Industrial Relations Commission

New South Wales

Case Name:	Transport Industry – General Carriers Contract Determination
Medium Neutral Citation:	[2016] NSWIRComm 3
Hearing Date(s):	16, 17, 18, 19, 20 and 30 November 2015; 2 December 2015
Decision Date:	29 April 2016
Jurisdiction:	Industrial Relations Commission
Before:	Kite AJ
Decision:	I am satisfied that the Transport Industry – General Carriers Contract Determination should be varied largely in accordance with MFI E so as to provide fair and reasonable conditions for owner-drivers and contractors. In these circumstances, I have decided to rescind the Interstate Determination and replace it by the Transport Industry – General Carriers Contract Determination. I will give the parties a short period to consider these reasons before making any formal orders. I propose, after hearing from the applicant as to the time required, to direct that the applicant prepare short minutes of order, including a draft interim determination, giving effect to these reasons.
Catchwords:	CONTRACT DETERMINATION – application to vary – principles to be applied – relevance of wage fixation principles – fair and reasonable conditions – relevance of consent or non-opposition of respondents – consent to division of proceedings into two stages – first stage to deal with non-rates issues – whether coverage of determination should be extended – whether rescission

of another determination should be ordered – whether second determination of continuing practical effect – whether "purpose" clause should be included – whether principal contractors should provide a copy of the determination to each contract carrier engaged – whether a cartage rate schedule should be provided before work commences - whether compensation should be paid for time lost during repainting of vehicle – whether work time should include mandatory short fatigue breaks and time lost due to accident or breakdown – whether principal contractors should be obliged to develop drug and alcohol policies or programs –records to be maintained by principal contractors – whether a deeming clause should be included if records are not kept.

Legislation Cited:

Fair Work Act 2009 (Cwlth) s 125
Heavy Vehicle National Law (NSW)
Industrial Arbitration Act 1940 (NSW) s 20
Industrial Relations Act 1996 ss 3, 163, 313, 316 320
Interpretation Act 1987 (NSW) s 12

Cases Cited:

Hildred v Richardson 1971 AR 1019
In re Butchers, Wholesale (Cumberland) Award 1971 AR 425
Milk Carters (Country) Conciliation Committee 1941 AR 625
Old UGC Inc v Industrial Relations Commission of New South Wales [2004] NSWCA 197; 60 NSWLR 620
Old UGC Inc v The Industrial Relations Commission of New South Wales [2006] HCA 24; 225 CLR 274
Re Annual Work Program [2013] RSRTFB 7; 239 IR 129
Re Crown Employees' Education Officers Award (1975) AILR 863
Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No.2) [2006] NSWIRComm 328; 158 IR 17
Tod v Reiher 1960 AR 64
Transport Industry - General Carriers Contract Determination Application by Australian Road Transport Industrial Organisation, New South Wales Branch for removal of Special Fuel Price Surcharge [2010] NSWIRComm 133

	Williamson v Ah On (1926) 39 CLR 95
Texts Cited:	Report to The Honourable E A Willis, BA, MLA, Minister for Labour and Industry on Section 88E of the Industrial Arbitration Act, 1940-1968 in so far as it concerns Drivers of Taxi-cabs, Private Hire Cars, Motor Omnibuses, Public Motor Vehicles and Lorry Owner-Drivers - NSW industrial Relations Commission Full Bench 1967 Safe Payments – Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry - Report by the National Transport Commission October 2008
Category:	Principal judgment
Parties:	Transport Workers' Union of New South Wales ("Applicant" or "TWU") Australian Federation of Employers and Industries ("AFEI") Australian Road Transport Industrial Organisation, New South Wales Branch ("ARTIO") Australian Industrial Group New South Wales Branch ("AIG") Linfox Australia Pty Limited ("Linfox") Mainfreight Distribution Pty Limited ("Mainfreight" as intervener) Master Builders' Association of New South Wales ("Master Builders") NSW Business Chamber Limited ("NSWBC") TNT Australia Pty Limited ("TNT") Toll Holdings Pty Limited ("Toll")
Representation:	O Fagir of counsel (TWU) N Ward and K Scott (NSW Business Chamber) J Murphy of counsel (Courier and Taxi Truck Association) M Baroni (Linfox and ARTIO) D Sloane (Toll) D Bray (AIG) M Moir of counsel (TNT) J Oakes (Master Builders) M Seck of Counsel (Mainfreight) J Light and P Thomson (AFEI)

Solicitors:
Transport Workers' Union of New South Wales (TW")
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Australian Federation of Employers and Industries (AFEI)
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Toll Holdings Pty Limited (Toll)

File Number(s): 2016/24907 (formerly IRC 1037 of 2013)

DECISION

1 In this matter the Transport Workers' Union of New South Wales ("TWU" or "applicant") seeks to vary the Transport Industry – General Carriers Contract Determination ("the Determination" or "GCCD") pursuant to s 320 of the *Industrial Relations Act 1996* ("IR Act"). The original application was filed on 13 December 2013.

2 There followed, throughout 2014 and in the first half of 2015, numerous conciliation conferences overseen by the Industrial Relations Commission of NSW ("the Commission") as well as conferences between the parties, either directed by the Commission or undertaken voluntarily. The result was a progressive and extensive narrowing of the issues in dispute.

3 Notwithstanding these constructive developments, by July 2015 it had become apparent that agreement could not be reached on a range of issues. Directions were made with a view to arbitrating those matters. At the request of the parties the remaining issues have been split into "non-rates" issues and "rates" issues. Stage one of the arbitration proceedings concerns the "non-rates" issues. There has been ongoing conciliation in relation to the "rates" issues concurrently with the hearing and determination of stage one.

4 The above developments led to the TWU filing amended applications on 16 July and 13 August 2015. By its amended application filed 13 August 2015, the TWU submitted it seeks to:

> modernise the language, structure and content of a document which has developed piecemeal over thirty one years;
>
> address certain ambiguities in the current instrument;
>
> address, at least in part, the gaps in its current coverage; and
>
> include in the instrument appropriate new provisions.

5 The following parties were named as respondents to the application:

- New South Wales Business Chamber Pty Limited ("NSWBC");
- Australian Federation of Employers and Industries ("AFEI");
- Australian Industry Group New South Wales Branch ("AIG");
- Australian Road Transport Industrial Organisation of New South Wales ("ARTIO");
- Courier and Taxi Truck Association;
- John Fairfax Publications Pty Limited;
- TNT Australia Pty Limited ("TNT");
- Toll Group ("Toll");
- Mail Call Couriers Pty Limited ("Mail Call"); and
- Master Builders' Association of New South Wales ("Master Builders")

6 In addition to the respondents named in the application Linfox Australia Pty Limited ("Linfox"), a member of ARTIO, entered an appearance and sought to be heard in its own right. No objection was taken to its appearance. A reference in this decision to "the respondents" shall include Linfox unless otherwise indicated. Brickworks Limited also appeared during the early stages of proceedings although not named as a respondent. In correspondence to the Commission dated 27 July 2015 from its solicitors, Harmers Workplace Lawyers, Brickworks sought to be excused. There was no objection to that course.

7 Shortly prior to the hearing Mainfreight Distribution Pty Limited ("Mainfreight"), through its solicitors, wrote to the Commission giving notice of an application to intervene in the proceedings for a limited purpose. The application was opposed by the TWU. Leave was granted to intervene for the purpose of cross-

examining two witnesses and making submissions as to the conclusions which may be drawn from their evidence as to the conduct of Mainfreight. No application was made by Mainfreight to call evidence of its own.

8 Of the named respondents (listed in [5] above) John Fairfax Publications Pty Limited did not appear before the Commission. On 11 November 2015, the Courier and Taxi Truck Association sought to be, and were, excused from further appearance in light of the TWU no longer pressing, in this application, for the Determination to regulate couriers and taxi trucks. Mail Call and Couriers Please Pty Ltd (which had entered an appearance although not named as a respondent) also ceased to participate in the proceedings.

Background

The Determination

9 The Determination covers contracts of carriage within specified geographical limits. Those geographical limits may be described as follows;

(a) within the County of Cumberland (effectively metropolitan Sydney); and

(b) elsewhere in the State of New South Wales provided the start and finish places of the contract of carriage are within a 50 kilometre radius of the contract carrier's "starting place".

10 Those geographical limits are further qualified by exclusions specified in cl 2(1)(b) of the Determination. The specified exclusions relate to contracts of carriage regulated by other Contract Determinations or Contract Agreements.

11 The Determination was made in 1984 by consent.

TWU's application

12 The TWU submitted that, since its establishment, the Determination has been subject "only to *ad hoc* variations" and has not been the subject of substantive review. In such circumstances, it contended that a comprehensive review of the Determination was warranted so as to modernise and update the instrument. The parties have generally approached the proceedings in that way. In addition, the TWU sought to extend the scope of the application by removal of the geographical limits and varying the exclusions.

13 The respondents in varying degrees supported a review of and variations to the Determination.

(1) NSWBC submitted:

NSWBC has not taken any in-principle opposition to the notion of modernisation, provided it produces a fair, balanced and practicably workable Determination.

In light of this, NSWBC has participated in and at various stages led the conciliation process with the TWU and various other principal contractor interests which has culminated in the formation of the document known as **MFI-D**.

MFI-D is the outcome of a process of negotiation and compromise by all parties who support or do not oppose the content of **MFI-D**.

For its part, NSWBC advances and commends **MFI-D** (subject to the comments below) as a fair, balanced and practicably workable modernisation of the Determination.

(2) ARTIO submitted:

ARTIO NSW supports the making of an amended Determination which contains provisions which are contained in both the TWU Draft and the NSWBC Draft.

Wherever there are differences between the TWU Draft and the NSWBC Draft, ARTIO NSW generally supports the NSWBC Draft and would not object to a Determination being issued on those terms. ARTIO NSW also generally supports the submissions of Toll Holdings Limited to the extent that those submissions vary from the NSWBC Draft.

(3) Toll submitted:

Toll does not necessarily concede that a case has been made out for any changes to the GCCD. That said, Toll sees value in modernising the document (which is essentially the subject of the current stage of the proceedings) and ultimately revisiting the rates provisions (which will be dealt with in "stage 2" of the proceedings).

Subject to the matters set out below, and to some extent notwithstanding Toll's earlier submissions, Toll would support the Commission making a contract determination in the terms of MFI D.

(4) TNT submitted

TNT broadly supports the variation of the existing General Contract Carriers Determination (**GCCD**) in the terms proposed in MFI D. This reflects TNT's support for the proposition that the GCCD should be updated and modernised.

(5) AIG and AFEI, while maintaining general opposition to the application did not oppose updating a number of clauses.

(6) Master Builders chief concern was the erosion of the current "existing exemption" for the building and construction industry. It made no specific submissions as to other clauses.

The ambit of the issues in dispute

14 Following service of the amended application other parties developed and served draft determinations in response. The parties all accepted that the competing drafts produced by the TWU, NSW Business Chamber and ARTIO, had "substantial common ground" with regard to much of the content of the proposed determination. The draft prepared by the NSW Business Chamber was supported either directly or as the preferred alternative by the other respondents, in the event their primary submissions were not accepted.

