TRANSPORT AND LOGISTICS CENTRE

Transport Ideas™

Five Star Trucking Safety Concept: Development of Model Options

FINAL REPORT 26 JULY 2012

Consortium Members

TRANSPORT AND LOGISTICS CENTRE

Transport and Logistics Centre
PO Box A2275 Sydney South NSW 1235
Principal Contact Email: info@talc.com.au
ABN 81 123 305 144
http://www.talc.com.au
Phone (02) 9032 7600

Transport Ideas™
PO Box A80 Sydney South NSW 1235
Contact Email: info@transportideas.com
http://www.transportideas.com
Phone 0407 599 407
ABN 79 130 686 378

DISCLAIMER

The information contained in this document is solely for the use of the NSW Road Freight Industry Council's Five Star Sub-Committee for the purpose for which it has been prepared and no representation is made or to be implied as being made for any third party.

Whilst reasonable care has been taken in the preparation of this document the origin, validity, accuracy, completeness or reliability of information presented is not guaranteed. Where statements, opinions, projections, forecasts and other material, which reflect various assumptions are presented these may or may not prove to be correct. No liability is accepted by TALC or Transport Ideas in relation to actions arising from the use of information in this report.

CONTENTS

1 EXECUTIVE SUMMARY

This report addresses key design features of a *5 Star Trucking Safety Rating System* (5 Star system) and develops specific models for delivery of such a system. The report builds upon the results of two consultancy reports previously commissioned by the then RTA, the report by Adeptus Consulting "Review of Safety Accreditation Schemes for Five Star Trucking Safety", and the preceding report by the Transport and Logistics Centre (TALC) and Transport Ideas (TI) "Five Star Trucking Concept: Review of Rating Systems and Identification of the Benefits".

The purpose of the report is to elaborate further the concept of a 5 Star system, to inform the next stage of development. This stage will provide for a better assessment of the potential of, and support for, a road freight transport initiative based on rating safety performance.

Key Design Features

The previous TALC/TI report found that "[A] a 5 Star Trucking Safety Rating System can harness the power of the market to improve safety outcomes and embed existing improvements into the industry. But all players in that market, especially customers and clients (whether government or private sector) need to be closely engaged to drive industry-wide outcomes. A system that fuses together industry and regulator information to provide a powerful tool to measure safety performance, and then uses that tool to give companies access to significant benefits, could achieve that engagement."[1]

This has led to a set of objectives for a 5 Star system being proposed in this report at Chapter 9:

- To support the National Road Safety Strategy 2011-2020 through contributing to reduction in the number of crashes involving freight transport vehicles in Australia, with subsidiary objectives of:
    - Addressing information failure in relation to the safety performance of individual road freight transport operators
    - Enhancing the priority given to safety by road freight transport operators, their customers, regulators and the community
    - Rewarding road freight transport operators that achieve high safety ratings through a range of regulatory concessions and operational benefits

Following on from this, the structure chosen for the 5 Star system will be important to achieve viability, and to build and maintain stakeholder confidence in its operation. As stated above, the starting point is that the system be based on a 'fusion' of industry and

[1] See the preceding TALC/TI Report, Volume 1, page 13

regulatory elements, bringing together information from regulators, existing industry schemes/ codes of practice, and stakeholders. Nine design features build on this foundation, encompassing:

1. *A 5 Star Standards Ratings Framework for Road Freight Transport Safety that applies nationally*
2. *A tripartite commitment shared across industry, government and unions*
3. *Participation open to all road freight transport operators*
4. *Provision of benefits and concessions relative to the rating achieved*
5. *Strong governance arrangements through clarity of roles and responsibilities*
6. *Advances in information available on safety performance*
7. *Integrity of audit assessment*
8. *Transparency through public availability of results*
9. *Capacity to evolve with experience and changing circumstances*

A strong commitment from all parties and implementation of a robust system will underpin market and regulator recognition, and add to the advantages of participation. Many trucking operators are not convinced that the efforts they make now to improve safety performance through participation in existing industry schemes are well recognised – as evidenced by the following stakeholder comment in consultations:

> *"Many operators are pressured to spend $ to gain accreditation or make compliance requirements, but there is little recognition from Insurance Companies, RTA or Police that an operator has jumped all the hurdles to provide a safer, better level of service to the industry and community."*

This report has highlighted three of the design features as central to the next stage of project development – the benefits available to operators, advances in information on safety performance (particularly from regulators), and specification of the 5 Star Standards Rating Framework (5 Star Framework).

Incentives to Participation through Attractive Benefits

A threshold issue in further development of a 5 Star system is consideration of the benefits that will accrue to participating trucking operators. Discussions with stakeholders and the previous reports indicate that benefits will be a key driver in achieving substantial take-up rates and in changing behaviour. This is particularly important given that the design brief is predicated on voluntary participation.

It is difficult at this early stage to estimate the level of benefits required to achieve a substantial take-up rate in a voluntary scheme. However the judgment is that both small and large fleet owners would want to see prospect of a net reduction in running costs in the

order of 5 to 10 per cent per vehicle to motivate their participation. Further benefits would relate to achievement of 'preferred tenderer' status to assist in gaining freight business.

The report explores at a high level a possible benefits package, to apply across all road transport sectors and sizes of operator (from owner-drivers to large nationally operating companies), which is summarised in the Table below:

Benefit Area	Benefits
Road transport law	The incidence, location and/or extent of heavy vehicle inspections Participation as a defence under chain of responsibility laws Inclusion as a pre-condition for: – accessing a new accelerated heavy vehicle licensing regime – accessing the extended working time hours regimes in fatigue management – lifting of infrastructure access restrictions for highly rated companies Revenue neutral charging concessions on licensing, registration and permits
Drivers	Training subsidies and rebates for training in: - Fatigue - OHS - Defensive driving - Fuel efficient driving - Other professional driver skill sets
Clients	Preferred tenderer status in supply chain procurement (private and public)

Table 1.1 Benefits in a 5 Star system (reproduced from Chapter 3)

The report recommends that a reduction in the incidence, location and/or extent of heavy vehicle inspections be explored as a key benefit in further development of the 5 Star system. For example, the network of road side inspection stations could reduce the frequency of inspections for heavy vehicles operated by highly rated companies on the basis that they pose a reduced safety risk. In addition, the use of in-vehicle telematics by these companies could see a reduction in the time spent when being inspected, allowing the disruption to the delivery of the freight task to be minimised. This type of benefit is provided in the Partners in Compliance (PIC) program in Alberta, Canada for highly rated carriers.

The Ratings Framework

The development of a national 5 Star Standard Ratings Framework will underpin an indicative ratings scoreboard (summarised in Table 1.2) with initial coverage of speed, fatigue management, driver health and vehicle and equipment conditions. The first iteration of the Ratings Framework based on these four areas reflects analysis which has identified them as the main 'on-road' risk factors to safe operation. Further applying this analysis, the scoreboard also weights the risk factors according to their relative contribution to safety incidents.

SAFETY SPECIFIC FACTORS	*Initiatives*	*Sub Scores*	*Weighting*	*Score Weighted*
SPEED *Speed Management Initiatives*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*	*35*	*3500*
FATIGUE *Fatigue Management initiatives*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*	*30*	*3000*
DRIVER HEALTH *Especially Alcohol and Drug management*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*	*20*	*2000*
VEHICLE & EQUIPMENT CONDITIONS *Vehicle & Equipment Conditions management*	– *People* – *Tools* – *Management* *Safety Specific Indicators*	*Out of 100*	*15*	*1500*
Total			*100*	*10000*

Table 1.2: Indicative Scoreboard with Weightings for Safety Specific Factors
(reproduced from Chapter 5)

A weighted scoring system will keep operators focused on the risk factors that most impact safety performance. The risk factors and their weightings can be adjusted over time, and like all the Scoring Rules should be regarded as indicative only at this stage.

The Scoring Rules provide for recognition of the status achieved by an operator under OHS standards, and of participation in existing industry accreditation schemes and codes of practice. However achieving a 5 Star rating will require further steps. The scoring structure also allows for an operator that is not an existing participant in an accreditation scheme to be able to achieve a 5 Star rating.

The risk factor of Speed provides the basis for a case study to further outline the safety measures being audited, and the development of an Audit Tool. The indicative Audit Tool for Speed includes different approaches in assessing owner-drivers and larger operators, and provides for the inclusion of best practice.

The scoreboard is presented in generic format at this stage of the 5 Star process. Further articulation of the scoreboard, and consideration of related audit issues, will be important next steps. The key building block for the scoreboard, and indeed the whole 5 Star system, will be the 5 Star Standard Ratings Framework. It is proposed that the Framework be developed with oversight by an expert Reference Group.

Delivery of a 5 Star system

With the prospect of a future Regulation Impact Statement process, and to assist consideration and consultation more generally, the Report considers suitable models to deliver the 5 Star system. Three models have been identified as providing a means for implementation

- A Standard-based Model, under which auditors would purchase licences to apply the 5 Star Framework, and operators would choose an auditor from those so licenced. There would be no central oversight, save for the Reference Group being reconvened at intervals (say 3 years) to review and update the Ratings Framework.
- A Joint Industry-Regulator Model, where a not-for-profit company with a Board comprising industry, union and regulator/government representatives would hold an exclusive right to manage the application and review of the 5 Star Framework. The Company would accredit auditors to undertake assessments of participating companies, and assign an auditor to an operator seeking assessment.
- A Regulator-managed Model, where regulators would operate the system through a national structure, with exclusive right to the 5 Star Framework. Individual jurisdictions would manage assessments in their areas and assign accredited auditors to undertake assessments of participating operators.

Given their embryonic nature, it is difficult to detail the respective costs for these models. However the initial assessment is that costs would be modest and potentially well outweighed by the benefits of safer on-road operations. Costs would also be contained through offsetting reductions in charges for operators with high safety ratings by increases in charges to other operators, and through re-allocation of funds within training budgets. The cooperation of regulators and governments more generally would be important to keeping costs down for the Standard-based and Joint Industry-Regulator Models – such as in provision of regulator-sourced safety performance data.

The report develops an indicative example of the minimum resourcing requirements based on the Joint Industry-Regulator model. With 35,000 vehicles participating and 10,000 drivers trained each year (provided by new funding), expected costs could fall between $6.7 – $7.2 million per annum. No net costs are assumed for the audit process itself, as it is proposed that audit fees be set on a cost-recovery basis.

Costs should be assessed against the potential for savings through reduction in crashes, and related fatalities, injuries and disruptions. For example, a 10 per cent reduction nationally in fatalities related to heavy vehicle crashes would lead to a $128 million saving in costs to the community, while a 20 per cent reduction would lead to a $256 million saving.

While the Joint Industry-Regulator Model appears to provide the best overall mix of attributes, it is suggested that all three models be retained as possible delivery options (allowing for the likelihood of a RIS process at some point in the future). Further specification of delivery requirements will anyway be influenced by the results of the next stage of development, and how that stage is undertaken.

A Pilot Project

For this next stage of development, interest has grown in the establishment of a pilot project to trial the 5 Star system. A Pilot project will give a very significant signal to the industry and the community of the potential that is seen in the 5 Star system by leaders in industry and government.

The Pilot would cover the four main risk factors of Speed, Driver Fatigue, Driver Health and Vehicle Conditions/Equipment. The focus would be on a particular sector, or at most two to three sectors, of the trucking industry such as carriage of livestock, steel, fast moving consumer goods (FMCG) or Defence-related work. The design would include a supply chain approach, through bringing in suppliers, distribution centres and end-customers. Participation in the Pilot would be encouraged by a package of concessions and benefits from trucking industry regulators, and desirably by further incentives from other regulatory authorities and market players.

A pilot would allow for an evaluation of the:

- Impact of participation on safety culture and performance of operators
- Relationship of '5 Star' to existing accreditation schemes
- Importance of benefits both in aggregate and specifically to encourage participation
- Perceptions of other supply chain participants
- Regulator experience and key data requirements
- Implications for the implementation model for a national 5 Star system

A major jurisdictional regulator such as RMS would be well placed to host the Pilot. However, while centred in a particular jurisdiction, the design and implementation of the Pilot should take a national perspective. This would not only ensure coverage of cross-jurisdictional vehicle and driver movements, but the availability of nationally consistent data sets on compliance. The sample size will need to be of a scale sufficient to underpin findings on overall value and viability of a future national scheme, and features of its core elements. An important requirement of the sample will also be an appropriate spread of trucking operators by size of fleet and vehicle, of the standards achieved under existing safety systems, and of safety performance.

Conclusion

This report has explored the options for delivery of a 5 Star system and has set out to model those to a level of detail to allow for the next stage of development. The report confirms

that a 5 Star system is feasible to develop, and would contribute to the safer performance of the freight task. Whether a Pilot is established or not, fundamental to the next stage of development of the 5 Star system will be to flesh out the 5 Star Framework and the Audit Tool, supported by a complementary information and consultation strategy. This work would run in parallel with the creation of a national regulatory data framework, and be an important input to it.

2 INTRODUCTION AND METHODOLOGY

Introduction

This consultancy report addresses the requirements of the *Five Star Trucking Safety Concept: Development of Model Options* brief issued by the Freight Branch of the then Roads and Traffic Authority of New South Wales (RTA) in April 2011, on behalf of the Five Star Trucking Safety Sub-Committee ('the 5 Star Sub-Committee') of the then Road Freight Advisory Council (RFAC). The consultancy continued under Roads and Maritime Services (RMS), a new service delivery organisation established on 1 November 2011, which took over the RTA's activities.

The report follows two consultancy reports previously commissioned by the RTA, that examine the issues involved in developing a *5 Star Trucking Safety Rating System* (5 Star system) to improve the safety performance of the road freight transport industry:

- The desktop study by Adeptus Consulting "Review of Safety Accreditation Schemes for Five Star Trucking Safety"

- The report by the Transport and Logistics Centre (TALC) and Transport Ideas (TI) "Five Star Trucking Concept: Review of Rating Systems and Identification of the Benefits"

The objective of this report is to build on the findings of these studies, and subsequent consultations, to firm up key design features of a 5 Star system and to develop models for implementation, to use in further consultation with stakeholders and in a possible Pilot project. The work will assist the 5 Star Sub-Committee in finalising a recommended approach to the NSW Government, through the recently established Road Freight Industry Council (RFIC)[2].

The Five Star Trucking Safety Concept

Consideration of a safety rating system for trucking companies stems from a public policy objective to enhance road safety outcomes from the movement of freight in both NSW and Australia. Projected growth in the road freight task to 2030 will result in more heavy vehicles on the roads. Notwithstanding considerable progress in introducing a range of safety measures related to road freight transport in recent decades, growth in freight transport volumes has the potential to increase safety risks for all road users.

In concept is a range of ratings from 1 to 5 Stars which will give clients seeking road freight services a clear and robust indicator of the safety performance of the trucking operators available in the market - from 1 Star indicating basic safety compliance, up to 5 Star indicating best practice in adoption of safety systems and in safety performance.

