terms and conditions of employment for the employees to whom the modern award applies (see s.47).

36. Historical inertia is not a justification for maintaining an inappropriate provision. If consideration of current award terms, in light of the current legislative regime, establishes that a variation to the instrument would better achieve the modern

awards objective, or is warranted for other relevant considerations, the Commission should exercise its discretion to vary the award, provided it is satisfied that if the award is so varied it will only contain terms *necessary* in order achieve the modern awards objective.

37. At paragraphs 37 and 38 the TWU point to an absence of evidence in support of the Ai Group claim. In response, we would simply observe that kind of modest variation that we are seeking is not of such a nature that necessitates an evidentiary case being advanced. We again note that In the Penalty Rates Case the Full Bench observed:

"2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation.[17] Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible,[18] probative evidence."[19]

38. The deficiencies of the current provisions are obvious on the face of the award; as is the inherent merit of the Ai Group proposal.

39. One element of the Ai Group proposal that the TWU takes issue with is the proposal to limit the application of cl 26.3 to circumstances where the overtime work follows the performance of ordinary hours of work. Our intent in this regard is to remove the necessity to pay the allowance in circumstances where an employee works an overtime shift. In the context of such shifts the employee will not be put in a situation of having to purchase a meal as a product of their working day having extended longer than anticipated.

40. In support of their opposition to the Ai Group proposal the TWU contend that short notice is often given to drivers who are asked to perform an over-time shift

[17] 4 yearly review of modern awards – Award Flexibility [2016] FWCFB6178 at [60] – [61]

[18] See Re Shop, Distributive and Allied Employees Association [2011] FWAFB 6251; (2011) 211 IR 462 at [24] per Lawler VP, Watson SDP, Hampton C.

[19] [2017] FWCFB 1001

such that they are not afforded sufficient time to prepare a meal. The assertions are not supported by evidence.

41. Regardless, even if the Commission were to give any weight to such submissions, they only support the proposition that a meal allowance to be payable where there is little advanced notice provided. It is not a legitimate argument against Ai Group's proposed cl.26.3(c), which would remove the obligation to pay the allowance where 24 hours' notice of requirement to work over-time is provided.

The Proper Interpretation of cl.26.3(a)

42. We contend that the current cl. 26.3(a) should only be interpreted as requiring the payment of meal allowance in circumstances the overtime is worked following the performance of overtime work on that day. The TWU disagrees with this interpretation.[20]

43. The general approach to the construction of award 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* (*Wanneroo*)[21]:

"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

[20] TWU submissions in reply at 31

[21] (2006) 153 IR 426

(Burchett J); *Australian Municipal, Clerical and Services union v Treasurer of the Commonwealth of Australia* (1998) 80 IR 345 (Marshall J). ”

44. The provisions of the award governing the payment of a meal allowance are contained in clause 26, which provides:

26. Breaks

26.1 Regular meal break

(a) An employee must be allowed a regular meal break during the ordinary hours of work except where unforeseen extraordinary circumstances arise.

(b) The meal break must:

(i) be of a regular duration of not more than one hour or less than 30 minutes; and

(ii) commence no earlier than three and a half hours and no later than five and a half hours after an employees fixed starting time of the ordinary hours of work; and

(iii) where reasonable and practical, be taken at a time to coincide with any requirement to take a break under fatigue management rules/regulations, or as otherwise required by the employer.

(c) If the meal break is not allowed, all time worked after the commencement time of the regular meal break until a break without pay for a meal time is allowed must be paid for at double the minimum hourly rate in clause 15.2.

26.2 Meal breaks after ordinary hours and before overtime hours

(a) An employee required to work overtime for two hours or more after working ordinary hours must be allowed a paid break of 20 minutes before commencing overtime work or as soon as practicable thereafter. A further rest break must be allowed upon completing each four hour period until the overtime work is finished. Any rest breaks shall be paid for at the ordinary time rate.

(b) Wherever reasonable and practical, the rest break must be taken at a time to coincide with any requirement to take a break under fatigue management rules/regulations.

(c) An employer and employee may agree to apply any variation of this provision in order to meet the circumstances of the work in hand.

26.3 Meal allowance

(a) An employee required to work overtime for two continuous hours or more must either be supplied with a meal by the employer or paid the amount specified for a meal allowance in clause 16—Allowances for each meal required to be taken.

(b) An employee required to commence work two hours or more prior to the normal starting time must be paid the amount specified for a meal allowance in clause 16—Allowances.

26.4 Notwithstanding anything contained in this clause an employee will not be required or permitted to work longer than five and a-half hours without a break for a meal.

45. Ai Group contends that the context and purpose of cl. 26.3(a) suggests that the allowance is only payable when an employee is entitled to a meal break under cl. 26.2. This is supported by the text of cl. 26.3 and of cl. 26 as a whole. It is also supported by the placement of 26.3 in clause 26, which deals with meal breaks. Similarly, a consideration of the terms of the relevant predecessor instrument from which the current award terms largely arose similarly supports this contention.

46. It is telling that subclause 26.3 of the award is contained within a clause dealing with 'breaks'. This alone suggests a connection between the entitlement to a meal allowance and a meal break, as contemplated by cl. 26.2. This contention is reinforced by the fact that the provision is not contained within cl 16 of the award, which deals with all other allowances.

