

IN THE FAIR WORK COMMISSION

Matter No: AM 2016/32

Road Transport and Distribution Award 2010 – Application of the Award to Truck Moves Australia and others in the vehicle relocation industry

Reply Submissions for Truck Moves Australia and others

1. These submissions reply to the evidence and submissions of the Australian Road Transport Industrial Organisation (**ARTIO**) and the Transport Workers Union (**TWU**) filed 22 December 2017.
2. In addition to these submissions, Truck Moves and others rely on additional statements from Mr Matthew Whitnall and Mr John Bradac.
3. A failure to respond to an aspect of the ARTIO and TWU submissions is not to be taken as an acceptance of any proposition or submission made.

Preliminary matters in reply

4. As to paragraphs [6] to [10] of the ARTIO submissions, these submissions are simply without substance and misguided. With respect to the criticism that Truck Moves and others have somehow gone too far in its application for the draft determination, Truck Moves says:
 - 4.1. Since late 2013, when the four yearly review proceedings began, no application was promptly made by any party to change the coverage of the RTD Award;
 - 4.2. Numerous conferences occurred in 2014, 2015 and 2016 to discuss the terms of the RTD Award in circumstances where no application had been made to alter coverage;
 - 4.3. On 10 October 2016, the Full Bench ([2016] FWCFB 7254) decided (over 2 ½ years later) to refer the issue of coverage for hearing and also gave the opportunity to comment on the revised draft awards;
 - 4.4. On 11 November 2016, Truck Moves and others complained about process of determining coverage late and relevantly raised the need to “*be heard on various aspects*” of the RTD Award including

“classification and pay”, “applicability of other award entitlement to its business and workers” and “transitional arrangements” after the issue of coverage was determined;

- 4.5. The issue of coverage and terms were accordingly separated;
- 4.6. In the proceedings before this Full Bench on the issue of coverage, Truck Moves and others explicitly raised issues to deal with:
 - 4.6.1. the applicability of the RTD Award itself (see outline of submissions filed 1 March 2017, [82] to [86]);
 - 4.6.2. the applicability of the classifications and pay rates (see [87] to [95]);
 - 4.6.3. the higher duties clause 19 (see [97] to [102]); and
 - 4.6.4. the economics of the RTD Award (see [103] to [109]);
- 4.7. In that context, the Full Bench’s comment at [87] (of [2017] FWCFB 1913) that *“we do consider there is an arguable case that some provisions ... should be modified in their application to this group of employees, having regard to the particular features of their work”* and *“there may also be a case for some transitional provisions”*;
- 4.8. Those comments represent a genuine statement that Truck Moves and others will be heard on the issue of modification of some provisions, and transitional arrangements, in the RTD Award;
- 4.9. The Full Bench noted that *“some provisions”* arguably *“should be modified”* – and in context those provisions must, absent any indication to the contrary, include classification and pay and higher duties - the terms raised by Truck Moves and others;
- 4.10. The Full Bench further noted that *“some provisions”* arguably *“should be modified”* *“in their application to this group of employees, having regard to the particular features of their work”* – in context, this requires an examination of the work in the vehicle relocation industry, and the conditions under which the work is performed. Invariably, by doing so, it is appropriate to look at other clauses relating to the

particular features of this work, like hours of work and long distance work;

- 4.11. The Full Bench must also take into account the economics of the RTD Award (s 134(1)(f) of the FW Act);
 - 4.12. In that context, Truck Moves has presented evidence *directly* relevant to the above matters to enable the Full Bench to make an informed decision. Criticism, such as at ARTIO submissions [7], is misguided and seeks to prevent Truck Moves being heard on an issue the Full Bench has explicitly given it an opportunity to present;
 - 4.13. Criticism at ARTIO submissions paragraph [8] that Truck Moves is proposing that the RTD Award “*effectively be re-written*” is a dramatic over-reaction. Truck Moves and others have addressed specific and discrete clauses in the RTD Award which it says (and has always said) are not applicable “*in their application to this group of employees, having regard to the particular features of their work*”; and
 - 4.14. Contrary to ARTIO submissions paragraph [10] that the Full Bench would have said “*crystal clear*” if terms were not appropriate, the Full Bench was not addressing the issue of terms (having separated the issue from coverage) but clearly did express the view that “*we do consider there is an arguable case that some provisions ... should be modified in their application to this group of employees, having regard to the particular features of their work*” and “*there may also be a case for some transitional provisions*”. Truck Moves and others are addressing these matters.
5. The above response is also in reply to the TWU submissions, including that the approach by Truck Moves is “*inconsistent ... with the decision of the Full Bench*” (at [4 (a)]) and “*there is no necessity for ... a de novo work value assessment*” (at [10]). The TWU, as with ARTIO, simply do not understand the context of the current proceedings. Truck Moves and others are availing themselves of the opportunity the Full Bench has afforded.
 6. Another aspect of the submissions of the ARTIO is about “*protecting the integrity of the current RTD Award*” and being concerned about “*a small sector of the industry ... seeking special treatment around rates and conditions*” (at

[12]). The assumption in that submission is that the vehicle relocation industry is “*in the road transport industry*” within the meaning of the RTD Award. This aspect of the submissions is based on a false premise.

