

30 April, 2021

Senator Glenn Sterle  
Chair  
Rural and Regional Affairs and Transport References Committee

By email: [rrat.sen@aph.gov.au](mailto:rrat.sen@aph.gov.au)

Dear Senator Sterle

**Importance of a viable, safe, sustainable and efficient road transport industry**

I wish to submit further supporting evidence as part of Submission 30, being the Fair Work Commission Decision to FWC Application AM2019/23, whereby truck drivers applied to have the Long Distance Operations Award 2010 varied to reflect the true value of hours worked and a fair and equitable delivery of Travelling Allowance, as provided for in the Modern Award.

This Application [AM2019/23] has been fully backed up, by the testimony of Dr Michael Belzer at this Inquiry on the 28<sup>th</sup> April, 2021, yet the most of the transport industry associations opposed this application.

It defies belief that in 2021, truck drivers can be on-duty for 17hrs per day and only be paid for 11.6hrs, when a driver is remunerated by way of the Km Rate.

Trevor Warner

Long Distance Truck Driver

Vice President of the National Road Freights Association

[2020] FWCFB 6130 [Note: a [correction](#) has been issued to this document]

**FAIR WORK COMMISSION**

# **DECISION**

*Fair Work Act 2009*

s 158 - Application to vary or revoke a modern award

**Trevor Warner; Brenda McKay**

(AM2019/23; AM2020/2)

Road transport industry

DEPUTY PRESIDENT SAMS

DEPUTY PRESIDENT DEAN

COMMISSIONER CAMBRIDGE

SDNEY, 20 NOVEMBER 2020

*Applications to vary a modern award – Road Transport (Long Distance Operations) Award – applications from two individual drivers – applications seek variation of the definitions of ‘loading or unloading’ in Cl 3 and Cl 14.2(c)(i) concerning travelling allowances – applications opposed by major industry parties – lack of evidence to demonstrate variations sought are unnecessary to achieve the modern awards objective – applications dismissed.*

## **BACKGROUND**

[1] Trevor Warner and Brenda Jane McKay the (‘applicants’) have made applications to the Fair Work Commission (the ‘Commission’), pursuant to s 158 of the *Fair Work Act 2009* (the ‘Act’) to vary the *Road Transport (Long Distance Operations) Award 2010* (the ‘LDO Award’). The applicants both seek to vary the definition of ‘loading or unloading’ in Cl 3 and to vary Cl 14.2(c)(i), concerning travelling allowances. The applications have been referred to this Full Bench by the President, Justice Ross, for determination. The applications were published on the Commission’s website and directions were issued by the Presiding Member seeking submissions from any organisations or persons in support of, or in opposition to the applications. A number of parties, including Mr Warner, sought extensions of time to file submissions which were granted by the Presiding Member.

[2] Submissions in support of the applications were filed by:

- Mr Trevor Warner;
- Ms Brenda McKay;
- Mr Roberto Pajuelo Dodds – Heavy Vehicle Operator;

- Mr Russell Wattie – Individual; and
- Mr Glyn Castinelli – Secretary, National Road Freighters Association ('NRFA').

Submissions opposed to the applications were filed by:

- The National Road Transport Association ('NATROAD')
- Australia Road Transport Industrial Organisation ('ARTIO')
- South Australian Road Transport Association ('SARTA'); and the
- Transport Workers' Union of Australia ('TWU').

**[3]** The applicants seek to vary the definition of 'loading or unloading' in Cl 3 by omitting the words 'tarping, installing and removing gates and operation of on-board cranes' and inserting the following:

'All non-driving activities including, but not limited to;

- (i) Complying with entrance and departure procedures at load or unload location.
- (ii) Apply or release all load restraint devices, including gates and tarps.
- (iii) Operation of trailer curtains.
- (iv) Operation of forklifts, pallet jacks, winches and mobile cranes.
- (v) Be on-call or to Assist a third party to load or unload freight.
- (vi) Waiting time or Queuing time.
- (vii) Processing of freight documentation.
- (viii) Checking vehicle weights on weighbridge.'

**[4]** The applicants seek this new definition to broaden the scope of non-driving activities performed by employees covered by the LDO Award to accurately reflect the work performed and to remunerate the work performed by employees in the modern road transport industry.

**[5]** The applicants further seek to vary Cl 14.2(c)(i) of the LDO Award, concerning Travelling Allowance, by omitting the following words from the current clause:

‘This will not be payable where an employee is provided with suitable accommodation away from the vehicle.’

We note that the LDO Award was consolidated in 2020 and incorporates all amendments up to and including 31 October 2020. However, apart from changes to the clause numbering, the definition of loading or unloading and the Travelling Allowances clause have not changed.