15 As is implicit in the NSWBC submission quoted above at [13], the common ground led to the production of a consensus document which became MFI D in the proceedings. MFI D was subsequently revised slightly and the revised document became MFI E. This last document highlighted the areas of consensus and difference and was the focus of the final submissions of the parties.

16 NSWBC submitted that the issue of coverage was a central feature of the matter. The remaining substantial issues in dispute in stage one were:

(1) Definition of "work time";

(2) The "Promotion of Determination" clause proposed by the TWU;

(3) The "Termination" clause; and

(4) The "Purpose" clause (referred to during the hearing as the "objects clause")

17 The issue of "coverage" was of primary importance to AIG, AFEI and Master Builders. Following a further requested conciliation during an adjournment in the arbitration, Master Builders reached agreement with the applicant as to a revised definition of "Specialised Vehicle" limiting coverage in the building and construction industry. That revision accommodated Master Builders concerns if the Commission was otherwise satisfied that coverage should be extended.

18 AIG, supported by AFEI, raised a number of other issues relating to the exclusion of certain clauses and or drafting.

Conduct of the proceedings

Evidence

19 Mr O Fagir, for the TWU, relied on the following evidence in support of the application insofar as it relates to stage one:

- Witness Statement of Michael Aird filed 11 September 2015;
- Witness Statement of Gary Reeves filed 11 September 2015;
- Witness Statement of Kevin Amos filed 11 September 2015;
- Witness Statement of Shane Michael Court filed 11 September 2015;
- Witness Statement of Darron Miles filed 11 September 2015; and
- Witness Statement of Maki Danalis filed 11 September 2015.

20 Each of these witnesses was required for cross-examination.

21 On 18 November 2015, a witness statement of a driver ("Driver A") previously engaged with a transport company not affiliated with the respondent organisations was tendered and relied upon by the TWU. The tender was contested by the respondents on the basis that Driver A was not available for cross-examination notwithstanding being required for that purpose. It was submitted by the TWU that the reasons he was not available were:

> [F]irstly, that he doesn't think he can cope with the anxiety of attending the Commission and being cross examined; and, secondly, that he is concerned that, if his name appears in the decision, he will develop a reputation as a troublemaker and that will hinder his efforts to obtain work in the industry, particularly in circumstances where he is currently out of work.

22 I allowed the tender, while upholding objections to some paragraphs, and marked the statement Exhibit 17. The weight to be attached to this evidence is to be assessed in this context and in light of the provisions of s 163(1) of the IR Act. Ultimately I did not find that the evidence in Exhibit 17 added to that provided by other witnesses and in so far as it was uncorroborated I have not attached any weight to it.

23 The only witness evidence called on behalf of the respondent parties was led by Toll. It consisted of:

- Witness Statement of Elvis Basaric filed 23 October 2015;
- Witness Statement of Andrew McArthur Eastick filed 26 October 2015;
- Witness Statement of Joshua Peacock filed 23 October 2015;

- Witness Statement of Warwick Rust filed 23 October 2015;
- Witness Statement of Bruce Rowan filed 23 October 2015; and
- Witness Statement of Michael Freestone filed 26 October 2015.

24 Mr Rowan and Mr Freestone were required for cross-examination.

Statutory Framework

25 Section 313 of the IR Act sets out the jurisdiction and powers of the Commission with respect to contracts of carriage. It provides:

> **313 Jurisdiction of Commission with respect to contracts of carriage**
>
> (1) The Commission may inquire into any matter arising under contracts of carriage and may make a contract determination with respect to remuneration of the carrier, and any condition, under such a contract.
>
> (2) In exercising its jurisdiction under this section, the Commission may:
>
> (a) include in the remuneration of persons affected by its determination such allowance instead of annual or other holidays, sick leave or long service leave as it thinks fit, or
>
> (b) otherwise make provision for all or any of those matters.
>
> (3) The Commission may, after inquiry, make a contract determination with respect to the records to be kept by principal contractors in respect of contracts of carriage.

26 Section 316 provides:

> **316 Making of contract determinations**
>
> (1) After hearing an application for it to exercise its jurisdiction under this Part, the Commission may:
>
> (a) dismiss the application, or
>
> (b) make a contract determination with respect to the application.
>
> (2) When the Commission makes a contract determination:
>
> (a) it may defer the operation of the determination wholly or in part for such period or periods as it thinks fit, and
>
> (b) it must specify the class or classes of contracts in respect of which the determination is to operate (including classes defined by reference to a named bailor or principal contractor).

27 Section 320 provides:

> **320 Variation or rescission of determinations**
>
> The Commission may vary or rescind a contract determination and, when it rescinds a determination, it may replace that determination with a new determination.

28 It is convenient to note also s 3 and s 146(2) of the IR Act. They provide:

3 Objects

The objects of this Act are as follows:

(a) to provide a framework for the conduct of industrial relations that is fair and just,

(b) to promote efficiency and productivity in the economy of the State,

(c) to promote participation in industrial relations by employees and employers at an enterprise or workplace level,

(d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,

(e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,

(f) to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value,

(g) to provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality,

(h) to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations.

146 General functions of Commission

(1) ....

(2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:

(a) the objects of this Act, and

(b) the state of the economy of New South Wales and the likely effect of its decisions on that economy.

This subsection does not apply to proceedings before the Commission in Court Session that are criminal proceedings or that it determines are not appropriate.

Consideration

Approach to Determination Making

29 Each of the parties made submissions as to the approach the Commission should adopt in light of this statutory framework. The outcome was succinctly summarised by the applicant. The TWU submitted:

> The parties' outlines of submissions indicate substantial agreement as to the general principles to be applied by the Commission, namely:
>
> (a) the Commission is vested with a broad discretion to make contract determinations under s313 of the *Industrial Relations Act 1996* (NSW) (**Act**);

> (b) that discretion is fettered by the objects set out in section 3 of the Act and the mandatory considerations set out in section [146(2)] of the Act; and
>
> (c) the determination making process should, in broad terms, abide by the principles applicable to award making processes including that the object of the exercise is to set fair and reasonable conditions of work.

30 A number of parties made reference to the decision of Haylen J in *Transport Industry - General Carriers Contract Determination Application by Australian Road Transport Industrial Organisation, New South Wales Branch for removal of Special Fuel Price Surcharge* [2010] NSWIRComm 133 ("*Special Fuel Price Surcharge Case"*. In that matter his Honour stated at [16];

> There was no dispute between the parties that there was a general and wide discretion provided by s 320 of the Act to vary a Determination. It was broadly accepted that, in exercising that power to vary a Determination, the Commission may be guided by similar considerations contained within s 10 and s 17, namely, that the Determination should set fair and reasonable rates and that in making a variation, the public interest is to be considered provided there is a substantial reason for making the variation.

31 Notwithstanding the "substantial agreement" there was one area in which there was disagreement. NSWBC, ARTIO, AIG, Toll, AFEI, Master Builders and Linfox each submitted that the TWU, as the applicant in these proceedings, bore the onus to satisfy the Commission that there are grounds to exercise its discretion to vary the GCCD. They referred to the *Special Fuel Price Surcharge Case* in which the TWU's submission with respect to the role of the applicant was summarised by the Commission as follows:

> Essentially, the position of the TWU was that, as applicant, the ARTIO bore a significant onus to satisfy the Commission that there were grounds to exercise its discretion to vary the Determination by deleting Schedule 5, when the Schedule had been an important part of the Determination for over 20 years. In making this submission, the TWU argued that the approach of the Full Bench in Re Clerical and Administrative Employees (State) Award (No 2) (2005) 148 IR 56 at [157] and [158] should be followed. Those passages were to the following effect:
>
> > [157] This means that in considering the substantial changes sought here from the current award arrangements, the Commission must be satisfied that in granting the application, it would be making an award which meets the statutory obligation in s 10 to make an award fixing fair and reasonable conditions of employment and one which conforms with the objects of the Act.
> >
> > [158] Existing award conditions are, of course, not immutable. Subject to compliance with the requirements of the Act and applicable principles, award provisions may be varied upon the basis of the consent of the parties, or in the case of contested proceedings, if a case is made out on the evidence that the award conditions in question

> no longer provide fair and reasonable conditions of employment. In a contested case, the onus falls on the applicant to make out a case for an alteration to an award, which otherwise will usually remain undisturbed: Re Pastoral Industry (State) Award (2001) 104 IR 168 at 184, 185 and Transport Workers Union of New South Wales v New South Wales Taxi Industry Association [2005] NSWIRComm 407.

32 His Honour Haylen J in making his decision accepted the proposition that the applicant bore the onus of establishing a proper case for variation.

33 While accepting that moving parties in award or determination matters bear an onus to make out a case, Mr Fagir drew a distinction between the concepts of legal onus and evidentiary onus. He accepted the applicant bore an evidentiary onus but submitted that once the applicant had led such evidence the onus shifted to the respondents. He submitted also that assertions advanced to rebut certain claims, for example as to the cost burden of those claims, needed to be supported by evidence. That is particularly so when such evidence is peculiarly within the knowledge of the respondents: *Williamson v Ah On* (1926) 39 CLR 95 at 113-115.

34 It has long been recognized that Industrial Tribunals are in a different position to the general courts. The duty of the Commission is to make an award or determination which prescribes fair and reasonable rates and conditions. In doing so the Commission is not bound by the rules of evidence or to act in a formal manner but *"is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms."* See s 163 (1)(c) of the Act.

35 The various authorities referring to the "onus" born by a party are to be understood in that context. There must be information before the Commission which allows it to be satisfied that the determination or award, if made, will provide just and reasonable rates and conditions. The assessment of the adequacy of that material will vary according to the nature of the case, including the degree of consent, before the Commission: see *In re Butchers, Wholesale (Cumberland) Award* 1971 AR 425 especially at 437- 440.

36 I intend to approach the matter in that light.

37 The TWU submitted that with respect to the overall application for variation:

> TWU's case has been run time and again and the answer has always been the same. There is a problem, change is needed. That is apparent firstly in the academic and judicial material which we introduced via Mr Aird, that is the Willis Report, but the Willis Report is the starting point. There is plenty that has come since and the effect of it in our submission is that the concerns that were identified in the Willis Report not only continue to exist, but if anything, the position has deteriorated. In particular, of course, we rely upon in addition to the Willis Report the Full Bench decision in the Mutual Responsibility case, the NTC report, the decision of the Road Safety Remuneration Tribunal recently and the vast amount of material that was considered by the tribunals, the NTC and the Full Bench of this Commission.
>
> In addition to that generic evidence, we have the evidence from Mr Aird and Mr Danalis who give, if you like, intermediate evidence, general evidence about the state of contract carriers in New South Wales specifically and in our submission that evidence confirms, if confirmation be needed, the issues that apply to the industry generally operating in respect of contract carriers in New South Wales.
>
> Then finally, we have the specific evidence of individual contract carriers which again in a narrower way identifies similar issues. So in that context we submit the notion that everything is okay, there is no reason to disturb the status quo or there is no demonstrated need for intervention simply could not be accepted. In our submission, the need for change is overwhelmingly demonstrated and particularly so given the conservative nature of this claim. These aren't sweeping changes that are proposed, they are basic procedural requirements which, on one view, the principals should be observing anyway. Tell the carriers what they are going to be paid, tell them how they are going to be paid, give them an indication of their rights and keep the records that will allow the carriers and/or their representative to assess compliance down the track.