7. Truck Moves and others say:
 - 7.1. The RTD Award (and other previous State and Federal awards¹) has historically been focussed on the industry of transporting freight. So much is apparent from the existing definition of ‘road transport and distribution industry’ in clause 3.1 of the RTD Award, subparagraphs (a) to (i). Those subparagraphs explicitly refer to the carriage of goods and different types of goods;
 - 7.2. The above conclusion has been subject to a declaration of the Federal Court (see [2015] FCA 1071), upheld on appeal (see [2016] FCAFC 83) – making it an incontrovertible fact that the RTD Award was not created and designed for the vehicle relocation industry;
 - 7.3. That is, as a matter of fact and law, Truck Moves and others in the vehicle relocation industry are not in the ‘road transport and distribution industry’ as properly defined in the RTD Award (and have not been for many, many years);
 - 7.4. The Full Bench in its decision (of [2017] FWCFB 1913) merely said the RTD Award “*is the appropriate award to cover the employees in question*” (and then proceeded to say there is an arguable case some provisions should be modified); and
 - 7.5. The proposed new subparagraph (j) ‘roping-in’ the vehicle relocation industry results in coverage extending to an industry that is ‘the odd one out’ (compared to subparagraphs (a) to (i) in clause 3.1) in that it is not involved at all in the cartage and distribution of goods (as properly understood).
8. In that above context, the opposite of what the ARTIO alleges at paragraph [12] of its submission is true. The vehicle relocation industry is being ‘roped-into’ an

¹ See the schedule A to the outline of submissions filed 1 March 2017 and the 1959 decision of the Commonwealth Conciliation and Arbitration Decision, as referred to at paragraphs [89] to [94] of the outline of submissions filed 1 March 2017.

award that was not designed and created to cover its industry or its peculiar features. So much is clear from the statement of the Full Bench when it says, “we do consider there is an arguable case that some provisions ... should be modified in their application to this group of employees, having regard to the particular features of their work” and “there may also be a case for some transitional provisions”. In the above premises (and consistent with the industrial history, the Federal Court decisions and the existing terms of the RTD Award itself), it can be readily seen that the vehicle relocation industry is not “seeking special treatment around rates and conditions” but rather, in the context of being brought into an award not created and designed for it, only seeking some accommodation for “the particular features of their work”. Despite the dramatic submission of the ARTIO at [12], terms tailored to this new industry will not “break down” the industrial award system. Neither is the insertion of a schedule² dealing with the vehicle relocation industry “inconsistent with the long-standing structure and method of determination of pay rates for drivers”, as the TWU submits at 4(b) – the method determined before was for a different industry.

Evidence

9. The ARTIO has filed no evidence. It cannot, with respect, simply rely on its status as a registered industrial organisation to make good its submissions. Moreover, its failure to file any evidence allows the Full Bench to draw a *Jones v Dunkel* inference.
10. As to the (unsigned and undated) statement of Mr Dennis Mealin, and in addition to any oral submissions to be made at the hearing, Truck Moves and others say:
 - 10.1. his statements (and that of others) of driving loaded vehicles ought to be rejected and the evidence of Mr Whitnall (whose evidence the Federal Court accepted) should be preferred. Otherwise, this issue is irrelevant as the evidence in these proceedings is that the vehicle relocation industry (and, critically, as it is defined by the proposed new subclause (j) to clause 3.1 of the RTD Award) does not involve the cartage of freight/goods;

² A schedule has been proposed by way of convenience, but the amendments could be in the body of the RTD Award itself. On one view, a schedule reflects how the vehicle relocation industry came to be covered by the RTD Award.