## SUBMISSIONS

### For the applicants

[6] The first applicant, Mr Warner has been employed as a long distance truck driver for 15 years and has accumulated in excess of 3 million kilometres, transporting fresh food and cold supply chains between Queensland, New South Wales, Victoria, Western Australia and South Australia.

[7] Similarly, the second applicant, Ms McKay has been employed as a long distance truck driver for 25 years, working both in Australia and New Zealand. In her role, Ms McKay has accumulated in excess of 5 million kilometres, transporting fresh food and cold supply chains between Queensland, New South Wales, Victoria and South Australia.

[8] Firstly, Mr Warner and Ms McKay have observed that long distance truck drivers covered under the LDO Award can be expected to perform extra duties without the appropriate remuneration for those duties. They claim this is due to a current loophole in the definition of ‘loading or unloading’ at Cl 3 – Definitions. They submit that the effect of this is that the LDO Award does not support the principle set out in s 134(e) of the Act.

[9] The applicants referred to the definition of a ‘long distance operation’, as outlined in Cl 3.1 of the LDO Award is:

**long distance operation** means 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. (Note: the reference to 500 kilometres is now 200 kilometres in the 2020 consolidated LDO Award)

The applicants submitted that modern long-distance road transportation has changed from being a principle Point A to Point B operation to a multi-point delivery system which has the effect of combining the duties covered under the LDO Award and those found in the *Road Transport and Distribution Award*

2010 (the 'Distribution Award'). Mr Warner and Ms McKay contend that they are expected to perform all duties ancillary to loading or unloading and have travelled many kilometres within the 32km radius of a capital city, without remuneration. They submit that such physical duties the driver may be engaged in, which are not covered under the LDO Award definition, may include:

- complying with entrance and departure procedures at load or unload location;
- apply or release all load restraint devices, including gates and tarps;
- operation of trailer curtains;
- be on-call or to assist a third party to load or unload freight;
- waiting time or queuing time;
- processing of freight documentation; and
- checking vehicle weights on weighbridge.

[10] Ms McKay submitted that a driver is not relieved of duty until 'loading or unloading' has been completed and may be expected to perform additional duties which can take hours, all of which are not covered by remuneration under the LDO Award. Such periods where the driver is physically engaged, but not covered under the definition of 'loading or unloading' may be spread across multiple pick up and drop off points. Ms McKay recounts that more often, deliveries are being made directly to the customer, rather than a central unloading service, as it is more cost effective to the employer for the long distance driver to deliver it directly at no cost, other than to pay the unloading service for a per pallet fee.

[11] Secondly, the applicants believe it is unreasonable for a driver, covered by the LDO Award, to be denied travel allowances provided for in that Award. Meals are expenses incurred by a driver pre or post a shift which are incurred in connection with their employment, as the employee cannot return home at the conclusion of their shift and is therefore likely to incur work related expenses each day.

[12] The applicants submit that the specific requirements of what is 'suitable accommodation' for an employer to provide to employees, is not defined. Therefore, provision of kitchen or cooking facilities, or any minimum standard of accommodation, are not required to be provided by the employer. This means the driver is disadvantaged by paying for meals, as they may not have the capability or option to prepare their own meals. The applicants believe that this is compounded by the strict driving schedule which drivers operate under. This limits their ability

to shop for groceries due to the irregular business hours in which drivers operate. This is unreasonable and impracticable.

### **For the NRFA**

[13] The NRFA is an unregistered group comprising of drivers, owner drivers, small fleet owners, large fleet owners and other businesses with interests in the transportation industry. The NRFA supports the applications in their entirety. The NRFA agree that long distance drivers are not equally remunerated for hours worked before and after a long distance trip; believing long distance drivers can accumulate hours of unpaid work waiting at distribution centres, driving between pick-ups, performing pick-ups and other duties, including weighing and cleaning. The NRFA submitted that when these same duties are performed by a local driver covered by the Distribution Award, these drivers are paid hourly rates for all hours.

### **For Mr Dodds**

[14] Mr Dodds has held a multi-combination heavy vehicle licence since 2009, with his first commercial licence issued in 2007. Mr Dodds supports the application made by Mr Warner, believing it to be in the best interest of workers in the transport industry.

[15] Mr Dodds relied on his personal experience working as a long distance driver. He gave examples of having to wait periods of 3 to 8 hours, which were not fully remunerated. From his experience, some employers only remunerate drivers as per the LDO Award. Realistically, many turnaround times for this process can take 3 to 4 hours.

