Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Proposed substantive variations to the Road Transport and Distribution Award 2010 (AM2016/32)

13 January 2017

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PROPOSED SUBSTANTIVE VARIATIONS TO THE ROAD TRANSPORT AND DISTRIBUTION AWARD 2010

1. INTRODUCTION

1. These submissions are advanced by Ai Group in support of the two substantive claims pressed by Ai Group in the context of the 4 Yearly Review of the Road Transport and Distribution Award 2010 (**RT&D Award**). The claims relate to proposed variations sought by Ai Group in relation to clause 19 – higher duties and clause 26.3 – meal allowance of the RT&D Award and are set out in the draft determination filed by Ai Group on 21 December 2017.

2. CLAIM TO VARY CLAUSE 19 – HIGHER DUTIES

2.1 The operation of the current clause

2. The RT&D Award contains a 'higher duties' provision at clause 19. The clause recognises that employees covered by this award may be required to perform work associated with more than one classification during the course of a single day. It has the effect of requiring an employer to pay an employee who performs the work of two or more classifications on the same day the wages that would be applicable to the highest classification covering such work for the entire day.

3. The current higher duties provision is as follows:

> **19. Higher duties**
> Where an employee is required to perform two or more grades of work on any one day the employee is to be paid the minimum wage for the highest grade for the whole day.

4. In order to understand the manner in which the higher duties clause operates it is necessary to consider the classification structure and minimum payment provisions contained in the RT&D Award. The classification structure is contained in *Schedule B – Classification Definitions for Distribution Facility Employees* and *Schedule C – Classification Structure and Minimum Rates of*

Pay. For employees other than Distribution Facility Employees, an individual's classification is largely based upon the duties undertaken by the individual rather than the employee possessing a particular skill or competency, level of experience, qualification or licence. In the context of employees performing driving duties this typically means that an employee's classification at any point in time will be dependent upon the nature of the vehicle that they are driving.

5. The RT&D Award does not require that an employee only perform work in a single classification. The combined effect of the minimum rates provisions (see in particular clause 15.2) and the classification structure is a requirement that an applicable hourly rate is applied for all time worked in a particular classification.

6. Although higher duties clauses are common in the modern award system, the current provision in the in RT&D Award is relatively unusual in that it does not specify any particular amount of time that an employee must spend performing the 'higher duties' in order to trigger the application of the clause.

7. Under the current clause 19, an employee performing *any* amount of higher duties in one day is entitled to receive the higher rate of pay for the whole day. This means that an employee performing the work of a higher classification for even just a few minutes would qualify for an entire day's pay at the higher wages applicable to that higher classification.

8. A clause that delivers such a generous windfall gain to an employee is, on its face, not an appropriate element of a fair and relevant minimum safety net of terms and conditions of employment.

9. The current clause also fails to strike a fair and relevant balance between the needs of employers and employees given the need for employees to occasionally perform, for a very small period of time, the work of a higher classification associated with moving vehicles on private property, such as a depot or yard, in circumstances where the work is not directly part of a road transport service.

2.2 Overview of the proposed variation to clause 19 and the reasons for it

10. Ai Group has proposed that the current higher duties provision be replaced with the following clause:

> **19. Higher Duties**
>
> **19.1** An employee who is required to perform two or more grades of work on any one day must be paid, for the whole day, the minimum wage for the highest grade of work that they perform for more than 2 hours.
>
> **19.2** This clause will not apply to an employee performing driving activities associated with the parking, refuelling or movement of vehicles at a depot, yard, garage or similar site.

11. Clause 19.1 is intended to ensure that an employee must have performed a meaningful amount of work at a higher grade in order to receive the benefit of the clause. Clause 19.2 is intended to exclude from the application of the clause work involving the performance of driving duties on private property that does not constitute the performance of a road transport service performed by a business and its employees. For example, it would exclude work associated with driving vehicles on the business's property in order to park, refuel, service or otherwise move them for some purpose (this would include relocating trailers).

12. In summary, we contend that it is *necessary,* as contemplated by section 138 of the *Fair Work Act 2009* (**FW Act**), to vary the award in the manner proposed to ensure that it meets the modern awards objective given the following considerations:

- The current clause is excessively generous and consequently unfair to employers.
- The current clause is out of step with the general or normal approach to comparable provisions adopted within the modern award system and some relevant predecessor instruments.

- There are no apparent reasons or special circumstances that justify the current anomalous higher duties provision in the RT&D Award. Relevantly, there are no unique or peculiar characteristics of either employers or employees covered by the award, or of the work performed in the industry, that warrants the maintenance of the current provision. There is also no element of the RT&D Award's structure that warrants the continuation of the current approach.