47. Moreover, the text of cl. 26.3(a) suggests a connection with the broader terms of cl. 26. The provision states:

(a) An employee required to work overtime for two continuous hours or more must either be supplied with a meal by the employer or paid the amount specified <u>for each meal required to be taken</u>. (emphasis added)

48. Clause 26.3(a) does not provide any guidance as to when a meal is *required to be taken*.

49. ARTIO contends that cl. 26.3(a) means that;

"…a meal allowance would not be payable if overtime is worked at a time when no meal allowance is required to taken.'

For example, in ARTIO's view, there would be no entitlement to a meal allowance for overtime which commenced at 2.30pm and concluded at 4.50pm as that is not a time when a meal is required to be taken."[22]

ARTIO appears to assert that whether the meal allowance is payable depends on the time of day at which the meal is taken. Presumably they perceive that this depends upon whether the time aligns with what might commonly be considered a typical time for eating breakfast, lunch or dinner.

50. The difficulty with ARTIO's view is that, firstly, there is no support for it in the words of the award. Secondly, reasonable minds might differ on the times that could be perceived to attract the payment of the meal allowance. If the clause potentially operates in the manner suggested by ARTIO it could be characterised as giving rise to an ambiguity or uncertainty, as contemplated in s.160. At the very least, cl. 26.3(a) could not be said to be simple and easy to understand, as contemplated by s.134(1)(g).

51. Notwithstanding our criticism of the ARTIO submission, we agree that the clause should not, and could not have been intended to, operate to require the payment of an allowance unless a meal was *required to be taken*. However, we consider that the reference to a *'meal required to taken'* should be read and interpreted in the context of cl.26.2 so as a whole. Put simply, we contend that a meal is required to be taken when an employee is entitled to a meal break as contemplated under cl. 26.2. In support of this contention we note that both cl.26.2 and cl.26.3 apply in the context of over-time work. Moreover, both provisions are essentially triggered by the employee working of two or more hours of overtime work; this is unlikely to be mere coincidence.

52. We also note that, if our interpretation of clause 26.3(a) is wrong, the potentially anomalous situation may arise in which an employee performs a short overtime shift in which no meal break arises (such as a shift of less than 5 1/2 hours) but the employee is nonetheless potentially entitled to a meal allowance.

[22] ARTIO submission at 19 and 20

53. Further, if clause 26.3(a) did not operate in the manner that we suggest it would also raise the prospect of an employee who performed two hours of overtime before commencing their ordinary being entitled to a separate meal allowance pursuant to clause 26.3(a) and 26.3(b). The requirements of both clauses would be satisfied.

54. ARTIO contend that, "*the current meal allowance has been around for 30 years, since the Transport Workers Award 983…"*[23]

55. It is true that the terms of subclause 26.3(a) have not changed for many years. However, for completeness, we note that the terms of cl.26 do vary from the corresponding terms of the Transport Workers Award 1998. Nonetheless, the ideas that led to the formulation of the meal allowance provisions of predecessor awards such as the 1998 Award are relevant to the interpretation of the current provision. However, to properly understand this context it is necessary to consider the terms of such predecessor awards in their entirety.

56. The relevant corresponding provisions of the over-time meal break clause in the Transport Workers Award 1998 provided (emphasis added):

> **36.2 Overtime meal break**
>
> **36.2.1** An employee required to work overtime for two hours or more after working ordinary hours shall be allowed a crib-break of twenty minutes before commencing overtime work and thereafter upon completing each four hour period until the overtime work is finished and such crib-breaks shall be paid for at the ordinary rate.
>
> **36.2.2** An employer and employee may agree to any variation of this provision to meet the circumstances of the work in hand provided that the employer shall not be required to make any payment in respect of any time allowed in excess of twenty minutes.
>
> **36.3 Meal allowance**
>
> **36.3.1** An employee required to work overtime for two hours or more shall either be supplied with a meal by the employer or paid $12.22 for each meal required to be taken.

[23] At paragraph 13

36.3.2 An employee required to commence work two hours or more prior to the normal starting time shall be paid a meal allowance of $12.22.

57. The structure of cl.36 and the use of the term meal break and crib break in this key relevant predecessor award reinforces our contention that, what is essentially an 'overtime' meal allowance has only ever been payable pursuant to the equivalent provision to the current clause 26.3(a) in circumstances where an over-time *meal* break was taken. We note that a crib break is generally considered to be a paid break in which an employee may down tools and eat but remain in the immediate workplace.[24] Both provisions are dealing with the consumption of a meal when a specific amount of overtime work is performed.

58. To conclude, Ai Group contends that it is necessary to vary cl.26.3 in the manner that we have proposed to ensure that the award is simple and easy to understand so as to satisfy the modern awards objective. We also contend that it would be open to the Commission to vary the award (at least in respect of the proposed variation to clause 26.3(a)) pursuant to the powers afforded to it under s.160. In the alternate, if our interpretation of clause 26.3(a) is not accepted by the Full Bench, we contend that an appropriate merit based case for granting the variation as part of this Review has nonetheless been made out.

[24] Duncan Holdings Ltd v Cross (1997) 76 IR 261 at 263