[16] Mr Dodds believed that the definition of 'loading or unloading' in the LDO Award, does not reflect industry practices. In his experience, every distribution centre and warehouse have policies that truck drivers are strictly prohibited from using the sites' equipment. He claims that drivers are not involved in the physical aspect of loading or unloading, but undertake facilitative roles in this process. However, paperwork and security checks take indeterminable periods of time, based on the busyness of the distribution centre. This can take hours for which a driver is not compensated.

[17] Mr Dodds further contended that the travel allowance disadvantages drivers. An employer can negate all travel allowance if they provide some form of accommodation to their driver. The long distance driver is unable to return home and is forced, by the nature of their employment, to be 'out of pocket'. He understood that out of pocket expenses do not extend to similar situations in other industries, such as FIFO workers or commercial pilots.

### **For Mr Wattie**

[18] Mr Wattie made a submission in support of the applications. He understood that the relevant legislation requires that work time and rest time be counted in a certain way. He submitted that understanding the rules for counting time will help drivers manage work and rest times and assist other responsible parties in managing work and rest time to prevent driver fatigue. The National Heavy Vehicle Regulations defines work time to include all tasks to do with the operation of the fatigue-regulated heavy vehicle. Accordingly, as well as driving, work time can also include:

- loading or unloading the vehicle;
- inspecting, servicing or repair work;
- attending to the load or to passengers (on a bus);
- cleaning or refuelling the vehicle;
- instructing or supervising another person including learning to drive a heavy vehicle, learning a new route, making deliveries etc.; and
- recording information or completing a document (e.g. your work diary).

Mr Wattie believed there is a conflict between the National Heavy Vehicle Regulations and what is recognised as work under the LDO Award.

[19] Mr Wattie also supported the proposed amendment which would affect the travel allowance clause. He believed that the travel allowance is being exploited by employers in that it is a common practice within the transport industry for employers to deduct the travel allowance from a drivers kilometre rate, then deduct the tax due on the remainder, and then ‘give’ the deducted amount back as transport allowance. He claimed that in effect, drivers are paying their own living away from home allowance (‘LAFHA’).

### **For the ARTIO**

[20] The ARTIO is the only industrial organisation of employers registered under the Act, which specifically represents employers in the transport and logistics industry. Since its registration in 1984, the ARTIO has been involved with the LDO Award and its predecessor awards of both the Conciliation and Arbitration Commission and the Australian Industrial Relations Commission (‘AIRC’). The ARTIO observed that the NRFA, which Mr Warner is an official of, is not a registered organisation, as defined in the Act, and thus has no standing in this matter. The ARTIO opposes both applications to vary the LDO Award and seeks that they be dismissed ‘on the papers’.

[21] It was the ARTIO's submission that in substance, the applications are 'work value' claims made by two drivers and therefore should be processed and determined by a Full Bench of the Commission, under s 157 of the Act.

[22] The ARTIO has been a direct participant in all major cases around the LDO Award, including the Full Bench Decision in *Four yearly review of modern awards* [2017] FWCFB 1913 in matter AM2016/32, where the TWU sought several variations to the LDO Award. One variation sought at the time, included the insertion of a 'pick up and drop off allowance', which was rejected by the Full Bench.

[23] The ARTIO submitted that it was determined that the current remuneration structure, which has been in the federal award since at least 1993, strikes a balance between the needs of the employers and employees. The hourly driving method and kilometre driving method gives employers a degree of certainty in tendering for work and employees know what they will be paid. There is no need to calculate the exact number of kilometres driven, or time taken in the journey. In some circumstances, employees benefit from the way the scheduling operates and in other circumstances the employer benefits.

[24] The ARTIO submitted that the outcome of the Full Bench in 2017, rejecting the application for variation due to insufficient evidence, applies to the current applications. The submissions in support of the applications are based on anecdotal observations made by the applicants and their supporters.

[25] The ARTIO further relied on the findings in *Laycock v J & C Independent Carriers Pty Ltd* [2018] FCCA 6 ('*Laycock*'), where the issue for determination was: when is a driver entitled to be paid the loading/unloading allowances under the LDO Award? It was found that an employee had to be 'physically' engaged in the loading/unloading to be entitled to be paid the allowance. The word 'physical' implies physicality to the task that contemplates some reward for work performed above and beyond driving duties. To be entitled to be paid the loading/unloading allowance, an employee must be 'physically engaged' to a sufficient degree. ARTIO submitted that the tasks identified in the applications do not meet the tests of physicality and are rudimentary or incidental to the tasks performed by the driver.