- There is significant industrial merit to adopting the proposed alternate provision. Relevantly, the following matters identified in section 134(1) of the *Fair Work Act 2009* (**FW Act**) favour the granting of the claim:

    - the need to encourage collective bargaining (s.134(1)(b));

    - the need to promote flexible modern work practices and the efficient productive performance of work (s.134(1)(d));

    - 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 (s.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 (s.134(1)(h)).

- There does not appear to be a significant relevant arbitral history that warrants retention of the current provision.

- The proposed clause 19.2 is a necessary part of a 'relevant' safety net because it addresses the specific needs and circumstances of the road transport Industry.

13. These considerations are discussed in more detail below.

2.3 Justification for the proposed variation – the nature of the road transport industry

14. We do not anticipate that there will be any dispute that, as a matter of fact, some employees covered by the RT&D Award perform work of more than one classification. Nor do we expect there to be any disagreement with the proposition that there are circumstances where employees perform 'higher duties' for a relatively short period of time; such a phenomenon has been long recognised and provided for under the terms of the NSW Transport Industry (State) Award (**NSW Transport Award**),[1] which is a relevant and major predecessor instrument to the RT&D Award. There are many reasons why an employee covered by the RT&D Award may be required or permitted to perform work of a higher classification for a very small period of time.

15. Consequently, the critical question that our claim to insert the proposed clause 19.1 raises is, whether, as a matter of merit, there should be some requirement that an employee spend a minimum period of time performing the work of a higher classification in order to receive the benefit of a higher duties clause.

16. With respect to the proposed clause 19.2, the other question that the claim raises is whether the characteristics typical of road transport businesses warrant the exclusion of the payment of higher duties in certain circumstances.

17. In practice, many road transport businesses require vehicles to be moved around an operator's depot or yard. This may be to facilitate refuelling, loading, washing or servicing of such vehicles, or indeed for a myriad of other reasons. Although some businesses (particularly larger businesses) have dedicated personnel that perform much of this work, a far more flexible approach is often adopted. Many employees covered by the RT&D Award perform such work as an incidental, minor or occasional part of their general duties.

18. A strict or literal application of the current clause 19 would dictate that an employee who moves a larger vehicle than that which they have driven for the

[1] See clause 30.2

overwhelming majority of the day would be eligible for a day's pay at the higher classification rate even though they may never have actually driven it on a public road or in the performance of a transport service. It also applies notwithstanding the fact that the employee is not required to exercise the same level of skill or responsibility (or indeed possession of a relevant licence given the work is performed on private property) as would be required in the performance of a transport service on a public road. The value of such work could not be said to properly justify the provision of the higher classification's rate of pay for an entire day.

19. Clause 19.2 of the Ai Group proposal seeks to amend the award to address the abovementioned factual context. In light of the conferencing process undertaken to date, we do not understand that the TWU disputes that the abovementioned work is, at times, undertaken by employees covered by the RT&D Award. Accordingly, the question for the Full Bench of the Fair Work Commission (**FWC**) is whether the award should, as a matter of merit, be amended to reflect such practices, having regard to the need to strike an appropriate balance between the interests of employers and employees and the various other relevant considerations, including in particular the matters that must be taken into account pursuant to section 134(1).

20. The amendment proposed by Ai Group is modest. We are seeking to address the inherently unfair and unnecessarily restrictive operation of the current higher duties clause. Our draft determination does not propose that an employee who performs a higher grade of work would not receive any higher rate of pay. The classification structure and minimum wage rates provisions (clause 14.2) operate to require that the actual time worked must be paid at the applicable rate. There would be force to the proposition that a provision similar to clause 30.2 of the NSW Transport Award be included in the Award. That provision stated:

> 30.2 This clause shall not apply to actual periods of one hour or less or to interchange of work arranged between employees to meet their personal convenience.

