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National Secretary
Michael Kaine

Fair Work Act 2009

s 158 - Application to vary or revoke a modern award

Application by Trevor Warner (AM2019/23)

Application by Brenda McKay (AM2020/2)

SUBMISSION ON BEHALF OF THE TRANSPORT WORKERS' UNION OF AUSTRALIA

The Transport Workers' Union of Australia (TWUA) refers to the above named applications and matters set out therein.

We note that these applications seek, in essence, to expand on core tasks regularly undertaken by road transport workers that have not to date been characterised in the relevant Awards as typical driving tasks but none the less occupy a significant amount of time in any road transport worker's day.

The variation applications identify key non-driving tasks performed by road transport workers for which they are often not appropriately remunerated. However, the TWUA submits that the applications are afflicted by two related flaws. First the variations are too confined in their scope, they do not go far enough to address all of the terms and conditions of the *Road Transport (Long Distance Operations) Award 2010 (LDO Award)* that require variation in order to meet the Modern Awards Objectives set out at section 134 *Fair Work Act 2009 (Cth) (FWA)*. Second, the variations (together with other variations that ought be made) must be coupled with supply chain accountability provisions to ensure that those at the top of transport supply chains who reap the economic benefit of the transport task cannot turn a blind eye to any increase in costs that such variations might provoke. Failure to incorporate such provisions means that there is considerable risk of perverse outcomes in that the cost burden of the applications may actually fall back on the drivers in the form of downward rate pressure or intensified time pressures imposed by already marginal transport operators who, absent supply chain accountability, would be unable to recover the cost of the variations from those entities

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requiring the work to be done. The type of supply chain provision which would assist in avoiding such perverse outcomes has a successful precedent in the *Mutual Responsibility for Road Safety Award* made by the Full Bench of the Industrial Relations Commission in 2006 and, if the Commission is minded to make the variations sought, it should ensure that such a supply chain provision is put in place as well.

The TWUA understands the motivation behind the applications before the Commission. The TWUA has made numerous submissions of this kind in Modern Award processes over the last 10 years. The barriers in the way of successful application have ranged from jurisdictional – particularly the overarching limitation of being unable to directly cover owner drivers and supply chain participants – to the practical, including lack of industry support for such change.

In the most recent decision on variations sought by the TWUA of this nature in the in the 2014 Four Yearly Review, in [2017] FWCFB 1913 at para. 103, the Full Bench decided as follows:

*[103] The current remuneration structure has been contained in federal awards since at least 1993. These ‘trip rates’ strike a balance between the needs of employers and employees – giving employers a degree of certainty in tendering for work, and for employees in knowing what they will be paid. There is no need to calculate the exact number of kilometres driven, nor time taken, for each journey. In some cases, employees will be advantaged by the way the schedule operates; in other cases, there could be some advantage to the employer. We do not consider that the proposed variations should be made without a thorough reassessment of the schedules and the way in which they operate. **No party sought such a wholesale reassessment and we do not have the evidence before us to conduct such an exercise. In these circumstances, we decline to make the proposed variations.** (emphasis added).*

Consequent to the above decision the TWUA indicated to Ross J that it had decided to file more fulsome applications to deal with this and other deficient matters in Road Transport Awards. Those applications are being finalised by the TWUA and will of necessity include (but not be limited to) a “work value” case.

The current industrial system has not kept pace with the times for several reasons. Most notable is the incapacity to directly bind supply chain participants including clients and who therefore, cannot be held accountable for the terms and conditions established within the industrial relations system itself as set out in

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various instruments including, modern awards. The Enterprise Bargaining system has fragmented the economic power of employers – employers themselves have become “price takers” meaning they have little or no capacity to recover increases in costs back up the supply chain to the ultimate customer, a customer who dictates price but that stands outside of the purview of the existing industrial relations system.

Accordingly, care must be taken that any application does not inadvertently put further pressure on transport workers because of the incapacity of their direct employers to recover increased costs from those requiring the transport task to be undertaken. This incapacity to recover costs has become a deadly characteristic of the current system with downward pressure on price applied on road transport employers imposed through current contracting and tendering practices of major industry clients that transport employers have not economic power to resist – they either accept the work on the terms dictated or lose the work to an operator who will accede to those terms. It is regularly observed that owing to the pressures placed on employers in road transport supply chains (which are often elongated with several intermediaries), failure to pay minimum award wages is common, and that other important matters including vehicle maintenance may be ignored in order to keep businesses afloat. There is now decades of evidence that such consequences lead to decreased safety including road fatalities.¹

Accordingly, we submit the Commission to hold this matter over until the TWUA has filed its more fulsome applications.

¹ *Safe Payments Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, the National Transport Commission with the Honourable Lance Wright QC and Professor Michael Quinlan, October 2008. See also: *R v Randall John Harm*, District Court of New South Wales, per Graham J, 26th August 2005; *Long Distance Truck Drivers: On road performance and economic reward*, December 1991, Federal Department of Transport and Communications; *In Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* [2006] NSWIRComm 328 the Full Bench of the Industrial Relations Commission of NSW said: “we consider that the evidence in the proceedings establishes that there is a direct link between methods of payment and/ or rates of pay and safety outcomes”; *National Road Freight Industry Inquiry, Report of Inquiry* to the Minister for Transport, Commonwealth of Australia, (1984), Canberra; *Beyond the Midnight Oil, An Inquiry into the Managing Fatigue in Transport*, House of Representatives Standing Committee on Communication, Transport and the Arts, October 2000, Canberra; C. Jones, J. Dorrian and D. Dawson, ‘Legal Implications of Fatigue in the Australian Transportation Industries’, 45 *JIR* 344 at 351; Professor Michael Quinlan, *Report into Safety in the Long Haul Trucking Industry*, A report Commissioned by the Motor Accidents Authority of New South Wales, 2001, Sydney; R Johnstone, ‘The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement’, March 2002, National Research Centre for OHS Regulation, the ANU; *WorkCover Authority of NSW v Hitchcock* (2005) 139 IR 439.

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However, if the Commission is minded to move forward with the current applications, we foreshadow that we will seek leave to file appropriate amendment to ensure that supply chain participants receiving the benefit of the services that include the loading/unloading process but who are not employers captured by the act at least receive notice that these costs have been incurred by the transport employer. This can be done by imposing on the employer an obligation to pass the records back up the chain to the supply chain participant who should be paying for the costs. This will also enable regulators to demonstrate that the supply chain participant is unable to run a “blind eye” defence and ensure safety and fairness in the long distance sector of the road transport industry.

Michael Kaine
National Secretary
Transport Workers' Union of Australia

21 April 2020