[26] The ARTIO also submitted that in *Transport Workers' Union of Australia v Linfox Australia Pty Ltd* [2020] FWC 489, Deputy President *Beaumont* observed that the phrase 'extra responsibilities associated with arranging loads' in the LDO Award was sufficiently broad enough to encompass waiting for paperwork and for trailers to be loaded and unloaded, in addition to coupling and uncoupling trailers in the yard, and oversized loads. On this basis, the Deputy President found that the cents per kilometre rate, referred to in the LDO Award, compensates the drivers for these responsibilities.

[27] In respect to the travelling allowance, the ARTIO submitted that the application, irrespective of whether the employer provides suitable accommodation, had been the subject of much industrial litigation. The current arrangement was the subject of an AIRC Full Bench Order in *Transport Workers' Union of Australia* PN951827, which endorsed a consent agreement reached between the major industrial parties. This included an increase in the LAFHA of 33% (now the travelling allowance), an increase in the leave loading from 17.5% to 30%, and a provision that any issue concerning the 'suitability of the accommodation' provided, could be processed through the dispute settlement clause. It was put that the terms agreed upon in relation to this issue, which had been the subject of dispute for several years, should not be overturned or disturbed without sufficient supporting evidence. None had been provided.

#### **For SARTA**

[28] SARTA represents some 350 employer truck operator businesses in all sectors of the road transport industry. SARTA opposed the applications sought to vary the LDO Award and also asked that the Commission to dismiss the applications 'on the papers'. SARTA supported the submissions of ARTIO and reinforced ARTIO's arguments through their own submissions, which we do not repeat.

#### **For NATROAD**

[29] NATROAD opposed the applications, and submitted that it was unclear whether the applicants have sufficient standing under the Act to make their applications.

[30] NATROAD argued that the applications were in substance, ones made pursuant to section 157 of the Act, which allege ambiguity. Despite no reference to invoking section 160 of the Act, NATROAD believed that the proposed variation has the opposite effect for which the applicants contend and creates more uncertainty. NATROAD submitted that the proposed variation to the definition of 'loading or unloading', which is defined by its ordinary meaning and confirmed in *Laycock*, would distort the meaning to encompass 'all non-driving activities'. It was said that the ordinary meaning of the term 'loading or unloading' cannot logically encompass everything other than driving. There is a clash between that phrase and potential payment for rest breaks, which are specifically excluded from the definition of 'driving time'. The proposed variation would make something which is easy to understand, uncertain and confusing.

[31] NATROAD submitted that any existing ambiguity in the phrase 'loading or unloading' had not been sufficiently explored. The applications appear to assert exploitation and unfairness in the industry and are based on personal experience and hearsay, which serves little probative value.

[32] NATROAD rejected the applications to vary Cl14.2(c)(i). The amount of \$40.44 is currently payable as an allowance and is most likely paid where a driver sleeps in the cab of the truck. That amount is not payable where an employee is provided with suitable accommodation away from the vehicle. The applicants appear to be under a misapprehension that the alleged assertion concerning an absence of legal standards for suitable accommodation, is correct. It is not. Minimum standards are in place and are applied.

[33] NATROAD believed that Mr Wattie had confused payment of the travelling allowance with LAFHA. The latter is an allowance paid directly to an employee to compensate the employee's additional non-deductible expenses and in respect to other disadvantages caused by working away from home to do their job. Travel allowances are considered to be assessable income and PAYG withholding tax may apply. Any expenses incurred on meals and incidental expenses may be deductible against the allowance, if certain criteria are met. The allowance, however, is subject to Fringe Benefits Tax ('FBT') and is non-assessable, non-exempt income. Mr Wattie was confusing the fact that an employer may not include some allowances in an employee's income statement or payment summary, such as the travel allowances paid under the Award, with the LAFHA.

[34] NATROAD noted that an incorrect assertion was made that if the driver operates a Fatigue Regulated Vehicle, as defined by the fatigue laws, the driver is restricted from visiting supermarkets to buy food supplies. The National Heavy Vehicle Work and Rest Hours Exemption (Personal Use) Notice 2018 (No. 1) provides up to an hour of additional work time to drivers under Standard Hours, for permitted personal activities.

[35] NATROAD refuted the submissions of the NRFA and the applicants that there exists an inequality between long distance drivers and those drivers paid under the Distribution Award. The two Awards are structured so that overlap exists between them and compensation is adjusted accordingly. The alleged inequality claim made in the NRFA submission, is based on the hourly rate calculations made by the applicants in highly particular circumstances that relate solely to the applicants. There is no broad comparison of alleged inequities that provides a sufficient evidentiary base to support a proposition that there is unequal remuneration for the same work, when workers covered by the two Awards are considered.

[36] NATROAD submitted that no sound or balanced reasoning had been presented as to why the proposed variations to the LDO Award would assist with it being a 'fair and relevant minimum safety net of terms and conditions', as required by s 134 of the Act. Fairness is to be assessed from the perspective of the employees and the employers covered by the relevant modern award.