21. Nonetheless, we have not, in the context of these proceedings, advanced such a proposal.

2.4 Higher duties provisions contained in other modern awards and predecessor instruments

22. Ai Group has analysed the higher duties clauses contained in the 122 modern awards made during the award modernisation process ending in 2010. Our analysis of these awards revealed the following:

- Out of the 122 modern awards, 26 awards do not contain higher duties provisions whilst 96 do contain such provisions;

- Out of the 96 modern awards that do contain higher duties provisions, in 85 of these the payment of the higher duties allowance is qualified by the performance of higher duties for a certain specified period of time whilst in only 11 of these the payment of the higher duties allowance is not so qualified;

- Out of the 11 modern awards where the payment of the higher duties allowance for a whole day or longer is not qualified by the performance of higher duties for a specified period of time, 4 of these awards are transport awards (the RT&D Award; the Road Transport (Long Distance Operations) Award 2010; Transport (Cash in Transit) Award 2010; and the Waste Management Award 2010). The other 7 awards include the Asphalt Industry Award 2010; the Mobile Crane Hiring Award 2010; the Professional Diving Industry Awards; Graphic Arts, Printing and Publishing Award 2010 and select awards in the airline operations industry including the Air Pilots Award 2010 and the Airline Operations – Ground Staff Award 2010.

23. Our analysis of the modern awards also revealed that out of the 85 modern awards we identified as having higher duties clauses where the payment of the higher duties allowance is qualified by the performance of higher duties for a certain specified period of time, the vast majority of these specify that

employees need to perform higher duties for either more than 2 hours, 3 hours or 4 hours in any one day/shift in order to receive the higher duties allowance for the whole day/shift (with 2 hours being the most common time qualification). If employees perform less than the specified number of hours, many of these awards specify that they only receive the higher duties allowance for the time so worked. For example:

- Clause 24.2 of the Manufacturing and Associated Industries and Occupations Award 2010 (**Manufacturing Award**) specifies:

  24.2 Higher duties

  An employee engaged for more than two hours during one day or shift on duties carrying a higher minimum wage than their ordinary classification must be paid the higher minimum wage for such day or shift. If engaged for two hours or less during one day or shift, they must be paid the higher minimum wage for the time so worked.

- Clause 19 of the Cleaning Services Award 2010 provides:

  19. Higher duties

  19.1 An employee who is required to do work for which a higher rate is fixed than that provided for their ordinary duties will, if such work exceeds a total of four hours on any day, be paid for all work done on such day at the higher rate.

  19.2 If such work does not exceed four hours on any day the employee will be paid the higher rate for the actual time worked.

24. The majority of the other current higher duties clauses in modern awards that contain such clauses are the same, or substantially the same, as one of the above 2 examples.

25. It should be noted that the higher duties clause in the Passenger Vehicle Transportation Award 2010 (**Passenger Vehicle Award**) (which is one of the transport industry awards), is one of these. Clause 18 of the Passenger Vehicle Award provides that an employee needs to perform higher duties for at least 2 hours in any day or shift in order to receive the higher duties allowance for the whole day.

26. A number of the other modern awards we identified as having higher duties clauses where the payment of the higher duties allowance is qualified by the performance of higher duties for a certain specified period of time are more restrictive than the above examples, requiring the performance of higher duties for even longer periods of time before higher duties allowances will be paid. For example:

- Clause 17.1 of the Corrections and Detention (Private Sector) Award 2010 requires an employee to perform higher duties for at least 3 consecutive working days before they will be able to receive the higher duties allowance;

- Clause 17 of the Educational Services (Post-Secondary Education) Award 2010 requires a general employee classified at Level 7 or below to perform higher duties for more than 2 weeks, and a general employee classified at Level 8 or 9 or member of teaching staff to perform higher duties for more than 4 weeks, before they will be able to receive the higher duties allowance;

- Clause 18.1 of the State Government Agencies Award 2010 requires an employee to perform higher duties for at least 5 consecutive working days before they are able to receive the higher duties allowance;

- Clause 22.1 of the Water Industry Award 2010 requires an employee to perform higher duties for more than 1 day before they will be able to receive the higher duties allowance; and

- Clause 18.2(c) of the Banking, Finance and Insurance Award 2010 requires an employee to perform higher duties for more than 4 days before they will be able to receive the higher duties allowance.

27. In light of the above, it is clear that the current approach in the RT&D Award is overly generous and inconsistent with the approach adopted in the vast majority of modern awards that contain a higher duties provisions, being to qualify the payment of higher duties for a whole day/shift or longer by the performance of higher duties for some specified period of time.

28. Given that the normal approach in awards containing higher duties provisions is to qualify the payment of higher duties by some minimum period undertaking the performance of work at higher duties, there is no apparent reason why the RT&D Award should reflect a different and far more generous approach.

29. We note that the context of the current claim is, to an extent, analogous to that which underpinned a recent decision of a five-member Full Bench of the FWC to amend the annual leave loading provisions of the Joinery Industry Award 2010 (**Joinery Award**) in order to align such terms with the general approach normally adopted within modern awards.[2] This decision was made in the context of Ai Group's claim to amend what we perceived to be an excessively generous provision in that award. Relevantly, at paragraph 194 of its decision, the Full Bench observed that the Joinery Award provisions were:

- inconsistent with the norm in respect of annual leave payments;
- out of step with the annual leave payment terms in other construction awards and in modern awards generally; and
- not justified on the basis of special circumstances pertaining to the Joinery Award.