38 NSWBC submitted with respect to the overall application:

> 30. Against the backdrop of those previous submissions made by the TWU [as to onus in the *Special Fuel Price Surcharge Case*], the Commission should adopt a cautious approach to any variation to the Determination which might adjust the 'internal balance'.
>
> 31. The Amended Application represents a wholesale rewriting of the existing Determination, which has been in operation since 1984. While the NSW Business Chamber does not oppose, in-principle, the proposal to update and revitalise the Determination (and in substance but perhaps not form supports various changes), it is of course trite to note that the TWU must satisfy the Commission that such a wholesale change is necessary and appropriate.
>
> 32. In this regard the level of consent or non-opposition is a factor that the Commission can take into account when determining whether to or how to exercise its discretion in this matter.

39 The NSWBC submission provides an illustration of the factors which may influence the assessment of whether a variation is justified. In addition to the evidence led by the applicant there is the consent or non-opposition (in respect

to a range of matters) of several experienced industrial parties with significant membership or standing in the particular industry.

40 Linfox submitted that although the application sought a variation of an existing determination *"properly understood the application is, in part in fact, an application for a 'first award and extension to an existing award"*. Accordingly, Linfox submitted, paraphrasing *Milk Carters (Country) Conciliation Committee* 1941 AR 625 at 629, the Commission should take a cautious approach and *"include only such provisions as may be necessary to safeguard the interests of (contract carriers), without unduly interfering with the conduct of the business"*. NSWBC made a similar submission which was in turn generally supported by other respondents.

41 I was not directed to any authority which held the Commission's award making principles applied to Contract Determinations. I accept however that reference to those principles is consistent with the approach outlined by Haylen J in the *Special Fuel Price Surcharge Case.*

42 The submissions of the respondents also need to be understood in the light of the substantial degree of consensus as to the need to revise the Determination. There is a tension between their urging caution and restraint to avoid disturbing the "internal balance" of the Determination and the positive submissions in support of its revision. In that light these submissions as to onus and caution are to be understood as directed to only the contested clauses.

43 In light of the evidence and the degree of consensus I am satisfied that the GCCD should be varied largely in accordance with MFI E so as to provide fair and reasonable conditions for owner-drivers and contractors. It is necessary to determine the discrete issues that remain in dispute between the parties, having regard to the approach discussed above. I will address these issues in turn.

Coverage

44 On the question of coverage, the TWU submitted:

> To the extent that the applicant bears any onus, it is met and more by the evidence—the evidence the Willis and Quinlan Reports describing the

> transport industry generally; by the findings of the RSRT and the actions taken by that tribunal; by the evidence of the union officials called in the proceeding; and most importantly by the lived experience of the owner drivers who have given witness statements in these proceedings. The evidence of the challenges faced by owner drivers is overwhelming and there are myriad "*obvious issues*". In that context any references to a failure to discharge an onus should be quickly dismissed.

45 The TWU relied on the general proposition that employees are *prima facie* entitled to award coverage: *Re Milk Carters*; also *Re Crown Employees' Education Officers Award* (1975) AILR 863. Similarly, contract carriers should be entitled to determination coverage, at least in the absence of a substantial countervailing reason.

46 The TWU submitted that the respondent parties had not identified "any substantive rationale" for the current scope of the GCCD, and relevantly, have not put forward any evidence in support of the contention that the prevailing conditions in the industry are fair and reasonable such that coverage need not be extended.

47 There was general acceptance that, as a matter of principle, employees are entitled to the protection of awards and, by extension, that contract carriers should be entitled to the protection of a determination. The concerns advanced by the respondents, particularly AIG, AFEI and Master Builders as to the extension of coverage were largely directed to the question of rates.

48 NSWBC proposed in its draft the extension of coverage of the GCCD provided that there is an alternative rates proposal for rates in areas outside the scope of current GCCD. An example of an alternative rates system is set out in clause 21 of the NSWBC's draft which reads:

> **21. ALTERNATIVE SYSTEMS OF REMUNERATION**
>
> 21.1 Despite clause 20 and Schedule A, a Principal Contractor may pay a Contract Carrier for the Cartage Work based on a system or method different to that set out in Schedule A provided that in any given pay period the Contract Carrier receives no less than the pay they would otherwise have received had they been paid in accordance with Schedule A.

49 NSWBC submitted the rationale for the alternative systems of remuneration proposal was due to historic difficulties in getting cartage rates "right outside of local cartage" and cartage in the greater Sydney area. On this note, NSWBC indicated that it has "no philosophical or in principle opposition" to the

expansion of coverage provided that provision is made for an alternative system of remuneration or cartage outside metropolitan Sydney. Ultimately the question of inclusion of such a clause was deferred until stage 2.

50 NSWBC reaffirmed its position that any position set out in its proposed variations to the GCCD is "not an application…to vary the current determination" but rather a representation of the NSWBC's submission should the Commission find that a variation should be made pursuant to the requirements of the IR Act.

51 The other respondent parties submitted that the TWU has not provided enough evidence to establish or demonstrate why a change to the current scope is required. The respondents' positions in respect of coverage largely turn on the current GCCD having been in operation for an extended period of time, and consistent with extension of existing award principles, the Commission must be satisfied that there is something "manifestly unfair" in the current determination.

52 In its *Report to The Honourable E A Willis, BA, MLA, Minister for Labour and Industry on Section 88E of the Industrial Arbitration Act, 1940-1968 in so far as it concerns Drivers of Taxi-cabs, Private Hire Cars, Motor Omnibuses, Public Motor Vehicles and Lorry Owner-Drivers* (the Willis Report) the Commission expressed a number of conclusions relevant to the appropriateness of regulation of lorry owner-drivers or contract carriers. Mr Fagir summarised them as follows:

> The Willis Report reached several relevant conclusions about the transport industry:
>
> > (a) owner drivers with one vehicle come under direction and control which is in a practical sense little different to employees (paragraph 30.14);
> >
> > (b) an owner driver with one vehicle and no certainty of work is in a weak bargaining position, and the transport industry is not lacking in operators willing to take the fullest advantage of that vulnerability (paragraph 30.17);
> >
> > (c) in a number of industry sectors, owner drivers have been exploited as to rates and oppressive working conditions (paragraph 30.17);
> >
> > (d) owner drivers' struggles to make ends meet led directly to abuses such as speeding, exceeding driving hours, overloading and drug taking (paragraph 30.56);

(e) industrial regulation, although not a panacea, must assist in reducing the bad practices of overloading and speeding which are prevalent in some sections (paragraph 30.24);

(f) those bad practices stem to an appreciable extent from depressed rates and adverse conditions (paragraph 30.24); and

(g) owner drivers have generally fared best where there has been a form of industrial regulation which permits them to present a united front (paragraph 30.18);

(h) the proposition that owner drivers are independent businesses who should not be mollycoddled by tribunals is to be rejected (paragraph 30.27).

53 It might be argued that, in paraphrasing these conclusions, the applicant has slightly overstated some of them. In my view however the summary represents a fair account of the conclusions of the Willis Report when taken as a whole.

54 The applicant also pointed to the findings of the Full Bench of the Commission in *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No.2)* [2006] NSWIRComm 328; 158 IR 17. The Commission held at [34] and [35]:

> We consider that the evidence in the proceedings establishes that there is a direct link between methods of payment and/or rates of pay and safety outcomes.
>
> …
>
> The conclusion that there is an association between payment and safety was acknowledged by the two NSW Road Transport Association officers who gave evidence as follows:
>
> (i) Rod Grace, Employment Relations Manager, New South Wales Road Transport Association:
>
> > "Q. Can I give an example. If a company operates a payment system which rewards drivers not by time worked, but for the completion of the trip and that system doesn't adequately remunerate the driver for time worked, that might lead to a result where the driver simply tries to complete the work as quickly as he or she can in order to maximise their income. Is that right?
> >
> > A. That's right, I agree with that."
>
> (ii) Hugh McMaster, Corporate Relations Manager, New South Wales Road Transport Association :
>
> > "Q. And you would agree with me that Mr Sheldon drew it directly between rates of remuneration and safety issues?
> >
> > A. Yes I do
> >
> > Q. And among other things he said this, "The lowest price means the ...in case of long distance"?

> A. Yes.
>
> Q. And you agree with that as a proposition?
>
> A. By and large I do yes. It's not as simple as that but I think there certainly is a connection between low price and lower safety standards."

....

> A number of the drivers also gave evidence of being paid below-award rates. Owner-drivers were particularly vulnerable to this sort of exploitation, being too scared to confront management about it in case they were not given any more work. However, employee drivers did not necessarily have any more success in persuading the employer to pay the correct rates, with the evidence disclosing the attitude of one employer as follows:
>
> "The award does not apply to us. You are employed under my conditions."
>
> In some instances, drivers found that companies were either unable or unwilling to pay them. Ireland stated that he was engaged to perform work on several occasions by companies that when asked for money replied that they were insolvent and others that would only pay the money they owed him once threatened with violence.
>
> [Transcript and exhibit references omitted]

55 The National Transport Commission expressed similar conclusions as to the link between safety and remuneration in its October 2008 report *Safe Payments – Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*. The report also observed that profitability of owner operators was very low and the owner drivers worked long hours.

56 Similarly the Road Safety Remuneration Tribunal held in its decision *Re Annual Work Program* [2013] RSRTFB 7; 239 IR 129 at [390]-[391]:

> 390 The material before us indicates remuneration related matters contribute to the work practices of road transport drivers.
>
> 391 Inadequate rates of payment pressure road transport drivers to perform more road transport services to supplement their earnings and to speed illegally, exceed working hours limits and/or not take required rest breaks to be able to do so, and/or to perform the extra road transport services while fatigued or under the influence of drugs to combat fatigue.

57 It is relevant to note that each of these reports or decisions expresses particular concern about long distance road transport, which is the principal area of dispute as to coverage. All of the reports and decisions provide support for the conclusion that fair and reasonable regulation of that area of activity is appropriate.

58 Mr Michael Aird, State Secretary of the TWU, gave evidence that the problems identified in these reports and decisions persist in New South Wales. Indeed he went further and indicated that, contrary to the findings in the Willis Report, the position in relation to local cartage is no longer satisfactory. Although he was cross-examined about his reading of the Willis Report and his knowledge of the jurisdictional reach of the Determination, particularly in relation to interstate haulage, I was satisfied that Mr Aird's evidence as to his observations of the industry generally was not overstated or his concerns misplaced.