**For the TWU**

[37] The TWU submitted that the applications are afflicted by two related flaws. First, the variations are too confined in their scope and should be expanded to address all terms and conditions of the LDO Award in order to meet the modern awards objective, set out at s 134 of the Act. Second, the variations (together with other variations that ought be made) must be coupled with supply chain accountability provisions to ensure that employers of transport supply chains, who obtain the economic benefit of the transport task, cannot arbitrarily increase costs in the form of downward rate pressure, or intensified time pressures on transport operators.

[38] The TWU requested that the Commission hold these matters over until more fulsome applications are filed. If the Commission moves forward with these applications, the TWU will seek leave to file appropriate amendments to ensure the Union's identified limitations in the current applications are considered.

### **In reply**

[39] Mr Warner filed further submissions in reply to all submissions filed. He maintained that the ARTIO's position, that the definition of 'loading or unloading' remains confined to the specific task of physically placing or removing goods, is not consistent with modern industry practice.

[40] Regarding the issue of standing, Mr Warner said that he is an employee under the ordinary meaning, found in s 12 of the Act. The applicant is employed for driving duties and his wages are paid by the kilometre rate under the LDO Award. A redacted payslip was provided to support the applicants' standing in this respect.

[41] Mr Warner refuted that a clear definition of 'loading or unloading' exists, due to recent modernising of the awards in the industry. The definition has gone largely unchanged since pre-2000, a time when drivers were more actively engaged in using forklifts and mobile cranes to load or unload their vehicles.

[42] Mr Warner believed that NATROAD had seized upon a belief that long distance drivers receive the Industry Disability Allowance which has the ancillary duties included in this 30% allowance. The argument made by NATROAD does not take into account the variation in types of shift work performed by all long distance drivers. The cents per kilometre rate may, in some circumstances, adequately provide for a similar wage to a weekday day shift worker on hourly rates with overtime. However, it in no way compensates the long distance driver for shift and weekend penalty rates, plus the Industry Disability Allowance and all duties ancillary to the current definition of 'loading or unloading'.

[43] Mr Warner rejected NATROAD's position that any variation to this definition would make the Award unclear. Rather, he believed that employers will continue to use this ambiguity to engage drivers to perform duties, without proper

remuneration. He rejected the submission of NATROAD that the ‘*evidence is jumbled*’. The applicant is not a solicitor and believed the Commission is open to all persons; not just those who can afford legal representation.

[44] Mr Warner argued that a driver covered by the Distribution Award receives both accommodation and meals. The applicants acknowledged it is difficult for employers to provide meals for long distance drivers, therefore cash in lieu, would be the obvious alternative. The applicants have not asked for extraordinary treatment and it is clear no other compensation is provided for in the LDO Award.

[45] In response to the submissions made by the TWU, the applicant claimed that the Union did not address any arguments put forward in the applicants’ submissions and its suggestion to defer consideration of the applications, should be dismissed by the Commission.

## CONSIDERATION

[46] The statutory framework applicable to this application is as follows. Section 157(1)(a) of the Act empowers the Commission to make a determination varying a modern award (other than to vary minimum wages or a default fund term of the award) if the Commission is satisfied that the determination ‘is necessary to achieve the modern awards objective’. Under s 157(3), the Commission may exercise its power under s 157(1)(a) on its own initiative or on application under s 158. Section 158(1) provides that an application to vary, omit or include terms (other than outworker terms or coverage terms) in a modern award may be made by an employer, employee or organisation that is covered by the modern award or an organisation that is entitled to represent the industrial interests of one or more employers or employees covered by the modern award. An organisation for the purpose of s 158(1) is one registered under the *Fair Work (Registered Organisations) Act 2009* (registered organisation).

[47] The modern awards objective is set out in s 134(1), and provides:

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

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

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

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

[48] We would also associate ourselves with the recent helpful summary of the Full Bench as to the relevant legislative provisions and authorities in respect to applications of this kind; see: *4 yearly review of modern awards – Award stage – General Retail Industry Award 2020* [\[2020\] FWCFB 5371](#) at [7]-[22].

