

IN THE FAIR WORK COMMISSION

Four yearly review of modern awards – Finalisation of exposure drafts – oil distribution workers (AM2019/17)

Road Transport and Distribution Award (the Award) - AM2014/212

Submissions of the National Road Transport Association (NatRoad)

Background

1. These submissions are filed on behalf of the National Road Transport Association (**NatRoad**). Following the proceedings on 9 October 2019 when, inter alia, the Exposure Draft of the *Road Transport and Distribution Award (the Award)* was considered by the Full Bench, an issue arose which prompted NatRoad to make a written submission dated 14 October 2019.¹ The issue is the manner in which the wages of oil distribution workers are calculated and whether that is accurately reflected in the Exposure Draft of the Award.
2. As a consequence of the making of the 14 October 2019 submission, and a telephone mention on 24 October 2019, the Commission issued Directions² in this matter. Inter alia the Commission directed:

All interested parties are to file a written submission setting out whether they support a divisor of 35 or 38 for the calculation of hourly wage rates for oil distribution workers covered by the Road Transport Award and the submissions they advance in support of that position.³

3. This submission sets out the NatRoad position as required by the Directions.

Current Relevant Provisions

4. Clause 23 of the Award establishes the ordinary hours of oil distribution workers. Clause 23.2 of the Award states: “The ordinary hours of work will be 35 per week or 70 per two week period.” Clause 23 does not establish that the 35 hour week translates to a divisor of 35 in respect of minimum wages. It is silent on that matter. Further, clause 15.2 is clear in its prescription of the minimum wage rates. It says: “The minimum wage rates of pay for a full-time adult employee are set out below.” There is no qualification to this statement. There is no cross-reference to clause 23 or a separate reference to oil distribution workers and the manner of the calculation of their wages. Accordingly, NatRoad has taken the position that oil distribution workers receive the minimum wage rates of pay as set out in clause 15.2 with the calculation of those minimum weekly rates to an hourly rate being reached using a divisor of 38.
5. That position led to our submission that certain of the Schedules in the Exposure Draft should be deleted as there has been no determination of the Commission that the divisor

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201917-sub-natroad-141019.pdf>

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201917-dirs-241019.pdf>

³ Id at para 4.1

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for oil distribution workers in respect of the weekly rate is 35. We reiterate that whilst clause 23 of the current Award specifies that employees engaged in the transport and/or distribution of petroleum products in their raw or manufactured state enjoy a 35 hour week, the nub of the issue is as to whether the weekly rates in clause 15.2 are divided by 35 or by 38. If the Draft stands unaltered the question is decided in favour of the divisor being 35.

6. It is NatRoad's contention that the Draft should reflect the status quo.

Award History

7. The Full Bench which established the Award⁴ had this to say about oil distribution workers' wages:

*[176] We acknowledge the fact that the rates in the Transport Workers (Oil Distribution) Award 2001 and the Transport Workers (L.P. Gas Industry) Award 2005 are higher than rates in the other pre-reform transport awards. We have considered the history of adjustment of the rates in those awards. It appears that each award had, in the past, operated as a paid rates award and it is not apparent that when the awards were simplified the rates were converted to minimum rates. **In any event the majority of rates in other pre-reform transport awards and NAPSAs weigh heavily in favour of them being reflected in the rates in the RT&D Modern Award.** We need say little about the TWU suggestion that we introduce an 11% industry allowance in the oil distribution and LP gas sectors. The union did not raise this proposal in submissions filed in accordance with the published timetable. When it was raised late in the consultation process little was said to justify it. Such an allowance would normally apply to all employees in the sector and for all purposes and before we would consider the introduction of such an allowance employers would need to first be alerted to the fact it was being sought and then an opportunity, on the days set aside for Full Bench consultations, to make submissions about it. We have decided that no such provision should be in the RT&D Modern Award. The rates for these two sectors can be considered further in the context of transitional provisions.*