30. Similar observations can be made about the higher duties provisions contained in the RT&D Award.

31. The proposed variation is also consistent with the position under the NSW Transport Award, which, as mentioned above, is a major predecessor

[2] [2016] FWCFB 8463

instrument to the RT&D Award. The comparable provision under that instrument was cast in the following terms:

30. MIXED FUNCTIONS

30.1 An employee required by the employer to work for less than two hours a day on work carrying a higher rate of pay shall be paid at the higher rate for the actual time so worked and when required to work for more than two hours a day on such work the employee shall be paid as for a whole day's work.

30.2 This clause shall not apply to actual periods of one hour or less or to interchange of work arranged between employees to meet their personal convenience.

30.3 On any day on which an employee covered by this award is engaged for more than two hours in the cartage or distribution within New South Wales, of petrol or petroleum products from refineries, terminals or depots of oil companies which are respondents to the Transport Workers' (Oil Companies) Award 1998, in force from time to time, the employee shall be paid for each such day at the rate of pay prescribed by this award, or the rate of pay prescribed by the Transport Industry-Petroleum, &c., Distribution (State) Award, whichever is the higher rate.

32. Ai Group's proposed clause 19.1 reflects the approach adopted in clause 30.1 of the NSW Transport Award. It is unnecessary to replicate that element of clause 30.1 that specifies that the time so worked is paid at the higher rate because it appears that this is the position under the current minimum rates of pay provisions of the RT&D Award. Given the 2-hour limitation contained within clause 30.1, combined with the general position in the modern award system, our proposal of a 2-hour threshold requirement for the application of the higher duties provision should be accepted as appropriate in the context of the road transport industry.

33. Amending clause 19 of the RT&D Award so as to require employees to perform higher duties for more than 2 hours in order to receive the higher duties payment would align the higher duties clause in the award with the prevailing approach in the majority of other modern awards and ensure that there is a consistent and fair approach to the payment of higher duties. Furthermore, as discussed above, the proposed clause 19.2 represents a necessary level of tailoring to the general approach that reflects the special circumstances of employers engaged in the road the transport industry.

2.5 The modern awards objective

34. Apart from aligning the higher duties clause in the RT&D Award with the general position in the modern awards system, the proposed variation to clause 19 is necessary to meet the modern awards objective.

35. The overarching obligation on the FWC derived from the modern awards objective, as espoused in section 134(1) of the FW Act, is to ensure that the modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.

36. The notion of 'fairness' in section 134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> [109] … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[3]

37. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by section 88B of the *Workplace Relations Act 1996* (**WR Act**). That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to section 88B, His Honour stated:

> 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

[3] *4 Yearly Review of Modern Awards* [2015] FWCFB 3177 at [109].

and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[4]

38. Ai Group contends that the current provision is not fair, in the sense contemplated by section 134(1), because it does not strike a reasonable balance between the interests of employers and employees. The proposed variation rectifies this and as such is necessary, as contemplated by section 138.

39. Ai Group also contends that the factors set out in section 134 which the FWC must take into account in determining whether the proposed variation meets the modern awards objective weigh strongly in favour of granting the claim. We consider each of these factors in the section below.

The relative living standards and the needs of the low paid (s.134(1)(a))

40. To the extent that it may be established that employees covered by the RT&D Award are low paid, this consideration would weigh against granting the claim, as it would potentially reduce the monetary entitlements of such employees in some circumstances. However, the weight that should be afforded to this consideration is minimal, given the very modest 2-hour limitation that we have proposed for the operation of the clause.

41. Any concern must also be balanced by the likelihood that employers would logically be more willing to utilise lower paid workers to perform the work or a higher classification (thus affording them some access to higher wages) in circumstances where the employer would not be as heavily penalised for doing this.

The need to encourage collective bargaining(s.134(1)(b))

42. It is doubtful that the current higher duties provision has been, or will be, the catalyst for widespread adoption of collective bargaining in the road transport industry.

[4] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

43. The modification of clause 19 will, to some extent, encourage enterprise bargaining by leaving more room for bargaining over this issue. Given the TWU is opposed to the higher duties clause it will incentivise it to bargain over the provision in order to develop provisions that suit the circumstances of a particular enterprise, rather than relying upon the existing very generous provision. It will also reduce an obstacle to agreements adopting more flexible higher duties provisions from passing the 'better off overall test'. This is not an insignificant consideration given the notoriously tight profit margins at play in the sector.