A rating system focused on safety will reward trucking operators that place a high corporate priority on safe operations, through indicating that they have introduced and maintain effective safety systems. Such systems include performance measurement and benchmarking, training programs and supportive employment arrangements.

[2] The RFAC was disbanded in 2012, and replaced by the RFIC, of which the 5 Star Sub-Committee is part.

A robust, structured and transparent rating system not only will provide competitive benefits to rated companies but also to the rest of the supply chains of which they are part. Purchasers of freight transport services will be able to choose highly rated operators to underpin supply chain performance and reliability, and publicise their own businesses by showing their priority to safer road transport. Regulators and the community will benefit from the higher profile given to safer operations.

Methodology

As well as the Adeptus Consulting study of safety accreditation systems and the preceding report by TALC/TI, a range of other information sources have provided background and content to this report. This includes information available on New Zealand's Operator Rating System (ORS) and the content of and responses to the Industry Discussion Paper circulated by the 5 Star Sub-Committee in early 2011. A range of industry stakeholders was consulted, with key points from these consultations provided at Appendix 2.

The Consultant's Brief requires that models developed in this report be defined to a level that can be used in a RIS context. Hence requirements for best practice regulation both for the NSW Government and the Council of Australian Governments (COAG) have been considered as part of the of this report. This consideration includes the requirements for a Regulatory Impact Statement (RIS) should a RIS be required at State or national level.

All of these sources contributed to consideration of how a 5 Star system might best be structured, what benefits the system could offer to drive participation, and the exploration of delivery models.

Given the early stage of development, it was seen as desirable to set out a framework for a 5 Star scoreboard and the broader audit arrangements that might be applied through various delivery models. Hence an indicative scoreboard and a description of supporting audit arrangements were seen as fundamental to the overall task. The focus of the scoreboard is on the four key safety risk areas of speed, fatigue, driver health (including alcohol & drug issues), and vehicle equipment and conditions.

The scoreboard takes into account experience with the industry's *Trucksafe* scheme, the National Heavy Vehicle Accreditation Scheme (NHVAS) and the National Logistics Safety Code (NLSC), as well as the Long Distance Fatigue Regulation used by Workcover NSW, and is intended to give an indication of what the final version might resemble.

Three delivery models are elaborated that would enable national implementation of a 5 Star system, providing for the scoreboard to be filled out by an independent audit and the key results to be made publicly available.

The conceptual approach underpinning the scoreboard and delivery models is that of a fusion of industry and regulator elements, as outlined in the preceding TALC/TI report. Implementation is anticipated to be evolutionary, and will be based on voluntary participation. The availability of a substantial package of concessions, benefits and other commercial advantages is therefore vital to encourage a high level of take-up by trucking companies.

3 BENEFITS THAT CAN DRIVE BEHAVIOUR CHANGE

This Chapter further explores the benefits that could be made available under a 5 Star system. Through consultations with stakeholders and the review work undertaken in the previous studies, it is apparent that the benefits derived by road freight transport companies will be the key driver in achieving substantial take-up rates and in changing behaviour. The level of benefits required to drive take-up rates in a voluntary scheme is difficult to estimate precisely. The Partners in Compliance (PIC) Program from Alberta, Canada achieves coverage of 5 to 10 per cent of their overall fleet by offering modest incentives, though the Program only aims to cover the top 25 per cent.[3]

As discussed in the previous report, these benefits need to provide a commercial advantage to participation and be based on the regulators and purchasers of transport services trust in the 5 Star system's assessment of an operator's safety performance. Non-participation should lead to less trust and increasing interest and attention from regulators, plus higher levels of scrutiny when purchasers are making decisions. This system should ultimately lead to a 'market for safety' where commercial decisions are positively influenced by safety performance (i.e. the safer the operator the more attractive they are to purchasers of transport services).

The level of benefits required to generate change

The benefits of participation must provide a significant incentive to each operator's bottom line, though the exact amount will vary according to each business. For example, an owner -driver with a profit level of $70,000 per year with a potential financial benefit from the program of 5 to 10 per cent of that profit level ($3,500 to $7,000 per year) would have significant encouragement to participate. However the level of benefit will be perceived in net terms after scheme participation expenses and costs from changed business practices. Both small and large fleet owners are likely to desire a net reduction in running costs per vehicle in the order of 5 to 10 per cent to motivate participation. Larger companies will also develop a company specific business case to assess whether it is attractive to participate.

The exception will be those companies that can meet high standards without changing their business practices substantially. If the audit cost is reasonable, these companies will be strong targets for early participation and so help achieve critical mass in the system.

Designing an attractive benefits package for the entire industry

The previous TALC/TI report canvassed the type of benefits that could be included in a 5 Star system. This report narrows the options outlined that report down by restricting the identification of benefits to those that can be provided by a road transport regulators (including dangerous goods regulators), workplace health and safety regulators and private and public sector clients. Engagement with education and training authorities for benefits around driver training is also recommended, though it is possible to proceed without them. The more focused the approach, the

[3] See the preceding TALC/TI Report, Vol. 1, page 29

greater are the chances of earlier system implementation as it will reduce the areas of government required to be involved in establishing the system.

This Chapter identifies specific benefits that could be pursued to begin the 5 Star system and that would be applicable across all sectors and sizes of operator, from owner driver to large nationally operating companies.

These benefits have been developed from the starting point that three elements are common across all the types of fleet, business size and supply chains:

1) Road transport law - Vehicles all need to interact with the road transport regulator for registration, licensing and permits

2) Drivers - All vehicles require drivers who are licensed and trained

3) Clients - Operators all have clients (noting that for ancillary operators 'internal' clients are purchasing transport services as part of an overall business service)

As these common high level characteristics are explored, operators start to differ. For example, large companies are more likely to use in-vehicle telematics and GPS tracking systems, have more sophisticated business systems, and can negotiate supplier discounts. A specific benefit will also inevitably be more attractive to one operator over another. For example, if an operator does not run 'over mass' vehicles then a benefit in this area will not be attractive. A mix of benefits is therefore developed to maximise the reach of the 5 Star system across each of the three characteristics above.

A high level description of recommended benefits is provided in Table 3.1 below (and is discussed extensively in the previous TALC/TI report):

Benefit Area	Benefits
Road transport law	The incidence, location and/or extent of heavy vehicle inspections Participation as a defence under chain of responsibility laws Inclusion as a pre-condition for: – accessing a new accelerated heavy vehicle licensing regime – accessing the extended working time hours regimes in fatigue management – lifting of infrastructure access restrictions for highly rated companies Revenue neutral charging concessions on licensing, registration and permits
Drivers	Training subsidies and rebates for training in: - Fatigue - OHS - Defensive driving - Fuel efficient driving - Other professional driver skill sets
Clients	Preferred tenderer status in supply chain procurement (private and public)

Table 1.1 Recommended benefits under a 5 Star system

Road transport law

An obvious source of incentives is through the provision of benefits, relative to ratings achieved, in the application of regulations under road transport law. This is an important area of focus for industry stakeholders, as indicated by a comment in the consultations that

> *"Benefits, as well as the speed exemptions, should include reductions in registration and insurance commensurate with their accreditations and conduct over a period of time. For companies that meet higher standards, a lengthened period of accreditation."*

A package of concessions can be built up around:

- The incidence and/or extent of heavy vehicle inspections[4]

[4] A transponder could be fitted to the vehicle, as occurs in systems overseas, which allows the vehicle to bypass the inspection station. Currently there are no specific concessions on inspection frequency of which the project team are aware.

- Inclusion as a precondition for:
    - accessing a new accelerated heavy vehicle licensing regime[5]
    - accessing the extended working time hours regimes in fatigue management
    - lifting of infrastructure access restrictions
- Revenue neutral charging concessions on licensing, registration and permits

If regulators agree to negotiate concessions along these lines, it would be a powerful new incentive that would enhance take up rates. The provision of these incentives will need extensive dialogue with regulators and will need to meet the following three principles:

1. Achievement of a certain overall rating provides the initial 'gateway' to access
2. A high rating in an individual category can also be required, for example this principle could lead to requirements that:
    a. access to the accelerated licensing regime requires 5 Stars in all areas
    b. access to Advanced Fatigue Management requires a high 5 Star rating in the fatigue area
    c. allowance for reduced inspections is only given to operators with a 5 Star rating in the Vehicle and Equipment Conditions category
3. Additional conditions can be imposed by regulators that relate specifically to the incentive gained (for example, accreditation under the relevant NHVAS module)

Such a structuring will ensure that companies must have competency in the specific areas as well as a good overall performance, so that safety is not compromised at any point.

[5] The case study at page 79 of the previous TALC/TI report elaborates this potential benefit.

Case study for a Road transport law benefit – Reduction in the incidence and/or extent of heavy vehicle inspections

After consultations with RMS and based on the Partners in Compliance (PIC) experience in Canada, the targeting of compliance inspections by road transport authorities was identified as a priority area for consideration. These regulators operate a network of road-side heavy vehicle inspections stations and conduct random inspections as well. The inspection stations target operators for safety checks and require them to leave the road for the inspections. A heavy vehicle may be required to leave the road and pass through the inspection station without stopping or may be inspected to different levels of intensity. In general road transport authorities do not want these compliance checks to delay the delivery of the freight task but need to balance this need with the requirement that heavy vehicle fleets meet safety and other legal requirements.

A 5 Star system is well suited to assisting those authorities in better targeting non-compliant operators and allowing those operators with good compliance histories to continue on with the delivering the freight task. As mentioned in the previous report, the PIC system includes the fitting of transponders to heavy vehicles so that as they approach a heavy vehicle checking station they can be notified as to whether an inspection is required. This gives companies who qualify for use of the transponder system the ability to by-pass inspection stations 98 per cent of the time. A similar system could be adopted in the 5 Star system and it is recommended that this be further explored as a key benefit to test, including in any pilot. *(*See *www.partnersincompliance.com).*

Drivers – Training subsidies and rebates

There are 170,600 truck drivers in Australia[6] with 70 per cent having no post secondary qualification other than their vehicle licence[7]. A drive to improve training in the industry linked to the 5 Star system would therefore likely be of significant interest. The courses targeted would include fatigue management, OHS, fuel efficient driving, defensive driving or any other course focused on increasing driver professionalism.

Engagement with OHS authorities would allow for benefits to be negotiated including access to safety rebates as discussed in the preceding TALC/TI report. The main area of interest for OHS authorities recently has been around the fatigue management area, and specific rebates or free access to seminars and training materials could be negotiated as well as in-cabin devices that may assist drivers with fatigue management.

Funding for such arrangements would require negotiation with OHS, education and training agencies, with existing resources being redirected to make it budget neutral. If this was not possible, a fall back option is the creation of a new fund that is recouped from heavy vehicle charges. Such a fund, of around $5 million per annum, could train 10,000 drivers each year in one or two day courses that cost around $500 each.

[6] ABS Labour Force Survey, DEEWR trend data to May 2010.
[7] ABS Survey of Education and Work, May 2008 ,cat. no. 6227.0.

There is a strong case for more training resources to be put into the trucking industry given the plethora of apprenticeship and traineeship schemes funded by governments for other industries.

Clients - Preferred tenderer status for supply chain procurement (private and public)

The preceding TALC/TI report canvassed the use of government procurement processes to drive system take-up rates. Recently the Australian Government applied the rating principle to the purchase of new vehicles, requiring that from 1 July 2011 all new government light passenger vehicles have a 5 Star ANCAP safety rating[8]. It is recommended that this principle be applied to the purchase of road freight transport services, and that governments be approached to agree to include procurement as part of the package of benefits to be available from the start of the system. Highly rated companies would be given preferred tenderer status and be able to bid for government work only in competition with other similarly rated companies. Government business undertakings would also have the capacity to give preferred tenderer status to highly rated operators.

A significant government client for road freight transport services is the Commonwealth Department of Defence (removals and logistics work). Other major government clients may have the capacity to influence the overall supply chain in their markets but further work is required to identify them.

As in government procurement policies, private sector clients could give similar status as a preferred tenderer. For example, if the major retailers recognised the 5 Star system in their procurement processes they could cover their entire supply chains fairly rapidly.

Preferred tenderer status is likely to be included only when the shape of the new system is better defined, as many clients and operators will want to see evidence that the system will work effectively before committing to participation. The largest clients already have processes for assessing road freight transport supplier safety performance (most notably through the NLSC) and they will need to be persuaded to use a 5 Star system as well. Clients that do not specifically measure safety performance may be more interested in using a 5 Star system initially as it will add a new dimension to their contractor management systems. Further detailed engagement with the industry's clients would be desirable to ensure that the developing system integrates with their procurement processes.

The preferred tenderer status will be most attractive to hire and reward operators as they directly contract for road freight transport services. For ancillary operators other approaches may be needed. For example, there is more to a supply chain than a client/operator interface, and different points along the supply chain may also engage with the system in innovative ways. A port authority or intermodal terminal could use rating standards as part of their access regimes or the food processing industry could use the standards as evidence for supply chain assurance. Competition policy requirements are likely to require careful consideration in this area, and may result in a higher rating giving an advantage but not necessarily preventing lower or non-rated companies from bidding for work if they can demonstrate equivalence of safety practices.

[8] Announced in May 2011 by the Australian Government and mentioned on www.atcouncil.gov.au

Other benefits

There are also a range of commercial benefits that will encourage participation and the achievement of improved safety ratings. From an operational cost perspective there would be less wear and tear on trucks and less time off the road, and lower insurance premiums. A high rating would enhance the corporate profile of the operator both in the industry and with customers. The recruitment and retention of staff, particularly drivers, will be assisted. These are well canvassed in the preceding TALC/TI report.

4 KEY DESIGN FEATURES OF A 5 STAR SYSTEM

This Chapter draws on the preceding reports by Adeptus Consulting and TALC/TI, the Consultant's Brief, and consultation with the Sub-Committee and the RMS to outline key design features for a *5 Star Trucking Safety Rating System*.

These inputs provide the starting point for development of the system. It will have voluntary participation, with other attributes being:

- A 'fusion' of industry and regulatory elements, bringing together information from regulators, existing industry schemes and codes of practice, and stakeholders
- Initial coverage of speed, fatigue management, driver health and vehicle and equipment conditions, reflecting analysis of these areas as the main risk factors to safe on-road operation
- Performance indicators established through independent audit and presented in a scoreboard format
- Benefits and concessions to participants relative to the Star rating achieved
- Systemic integrity through quality data inputs and transparency of reporting

The following discussion expands these five points into nine key design features for a 5 Star system, with further detail on structural and implementation issues. The nine design features are summarised below in Table 4.1.

