
Fair Work Commission: 4 yearly Review of modern awards

SUBMISSIONS IN REPLY

**4 YEARLY REVIEW OF MODERN AWARDS – TRANSPORT
INDUSTRY AWARDS (AM2016/32)**

**AUSTRALIAN BUSINESS INDUSTRIAL
- and -
THE NSW BUSINESS CHAMBER LTD**

2 MARCH 2017

1. BACKGROUND

- 1.1 These submissions in reply are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).
- 1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 4,200 members, while NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) with more than 18,000 members.
- 1.3 These submissions in reply are filed in accordance with item [3] of the Amended Directions of the Commission issued on 20 December 2016.
- 1.4 These reply submissions are filed in response to the variations sought by the Transport Workers' Union of Australia (the **TWU**).
- 1.5 The TWU filed Draft Determinations on 21 December 2016 outlining the variations it was seeking in relation to the Transport Awards. The TWU then filed revised Draft Determinations on 27 January 2017, withdrawing a number of the claims they had previously intended to pursue.
- 1.6 The TWU filed its written submissions on or around 19 January 2017. The TWU seeks the following variations across the *Road Transport and Distribution Award 2010* (the **RTD Award**) and the *Road Transport (Long Distance Operations) Award 2010* (the **LDO Award**):
- (a) an introduction of a definition of 'driver' into the RTD Award;
 - (b) an amendment to the definition of 'road transport and distribution industry' in the RTD Award;
 - (c) the insertion of a new sub-clause providing for hours worked under another award to count towards the ordinary hours of work under the RTD Award;
 - (d) an amendment to clause 13.5(a)(iii) of the LDO Award to require the provision of fatigue management plans to drivers where the fatigue management plan is used to calculate a trip rate; and
 - (e) the insertion of a new pick up / drop off allowance in the LDO Award.
- 1.7 These reply submissions address the variations referred to in (a) and (e) above.
- 1.8 Our clients do not wish to make any submissions in relation to the variations referred to in (b), (c) and (d) above.

2. PROPOSED DEFINITION OF 'DRIVER'

- 2.1 Our clients do not have any philosophical objection to the insertion of a definition of 'driver' in the RTD Award. However, our clients do not consider that the absence of a definition has caused any significant issue with the operation of the Award, or parties' understanding of it, over the past six years. On that basis, we do not consider that the variation is necessary.
- 2.2 For that reason, our clients are opposed to the TWU proposal.
- 2.3 However, to the extent that the Commission is minded to include a definition of 'driver', we raise the following matters for the Commission's consideration, particularly in relation to the wording proposed by the TWU.

Incomplete definition

- 2.4 Pursuant to clause 4.1 of the RTD Award, the RTD Award covers:
- (a) employers throughout Australia in the road transport and distribution industry (as defined in clause 3.1); and their
 - (b) employees in the classifications listed in clause 15.
- 2.5 Clause 15.1 provides that the classifications are set out in Schedule B and Schedule C, but does not otherwise detail which employees are covered by the RTD Award. Schedules B and C effectively detail the employees covered by the RTD Award.
- 2.6 Schedule C sets out a list of what can best be described as occupations, each of which fall into one of the 10 transport worker grade classifications. Schedule C lists a large number of 'driver' occupations. These include 'drivers' of:
- (a) motor cycles;
 - (b) rigid vehicles;
 - (c) a rigid vehicle and heavy trailer combination;
 - (d) articulated vehicles;
 - (e) double articulated vehicles;
 - (f) fork-lifts;
 - (g) concrete mixers;
 - (h) mobile cranes;
 - (i) gantry cranes;
 - (j) oil tractors;
 - (k) straddle trucks;
 - (l) low loaders; and
 - (m) multi-axle platform trailing equipment.
- 2.7 The definition of 'driver' proposed by the TWU does not encompass all of the above occupations, notwithstanding that these occupations are described in Schedule C of the RTD Award as being 'drivers'. Rather, the TWU definition of 'driver' covers only drivers of rigid vehicles, rigid vehicles with trailer combinations, articulated vehicles, double articulated vehicles and multi-axle platform trailing equipment.
- 2.8 Under the TWU proposal, notwithstanding that drivers of motor cycles, fork-lifts, concrete mixers, mobile cranes, gantry cranes, oil tractors, straddle trucks and low loaders are expressed to be 'drivers' within Schedule C, they would not meet the TWU's proposed definition of 'driver'. It is not clear whether such drafting is deliberate or inadvertent.