- 10.2. his mere statement of not being paid waiting time is wrong, as Mr Whitnall provided evidence in his statement on 1 March 2017 (including sample pay records) that he was paid for such times; and
 - 10.3. he appears to be motivated to discredit Truck Moves (see, for example, paragraph [90] to [91] of his statement) but his evidence (in this particular regard) is overstated, scandalous and contrary to the facts (as addressed by Mr Whitnall at paragraph 46 of his statement dated 24 November 2017).
11. The statement of Mr Darrell Haining is intermingled by the nature of his employment at Prixcar. Prixcar does much more than mere vehicle relocation and undoubtedly this influences its business model, behaviours and practices and processes.
 12. The statements of Mr Anthony Cassar and Mr Glen Declase out to be treated with caution:
 - 12.1. They are (or were) employees of a substantial business wanting to compete with a much smaller industry;
 - 12.2. They are not experts, including as shown by their misunderstanding of the traditional coverage of the RTD Award – and as such, their opinions need to be treated with restraint;
 - 12.3. Their evidence of the work of drivers at Prixcar is not aligned with work in the vehicle relocation industry;
 - 12.4. The business of Prixcar is distinct from a business solely operating in the vehicle relocation industry, including because of its economic ability; and
 - 12.5. The statements of Truck Moves “*undercutting*” Prixcar are wrong and misleading – see paragraph [57.6] of our outline of submissions filed 1 March 2017.
 13. Further submissions will be made after cross-examination of these witnesses.

Reply to ARTIO

14. In specific reply to the ARTIO submissions, Truck Moves and others also say:
 - 14.1. It is once again, a misunderstanding of the current proceedings to say the draft determination is “*plainly, and very simply, an attempt to continue to operate ... with minimal coverage*” at [21]. Truck Moves and others accept they are to be covered in the RTD Award, and that its terms will apply to it. It merely seeks modification to three areas (classification and pay, hours of work and higher duties) out of many areas covered by the RTD Award;
 - 14.2. Truck Moves and others have provided evidence and submissions to support the claim for the proposed pay rate, despite what is said at paragraph [22]. This includes:
 - 14.2.1. evidence of the nature and circumstances of the work performed,
 - 14.2.2. evidence of the work being less physical demanding than the transport industry,
 - 14.2.3. a financial analysis, including against customer rates,
 - 14.2.4. submissions about the context and structure of the RTD Award,
 - 14.2.5. having regard to how wage rates in the transport industry (as traditionally understood) have been determined (including by having regard to the 1959 decision of the Commonwealth Conciliation and Arbitration Decision, as referred to at paragraphs [89] to [94] of the outline of submissions filed 1 March 2017).
 - 14.3. In response to paragraph [23] to [24], having regard to the peculiar nature of the industry, and that up to 50% of the workers time can be spent not driving, i.e. the lack of physical demand on the driver, Truck Moves have sought payment of overtime, as per the RTD Award, after 10 hours;

- 14.4. Despite [25], clause 7 is not a mechanism to increase ordinary hours to 10 hours a day with certainty and ongoing consistency;
- 14.5. The ARTIO's submission at paragraphs [28] to [34] that the LDO Award applies to Truck Moves and others and they "*could temporarily transfer to the LDO when 'long distance work' was available*" is simply incorrect in fact and law. The Federal Court declared that the LDO Award does not apply to the vehicle relocation industry: see [2015] FCA 1071. It is implicit in the ARTIO's submissions that long distance provisions of paying cents per kilometre may be applicable to the industry in the absence of recourse to the LDO Award. Of course, regard needs to be had to the fact that the rates of pay in the LDO Award were also set for a different industry involving different responsibility and work (including working with freight/goods);
- 14.6. The submissions of ARTIO at paragraphs [35] to [38] with respect to "higher duties" are irrelevant, misguided or baseless. The submissions and evidence of Truck Moves and others demonstrated an inapplicability to the vehicle relocation industry with respect to the "higher duties" clause and is therefore consistent with the observations of the Full Bench said "*we do consider there is an arguable case that some provisions ... should be modified in their application to this group of employees, having regard to the particular features of their work*";
- 14.7. With respect to paragraph [39] of the ARTIO submissions there is simply no evidence to make the assertion it does. Further, the overwhelming evidence is that in the vehicle relocation industry, a worker may driver many different types of vehicles in a day such that the higher duties clause is inapplicable having regard to the peculiar features of this industry;
- 14.8. The submission at paragraph [41] is irrelevant given the financial evidence, and the impact of wage increases, on the industry;
- 14.9. The submission at paragraph [48] is incorrect. The statutory regime does not regulate ordinary hours per day, only 38 hours a week.

Truck Moves and others are not seeking to expand ordinary hours beyond 38 hours a week (only the permissible number of hours that can be worked a day);

- 14.10. Contrary to paragraphs [53] to [59], it seems blatantly unfair and unreasonable for the vehicle relocation industry to have only two years to transition when employers (who were covered by a transport award previously) were given four years to transition in 2010. The vehicle relocation industry is coming into coverage for the first time. For all the reasons for having a four year transition period in 2010, would have equal (if not more) force to the situation of 'roping-in' the vehicle relocation industry. The balance of ARTIO's submissions regarding transitional provisions are simply baseless and unsupported by any evidence.