### **Standing of the applicants**

[49] We deal firstly with the challenge to the standing of the applicants. The ARTIO and NATROAD submitted that the applicants do not have standing to make these applications. We reject this submission. Applications of this kind are not restricted to industrial organisations of employers or employees. The Act at s 158 provides:

<b>Who may make an application?</b>		
<b>Item</b>	<b>Column 1</b>	<b>Column 2</b>
	<b>This kind of application ...</b>	<b>may be made by ...</b>

1	an application to vary, omit or include terms (other than outworker terms or coverage terms) in a modern award	(a) an employer, employee or organisation that is covered by the modern award; or  (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.
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[50] The directions issued in this matter (8 January 2020) – indeed, all applications under the award review process – invite submissions from any party **or person** who may have an interest in the particular matter. It is difficult to see how a driver/s employed under the terms of the LDO Award under review, are not persons who have an interest in this matter. We accept that the applicants have standing and their applications are competently before the Commission for determination. We turn then to the two variations sought to the LDO Award; see: [3] and [5] above.

### **Loading or unloading claim**

[51] The definition of loading or unloading in Cl 3 is to be read in conjunction with Cl 13.6 which reads:

#### **13.6 Loading or unloading**

(a) Where an employee is engaged on loading or unloading duties, that employee must be paid for such duties at an hourly rate calculated by dividing the weekly award rate prescribed by clause 13.1 by 40 and multiplying by 1.3 (industry disability allowance), provided that a minimum payment of one hour loading and one hour unloading per trip must be made where loading and/or unloading duties are required.

(b) As an alternative to clause 13.6(a), where there is a written agreement between the employer and the employee a fixed allowance based on the hourly rate in clause 13.6(a) may be paid to cover loading or unloading duties, provided that such written agreement is attached to the time and wages record.

(c) A casual employee attending to the loading or unloading of the vehicles must be paid a loading of 25% in addition to the rates prescribed by this clause.

We observe that Cl 13.6 sits in Cl 13 – Minimum Weekly Rates of Pay and Classifications.

[52] We consider it sufficient to reject the ‘loading or unloading’ claim in this case based on the conclusions and findings of the Full Bench in *Four yearly review of modern awards* [\[2017\] FWCFB 1913](#). At [92]-[103] in rejecting a then claim by

the TWU to insert a 'pick up and drop off allowance' in the LDO Award, the Full Bench said:

[92] It is clear from the evidence presented by the TWU that at least some long distance drivers undertake multiple pickups and/or drop-offs at either the principal point of commencement or destination of a long distance operation, as well as pickups and/or drop-offs between those two points. The TWU argues that drivers are not being properly compensated for these multiple pickups and drop-offs. In its view, these pickups and drop-offs cannot be considered as part of a long distance operation, and should receive additional remuneration.

[93] It should be noted that cl 13.6 already provides an allowance for loading or unloading, based on the time taken to perform such duties, with a minimum payment of one hour loading and one hour unloading per trip. This is not limited to requiring payment in circumstances where such work is undertaken at a principal point of commencement or a principal point of destination.

[94] It should also be noted that where an employee who has undertaken a long distance operation subsequently performs additional driving work unrelated to that operation, such as delivering different freight, such work is not part of a long distance operation and is therefore not covered by the Long Distance Award.

[95] 'Long distance operation' is defined in the Long Distance Award 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.'

[96] An 'interstate operation' is defined as:

'...an operation involving a vehicle moving livestock or materials whether in a raw or manufactured state from a principal point of commencement in one State or Territory to a principal point of destination in another State or territory. Provided that to be an interstate operation the distance involved must exceed 200 kilometres, for any single journey. An area within a radius of 32 kilometres from the GPO of a capital city will be deemed to be the capital city.'

[97] There is nothing in the definition of 'long distance operation' to imply that an operation will only involve one pickup and one drop-off. For a journey to

constitute a long distance operation, it must (at least) involve moving livestock or materials from a principal point of commencement to a principal point of destination. That does not mean the journey might not involve picking up or dropping off at more than one location. Indeed, that possibility is implicit in the use of the word '*principal*', which implies that there might be 'secondary' points of commencement or destination.

[98] The Long Distance Award has an unusual remuneration structure, reflecting the particular circumstances and needs of the industry. Long distance drivers are not necessarily remunerated for the driving component of their work on the basis of the actual time taken. Instead, they are paid either on the basis of the kilometres travelled (the kilometre driving method) or by the hourly driving method.

[99] In relation to the kilometre driving method, the Long Distance Award contains a schedule of agreed distances for most journeys between capital cities (excluding Canberra). Where an employee performs a journey specified in the schedule, the number of kilometres is deemed to be the number indicated in the schedule for that journey. The award then sets out the minimum cents per kilometre that must be paid for each grade of vehicle.

[100] Two things should be noted about the kilometre driving method. First, the number of kilometres in the schedule is unlikely, in most cases, to represent the exact number of kilometres actually driven. In some cases, the number of kilometres driven would be fewer (though in other cases it could be more). Secondly, if the journey involves a significant diversion to make a pickup or drop-off along the way, such that it changes the nature of the journey, then it would be more appropriate to use the actual kilometres driven rather than the agreed distances in the schedule.