59 Mr Reeves gave evidence of his extensive career particularly in transport of refrigerated goods largely outside the County of Cumberland. He spoke of his good fortune in contracting with a company, Inghams Enterprises, which for the most part treated him fairly and was responsive to his approaches for adjustment in rates and negotiated with him in good faith. The onus, however, was on him to move for an adjustment in rates to meet his rising costs. The fragility of his position was demonstrated by the termination of his contact with notice of only two weeks after forty years of providing services. In that context one can well understand why an owner driver may be reluctant to rock the boat. As is apparent from the extract above, fear of losing the work was recognised as a debilitating factor in the minds of owner drivers in the *Mutual Responsibility Case.*

60 Although his evidence was of greater relevance to issues other than coverage of the Determination, Mr Amos also gave evidence of the challenges confronting owner drivers. Mr Amos impressed as an adept and agile small business operator. In that respect he was an excellent witness in support of the respondents' arguments that regulation of a kind suited to employees was inappropriate for small businesses. However Mr Amos also gave evidence of unforeseen circumstances which placed significant economic pressure upon his business. Examples he gave were: the sudden termination of a contract for 15 years after only 18 months without redundancy and without compensation for the need to repaint his truck which had been specially obtained for the purpose of the contract and which he could not dispose of for a further 14 months; losing work when undercut by a cut price operator; and being

confronted by a sudden and unilateral 33% reduction in the rate the principal contractor was prepared to pay for his services.

61 Mr Amos was able to survive these financial setbacks with the assistance of the TWU and his business acumen. I doubt all owner drivers would have the same degree of determination and adaptability as Mr Amos. The threat to survival from cut price operators can be at least mitigated by appropriate regulation of rates and conditions.

62 At the other end of the owner-driver spectrum, submitted the applicant, were Mr Court and Mr Miles.

63 Mr Court gave evidence of his history. He was a small business operator in the security industry for many years followed by 2 years employment as an undertaker. A casual conversation with Mr Tony Barnett, the father of a member of a football team coached by Mr Court, led to him taking up an engagement with Barnetts Couriers (Barnetts).

64 Notwithstanding his small business experience, Mr Court entered into the arrangement in 2006 without clearly understanding important aspects of the agreement. He was not clear, for example, whether he was to be an employee or subcontractor. He did not understand the payment system. He knew that there was a deduction of 10% from his payments for "motor vehicle usage", which he understood to be a lease fee for a vehicle to use for his deliveries although he did not know which vehicle he was leasing, what its value was, what the lease period was, whether he was paying interest or what rights he may have to acquire the vehicle at the end of the lease. Again although he had a belief that he was in some way purchasing a vehicle he had no idea when that may happen or on what terms. He was not even sure which vehicle he was buying.

65 Notwithstanding that Mr Court had no written agreement with Barnetts, in 2012 he was informed that Barnetts were rolling out a new set of contracts. The "contracts" consisted of a Franchise Agreement, a Factoring Agreement, a Vehicle and Equipment Bailment Agreement and a Recipient Created Tax Invoice Agreement for the Supply of Services. Mr Court, who became a delegate of the TWU about this time, notwithstanding assistance from the TWU

did not understand the new "contracts". The TWU notified the Commission of a dispute in relation to these "contracts". A Contract Determination was made and the drivers were given the option to work under the determination or under the contracts. Mr Court's evidence was that there was no real choice. He said in cross-examination by Mr Ward:

> Q. Did you ask Mr Lawlor what the Union thought about these documents?
>
> A. Yes, I did.
>
> Q. What did Mr Lawlor tell you?
>
> A. Virtually, well, we tried to get it as under the contract courier and, um, when we got given that, the piece of paper to tick which one we wanted (witness indicated). That, um, most of us picked the contract courier, but Barnetts wouldn't allow us to do that because they wouldn't lease us the trucks. So, virtually, we had to sign and agree to what was in these contracts, even though our better judgment and advice from Mr Lawlor, a lot of it was wrong. Um, we had to sign it to get our jobs.
>
> Q. So, let me understand. The TWU negotiated a contract determination for you?
>
> A. That's correct.
>
> Q. You don't own a truck?
>
> A. No.
>
> Q. Don't have a truck registered in your name?
>
> A. No.
>
> Q. So, is what you're telling me, because of that, you felt you had to sign these documents?
>
> A. It was the only way to work.
>
> Q. Okay. So again, you're a man who had run a pretty successful business employing 21 people. You've just told the Tribunal, over a lengthy period of time, how you've lost money every year in your mind and, yet, you have hung on and stayed here. Your accountants told you not to stay. Your wife told you not to stay. Your lawyers told you not to stay. But, you stayed. You were presented with these very complex legal documents. You don't see your accountant, you don't see your lawyer, but you sign them?
>
> A. Correct.
>
> Q. Did you read them?
>
> A. Yes. Did I understand them? No.

66 Mr Court explained why he stayed at Barnetts despite the unhappy history he described. He replied to Mr Ward:

> Q. So let me understand this. Even though Tony Barnett is a personal friend, you've told the Tribunal today that you are going backwards financially year

after year after year after year, you've just told me that it is a company that doesn't care about your safety, why are you there?

A. Because I love me job.

Q. You love your job?

A. I love me job.

Q. When you say you love your job, what do you mean by that?

A. I love what I do, I love driving.

Q. You can drive anywhere else?

A. Yes, I have tried to get another job. It is not to say that I haven't applied, which I have.

Q. You can't get a job?

A. Not at this present time, I haven't been able to get a job.

67 Mr Court's relationship with Barnett's seems more akin to employment than an independent business.

68 Mr Miles gave evidence of his engagement with Mainfreight. He said he had experience as a driver in New Zealand and was asked by a friend to drive his truck while the friend took a holiday. He was then invited by Mainfreight to become an owner driver. He was promised, he said, a minimum of $2500 per week. He needed finance to purchase an appropriate truck and Mainfreight provided a letter indicating his likely annual earnings. The indicative figure was consistent with the promised minimum for 48 weeks. The claim to a promised minimum was also supported by Tax Invoices prepared by Mainfreight. Mr Miles was cross-examined by Mr Seck. No evidence was called by Mainfreight (consistent with its application for leave) to rebut Mr Miles evidence. I accept for the purposes of these proceedings that Mr Miles was given a minimum payment guarantee.

69 Once the minimum was unilaterally removed Mr Miles found himself losing money. He was told to "work harder". The immediate difficulties with that were firstly, working longer hours, 12-13 hours each day in the first week without the guaranteed minimum, and secondly, higher fuel costs. Mr Miles was not aware of the Determination nor, therefore, of his rights under it. Mainfreight made no reference to the determination.

70 Mr Miles evidence was corroborated by Mr Maki Danalis, an organiser with the TWU. Mr Fagir submitted:

The salient features of his evidence are that:

(a) Mainfreight is a national transport company with around 68 carriers based in Sydney;

(b) the company exhibited an almost total resistance to engagement with the TWU and a (at best) dismissive attitude to the GCCD and the NSW IRC, failing to attend the Commission on at least four occasions;

(c) Mainfreight's drivers appeared wholly ignorant of the existence of the GCCD;

(d) his preliminary inquiries suggested that some drivers were earning more than the GCCD and some less;

(e) inquiries further suggested that many drivers had, similarly to Mr Miles, been mislead in relation to a guaranteed payment; and

(f) there appeared to be a variety of unlawful deductions occurring in respect of the cost of uniforms ([36]) and GPS equipment as well as breaches of the GCCD provisions relating to painting of vehicles.

[References to paragraphs of the evidence omitted]

71 Mr Danalis was cross-examined by Mr Seck as to whether Mainfreight had:

(a) Failed to comply with the Determination or a related determination by:

(i) failing to pay redundancy benefits to a particular owner-driver;

(ii) failing to pay for the cost of painting the owner-driver's truck in Mainfreight's colours;

(iii) failing to pay the cost of re-painting the truck;

(iv) making deductions for the cost of uniforms; and

(v) failing to pay some owner-drivers in accordance with the Determination

(b) been misleading or deceptive as to promises of guaranteed minimum payments;

(c) applied objective criteria in allocating work to owner-drivers.

72 For the most part Mr Seck suggested to the witness that he had failed to adduce the evidence necessary to satisfy a court that Mainfreight had breached the Determination, or that there were arguments available to support alternative constructions of certain clauses which meant it was not clear that Mainfreight had acted in breach. I can accept both propositions: but these are not enforcement proceedings and the cross examination served to demonstrate there was ambiguity in at least some of the existing clauses as alleged by the applicant.

73 I can also accept that there will be cases in which it is fair to describe a settlement of a claim following notification to the Commission of a dispute as evidence of the "system working". However, I do not regard it as part of the "system" to withhold benefits until confronted by a dispute notification or legal process. Such conduct takes advantage of the system rather than demonstrates its utility. I do not find that Mainfreight sought to take such advantage, but the evidence of Mr Danalis and Mr Miles demonstrates the very real prospect of such conduct occurring and it supports the claim of the applicant for a revised, modern and unambiguous instrument.

74 The evidence of each of these witnesses and the various decisions and reports referred to by the applicant, together with the non-opposition of the Respondents satisfy me that the TWU has met the onus it bore and coverage should be extended in the manner sought by the applicant and, subject to one exception to which I shall return, as contained in MFI E. I am satisfied that it is consistent with the objects of the IR Act and in the public interest to extend coverage.

75 It is necessary to deal further with one particular aspect of contested coverage. The applicant effectively seeks the rescission of the Transport Industry – Interstate Carriers Contract Determination ("the Interstate Determination") with the contracts of carriage within its scope to be subject to this determination. A number of respondents challenged that extension of coverage.

Interstate Carriers Contract Determination

76 In relation to the Interstate Determination, the TWU submitted:

> The submissions of various parties place some emphasis upon the Transport Industry – Interstate Carriers Contract Determination. That determination, it would be noted, was last varied 23 years ago in 1992. It contains a total of ten clauses, including a definitions and a leave reserved clause. It applied to cartage which was performed partly in NSW and partly without. Its jurisdictional basis is and has been disputed by principal contractors, including in these proceedings.
>
> The evidence of Michael Aird is that he had never heard mention of it in a practical context before 2013. The instrument is plainly otiose. Its adoption of a tonnage based rate of pay contradicts the academic and other material regarding the legitimacy of piece rates. It should be formally overtaken by the GCCD.

77 The respondents, in particular ARTIO, Linfox and TNT, contended the Interstate Determination should not be rescinded in lieu of the expanded coverage of the GCCD.

78 Linfox submitted that the Commission lacked jurisdiction to regulate interstate haulage. Mr Baroni conceded that the Commission has jurisdiction to regulate conditions of employment of employees who may from time to time work interstate. He accepts that the same may be said of contracts of carriage. He draws a distinction though with interstate haulage. Mr Baroni submitted:

> The work of an interstate driver is not performed outside of NSW **only** some of the time. The fact is that an interstate driver will perform, on every occasion, work outside of NSW. In those circumstances it is submitted that even if the contract of carriage did have a sufficient connection with NSW, that would not be enough to enliven the jurisdiction of the Commission to grant the Application in the terms sought by the TWU.

79 In response to Mr Baroni's submission, Mr Fagir submitted:

> [T]he discussion between the ambit of ch 6 is very interesting, but doesn't really arise, we submit, in these proceedings. The jurisdiction goes as far as it goes. There is nothing we can do in terms of drafting the instrument that is going to make any difference. So that stream can't rise above its source and there is nothing we can do in these proceedings that would better on the ambit of the jurisdiction. So it's all academic and very interesting, but beside the point I submit.

