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The President
Fair Work Commission
11 Exhibition Street
MELBOURNE VIC 3000

1 March 2017

Our ref JBM:142182

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Dear Associate

**AM2016/32 – Road Transport and Distribution Award 2010**

We refer to proceedings numbered AM2016/32, and in particular the application by the Transport Workers Union to vary the coverage provision in the *Road Transport and Distribution Award 2010* to capture the industry of our clients, Truck Moves Australia Pty Ltd, Quick Shift Vehicle Relocations Pty Ltd and Vehicle Express Pty Ltd.

In accordance with the directions of the Commission, we enclose the following material to be relied on at the hearing commencing 6 March 2017:

1. A statement from Mr Matthew Whitnall dated 1 March 2017.
2. A statement from Mr John Bradac dated 1 March 2017.
3. A statement from Mr Don Clayton dated 1 March 2017.
4. An outline of submissions dated 1 March 2017.

If you have any questions in relation to the above, please do not hesitate to contact the writer.

Yours faithfully
**Bartier Perry**

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**FAIR WORK COMMISSION**

**Commission Matter No.:**
AM2016/32

**s.156 of the *Fair Work Act* 2009 - 4 yearly review of modern awards**

***Road Transport and Distribution Award 2010***

# OUTLINE OF SUBMISSIONS

1. The Transport Workers Union (**TWU**) has made an application to change the coverage of the *Road Transport and Distribution Award 2010* (**RTD Award**) by amending the definition of the phrase "*road transport and distribution industry*" in clause 3.1 of the RTD Award to include "*the distribution and or relocation by road of new or used vehicles ... where the vehicle itself is required to be driven from one location to another for the purpose of delivery and or relocation of the vehicle*". That proposed amendment is the only application made by the TWU as to coverage, and the only application to be answered in respect of coverage.

2. **Truck Moves** Australia Pty Ltd, Quick Shift Vehicle Relocations Pty Ltd and Vehicle Express Pty Ltd (**Truck Moves and others**), seek that the application be dismissed, including for the reasons that:

   2.1. the application is late, and as a matter of fairness substantive issues of coverage should not be determined at this late time;

   2.2. the application is not supported by persuasive evidence or submissions to warrant a change of coverage;

   2.3. the RTD Award is not suited to businesses like the business of Truck Moves and others; and

   2.4. the RTD Award is not the appropriate modern award to cover businesses like the business of Truck Moves and others.

3. These submissions are structured as follows:

   3.1. An introductory background is given to the issue as to coverage under the RTD Award;

   3.2. The submission is made that the application to change coverage is too late;

   3.3. We examine the nature of the industry of businesses like Truck Moves and others, conveniently called the **Driveaway Industry** (as is described in the comprehensive statement from **Mr** Matthew **Whitnall**

dated 1 March 2017 and supported by Mr Don Clayton's statement also dated 1 March 2017);

3.4. We outline the relevant statutory provisions and principles applicable to the review of modern awards;

3.5. It is submitted that the TWU case for a change in coverage of the RTD Award is not supported by probative evidence and persuasive submissions; and

3.6. We conclude by demonstrating that the RTD Award is not appropriate for, or suited to, the Driveaway Industry.

4. The TWU says the variation is "*necessary*" as, in particular, there is an "*inexplicable gap*" in the coverage of the RTD Award (see **TWU Submissions** dated 18 January 2017 at [24]). For all the reasons set out below, there is no gap, inexplicable or otherwise. The RTD Award as designed, and drafted, meets the modern award objectives.

5. The RTD Award covers a particular and specific industry of which businesses like Truck Moves and others are not part. The RTD Award is not designed to cover, nor intended to cover, businesses like Truck Moves.

6. It is erroneous and misconceived to place Truck Moves and other similar businesses within the freight and transport industry (and consequently, the coverage of the RTD Award) simply because its employees are drivers. There are fundamental, significant and substantial differences between the freight and transport industry and the Driveaway Industry.

7. Placing the Driveaway Industry within the coverage of the RTD Award would not be consistent with the RTD Award, create inequities, not promote productivity and economic growth and be burdensome and uneconomic for businesses like Truck Moves and others.

## Introduction

8. The issue of coverage for businesses like Truck Moves is not new. As Mr Whitnall deposes, authorities and regulators have previously confirmed that the industry is "*award-free*".[1] This has been the prevailing state of affairs, on which businesses like Truck Moves and others have depended and relied on, for over 25 years.[2] To the extent the Fair Work Ombudsman (**FWO**) provided "*differing advice*" in 2014 suggesting the RTD Award did apply to Truck Moves and similar businesses (see TWU Submissions at [28]), the FWO was (as is discussed below) simply wrong in its advice.

9. TWU's member, Mr John Zader, and employee of Truck Moves, agitated the issue of coverage in 2013 and 2014 resulting in Truck Moves commencing

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1 Whitnall statement at [6].

2 Whitnall statement at [88] and [119]; Clayton statement at [14].

proceedings in the Federal Court of Australia for a declaration that its business was not covered by the RTD Award.

10. In those proceedings, the Federal Court broadly described the business of Truck Moves as follows:

> *Truck Moves' business usually, but not exclusively, involved it using its employee drivers, including Mr Simmonds and Mr Zader, to move unladen vehicles for its clients between locations. The vehicles were generally unregistered, but Truck Moves drivers moved them after they had fitted trade (registration) plates. Trade plates have a condition of use that vehicles driven when displaying them not be laden.*

See *Truck Moves Australia Pty Ltd v Simmonds* [2015] FCA 1071 (**Federal Court Decision**) at [2].

11. The Federal Court found that about 96% of the time the vehicles driven were unregistered: at [31] of the Federal Court Decision. As the Full Federal Court of Australia summarised, the vehicles "*did not carry any freight or goods. They were driven un-laden both locally and interstate*": see *Zader v Truck Moves Australia Pty Ltd* [2016] FCAFC 83 (**Full Court Decision**) at [4]. The vehicles could be of any size or type.

12. Some evidence was given in the Federal Court proceedings of the work performed by employee drivers of Truck Moves. For example, the Federal Court found that the drivers could spend about 50% of each day driving and the other 50% being shuttled around, on rest breaks or doing other minor work: see Federal Court Decision at [25] to [26]. The statement of Mr Whitnall provides much further detail on the duties of employee drivers. By way of introduction, it is fair to say that employee drivers in the Driveaway Industry, are engaged in far less onerous and physically demanding work compared to those employees in the freight and transport industry covered by the RTD Award.

13. Ultimately, the Federal Court found Truck Moves was not covered by the RTD Award and made the following declarations as of right:

> *It be declared that* [Truck Moves]*'s employment of each* [employee] *was not covered by the Road Transport and Distribution Award 2010 or the Road Transport (Long Distance Operations) Award 2010.*
>
> *It be declared that during the period between 1 January 2010 and the respective dates on which* [their] *employment by* [Truck Moves] *terminated,* [Truck Moves] *was required to pay each* [employee] *in accordance with the national minimum wage order as in force from time to time made pursuant to the provisions of the Fair Work Act 2009 (Cth) or at any higher rate actually paid to him.*

14. Those declarations as of right were not overturned on appeal.

**The application is too late**[3]

15. In this section of these submissions, we:

    15.1. begin by setting out the history of businesses like Truck Moves not being covered by industrial awards;

    15.2. examine the process of this 4 yearly review of the RTD Award; and

    15.3. argue that the TWU application to now change the coverage of the RTD Award should be dismissed (or in the Full Bench's discretion, declined) as a matter of fairness as it is too late in the process.

16. Historically, businesses like Truck Moves have been award free. This history is relevantly set out at **Schedule A** to these submissions.

17. As a consequence, and due to the Australian Industrial Relations Commission (**AIRC**) in the award modernisation process during 2008 to 2010 not indicating any change in coverage from past awards[4], businesses like Truck Moves had no basis or reason to get involved in the process leading to the drafting and making of the RTD Award. That is, it had no opportunity to have a say, and be heard, as to the drafting of the RTD Award. The RTD Award did not apply or cover the business.

18. The 4 yearly award review process under s156 of the *Fair Work Act 2009* (**FW Act**) commenced in late 2013 with the 'initial stage' of review proceedings.

19. The 'common issues stage' in respect of general proposals or significant variation or change across the award system commenced in 2014, with a number of issues having been determined since that time.

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[3] We rely, in full, on our letters to the Fair Work Commission dated 27 November 2014, 11 January 2016 and 11 November 2016, copies of which are annexed and marked "**A**" to these submissions.

[4] It is important to keep in mind that the award modernisation process was a consolidation of existing Federal, State and Territory industry or occupational awards into one award. In respect of transport, the Full Bench of the AIRC said in [2009] AIRCFB 50 at [98] (our emphasis in bold):

> ***[98]*** *The RT&D Modern Award covers the road transport and distribution industry as defined in the exposure draft. The definition is broad and* ***is intended to incorporate the scope of the pre-reform Transport Workers Award 1998 (Transport Workers Award) and NAPSAs operating in each state as the general industry transport award. It also incorporates the transport activities previously covered by freight forwarding, petrol and petroleum products, crude oil and gas and quarried materials awards.*** *These are a subset only of the sectors covered by the exposure draft and the parties should give close consideration to the definition of the industry.*

The Full Bench of the AIRC then said in [2009] AIRCFB 345 at [168] : "*we have made some variations to make it clear that the award relates to the transport of goods etc by road*".

Also see *Truck Moves Australia Pty Ltd v Simmonds* [2015] FCA 1071, including at [58] and *Zader v Truck Moves Australia Pty Ltd* [2016] FCAFC 83 at [36] and [37].

20. On 20 May 2014 and 24 November 2014 the FWO wrote to Fair Work **Commission** and raised the issue of coverage of the RTD Award and whether it covered businesses like Truck Moves, but the FWO said "*it does not intend to appear at the hearings for the Group 2 Modern Awards*". The FWO was not making any application to change to coverage of the RTD Award. As such, there was no application made, or pursued, to change the coverage of the RTD Award.

21. Despite being on notice of the issue, neither the TWU, any other party nor the Commission on its own motion, made any application to change the coverage of the RTD Award at this time. It can comfortably be inferred that a deliberate decision was made by the TWU and other parties to not seek to change the coverage of the RTD Award.

22. On 28 November 2014 Truck Moves lodged its application with the Federal Court seeking a declaration that it was not covered by the RTD Award.

23. At a listing of 4 yearly award review proceedings before the Commission on 2 December 2014, no party, including the TWU or the Commission on its own initiative, sought to make any application to vary the RTD Award to cover businesses like Truck Moves.

24. At a conference on 16 January 2015 before this Commission, no party, including the TWU or this Commission on its own motion, sought to make any application to vary the coverage of the RTD Award to cover businesses like Truck Moves. As coverage was not being sought to be changed (either on application by the TWU or the Commission of its own motion), Truck Moves was not required to attend the conferences. Logically, this was because it was not covered by the RTD Award and had no place or standing to have a say on an award that did not apply to it.

25. Again, it can comfortably be inferred that a deliberate decision was made, at least by the TWU, to not pursue a change the coverage of the RTD Award.

26. A number of subsequent conferences between parties covered by the RTD Award occurred before the Commission and agreement reached on variations to the RTD Award. Businesses like Truck Moves had no opportunity to have a say, and be heard, as to any variations to the RTD Award.

27. On 2 October 2015 the Federal Court held that Truck Moves was not covered by the RTD Award: see *Truck Moves Australia Pty Ltd v Simmonds* [2015] FCA 1071.