[101] Under the hourly driving method, a driver may be paid for the driving component of a particular journey by means of an hourly driving rate for the relevant grade. As with the kilometre driving method, there is a schedule of agreed driving hours for most journeys between capital cities. The minimum hourly driving rate is calculated by dividing the minimum weekly rate prescribed by cl 13.1 by 40, and multiplying by 1.3 (industry disability allowance) and 1.2 (overtime allowance). Where the journey is not listed in the schedule, payment is to be for the actual hours worked. Alternatively, the number of hours contained in an accredited FMP can be used.

[102] The proposed variations would provide that where an employee engaged in a long distance operation is required to pick up or drop off at two or more locations at the principal point of commencement or principal point of destination, the employee must be paid an hourly rate for all additional hours worked (calculated by dividing the weekly award rate prescribed by 40 and

multiplying by the industry disability allowance). Where an employee is required to pick up or drop off at a location en route between the principal point of commencement and principal point of destination, the employee must similarly be paid an hourly rate for all additional hours worked.

**[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.’ (our emphasis)**

[53] There is no evidence that the industry circumstances and practices, as reflected in the LDO Award which existed less than three years ago, have changed to such an extent, or at all, such as to warrant a reconsideration by this Full Bench of an assessment of the remuneration structure in this Award. In our view, this is in essence what is being advanced by the applicants in the variations which they seek. The evidence of two individuals cannot satisfy the Commission that the requisite degree of actual cogent and representative evidence has established that such a fundamental change in the nature of how the industry operates and as understood by the major parties, should be made at this time.

[54] Further, individual examples of alleged unfairness do not reflect the balance between the needs of employers in providing a degree of certainty in tendering for work and for employees to know what they will be paid, as discussed by the Full Bench above. Neither applicant contended that the current arrangement does not have ‘swings and roundabouts’. Their submissions seem to be premised on a belief that the driver will be paid in such a way as it benefits the driver in all circumstances, and on all occasions, the driver undertakes long distance work.

[55] We would agree with the proposition that the words ‘loading or unloading’ in Cl 3 – Definitions – means ‘physically engaged’ in loading or unloading. It does not comprehend activities such as:

- complying with entrance and departure procedures at load or unload location;
- applying or releasing all load restraint devices, including gates and tarps;

- operation of trailer curtains;
- waiting time or queuing time;
- processing of freight documentation; and/or
- checking vehicle weights on weighbridges.

We do not apprehend that the applicants contend that these tasks are ones which involve the physical engagement of the driver.

[56] For completeness, we do not consider that the definition of ‘loading or unloading’ is ambiguous or unclear. No evidence was provided as to any examples of individual drivers being unclear – let alone there being widespread confusion in the industry – as to how the provisions have been applied and operated in the industry for some time. We would note that if further clarity was needed, it can now be found in the preamble to the Industry Disability Allowance clause in the 2020 Consolidated LDO Award which reads:

**(a) Industry disability allowance**

The minimum hourly driving rates, rates per kilometre and **loading or unloading rates are inclusive** of an industry disability allowance of 1.3 times the ordinary rate ... (*our emphasis*)

Further, there was no evidence, other than personal assertions of unfairness, which demonstrated that the change sought by the applicants should be made. We reject these assertions and reject the variations sought to Cl 3 of the LDO Award.

**Travelling Allowance Claim**

[57] In determining this claim, it is necessary to appreciate and understand the historic arrangements which have been accepted by the major parties to the Award, as to the appropriate remuneration and compensatory provisions for the particular work performed and the conditions under which it is performed by long distance truck drivers.

[58] The Travelling Allowance clause provides at Cl 14.2(c):

**Travelling Allowance**

- (i) An employee engaged in ordinary travelling on duty or on work on which the employee is unable to return home and takes their major rest break under the applicable driving hours regulations away from home must be paid \$39.76

per occasion. This will not be payable where an employee is provided with suitable accommodation away from the vehicle.

(ii) In exceptional circumstances, where amounts greater than those specified are claimed, an employee will need to demonstrate why the claim is necessary and gain approval from a representative of the employer. Such approval will not be unreasonably withheld.

(iii) If an employee is engaged in more than one long distance operation or part thereof in a fortnight, the allowance due for each long distance operation or part thereof must be separately calculated in accordance with this clause.

**[59]** Rates of pay for the driving component of a journey may be calculated by reference to two different methods set out at Cl 13.4 and Cl 13.5. Essentially, Cl 13.4 provides for rates of pay calculated by reference to distances travelled and with cents per kilometre with a schedule of major routes from and to, with agreed distances. Cl 13.5 provides for rates of pay per hour for the number of agreed hours driving to and from the same list of major routes.