80 The first point to be observed is that the application and MFI E do not refer to an "interstate driver". The amended application seeks the following clause:

> 3. Scope
>
> 3.1 This determination shall operate in respect of all contracts of carriage, other than:
>
> (a) contracts of carriage to which one of the Nominated Contract Determinations applies;
>
> (b) contracts of carriage performed using a Specialised Vehicle.
>
> Note: see clause 1 for the meaning of "Nominated Contract Determination" and "Specialised Vehicle".

81 The term "contract of carriage" is defined in the amended application to have the meaning given to the expression in the IR Act. In the IR Act the term is defined in s 309 which relevantly provides:

> For the purposes of this Chapter, a ***contract of carriage*** is a contract (whether written or oral or partly written and partly oral) for the transportation of goods by means of a motor vehicle or bicycle in the course of a business of transporting goods of that kind by motor vehicle or bicycle…

82 There follows a number of qualifications and exclusions not presently relevant save for the observation that there is no exclusion of contracts which have some interstate element, nor is there any specific reference to New South Wales. Linfox draws attention to s 12 of the *Interpretation Act 1987 (NSW)* which provides:

> **12 References to New South Wales to be implied**
>
> (1) In any Act or instrument:
>
> (a) a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for New South Wales, and
>
> (b) a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales.
>
> (2) In any Act or instrument, a reference to a body constituted by or under an Act or instrument need not include the words "New South Wales" or "of New South Wales" merely because those words form part of the body's name or title.

83 I am prepared to accept, for present purposes, that the expression, "contract of carriage" as used in the IR Act is a reference to such a contract in and of New South Wales.

84 The scope of the Determination as set out in of MFI E is as follows:

> **3.1 Applicable Contracts of Carriage**
>
> This Determination operates in respect of all Contracts of Carriage within New South Wales, other than Contracts of Carriage:
>
> (a) which are covered by one of the Nominated Contract Determinations; and/or
>
> (b) performed using a Specialised Vehicle.

85 As noted, neither the terms of the application nor those of MFI E are directed to an "interstate driver". Rather the clauses are directed to contracts of carriage "in and of" (the amended application) or "within" (MFI E) New South Wales.

86 The extraterritorial reach of the IR Act and predecessor statutes has been considered and accepted in cases such as *Hildred v Richardson* 1971 AR 1019 (at 1024) and *Tod v Reiher* 1960 AR 64 (at 68-69). These cases related to s 88F and s 20 (1) of the *Industrial Arbitration Act 1940 (NSW)* respectively. In both cases the Commission was satisfied on the facts that the majority of the

work was performed in New South Wales and that was sufficient to support jurisdiction.

87 In *Old UGC Inc v Industrial Relations Commission of New South Wales* [2004] NSWCA 197; 60 NSWLR 620 Spigelman CJ with whom Mason P and Handley JA agreed, considered whether the Commission had jurisdiction (under s 106 of the IR Act) to deal with a contract the proper law of which was not the law of New South Wales. The second opponent submitted that the statute established an alternative territorial nexus. The Chief Justice held:

> **[32]** In my opinion, the second opponent's submissions in this respect should be accepted. The concern of the legislative scheme is not with the contracts as such. It is true that s 106 is directed to contracts, as defined, but it is so directed out of a concern with the terms and conditions upon which work is performed in any industry in New South Wales.
>
> **[33]** The phrase "in and of New South Wales", derived from s 17 of the *Interpretation Act* 1897 (now see s 12(1)(b) of the *Interpretation Act* 1987), has generally been applied in the authorities as the relevant territorial restriction: see *Ex parte Richardson; Re Hildred* [1972] 2 NSWLR 423 at 433–434. This is a territorial nexus of a clear and comprehensive character which indicates that it is inappropriate to rely on the general principle of statutory construction. To use the words of Dixon J in *Wanganui*, this is a "restriction … supplied by context and subject matter".
>
> **[34]** Indeed, in my opinion, the legislative scheme is inconsistent with the application of the general principle that statutory intervention in contracts is intended to relate only to the contracts of which the proper law is, relevantly, New South Wales. There are a number of statutory indications to the contrary in this regard.

88 I note that the decision of the Court of Appeal was reversed on appeal to the High Court but on other grounds. The aspect of the decision to which I refer was confirmed: See *Old UGC Inc v The Industrial Relations Commission of New South Wales* [2006] HCA 24; 225 CLR 274 per Gleeson CJ at [1],Gummow, Hayne, Callinan and Crennan JJ at [22]-[23] and Kirby J at [55]-[59], Heydon J deciding on other grounds.

89 The second point to note is that Mr Baroni's submission is that an "interstate driver …will perform, on every occasion, work outside of NSW". I note it is not submitted that the interstate driver will perform *all* of his work outside the State. Even if he did it would remain a question whether the contract of carriage pursuant to which the work is done is one in and of New South Wales. The observation of Spigelman CJ as to the legislative scheme is directed to S 106

of the IR Act. It does not necessarily follow that his conclusion applies to every aspect of the IR Act.

90 The precise limit of the jurisdiction need not be determined now. It suffices that I am satisfied that the Commission has jurisdiction to make a determination which regulates contracts of carriage as defined "in and of New South Wales" including those which may begin or end outside the State.

91 There was no debate as to the meaning or appropriateness (to avoid ambiguity or uncertainty) of the word "within" as it appears in cl 3.1 of MFI E. Whatever the intent of that word I make it clear that it is my intention that the GCCD once varied will rescind and replace the Interstate Determination and will apply to all contracts of carriage in and of New South Wales not otherwise excluded by paragraphs 3.1 (a) or (b) of MFI E. The question of whether "within" is apt to unambiguously reflect this intention may be dealt with when settling the minutes of the Determination.

92 Mr Baroni expressed a concern that to rescind the Interstate Determination at this stage would create a vacuum.

93 Mr Baroni submitted, flexibly, that, notwithstanding his submission as to the want of jurisdiction to regulate "interstate contracts of carriage" and thus the invalidity of the Interstate Determination, rescission at this point in the proceedings, before dealing with the rates provisions, would have the practical effect of leaving interstate cartage work *without* a valid instrument providing for the remuneration of such cartage. Mr Fagir's response on behalf of the applicant was that it was not at all concerned at that prospect, the rates being manifestly out of date.

94 Mr Ward submitted, in support of deferral:

> If the commission is minded to vary the determination and extend coverage in accordance with clause 3.1 of MFI E, 3.2 then comes into effect and excludes certain terms and conditions of MFI E of applying outside of the current determinations geographical scope but the remaining clauses will be introduced.
>
> Given the position I have articulated which is the coverage is linked to rates and 3.2 effectively says, well, the rates won't come into effect until outside the existing coverage, then my minds hands are a little tied in opposing the extension of coverage. But it is a position we may wish to revisit after seeing the numbers.

95 The terms of sub clause 3.2 of MFI E are:

> **3.2 Application of Cartage Rate Clauses**
>
> Despite clause 3.1, the following clauses [insert clauses referencing *remuneration*] shall only apply to Cartage Work (excluding Cartage Work for the transportation of goods requiring refrigeration transported in refrigerated Vehicles):
>
> (i) within the County of Cumberland; and
>
> (ii) where the Finishing Place is within 50 kilometres from the Starting Place.

96 I have already indicated the concerns of other respondents particularly AIG, AFEI and Master Builders about the extension of coverage and rates. Mr Bray in particular urged that the question of coverage should be deferred and determined in stage 2 at the same time as the rates issues.

97 TNT submitted that the TWU had not "identified any problems with the operation of the Interstate Determination which warrants the intervention of the Commission". The thrust of the TWU's submission was, of course, that the "problem" was that the instrument was "plainly otiose", it not having been referred to in a "practical context" before the present application, and that the adoption of a "tonnage based rate", contrary to TNT's submission, contradicts academic and practical material regarding piece rates.

98 In response to Mr Baroni's and others' submissions as to deferral, Mr Fagir submitted:

> It's been suggested that the operation of the provisions which spring forth from this proceedings should be deferred. We resist that suggestion for a couple of reasons. Firstly, there is no real reason for it. It's been submitted, a number of times that, there is some close connection between the provisions that are sought in this financial rates paid to be dealt in the second tranche, but it hasn't been explained or, if it has, I missed it of what the nature of the connection actually is. For example, it's difficult to see how the obligations to keep records interact with the question of quantum of rates. How the provision of a rates schedule is contingent on fixing of the rates and so on.
>
> Firstly, I should say, there should no [*deferring]* because there is no reason for it. Second, there is a reason not to defer. Which is, the deferral creates an incentive to delay longer in the second tranche, at least to avoid expediency. In the experience of this proceeding, as the Road and Safety Remuneration Tribunal suggests, that is the last thing that is needed. Thirdly, as your Honour pointed out on the last occasion, the propagation of rates schedules and so on may in fact be of assistance in relation to tranche two. Ultimately, the provisions that are sought in this part of the proceeding are demonstrable of utility and implementation should not be delayed in the absence of some good reason.

99 I accept the TWU's submission that the Interstate Determination is otiose. The evidence before me suggests the Interstate Determination has not been varied for almost a quarter of a century. Mr Aird was unaware of its existence before a relatively recent dispute involving TNT was notified. TNT submitted the Interstate Determination "had contemporary relevance" but did not identify how or where. Similarly, AIG did not agree that the Interstate Determination was redundant or otiose and observed the evidence was "skinny" about its operation. No other respondent suggested that it had practical application. Indeed, Mr Baroni's submission was that I should do nothing because there was nothing to suggest what the consequences might be.

100 It has always been part of the applicants claim that the Interstate Carriers Determination should be replaced. Some respondents, including AIG, noted the application did not expressly seek rescission of the Determination but it appeared generally accepted that was the necessary inference to be drawn from its terms. The applicant indicated a willingness to file a formal application should that be considered necessary. I did not consider it necessary. There has been ample opportunity for a respondent or other interested person to put forward evidence as to the utility of that instrument. Deafening silence has been the only response.

101 I make no observation about the TWU's submission as to the appropriateness of tonnage rates beyond noting it remains a live question to be considered in stage 2.

102 In deciding to extend coverage I am not overlooking the difficulties in setting appropriate rates for such a diversity of contracts of carriage. It may be, although I doubt it, that it is too difficult to prescribe rates for some types of contracts of carriage. That does not mean that no aspect of the contracts should be regulated. No argument has been advanced, particular to interstate cartage, to suggest that the non-rates regulation should be different from other contracts of carriage within the scope of the GCCD. The difficulties of setting "fair and reasonable" rates will be confronted in stage 2.

103 In these circumstances, I have decided to rescind the Interstate Determination and replace it by the GCCD. However, given the manner in which the

application has proceeded, any decision with respect to the rates for interstate work is deferred until Stage 2. Accordingly, the scope of the Determination (with respect to the non-rates provisions at this stage) shall extend to interstate cartage.

Refrigerated and Other Work

104 In my view, for the same general reasons, coverage should be extended to refrigerated work. Although Mr Freestone, whose evidence I accept, suggested that there would be a significant cost in extending coverage to refrigerated work, that evidence was based on the rates set out in the claim by the applicant. The cost is a matter to be addressed in stage 2 when rates are considered. I can identify no other reason to exclude refrigerated work.