1.	A national 5 Star Standard Ratings Framework for Road Freight Transport Safety, incorporating the rules for auditing and generating a scoreboard
2.	A shared commitment through a tripartite approach across industry, unions and government
3.	Participation open to all road freight transport operators whatever their specialty and size
4.	Access to benefits and concessions for operators relative to the ratings achieved
5.	Strength in governance through clarity of roles and responsibilities across all participants
6.	Advances in information availability through new 5 Star and regulator data sets
7.	Integrity of audit assessment through a rigorous process with review procedures
8.	Transparency through public availability of operator results plus national evaluation of impacts
9.	Capacity for the 5 Star system to evolve with experience and changing circumstances

Table 4.1: Key Design Features for a 5 Star system

A National 5 Star Standard Ratings Framework for Road Freight Transport Safety (5 Star Framework)

The central feature is assessment of the safety systems and performance of road freight operators against a new standard national framework for safety of road freight transport. This framework will provide for robust assessment and reporting, and will incorporate the rules for auditing operators and publishing a scoreboard of their safety performance. The scoreboard will include rating an operator from the bottom 1 Star rating (indicating basic compliance with regulations and safety requirements) up to the top 5 Star rating (indicating the highest possible standard of safety performance against regulations and best practice systems).

It is important to emphasise that assessment against the proposed framework is not focused on receiving a 'pass or fail' against a given threshold, as is the case for most standards, but to position each operator being assessed in a range of possible ratings in the scoreboard format discussed in the previous reports and elaborated further in Chapter 5. The only effective threshold is the failure to secure at least a 1 Star rating. Any operator falling at this end of the market for road freight transport services is unlikely to participate in a voluntary scheme, and is also an obvious candidate for regulatory action.

The suggested working title is the 5 Star Standard Ratings Framework for Road Freight Transport Safety (the 5 Star Framework). While the effective ownership and application of the 5 Star Framework varies across the three models outlined in Chapter 6, common to all is initial development of the Framework through an expert Reference Group comprised of representatives from road freight operators, client industries, unions and regulators. The Reference Group would work with a consultant who would initially specify the 5 Star Framework. Subsequent consultation

and testing would be undertaken with individual operators, industry associations, the industry's work force, the industry's clients, regulators and the wider community. Development of the Framework could commence prior to the delivery model being settled.

With the involvement of Standards Australia, it is possible that an end result will be an accredited Australian Standard. This would enable learning from, and links with, relevant Australian Standards and also facilitate consideration of international standards such as OHSAS 18001:2007 and ISO 9001:2008. Other relevant international approaches are the International Safety Rating System (ISRS) and the Global Reporting Initiative 2006. Development of the Framework in such a broad context would help to identify best practice elements and approaches, and to achieve compatibility with related national and international standards wherever possible.[9]

The 5 Star Framework will be subject to a regular review cycle. In its early stages of implementation, review is proposed at three year intervals. The suggested content is summarised at high level in Table 4.2 below, with the Scoreboard in Chapter 5 providing more detail on the specific standards and indicators to be included.

[9] This reference to international approaches is taken from the report by Adeptus Consulting (2010), *"Review of Safety Accreditation Schemes for Five Star Trucking Safety"*, Sydney, Volume I, page 12.

5 Star Standard Rating Framework Areas	Content
Safety Specific Indicators	
1. Speed	How the company ensures that vehicles are not speeding during their journey.
2. Fatigue	How the company ensures drivers are not fatigued during their journey.
3. Driver health	How the company ensures that driver health is appropriate for the task, including the management of drug and alcohol issues.
4. Vehicle and Equipment Conditions	How the company ensures that appropriate vehicles and loading equipment are selected, maintained and kept in safe working order.
System Rules	
1. Entry Requirements	Sets out who can be rated and the rules for participation.
2. Scoring Rules	Sets out the rules for scoring and rating a company, including the points awarded and publication of details.
3. Auditing Requirements	Sets out the auditing rules and review requirements. Areas covered include: - Incorporation of audit results from accreditation systems (NHVAS, *TruckSafe*, NLSC) - qualifications of auditors - access to material - information sources including regulators, local government, clients, unions and the community - review rights

Table 4.2: Overview of the 5 Star Standard Rating Framework

A shared commitment through a tripartite approach across industry, unions and government

Underpinning development of the 5 Star Framework, and the subsequent introduction of a 5 Star system, will be a commitment shared across all participants to enhance the safety performance of road freight transport. This will best be achieved through a tripartite approach, where industry, unions and regulators are involved in both development and implementation.

Central to achieving and sustaining a shared commitment will be focused and regular communication as the initiative proceeds. Champions in all three groups will be important to the process, as will be support from Ministers and senior officials in Commonwealth and State/Territory governments.

Such support will be critical in building market engagement, which was a key success factor identified in the preceding TALC/TI report. The importance of broadly-given recognition to participants was brought out by two stakeholders in the consultations for this report through their comments on existing industry schemes

> *"Many operators are pressured to spend $ to gain accreditation or make compliance requirements, but there is little recognition from Insurance Companies, RTA or Police that an operator has jumped all the hurdles to provide a safer, better level of service to the industry and community."*
>
> *"The Scheme providers and regulators don't publicise or advertise the message that accredited operators have made considerable effort and gone to considerable expense to attain requirements."*

Participation open to all road freight transport operators whatever their specialty and size

The basic design of the 5 Star Framework is proposed to provide access to all road freight transport operators, whatever their type of business, the nature of their heavy vehicle fleet and its size. This openness in access applies equally across the 'Hire and Reward' trucking industry, and 'Ancillary Operators' of road freight transport in other industries.

However, it is possible that some operators may get more benefit from participation than others, depending on the type and mass of their vehicle fleets in relation to the road transport law concessions discussed in Chapter 3. This would stem from the different rules that apply to a particular mass and use of a heavy vehicle. For example, the ABS defines heavy rigid trucks as over 4.5 tonnes Gross Vehicle Mass (GVM)[10], while in NSW all heavy vehicles with a GVM greater than 8 tonnes are required to enter a heavy vehicle checking station[11], speed limiters are required for heavy vehicles with a GVM of 12 tonnes or more[12] and these same vehicles are specifically regulated for fatigue management[13]. Overly concentrating major benefits on vehicle mass and/or use could skew the 5 Star system to particular heavy vehicle sizes (eg if changes to heavy vehicle inspections are a

[10] See Glossary of ABS '9309.0 - Motor Vehicle Census, Australia, 31 Jan 2011' at *www.abs.gov.au*
[11] See RMS web site at http://www.rta.nsw.gov.au/heavyvehicles/inspectionstations/index.html
[12] See RMS web site at http://www.rta.nsw.gov.au/heavyvehicles/safety/speeding/hv_speedlimiters.html
[13] See RMS web site at http://www.rta.nsw.gov.au/heavyvehicles/safety/hvfatigue/index.html

key element then the effective benefit would go to heavy vehicles that use the checking stations – in NSW, generally those over 8 tonnes).

Such considerations bring out the importance of having as wide a range of benefits as possible, to maximise the attractiveness of the 5 Star system across both 'Hire and Reward' and 'Ancillary' operators as well as different fleet/vehicle sizes. The better the coverage, the higher will be the level of participation and the greater the safety benefit. For example, procurement benefits through a 5 Star system are not so constrained by heavy vehicle mass or use, and would be attractive to many operators, regardless of whether all such benefits are available to every vehicle in their fleets.

A further area for consideration when encouraging participation in the 5 Star system will be to keep the cost of safety assessments at an affordable level, relative to the benefits available through participation. This will be important to underpin take-up rates and to build critical mass. Seed funding by governments will be required in the establishment phases of a *5 Star Trucking Safety Rating System*, and some ongoing support is also likely to be needed to keep the system affordable. The case for this financial contribution will be established against the net benefit of a 5 Star system and its related impact on safety culture.

Access to benefits and concessions for operators relative to the rating achieved

There are different scales or means of representing safety performance and presenting information collected under a 5 Star system. Options include:

- Using a graduated range from 1 to 5 stars (as applied in this report)
- Limiting the scoreboard to a smaller number of stars (eg 3,4, and 5 stars)
- Using a category style system like the food safety rating systems (eg Unsatisfactory, Pass, Fair, Excellent)
- Using a simple binary system (pass or fail) similar to existing accreditation schemes

As developed in the previous TALC/TI report (see page 56), the scoreboard and access to benefits is based on a 5 star range and a tiered approach to measuring safety performance. This was favoured by the original proponents of the concept as being able to represent differing levels of effort and outcomes, much as 5 Star accommodation represents a level of effort (and price) that is vastly superior to 1 star accommodation.

Grading the effort and safety outcomes allows for market differentiation between operators. It also provides a pathway along which safety improvements can be made over time. Achieving a 1 star rating would represent minimal levels of compliance and accordingly attract minimal, if any, benefits. An operator may be dissatisfied with achieving a low rating and be motivated to either improve, or exit the system. While there are some risks in this approach, with some choosing to exit rather than improve their safety performance, the available benefits and a growing market awareness of the 5 Star system should motivate many operators to participate (even at the 1 star level) or act to improve low ratings.

Insights into how the rating system is perceived, how it might be best structured, and how it might be publicised would be provided if a pilot or trial is implemented. Feedback from users could also be

sought on the ratings, as occurred when piloting the food safety rating system ('*Scores on Doors*') in NSW.

The importance of linking benefits and ratings was examined in depth in Chapter 3, where it was argued that the benefits package will need to be attractive enough to encourage a high level of participation. The costs of these benefits and their administration will be key considerations when deciding the final model.

The structure of that model should lead to the highest level of benefit access, balanced against cost effectiveness, and keep the focus on how to best to drive behaviour change in the industry. Without substantial benefits, a more traditional compliance model would need to be considered (ie a mandated scheme along the lines of CSA in the US).

Strength in governance through clarity of roles and responsibilities across all participants

A robust governance structure setting out roles and responsibilities will apply across the delivery model that is ultimately introduced. This structure will identify

- Responsibilities for the development and maintenance of the 5 Star Framework
- The safety audit process and the selection of auditors
- Ownership of intellectual property
- Procedures to access audit results
- Provision of benefits and concessions
- Accountability and liability
- Monitoring and evaluation
- Funding arrangements

The importance of a clear governance structure is that any ambiguity in roles and responsibilities is avoided, the businesses and agencies involved in each stage of the system can focus on their respective contributions, and confidence is built in the integrity of the system overall.

Advances in information availability through new 5 Star and regulator data sets

The fusion approach underlying the 5 Star system requires the bringing together of a range of regulatory and industry-sourced information. It is critical that this information be of high and consistent quality. There will be three central sources of information:

- Existing industry-sourced information for operators
- New operator level information generated from the 5 Star audit process
- Regulator-sourced information

On the industry side, there are already well-established sources of information on the safety systems and performance of freight transport operators through their involvement in the NHVAS and *TruckSafe* accreditation schemes, and the National Logistics Safety Code (NLSC). This information

provides a solid foundation on which to build operator-specific elements of the 5 Star audit. The 5 Star system should be developed to recognise parallel participation in these existing schemes and codes by including the results achieved, and establishing their equivalence in the 5 Star structure. This information will be integrated with new and innovative elements of the 5 Star audit processes, to enable a comprehensive assessment of an operator's safety performance through the one audit process.

An important contribution will come from broadening the information sources available to include the following key stakeholders:

- Clients - similar to NLSC's Partnership Audit Review, clients can advise whether the rating the company is given is reflected in their perspective of the operator's performance
- Labour force and unions – drivers and their unions can provide verification about actual safety performance and collect information under Fair Work and OHS legislation
- Local Government – from local governments in areas where operators are located or travel through
- Community – through complaints mechanisms and general feedback

While these sources will often be outside the central contractual relationships of the operator, they have a legitimate interest in the operator's safety performance and provide great potential to assist not only the overall audit process but to enhance the operator's appreciation of the broader safety environment in which they provide their services. The contribution of this information can be very significant to assessment of, as an example, fatigue management practices and performance.

From the regulatory perspective, a major reform linked to the 5 Star Framework will come from addressing the major gap that currently exists in the availability of a public and consistent information from Australian safety regulators on the safety performance of freight transport operators. Here the recently introduced Compliance, Safety, Accountability (CSA) program administered by the US Federal Motor Carrier Safety Administration (FMCSA) provides potential for application in the Australian context. The seven safety improvement categories (or BASICs) of the CSA build up to a comprehensive Operator Carrier Profile, identifying road performance and potential crash risk, that is applicable nationally across all US jurisdictions. The CSA approach, and also New Zealand's experience with its Operator Rating System, can provide important inputs to development of a nationally consistent data base on the compliance and safety record of Australian road freight transport operators. Developing such a data base would logically be a task for the NHVR, in conjunction with jurisdictional regulators.

There may be an interim period, while a national data base and access arrangements to regulator information are being settled, where companies seeking assessment will need to provide their own information on their major interfaces with regulators in areas such as accidents, compliance testing and driver infringements. This interim stage will in itself require some input from regulators. Settlement of the NHVR regulatory data sets and any interim arrangements will be a critical task in the development of the 5 Star Framework.

In the longer term, access to up-to-date and consistent information from regulators will provide a basis to move to a 'live' reporting system where trucking companies, client businesses, auditors, and regulators have access to up-to-date information on operator performance against key regulatory requirements and crash incidence.

The addition of regulator information, especially moving to any 'live' system in the long term, as discussed above and in the previous TALC/TI report in Chapter 10, will require addressing a series of technical, legal and practical barriers. These barriers are overcome by regulators currently when they collate information on operators when planning compliance campaigns. Moving beyond this to the level of information that can be made available in early phases of a 5 Star system requires further consultation and in-depth discussion with these regulators as this information will effectively become public for participants. However, information held by regulators in the UK, US, New Zealand and Canada is able to be made available to companies, and they often have more jurisdictions to coordinate then Australia. This is a key area for further exploration by regulators and will require their active participation in resolving.

Integrity of audit assessment through a rigorous process with review procedures

Integrity of assessment is central to the success of a 5 Star system. A foundation stone for system integrity will be independent assessment of operator performance by an external auditor using the 5 Star Framework. Another important feature to underpin integrity will be access to a review process where a rating is reduced.

Confidence in the integrity of assessment is critical to the provision of benefits and concessions by regulators and purchasers of road freight transport services. If there is any uncertainty about the assessed level of safety performance of an operator, then there will be a reluctance to provide benefits and concessions, with likely requests to make further tests of the operator, so undermining the integrity of the 5 Star system. The more input that that regulators have to the 5 Star system, the greater will be their confidence in results and their willingness to accept the safety potential from performance that exceeds minimum standards of compliance.

Transparency through public availability of operator results plus national evaluation of impacts

A major objective of a 5 Star system is to enhance the availability of information on the safety performance of all trucking operators, ranging from the largest fleet operators to owner-drivers, and to build a higher priority for safety performance across these operators and their customers. To achieve this, a starting presumption for all 5 Star audits and reviews is that the key results be publicly available. Only pre-audit assessments would remain as internal commercial information.

A basic requirement will be for the overall rating and other key results to be readily and publicly available, to inform customers and stakeholders of an operator's safety performance. This can be achieved through establishment of a central website. Information could also be included in company reports and websites. The authority or auditor issuing the audit results could also be required to record that it undertook the audit and to indicate summary results.