28. Following the Federal Court Decision, the TWU wrote to the Commission on 14 October 2015 (over 22 months since this 4 yearly review process commenced) foreshadowing an intention to seek a variation of the coverage of the RTD Award but did not (a) provide any particulars of the application, or (b) take any steps to pursue the application.

29. The TWU, on behalf of Mr Zader, instead lodged an appeal of the Federal Court Decision with the **Full Federal Court** of Australia.

30. Consistent with a deliberate and intentional decision to not pursue a variation of coverage of the RTD Award, at a conference held on 28 October 2015 before the Commission, neither the TWU nor any other party, including the Commission of its own motion, pursued a change to coverage of the RTD Award. Truck Moves attendance and participation at the conference was not required as no one was pursuing a change to coverage at that time.

31. A number of subsequent conferences between parties covered by the RTD Award occurred before the Commission and agreement reached on variations to the RTD Award. Businesses like Truck Moves had no opportunity to have a say, and be heard, as to any variations to the RTD Award. No application to change coverage was being pursued.

32. On 10 June 2016, the Full Federal Court dismissed the appeal by Mr Zader (represented by the TWU): see *Zader v Truck Moves Australia Pty Ltd* [2016] FCAFC 83.

33. On the TWU request, and some 34 months after the 4 yearly review process commenced, on 10 October 2016 the Full Bench determined (without notice to, or hearing from, Truck Moves) to refer the issue of coverage for hearing: *4 yearly review of modern awards – Group 2* [2016] FWCFB 7254 at [174]. On 11 November 2016, Truck Moves and others expressed concern about this approach. On 21 December 2016 the TWU gave its first particulars of the amendment it proposes to change the coverage of the RTD Award.

34. At the time of determining the issue of coverage at the hearings in March 2017, the Commission is also hearing and determining other matters relating to the terms of the RTD Award: [2016] FWCFB 7254 at [174].

35. With respect, the cart has been put before the horse. The issue of coverage should have been pursued upfront and promptly by the TWU or the Commission at its own initiative. As the above chronology demonstrates, other substantive issues relating to the RTD Award have been determined, and will be determined, before or at the time of, the issue of coverage. As a matter of fairness and logic, the issue of coverage should have been pursued promptly in 2014 when the FWO identified the issue. Only then could Truck Moves and others have had a fair and proper chance to be involved in the review process, which is now well advanced.

36. Truck Moves sought on a number of occasions to be involved in the process, but as no variation was being pursued or discussed (by the TWU or the Commission), it had no opportunity or reason to be involved. The TWU made a deliberate decision to not pursue any variation to coverage at an early time, despite being on notice of the issue.

37. It is unsatisfactory to say that if Truck Moves and others are captured by the RTD Award, then they can have a say on award provisions at subsequent hearings. Unfortunately, decisions and determinations have already been made, and will be made in the March 2017 hearings, without Truck Moves and others having had the ability to have a say beforehand. It is an unreasonable and expensive burden to impose on a business that is not covered by an award,

to partake in a process on the possibility it may be covered at a later time. This point serves to emphasise the need for coverage to be dealt with promptly at the beginning of the process.

38. The above chronology demonstrates that the TWU made a clear and deliberate decision to not promptly pursue a variation to amend the coverage of the RTD Award during the significant consultation period in 2014 and 2015. Details of its variation application only arise in late 2016, after it was unsuccessful in its appeal of the Federal Court Decision. The delay (of over 30 months) in pursuing a variation to coverage is unexplained by the TWU. It ought to have been pursued promptly at an early stage.

39. It is also noted that there is no evidence of the TWU taking any recent steps to notify other businesses affected by the proposed change, like Ozwide Heavy Vehicles, as identified in the statement of Mr Mealin. This is a further example of procedural fairness lacking in the issue of coverage. To expand coverage is not an insignificant issue, and for it to arise so late in the process, risks businesses being unaware and denied an opportunity to have a say. It is not for Truck Moves to pursue the Driveaway Industry (as it is not pursuing the change).

40. As a matter of fairness, any change to coverage should be dealt with promptly at the commencement of the next 4 yearly review, or at some later time. Not only will this give businesses like Truck Moves a fair opportunity to be heard and to have a say on outcomes at the appropriate time, but it will also allow them to adjust and prepare their businesses for the possibility.

**The nature of the industry**

41. The findings of the Federal Court[5] and the statement of Matthew Whitnall made on 1 March 2017 demonstrate the Driveaway Industry is very different from, and separate to, the freight and transport industry (that is regulated by the RTD Award).

42. The following observations can be made about the Driveaway Industry and the businesses that operate in this industry:

    42.1. The businesses are small businesses, and with the exception of Prixcar, are focussed simply on the one stream of business, namely the ferrying of vehicles from one location to another[6];

    42.2. The businesses are not involved with freight and goods, and the transportation of such[7];

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5 It is noted that the Federal Court accepted the evidence of Mr Whitnall in the Federal Court proceedings: see Federal Court Decision at [27].

6 Whitnall statement at [106]; Clayton statement at [9] and [11].

7 Whitnall statement at [24], [34] and [79] to [83], [94]; Clayton statement at [10]; and the Federal Court Decision.

42.3. The businesses use trade plates which prohibit the transportation of freight and goods[8];

42.4. The vehicles that are relocated are, almost always, pre-registered and or partially built[9] (see Federal Court Decision at [2], [23] and [31]);

42.5. The businesses do not own the vehicles being relocated[10];

42.6. The clients of businesses in the Driveaway Industry are not necessarily from the freight and transport industry[11];

42.7. The consequence of the matters in paragraphs 42.2, 42.4 and 42.5 is that businesses in the Driveaway Industry have an economic disadvantage compared to the freight and transportation industry as to how it can charge and the taxation benefits it can obtain.[12]

43. The following observations can be made about the employees engaged to work in the industry:

43.1. Experience or background in the freight and transportation industry is not a pre-requisite for employment in the Driveaway Industry[13];

43.2. The key skill and requirement to work in the Driveaway Industry is a heavy vehicle licence and ability to drive[14];

43.3. To work in the Driveaway Industry, employee drivers need to undertake far less training than employees in the freight and transportation industry[15];

43.4. Employees are prohibited from transporting freight or goods, and as a result have no responsibility for freight and goods (or loads)[16];

43.5. Employees in the Driveaway Industry do not perform the array of tasks undertaken by drivers in the freight and transport industry, like loading and unloading, use of loading equipment, checking and use of restraints, use of technology, customer liaison and other laborious work[17];

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8 Whitnall statement at [38] to [42].

9 Whitnall statement at [28].

10 Whitnall statement at [25].

11 Whitnall statement at [43] to [45].

12 Whitnall statement at [115] to [116].

13 Whitnall statement at [60].

14 Whitnall statement at [60].

15 Whitnall statement at [73].

16 Whitnall statement at [41], [51] and [83].

17 Whitnall statement at [75], [76] and [77].

43.6. Employees can drive an array of vehicles, including over a day, including vehicles that are not covered by the RTD Award[18];

43.7. Employees drive locally, regionally and interstate[19];

43.8. During any given day, employees can have up to 50% of working time not involving driving duties[20] (see Federal Court Decision at [25] and [26]);

43.9. The time not spent driving, can involve the employee being shuttled between locations, being on breaks, or performing some minor work[21];

43.10. That minor work can involve visually checking the vehicle for damage, completing some basic paperwork, attaching and removing trade plates and tyre guards, and occasionally, refuelling a vehicle[22]; and

43.11. The work of employee drivers in the Driveaway Industry has low physical demands and there is a low risk of injury[23].

44. As elaborated on below, these differences are significant and demonstrate the inapplicability of the RTD Award (as designed) to the Driveaway Industry and its employees.

**Relevant statutory provisions and principles**

45. An objective of the FW Act is "*ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders*" see s3(b). The minimum safety net is not created by modern awards alone.

46. Under the FW Act, all employees have the benefit of the safety net comprising the National Minimum Wage Order (**NMWO**), default casual loading and National Employment Standards (**NES**): see ss 44, 59 to 131 (Part 2-2) and 282 to 299 (Part 2-6) of the FW Act. A subset of employees then have the benefit of being covered by a modern award: see ss 45 and 132 to 168D (Part 2-3) of the FW Act. As a result of the scheme of the FW Act, it is neither unusual nor unexpected that some employees would be "*award-free*". These employees are still covered by a safety net determined by Parliament.

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18 Whitnall statement at [30]

19 Whitnall statement at [23].

20 Whitnall statement at [66] to [67].

21 Whitnall statement at [66].

22 Whitnall statement at [74].

23 Whitnall statement at [78]; Clayton statement at [10.7].

47. Modern awards were made and commenced on 1 January 2010. The FW Act provides for the four yearly review of modern awards, like the RTD Award: s156(1). Relevantly, s156(2) of the FW Act provides (our emphasis in bold):

> *(2) In a 4 yearly review of modern awards, the FWC:*
>
> *(a) must review all modern awards; and*
>
> *(b)* ***may make****:*
>
> *(i) one or more determinations varying modern awards; and*
>
> *(ii) one or more modern awards; and*
>
> *(iii) one or more determinations revoking modern awards.*

48. There is, by the use of the word "*may,*" a discretion invested in the Full Bench to vary or not to vary the RTD Award.

49. The following principles are applicable to the review:

    49.1. The Full Bench will have regard to the historical context applicable to each modern award review;[24]

    49.2. The Full Bench proceeds on the basis that *prima facie* the RTD Award achieved the modern award objectives at the time it was made;

    49.3. There must be a merit argument in support of the proposed variation; and

    49.4. Where a significant change is proposed (like coverage) it must be supported by probative evidence (demonstrating the facts supporting the proposed variation) and persuasive submissions.

    See [2014] FWCFB 1788 at [23] and [24], [2015] FWCFB 8810 at [10], and 4 *yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [111 (ii)] (**Penalty Rates Decision**).

50. Further to paragraph 49.4 above, the Full Bench emphasised at [257] in the Penalty Rates Decision earlier comments made by it in proceedings concerning the *Security Services Industry Award* (original emphasis):

> *While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. <u>In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed</u>*

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[24] In this case, the historical context includes the deliberate design of the RTD Award (and its predecessors) to not cover the Driveaway Industry and the fact the industry has not traditionally been covered for many, many years.

> *changes.*[25] *Such evidence should be combined with sound and balanced reasoning of the proposed changes.*

51. In the review, the Full Bench must have regard to s134 of the FW Act, which relevantly 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*
>
> ...
>
> *(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.*

52. Fairness is assessed from the perspective of both employees and employers covered by the modern award in question: Penalty Rates Decision at [117] and [118]. The Full Bench's task is to balance the various considerations in s134: Penalty Rates Decisions at [163].

53. In reviewing the RTD Award, the Full Bench ultimately asks itself: does the RTD Award achieve the modern award objectives? It is submitted that the RTD Award, for the purpose for which it was designed and drafted, achieves the modern award objectives.

**The TWU case**

54. The TWU is proposing the variation to the coverage provision of the RTD Award. It is the TWU that needs to bring probative evidence and

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[25] In this case, it is submitted that the TWU have not advanced a detailed case with evidence including of the impact of the current RTD Award on employers and employees covered by it and the impact of the proposed changes. The TWU case is, with respect, scant or thin.

persuasive submissions in support of the variation: [2014] FWCFB 1788 at [23] and [24] and [2015] FWCFB 8810 at [10].