105 Mr Bray referred to three other areas, previously excluded, to which the Determination would now apply. They are:

(1) Furniture Removal;

(2) Cash transported in armoured vehicles; and

(3) Private Pathology (vehicles less than two tonnes)

106 The submissions he made for their continued exclusion in essence were related to the question of appropriate rates. I cannot see any reason therefore to exclude them at this time.

Work time

107 The definition proposed by the TWU for "work time" is set out in Exhibit 29 of these proceedings. It reads:

> **Work Time**
>
> **1.1** Work Time means the time during which a Contract Carrier is necessarily engaged performing a contract of carriage.
>
> **1.2** To avoid doubt, Work Time:
>
> (a) includes all time during which the Contract Carrier is required to be at the disposal and/or at the direction of a Principal Contractor; and
>
> (b) includes fatigue breaks of sixty minutes of less.

108 The definition for Cartage Work Time as set out in MFI E, read:

> **Cartage Work Time** means the time during which a Contract Carrier is necessarily engaged in performing a Contract of Carriage. To avoid doubt, cartage work time includes all time during which the Contract Carrier is

> required by the Principal Contractor to be at their disposal and/or at their direction, but excluding **time lost because of breakdowns or accidents** and the time taken by the Contract Carrier for meal breaks **but including time necessarily spent in order to comply with fatigue management regulation including the taking of fatigue breaks**.

109 I do not understand there to be a distinction based on whether the phrase includes the word "cartage". Ultimately that may be addressed if necessary in the minutes of the Determination.

110 The TWU indicated that the variation proposed in the definition in Exhibit 29 had been intended to address the submission of Linfox and ARTIO that the definition of "Work Time" in MFI E would comprehend overnight fatigue breaks as well as inter-trip fatigue breaks. The rationale behind the inclusion of fatigue breaks as "work time", it submitted is that:

> Fatigue breaks are mandatory. They are in that sense part and parcel of the operation of a heavy vehicle. Carriers who pause to take fatigue breaks are not on leisure time and are not stopped by the road by choice. They are deprived of the utility of the time spent on a fatigue break in the same way that they are deprived of the utility of time spent driving and loading. Industrial fairness requires that they be compensated accordingly.

111 The respondents disputed the inclusion of fatigue breaks in the definition for work time in the GCCD. The respondents noted that the Commission had previously determined that fatigue breaks are not "contract time" for the purposes of the current GCCD: *Transport Workers Union of New South Wales v Linfox Australia Pty Ltd (No 2)* [2014] NSWIRComm 57. NSWBC submitted:

> While it is acknowledged that the Commission is not strictly bound to follow, in these proceedings, the Full Bench decision of Transport Workers' Union of New South Wales v Linfox Australia Pty Ltd (No 2) [2014] NSWIRComm 57 given that this is an application to vary the Determination, the Full Bench decision is obviously still of considerable relevance to a consideration of whether or not the Determination should count fatigue breaks as work time.

112 In *Linfox*, the Full Bench concluded at [70]-[71]:

> [70] Of course, the question is not really whether a fatigue break constitutes "work". The question is whether it constitutes "contract time" or it constitutes an interruption to work.
>
> [71] Our opinion is that a mandatory fatigue break is "contract time" under the definition in the Determination, but that it also constitutes an "interruption to work". "Rest time" under the Regulation is time that is not work time of the driver. That is, the driver is not driving and is not performing any task related to the operation of the vehicle. During rest time the driver is not working. That is the driver is not performing any physical or mental labour in connection with the transportation of goods under a contract of carriage. Therefore, as a matter

> of ordinary language, rest time (or a fatigue break) is an interruption to work. There does not appear to us to be any basis for distinguishing a lunch break from a fatigue break. A lunch break, being a meal break in our opinion, would ordinarily be regarded as "contract time". However, it is apparent from the definition of "contract time" that a meal break is to be regarded as an interruption to work that is not included in contract time. Similarly, a fatigue break is an interruption to work and not included in contract time

113 The various respondents relied on the conclusions made by the Full Bench in *Linfox* and urged the Commission to consider the decision in determining whether the GCCD should include fatigue breaks within the definition of "work time".

114 The thrust of Mr Baroni's submission on behalf of ARTIO and Linfox, was that it would be extremely "odd" if contract carriers were to be entitled to payment for time that is expressed as "rest time", being time that is not "work" for the purposes of the legislation, as fatigue breaks do not equate to work "in relation to a fatigue-regulated heavy vehicle". Mr Baroni also submitted there was concern as to the creation of a lack of uniformity across each state in Australia.

115 In response, the TWU submitted that the present question, relevantly being whether it would be fair and reasonable to require contract carriers be paid for fatigue breaks, was not the issue considered by the Full Bench in *Linfox*. Rather, those proceedings dealt with the question of whether the existing Determination provided for payment for fatigue breaks.

116 The TWU further submitted that the taxonomy adopted by fatigue laws similarly has little or no bearing on the present question. Those laws provide that a contract carrier may not "work", in the sense of operating a vehicle, for particular periods. It does not follow that a contract carrier is at leisure during those periods.

117 The TWU acknowledged that a contract carrier is obliged to take any fatigue break together with an unpaid lunch break where it is safe and reasonably practicable to do so, and accordingly, would not be entitled to payment in respect of that period.

118 The TWU submitted there was no jurisdictional issue with respect to any inconsistency between the proposed clause as to work time and statutory fatigue laws. In this respect, the TWU submitted there is no provision of any

fatigue law which prohibits payment for time spent on fatigue breaks. In answer to a question from the Commission, Mr Fagir submitted the term "fatigue break" was defined in the legislation.

119 I understood the legislation to be the *Heavy Vehicle National Law (NSW)* and associated regulations. That legislation provides a comprehensive framework designed to facilitate and regulate the use of heavy vehicles on roads. It imposes duties on a variety of parties, involved in one way or another in the operation of heavy vehicles, to ensure a driver is not fatigued while operating the vehicle. The legislation for example prescribes mandatory rest periods to prevent fatigue. There are many defined terms including definitions of "work", "fatigue" and "rest" but I have not been able to identify "fatigue break" as a defined term. Although not defined, in the context of this legislative framework, the meaning of the term is relatively clear. Mr Fagir indicated there was no resistance by the applicant to a definition being included which reflected the legislative intent should that be considered necessary,

120 At first blush the issue appears to be a stark choice between whether or not the carrier should be paid for mandatory fatigue or rest breaks. I do not consider it as simple as that. Much will depend on the rates determined in stage 2. The way rates are structured or calculated may indeed provide compensation for the incidents of operating heavy vehicles such as the need to avoid operating them when fatigued.

121 The decision to operate as a contract carrier gives the carrier the opportunity to operate as an independent business. I have earlier noted that some are more adept business people than others and that will always be the case. But it seems to me that operating one's business includes managing time and resources as efficiently as one is able. It also means accepting the business will incur certain overheads and confront operational risks. Fatigue breaks seem to me to fall into that category.

122 I accept the TWU's argument that such time is not totally at leisure. There are undoubted restraints on what the carrier may choose to do when "resting". Equally the time is not "work" time, though it may be time necessarily related to work. It is for that reason one of the overheads or "profit costs" incurred in

deciding to operate a heavy vehicle. In my view the issue should be addressed in that light.

123 I take the same view about time lost to breakdown and accidents. The carrier has the responsibility to maintain the vehicle. There is a clear incentive to do so in order to avoid losing time because of breakdowns. I accept that there may be occasions when a breakdown can occur notwithstanding diligent maintenance but that is a risk the carrier is to bear in operating the business. These sorts of risks may be addressed in calculating the fair and reasonable rates to be applied to various types and sizes of vehicle.

124 Moreover the evidence of the Toll witnesses was to the effect that Toll does not pay for fatigue breaks or time lost due to breakdown or accident. Bearing in mind the guidance provided by the "First Awards Principle" the Commission should be cautious about introducing new obligations in a previously unregulated area. I regard that policy as apt in this context.

125 For these reasons I accept the appropriate definition of "work time" is that advanced by the NSWBC and supported by other respondents and takes the following form:

> **Cartage Work Time** means the time during which a Contract Carrier is necessarily engaged in performing a Contract of Carriage. To avoid doubt, cartage work time includes all time during which the Contract Carrier is required by the Principal Contractor to be at their disposal and/or at their direction, but excluding time lost because of breakdowns or accidents and the time taken by the Contract Carrier for meal breaks

Savings Clause

126 MFI E includes a savings clause in the following terms:

> No contract carrier shall suffer a reduction in their terms and conditions of engagement because of the making of this Determination.

127 Mr Bray, supported by AFEI criticised the drafting of this clause as uncertain expressed as it is in the passive voice. He advocated the retention of the existing clause which provides:

> **Savings Clause**
>
> Nothing in this determination shall be construed so as to require the reduction or alteration of more advantageous rates and conditions to which a Contract Carrier may be entitled under an existing agreement with a Principal Contractor.

128 In my opinion the two forms of the clause are directed to the same end. Mr Bray submitted that the proposed clause fails to identify upon whom the obligation rests. However, in my view the same may be said of the existing clause. The overwhelming inference in both cases is that a principal contractor has no right to reduce rates or conditions simply because the Determination applies. Conditions may be reduced for other reasons but not because the Determination applies. However I think the form proposed in MFI E is to be preferred.

Promotion of Determination

129 The TWU has sought in its application the following clause with respect to the requirements by the principal contractor to promote the Determination:

> 5.1 Within seven days of the commencement of this determination the Principal Contractor shall give every Contract Carrier it currently engages a copy of this determination.
>
> 5.2 The Principal Contractor must give every new Contract Carrier it engages after this determination commences a copy of this determination before the Contract Carrier performs work.
>
> 5.3 A Principal Contract Carrier shall give every Contract Carrier it engages a copy of any variation to this determination within seven days of the commencement of the variation.
>
> 5.4 A copy of this determination may be provided to the Contract Carrier by email. A Principal Contractor may require that the Contract Carrier provide a current email address for that purpose.

130 The respondents strongly opposed the inclusion of the promotion clause in the manner proposed by the TWU. In particular, the requirement that principal contractors must give *every* Contract Carrier it engages a copy of the Determination, the respondents submitted, was particularly onerous such that there would be "widespread breach" by many principal contractors by virtue of the operation of the clause. NSWBC submitted an alternative clause which read:

> 5.1 A Principal Contractor must take reasonable steps to promote this Determination, which may be done in one or more of the following ways:
>
> (a) displaying a copy of the Determination at the Principal Contractor's workplace;
>
> (b) making a copy of the Determination available to Contract Carriers upon request;

> (c) making a copy of the Determination available on the Principal Contractor's website or intranet; or
>
> (d) advising all Contract Carriers of the existence of the Determination and providing information concerning where the Determination can be viewed.

131 In response to the respondents' contention that the "administrative inconvenience" was such that there would be inevitable breach of the Determination, the TWU submitted:

> The respondents' submissions about administrative inconvenience cannot be accepted. They were not supported by evidence. To the contrary, the only evidence before the Commission is to the effect that carriers described as "ad hoc" or "casual" are in fact subject to three days' training before they are permitted to work.
>
> It may not necessarily be the case that all carriers are required to carry out a three day induction before performing work. It is inevitable however that there is some contact with carriers and some exchange of information, most likely in the form of paperwork – contracts, run sheets, invoices, and so on. The notion that the contact with carriers is so ad hoc that it is impossible to provide them a document before engagement must be rejected.