**[60]** Relevantly, Cl 14.1(a) sets out an Industry Disability Allowance as follows:

#### **Industry disability allowance**

The rates per kilometre are inclusive of an industry disability allowance of 1.3 times the ordinary rate, which compensates for the following:

- (i) shiftwork and related conditions;
- (ii) necessity to work during weekends;
- (iii) lack of normal depot facilities, e.g. lunch room, wash rooms, toilets, tea making facilities;
- (iv) necessity to eat at roadside fast food outlets;
- (v) absence of normal resting facilities and normal bed at night;
- (vi) additional hazards arising from driving long distances at night and alone;
- (vii) handling dirty material;
- (viii) handling money;
- (ix) extra responsibility associated with arranging loads, purchasing spare parts, tyres, etc;

(x) irregular starting and finishing times; and

(xi) work in rain.

[61] It may be accepted that the 2010 Modern Award contemplated and replaced the LAFHA and meal allowances inserted into the *Transport Workers (Long Distance Drivers) Award* in 2004 and referred to in the ARTIO submissions at [20]-[27] above. The variations made by Senior Deputy President *Harrison* on 10 September 2004, varied this award in *Transport Workers' Union of Australia* [[PR951827](#)] as follows:

‘A. The above award is varied as follows:

1. By deleting clause 20.1.1 and inserting the following:

20.1.1 An employee engaged in ordinary travelling on duty or on work on which the employee is unable to return home to sleep shall be paid such personal expenses as are reasonably incurred, which shall not be less than:

20.1.1(a) the sum of \$28.00 for each day/night in a 24 hour period that an employee is required to sleep away from home, provided that where the employer provides suitable accommodation, the employee shall not be entitled to this allowance, and

20.1.1(b) the sum of \$20.00 for each day/night in a 24 hour period that an employee is required to sleep away from home for meal expenses, provided that where the employer provides suitable meals, the employee shall not be entitled to an allowance for that meal.

2. That on 28 January 2005 the sum of \$28.00 in 20.1.1(a) will be replaced by the sum of \$35.00.

B. Item A.1 of this order shall come into force from the first pay period to commence on or after 10 September 2004 and shall remain in force for a period of six months. Item A.2 of this order shall come into force on 28 January 2005 and shall remain in force for a period of six months.’

[62] The applicants submitted that the travelling allowance should be paid, irrespective of whether or not the employer provides suitable accommodation away from the vehicle. Further, the applicants, supported by Mr Dodds and Mr Wattie, believed that drivers are denied travel allowances provided for in the LDO Award and that the travel allowance is being exploited by employers. Mr Dodds also considered that because the driver is unable to return home, they are forced to be ‘out of pocket’, whereas other employees, such as FIFO workers and commercial pilots, are not.

[63] These submissions cannot be accepted for the following reasons.

(a) There was no direct and cogent evidence of the exploitation by employers as alleged; the highest this allegation reached were general, unsupported submissions, without a skerrick of detail.

(b) In our view, the applicants misapprehend the interaction of travelling allowances, the LAFHA and the provision of meals.

(c) To compare the corresponding provisions for FIFO workers and commercial pilots, without providing any details, is misconceived. Moreover, it is plainly not a comparison of work of equal or comparable value.

(d) The issues of the travelling allowance and suitable accommodation have been the subject of considerable dispute and litigation which was settled by the Full Bench of the AIRC in 2004 when it endorsed a consent agreement between ARTIO, SARTA and the TWU as follows:

- an increase in the LAFHA of 33% from \$21 to \$28 (the LAFHA is now a ‘travelling allowance’) and also provided that a driver could claim additional funds in exceptional circumstances. This provision still exists in Cl 14.2 (c) (ii) of the LDO Award;
- an increase in the leave loading payment from 17.5% to 30% so as to ensure that when an employee was on leave, the loading equated to the equivalent of the industry disability allowance;
- any issue or concern around ‘suitable accommodation away from the vehicle’ could be processed through the Settlement of Disputes clause; and
- a TWU claim for an additional week’s leave would be withdrawn.

[64] We are not persuaded that any basis has been established to review these arrangements, let alone overturn the AIRC’s endorsement of them, without a proper and sound evidentiary foundation. No such foundation has been established. We reject the variation sought.

## CONCLUSION

[65] We do not consider the variations sought and the submissions in support of the applications, have demonstrated that they are necessary to meet the modern awards objective. Nor do we accept they are otherwise necessary to correct any ambiguity or uncertainty in the LDO Award. We order that applications AM2019/23 and AM2020/2 be dismissed.



DEPUTY PRESIDENT

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