55. The TWU relies on two statements of evidence:

    55.1. A statement from an ex-employee of Truck Moves, **Mr** Dennis **Mealin** dated 9 November 2017 (sic); and

    55.2. A statement from a former employee of a (recent) competitor of Truck Moves, **Mr** Glen **DeClase** dated 23 December 2016.[26]

56. The statement of Mr Mealin is not probative:

    56.1. Mr Mealin's evidence seeks to cavil with findings of the Federal Court (which were not challenged on appeal to the Full Federal Court nor disturbed on appeal).

    For example, Mr Mealin states "*the assembled trucks I drive were both loaded and unloaded*" (paragraph 11), "*I often moved vehicles with loads for clients such as Toll*" (paragraph 19) and the work "*involved delivering a new truck to one of their depots where at some stage it would be loaded*" (paragraph 20). The Federal Court accepted such instances of driving laden vehicles was "*rare*" (Federal Court Decision at [28]), that drivers were directed not to drive vehicles laden (Federal Court Decision [28]) and now, as a result, it is the case that vehicles are not driven laden (Mr Whitnall Statement at [82]).

    Mr Mealin gives evidence that his work included "*collecting and relocating new trailers*" (paragraph 15). The Federal Court accepted the evidence of Mr Whitnall (Federal Court Decision at [27]), that such jobs were 0.15% of all jobs undertaken by Truck Moves (or 95 jobs out of 62,600 jobs between 2007 to 2013) (Federal Court Decision at [29]).

    Mr Mealin gives evidence that he drove "*heavy vehicles with machinery loaded on the back*" (paragraph 22). The Federal Court found the equipment "*is part of the vehicle and not in the nature of goods or freight carried on it*" (Federal Court Decision at [31] and [32]).

    The TWU is estopped from cavilling with the findings of the Federal Court, not disturbed on appeal.

    56.2. Mr Mealin provides only a very general summary of his duties, and as such, he provides no real evidence as to the nature of the role and the Driveaway Industry.

    56.3. Mr Mealin's evidence about his pay, and not being paid waiting time, is incorrect and inaccurate (see Mr Whitnall statement at [95]).

    56.4. The evidence from Mr Mealin does not allow the Commission to assess, in any meaningful way, the work value of the work performed by

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26 We object generally to the statement of Mr DeClase on the grounds of relevance.

employee drivers in an industry with no responsibility for freight or goods.

56.5. There is no evidence from Mr Mealin (or the TWU) as to the impact of the current RTD Award provision on him, or other employees.

57. The statement of Mr DeClase does not advance matters and is not probative:

57.1. Mr DeClase is not presently employed by Prixcar and the statement does not appear to be authorised by Prixcar.

57.2. The business of Prixcar is distinct from businesses solely operating in the Driveaway Industry (see Mr Whitnall Statement at [106]).

57.3. The business of Prixcar involves employee drivers operating within the coverage of the RTD Award (see Mr DeClase's statement at [12]). This is unlike the Driveaway Industry, which does not deal with goods and is (and historically have always been) award free.

57.4. It is irrelevant to any analysis that Mr DeClase wrongly believed work in the Driveaway Industry was covered by the RTD Award (see Mr DeClase's statement at [20]).

57.5. The fact Prixcar negotiated and made enterprise agreements is irrelevant to the matters before the Full Bench. Truck Moves and others have been operating in accordance with the law.

57.6. Mr DeClase's statements about Truck Moves "*undercutting*" Prixcar (see Mr DeClase's statement at [18] to [19]) is wrong and misleading given: (a) Truck Moves and others were operating in accordance with the law; and (b) the evidence from Mr Whitnall is that Prixcar has been using its business depth and size to undercut Truck Moves (see Mr Whitnall Statement at [109]).

58. The evidence from Mr Mealin and Mr DeClase is scant and does not address in any adequate and meaningful way the Driveaway Industry and work performed so that a proper assessment can be made by the Commission of the need to vary the RTD Award, and or the applicability/suitability of the RTD Award to the Driveaway Industry. The application by the TWU, on its own evidence, should be dismissed.

59. The TWU submissions advance five reasons in support of the variation in its submissions: see TWU Submissions at [30], [32], [34], [39] and [40].

60. ***Firstly***, the TWU says, "*the variation is consistent with the modern award objectives*" (TWU Submissions at [30]) but this is a conclusion.

61. The TWU then assume (TWU Submissions at [30]) that the Driveaway Industry is "*part of the transport industry*" but this submission pays no attention to the differences between the Driveaway Industry and the transport industry. As was determined by the Federal Court (and not overturned on appeal), Truck Moves and others are not part of the "*road transport and distribution industry*". As

Mr Whitnall's statement makes clear, Truck Moves is not considered part of the transport industry for workers compensation and other insurance purposes.[27] Clients of the Driveaway Industry are not necessarily, or predominately, part of the "*road transport and distribution industry*".[28] The Driveaway Industry does not deal with freight or goods.

62. The proposition then advanced by the TWU is that the RTD Award "*fails to ensure a fair and relevant minimum safety net*" for "*one particular type of driver*" (TWU Submissions at [30]). This proposition wrongly assumes that the RTD Award is intended to cover all drivers; it is not (see the Federal Court Decision). A number of other awards deal with drivers in different contexts. The mere task of driving does not bring, or predispose, coverage under the RTD Award. The RTD Award, as discussed below, is not designed, intended or suited for the Driveaway Industry.

63. The TWU then advance a submission that the "*exclusion of drivers engaged in vehicle relocation from the coverage of the RTD Award results in absurd consequences*" (TWU Submissions at [31]). Such a submission ignores the finding of the Federal Court that the RTD Award was not intended to cover, and did not cover, drivers in the Driveaway Industry. It is understandable, and logical, that the RTD Award only deals with an industry dealing with the distribution of freight and goods. Further, given the deliberate design of the RTD Award, the history and purpose of predecessor transport awards and the nature of the "*road transport and distribution industry*" (all discussed below), the exclusion of drivers in the Driveaway Industry from the RTD Award is understandable and rational. The RTD Award is not designed for, and suited to, the Driveaway Industry.

64. ***Secondly***, the TWU submits (TWU Submissions at [32] to [33]) that there is commonality with drivers in the "*road transport and distribution industry*" making it appropriate for employees in the Driveaway Industry to be covered by the RTD Award.

65. Other than the mere task of driving on roads, there are fundamental and significant differences between the "*road transport and distribution industry*" and the Driveaway Industry. These are set out extensively in the statement of Mr Whitnall and Mr John Bradac.

66. Even with the task of driving itself, it is different in each industry due to the absence of freight and goods on the vehicle being driven. In the Driveaway Industry, vehicle checks are less demanding, refuelling is only for long distance travelling, any paperwork required to be completed is less and the attaching of trade plates and travel guards is of minimal exertion. Minor maintenance is not a task of the industry (as the vehicle belongs to the client).

67. What is missing from the Driveaway Industry includes: the use of loading/unloading equipment, responsibility for pallets, dealing with and

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27 Whitnall statement at [58] and [82].

28 Whitnall statement at [43] and [45].

responsibility for freight and goods, responsibility for checking load distribution, using restraints, dealing with consignment notes, checking vehicle weight, periodic checking of loads during transport, use of technology, fuelling of vehicle, vehicle maintenance and customer service.[29]

68. The application of (some of) the *Heavy Vehicle National Law* to drivers in the Driveaway Industry does not demonstrate commonality of work, much like the application of work health safety laws does not demonstrate a commonality of work amongst different industries. The *Heavy Vehicle National Law* has a public safety genesis "*in the road transport of goods and passengers by heavy vehicles*": s3(c) of the *Heavy Vehicle National Law (NSW)*. Notably, drivers in the Driveaway Industry, unlike the "*road transport and distribution industry*" have no responsibility over chain of custody (as they do not consign, pack, load or receive goods) and are not governed by regulations dealing with loading and mass requirements. Similarly, dangerous goods regulations do not apply as the Driveaway Industry does not deal with any freight or goods, like dangerous goods.

69. The TWU then relies on commonality between industries because "*persons employed as drivers undertaking vehicle relocations will commonly have prior transport industry experience*" (TWU Submissions at [33]). Such a submission does not demonstrate a commonality. As Mr Whitnall deposes, it is not a requirement for employment in the industry that an employee have experience in the "*road transport and distribution industry*".[30] Further, employees that are employed by Truck Moves often have left the "*road transport and distribution industry*" due to injury and do not wish to work in that industry anymore.[31]

70. ***Thirdly***, the TWU submits that "*the variation is consistent with the intention of the Commission in initially making the RTD Award as part of the award modernisation process*" (TWU Submissions at [34] to [38]). Such a statement is erroneous and contrary to the express and binding finding of the Federal Court (not disturbed on appeal).

71. The Federal Court conclusively determined the meaning of the RTD Award, so far as it concerned coverage in this matter. It declared that the Driveaway Industry is not covered by the RTD Award (and therefore, was not intended to be covered). The purpose of statutory construction, and the duty of the court in interpretation exercises, is to give the words in a provision the "*meaning that the* [drafter] *is taken to have intended them to have*": *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [78].

72. The Federal Court found that the expression "*road transport and distribution industry*" was intended to not cover businesses like Truck Moves: see Federal Court Decision at [53] and [59] where it was said (our emphasis):

> *[53] I am of opinion that the expression "the transport by road of goods" as used in paragraph (a) of the industry definition in the RTD Award means the carriage of goods*

29 Whitnall statement at [75].
30 Whitnall statement at [60].
31 Whitnall statement at [52]; Clayton statement at [4].

*by road and does not extend to the mere driving or ferrying of vehicles between locations.*

*...*

*[59] The use of etcetera after "goods" by the Commission at [168] suggests that **it intended** the word "transport" in the RTD Award to have the meaning at which I have arrived, namely "carriage" of goods and other things by road....*

73. The Federal Court has determined the intention of the drafters of the RTD Award from the text and context of the RTD Award. It was not to cover businesses like Truck Moves, and any assertion to the contrary (including that at TWU Submissions [38]) is incorrect.

74. The reference at TWU Submissions [35] to the *Award Modernisation – Statement* [2009] AIRCFB 50 decision, paragraph [98], does not support the propositions then made at TWU Submissions [36]. The Full Bench did not say at [98] that the RTD Award "*was to be the "general industry transport award"*". Rather it said the RTD Award "*is intended to incorporate ... NAPSAs operating in each state as the general industry transport award*". The reference to "*general industry transport award*" was a reference to States having common rule awards. Schedule A to these submissions demonstrate that the State awards did not cover businesses like Truck Moves. As the Federal Court concluded, and as was accepted by Flick J of the Full Federal Court, there was "[*n*]*othing in the Commission's reasons there, or in its earlier Statement [2009] AIRCFB 50, suggested that it had in mind that either of the two Awards would cover a business of the kind operated by Truck Moves*" (see Federal Court Decision at [58]; Full Court Decision at [37]).

75. Further, there is nothing in the material from the award modernisation process that demonstrates, explicitly or implicitly, that the Driveaway Industry was intended to be covered, but by some drafting error by the AIRC was excluded. If that was the case, an application would be made under s160 of the FW Act to "*remove an ambiguity or uncertainty or to correct an error*". No such application was made.

76. ***Fourthly***, the TWU submits that as "*employers other than Truck Moves ... have been operating on the assumption the RTD Award applies*" that the RTD Award can extend to the Driveaway Industry (TWU Submissions at [39]). This is not a reason, or a persuasive reason, to vary the RTD Award.