The level of detail published on each company will need to be sufficient to allow for a proper assessment of performance by existing and potential customers, and the community more broadly. As well as the overall Star rating, it is proposed in Chapter 5 that numerical scores for each of the

four 'risk' components be publicly available. Operators could decide to provide further information on their assessments if they wish. The CSA 2010 system in the US provides an example of how much detailed information can be published about a company.

Further development could see inclusion of 'live' indicators such as offences in the last 12 months, historical rating history and membership of accreditation systems. This would give the 'dashboard' effect discussed in the preceding TALC/TI report. The extent to which this additional level of information would be released would require company agreement and confidence in the accuracy of the information and its usefulness in judging safety performance.

Transparency is also important at a systemic level. Auditing authorities will be required to provide an annual report summarising the level of activity, spread of ratings and related significant developments. This information will provide an important input into monitoring and research by regulators, road safety authorities and other industry and government bodies.

Over time, results from the review cycle for the Standard Ratings Framework will provide another important source of information on the impact of the 5 Star system.

Capacity for the 5 Star system to evolve with experience and changing circumstances

Past the initial four modules covering speed, fatigue management, driver health and vehicle conditions and equipment, the 5 Star system will be evolutionary as operational experience grows, and industry, regulatory and technological circumstances change. The structure of the 5 Star Framework will provide for further modules to be added over time, as well as for existing modules to be restructured. Such updating will typically be undertaken as part of the proposed three-year review cycle.

Such updating could, for example, include the addition of modules directed to supply chain contribution, safe and fuel efficient driving, broader environmental performance, dangerous goods and animal welfare. It would also be desirable to develop an early capacity for drivers to be personally assessed as to their capabilities and performance in a 5 Star system for individuals. Another potential modular inclusion would relate to the clients of the road freight transport industry, who could have their practices and performance in planning and contracting freight movements assessed from a safety perspective.

Innovation in delivery of the 5 Star system will also be expected over time, such as through applying advances in technology to assessment and reporting processes, and access to results.

5 INDICATIVE SCOREBOARD AND AUDIT TOOL

This Chapter develops an indicative scoreboard for the 5 Star Framework, which can be further developed in consultation with stakeholders. The conceptual structure of the scoreboard is developed from the preceding Adeptus and TALC/TI reports and is based on the following building blocks:

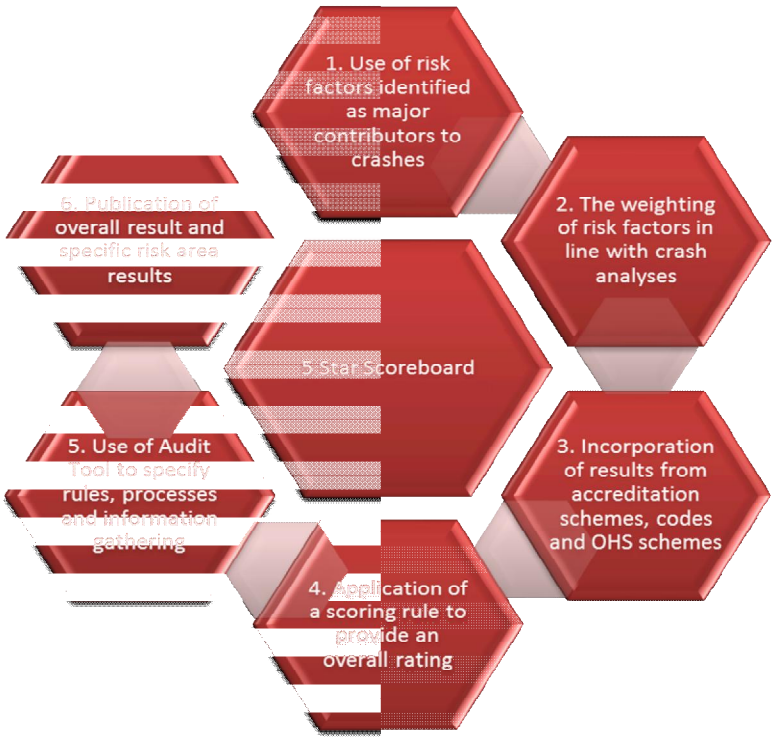

Figure 5.1: Building Blocks of the 5 Star Scoreboard

1. Use of Risk Factors

Analysis of the safety performance of the road freight transport industry identifies speed, fatigue, and driver health as the major issues in crashes and this is reflected in the scoreboard. The risk factor of vehicle & equipment conditions has been included as a fourth element of the scoreboard, as providing a proxy indicator of the broader safety culture and related management systems applying in a road freight transport company. Each risk factor will have a score of 100 points, prior to weighting as outlined in Table 5.1 below.

SAFETY SPECIFIC FACTORS	*Initiatives*	*Sub Scores*
SPEED *Speed Management Initiatives*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*
FATIGUE *Fatigue Management initiatives*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*
DRIVER HEALTH *Especially Alcohol and Drug management*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*
VEHICLE & EQUIPMENT CONDITIONS *Vehicle & Equipment Conditions management*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*

Table 5.1: Risk factor and Management Initiatives

Initiatives that operators can undertake to address each of the risk factors can be specified. Drawing from the Adeptus report, these initiatives are categorised under the broad headings of 'People, Tools, Management, and Safety Specific Indicators'. Not all will apply to owner-drivers, or some may need to be applied differently. In such cases the differing measure applying to the owner-driver can be outlined. Table 5.2 sets out how this could look for the risk factor of Speed:

SPEED	*Speed Management Initiatives*	*Max. score (0-100)*
Tools	*Tachograph, GPS, Camera*	*30*
People	*Training, Log Books, Licence Records*	*30*
Management	*GPS, trip pre-planning, Training, Labour standards*	*25*
Safety Specific Indicators	*Near Miss reporting, Feedback, fines/km travelled*	*15*
TOTAL SCORE		*OUT OF 100*

Table 5.2: Speed risk factor and Speed Management Initiatives

Without access to the actual audit tools of the existing accreditation schemes, it is not possible to specify all of the measures that an operator might take across each of the Factors. It is therefore important that these schemes be brought into the next stage of the 5 Star Framework development process.

2. *Weighting of Risk Factors*

The indicative scoreboard will then need to weight the risk factors according to their relative contribution to safety incidents. The following weightings are included in the Indicative Scoreboard

outlined in Table 5.3 below and are based on a combination of NTI research[14] and the TALC/TI project team's experience with the road freight industry.

SAFETY SPECIFIC FACTORS	*Initiatives*	*Sub Scores*	*Weighting*	*Score Weighted*
SPEED *Speed Management Initiatives*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*	*35*	*3500*
FATIGUE *Fatigue Management initiatives*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*	*30*	*3000*
DRIVER HEALTH *Especially Alcohol and Drug management*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*	*20*	*2000*
VEHICLE & EQUIPMENT CONDITIONS *Vehicle & Equipment Conditions management*	– *People* – *Tools* – *Management* – *Safety Specific Indicators*	*Out of 100*	*15*	*1500*
Total			*100*	*10000*

Table 5.3: Indicative Scoreboard with Weightings for Safety Specific Factors

The purpose of weighting the scores is to keep operators focused on the risk factors that most impact on safety performance. Weightings can be adjusted over time with experience and new factors can be included.

3. *Incorporation of Existing Accreditation Schemes, Codes and OHS schemes*

Alignment of the 5 Star system with existing accreditation systems, codes of practice and the Long Distance Driver Fatigue Regulations under the various OHS Acts (OHS Fatigue Regulations) will enable points to be automatically awarded for participation in the schemes or compliance with the OHS Fatigue Regulations. Such alignment will simplify the additional 5 Star audit process for operators that participate in other industry schemes. This will also help to contain the specific costs of the 5 Star audit, a concern for industry as evidenced by a comment in consultations that:

> *"The combination of auditors to check all schemes including mass would assist in the workload for operators."*

In relation to OHS Fatigue Regulations, a new audit would need to be undertaken by the 5 Star auditors to that standard, or alternatively, if an OHS audit had been conducted, this may be used as evidence to support allocating points. An operator that chose to accept the points automatically

[14] O.P. Driscoll, *NTI Major Accident Investigation Report*, National Truck Accident Research Centre, 2011

allocated from accreditation schemes or the OHS Fatigue Regulation can then be audited for best practice by the 5 Star auditors to take their score up to the maximum.

If two or more accreditation schemes address a specific Factor, it is proposed that the result with the highest value be utilised. However the points available are structured so that participation alone will not achieve a 5 Star rating for any category. At least one of the best practices must also be present.

The allocation of points to existing schemes has been made on a subjective and notional basis to initiate discussion. A summary of the allocation of points across Factors is provided in Table 5.4. The determination of how many points should be attributed for each measure will need extensive further work and consultation, as each existing scheme has its own audit tool that addresses its specific context, and has its own standard of proof, legal requirements and authorisation.

Factor / Points	*OHS Fatigue Standards*	*Accreditation Schemes*	*Best Practice*
Speed	*40*	*Up to 80*	*100*
Fatigue	*40*	*Up to 80*	*100*
Driver Health	*0*	*Range from 70-80*	*100*
Vehicle and Equipment Conditions	*0*	*Range from 60-80*	*100*

Table 5.4: Points available for participation in existing accreditation schemes, OHS Fatigue Regulations and best practices

Trucking companies that do not participate in an existing accreditation scheme will not be disadvantaged when applying to join the 5 Star system. They can be audited against the 5 Star Framework, which will include best practice, which in most cases is above and beyond accreditation scheme standards, and will be able to be awarded maximum points.

4. Application of Scoring Rules

A weighted score for each Factor is derived by adding up the points under each measure and multiplying the sub total by the weighting to generate the weighted score (e.g. for Speed this will between 0 and 3500). Once all of the weighted scores are added together a number between 0 and 10,000 is arrived at. By using this overall weighted score and the points for each Factor the overall Star Rating is determined according to the Scoring Rules outlined in Table 5.5.

Overall Rating	*Scoring Rules*
*****	*Must achieve 8000-10000 weighted score plus at least 81 points for each Factor*
****	*Must achieve 6000-8000 weighted score plus at least 61 points for each Factor*
***	*Must achieve 4000-6000 weighted score plus at least 41 points for each Factor*
**	*Must achieve 2000-4000 weighted score plus at least 21 points for each Factor*
*	*Must achieve 0-2000 weighted score*

Table 5.5: Overall Rating Scoring Rules

By using both the overall weighted score and individual Factor points in the Scoring Rules, operators need to demonstrate high performance across all of the Factors to achieve a 5 Star rating. This will ensure a well rounded safety performance and reduces the opportunity for 'gaming' in the system.

5. *Use of an Audit Tool*

Each participating operator will be audited through application of an Audit Tool matched to the Framework. Audits would be undertaken under a clear and sequential audit process, allowing for operators to carry out a preliminary check against the 5 Star Framework, then come into the system for a full independent audit, the results to be published, and an ongoing audit cycle to be set in train. The sequence of the auditing process will be similar across the three delivery models explored in the following Chapter. It is summarised in Figure 5.2.

A first stage will provide for an operator considering participation to undertake a 'pre-audit' assessment. This could be done through a self-assessment (desk-top check) of performance against the 5 Star Framework, or through engaging a consultant or auditor to undertake a preliminary assessment of safety systems and performance. To avoid any subsequent conflict of interest, an auditor so engaged would not be permitted to then carry out a full audit of the operator. The information gathered in this stage would remain internal to the operator.

The second stage will be for the operator to join the 5 Star system by requesting an independent audit against the 5 Star Framework. Collection of information from other sources (regulators, clients, unions, local government and other interested parties) would then take place. In taking this step the operator will enter into a contract with the auditor/ratings provider and agree to accept the results of the audit and their publication (subject to review provisions discussed below).

The third stage relates to the period after the initial audit. To maintain the integrity of the system, to provide incentive for improvement and to minimise operator complacency, there will be a requirement that a full audit is undertaken annually to retain participation. Alternatively a review will be triggered where the operator had undergone major changes (e.g. through being involved in a

merger with another operator, or the business sold), or a major incident had occurred (such as coronial findings related to a crash involving a vehicle of the operator where there were fatalities). As the system develops and 'real time' features are introduced, reviews could also be initiated where key indicators of an operator's safety performance varied up or down to a significant degree.

For a voluntary 5 Star system to build acceptance in the industry it will be important that it include workable provisions for such reviews. For example, where an audit indicated a downgrading of the safety rating, the operator could request a three month period in which to address the cause of that downgrading, and then to seek re-assessment. Operators in this situation would retain their rating during this period but with a flag that it was provisional while they were under a performance review.

Where a serious incident occurs, audits and reviews in the 5 Star system will recognise the principle of 'reasonable steps' being taken by operators to achieve safe operations.

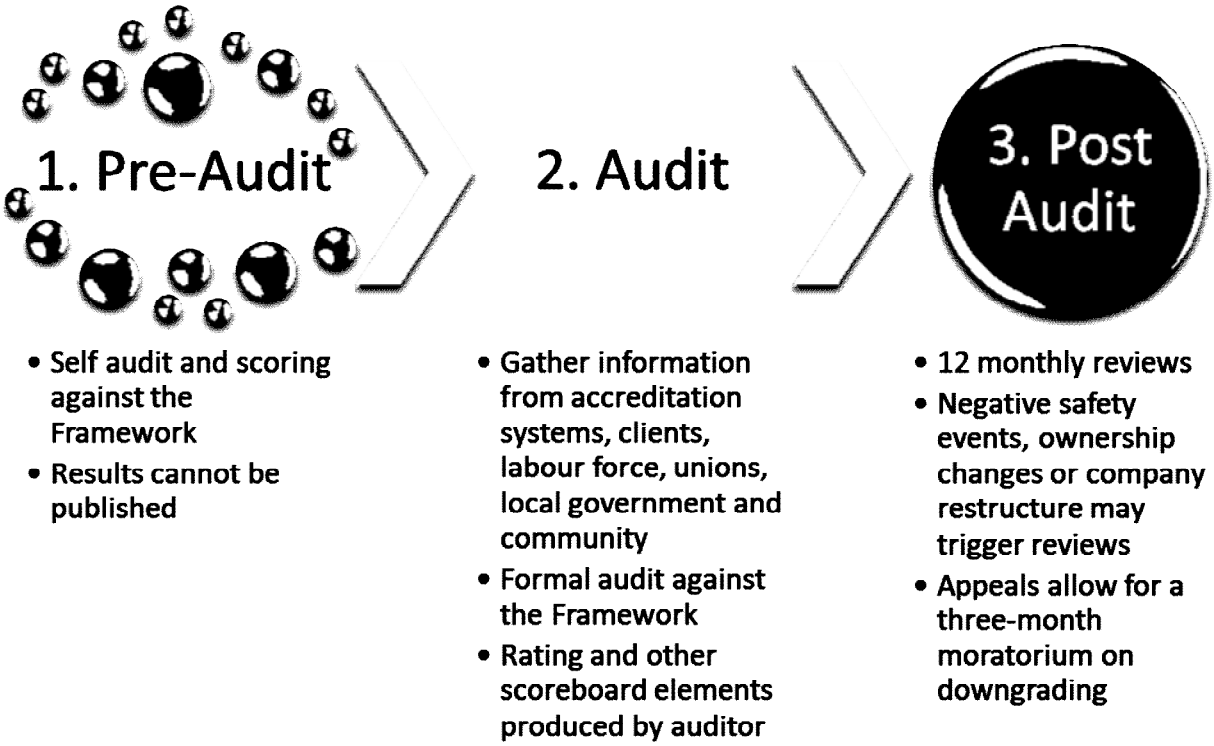

Figure 5.2: Auditing Process for 5 Star System

6. Publication of Scoreboard Results

The project team recommends publishing the points for each Factor, as well as the overall Star rating, to aid transparency and provide better information on operator performance.