The need to promote social inclusion through increased workforce participation (s.134(1)(c))

44. This is not a significant consideration in the context of this claim.

The need to promote flexible modern work practices and the efficient productive performance of work (s.134(1)(d))

45. This consideration weighs heavily in favour of granting the claim. The clause imposes a cost barrier to employers utilising employees predominantly performing the work of a lower classification from undertaking work of a higher classification. Its capacity to undermine flexible and modern work practice and the efficient performance of work is obvious.

46. It is important to appreciate that the emphasis is on the need to "promote" the relevant practices and productive performance of work. This denotes a need to support or actively encourage such outcomes. The proposed clause would *promote* such practices by removing a financial disincentive to utilising employees to perform the work of multiple classifications.

47. Members have advised Ai Group that the current clause operates to discourage them from allowing drivers to perform work of a higher classification in circumstances where this would be beneficial for not only the efficient and productive performance of the work in the immediate instance but in order to enable the employee to effectively upskill so that they can perform higher grades of work on a more routine basis when needed. From a very practical

perspective there is clear mutual benefit in employees being permitted to perform small amounts of work associated with the driving of larger vehicles in order to improve their skills and confidence undertaking such activities so that they can more readily be called upon to perform work of higher classification as needed. This is obviously also in the interests of the driver.

48. Any initiative that reduces the disincentive for employers to undertake the training or development of their workforce is particularly important in the road transport sector given the broadly acknowledged challenges of a shortage of skilled and experienced drivers.

The principle of equal remuneration for work of equal or comparable value (s.134(1)(e))

49. This consideration encompasses consideration of pay equity between male and female workers. Considerations of this nature are not relevant in the context of the current claim.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(f))

50. The impact of the proposed variation will plainly be beneficial for business. It has the capacity to both improve productivity and reduce employment costs and would amount to a reduction in the regulatory burden.

51. The variation would particularly assist many smaller businesses that, given the limited number of staff, are more likely to need to their employees to operate in a flexible manner by performing the work of multiple classifications. The object of the FW Act speaks to the provision of a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by, among other things, acknowledging the special circumstances of small and medium-sized businesses.[5] The object

[5] Section 3 of the FW Act

of the FW Act is relevant to the Full Bench's exercise of its discretion in the context of this Review. [6] It further weighs in favour of granting the claim.

The need to ensure a simple, easy to understand, stable and sustainable award system that avoids unnecessary overlap of modern awards (s.134(1)(g))

52. The proposed clause is consistent with this consideration because it is drafted in a manner that is simple and easy to understand. By addressing specific factual circumstances that arises in practice in this industry, that is the movement of vehicles on private property as opposed to public roads, clause 19.2 also provides helpful clarity as to how the general higher duties provision should apply in this context.

53. The proposed variation also reflects the consideration in s.134(1)(g) to the extent that it aligns the award with the typical approach of limiting the application of higher duties provisions to a minimum period of performance at higher duties. Indeed, achieving greater alignment of the wording of the RT&D Award with other instruments that are often applicable to employers in the road transport industry (including both the Clerks Private Sector Award 2010 and the Manufacturing Award) will assist to make the industrial system simpler and easier to understand for these employers. In the context of this Review, numerous Full Bench decisions have endorsed the approach of attempting to achieve greater uniformity in award provisions.

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

54. It is trite to observe that the road transport industry is of vital strategic importance to the Australian economy. Virtually every other industry is to some extent impacted by the performance of the sector. Consequently, while we do not purport to be able to quantify the exact or measurable impact of the award variation on the matters identified in section 134(1)(h), any reduction in costs

[6] 4 yearly review of modern awards – *Fire Fighting Industry Award 2010* [2016] FWCFB 8025 at p.16-19

for the road transport industry could be expected to have a positive impact on such considerations.

3. CLAIM TO VARY CLAUSE 26.3 – MEAL ALLOWANCE

55. Ai Group has proposed variations to the RT&D Award that would alter the circumstances in which a meal allowance contemplated in clause 26.3 would be payable.

3.1 The operation of the current clause

56. The relevant provision of the RT&D Award currently provides as follows:

> **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.

57. Clause 16.4(e) deals with the quantum of the meal allowance. It provides as follows:

> **16.4 (e) Meal allowance**
>
> Where clause 26.2(a) applies an employee must be paid a meal allowance of $15.26.