77. There is no evidence of employers (plural) operating on the assumption the RTD Award applies. Rather, the evidence is to the contrary.

78. The only business operating under the erroneous assumption as to coverage under the RTD Award is Prixcar, a business fundamentally different to Truck Moves and others. The fact it was mistaken[32] as to award coverage, is not a reason to extend coverage. While extension may not affect Prixcar's business, it will have significant consequences and disruption for Truck Moves and others,

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[32] Given the nature of its business, and the integration of vehicle relocation within a clear transport business, may mean that its coverage under the RTD Award has a different genesis.

and the industry. We rely on the evidence of Mr Whitnall and Mr Clayton in this regard.

79. ***Fifthly***, the TWU concludes as it started by saying the variation of the coverage of the RTD Award will "*enhance the achievement of other aspects of the modern award objective*" (TWU Submissions at [40]). This is a conclusion and there is no detailed analysis of the relevant considerations.

80. As is demonstrated below, the RTD Award was not designed or intended to cover the Driveaway Industry and is not suited to the Driveaway Industry. As an exercise of discretion, the RTD Award should not be varied to cover the Driveaway Industry. The RTD Award, for the purpose it was designed, achieves the modern award objectives and a change in coverage is not necessary.

**The RTD Award is not suited or appropriate to the Driveaway Industry**

81. Truck Moves and others respectfully submit that the RTD Award is not suited or appropriate to cover the Driveaway Industry. The application by the TWU to vary the RTD Award should be dismissed.

82. ***Firstly, the RTD Award was not designed, nor was it intended, to cover the Driveaway Industry***.

83. It would not be appropriate to place an industry in an award that it is not designed or intended to cover.

84. The fact that the RTD Award was not intended to cover the Driveaway Industry is apparent from the Federal Court Decision itself. As a matter of fact and law, the Federal Court declared that the RTD Award does not cover the Driveaway Industry.

85. That the RTD Award was not designed, or intended, to cover the Driveaway Industry is reinforce by the terms of the RTD Award itself:

    85.1. There are numerous definitions in clause 3.1 of the RTD Award that refer to "*goods*", "*loads*", "*loading*", "*unloading*": see the terms 'ancillary vehicles and/or equipment', 'courier', 'crane offsider', 'distribution facility', 'driver-salesperson', 'gross combination mass or GCM', 'gross vehicle mass or GVM', 'loader', 'low loader', motor driver's assistant' and 'truck loading crane';

    85.2. The definition of "*road transport and distribution industry*" in clause 3.1 of the RTD Award has each limb referring to "goods" or type of goods (our emphasis in bold):

    > *(a)* ***the transport by road of goods****, wares, merchandise, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock, including where the work performed is ancillary to the principal business, undertaking or industry of the employer;*
    >
    > *(b)* ***the receiving, handling or storing of goods****, wares, merchandise,*

*material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise in a distribution facility;*

*(c)* ***the storage and distribution of goods****, wares, merchandise, materials or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock where the storage and distribution activities are carried out in connection with air freight forwarding and customs clearance;*

*(d)* ***the wholesale transport and delivery by road of meat*** *from abattoirs, slaughterhouses, and wholesale meat depots;*

*(e)* ***mobile food vending****;*

*(f)* ***the cartage and/or distribution, in tankers, of petrol or bulk petroleum*** *products (in the raw or manufactured state) from refineries, terminals or depots of oil companies and/or distributors;* ***the cartage and/or distribution on road vehicles of packaged petroleum products*** *(in the raw or manufactured state) from refineries, terminals or depots of oil companies and/or distributors and* ***the transport and/or distribution of petrol and petroleum products*** *(in the raw or manufactured state) for distributors of oil companies or for contractors or sub–contractors to such distributors;*

*(g)* ***the road transport of crude oil or gas*** *condensate;*

*(h)* ***the transport on public roads of milk and cream in bulk****, and the transport, vending and distribution of milk, cream, butter, cheese and their derivatives (including fruit juices, yoghurt and custard); and/or*

*(i)* ***the cartage by road of quarried materials****.*

Given the apparent and obvious coverage of the RTD Award, the proposal to vary by the TWU will be 'the odd one out' as it does not involve the "*transportation by road of goods*". The variation would be glaringly inconsistent with limbs (a) to (i).

85.3. The allowances payable under the RTD Award are referrable to the freight and transportation industry: see clauses 16.2(b)(iii), (v), (vi), (vii), (viii), (x), (xi), (xii), (xiii), (xiv) and 16.2(d) which are replete with references to goods, "*carting*" and "*loading*" and "*unloading*".

85.4. Ordinary hours of work are organised differently based on the goods being delivered: see clauses 22.4 and 23 of the RTD Award.

85.5. The classifications and roles of employees relate to the delivery and transportation of goods: see Schedule B and C. The classification scale is not suited to the Driveaway Industry.

86. There would be an apparent and obvious anomaly in including the Driveaway Industry within in the RTD Award, given its design and intended coverage.

87. ***Secondly, the classifications and pay scale in the RTD Award are inapplicable to the Driveway Industry.***

88. It would be inequitable and unfair to apply the RTD Award pay scale (clause 15.2). This matter further reinforces the point that the RTD Award is not suited to the Driveaway Industry.

89. As the TWU Submissions at [10] acknowledge, the Commission has set rates of pay by reference to the full scope of duties undertaken by drivers in the freight and transport industry. At **Annexure B** is a copy of the decision of the Commonwealth Conciliation and Arbitration Commission concerning the *Transport Workers (General) Award* and adjusting rates of pay to compensate for the value of work in that industry: *The Transport Workers Union of Australia v A1 Carrying Co and others* (20 February 1959).

90. The decision of Commissioner Austin appears to be the genesis of the classifications and the skills for which drivers of vehicles in the transport industry were compensated.[33] This decision indicates that the rate of pay for drivers does compensate for their responsibilities for "*deliveries*", "*greater use of road vehicles for transportation of goods*", "*loading and unloading*".[34] It is also clear that these predecessor awards (on which the RTD Award was based) were designed for the employment of drivers who undertake deliveries, transportation of goods, "*loading and unloading and laborious work*".[35] There is nothing to suggest that the drivers were to be compensated (at the rate they presently are) merely for driving an unladen vehicle (for only some of their work day).

91. In that 1959 case, the Commission received evidence about driver duties including "*vehicle-operating difficulties in traffic and parking, bigger vehicles and loads, ...loading and unloading "know-how", ...mechanical loading and unloading aids, value of loads etc.*" (page 4). The evidence showed "*responsibility is a real factor in this industry ... whether it be deliveries, haulage of heavy loads, machinery transportation, ... speedy turn around*" (page 5).

92. The Commission increased rates of pay to reflect the value of work. This included having regard to the skill of drivers (page 6) which explicitly included (our emphasis in bold):

> *One cannot lightly dismiss the value of an employee to his employer in the transport industry, notwithstanding the type of work on which he is engaged. Some make deliveries to suburban homes, others to stores and the like. Heavy haulage from wharves and manufacturing points all entail, ore completely than most other industries, intimate individual representation between the owner of the vehicle and the parties whose goods are being carried...*

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[33] The decision of Commissioner Austin of the Commonwealth Conciliation and Arbitration Commission on 29 February 1959 made the *Transport Workers (General) Award 1959* (which was the predecessor to the *Transport Workers Award 1983* and then the *Transport Workers Award 1988* on which the Road Transport Award was drawn).

[34] Ibid, at pp4-7.

[35] Ibid.

> ***The industry of transport driver requires certain skilled qualities. I extend the definition of "skill" to, not only the fact that a driver's licence entitles a person to drive, but to work with mechanical aids, manual loading, efficient operation of prime-mover when pulling trailers etc.***

93. The factor of loading and unloading goods was significant (page 7) (our emphasis in bold):

> ***One other factor related to the industry is that of loading and unloading and laborious work.*** *Here again, the evidence was not greatly in conflict but the parties were sharply divided as to the value they represented in margins and conditions.* ***Some loads are undoubtedly difficult, not only the stowing aspect but also unloading. Others are heavy and require "know how", probably more so than brute strength,*** *whilst much of the goods and the material handled is light and or loaded and unloaded by means of mechanical aids.*

94. As is apparent, the rates of pay in the RTD Award reflect the performance of a full gambit of duties, which are not required nor performed in the Driveaway Industry. As set out above, many of these duties, other than driving, are not performed in the Driveaway Industry. To require the Driveaway Industry to apply to RTD Award, and in particular its pay scale, would expose it to an inapplicable, unfair, inequitable and uneconomic cost.

95. The same observation applies in respect of allowances. To the extent they are capable of being read to apply based on the vehicle driven (see clauses 16.2(b)(vii) and (viii)), compensation would be paid when vehicles are unloaded.

96. ***Thirdly, the RTD Award cannot operate fairly to the Driveaway Industry as a consequence of the operation of clause 19 of the RTD Award.***

97. Clause 19 of the RTD Award provides:

> *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.*

98. Schedule C has a number of classifications TW 1 to 10, based on the type of vehicle driven.

99. In the Driveaway Industry, employee drivers may drive an array of vehicles during one day.[36] Clause 19 has the effect of requiring the highest classification to be paid for the whole day, regardless of the time (and perhaps minimal time) spent by the employee driving a vehicle at the highest classification.

100. The inequity and unfairness is readily apparent, including given that the core task of driving in the Driveaway Industry is largely the same no matter what vehicle is driven (given it is unloaded). Another inequity with clause 19 is the inability for a business to structure its fees based on the classification of the vehicle, given the array of vehicles driven and the significant time each day spent by a driver not driving any vehicle.

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36 Whitnall statement at [30] and [113].

101. The result of the operation of clause 19 is a significant financial impost on the industry. With the current NMWO at $17.70 an hour, an employee who drives a vehicle, say for 1 hour, at classification TW 6, would get paid $162.32 (for an 8 hour day), which is a 14.6% increase on the NMWO.

102. In this regard, it is important to bear in mind that s.134 of the FW Act provides that the Commission must ensure that the modern awards provide "*a fair and relevant minimum safety net of terms and conditions*" taking into account the modern awards objective specified in s.134(1)(a)-(h). Those objectives include need to promote "*flexible modern work practices and the efficient and productive performance of work*", an assessment of the likely impact on businesses including employment costs and regulatory burden and the need to ensure a simple and easy to understand modern award system. It would be inconsistent with all of these objectives to impose prohibitive cost and regulatory burden on employers in the Driveaway Industry with the operation of clause 19.

103. ***Fourthly, the RTD Award is not economic for the Driveaway Industry***.

104. The freight and transport industry captured by the RTD Award have an economic benefit due to the fact that they transport goods on the back of their trucks.

105. Those benefits, and therefore the ability to absorb higher labour costs and viably compete in the marketplace, include: the ability to charge based on freight and pallets and the ability to tax deduct ownership of transportation vehicles.

106. The Driveaway Industry has significant costs and limited ability to recover. Labour costs and insurance costs are significant in a market that does not allow high margins.

107. The increase from the NMWO to just TW 1 in the RTD Award is a 6% increase (from $17.70 to $18.75 an hour). The increase in respect of TW 3 is almost 10%. A 6% increase is more than the last two years annual wage review increases, and 10% more than the last three years.