132 TWU submitted that the evidence given by Messrs Aird, Danalis, Miles and Driver A demonstrated "widespread ignorance" of the existence of the Determination and that its proposal for principal contractors to provide a physical copy to all engaged contract carriers is a "simple step with potentially major impact on compliance in the industry."

133 The respondent parties, in particular NSWBC, submitted the TWU's evidence, to the extent relevant, amounted to "generalised opinions" and was not indicative of "widespread ignorance". Under these circumstances, NSWBC submitted, it would be far too onerous on principal contractors to ensure that a physical copy of the Determination would be provided to all contract carriers engaged by them.

134 NSWBC further submitted that inserting such a requirement in a Determination "that they are ignorant about achieves nothing" and noted the matter was an issue of "public policy" and not about rights and obligations with respect to working conditions. NSWBC noted that its proposal achieves the outcome sought by the TWU in seeking greater awareness of the Determination within the industry but "not in an unduly onerous way".

135 It is my view that principal contractors should be required to do something more than what has been proposed by the NSWBC, but not go so far as to require a physical copy of the Determination be provided to all contract carriers engaged by principal contractors. I accept that such a requirement would introduce unwarranted costs for principal contractors and would no doubt cause many principal contractors to be in breach of the Determination by virtue of failing to copy, distribute and record the distribution of the Determination and any variations.

136 I do not accept, however, that notification of the existence of the determination by electronic means would impose such costs or amount to a significant burden. Basic business practice will ensure there will always be some form of documentation exchanged on engagement. Mr Freestone gave evidence as to Toll's induction practice. He said in answer to Mr Fagir:

> Q. There is a rule, isn't there, at Minchinbury that no-one carries goods for you unless they have done three days induction/training?
>
> A. Buddy training.
>
> Q. That is two days in the truck?
>
> A. Yes, two days in the truck, they do the induction in front of the computer.
>
> Q. And another day in front of the computer, a third day in front of the computer?
>
> A. They will do all the inductions before they start, they will get an interview with our local delegates and they will do two days buddy training.
>
> Q. And that applies not only to your tied carriers but also to your casual carriers?
>
> A. Correct.

137 In my view, it would not impose an unreasonable burden to require the principle contactor to provide an electronic copy of the Determination and variations. The applicant also accepted that the principal contractor should not be obliged to provide the document every time a carrier is engaged. Mr Fagir proposed in that regard a regime similar to that required under the *Fair Work Act 2009 (Cwlth) s125.* That section provides:

> **125 Giving new employees the Fair Work Information Statement**
>
> (1) An employer must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

> (2) Subsection (1) does not require the employer to give the employee the Statement more than once in any 12 months.

138 Mr Fagir indicated the TWU would not be troubled by inclusion of a provision equivalent to s 125(2). I intend to do so. Toll submitted that the clause should also embrace the concept of practicability reflected in s 125(1). In view of the approach I have determined to adopt I am not persuaded that is necessary.

139 I note that there is substantial consensus, reflected in cl 13(g) of MFI E, about the provision of a Cartage Rate Schedule prior to the commencement of cartage work at least in relation to regular contract carriers. With that in mind, I consider a combination of the TWU and NSWBC drafts to be appropriate as follows:

> 5.1 Within fourteen days of the commencement of this determination the Principal Contractor shall provide every Contract Carrier it currently engages a copy of this determination.
>
> 5.2 The Principal Contractor shall provide every new Contract Carrier it engages after this determination commences a copy of this determination within seven days of the engagement.
>
> 5.3 A Principal Contractor shall provide every Contract Carrier it engages a copy of any variation to this determination within fourteen days of the commencement of the variation.
>
> 5.4 The obligations in this clause may be satisfied by providing an electronic copy of the instrument by email or other electronic means. A Principal Contractor may require, and the Contract Carrier shall provide, a current email address for that purpose.
>
> 5.5 Notwithstanding the terms of paragraphs 5.1 – 5.3 a Principal Contractor is not obliged to provide a copy of the documents more than once in any 12 months.
>
> 5.6 A Principal Contractor shall display a copy of the Determination and any variations then in force at the Principal Contractor's workplace.

140 I note the parties have not had a specific opportunity to address the Commission on the drafting of this clause and that may be done in settling the minutes of the Determination.

"Purpose" clause

141 The applicant sought the inclusion of a "purpose" or "objects" clause. There was significant opposition to such a clause being included. The proposal, highlighting the remaining issue, was included in MFI E. The words in italics below reflect the ultimate area of dispute if I was persuaded that such a clause

should be included. The Respondents did not concede such a clause had utility. AIG and AFEI positively submitted the clause was unnecessary.

> This Determination is designed to:
>
> (a) *provide a system of remuneration to achieve cost recovery of reasonably determined fixed and variable operating costs; (TWU: provide a framework for viable and fair Contract Carrier operations by providing a system of remuneration which allows Contract Carriers to recover reasonably determined fixed and variable operating costs)*;
>
> (b) regulate Contracts of Carriage for general freight within the area in which this Determination operates; and
>
> (c) set out enforceable terms and conditions of engagement for Contract Carriers and various rights and obligations applicable to Contract Carriers and Principal Contractors.

142 The TWU submitted:

> The true question is whether the proposed objects clause will improve the Commission and the parties in interpreting the instrument. A statement of the guiding principle underpinning the instrument's design must necessarily assist in comprehending it. The purpose clause proposed by the TWU is consistent with the objects of the Act as well as the objects of the GCCD. It should be adopted.

143 The NSWBC submitted that the contest between it and the applicant *"essentially relates to the use of the phrase 'viable and fair contract carrier operations'"*

144 Toll Submitted:

> For the reasons previously submitted, Toll remains unconvinced of the need for any contract determination to contain a purpose clause, such as that proposed in clause 2 of MFI D. However, if such a purpose is to be stated it should be clear and factual, otherwise the purpose is entirely vague and uncertain.
>
> This is particularly pertinent in connection with clause 2(a). It is clear and factual to state a purpose of providing a system to achieve cost recovery of reasonably determined costs. By contrast, the language suggested by TWU – namely, "to provide a framework for viable and fair Contract Carrier operations" – defies precise definition. What is "viable" or "fair" will be a matter of opinion and possibly contention. The words do nothing to clarify what the contract determination is set out to achieve.

145 I accept the TWU's formulation of the issue and in that context accept Toll's analysis of the competing drafts. The version proposed by NSWBC is to be preferred should such a clause be included.

146 Paragraphs (b) and (c) seem to me to be statements of law or principle which are derived from the legislation under which the instrument is made. In that sense they may be unnecessary. The TWU, however, has urged all along that the Determination should be simple, clear and unambiguous because it is to be understood and applied by contract carriers and principal contractors of varying skills and experience. The qualities identified seem to me to be ideals which should be the ambition of all industrial instruments. Equally the context in which the instrument may be applied is not unique to this Determination. Therefore there is nothing special about this Determination which itself justifies the inclusion of such a clause.

147 While I accept Mr Fagir's submission that novelty itself is not a reason to reject the claim I am not persuaded that the proposed clause will be productive of greater understanding and lessen disputes. The issue may be better informed after the question of rates is determined. The challenges of prescribing a regime of rates which is complex and diverse but intelligible to stakeholders may be assisted by a clause like this. At this stage I am not persuaded that the clause should be included but I grant leave to revisit the issue in stage 2.

148 I should note in that regard the wording of paragraph (b) introduces potential ambiguity by use of the term "general freight". The term is not defined and the scope clause makes no reference to it so far as I have been able to observe.

Vehicle Painting

149 The remaining issue here, as set out in MFI E cl 6.8(d), was whether the contract carrier should be compensated for the loss of remuneration while the vehicle is being painted.

150 The evidence of Toll witnesses in relation to this issue varied. Mr Basaric said that in relation to Toll Tasmania it had been the practice to require painting in Toll colours before the contract carrier started work. Mr Eastick, Toll IPEC, and Mr Peacock, Toll Priority, said their businesses provided the contract carrier with an alternative vehicle while theirs was being repainted. Mr Rust, Toll Express, said that major work such as repainting was done during the contract carrier's annual break so *"they do not lose out".*

151 It does not seem to me unreasonable that contract carriers should "not lose out" because their vehicle is being repainted at the direction of the principal contractor. The Toll evidence indicates that there are several ways of ensuring that end other than simply compensating the contract carrier. TNT submitted that alternative mechanisms should be recognized if the Commission were otherwise persuaded to grant the claim.

152 Mr Fagir submitted that the specification of the alternatives would lead to all sorts of practical difficulties. I am not persuaded that practical difficulties can't be overcome by intelligent drafting. In my view the Determination should recognise those alternative mechanisms and impose an obligation on the carrier to co-operate with those reasonable alternatives. Compensation should be recognised as one of the alternatives. I will give the parties an opportunity to make submissions on the drafting of a clause to give effect to these reasons.

Contract Carrier Obligations

153 Clause 12 of MFI E specifies the obligations of contract carriers. AIG submitted additional obligations should be included as per clauses 12.8, 12.9 and 18(1)(c) and (d) and 18.2 of MFI F. In my view the matters are sufficiently encompassed in the existing drafting particularly through clause 12.1of MFI E.

Drug and Alcohol Policies and Programs

154 Toll and TNT argued for amendments to cl 12.5 of MFI E. They each suggested that the clause should make it mandatory for principal contractors to have such a policy and/or program. The TWU made no submission as to substantive suggestion beyond observing that it seem to impose rather more of a burden on principal contractors "than an obligation to provide a rates schedule". No other respondent expressed support for the proposal. I am not inclined, praiseworthy though it may be, to impose the obligation at this stage.

Cartage Rate Schedule

155 Clause 13 (g) of MFI E requires the provision of a "Cartage Rate Schedule" to each contract carrier prior to the carrier commencing cartage work. The term "Cartage Rate Schedule" is defined in cl 1.1. Although originally represented as an agreed definition in MFI E, NSWBC, Toll, ARTIO and Linfox subsequently revised their positions on the definition.

156 The definition originally set out in MFI E was as follows:

> **Cartage Rate Schedule** means a written schedule (which may be an electronic document) identifying:
>
> (a) the basis of calculation of the Cartage Rates (e.g. per hour, per km or some other basis);
>
> (b) the amount of remuneration to be paid to the Contract Carrier for the Cartage Work (e.g. $100 per hour); and
>
> (c) the timing of the payment of remuneration (e.g. the day of the week on which remuneration will be paid and the pay period).

157 Mr Baroni submitted his clients' concerns, which essentially related to duplicating information already provided, could be met by deleting the words "a written schedule" and substituting "a document or documents".