58. The inclusion of a provision relating to the meal allowance in clause 16.4 is significant. Clause 16.4 deals with "Expenses incurred in the course of employment". There can be no doubt that the meal allowance is an expense related allowance. Pursuant to clause 16.5 the meal allowance is increased by reference to movement in the consumer price index for the "take away fast foods sub group". It cannot validly be argued that the allowance in anyway represents a payment for the working overtime. It is intended to cover the costs of acquiring a meal.

59. Clause 27 of the RT&D Award regulates the payment for working overtime. Clause 27.1 states:

27.1 For all work done outside ordinary hours the rate of pay will be time and a half for the first two hours and double time thereafter, such time to continue until the completion of overtime work.

60. Clause 27 also deals with other matters relevant to the regulation of overtime work. This includes: rest period after overtime, call-back, standing–by, transport of employees and 'TOIL' arrangements.

61. Clause 24.5 of the RT&D Award regulates the payment of overtime performed by shift workers.

62. The wording of clauses 27 and 24.5 will be varied as a product of the exposure draft process currently being undertaken in the 4 yearly review, but their substantive effect will not be altered.

63. Both clause 27 and clause 24.5 already provide that a higher penalty applies once an employee works for more than two hours. Neither clause 27 nor clause 24.5 contemplate that there will be a further additional payment that should be received once the employee works for two hours. This alone suggests that the payment of the meal allowance is not intended to be compensation for the working of overtime in and of itself. This is already addressed by the relevant penalty rates.

64. For completeness, we note that clause 28.2 addresses the rates of pay for working on a weekend.

3.2 Overview of the proposed variation to clause 26.3 and the reasons for it

65. Ai Group has proposed that the current clause 26.3 of the RT&D Award be replaced with the following provision (emphasis added):

26.3 Meal allowance

(a) An employee required to work overtime for <u>two or more</u> continuous hours <u>after working ordinary hours</u> 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 either be supplied with a meal by the employer or paid the amount specified for a meal allowance in clause 16—Allowances.

(c) An employee will not be entitled to a meal allowance if they are provided with 24 hours' notice of the requirement to work more than 2 hours of over-time or to commence work two or more hours prior to their normal starting time.

66. The proposed variations are directed at achieving three outcomes.

67. Firstly, the proposed variation to clause 26.3(a) is intended to ensure that an employee working overtime hours only receives the meal allowance in circumstances where such ovetime is worked after performing ordinary hours. We seek to remove an employee entitlement to a meal allowance in circumstances where an employee works an entire shift that is overtime. In such circumstances an employee will have advance notice of the need to work.

68. In support of the proposed variation to clause 26.3(a), we contend that the structure of clause 26.3, when read as a whole, suggests that the proper interpretation of clause 26.3(a) is that it should only apply in the context of overtime worked immediately following the performance of ordinary hours of work. In this respect we suggest that the amendment addresses a potential ambiguity, uncertainty or error so as to justify the award's variation pursuant to section 160 of the FW Act.

69. Secondly, the proposed variation to clause 26.3(b) is intended to align the provision with the terms of clause 26.3(a) by allowing a meal to be supplied by the employer in lieu of the payment of the meal allowance. In the course of this review no party has questioned the appropriateness of an employer being afforded the capacity to supply a meal and there is no obvious reason why this flexibility should not be afforded in circumstances where an employee works the overtime prior to the commencement of their ordinary hours.

70. Thirdly, the insertion of the new clause 26.3(c) is intended to remove any obligation on an employer to pay a meal allowance in circumstances where the employee has been provided with significant advance notice of the need to work

ovetime and consequently afforded the opportunity to bring an appropriate meal to work.

71. Clause 26.3(c) is also intended to incentivise an employer to provide an employee with advance notice of the need to work overtime. Relevantly, in the context of the road transport industry this outcome also has the potential to assist employees to manage their fatigue. This is not an insignificant consideration.

3.3 Similar provisions in the modern award system and predecessor instruments

72. The proposed variations to clause 26.3 are consistent with the approach commonly adopted in comparable provisions within the modern award system and the underlying justification for such allowances. Relevantly, the Manufacturing Award requires the payment of a meal allowance but relieves an employer of the obligation to make the payment if the employee is advised on the previous day of the need to work such overtime or if a meal is provided by the employer. Clause 40.11 of the Manufacturing Award states:

> **40.11 Meal allowance**
>
> **(a)** An employee must be paid a meal allowance of $13.81 on each occasion the employee is entitled to a rest break in accordance with clause 40.10, except in the following circumstances:
>
> **(i)** if the employee is a day worker and was notified no later than the previous day that they would be required to work such overtime; or
> **(ii)** if the employee is a shiftworker and was notified no later than the previous day or previous rostered shift that they would be required to work such overtime; or
> **(iii)** if the employee lives in the same locality as the enterprise and could reasonably return home for meals; or
> **(iv)** if the employee is provided with an adequate meal by the employer.
>
> **(b)** If an employee has provided a meal or meals on the basis that they have been given notice to work overtime and the employee is not required to work overtime or is required to work less than the amount advised, they must be paid the prescribed meal allowance for the meal or meals which they have provided but which are surplus.