Table 5.6 outlines a full indicative scoreboard and scoring system that would be published for each operator.

SAFETY SPECIFIC FACTORS	Sub Scores*	Weighting	Score Weighted
SPEED			
Tools	0-30		
People	0-30		
Management	0-25		
Safety Specific Indicators	0-15		
SUB-TOTAL	*100*	*35*	*3500*
FATIGUE			
Tools	0-30		
People	0-30		
Management	0-25		
Safety Specific Indicators	0-15		
SUB-TOTAL	*100*	*30*	*3000*
DRIVER HEALTH			
Tools	0-30		
People	0-30		
Management	0-25		
Safety Specific Indicators	0-15		
SUB-TOTAL	*100*	*20*	*2000*
VEHICLE & EQUIPMENT CONDITIONS			
Tools	0-30		
People	0-30		
Management	0-25		
Safety Specific Indicators	0-15		
SUB-TOTAL	*100*	*15*	*1500*
TOTAL		*100*	*10000*

**Notional allocations only*

5 STAR	*Must achieve 8-10k plus at least 81 in each category*
4 STAR	*Must achieve 6-8k plus at least 61 in each category*
3 STAR	*Must achieve 4-6k plus at least 41 in each category*
2 STAR	*Must achieve 2-4k plus at least 21 in each category*
1 STAR	*Must achieve 0-2k*

Table 5.6: Indicative 5 Star Scoreboard

The Case Study of Speed

At this early stage of conceptual development, finalising the Audit Tool is premature as the components of the scoreboard need first to be settled. However to give an indication of what the Audit Tool will include, this section continues to develop the risk factor of Speed as a case study, to propose best practice requirements and provide components of an audit tool to assess performance against that practice.

The treatment of the Factor of Speed is presented in Table 5.7 with best practices marked with a '*' for each section. This Table expands upon the preceding Table 5.2 which summarised the initiatives that could be measured for Speed. Points are awarded to each measure, with those considered best practice awarded 8 or more. Those operators in accreditation systems will be awarded an automatic allocation of points (up to 80 depending on the Factor and accreditation system), and can then be awarded additional points if they undertake one or more of the best practices marked to take them to the maximum 100 points for each Factor.

Measures (best practices worth 8 points or greater are marked with a '*')	Points (100)
Tools	
GPS based monitoring of speed; idling, stops and duration. The ability to receive real time alerts for speed, as well as the ability to produce individual trip reports or composite quarterly reports.*	10
Camera system to capture 24/7 video footage, with a minimum storage capacity of 7 days.*	8
Electronic Tachographs as a mechanism to record accurately all speeds on all trips.	6
Electronic log books with real time monitoring.	6
Total	30
People	
Driver training to impress a no speeding culture, with particular reference to driving for conditions and speed management on corners.*	10
Drivers to supply annual driver record to employer.* Owner-Driver: record of all speeding infringements by driver supplied to 5 Star Auditor.*	8
Drivers to comply with a company policy to notify their employer of all work related speeding (and other traffic) offences. Owner-Driver: not applicable.	6
Accurate and timely log books.	6
Total	30
Management	
Labour standards, agreements and/or OD contracts in place that do not encourage speeding.*	12
GPS based tools to preplan all trips and expected durations with appropriate rest breaks and ranges for likely delivery times to ensure speeding is not mandated by unrealistic delivery timeframe demands.*	8
Initial employment includes licence checks for drivers. Owner-Driver: 10 year driving record made available to 5 Star Auditor.	5
Total	25
Safety Specific Indicators	
Speeding fines/kms travelled.*	8
Real time driver demerit points monitoring.	3
Near miss reporting.	2
Feedback information provided by 1800 systems.	2
Total	15

Table 5.7: Speed Factor measures

The Audit Tool

An Audit Tool that sets out the questions and evidence required to demonstrate compliance is central to the 5 Star system. A indicative Audit Tool is included in Table 5.8, and demonstrates how the 'Tools' component of the 'Speed' measures from Table 5.7 above could be audited.

Before the audit of an operator, other parties in the supply chain, industry representatives and unions will be able to provide confidential information to the auditor, who will then be better placed to test the procedures and actual business practices of the operator. All the 'Evidence Observed' will be recorded and in the 'Measure In Place?' column of the Audit Tool the auditor will have to come to an overall view based on all the evidence whether to give a 'Yes' or 'No' and award points for that measure.

A secondary process could also be included where the audit results are provided to clients and local union representatives for their comment and advice before the auditor finalised the assessment.

Measure – "Speed – Tools"	Minimum Evidence required *(these are the minimum evidentiary requirements)*	Actual Evidence Observed and/or Provided *(detail the evidence collected including observations made, documents sighted and evidence from regulators, clients, unions and other parties)*	Measure in Place? *(Yes or No)*	Points Awarded
Tools - Electronic Tachographs as a mechanism to accurately record all speeds on all trips.	• Operator declaration • Sample no. of vehicle/s inspected			Yes – 6, No - Nil
Tools - GPS based monitoring of speed; idling, stops and duration. The ability to receive real time alerts for speed, as well as the ability to produce individual trip reports or composite quarterly reports.*	• Operator declaration • Sample no. of vehicle/s inspected • Sample no. of drivers interviewed • Records kept of trips for 12 months			Yes – 10, No - Nil
Tools - Electronic log books with real time monitoring. [Owner-Driver: not applicable]	• Operator declaration • Sample no. of vehicle/s inspected			Yes – 6, No - Nil
Tools - Camera system to capture 24/7 video footage, with a minimum storage capacity of 7 days.*	• Operator statement • Sample no. of vehicle/s inspected			Yes – 8, No - Nil
Total points awarded for Tools	*NB: an asterisk (*) indicates this is a best practice measure*			Between 0 and 30

Table 5.8: Indicative Audit Tool for Speed - Tools

The Audit Tool will also include:

- Detailed rules around the scoring and calculation of the Star rating
- How to allocate automatic points from participation in accreditation schemes
- Specific guidance on auditing of owner-drivers
- Information gathering processes that ensure that clients, the workforce, regulators and other interested parties are notified of the audit and their ability to provide any information they may have
- Handling disputes about evidence collected
- An outline of the Audit process

Further work at this stage is likely to be unproductive as the Audit Tool will change dramatically if system features change, especially the inclusion of regulator information. For example, the provision of speeding fine information for each vehicle registered to an operator would provide a very strong piece of evidence of their Speed management outcomes, but this may not be available in the early stages.

6 DEVELOPING MODELS FOR DELIVERY

This Chapter considers the options available to deliver a *5 Star Trucking Safety Rating System*, and goes on to outline three models – *Standard-based*, *Joint Industry-Regulator* and *Regulator-managed*.

The design features set out in the preceding Chapters have informed the construction of each of the models, although the means of giving effect to specific features varies, as does the extent to which specific features are embedded. These aspects are also addressed in comparative analysis later in the report.

Consideration of Options

As will be discussed in Chapter 9, guidelines for best practice regulation and related Regulatory Impact Statement (RIS) require that consideration be given to as wide a range of options as possible before a final list of options is settled for further development and consultation.

The guidelines also require that a base case of 'no-change', or *maintaining the status quo*, be considered as an option in a RIS process. In the trucking safety context, such an option would see continuation of:

- Industry access to the current voluntary schemes (e.g. NHVAS, *TruckSafe* and the NLSC) and related concessions and benefits
- Contractual disclosure of safety-related issues in dealings between road freight transport providers and their clients, and with insurance companies
- Introduction of safety initiatives related to the National Road Safety Strategy 2011-2020
- Implementation of the new Road Safety Remuneration system

The status quo base will also include further evolution of national regulatory arrangements as the National Heavy Vehicle Regulator (NHVR) builds up its operations, and otherwise an ongoing role for the current jurisdictional regulators in compliance activity.

Consideration of the various approaches to implementing a 5 Star system based on the principles outlined earlier in this report and in the previous studies (especially the fusion of industry and regulator information) identified five possible models, with increasing regulator involvement. These are summarised in Table 6.1:

Commercial	Standard-based	Industry-based
Private company owns Rating Standard (e.g. as does Moody's for finance ratings) Private auditing and publication	Standards Australia or other not-for-profit body owns the Rating Standard Private auditing and publication	Industry-based company owns the Rating Standard Auditor appointed by 5 Star company
Joint Industry- Regulator	**Regulator-managed**	
Tripartite company owns the Rating Standard Auditor appointed by 5 Star company	Regulators own the Rating Standard Consultation through industry advisory committee Auditor appointed by assessing regulator	

Table 6.1: Possible Model Options for Delivery

Three of these models are developed in this Chapter, and two are not further elaborated (the Commercial and Industry-based models), as neither was seen as viable. Fundamental to the success of a 5 Star system will be the information provided by regulators as part of the fusion structure, and it would be unlikely that regulators would be comfortable to be involved closely in the commercial model in particular, and to provide a sufficient range of concessions and benefits to drive voluntary take-up. These options also do not promise success in tapping envisaged new sources of information, particularly from stakeholders such as clients, industry and union representatives and the broader community.

The government funding that will be required to get a 5 Star system moving would not be available to a commercial model, and would unlikely be extensive, if provided at all, to a wholly industry-based model.

Further, from where an impetus would come to establish either of the Commercial or Industry-based models is unclear. There has as yet been no commercial interest in providing a safety rating scheme for trucking or broader transport safety in Australia and it is unlikely that this situation will change in the foreseeable future. A groundswell of support for an industry-wide consortium focusing on trucking safety is not apparent, given the fragmentation of the industry across a number of associations and interests who are pursuing their own business models.

Underlying a 5 Star system is an over-riding public policy imperative to enhance the road safety performance of heavy freight vehicles. A 5 Star system will not be effective as public policy without a central role for regulators, and support by governments more generally. A circuit-breaker is required

to move from the status quo, and involves a leadership role by industry, unions and key regulators in creating an environment where a new integrated and transparent system is established with high quality and comprehensive information sources.

Thus consideration comes back to the three models set out below. The models cover a spectrum for delivery of a new system in terms of regulatory intensity and the related provision of concessions and benefits. At one end of the spectrum is the *Standard-based* model involving devolved delivery against a national standard, in the middle is the *Joint Industry-Regulator* model with delivery through a tripartite consortium, and at the other end is the *Regulator-managed* model delivered by regulators in consultation with industry and unions. To move any further 'upward' from the Regulator-based model would involve mandating at least some elements of a 5 Star system.

Specification of Model Options

Option 1: Standard-Based Model

The Standard-based model would be delivered in a devolved manner, without a central coordinating body. The model is essentially that applied to implementation of most national standards where delivery is dispersed to licensed agents, typically working on a for-profit basis.

Audits will be based on the 5 Star Framework. The owner of the intellectual property of this 5 Star Framework (likely Standards Australia or the NHVR) will have authority to licence companies to apply the Framework to audit and rate individual transport operators.

While initial funding to establish the 5 Star Framework would be through government grants, and possible contributions from industry, the aim would be that ongoing costs of maintenance and review to the owner of the 5 Star Framework be covered by the licence fee charged to purchasers. (There will also be initial and ongoing 'in-kind' contributions of time and expertise from industry and regulatory experts in establishing and maintaining the 5 Star Framework.)

Qualifications for auditors will be set as part of specification of the Framework, but there would be no individual accreditation of auditors by the licensing authority. Industry associations and businesses will be able to offer auditing and advisory services. Businesses offering audits under the Framework may also offer initial diagnostic services in a 'pre-audit' context (but would not be able to perform both a pre-audit check and then an audit, to avoid conflict of interest concerns).

Assessment under the 5 Star Framework will be made by an independent auditor chosen by the trucking operator, under agreed contractual arrangements including fees, liabilities and arbitration provisions.

Audit reports will be issued under the name of the auditor. Details of intellectual property ownership will be a matter for the contractual relationship, but will typically reside with the operator save for the auditor's responsibility to report the undertaking of the audit and its key results. Issues of legal liability will also be a matter for the contractual relationship.

A condition of the licence to undertake audits under the 5 Star Framework will be that specified elements of each audit's outcomes are made publicly available by both the operator and the auditor.

Past the release of the specified mandatory public elements of the ratings, the form and extent of publication of additional information will be a matter for the operator.

The licensing authority will maintain a dedicated website explaining the 5 Star Framework, providing summary figures on participation and results, and the results of individual operator audits. As part of their licence, auditors would have access to the website and load in the required reporting information on each audit. The website will also provide a basic check-list for operators to make a preliminary assessment of how they might fare against the Framework.

Benefits and concessions will relate to the rating achieved and, past a minimum range, may vary across jurisdictions. It will be open to providers of benefits and concessions to set certain conditions under the system – for example, a benefit provider may specify particular auditor(s) that they require operators to use before a benefit can be provided. A similar situation will apply in tendering processes, where government and private purchasers of freight transport services may set particular requirements for auditing and results, before preferred status will be considered.

Annual monitoring of safety performance and overall road safety outcomes related to application of the Framework will be a matter for regulators and industry associations. The owner of the Framework may also undertake an annual review as part of development and promotion. Detailed evaluation of the Framework will be at the suggested three-yearly review point.

There will be no specific legislative change required to implement the delivery model. Some regulatory change may be required by the Commonwealth or individual jurisdictions to give effect to benefits and concessions.

Option 2: Joint Industry-Regulator Model

This model will be delivered through a tripartite consortium with joint membership from industry (road freight transport industry associations, client associations and unions) and the various road transport regulators (and potentially OHS regulators). It is suggested that the actual delivery vehicle be a 'not-for-profit' company limited by guarantee ('the Company'). The approach is broadly similar to that used for delivery of the Australian New Car Assessment Program (ANCAP).

The Company will own the 5 Star Framework outright, or otherwise licence it on a long-term and exclusive basis from Standards Australia or the NHVR.

The Company's Board will reflect its joint ownership structure, and decision-making will be on a majority basis, with none of the groups having control in its own right. Individual members such as transport companies will vote as members in General Meetings but Board membership will be entirely independent, possibly only available to officers of industry associations, unions, regulators or other individuals appointed on merit but not directly involved in the companies being rated.