108. To extend coverage to the RTD Award also has implications for the business and financial structure of businesses in the Driveaway Industry. As Mr Whitnall says at [119] and [120]:

> *All business modelling and financing of Truck Moves has been based on it being award free. That has been the consistent position for over 25 years.*
>
> *As said above, Truck Moves has long term agreements with a number of significant clients. As I explain below, coverage under the RTD Award at this time will place these agreements, and the business of Truck Moves, at risk.*

Then see Whitnall statement at [119] to [126].

109. As Mr Don Clayton says at [13] to [15] of his statement:

> *Coverage under the RTD Award for Vehicle Express would have a profound effect on our business with increased labour cost. We do not have the economy of scale to compete with businesses like Prixcar.*
>
> *Our contracts, financial modelling and pricing has always been based on, and is based on, the National Minimum Wage Order (and casual loading) and not the RTD Award.*
>
> *The industry is competitive. Having our pricing equivalent to those in the road transport and distribution industry, like Prixcar, will make it much easier for them to price us out of the market.*

**Conclusion**

110. For all the reasons set out above, the application to vary the RTD Award to change its coverage to include the Driveaway Industry, ought to be dismissed. Addressing the factors in s.134(1) of the FW Act, we further say:

111. There is no evidence filed and served by the TWU as to the impact on employees in the Driveaway Industry by not being covered by the RTD Award: see s134 (1) (a) of the FW Act. Engaged a casual employees, which is the practice, employed drivers are paid $22.125 per hour or above.

112. As to s134 (1) (b), as the Full Bench noted in the Penalty Rates Decision, decision-making about bargaining is influenced by a complex mix of matters: Penalty Rates Decision at [178].

113. As is clear from the evidence of Mr Whitnall and Mr Clayton, the Driveaway Industry provides valuable employment for a group of senior employees who are unable to work in the road transport and distribution industry. It provides a valuable opportunity for them to continue to apply some of their skills (without great risk of injury due to the work in the Driveaway Industry not being onerous or physically demanding). The Driveaway Industry allows drivers to participate in the workforce and society: see s134 (1) (c) of the FW Act.

114. As to s134 (1)(d) of the FW Act, the RTD Award covering the Driveaway Industry would not promote flexible modern work practices and efficient and productive performance of work. The RTD Award is designed to cover a different industry (with different economic structures) such that the rates of pay, allowances, classifications and “higher duties” are all designed in a way that will be inapplicable to, and penalise, the Driveaway Industry. It would impose inefficient and unnecessary cost (which is not insignificant).

115. Considerations in s134 (1) (da) and (e) are not addressed in the TWU’s case.

116. The consideration in s134 (1) (f) is significant. As the Full Bench said in the Penalty Rates Decision at [218]:

> *We note at the outset that s134 (1) (f) is expressed in very broad terms. We are required to take into account the likely impact of any exercise of modern award*

> *powers 'on business including' (but not confined to) the specific matters mentioned, that is, 'productivity, employment costs and the regulatory burden'.*

117. The evidence from Truck Moves and others, discussed extensively above, outlines the significant impact on the Driveaway Industry in covering it by an award that was not designed for its industry. It is possible that coverage under the RTD Award could lead to the reduction or demise of the industry, and a loss of employment to employees unable to work in the road transport and distribution industry.

118. As presently drafted, for the purpose for which it was designed, the RTD Award achieves the modern award objectives.

119. Finally, in the event the Full Bench determines to cover the Driveaway Industry in the RTD Award (which is opposed), then further hearings will be necessary, and Truck Moves and others seek to be heard, on transitional provisions and the applicability of specific provisions in the RTD Award to it, including the need to amend classifications, rates of pay and other award provisions.

.......................................

James Mattson

1 March 2017

**Schedule A**

## The coverage of various Federal and State Awards before the award modernisation process

By reason of a Ministerial Direction issued on 28 March 2008 pursuant to the s576C (1) of the *Workplace Relations Act* 1996 (Cth), the (then) Australian Industrial Relations Commission was directed to make modern awards applicable to industries or vocations.

In accordance with the Ministerial Request, an award modernisation process was embarked upon and designed to create modern awards primarily along industry lines operating throughout Australia, thereby reducing the number of awards operating in the workplace relations system: *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [2].

As a result, many of the modern awards sought to consolidate earlier federal awards and a myriad of State and Territory awards.

Here are the main and significant awards, and their coverage provisions, that were considered in making the RTD Award.

### Federal and Victoria

A. In respect of Victoria, there was a Federal award called the *Transport Workers Award 1998*. That award relevantly provided at clause 6.1 in respect of its coverage:

> *The industry covered by this award is or is in connection with* ***the transport of goods, wares, merchandise, material or anything whatsoever*** *whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock.*

B. Truck Moves and others were not named as respondents to this Federal award.

C. North and Jessup JJ of the Full Federal Court held that the *Transport Workers Award 1998* was "*relevantly indistinguishable*" from the RTD Award: at [10].

D. The Full Court Decision confirmed that businesses like Truck Moves are not covered by the RTD Award. The drivers at Truck Moves never have been, and are not engaged in "*the transport of goods, wares ...*".

### New South Wales

E. The coverage of the NSW *Transport Industry (State) Award* was at clause 50:

> *This award shall apply to employees of the classifications specified herein within the jurisdiction of the Transport Industry (State) Industrial Committee.*

F. The Transport Industry (State) Industrial Committee was defined as follows (our emphasis):

> ***All drivers and loaders*** *of trolleys, drays, carts, floats, articulated or semi-articulated vehicles and trailers and motor and other power-propelled vehicles, including motor cycles* ***engaged in the carriage of goods, merchandise and the like****, together with bicycle couriers, employees engaged in greasing or washing any such vehicle, employees without supervisory or other duties beyond those of loading*

> *or unloading vehicles employed by common carriers or who are not engaged upon or in connection with the premises of the employer, not being a common carrier, and employees of common carriers receiving, sorting and loading or unloading goods for delivery or re-delivery, carters, tip carters and tip wagon drivers, brakesmen or extra hands, trace boys, and all grooms, stablemen and yardmen employed in connection with any of the above, and drivers of mobile cranes, auto trucks and fork lifts employed by general carriers in connection with the carriage of goods, merchandise and the like*

G. The Chief Industrial Magistrate in the case of *TWU v Syddeck Pty Ltd trading as Royale Limousines* [2003] NSWCIMC 11 (15th January 2003) made it clear that the NSW award applied to the carriage of goods i.e. laden vehicles. The CIM said (emphasis added):

> *It is clear that when the industries and callings are read in its ordinary and natural sense its purpose is to catch vehicles engaged in the* ***carriage of goods, merchandise and the like****.*

H. The drivers at Truck Moves were not engaged in the carriage of goods, merchandise and the like.

## Queensland

I. In Queensland, the relevant award was the *Transport, Distribution and Courier Industry Award*. That award relevantly provided at clause 1.4 in respect of its coverage (our emphasis):

> *This Award applies to the employees classified in clause 5.1 engaged in or in connection with* ***the transport of goods, wares, merchandise, material or anything whatsoever*** *whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock.*

J. The above wording is the same as the RTD Award. The Federal Court has held such a coverage provision does not cover businesses like Truck Moves. The drivers at Truck Moves were not engaged in "*the transport of goods, wares …*". They simply drove a cab chassis or other vehicle, unladen.

## South Australia

K. In South Australia, the relevant award was the *Transport Workers' (South Australian) Award*. That award relevantly provided at clause 1.3.2 in respect of its coverage (our emphasis):

> *This Award is binding on the industry of the occupations of employees employed as drivers of motor vehicles of all descriptions used in* ***the transport of goods and materials upon public highways****, driver's assistants, yardpersons, loaders, leading loaders, greasers and cleaners, and collectors from house to house of monies payable for milk delivered (other than employees engaged in the carting or delivery by carting of bread, cakes, pastry and smallgoods) whether as employers or employees and whether members of an association or not.*

L. In respect of this coverage clause, it explicitly talks about "*in the transport of goods and materials upon public highways …*". Drivers at Truck Moves were not engaged in "*the transport of goods and materials …*". They simply drove a cab chassis or other vehicle, unladen.

## Tasmania

M. In Tasmania, the relevant award was the *Transport Workers General Award.* That award relevantly provided at clause 2 in respect of its coverage (our emphasis):

> *This award is established in respect to the occupations of:*
>
> *(a)* ***driver, driver's assistant, and loader employed in connection with a motor vehicle used for the transport of goods or materials****;*
>
> *(b) driver of a mobile crane;*
>
> *(c) driver of a fork lift truck;*
>
> *which are not covered by other awards of this Commission.*

N. In respect of this coverage clause, it explicitly talks about "*employed in connection with a motor vehicle used for the transport of goods or materials*". This does not cover businesses like Truck Moves.

## Annexure A

**Letters to the Fair Work Commission dated 27 November 2014, 11 January 2016 and 11 November 2016**

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The Associate to Hon Justice Iain Ross AO
Fair Work Commission
11 Exhibition Street
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27 November 2014

Our ref SML:142182

Email amod@fwc.gov.au

Dear Associate

**AM2014/212 Road Transport and Distribution Award 2010**

We presently act for Truck Moves Pty Ltd, Vehicle Express Pty Ltd and Quick Shift Vehicle Relocations Pty Ltd. Our clients have an interest in the above review proceedings for the reasons expressed below.

Our clients are not in the freight and distribution industry.

Our clients employ casual drivers whose role it is to simply drive unladen vehicles from one location to another. There is no carriage of goods or freight. The vehicles vary in nature and size and are driven locally or interstate, depending on the needs of the client. The vehicles are predominantly driven with trade plates, which preclude the carriage of goods.

Historically, our clients have been award free. The question of award coverage has been addressed by a number of industrial authorities, including the NSW Office of Industrial Relation (**OIR**) and the Office of the Employment Advocate (**OEA**). Each authority was of the view that the then applicable transport award did not apply to the business of our clients as they were not involved in the carriage of goods.

We note that the Fair Work Ombudsman (**FWO**) in its public submission on 20 May 2014 observed that the coverage clause "*in the* [above] *modern award could be clarified*". The FWO said:

> *Coverage for drivers who are driving empty vehicles under either of these awards*[1] *is not immediately clear, given these industry definitions.*

Our clients are of the view that relevantly the *Road Transport and Distribution Award 2010* was only intended to apply to businesses involved in the carriage of goods etc by road.

Recently, the Federal Circuit Court of Australia was asked to interpret (in the circumstance of a business like our clients) the coverage provisions in the *Road Transport and Distribution*

[1] The other award referred to is the *Road Transport (Long Distance Operations) Award 2010*.



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*Award 2010* and the *Road Transport (Long Distance Operations) Award 2010:* see *Rooth v S. Brady Industries Pty Ltd* [2014] FCCA 1435 where the Court noted at [26] that the issue of coverage under the *Road Transport and Distribution Award 2010*, was a matter *"susceptible of being argued persuasively both ways"*. Truck Moves is in the process of filing an application in the Federal Court of Australia, seeking a declaration that its business does not fall within the coverage of the *Road Transport and Distribution Award 2010*.[2]

On 24 November 2014, the FWO again observed that the coverage clause in the *Road Transport and Distribution Award* might need to be reviewed in the four yearly review process. However, the FWO said that *"it does not intend to appear at the hearings for the Group 2 Modern Awards"*.

It does not appear to our clients that any party is actually seeking a variation to the coverage clause in the *Road Transport and Distribution Award 2010*.