73. The NSW Transport Award also provided for a meal allowance in circumstances where an employee worked overtime after working ordinary hours of work. However, under the award, the obligation did not arise if the employee was provided with advance notice of the need to work such overtime. The relevant provision stated:

> **8.2.1** An employee who is required to work overtime on any week day for a period of two hours or more after the employee's normal finishing time shall be allowed a paid crib break of 20 minutes not later than 5 hours after the end of the lunch break and, shall, unless notified the previous day or earlier that the employee would be required to work such overtime, be paid a meal allowance of the amount specified in Table 9 of Part B. Where notification to work overtime has been given on the preceding day or earlier and such overtime is then cancelled on the day such overtime was to be worked, an employee shall be paid a meal allowance of the same amount.

74. There is no reason for concluding that the maintenance of a markedly different approach in the RT&D Award to that adopted in the above provisions is necessary.

3.4 The justification for an overtime meal allowance

75. The terms of the RT&D Award demonstrate that the purpose of the meal allowance is to compensate for an "expense incurred in the course of employment". They suggest that the intention of the current clause is to compensate or reimburse an employee for the cost of purchasing a meal. This proposition is substantiated by the fact that the meal allowance is not payable if a meal is supplied.[7]

76. The general intention or justification for this type of award provision is to ensure that an employee is not disadvantaged when working overtime by being required to make alternative meal arrangements or being out of pocket for expenses incurred in purchasing a meal. Such matters were considered by Portus C in a matter involving the printing industry.[8] As part of this case, the union involved claimed that the 'tea money' should be paid in circumstances

[7] Clause 26.3(a)

[8] CAR Vol 63 1949 1 at 6

where an employee works overtime, regardless of whether notice of overtime was given on the previous day. In considering the claim Portus C held:

> Under the existing clause tea money is only paid when notice of overtime is not given during the previous shift. The employers contend that this provision should not be altered and they point out that the purpose of tea money is to ensure that the employee does not lose money by reason of being required to work overtime. If he is given notice he will be able to arrange that no evening meal is cooked for him at home and he will either bring his meal to his work or make arrangements to buy it. For the Unions it is pointed out the type of meal an employee brings to his work is very different from the type of evening meal that he would have at home and for this reason the employee should be compensated. It is also pointed out that in many cases the evening meal must be prepared at home whether or not the wage earner himself is presented and that therefore the giving of notice which saves the preparation for one extra person makes little difference.
>
> I have carefully considered the arguments advanced by the Union. It appears to me that even if an employee is given notice he suffers some loss or inconvenience. Either he suffers the inconvenience of having his household prepare for him a meal which he takes to his work and which is no real substitute for his evening meal at home, or he must spend money in purchasing his meal near his place at work. In either case the inconvenience and expense is only partly balanced by the fact that no meal need be prepared for him at his home. On the other hand when an employee is not advised of the necessity of working overtime he suffers added disabilities not only as the result of the domestic arrangements made for his meal at home which he has not the opportunity of cancelling but also because has not the opportunity of bringing a meal to his work and saving the expense of buying one. I consider that the payment of meal money must be regarded as a compensation for these added disabilities and that the disabilities suffered by the employee to whom notice has been given is a matter which is relevant to the fixation of the ordinary overtime rate. Accordingly, the claim is refused.

77. If an employee is afforded advanced notice of the need to work over-time they will have the opportunity to make arrangements for the preparation of a meal that they can take to work. An award term proving for the payment of an expense related meal allowance in circumstances where an employee is provided advanced notice of the need to work overtime cannot be considered 'necessary' to ensure that the award represents a 'fair and relevant *minimum* safety net of terms and conditions' as contemplated by sections 138 and 134(1) of the FW Act.

78. The fact that a meal may not be of the same nature as one which might be consumed by the employee in circumstances where they were not working is not a relevant justification for the maintenance of the current provision. As

observed by Portus C, such matters are properly compensated for through the relevant overtime penalties.