Over time the major funding source will be through the charges levied by the Company for operator audits, which will be set at a level consistent with cost-recovery plus a small margin for research and development. However it is possible that governments (through regulators or other departments or agencies) will need to provide some ongoing financial assistance, on a public interest basis, to ensure financial viability or to underpin enhancement of the system. This would be in addition to initial seed funding provided to establish the Company.

The contractual relationship for audits will be between the Company and the operator. The Company may undertake the audits itself, or sub-contract all or part to auditors accredited by it. Operators will not be able themselves to choose and engage an accredited auditor, save for a pre-audit assessment (where the information will remain internal to the operator). The Company will provide a structure for review of audit outcomes where a dispute arises.

Audit reports will be issued under the name of the Company. Intellectual property ownership will be shared between the Company and the operator. Legal liability will apply to both the Company and the operator – for example, the Company could be joined in a legal action against an operator in a case where the audit and related rating was linked to a safety-related claim against that operator.

A condition of the contractual relationship between the Company and the operator will be for specified key results of audits to be made publicly available through both the operator and the Company. The Company will only have the right to publish the specified range of information for an individual audit on its website. Publication of detail past the minimum specified will be a matter for the operator.

The Company's website will provide a basic check-list for operators to make a preliminary assessment of how they might rate against the Framework.

Benefits and concessions will relate to the rating achieved and be on an automatic 'entitlement' basis against a nationally-applicable package. In addition to that package, jurisdictional regulators will be able to reserve their right to negotiate additional benefits or concessions with operators.

Government and private purchasers of freight transport services will have the capacity to set particular benchmarks for audit results in determining preferred tenderer status.

Monitoring of safety performance and overall road safety outcomes for participating road freight transport operators will be undertaken by the Company and published in its Annual Report. The Company will also have an obligation to report on detailed evaluation of the Framework at the suggested three-yearly review point.

There will be no specific legislative change required to set up the Company, which will operate under standard corporate law. Some regulatory change may be required to give effect to benefits and concessions, at either Commonwealth or jurisdictional level.

Option 3: Regulator-managed Model

Delivery of this model will be through government regulators. As a nationally applicable system it will be appropriate for the NHVR to have overall responsibility and ownership, with the jurisdictional regulators having delegation to manage the assessment and reporting processes within the Standard Ratings Framework.

The NHVR will own the 5 Star Framework outright, or otherwise licence it on a long-term, exclusive basis from Standards Australia.

Overall management will be through a Management Committee comprising representatives of the NHVR and jurisdictional regulators. An Advisory Group with representatives of road freight

operators, client industries and unions will meet bi-annually (at least in the early years) to give feedback on operations.

The contractual relationship for audits will be between the assessing regulator and the operator. That regulator may sub-contract all or part of the assessment to auditors accredited by the Management Committee. There will be no choice of auditor on the part of the operator.

Funding will be on a 'participant pays' basis through a scale of fees agreed nationally to cover costs of assessment and management of the system. Governments, through regulators or other agencies, may need to provide some initial funding to cover establishment. Otherwise the system will be self-funding (with the option of cross-subsidisation by regulators through savings in other areas of operation stemming from the 5 Star system, such as compliance activity).

Audits will be issued under the name of the assessing regulator. Intellectual property ownership will be shared between the regulator and the operator. Each regulator will set up review arrangements in a nationally consistent structure, through which operators will be able seek re-assessment of aspects of an audit.

Legal liability will apply to both the assessing regulator and the operator in a similar way to the potential that now exists for regulators to be joined in a legal action against an operator where contributory regulatory shortcomings are alleged by the party mounting the action.

A condition of the contractual relationship between the assessing regulator and the operator will be for specified key results of the audit to be made publicly available by both regulators and the operator. The specified indicators of results of audits will be entered onto a data base maintained by the NHVR and be publicly accessible. The NHVR and assessing regulator will only have the right to publish the specified range of information on an audit. Publication of detail past the minimum specified will be a decision for the operator.

The websites of the NHVR and participating jurisdictions will provide advice on the system and assistance to operators to assess possible participation eg through a basic check-list of safety systems and performance that can be downloaded.

Benefits and concessions will relate to the rating achieved and, if relevant, the particular 'risk' area related to a specific benefit provided. Benefits will be available on a 'gateway' basis as part of a package developed and agreed nationally, and implemented by the NHVR and assessing jurisdictions. Additional benefits and concessions may be provided by particular jurisdictional regulators but these will in no way compromise the national package.

Government and private purchasers of freight transport services will have the capacity to set particular benchmarks for audit results in determining preferred tenderer status. Setting at least basic benchmarks will be a matter between tendering businesses and agencies, the Management Committee, and representatives of trucking operators.

Monitoring of safety performance and overall road safety outcomes for participating road freight operators will be undertaken by jurisdictions and the NHVR, and provided through Annual Reports. An independent review would be undertaken for the Standing Committee on Transport and

Infrastructure (SCOTI) at three-yearly intervals. The NHVR and jurisdictional regulators will also report on detailed evaluation of the Framework at three-yearly review points.

Legislative backing for the NHVR's role in the 5 Star system will need consideration in the context of the Regulator's enabling legislation and related Inter-Government Agreement(s). Further regulatory change may be required to give effect to benefits and concessions, at either Commonwealth or jurisdictional level.

Summary of Features across the Models

Table 6.2 provides a summary of the key features of each of the models in a comparative matrix.

COMPONENT	STANDARD-BASED MODEL	JOINT INDUSTRY-REGULATOR MODEL	REGULATOR-MANAGED MODEL
Ownership of Ratings Framework	Standards Australia or NHVR	The delivering Company outright, or under long-term exclusive licence from Standards Australia or NHVR	NHVR outright, or under long-term exclusive licence from Standards Australia
Business Model for Delivery	Devolved to independent auditors licensed by Standards body to apply the Framework	Auditing undertaken through contract with the Company. Subcontracting possible to accredited auditors	Auditing undertaken through contract with the assessing regulator. Subcontracting possible to accredited auditors
Management Responsibility	Standards body has no responsibility for supervision of delivery issues	Rests with delivering Company	Rests with national Management Committee of NHVR and jurisdictions
Initial Funding	Seed funding through regulators or other government agencies	Seed funding through regulators, other government bodies and industry	Seed funding through regulators and other government agencies
On-going Funding	Licence fees to be set on a cost-recovery basis, with regulators/government agencies to underwrite any shortfall	Audit fees, plus top up from regulators/government agencies to cover costs to keep Company solvent	Audit fees, plus possible top up through government agencies and/or cross-subsidisation by regulators
Auditor Accreditation	No individual accreditation	Accreditation by the Company	Accreditation through NHVR and national Management Committee
Auditor Selection	By the road freight transport operator	By the Company	By the assessing regulator
Issuing Authority for Audits	The auditor	The Company	The assessing regulator
Publication	Key results to be published by both operator and auditor. Publication of further detail a matter for the operator	Key results to be published by both operator and Company. Publication of further detail a matter for the operator	Key results to be published by operator and regulator. Publication of further detail a matter for the operator

COMPONENT	STANDARD-BASED MODEL	JOINT INDUSTRY-REGULATOR MODEL	REGULATOR-MANAGED MODEL
Review and Arbitration	Contractual issue between operator and auditor	Review structure provided by Company	Review structure provided by assessing regulator within national system
Legal Liability	Contractual issue between auditor and operator	Potential liability with the Company	Potential liability with the assessing regulator
Benefits and Concessions	Related to ratings. A matter for individual regulators, government agencies and businesses tendering for road freight services	Related to ratings. Automatic access to a national package of regulatory benefits with possible additional benefits on jurisdictional basis. Preferred tendering status also related to ratings	Related to ratings. Automatic access to a national package of regulatory benefits and possible additional benefits on jurisdictional basis. Preferred tendering status also related to ratings
Legislative Requirements	Minimal, may be required for certain benefits and concessions	Minimal, relevant only to benefits and concessions	To be addressed consistent with enabling legislation for NHVR, plus as required for benefits and concessions

Table 6.2: Summary of Key Features of Delivery Models

7 RESOURCE REQUIREMENTS

The resource requirements for a new system are an important consideration. Tables 7.1 to 7.4 attempt to quantify the resource requirements for a 5 Star system and should be seen as providing indicative estimates only. They are designed to assist the Sub-Committee in consultations and need extensive further detailed consideration and discussions with stakeholders (regulators in particular) before decisions are made. All costs are expressed in annual terms and are focused on the initial system implementation phase that will need to be reviewed after the first 3 to 5 years.

The Governance Structure

The estimates in Table 7.1 relate to the establishment of the governance structure to operate the system. These are primarily staff and travel costs. A large-scale industry education and promotional campaign has not been included as the models rely on industry engagement and promotion though existing networks. The 'face to face' interaction with the heavy vehicle operators will be undertaken by the auditor or auditing authority, which will be paid by the operator being rated, and these costs are not included. Estimates of audit costs vary between $500 for an owner driver to $10,000 plus for a large company with many vehicles.

Cost Element	*1. Standard-based*	*2. Joint Industry-Regulator*	*3. Regulator-managed*
1. Governance structure	*$100,000-$200,000*	*$500,000-$1 million*	*$500,000 - $1 million*
a. Administration	*1-2 Full Time Equivalent (FTE) Staff - Executive Officer plus administration officer*	*4-8 FTE Staff – CEO, Assistant plus 5 Star Standard manager, accountant and support staff. NB: likely to be extensive travel involved*	*4-8 FTE Staff –Manager, Assistant plus 5 Star Standard manager, accountant and support staff. NB: likely to be extensive travel involved*
b. Auditor management (initial requirements, will grow as system grows)	*Nil*	*1-3 FTE depending on system size*	*1-3 FTE depending on system size*
c. Stakeholder liaison and education (initial requirements, will grow as system grows)	*Nil*	*1 FTE for Communications Officer*	*1 FTE for Communications Officer*

Table 7.1: Governance costs

The Benefits Package

The resources required to deliver the regulatory benefits outlined in Chapter 3 are proposed to come from restructuring the existing heavy vehicle registration charging regime to make it revenue neutral – highly rated operators will pay less, and operators with a basic or no rating will pay more. However, the New Driver Training Fund may require $5 million in additional funding if education and

training agencies do not redirect the existing training subsidies. If funding is additional and not redirected, there will be some administrative costs in determining access to benefits, and processing claims, but these are not expected to be significant. Major cost incidence is articulated in Table 7.2 below.

Cost Element	*Net Cost to Governments*
1. Benefits package (direct costs)	*$5 million for training (if redistribution not achieved)*
a. Preferred tenderer status	*Nil*
b. Road transport law	*Revenue neutral*
c. Training	*$5 million for 10,000 drivers*

Table 7.2: Costing of Benefits

Regulator costs

The most difficult area for identification of costs relates to regulators. Cost areas have been identified but no realistic estimate was able to be made of their quantum without in-depth discussion with regulators. This would need further consultation and would also be addressed during a Pilot project and a full RIS process. The costs have been broken down in Table 7.3 into three discrete areas:

a) Costs of managing the road transport law benefits package which are separate to the actual financial benefit identified in the previous Table 7.2. These staff will be issuing permissions, and managing registration discounts for companies who qualify. Actuarial costs to determine the structure of registration charges will increase.

b) Costs to provide information on individual companies from regulator databases for each regulator participating, though the processing cost could be centralised to the NHVR by agreement. This includes regulator staff that prepare reports on each company and handle data accuracy and objections. Costs to upgrade databases and import existing information are also extensive and could not be quantified.

c) Costs to amend legislation to allow for release of information and, for the Regulator-managed model, to create enabling legislation. This consists of stakeholder consultation, policy, legal drafting and management time and cannot be quantified at this stage.

Cost Element	*Net cost to government*
1. Regulator costs	*Cannot be quantified at this stage*
a. Road transport law benefits package management costs	*Difficult to estimate but possibly a Unit in each regulator based on 1 FTE or $100,000 per 3,000 vehicles participating (NB: these figures are notional only). Also additional costs in calculating registration charges and administering.*
b. Costs to provide information to the 5 Star system	*Database development and interrogation costs are unknown*
c. Legislation costs (if required)	*Unknown but likely to need changes to allow information to be released.*

Table 7.3: Regulator costings

An indicative example of the minimum costs based on the Joint Industry-Regulator managed model and 35,000 vehicles participating and 10,000 drivers trained each year from a new funding source is included in Table 7.4. The major missing costs are additional regulator costs to provide information, and to implement legislative and system changes especially in delivering the benefits package.

Element	*Cost (millions per year)*
Governance	*0.5 - 1*
Benefits package	*5*
Regulator costs (minimum)	*1.2*
TOTAL (MINIMUM)	*6.7-7.2*

Table 7.4: Illustrative costs for Joint Industry-Regulator Model

The principal cost comes in the provision of benefits to rated companies and regulator costs to develop, implement and manage. Other ongoing costs are minimal for a system this size. Clearly further detailed costing work needs to occur but the initial evidence on cost effectiveness is promising.

The costs of a 5 Star system should be held against the potential for savings through reduction in crashes, and related fatalities, injuries and disruptions. For example, a 10 per cent reduction nationally in fatalities related to heavy vehicle crashes would lead to a $128 million saving in costs to the community, while a 20 per cent reduction would lead to a $256 million saving.

8 COMPARATIVE ANALYSIS OF THE MODELS

The three models outlined in Chapter 6 have relative advantages and disadvantages. In this Chapter these are examined from a supply chain perspective, across business size and business model, and from the perspective of the audit (or rating system) providers.

In assessing advantages and advantages, and comparing the models, the focus is essentially on delivery of the 5 Star system, and the related provision of benefits. Common across all three models is the 5 Star Standard Rating Framework for Road Freight Transport Safety. The areas where the models will differentiate are in such matters as cost and accessibility, the extent and range of benefits available, perceptions by stakeholders of quality of governance and service delivery, and the capacity to evolve over time.

Operational Overview

In lead-up to the detailed assessment below, some high level comments on the operational advantages and disadvantages of each model are warranted.

1. *Standard-based Model*

A significant advantage of this model is its cost effectiveness by using a devolved operational approach to deliver the system. The 5 Star Framework is implemented through direct dealing between the service providers (operators) and the auditors. This gives it a high degree of independence from regulators. Only the ongoing maintenance of the 5 Star Framework requires input of 'whole of' industry and regulator resources. Ongoing financial support from governments would not be required when the demand for the system reached a level where it was self supporting through the licence fees charged.

A disadvantage of this model is that those who would be required to provide benefits to participants are likely to either limit those benefits, or impose more of their own conditions on participation to be certain of the integrity of assessments. Resources are then required for further assessments and performance monitoring by the benefit provider. For example, this could include a panel of auditors being stipulated by the benefit provider (eg a regulator), with additional resources required for the provider to accredit those auditors. The lack of strong central coordinating arrangements will also limit the extent and frequency of evaluation of safety impacts.