Reply to TWU

15. In addition to the above submissions, in response to particular aspects of the TWU submissions that are different, Truck Moves and others say:
 - 15.1. Despite paragraph [4 (c)], Truck Moves and others have not "*substantially overstated*" the nature of the industry or the work. Indeed, no such findings have been made in the Federal Court proceedings, or the proceedings below, against Truck Moves and others;
 - 15.2. As to paragraphs [9] and [10], the creation of a particular classification for this industry does not result in a wages review but rather the making of modifications "*having regard to the particular features of their work*";
 - 15.3. The submissions at [10] that the rates of pay in the RTD Award "*are already properly set for professional driving work*" ignores that the work covered by the RTD Award involves much more than just driving and that the RTD Award was created and designed to compensate for work involved with the cartage of freight (which includes an array of duties and responsibilities, including in relation to loading and unloading) and that the Commission has historically set wage levels to

account for this significant work (which is not performed in the vehicle relocation industry);

- 15.4. The submissions of the TWU with respect to “first award” principles are nonsensical. There is nothing inconsistent with that approach. Contrary to [11], first award principles provide the appropriate guidance for the Full Bench in this context, having due regard for s 134 of the FW Act;
- 15.5. It is incorrect at paragraph [13] to suggest (if it is to be suggested) that historically drivers engaged in the *vehicle relocation industry* have been covered by awards:
 - 15.5.1. The Vehicle Manufacturing Award does not apply to the industry;
 - 15.5.2. Car carrying or towing is different to the work of the vehicle relocation industry; and
 - 15.5.3. The decision in *Rooth* did not mean the vehicle relocation industry was regulated by the RTD Award, as that decision was wrong at law;
- 15.6. Absent cogent evidence and particulars, for the TWU to suggest at paragraph [14] that Truck Moves pays less than the NMWO (the legally required rate it must pay) should be rejected. In any event, such a submission is irrelevant to the issues in these proceedings;
- 15.7. The reference to “employers” at paragraph [15] is misleading as the only employer (of which there is evidence) is Prixcar. The submission at this paragraph is otherwise irrelevant;
- 15.8. Despite paragraph [17], the evidence and indeed the definition of proposed subparagraph (j) in clause 3.1 of the RTD Award, operates on the incontrovertible basis that the vehicle relocation industry does not perform the same array of tasks as the transport industry as properly defined under the RTD Award. Contrary to paragraph [19], workers in the vehicle relocation industry do not perform a significant array of tasks that are undertaken in the transport industry as defined in the RTD Award;

- 15.9. The advertisements for drivers issued by Truck Moves does not assist the TWU arguments at paragraph [21];
- 15.10. The decisions referred to at paragraphs [20] and [22] speak for themselves and support the arguments of Truck Moves and others;
- 15.11. As to paragraphs [24] to [26], Truck Moves and others say:
- 15.11.1. The rate it has proposed takes account of the structure of the RTD Award and the work involved by drivers at each classification in comparison to the far less physically demanding nature of the role in the vehicle relocation industry, having regard to its peculiar features;
- 15.11.2. The rate accounts for the fact the Commission has historically increased the rate of pay specifically for work the vehicle relocation industry does not perform;
- 15.11.3. The rate is above the NMWO; and
- 15.11.4. The TWU submission ignores the economics and uncertainty of managing wages and work distribution (and work culture) through the operation of a higher duties clause in the vehicle relocation industry; and
- 15.12. In the context set out above at paragraph 14.10, it is simply not apparent how it can be said at [4(e)] that the transitional provisions (of four years) are “*excessive and unnecessary*”. It is also irrelevant and wrong to say at paragraph [31] that the industry has been on notice and had “*a number of years*” to adjust – which begs the question, adjust to what? As said above, the TWU never applied for a change to coverage in 2013, 2014 and 2015. Logically, that would have been the first step of a review. Business needs to operate with certainty. No application was made for over two years. Arrangements and deals cannot be negotiated, in a competitive market, based on uncertainty and some unknown possibility. As such, there has been no de-facto transitional arrangement to date that would militate against a four year transition. The ineptitude of the TWU in making an appropriate and timely application should not be used adversely against Truck Moves.

16. Truck Moves and others press its draft determination for all the reasons set out in its submissions dated 24 November 2017, to be supplemented at the hearing by oral submissions.

Maurice Baroni - Denman Chamber

Counsel for Truck Moves

19 January 2018

Matter: AM2016/32-Road Transport and Distribution Award 2010

RE: Supplementary submissions from: Truck Moves Australia Pty Ltd, Quick Shift Vehicle Relocations Pty Ltd and Vehicle Express Pty Ltd

Supplementary witness statements from:

- [Mr Matthew Whitnall dated 19 January 2018](#)
- [Mr John Bradac dated 19 January 2018](#)