[177] We next turn to the hours clause in the RT&D Modern Award and in particular cl.23 which provides for ordinary hours of work for oil distribution workers. The exposure draft clause reflected the existing regime of hours being 35 per week or 70 per fortnight. We are aware that these hours have operated within these sectors of the transport industry for many decades. We considered whether, in the context of this modern award, the ordinary hours for this sector of the industry should be less than those for the remaining sectors. In this respect we acknowledge the submissions of the Oil Industry Industrial Committee as to why two different hours clauses may not be appropriate. On balance however we have decided it is appropriate to retain the two minimum ordinary hours clauses. As a consequence of doing so we have inserted into the facilitative provisions and the provisions of cl.23 additional flexibilities contained in existing awards. We should indicate that it is not our intention that these minimum hours of work should extend any further than they have traditionally applied. It may be that, at an appropriate time, consideration needs to be given to variations to the award to ensure these constraints are reflected in it.⁵

⁴ [2009] AIRCFB 345 http://www.airc.gov.au/awardmod/databases/general/decisions/decisions_030409.htm

⁵ Id at paras 176 and 177

8. The bolded sentence above clearly indicates that minimum wages for oil distribution workers were to be reflective of “the majority of rates” in other pre-reform awards and NAPSAs. The Full Bench has clearly separated its consideration of minimum rates in paragraph 176 of its decision from the ordinary hours of work issue that is then addressed in paragraph 177 of its decision. The Award reflects this distinction. It should not now be interpreted so that these issues are conflated.
9. We submit that the Full Bench considered pre-modern awards and that its consideration led to a separation of the issue of minimum wages from ordinary hours of work. We submit that this accords with the omission from the Award of any clear statement of a linkage between the ordinary hours of work of oil distribution workers and the minimum rates of pay as appeared in the federal pre-modern award, the *Transport Workers (Oil Distribution) Award 2001*⁶ as follows:

*Ordinary-time rate means for an employee (other than a casual employee) 1/35th of the wage rate prescribed in clause 16 - Classifications and wage rates, of this award for the classification in which the employee is employed.*⁷

10. Whilst the disjunction between the ordinary hours of oil distribution workers and the setting of their minimum wage may lack coherence in that there is a clear linkage between these two concepts in other modern awards, interpreting the Award now so as to make that link is not founded in the manner in which the Award is currently established. In addition:

Many people in the law believe that formal validity – 'logic' or 'coherence' if you will – is a worthwhile goal. I am not sure, however, that all those who invoke coherence as an informing legal value necessarily have themselves the most complete grasp on the distinction between valid reasoning (with which logic and coherence are solely concerned) and arguments that are correct or right (which may or may not also be logical or coherent).

And

(I)t was Oliver Wendell Holmes Jr who observed that '[t]he life of the law has not been logic; it has been experience'.⁸

11. The Full Bench which established the Award created a distinction between the ordinary hours of oil distribution workers and their minimum wage rates, a distinction that should not be set aside because of the manner in which an Exposure Draft of the Award is now proposed. The experience or the history of the Award shows that there has been a distinction between the setting of ordinary hours and minimum wage rates, a distinction that should be maintained.

⁶ <http://awardviewer.fwo.gov.au/award/show/AP813252>

⁷ Id clause 8.11

⁸ Perram J *Constitutional Principles and Coherence in Statutory Interpretation* 11 November 2016

<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perram/perram-j-20161118>

Variation of the Award?

12. NatRoad notes that there has been no application by the Transport Workers Union or another party to change the status quo. Insofar as the matters in s134(1)(a)-(h) are concerned, these proceedings are in relation to whether the Exposure Draft changes the terms of the Award or reflects them. We also note that a fundamental principle applied in modern award proceedings is that the broad scope of the four yearly review does not obviate the need for a merit argument to be advanced in support of a proposed variation.⁹ No such merit arguments have been advanced as a trigger for the current consideration of the issue before the Commission.
13. In addition, in the same Full Bench Decision where the proposition about a necessary merit argument to be advanced was set out¹⁰ it was emphasised that “[i]n the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.”¹¹
14. The Exposure Draft should reflect the status quo as outlined in this submission.

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⁹ [2015] FWCFB 3406 at para 22

¹⁰ Id

¹¹ Id at para 23