3.5 Past consideration of the current clause 26.3 in the RT&D Award

79. Ai Group has not identified any detailed consideration of clause 26.3 in the course of the Part 10A Award Modernisation process.

80. In the course of the 2 Year Review the employer parties did seek an amendment to the meal allowance clause (clause 26.3) that would have partly addressed the issues now identified by Ai Group. However, we did not pursue the same substantive claim that is now pressed. Rather, amendments were sought to both the rest break and meal allowance provisions (clauses 26.2 and 26.3) that would address the anomalous situation whereby an employee that works a very short amount of time before proceeding into overtime (for reasons such as working past the spread of ordinary hours prescribed by clause 22.3) would obtain a paid meal break and a meal allowance.

81. The review of the RT&D Award was undertaken by Senior Deputy President Harrison. The relevant extract from the decision[9] is as follows:

> **Clause 26.3(a) - Meal allowance**
>
> **[93]** Clause 26.3(a) provides for a meal allowance where an employee is required to work overtime for two or more hours. The parties sought to insert the words underlined into this clause:
>
> "An employee required to work overtime for two continuous hours or more <u>after working at least seven ordinary hours</u> 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."
>
> **[94]** In light of my ruling in respect to clause 26.2 about inserting a reference to seven ordinary hours, I have decided to refuse to make this variation. I am not persuaded a meritorious case has been made out to warrant the variation.

[9] [2013] FWC 9805

82. Clearly, very limited consideration was given to the proposed variation to clause 26.3 during the course of the 2 Year Review. It cannot be suggested that the issue now ventilated in the context of this review was squarely or thoroughly considered in the context of the 2 Year Review. To the extent that it might be asserted that there is some overlap between what is now sought and the variation previously pursued it is sufficient to note that the reasoning of Commission's decision in the 2 Year Review reveals that the consideration of the claim then advanced in relation to clause 25.2 was subsumed within the consideration of the specific proposed variation to clause 26.2. Moreover, a different claim and case was then presented in comparison to what is now advanced in the context of this broader review of the award. In any event, it should nonetheless be observed that the decision of Senior Deputy President Harrison falls well short of any considered endorsement of the merits of the current provision, or the extent to which it should be considered necessary to meet the modern awards objective.

3.5 The modern awards objective

83. Ai Group contends that the proposed variations to clause 26.3 of the RT&D Award are necessary to meet the modern awards objective and provide a fair and relevant minimum safety net. We contend that, on balance, a consideration of the factors in s.134 (1) of the FW Act weigh in favour of granting the claim.

84. In particular, the granting of the proposed variation to clause 26.3 is strongly supported by a consideration of s.134 (1) (f): "*the likely impact of exercise of modern award powers on business including on productivity, employment costs and the regulatory burden".* Clearly, the granting of the claim would reduce employment costs and the regulatory burden. The extent of any such saving will of course vary from employer to employer, depending upon the nature of their operations.

85. To the extent that the changes reduce or remove a financial disincentive to an employer offering an employee the opportunity to work additional overtime hours, by reducing the cost of such practices, granting the claim would also

promote flexible modern work practices and the efficient and productive performance of work, as contemplated by section 134(1)(d).

86. The proposed clause has been drafted in a manner that is simple and easy to understand, so as to be consistent with relevant considerations arising under section 134(1)(g). Similar limitations to those that we have proposed to insert into the clause are widely adopted within the modern awards system. On this basis, granting the claim would increase consistency between awards.

87. In crafting the proposed variations Ai Group has been mindful of the obligation on the FWC to take into account the relative living standards and needs of the low paid (as per section 134(1)(a)). Any negative impact is moderated by the fact that the provision of advanced notice will mitigate against the need for an employee to incur any additional expense as a result of working overtime.

88. Regardless, the provision of a meal allowance is intended to be payable in recognition of an expense incurred in the course of employment. If the need to incur such an expense is removed, it cannot possibly be argued that a term that still requires that a payment be made to an employee is justified or necessary, in the relevant sense. Indeed, if the allowance genuinely compensates employees for a 'cost incurred in the course of employment', the proposed change should have a neutral impact on the needs and living standards of the low paid. The overtime penalties prescribed by the RT&D Award appropriately compensate employees for the performance of work during overtime hours.

89. To the extent that the proposed amendment reduces the costs of employers covered by the award it is likely to have a positive impact on the matters identified in section 134(1)(h) for the reasons already identified at paragraph 54 of these submissions.

4. CONCLUSION

90. For the reasons outlined in this submission Ai Group's proposed variations to clauses 19 and 26.3 of the current RT&D Award should be granted.