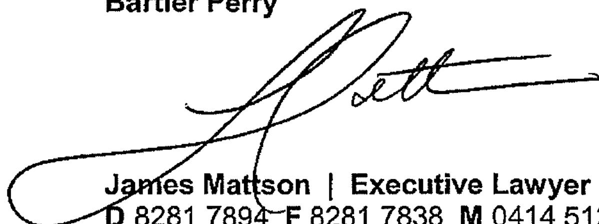
If any variation is sought or proposed (whether by another party or on the Commission's own motion), then our clients want the opportunity to be heard on it. Our clients are however concerned about having to address the coverage issue, in the absence of any positive case for a variation being made by any interested party.

In the event that an amendment to the coverage clause is made, our clients would also want to be heard on the terms and conditions that would be applicable to the work performed by their employees, given that the employees have no responsibility over freight, including whether there is a need to add a new classification, amend rates of pay and other allowances or loadings that may be applicable to the work performed by them.

Either counsel, or someone from our office, will attend the listing of the above matter on 2 December 2014, and seek leave to represent the above businesses.

We apologise for the delay in expressing this interest in the review proceedings.

Yours faithfully
**Bartier Perry**



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[2] The Federal Circuit Court held that the *Road Transport (Long Distance Operations) Award 2010* did not apply to businesses like our client.

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Bartier Perry

The Associate to Hon Justice Iain Ross AO
Fair Work Commission
11 Exhibition Street
MELBOURNE VIC 3000

11 January 2016

Our ref SML:142182

Email amod@fwc.gov.au

Dear Associate

**AM2014/212 Road Transport and Distribution Award 2010**

We act for Truck Moves Pty Ltd (**Truck Moves**), Vehicle Express Pty Ltd and Quick Shift Vehicle Relocations Pty Ltd.

We write about an application made on 14 October 2015 by the Transport Workers Union (**TWU**) to have the *Road Transport and Distribution Award 2010* (**Award**) varied to cover businesses like those operated by our clients.[1]

**Overview**

Our clients are not in the freight and distribution industry. Our clients employ casual drivers whose role it is to simply drive unladen vehicles from one location to another. There is no carriage of goods or freight. The vehicles vary in nature and size and are driven locally or interstate, depending on the needs of the client. The vehicles are predominantly driven with trade plates, which preclude the carriage of goods or freight. Consequently, the duties and responsibilities of our clients' drivers differ markedly from those engaged in the freight and distribution industry.

Historically, and confirmed recently (see below), our clients have always been and are "award free" but governed by the minimum standards established by the *Fair Work Act 2009*.

As said above, the TWU has not, until 14 October 2015, sought to make any application to vary the Award to expand its coverage. The dispute as to coverage has been known since at least May 2014 (18 months earlier). Truck Moves, in late 2014, filed proceedings in the Federal Court of Australia (proceedings NSD 1249 of 2014) to determine the issue of coverage. The TWU were a representative of a party in those proceedings. The TWU was content in allowing the matter of coverage to be dealt with in that forum. No application to

[1] The letter from the TWU to the Fair Work Commission on 14 October 2015 is in very general terms. It simply proposes a variation to the definition of 'road transport and distribution industry' and otherwise provides no grounds or particulars identifying the basis for the variation.



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vary the Award was made to the FWC during that time despite the award review process having commenced and progressing.

On 2 October 2015 the Federal Court in *Truck Moves Australia Pty Ltd v Simmonds* [2015] FCA 1071 held that businesses like our clients are not covered by the Award. Following that decision, the TWU has: (a) lodged an appeal from the decision with the Full Federal Court, and (b) given notice of an application to vary the Award dated 14 October 2015.

It is not clear, at this time, whether the TWU is pursuing the variation in light of its filing of the appeal. The TWU will be arguing in the appeal that businesses like our clients are clearly captured by the existing coverage provisions of the Award. The two applications (appeal and variation) appear inconsistent. It is not apparent in these circumstances that the TWU are pursing the variation at this time.

The Appeal is expected to be listed for the May 2016 sittings, with any judgment likely in later 2016.

**Background**

The Fair Work Ombudsman (**FWO**) in its public submission on 20 May 2014 observed that the coverage clause "*in the* [above] *modern award could be clarified*". The FWO said:

> *Coverage for drivers who are driving empty vehicles under either of these awards*[2] *is not immediately clear, given these industry definitions.*

On 24 November 2014, the FWO again observed that the coverage clause in the Award might need to be reviewed in the four yearly review process. However, the FWO said that *"it does not intend to appear at the hearings for the Group 2 Modern Awards"*.

It did not appear to our clients that any party was actually seeking a variation to the coverage clause in the Award.

Nevertheless, our client attended a directions hearing at the Fair Work Commission (**FWC**) on 2 December 2014.

Our client attended a conference on 16 January 2015 before SDP Harrison. The TWU and other unions were present. No party, including the TWU, indicated any intention to pursue a variation to coverage of the Award. Our attendance, and participation in this conference, and subsequent conferences, was explicitly not required. Without demur, we were excused from any further attendance.

On 16 January 2015, we wrote to the TWU asking to be notified *"if the TWU makes an application to vary the coverage of the Award"*. No such application was made.

The Federal Court proceedings were heard on 2 to 3 September 2015, with judgment on 2 October 2015.

It appears from the transcript that on 7 October 2015 the TWU foreshadowed to the FWC an application to vary the coverage of the Award. We did not attend as this application was not foreshadowed.

On 19 October 2015 the TWU sent to us a copy of its letter to the FWC of 14 October 2015.

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[2] The other award referred to is the *Road Transport (Long Distance Operations) Award 2010.*

We attend the conference listed before SDP Hamberger of the FWC on 28 October 2015. Again, on this occasion, the TWU was not pursuing its variation and did not seek to have any discussions about it. Our attendance and participation in this conference, and subsequent conferences, was explicitly not required.

On 30 November 2015 SDP Hamberger reported to the Full Bench:

- a significant number of variation to the Award that had support of the parties (being those parties that have had reason to participate to date in the process); and
- that the issue of coverage "*did not have general support and will need to be dealt with by a Full Bench*".

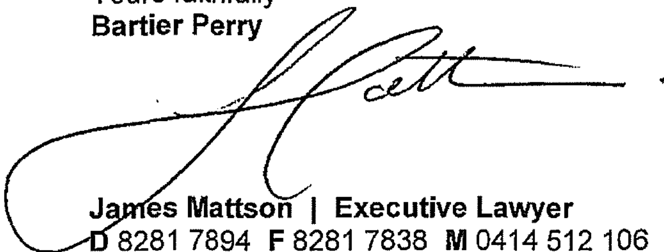
**Conclusion**

In the circumstances, our clients respectfully submit that any application to vary the coverage of the Award by the TWU:

- is late;
- by its lateness, has denied our clients any participation in the process to date (which has significantly advanced over the year);
- exposes our clients, and their businesses, to unfair uncertainty and duplicitous proceedings; and
- seeks to circumvent the recent decision of the Federal Court.

Our client wishes to be heard if the TWU pursue, and are permitted to pursue, the variation to coverage. In the event that an amendment to the coverage clause is made to capture our clients, our clients would also want to be heard on the terms and conditions that would be applicable to the work performed by their employees in their industry.

Yours faithfully
**Bartier Perry**



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Bartier Perry

The Associate to Hon Justice Iain Ross AO
Fair Work Commission
11 Exhibition Street
MELBOURNE VIC 3000

11 November 2016

Our ref SML:142182

Email amod@fwc.gov.au

Dear Associate

**AM2014/211 – Road Transport (Long Distance Operation) Award 2010**
**AM2014/212 – Road Transport and Distribution Award 2010**

We act for Truck Moves Pty Ltd, Vehicle Express Pty Ltd and Quick Shift Vehicle Relocations Pty Ltd.

We refer to our letter to you dated 11 January 2016. We also refer to the Full Bench decision with citation [2016] FWCFB 7254 given on 10 October 2016, and in particular:

1. The referral to a Full Bench at paragraph [175] of the issue of amending the coverage of the two awards (which if granted, may result in our clients being covered by an award for the first time).

2. The opportunity given to the parties currently covered by the awards to comment on the revised drafts awards at [227].

As confirmed by the Full Federal Court in *Zader v Truck Moves Australia Pty Ltd* [2016] FCAFC 83, our clients are not covered by the *Road Transport and Distribution Award 2010* and it was accepted in those proceedings that they are not covered by the *Road Transport (Long Distance Operation) Award 2010.*

Since the review proceedings began in 2014, no application has been made by any party to change the coverage of the two awards. In the absence of such a change, there has been no basis to be involved in the proceedings and indeed our clients have not been required to be involved. It is only after the Full Federal Court decision in June 2016 that the TWU has now given notice to seek to change the coverage provision in the award.

In circumstances where our clients are not covered by the awards, it seems unfair and unnecessary for our client to now comment on the draft revised awards.

As set out in our letter of 11 January 2016, the process appears to have put the 'cart before the horse'. Numerous conferences have occurred discussing the terms of the awards in circumstances where no application has been made to alter the coverage.



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AM2014/211 – Road Transport (Long Distance Operation) Award 2010

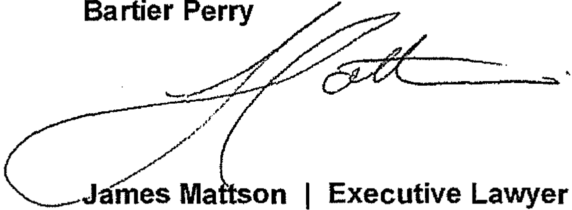
AM2014/212 – Road Transport and Distribution Award 2010

In the event that coverage of the award is changed, then we expect our clients will want to be, and need to be, heard on various aspects of the draft awards including:

- classification and pay for its workers;
- the applicability of other award entitlements to its business and workers; and
- transitional arrangements, given they were not previously covered by the modern award and have not had the benefit of transitional arrangements that were in the 2010 award.

We will be appearing at the listing of the matter before Senior Deputy President Hamberger on 15 November 2016.

Yours faithfully
**Bartier Perry**



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**Annexure B**

**Decision of Commonwealth Conciliation and Arbitration Commission in *The Transport Workers Union of Australia v A1 Carrying Co and others***

(20 February 1959)

NOT FOR SALE.

THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION.

In the matter of the *Conciliation and Arbitration Act* 1904-1958

and of

THE TRANSPORT WORKERS UNION OF AUSTRALIA
Claimant

*v.*

A1 CARRYING CO. and others
Respondents

(C No. 666 of 1957)

and of

GIBB AND MILLER LTD. and others
Appellants

*v.*

THE TRANSPORT WORKERS UNION OF AUSTRALIA
Respondent

(C No. 228 of 1959).

*Industrial dispute—Wages and working conditions for transport workers—Margins—Effect of individual responsibility of drivers upon assessment of margins—Junior rates—Minimum payment for work performed on Saturdays, Sundays and public holidays—Shift work—Deduction for housing accommodation—Boards of Reference—Amenities—Award made.*

*Appeal against award made by Commission constituted by a Commissioner—Margins—Retrospective operation of award—Minimum payment for work performed on Saturdays—Shift work—Public interest—Conciliation and Arbitration Act 1904-1958 ss. 34, 35—Appeal dismissed.*

Notification of a dispute between the above parties was given pursuant to section 28 of the *Conciliation and Arbitration Act* 1904-1956 by the Transport Workers Union of Australia.

The dispute came on for hearing before the Commonwealth Conciliation and Arbitration Commission (Commissioner Austin), in Melbourne, on 10th September, 1957.