2. *Joint Industry-Regulator Model*

An advantage of this model is that it promotes engagement with the entire industry and regulators. It commits all the parties to working together to lift the safety performance of the industry by locking in the collaborative approach in the governance structure. The assessment process will be managed by the Company as an independent party, thereby giving greater confidence to the users of the rating that it is impartial and well reflects safety performance. Auditing performance can also be managed, with poorly performing auditors identified quickly and corrective action taken. Industry best practice can be more easily fed into the system as the model is 'arms length' from regulation and is less susceptible to bottlenecks in legislative amendment or lengthy regulatory approval processes to make changes.

The disadvantage of the model is its cost effectiveness, as it will require more extensive government support to establish, and to operate initially. It also relies on the majority of the industry supporting the system, otherwise it will not be viable or will only operate in those parts of the industry that support the model (e.g. specific supply chains).

3. *Regulator-Managed Model*

An advantage of this model is that it provides regulators with a greater degree of assurance around the integrity of the system as they are managing delivery, thus encouraging greater application of regulator information and the provision of regulatory benefits. The CSA 2010 and Operator Rating System are both examples of regulator managed systems and both have an underlying assurance around the overall quality of assessments. Further, concerns about the accuracy of some of the regulatory data (common to all three models) are likely to be more effectively addressed by regulators if they are also responsible for publishing the assessments.

The main disadvantage of this model is that it risks lack of engagement with industry, who may view it as just another regulatory scheme. Initiation of new regulatory schemes also takes significant amounts of time with Ministers across all the States and Territories usually expected to approve system decisions. Cost will also be a major issue, with less industry support meaning that regulators will have to fund the set up and ongoing operation of the system from their own resources.

A supply chain perspective

The Consultant's Brief requires that the advantages and disadvantages of each model are outlined for the key participants in the supply chain – specifically clients, employers, employees, labour hire companies, transport operators, intermediaries, and regulators. Advantages and disadvantages are also sought for the broader economy and community.

Table 8.1 provides this analysis, and indicates the project team's judgment as to the ranking of each model from the perspective of each stakeholder group. The ranking of models is from 1 to 3 with models indicated as S = Standards-based, J = Joint Industry-Regulator, and R = Regulator-managed.

STAKEHOLDER	Preference			Advantages and Disadvantages
	1	2	3	
Clients	J	R	S	Clients are expected to regard the Joint Industry-Regulator Model as providing a more comprehensive focus on safety factors across business and regulatory practice than the Regulator-managed Model, as well has having tripartite management and scope for client membership. Clients would see the approach as typically more aligned with understanding their business needs, and be more likely to extend procurement benefits. There is unlikely to be as much confidence in the Standard-based Model as it allows operators to choose their auditor and is not likely to have as great a role for regulators as the two other Models.
Employers	J	S	R	From the employment perspective, a preference is expected for the Joint Industry-Regulator Model. This Model is likely to be seen as better addressing the key trade-off between employment-related compliance costs and the benefits of participation. It also has ongoing tripartite management which may assist in addressing broader employment and labour issues. The Standard-based Model is expected to be the second preference as it will be cheaper to work within. While the Regulator-managed Model may be clearest for provision of actual benefits, particularly to the extent that OHS authorities participate, there is likely to be some aversion to regulator management and perceived bureaucracy.
Employees	R	J	S	Employees and their union representatives are expected to have a preference for the Regulator-managed Model, with its advantage of providing the closest links to industrial and OHS requirements. The Joint Industry-Regulator Model has an advantage over the Standard-based Model, through its involvement of union representatives in the tripartite management structure. The Standard-based Model is likely to appeal least, because it gives greater freedom to the employer in the audit process.
Labour Hire Companies	R	J	S	There is no obvious leader among the three Models from the labour hire perspective. However the Regulator-managed Model has the advantage of labour hire companies being able to fall back on 'official' assessments should subsequent problems arise in an employment arrangement.

Transport Operators	J	S	R	Operators will see advantages in the 'business-like' structure of the Joint Industry-Regulator Model, which provides a blend of recognition of business needs with provision of benefits and concessions. Operators will also have a say in future directions through industry association membership of the Company Board. The Standard-based Model has the advantage of flexibility of choosing their auditor and proceeding at their own pace. The Regulator-managed Model appears the least attractive, as it will be seen to have a bureaucratic foundation - although this could be addressed through regulators setting up responsive communication and management systems for participating operators.
Intermediaries	J	R	S	Intermediaries such as freight forwarders and supply chain advisors are expected to see overall advantages in the Joint Industry-Regulator Model given its tripartite approach, although the Regulator-based Model provides assurance on regulatory compliance. The Standard-based Model is likely to give less confidence as to overall quality of assessments, given the closer operator-auditor relationship and a lesser role for regulators.
Regulators	R	J	S	Regulators will have most confidence in the system that they themselves own and operate. However they will still have a major role and influence in the Joint Industry-Regulator Model, given the central importance of the regulatory-related elements of the audit process. The Standard-based Model will be the least attractive and is not expected to secure as much regulator input and involvement. There will be less enthusiasm for provision of benefits and concessions without introducing further requirements into the audit process, such as establishing a panel of accredited auditors, which would be at a cost to regulators.
Broader Economy	J	R	S	All three Models hold out prospect of improved safety and reliability in supply chain operation, with positive economic benefits. The ratings provided through the 5 Star system will address information failure, and boost the profile of safety. The Joint Industry-Regulator Model promises the most positive impact given the range of interests involved and its related capacity for innovation and growth. It and the Standard-based Model also give more opportunity than the Regulator-managed Model to recover some of the establishment costs of the 5 Star system through contributions from industry.
Community	R	J	S	Community members will see a basic benefit in adoption of any of the Models, given the widely held priority to road safety and concern about growing numbers of trucks on the roads. The community is likely to see most advantage in the Regulator-based Model, given that it will most clearly reflect performance against legislated trucking safety measures and provide clearer accountability for the provision of benefits and concessions. However there will be a concern about any of the Models should they prove costly and affect price and availability of goods.

Table 8.1: Comparative Analysis of Models from Supply Chain Perspective

The Road Freight Transport Perspective

Following on from the more general assessment of advantages for transport operators and employers in Table 8.1 above, the Consultant's Brief seeks more detail on advantages and disadvantages for key groups within the road freight transport industry – for small and large operators in both the ancillary and hire and reward sectors.

Table 8.2 addresses impacts across the four groups identified in similar format to the preceding Table.

INDUSTRY GROUP	Preference			Advantages and Disadvantages
	1	2	3	
Large Operators – Hire and Reward	J	S	R	Achieving a safety rating will be particularly attractive to large operators, as it can provide marketing advantages (such as 'preferred tenderer' status), access to benefits and concessions and have value in attracting and retaining drivers. The marginal cost of the audit will not be so important to those operators who already have extensive involvement in accreditation schemes and/or employ best practice approaches. The Joint Industry-Regulator Model is likely to be the preferred approach in providing these advantages, particularly given industry involvement in management. The Standard-based Model has the advantage of flexibility and choice in auditor but the likely disadvantage of more limited benefits and concessions, or more onerous access to them. The main advantage of the Regulator-managed Model is in access to concessions and benefits, but at the cost of a lesser role for industry in operation.
Large Operators - Ancillary	J	S	R	The delivery model is likely to be an important factor in the decision of ancillary operators to participate or not. Accessibility and costs will be important considerations, relative to the benefits available. The decision to participate will also be affected by the nature of the ancillary operation within its parent group - the use of 'internal markets' or contestability with the hire and reward sector will encourage participation for the same reasons as Hire and Reward operators. Otherwise, the large ancillary operators are expected to have the same broad order of preference as their hire and reward counterparts, with the Joint Industry-Regulator Model favoured on grounds of industry input to management even though ancillary operators may not be so involved with road freight industry associations. The Standard-based Model is expected to be the second preference on grounds of cost, although the expected higher level of benefits and concessions under the Regulator-managed Model may be attractive to some operators.

Small Operators – Hire and Reward	S	J	R	The participation of smaller Hire and Reward operators will be influenced heavily by the sub-market(s) that they operate in. Operators with links with large clients (e.g. those with 'painted' trucks) and/or sub-contracting arrangements with larger freight companies will be drawn to follow the decisions of the dominant client/contractor. Those with more general business models may be less likely to seek a rating, especially in the early years of the 5 Star system's operation. The benefit: cost equation will be critical to smaller operators. If benefits and concessions are broadly similar, there may be a slight preference for the Standard-based Model over the Joint Industry-Regulator Model because of the former's flexibility.
Small Operators - Ancillary	S	J	R	Smaller ancillary operators are the industry group who will be least likely to participate. It is difficult to assess which Model they might see most advantage in. The judgement is made that, if they regard a rating and related benefits/concessions as necessary to support their freight transport role, they would favour the Standard-based Model as this would secure a rating with maximum flexibility to the operator. These operators would have little affinity with the industry component of the Joint Industry-Regulator Model , while the Regulator-managed Model is likely to be least attractive given that regulator links would not be a key priority and typically seen as something to be minimised.

Table 8.2: Comparative Analysis of Models from Industry Perspective

Rating System Service Providers

The main considerations here relate to the advantages and disadvantages perceived by those bodies providing assessment services under the 5 Star system, or those considering entering the market to provide such services.

A key factor in the decisions of audit providers will be their perception of the overall level of audit activity, and the resulting business opportunities. Another important factor will be the extent to which the 5 Star system dovetails with existing accreditation schemes – auditors who can provide integrated assessment across a range of industry safety-related schemes, including 5 Star, are likely to have marketing advantages, and to achieve efficiencies in operation which could be reflected in costs of assessment.

The cost of entry will be an important consideration. In this regard the Standard-based Model involves a clear up-front cost in purchasing the right to apply the 5 Star Framework. If the cost was significant, this may deter purchase and subsequent participation if activity levels are uncertain. The Regulator-managed Model is likely to provide less business opportunity to the extent that regulators undertake their own components of the assessment and only accredit auditors to undertake the 'industry' component.

Hence the balance of advantage to auditors is likely to be seen in the Joint Industry-Regulator Model. This applies especially if processes for securing accreditation are not overly onerous and costly, and auditors have opportunity to undertake a comprehensive assessment across all aspects of operator safety performance.

Concluding Observations

While the above analysis suggests that the Joint Industry-Regulator Model would provide the best overall mix of attributes, it is not a clear-cut 'winner' across all the dimensions. Therefore at this stage it is suggested that all three models be retained as possible delivery options, (bearing in mind that a future RIS process would require consideration of a range of options).

There is also the question of balancing 'start-up' considerations against the longer term objective of a 5 star system. While the Joint Industry-Regulator Model has obvious attributes, there could be merit in commencing national implementation through the Standard-based Model to test the efficacy of the 5 Star Framework and to better gauge the potential take-up of a voluntary system. On the other hand, should there be a disposition of governments toward a mandatory scheme in the longer term, commencing with the Regulator-managed Model would have attractions. The Regulator-managed Model would also provide a basis for a Pilot scheme, as funding would be assured and setting up would not require the level of commitment from other parties as is inherent to the other models.

Appendix 4 sets out key stakeholders and their likely interest in a 5 Star system in more detail. A better guide to the preferences of stakeholders and industry groups will come from the proposed pilot and/or consultative phase, and be brought out further in any subsequent RIS process. The views of key participants will also likely shift over time as the details of a scheme are settled, and it is brought into operation. Consistent with meeting the design feature of providing a capacity to evolve over time, initial experience should be expected to lead to changes in design and method of delivery.

9 REGULATORY IMPACT STATEMENT (RIS) CONSIDERATIONS

The preceding TALC/TI report "Five Star Trucking Concept: Review of Rating Systems and Identification of the Benefits", flagged the need to consider a 5 Star system in the context of principles for best practice regulation, and related Regulatory Impact Statement (RIS) requirements. This was in the expectation that assessment of the regulatory implications of a 5 Star system would likely be required at some point in the future.

The Consultant's Brief recognises the relevance of proceeding in a framework of best practice regulation. A particular request was that specific models for a 5 Star system be defined at a level to enable preparation of a RIS. Delivery options have been discussed in Chapter 6, with three models identified as meriting further development.

More generally, for the further elaboration of a 5 Star system, a continuing awareness of regulatory best practice will assist in framing proposals, in undertaking consultation, and in related analysis. Making provision now for the possibility of a future RIS will help not only in the task of exploring issues and delivery models, but will make it easier to move subsequently to a formal RIS process if and when that is required.

An immediate case in point is that further rounds of consultation be framed consistent with the principles of best practice regulation, by providing a means for extensive industry and community involvement in development of the 5 Star system. These principles would also inform the structure of a possible Pilot project to test the net benefits that might be achieved by a 5 Star system, and to identify any particular and significant impacts or issues that require further analysis.

Application of RIS Requirements

Implementation of a *5 Star Trucking Safety Rating System* in NSW only raises the potential application of State guidelines on the analysis of regulatory impacts. However, given that the preferred form of the 5 Star system is for it to have national application, the guidelines agreed by the Council of Australian Governments (COAG) would most likely take precedence.

For now, at this stage of conceptual development it should be sufficient to work within the broader requirements for regulatory analysis that are common to both the NSW and COAG guidelines. The main steps are essentially similar for the NSW and national RIS frameworks (see Appendix 3), and require

- an analysis of the problem
- a statement of objectives
- identification of options and their specification
- for each option, identification of costs and benefits, their magnitude and their incidence (including operational resource requirements)

Comments on the first and second of these requirements are provided below. In relation to the third and fourth requirements, preceding Chapters in this report explore the identification and

specification of options for the content and delivery of a 5 Star system, and provide a preliminary examination of costs and benefits. The further articulation of options, and the quantification of costs and benefits, would be assisted through a Pilot project and related consultation.

Past the above four requirements, any future RIS process would need to cover all other mandatory areas of analysis – such as a thorough examination of the level and incidence of risks, and assessment of impacts related to Competition Policy.

Analysis and Objectives for a 5 Star Initiative

There is a considerable body of material to be drawn upon for the 'analysis of the problem' element of a future RIS. For example, the road safety imperative and the impacts of crashes involving freight transport vehicles were major issues before the Road Freight Advisory Council and will continue to be for the new Road Freight Industry Council, as well as the ongoing focus of the 5 Star Sub-Committee. The first TALC/TI report also addressed safety issues as part of the analysis of industry structure and performance.[15]

A further and significant reference is the recent National Road Safety Strategy, which provides an extensive analysis of Australia's road safety performance, past initiatives by governments and industry to improve safety outcomes, and future actions based on a Safe System approach.[16] The Strategy identifies the need to enhance the safety performance of heavy vehicles within an overall objective to reduce road fatalities in Australia by 30 per cent by 2020, and consistent with a long-term vision that no person should be killed or seriously injured on Australia's roads.