158 Mr Sloane submitted:

> ..Toll's concerns with the clause does not stem from a desire to keep contract carriers "in the dark" about their remuneration arrangements, but from concerns as to the feasibility or practicability of the absolute nature of the obligation imposed by the clause to provide a *particular* document to *every* contract carrier *before* any work is performed.
>
> Toll submits that its concerns could be addressed through the following amendments to MFI D:
>
> a. amend the definition of "Cartage Rate Schedule" to read:
>
> ***Cartage Rate Schedule*** *means a written schedule (which may be an electronic document) identifying:*
>
> *(a) the amount of remuneration to be paid to the Contract Carrier for the Cartage Work (e.g. $100 per hour);*
>
> *(b) the rate or rates (e.g. per hour, per km or some other basis) on which the amount of remuneration is to be calculated; and*
>
> *(c) the timing of the payment of remuneration (e.g. the day of the week on which remuneration will be paid and the pay period).*
>
> b. replace clause 13(g) with the following:
>
> *(g) provide to each new Contract Carrier that is intended to be a Regular Contract Carrier a Cartage Rate Schedule, prior to the Contract Carrier commencing to perform Cartage Work;*
>
> *(h) provide to each Regular Contract Carrier a new Cartage Rate Schedule whenever there is a change to the basis of calculation of the cartage rates and/or a change to the cartage rates; and*
>
> *(i) provide to each Contract Carrier who is not a Regular Contract Carrier the information that would otherwise be included in a Cartage Rate Schedule, prior to commencing to perform Cartage Work.*

159 NSWBC supported Toll's submission.

160 Mr Baroni's submission seems less of a change to the formerly agreed position than Toll's which is directed, as I understand it, to so called ad hoc contract carriers. In that regard the arguments about the "Promotion of the Determination" are rehearsed.

161 In my view it is simply sensible business practice to record in writing, whether electronically or in hard copy, the consideration which underpins the contract. That may require a variation of current practice but in the absence of compelling evidence to the contrary I am satisfied it is a reasonable obligation to impose. There is greater scope to argue about what is meant by "before" in the case of ad hoc carriers who are engaged several times in a period of say 12 months. Nevertheless, with the aid of modern technology I am satisfied the obligation is fair and reasonable.

162 In respect of Mr Baroni's submission, I consider it desirable that the specified information be in one document. That may involve an adjustment to current practice but, in the absence of evidence suggesting the adjustment would cause significant disruption, the required adjustment is not such as to sacrifice the advantage of coherence evident in the original draft.

Allocation of Work and Rostering

163 ARTIO and Linfox submitted that the words "transparently, reasonably and" should be deleted from both paragraphs of cl 15 of MFI E because the words are "subjective and don't add anything". The submission was supported by AIG and AFEI.

164 The TWU response was that it was important that allocation and rostering principles applied by the principal contractor be known and understood by the contract carriers. That did not require publication of a written policy but some process by which contract carriers are made aware of "the basic logic of allocation". The TWU accepts that there are too many variables to specify a process of allocation or rostering in a determination. The proposed clause seeks to balance the need of contract carriers to understand the process with the need of principal contractors to develop an appropriate process.

165 I accept that the word "transparently" in particular has an element of subjectivity about it. That subjectivity may lead to disputes. I accept also the

importance of fair work allocation to contract carriers. On this issue, which is finely balanced and really a contest in drafting I am inclined to accept the applicant's contention. The words should remain.

Termination

166 AIG (supported by AFEI), ARTIO, Linfox and Toll sought the reintroduction of a "Termination" provision. AIG, ARTIO and Linfox submitted it should be in the form found in the current Determination. The applicant did not oppose that reintroduction. I understood that concession to include the definition of "misconduct" which relates to the operation of that provision.

167 Toll sought the specification of a right to terminate on notice and the period(s) of notice required. There was no concession to that course and AIG and AFEI positively opposed it submitting it should be a matter for agreement. No other respondent sought such a clause.

168 The Determination should include a clause dealing with "Termination" and it should be in the form of the current Determination with the ancillary definition.

Record Keeping

169 MFI E cl 24.1 provides:

> The Principal Contractor must record either in documentary form or electronic form, the following information for each Contract Carrier:
>
> (a) any Cartage Rate Schedule;
>
> (b) start and finish times;
>
> (c) hours worked per day;
>
> (d) kilometres travelled per day;
>
> (e) Start and Finish place;
>
> (f) remuneration paid;
>
> *(g) a copy of any written contract entered into with Contract Carriers;*
>
> *(h) all trip schedules and driver rosters;*
>
> *(i) all safe driving plans and risk assessments that relate to the fatigue of road transport drivers;*
>
> *(j) all reported breaches and suspected breaches of a fatigue management law, including breaches and suspected breaches identified by the principal contractor; and*
>
> *(k) all breaches of fatigue management laws investigated by the principal contractor, the outcome and any remedial action taken*.

170 The paragraphs in italics again represent the area of dispute.

171 Each of the Toll witnesses gave evidence that all of these records are kept. For example Mr Freestone said:

> I refer to clause 23 of the TWU Draft. In one way or another, Toll Contract Logistics would keep all of the records referred to in clause 23.1. However, they are not stored in a single, easily-accessed place, much less sorted contractor-by-contractor. To the extent that clause 23.2 requires all records to be provided to a contract carrier each pay period, it would place an onerous and unnecessary obligation on Toll. In my experience, contract carriers are only ever interested in receiving their pay records.

172 The requirement in the then proposed cl 23.2 about which Mr Freestone and other Toll witnesses spoke is not included in the form of the draft determination which is MFI E. I therefore see no reason why paragraphs (g) to (k) should not be included. The obligation, as I understand it, is to maintain the nominated documents either in hard or soft copy. That appears to reflect current business practice.

173 NSWBC made a submission that specification of some or all of the disputed paragraphs was unnecessary because they duplicated existing statutory requirements. That may expose principal contractors to liability under two statutes it was said. The applicant accepted that point but argued there was a clear advantage in documenting in the Determination the records to be kept. That would be more accessible to the persons covered by the instrument. The principles of totality and double jeopardy would protect principal contractors from prosecution twice or penalties under two statutes. I accept the submission of the TWU on this point.

Deemed Hours and Kilometres

174 The applicant presses for the inclusion of a clause in the following form:

> For the purposes of calculating a Contract Carrier's entitlement to remuneration, and notwithstanding any other provision of this Determination, in respect of Cartage Work performed on any day where records of kilometres travelled and start and finish times are not kept:
>
> (a) the Contract Carrier's Cartage Work Time on that day will be taken to be twelve hours; and
>
> (b) the Contract Carrier's Work Distance travelled on that day will be taken to be 240 kilometres

175 In support of the inclusion of this clause the applicant submitted:

Keeping of proper records is, of course, essential to compliance. Without them enforcement is virtually impossible. As Aird's evidence indicated, there is consequently a perverse incentive to avoid keeping records and thereby make difficult or impossible any prosecution for underpayments.

It is presumably for that reason that the *Transport Industry – Courier and Taxi Truck Determination* contains the following deeming provision:

> 8.3 Where a principal contractor does not keep remuneration records that comply with the requirements of Clause 10, Remuneration Records, then for the purpose of subclause 12.2 the safety net calculation for each contract carrier for whom remuneration records do not comply shall be based upon the contract carrier having been engaged for a minimum of ten (10) hours engagement for each day worked during the period for which the remuneration records do not comply. Nothing in this subclause shall limit the legal rights of the contract carrier to seek recovery for any hours performed in excess of ten (10) hours on any day.

There is nothing to suggest that the clause has operated oppressively or that it has ever caused any serious concerns for operators in that sector. It is effective to address the perverse incentive, improve compliance, and ensure that contract carriers who have been underpaid have some capacity to obtain remedy. The equivalent deeming provision proposed in this case should be adopted.

176 In response the NSWBC submitted:

> Limited evidence has been advanced in support of the deemed penalty for breaching recordkeeping obligations as proposed by the TWU. The following elements of the evidence appear to be the only ones that could be said to go to this issue:
>
> (a) Mr Aird gave evidence about the 'arduous task' that is proving underpayment claims in court, made 'almost impossible' when records do not exist; and
>
> (b) Mr Aird made a generic assertion that 'in some instances companies deliberately do not keep records to mask their non-compliance with rates of pay and fatigue breaks, although notably did not provide any probative evidence to support that claim.
>
> Again, there is insufficient evidence to support the TWU claim. At its highest, this evidence simply says the TWU want it to be easier to prosecute principal contractors and for them not to have to allocate resources to this.
>
> There is no evidence before the Commission of any value or weight of specific examples of flagrant compliance abuse that would warrant the inclusion of such an extraordinary clause and certainly none to support the punitive clause claimed.

177 Toll submitted the proposed clause was a penalty and that there was no evidence that 12 hours or 240 kilometres were appropriate levels at which to set any penalty. ARTIO, TNT, AFEI, and AIG also submitted the clause was a penalty and should not be included.

178 Notwithstanding Mr Fagir's articulation of the difficulties of enforcement proceedings I am not satisfied that it is necessary or appropriate to insert a clause of this kind into the Determination. There was no evidence of any real strength to suggest that the proposed hours and distance reflected the daily average for any particular sector covered by the Determination let alone all sectors within its coverage.

Leave Reserved

179 The agreement between the TWU and Master Builders to which I earlier made reference included an agreement as to a "Leave Reserved" clause. Mr Fagir proffered a draft of that clause which was included in Exhibit 29. The clause should be included in the Determination in that form.

Commencement Date of the Determination

180 Given the deferral of the determination as to the rates provisions to "Stage 2" of these proceedings an issue arose as to the commencement of the non-rates provisions as determined in this decision. On this note, NSWBC submitted:

> In my submission there are two options before this commission. The first is if there is a decision to vary the determination the first is to determine what is an appropriate implementation date. It may depend upon the substantial change or lack thereof of the determination. If MFI E is endorsed and it is the determination varied consistent with MFI E, I think it would probably be appropriate for a deferral date of around three months to allow parties, and particularly employer associations and the union, to inform their constituents of the change. The second option is to defer the implementation of any variation until the end of stage 2. That is, there might be a decision that your Honour hands down that varies the determination but it is not limited until the outcome of stage 2 so the entire examination comes into effect in one go. That would avoid having clause 3.2 in this determination because this determination did not come into effect until the rates issue has been settled. So I'm not hugely persuaded one way or the other but I think there may should be some deferral or some time provided to parties if there is a variation.

181 ARTIO, Linfox and Toll contended for the second alternative suggested by NSWBC.

182 The applicant pressed for the determination in relation to non-rates issues to come into effect without waiting for the decision in relation to stage 2. That seems to me consistent with the rationale for dividing the proceedings. I accept however that there should be some deferral to allow the parties time to inform their constituents and for the constituents to make any necessary practical adjustments to ensure compliance with the interim determination. In view of the

directions I intend to make there will be a lapse of time before the interim determination is settled and that time can be used to forewarn constituents of the determination. The interim determination will then come into effect one month after the settlement of minutes.

183 There was acceptance by the parties that there may need to be a revisiting of some of the matters, and in particular the question of coverage, dealt with in this part of the proceedings once stage 2 is complete. I suggested that the parties should develop a clause to be included in the interim variation to facilitate that possibility. None has yet been forthcoming. I am prepared to grant leave accordingly and a provision to that effect that should be included in the interim determination.

184 I will give the parties a short period to consider these reasons before making any formal orders. I propose, after hearing from the applicant as to the time required, to direct that the applicant prepare short minutes of order, including a draft interim determination, giving effect to these reasons.

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