*D. Corson*, of counsel, *W. H. Cheney*, *D. M. Lucas* and *G. J. Hill* for the Transport Workers Union of Australia.

*E. J. Clarkson* for The Victorian Chamber of Manufactures and others, with *K. Peisse* for the Victorian Automobile Chamber of Commerce, and with *B. Lyons* for the Tasmanian Timber Association.

*F. R. O'Connell* and *G. Fergi* for the Timber Merchants and Sawmillers Association.

*H. H. Bishop* for The Vehicle Manufacturers Association of Australia.

*K. J. Bradden* and *T. Brack* for Nestle's Food Specialities (Aust.) Ltd.

1957. MELBOURNE, Sept. 10.
1958. MELBOURNE, June 24, 25, 27; ADELAIDE, July 2, 3; HOBART, July 15; MELBOURNE, July 23-25, 31; Nov. 5, 7, 10-12, 18, 19;
1959. MELBOURNE, Feb. 9, 10, 20.
Commr. Austin. March 10, 13.
Kirby C.J. Gallagher J. Senr. Commr. Chambers. March 31; April 1, 2.
Kirby C.J., Ashburner J., Senr. Commr. Chambers.

N. 6566.—3369/59.

*Commr. Austin.*]

*K. W. McDermott* for Her Majesty the Queen in Right of the State of Victoria.

*E. N. West* with *R. H. Maher* for Her Majesty the Queen in Right of the State of Tasmania and another and with *S. S. Smith* for the Forestry Commission of Tasmania.

*J. S. Kerr* and *J. Gerrard* for the State Electricity Commission, Victoria.

*K. L. Hayes* for the State Rivers and Water Supply Commission, Victoria.

*R. A. Bell* and *F. E. Williams* for the Country Roads Board, Victoria.

*J. J. Paterson* for the Forestry Commission, Victoria.

*T. J. Forrestal* for the Department of Public Works, Victoria.

*J. G. Bailey* for the Melbourne Harbour Trust Commissioners.

*J. R. A. Russell* for the Hydro Electric Commission of Tasmania.

*K. W. Thorne* for Colonial Gas Association Ltd. and others.

*J. D. Keary* for the Flax Commission and another.

*C. M. Bryant*, *E. R. Gwyther* and *B. D. Purvis* for respondents members of the Victorian Employers Federation and others.

*G. E. Pryke* for respondents members of the South Australian Employers Federation and others.

*L. Rooney* for respondents members of the Employers Federation of Tasmania and others.

*G. C. Martin* for respondents members of the South Australian Chamber of Manufactures (Incorporated).

*W. H. Talbot* and *G. C. A. Pullman* for respondents members of the Victorian Road Transport Association.

*D. L. Fallon* for respondents members of the South Australian Road Transport Association.

*C. P. Tucker* and *T. R. Kent* for the Electricity Trust of South Australia.

*J. F. A. Howell* for the Ford Motor Co. of Australia Pty. Ltd.

*J. S. McManamny* for General Motors-Holdens Ltd.

*C. P. Tucker* for Her Majesty the Queen in Right of the State of South Australia (intervening).

On 20th February, 1959, the Commission issued the following decision and made the award hereinafter appearing:—

On 6th August, 1957 a notification pursuant to section 28 of the Act was filed by the Transport Workers' Union of Australia in connection with a dispute between the above parties *re* wages and working conditions of employees in the Transport industry in the States of Victoria, South Australia and Tasmania.

When this matter first came before me on 10th September, 1957, I found that a genuine industrial dispute within the meaning of the Act existed, and signed a record of findings accordingly. On the same day I

adjourned the proceedings to enable the parties to confer and I indicated that matters not readily agreed to could be discussed under the chairmanship of a Conciliator. I further indicated that when all means of conciliation had been exhausted I would ask the Conciliator to refer the outstanding matters to me for arbitration.

A series of conferences was held between the parties at various times and places and on 25th March, 1958, the parties met in Adelaide under the chairmanship of Conciliator Whitehead, and agreement was reached on a number of claims. Subsequently a report was received from the Conciliator, as follows:—

1. On the 5th day of August, 1957, Mr. W. H. Cheney, Federal Secretary of the Transport Workers' Union of Australia, lodged an affidavit with the Commission advising that a Log claiming wages and working conditions had been served on some 3,350 employers in the States of Victoria, South Australia and Tasmania and applied for an Order for Substituted Service.

2. On 6th day of August, 1957, the Federal Secretary of the Union advised that the claims set out in the Log had not been agreed to by the employers duly served.

3. The hearing of this industrial dispute was held before Mr. Commissioner Austin on 10th September, 1957, when it was found that an industrial dispute within the meaning of the Act, existed and was covered by the Log served by the Union.

4. On the same date, the proceedings were adjourned to enable the parties to confer.

5. A series of conferences were held between the parties at various times and places. On 25th March, 1958, the parties met in Adelaide with Conciliator Whitehead and on the basis of the present award agreed as set out in attachments Nos. 1 to 4 to this Report.

6. Having reached amicable agreement as set out in the attachments, the parties requested that the Commissioner for the industry be asked to set a date for the determination of the items still undetermined between the parties.

7. The parties agreed to continue negotiations in regard to certain of the undetermined clauses and should any further clauses be agreed, you will be advised in a supplementary report.

The report included four attachments marked "1 to 4" setting out separately clauses accepted by the parties as written into and varied from at the date of the report; clauses not agreed to; clauses specifically reserved to the respondents, namely:—

| Clause number. | Brief title. |
|---|---|
| 4 .. .. .. | Incidence, Parties Bound, etc. |
| 6 (b) .. .. .. | Contract of Employment. |
| 8 (c) .. .. .. | Juniors. |
| 10 .. .. .. | Wages. |
| 15 (c) .. .. .. | Hours of work. |
| 18 (b) (c) (e) .. .. | Overtime. |
| 22 (a) (c) .. .. | Sick Leave. |
| 28 (b) .. .. .. | Housing. |

and clauses specifically reserved to the claimant Union, namely:—

| Clause number. | Brief title. |
|---|---|
| 4 .. .. .. | Incidence, Parties Bound, etc. |
| 8 (a) .. .. .. | Juniors. |
| 10 .. .. .. | Wages. |
| 15 (c) .. .. .. | Hours of Work. |
| 18 (b) (c) (e) .. .. | Overtime. |

*Commr. Austin.*]

| Clause number. | Brief title. |
|---|---|
| 20 (e) (i) .. .. | Holidays. |
| 20 (f) (ii) .. .. | Holidays. |
| 22 (a) (b) (c) .. .. | Sick Leave. |
| 23 .. .. .. | Articles of Clothing. |
| 26 .. .. .. | Heavy Articles. |

In addition to the foregoing clauses of the award, the Union still has claims unsatisfied in respect to log claims Nos. 17, 18 and 41.

This is the first occasion for many years, so it was stated by Mr. Corson, that an industrial authority has embarked upon a complete examination of the values on which an award is based, consequently the representatives of the various parties to the dispute have given me a detailed description of certain grades and conditions.

Evidence was called on certain grades which the applicant relied upon to cover the interests of all award classifications. This evidence was supplemented by inspections and the following arguments in support of the claims:—

1. Increased motor traffic since 1949 and consequential repercussions to drivers.
2. Faster and bigger vehicles introduced into the industry since 1949, making more intricate and difficult driving duties.
3. Depreciation of the money value of margins since 1949.
4. The industry has not had an award completely determined on all factors related to the industry since 1950.
5. The 1955 variation following closely upon the Metal Trades Award variation of 1954[1] being interim in character, did not accord to the industry the full benefit of the " two and a half times " formula.

The claim is for substantial marginal increases as well as improved conditions, in order, as stated by its counsel, to restore parity with employees in other industries and whilst no disagreement exists between the applicant and the respondents as to the importance of the industry to the Australian economy, national progress, and conditions essential for efficient transport, disagreement does exist on the values each side to the dispute place upon them.

The evidence called by the claimant was restricted to certain classifications and certain conditions or issues of responsibility, vehicle-operating difficulties in traffic and parking, bigger vehicles and loads, nervous tensions and reactions, loading and unloading " know-how ", greater skills and increased traffic regulations. A substantial number of the exhibits presented by both contestants covered statistical and general development of the transport industry in Australia since 1950. Not only was attention paid to the motor industry but other matters such as population increase, vehicle operation development, mechanical loading and unloading aids, value of loads etc. In short, the representatives of the parties spared no effort to fully inform me by evidence, exhibits, inspections and submissions of every facet of the industry.

[1] 80 C.A.R., p. 3.

AWARD
E



I have herein referred to the grounds on which the applicant relies for increased margins and improved conditions and I outline the grounds on which the employers resist the claim:—

1. Industry changes admitted since 1950 have been fully compensated by the 1955 decision.[1]
2. That an increase to margins now will distort and disturb a relativity, not only within the framework of the award, but outside the award for comparable, near comparable and analogous industries.
3. A fixed pattern of wage fixation in the transport industry has applied to awards in the industry since the time of Mr. Justice Powers and the late Chief Judge Piper and the most recent awards—since 1949—have continued such pattern.
4. No alteration to margins should be approved on the sketchy evidence on selected classifications and the absence of evidence on all others.
5. Notwithstanding *prima facie* there may appear justifiable reasons for marginal increases, such action is not warranted in the light of the history of the margins for the industry and their position in wage fixation generally.
6. That margins are adequate and, in the main, conditions should not be altered.

The evidence covering the three States involved—Victoria, South Australia and Tasmania—in the main, was centred around such transport factors as bigger vehicles, bigger population, keeping abreast of regulations and rules, pedestrian problems, etc., all of which increased responsibility, onerousness, skills and capacity to competently carry out duties for an employer that were expected of transport drivers. The issue of responsibility is one that is exceedingly hard to measure in this industry and can only be broadly gauged, having in mind and giving full cognisance to all facets of the industry upon the driver. I am satisfied that responsibility is a variable condition, never constant, but depending upon many conditions associated with the employee's work. I suppose one of the most important of such factors is the employer-employee relationship that exists in this industry and, on that score, I am satisfied that, whatever it may be, it is on a closer individual basis, again in the main, than probably any other industry of such proportions. The closer the understanding and tie between the two, tends, in my opinion, to create greater responsibility, yet that yardstick cannot be the sole basis for fixing some degree of the issue of responsibility. Young men in the industry would be less consciously affected than men getting on in years and with long service, and so one could enlarge on the subject at length. Suffice for me to say on this point that I am satisfied that responsibility is a real factor in this industry when taking into consideration the individuality indispensable with motor transport and the keenness that drivers evince in maintaining a fair day's schedule of work, whether it be deliveries, haulage of heavy loads, machinery transportation, or road work, each taking apparent pride in his machine, speedy turn around accident free, and availability to his employer.

(1) 83 C.A.R., p. 236.

*Commr. Austin.*]

This is an industry that is dependent on individual application more so than most industries. I know of no other industry where the major part of each day, in most instances, needs the services of capable and trustworthy employees who perform the work for which they are paid without constant supervision.

There is no doubt in my mind that the responsibility briefly outlined, not overlooking many other factors that contribute, to some degree, enlarges this most valuable attribute in this industry. I might add that any deficiency on this phase of employment would result in a less successfully operated industry.

Another factor which supports the claim is the individual application, in nearly every instance, and contact with clients in reception and delivery by employees. This industry is dissimilar to other industries, chiefly due to the fact that employees have to carry out all functions of their employment singly.