Non-driving tasks

- 2.9 It is uncontroversial that a proportion of individuals who are employed as 'drivers' by employers in the road transport and distribution industry are also required, from time to time, to perform tasks that are ancillary or incidental to the primary driving task.

- 2.10 However, reference to any non-driving tasks in any definition of 'driver' must be clearly stated to be ancillary or incidental to the primary driving task. It is 'driving' that is the primary function of drivers regulated by the RTD Award, and driving must be given primacy.
- 2.11 In our submission, the wording proposed by the TWU does not make it sufficiently clear that 'driving' is the principal purpose of individuals classified as 'drivers' under the RTD Award. Under the proposed wording, employees who spend the majority of their working time performing non-driving tasks such as clerical work and then occasionally drive a vehicle could arguably fall within the definition of 'driver'.
- 2.12 The wording proposed by the TWU could be more clearly expressed by:
- (a) stating that a 'Driver' must be *principally* engaged to drive a vehicle; or
 - (b) stating that the non-driving duties or tasks are '*ancillary or incidental to, and in connection with*, driving the vehicles...'
- 2.13 A further issue with the proposed wording is that it is ambiguous as to whether the list of non-driving tasks specified in the definition is exhaustive or non-exhaustive.
- 2.14 Any definition which deals with non-driving tasks should use language like "including but not limited to..." to ensure that the definition is not construed as being exhaustive of the types of tasks performed by drivers.

3. PROPOSED PICK UP / DROP OFF ALLOWANCE

- 3.1 ABI and the NSWBC are opposed to any pick up / drop off allowance in the LDO Award.

Jurisdictional issue

- 3.2 The TWU's proposal to insert a pick up and drop off allowance into the LDO Award raises jurisdictional issues concerning which Award applies to the particular work in question.
- 3.3 The LDO Award is expressed to cover employers throughout Australia in the private transport industry engaged in 'long distance operations' and their employees in the classifications listed in Schedule A. Clause 3.1 of the LDO Award defines a 'long distance operation' as:
- any interstate operation, or any return journey where the distance travelled exceeds 500 kilometres and the operation involves a vehicle moving livestock or materials whether in a raw or manufactured state from a principal point of commencement to a principal point of destination. An area within a radius of 32 kilometres from the GPO of a capital city will be deemed to be the capital city.
- 3.4 Clause 4.2 then provides that the LDO Award does not cover an employee while they are:
- temporarily required by their employer to perform driving duties which are not on a long distance operation, provided the employee is covered by the Road Transport and Distribution Award 2010 while performing such duties.
- 3.5 The combined effect of clauses 4.1 and 4.2 of the LDO Award is that where employees are performing work that does not form part of a 'long distance operation', the LDO Award does not apply to the employee in respect of that work and the RTD Award applies.

3.6 The TWU acknowledges this position in its submissions, whereby they state at [19]:

For example, the Road Transport (Long Distance Operations) Award 2010 (RT (LDO) Award) contemplates circumstances whereby an employee who is engaged in long distance operations may temporarily be required to perform duties, which do not form part of a long distance operation. In those circumstances the employee is to be covered by the RT&D Award (subclause 4.2 of the RT (LDO)).

3.7 The TWU also variously states that:

- (a) the purpose of the pick up and drop off allowance is to make clear that employees should be appropriately remunerated for work that does not form part of a long distance operation¹;
- (b) the purpose of the proposal is “to ensure that the Award makes appropriate remuneration for employees who perform duties that do not form part of a long distance operation, or are required to pick up or drop off at locations between the principal point of commencement and principal point of destination”²; and
- (c) the variation will ensure that employees are appropriately remunerated for time not engaged in a long distance operation...” [emphasis added]

3.8 In light of the above, our clients do not consider that the proposed variation will have the effect intended by the TWU. This is because the LDO Award does not apply where the employee is performing work that does not form part of a long distance operation. Accordingly, the inclusion of a pick up and drop off allowance into the LDO Award will have no effect.

Definition of long distance operation

3.9 If the evidence demonstrates that employees engaged in long distance operations are performing multiple pick ups or drop offs during the course of a long distance operation, it may be appropriate to consider whether the definition of ‘long distance operation’ should be amended in order to ensure it is reflective of the type of work being performed by drivers.

AUSTRALIAN BUSINESS LAWYERS & ADVISORS

On behalf of Australian Business Industrial and the New South Wales Business Chamber Ltd

2 March 2017

¹ See [14].

² At [16].