One cannot lightly dismiss the value of an employee to his employer in the transport industry, notwithstanding the type of work on which he is engaged. Some make deliveries to suburban homes, others to stores and the like. Heavy haulage from wharves and manufacturing points all entail, more completely than in most other industries, intimate individual representation between the owner of the vehicle and the parties whose goods are being carried which, joined to "responsibility" herein referred to, satisfies me that on these aspects of the case there is justification for marginal increases.

The industry of transport driver requires certain skilled qualities. I extend the definition of "skill" to, not only the fact that a driver's licence entitles a person to drive, but to work with mechanical aids, manual loading, efficient operation of prime-mover when pulling trailers, etc. All these attributes, and others referred to during the hearings, are important, and my conclusion on this point is that this factor has developed since 1949 and should be recognised in the marginal fixation in this dispute.

It is not my intention to deal at length with many of the issues raised by the claimant and the respondents because, on examination of evidence and submissions, I find that no great disagreement is apparent. The variance between the parties on such points as population increases; increased traffic; size of vehicles; increased load values; road problems; greater use of road vehicles for transportation of goods, etc.; school hazards; pedestrian crossings, etc., is on the monetary value they collectively represent. However, one part of the respondents' case is based upon a claim that offers made in the past to the claimant, having settled the then existing disputes, entitled them to recognition of capacity to fairly evaluate all phases of the work on a fair and equitable monetary basis and, as this was the case in 1950 supplemented by a decision in 1955[1], they were not prepared to offer any increase on the margins now prescribed. In the circumstances, I should accept their viewpoint that by refusing an increase they have fairly established for me a pattern which not only is consistent with past award-making in the industry, but fully covers the period of all development since 1955.

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(1) 83 C.A.R., p. 236.

AWAR



I am appreciative of the cordial relations that have existed between the parties, but am not disposed to accept the issues presented by either parties on the claim as a reason why I should accept either one or the other viewpoint for the settlement of the dispute. I have dealt with the claim briefly on three grounds, without covering the arguments but drawing conclusions from the wealth of material before me in exhibits and transcript and, coupled with other aspects, including, generally speaking, work values and depreciation of money value of the margins, I have come to the conclusion that justification does exist for marginal increases.

There is no evidence before me that would warrant differential treatment on the question of margins as between the States of Victoria, South Australia and Tasmania. The award has, over a long period of time, prescribed one marginal amount for the classified work wherever it was effected. Consequently, I do not intend to depart from long-standing uniformity as, in my opinion, the relative effects of traffic responsibility, skills, work value, etc., are the same.

During the proceedings much emphasis was placed on driving reactions and high tension working by the claimant, replied to in detail and with equal emphasis by the respondents. I find it difficult to appreciate to what extent such conditions are important when fixing a margin. Each witness, both young and elderly, informed me that, during the day, many incidents occurred which later created reactions that caused him some concern. I suppose every car or lorry driver has experienced some tension and reaction to incidents in the course of his driving, but to measure its compensatory marginal factor, if any, on the evidence in this case, is beyond me.

One other factor related to the industry is that of loading and unloading and laborious work. Here again, the evidence was not greatly in conflict but the parties were sharply divided as to the value they represented in margins and conditions. Some loads are undoubtedly difficult, not only the stowing aspect but also unloading. Others are heavy and require "know how", probably more so than brute strength, whilst much of the goods and material handled is light and/or loaded and unloaded by means of mechanical aids. I have included every consideration of the differing phases of this work in fixing the margins and, in addition, consider the provision in clause 26, adequate.

The margins also include consideration for damage to clothing and boots and other incidentals to this particular part of the claim.

I have not specifically referred to all the exhibits and the submissions made during the hearing, nor do I intend to deal in detail with all the points the parties pressed, but I want to emphasise that every consideration has been given to the arguments advanced and that this decision is in settlement of the log in its entirety on every issue raised.

The last matter affecting margins is junior percentages, in respect of which substantial increases were claimed by the claimant. Naturally, the employers opposed increases, relying upon long-standing relativity with percentages for juniors in other awards to justify rejection of this claim. The claimant, on the other hand, submitted that the junior in the transport

industry should not have his percentage rate dependent on an unrelated relativity with certain other junior rates. In the industry it is common practice to have juniors working alone and without supervision.

I have given serious thought to this matter and have decided that the percentages now prescribed should be more closely related to each other. There are three progressions at present, namely, "Under 19 years of age—65 per cent. of the total wage payable to an adult for the class of work performed; 19 years and under 20 years of age—75 per cent. of the total wage payable to an adult for the class of work performed; and 20 years of age—the full rate payable to an adult employee for the class of work performed."

I find the disparity in the progression for this industry greatly favouring the move to "over 20 years", even though it appears that the overall value of the duties performed by juniors is fairly evenly related. I would regard some period of the first year that a junior is employed as one that has some productivity values on a driving basis for the employer and the balance of the time taken up in experience and learning the industry. In hardly any other industry, in my experience, would juniors so early in their career, return anywhere near the same volume of production, consequently I have decided to increase the percentage from 65 per cent. to 70 per cent. to fully recognise the work involved, and the second progression will move to 80 per cent. The progressions will move from 70 per cent. to 100 per cent. of the full rate payable to an adult for the class of work performed.

I have decided to extend the minimum payment for Sunday work, Saturday work and for work performed on public holidays. On the evidence I am satisfied that employees who co-operate freely—and on this aspect there was high appreciation from the employers—on the above period when overtime is necessary should receive a minimum equivalent to one half day payment. There can be no doubt in the minds of any one that family, social and other forms of associations are mainly planned for those days, consequently intrusion into such arrangements should be rewarded by a guarantee of at least four hours.

The respondents strongly pressed for shift work provisions which was opposed by the applicant. Witnesses before me outlined difficulties experienced in the undertakings they were intimately connected with. They pointed out that the costs associated with the projects they were engaged in adversely affected the public interest, due to heavy overtime working and special payments where the Union had agreed to shift work. The claimant claimed that there being only two employers affected, each of whom had covered the disability by making provision to cover costs of such working when tendering for the work, it appeared reasonable to conclude that the industry would not extend its operations beyond the present spread of hours and that the award should not be altered. I have given this issue much thought and have decided not to alter the award as sought, which incidentally, is on the same basis as now prescribed in the Metal Trades Award. I am not satisfied that an urgency exists or that the present shift work is work that is likely to expand in the near future. However, I appreciate the need for a shift work clause for an industry which depends

upon maximum utilisation of plant and the operating of manpower and plant at periods best suited for expeditious completion of work, and to the effective utilisation of manpower and unhindered operation of machinery, and for those reasons I reserve rights to the parties to proceed on this issue during the duration of this award.

In clause 28, by altering the amount of 15s. to 25s., I have merely fixed the payment of rental for "proper housing accommodation for an employee and his wife and family" who is required to live on an employer's premises on a scale related to capital values, rates, etc. between the year 1949 and 1959. Whilst, on the surface, the figures appear low, they represent an employment condition which, in my opinion, is really tantamount to an indirect form of an over-award payment. I am not fixing 25s. as a fair and equitable figure on any other basis than that 25s. at 1959 is equal to 15s. at 1949.

The Board of Reference clause has been altered to eliminate redundancy and to provide proper authority and clarity on the powers and rights possessed by the Board. The clause will be based on a variation to the Ship Painters and Dockers Award made by Mr. Commissioner Horan on 24th October, 1958,[1] which appears to fully cover the functioning of a reference board.

The last matter I mention in this decision relates to "Amenities" in respect of which the claimant requested specific directions in an appropriate clause to ensure certain amenities for the industry. The evidence shows that attention to this work factor has been given by some employers and, to a limited extent, by others. However, neglect by certain employers to provide amenities has resulted in this claim being made. My attitude over the years on the issue of amenities has been to regard the legislative action taken by statutory bodies in the various States as sufficient for the normal requirements of employees engaged in different industries. My experience has been that employers apply themselves to the task of implementing regulations, etc. on a reasonable basis for their employees. I would regard the parties to this dispute as reasonable people (employer and employee), who would approach the question of amenities realistically and give full regard to the actual needs of those who would use them. The employers, during the proceedings, gave to the claimant and myself an undertaking to provide reasonable washing facilities which will greatly improve the position for those employees where such facilities at present do not exist. I sincerely trust that the employers' commendable attitude on this question is implemented as quickly as possible. I do not intend to make an order on amenities for the reason that I am satisfied, in the main, that State Legislation is adequate, that improved amenities can best be introduced by discussion between reasonable people and, finally, that problems of interpretation are likely to create industrial unrest on award provisions on the matter. I have not set down my reasons, in some instances, for refusing to alter existing provisions. Suffice me to say that the arguments on these subjects have not impressed me sufficiently to make a change to conditions long standing and with a relationship to similar provisions in other awards.

(1) Serial No. A6482.

*Commr. Austin.*]

I have decided to make the award retrospectively active from 4th January, 1959, in order to compensate the people concerned for an unavoidable delay in finalising this dispute.

It remains now for me to briefly mention my appreciation of the thorough, comprehensive and skilful presentation of the factors associated with the work of the employees in the transport industry by counsel for the applicant, and the valuable appraisement and analysis of the evidence by the respondent representatives. In view of the fact that this is the first occasion on which I have had to settle a dispute in the transport workers industry, all I need to say is that I am satisfied it would be impossible for any one occupying the position I occupy to complete the hearing without the capable examination of all phases of the case by the parties associated with the industry.

*Award order and prescribe:—*

TITLE.

1. This award may be referred to as the Transport Workers (General) Award, 1959.

ARRANGEMENT.

2.

| Subject-matter. | Clause number. |
|---|---|
| Annual leave | 21 |
| Arrangement | 2 |
| Articles of clothing | 23 |
| Award to be exhibited | 29 |
| Board of Reference | 33 |
| Casual employees | 7 |
| Change (money) | 24 |
| Change of place of employment | 9 |
| Contract of employment | 6 |
| Definitions | 5 |
| Duration of award | 4 |
| Exemptions | 4 |
| Gear to be provided | 25 |
| Heavy articles | 26 |
| Highest function | 12 |
| Holidays | 20 |
| Horse stabling | 27 |
| Hours of work | 15 |
| Housing | 28 |
| Incidence of award | 4 |
| Juniors | 8 |
| Meal times | 19 |
| Modifications | 4 |
| No reduction in wages | 11 |
| Notice board | 30 |
| Operation of award | 4 |
| Overtime | 18 |
| Parties bound | 4 |
| Payment of wages | 14 |
| Previous awards superseded | 3 |
| Sick leave | 22 |

*NOTE.—On 2nd April, 1959, an appeal by Gibb and Miller Ltd. and others against the above award was dismissed by the Commission (Kirby C.J., Gallagher J., Senior Commissioner Chambers)—see pp. 83-86 hereof.*

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

**Submission from**: Truck Moves Australia Pty Ltd, Quick Shift Vehicle Relocations Pty Ltd and Vehicle Express Pty Ltd

**RE**: the application by the Transport Workers Union to vary the coverage provision in the Road Transport and Distribution Award 2010 to capture the industry of our clients.

The material to be relied upon at the hearing commencing 6 March 2017:

**Outline of submissions** dated 1 March 2017.

**Witness statements** from:

- Mr Matthew Whitnall dated 1 March 2017;
  - Part 1 (Statement and attachments MW-1 to MW-11)
  - Part 2 (MW-11-continued to MW-13)
- Mr John Bradac dated 1 March 2017
- Mr Don Clayton dated 1 March 2017