A starting point for developing a statement of objectives for a 5 Star system would be to make a linkage with the National Road Safety Strategy's long-term vision and specific 2020 objectives. The contribution of a 5 Star system would fall under the Safe Speeds, Safe Vehicles and Safe Speeds elements of the National Strategy.

Taking this approach, an initial statement of objectives for a *5 Star Trucking Safety Rating System* is as follows:

> *To support the National Road Safety Strategy 2011-2020 through contributing to reduction in the number of crashes involving freight transport vehicles in Australia, with subsidiary objectives of*
>
> - *Addressing information failure in relation to the safety performance of individual road freight transport operators*
> - *Enhancing the priority given to safety by road freight transport operators, their customers, regulators and the community*
> - *Rewarding road freight transport operators that achieve high safety ratings through a range of regulatory concessions and operational benefits*

This specification will evolve as the focus of a 5 Star system becomes clearer – for example consultation and experience through a Pilot project and a future RIS process would provide valuable

[15] See the TALC/Transport Ideas Report (2011), *Five Star Trucking Concept: Review of Rating Systems and Identification of the Benefits*, Chapter 3 of Volume 1 and also "Overview of the Road Freight Transport Industry" at part 2 of Volume II.
[16] Australian Transport Council (2011), *National Road Safety Strategy 2011-2020*, Canberra

insights into the articulation of objectives. Changes in the road safety policy context will also impact on finalisation of objectives.

Consultation with Regulatory Agencies

Ultimately, it may be that a national, voluntary *5 Star Trucking Safety Rating System* would not require a RIS to be prepared. A pilot of a voluntary scheme, the possible next stage of development, would also seem unlikely to require a specific regulatory analysis.

However, to avoid any uncertainty, consultation with the appropriate regulatory agencies nationally and/or in NSW would be desirable at appropriate points as the 5 Star project develops. For example, there would seem advantage in regulatory agency input to design of a Pilot project, in terms of ensuring coverage of key elements which may feature in a future RIS. The framework for further consultation on the 5 Star system, whether through a Pilot project or more generally, could be enhanced by advice from regulatory agencies (noting that the COAG Guidelines set out seven principles for best practice consultation).

Interpretation of regulatory coverage is also important to address. For a national scheme, advice could be sought from the Office of Best Practice Regulation (OBPR) on whether a wholly voluntary scheme might still require a RIS assessment where, to give effect to concessions and benefits for scheme participants to encourage their participation, changes are needed to regulations, rules or important related administrative practices. There is also clarification as to whether the concept of 'quasi-regulation' might apply, which OBPR identifies as a situation where governments take action to influence businesses to act in a particular way.

RIS requirements would need to be reconsidered if there were any substantial changes to the 5 Star system concept as developed in this report – for example a decision to move from a wholly voluntary system to mandate at least some elements would have implications for objectives, options and impacts, and make a RIS process highly likely.

10 CONCLUSIONS

The developmental work involved in preparing this report and the preceding two reports confirms that a *5 Star Trucking Safety Rating System* is conceptually robust, and that audit, reporting and management processes can be assembled to put a System into practice. The costs appear modest against the potential benefits to be gained from enhanced trucking safety.

The Critical Elements

The report has highlighted three intermeshing elements that are central to the viability of a 5 Star System in which participation is voluntary. While each of these three elements has value in its own right, all three together are indispensible to ensuring the success of a voluntary scheme.

The first element is the development of the 5 Star Framework to underpin the 5 Star system, which will provide a thorough understanding of the organisational and cultural imperatives of enhanced trucking safety, and provide an Audit Tool that can be applied consistently in a wide range of circumstances and by a large number of auditors. The rating of each operator can then be readily translated to a scoreboard format. The successful undertaking of this first element is critical if all parties jointly are to create, and then maintain, a high level of confidence in the ratings process and the individual ratings that result.

The second element is achieving a significant improvement in the coverage and accessibility of safety-related data collected by regulators, on a nationally consistent basis. Under the umbrella of the NHVR, each jurisdiction would provide common datasets to allow national exchange and benchmarking, and implement related processes for faster, targeted reporting on compliance. Progress in this element will in turn provide for enhancement of the scoreboard for individual operators. A longer term objective should be to develop 'live' compliance data (eg secure on-line advice to an operator that one of its trucks had been stopped and the driver had received an infringement notice).

The third element is the provision of benefits to trucking operators that achieve high standards in their safety systems and on-road performance. Substantial, tangible benefits must be available to participants, with highly-rated operators enjoying lower costs and increased efficiency. Through indicating clearly the gains that can be achieved through participation, such benefits will be key to building critical mass for the 5 Star system. Without incentives on the costs side of the operating ledger, take-up will be limited in an industry with ongoing competitive pressures and tight margins.

The intermeshing of the three elements highlights the responsibility shared between industry, unions and government for the *5 Star Trucking Safety Rating System* to be developed and then implemented. Constructive contributions from all parties will be required over a number of years to ensure that the System is built in a rigorous manner, thoroughly tested, and put effectively into operation. There needs to be widespread involvement in, and ownership of, the development process and resulting System.

Information and Consultation

While there is already some awareness in the industry of the consideration that has gone into the 5 Star safety concept, it is important that the next steps include a strategy for achieving a wider understanding and support base that will increase the momentum for development. This strategy will include both progress reports and phases of consultation, centred on major milestones in development. The strategy will need to be sustained for several years.

On the industry side, the focus should be on building national awareness through a wide coverage of trucking industry leaders, associations and unions. An area for early attention is to forge linkages with existing accreditation schemes and their host organisations, particularly *Trucksafe* (the Australian Trucking Association) and the National Logistics Safety Code (the Australian Logistics Council). The involvement of clients of the road freight transport industry is also important to the ultimate effectiveness of the 5 Star system, as client recognition and related benefits will add substantially both to participation and safety outcomes.

Industry interest will be bolstered by a clear statement from road transport regulators and other government agencies, committing that the 5 Star system would be accompanied by a substantial package of benefits for those operators that give high priority to safety. Such a package would go well past the benefits available in the NHVAS. Support from the NHVR and NTC would further highlight a national approach. Progress by NHVR and jurisdictional regulators in the much-needed improvement in national consistency and availability of data would be another supportive move.

There are some other key benefit providers that will need to be involved to generate support for the system. Education and training authorities can be asked to support the training subsidies on the basis that targeting operators with a better safety record achieves broader government objectives of promoting both workplace and road safety. Similarly, it can be argued to procurement agencies that broad government objectives (and costs savings from reductions in crashes) make the use of a 5 Star system sensible policy.

A comprehensive list of stakeholders has been provided at Appendix 4 along with an identification of their interest in a 5 Star system. Making an early start in building a coalition of support will be of great assistance in the next stage of the 5 Star system, where industry, union and government representatives need to come together in the design and testing of the 5 Star Standard Rating Framework and supporting Audit Tool.

A Pilot Project

The brief for this consultancy focused on the specification of models for a further round of consultation with industry, regulators and stakeholders. The intention was that the report would assist the next stage in development by fleshing out a framework of what a 5 Star system would look like and how it could be delivered.

During the process of the consultancy, interest has grown in the possibility of a pilot project being established to trial the 5 Star system 'in the field'. This has led to the articulation of a Pilot as part of

the next stage of development. Establishing a Pilot project will give a very significant signal that significant potential is seen in the 5 Star system, and that key players are serious about fully testing the concept in operational situations.

The Pilot would trial a 5 Star system along the lines set out in this report, covering the four factors of Speed, Driver Fatigue, Driver Health and Vehicle Conditions/Equipment. It would include results of compliance checks.

The Pilot would focus on a particular sector, or at most two to three sectors, of the road freight industry such as carriage of livestock, steel, fast moving consumer goods or Defence-related work. A supply chain approach would be taken, with relevant participants such as suppliers and end-customers brought in to the Pilot process and resulting evaluation report. Consideration of heavy vehicle fleet size would need to occur, and would be shaped by the benefits available for participation in the Pilot. For example, if a major benefit was reduced inspections based on safety performance, the Pilot would effectively focus on operators with vehicles of a GVM that requires them to enter heavy vehicle checking stations.

While this report has developed three models that could be used to deliver the 5 Star system, the Regulator-managed Model is judged to have advantages for a pilot stage. It would allow timely establishment and provide the best prospect of gaining the required financial support. A strong public policy dimension would also be ensured in evaluation, which is critical to the ultimate support of governments through a substantial benefits package and the linked provision of compliance data.

A major jurisdictional regulator such as RMS would be well placed to host the Pilot. However, while centred in a particular jurisdiction, the design and implementation of the Pilot would need to take a national perspective. There is the immediate matter of ensuring that cross-jurisdictional vehicle and driver movements are covered in the Pilot. Further and most importantly, the Pilot design and final evaluation need to be both robust in underpinning overall conclusions on the value of establishing a national industry-wide scheme, and flexible in informing choices on major details - such as in the choice of delivery model and the final shape of the rating scale (e.g. retain 1 to 5 Star, use a reduced scale, or just 5 Star alone).

Hence the sample size would need to be sufficient to allow not only firm recommendations to be made about efficiency and effectiveness in aggregate, but key components more specifically. To represent the stratification of the industry, an appropriate mix of small, medium and large operators would need to participate. The operators so included must also provide a range of safety systems and performance – it is important to avoid a situation where predominantly operators that already have a high safety performance join the Pilot. Bias toward 'self-selection' by already high-performing operators would be reduced to the extent that the Pilot provides an attractive range of benefits to participants, so encouraging a wide spread of interest.

It is expected that the initial specification of benefits would centre on those that jurisdictional trucking regulators can provide, such as concessions on licensing, registration and permit costs, access to a more streamlined access application determination process, access to an accelerated Heavy Vehicle licensing regime, and access to extended work hours under fatigue management processes. As also discussed earlier, changes to the incidence of inspections at heavy vehicle checking stations, based on reduced safety risk, is another benefit that can be trialed in a Pilot. A

final consideration is the desirability that the range of benefits be fine-tuned against the particular sector(s) chosen for the Pilot.

However, to increase incentives to join the Pilot, provision of further benefits should be explored. Examples that could be considered include regulatory concessions for OHS, rebates for driver training programs, and recognition as preferred tenderers.

For regulator data, the Pilot will require an early start to improving compliance information provided by regulatory authorities. Each jurisdiction affected by the Pilot would need to agree a group of common datasets to allow national exchange and benchmarking, and processes for reporting (eg to companies employing drivers that receive infringements).

Oversight of the Pilot would be through a Steering Committee (ideally including some members of the current 5 Star Sub-Committee to ensure continuity). Representatives would come from the trucking industry, unions, supply chain members, and government. The NTC and NHVR must be closely involved and could be invited to join the Committee. The Steering Committee would agree the details of the Pilot, the 5 Star Framework, and Audit Tool, and be responsible for maintaining the momentum of the Pilot and its overall evaluation.

A required initial step would be to draft the 5 Star Framework, including the scoring rules and the Audit Tool, with review through an expert Reference Group. This is a pre-condition for the commencement of the Pilot itself. While this work was underway, the particular sector focus of the Pilot could be decided with accompanying details of the sample requirements. The benefits available to participants, and provision of data by regulators also could be settled over this period, so that the Pilot could start when the 5 Star Framework, scoring rules and Audit Tool were ready.

The application of the Audit Tool would be by independent auditors, who would be contracted to assess participating companies. Auditors of existing industry schemes should form a major part of the audit panel, to develop a better understanding of the linkages between coverage of those schemes and the 5 Star system. The panel of auditors and arrangements for their allocation to participating companies would be decided by the Steering Committee.

A summary of the main elements of a Pilot project is provided in Table 10.1.

DESIGN OF PILOT	*INDUSTRY SAMPLE*
§ Four risk factors – Speed, Driver Fatigue, Driver Health, Vehicle Conditions/Equipment § 5 Star Framework and Audit Tool to be specified for the factors, including Safe Rates issues § 'One audit' approach - existing accreditation schemes (Trucksafe, NLSC, NHVAS) to form part of ratings and audit structure § Specification of nationally consistent data sets on compliance, and subsequent provision § Substantial benefits package available to participants	§ Sufficient to draw conclusions on overall viability and key elements of a national scheme § Focus on one to three sectors of trucking industry and related supply chains § Mix of operators according to scale and current safety systems/performance § Jurisdiction-based but coverage of cross-border issues § Auditors allocated to, not selected by, operators
KEY AREAS FOR EVALUATION	*MANAGEMENT OF PILOT*
§ Impact of participation on safety culture and performance of operators § Relationship of '5 Star' to existing accreditation schemes § Importance of benefits, both specific and in aggregate, to encourage participation § Perceptions of other supply chain participants § Regulator experience and key data requirements § Implications for the implementation model for a national 5 Star system	§ Project hosted in a major regulator § Funding from government, with industry and unions 'in-kind' input § Three-year commitment to project § Regular reporting and consultation against milestones § Steering Committee to oversee Pilot and sign off final evaluation report § Expert Reference Group to advise on 5 Star Framework and Audit Tool

Table 10.1 Key Features of a Pilot Project for 5 Star Trucking Safety Rating System

The Pilot would have clear timelines for progress reports and completion of the final evaluation report. It is expected that the development stage and the following evaluation process would take around three years, and funding would need to be committed on this basis. Throughout this period, it will be important to maintain an open dialogue with all interested parties to build operator and client support, encourage participation and improve scheme components and operation. This

dialogue will be part of the overall communications strategy mentioned above, and the Project secretariat will need to include, or have access to, expertise in communication and consultation.

The expectation is that the Pilot would be undertaken and reported on a confidential basis, with no identification of individual companies and their results (via test scoreboards or otherwise) during the Pilot and in the final report. However consideration could be given to allowing companies to publicise their Pilot ratings if they so wished (noting that a future scheme would be based on public availability of audit results, with the incentive that a company achieving a 5 Star rating could leverage this by advertising its status). Participating companies would of course be able to use results to improve their own safety systems over the course of the Pilot. Assessment of such impacts would be an important part of the evaluation.

A Pilot of a voluntary scheme would not appear to require an initial Better Regulation Statement or Regulation Impact Statement to be prepared. However, it would be valuable to consult the relevant NSW or national authorities in design of the Pilot to ensure that it would provide appropriate input into any future analysis of regulatory impact.

The Next Steps

The point has been reached where decisions can be taken to move the concept of a *5 Star Trucking Safety Rating System* forward to the next stage.

The key decision relates to the establishment of a Pilot, a move that would not only consolidate and build on the work done to date, but bring new momentum to policy development in road transport safety. This would require support to be gained from the RFIC, and subsequently at senior official and Ministerial level, to allow agreement on hosting arrangements for the Pilot and related funding (over a three year period). Consultation with the NHVR and NTC, and with those organisations overseeing current accreditation schemes, would also be an important part of the initial steps leading up to commencement of the Pilot.

When the way ahead was clear, likely later in 2012, the task of informing the industry and other stakeholders would begin in a substantial way as the first stage of the information and consultation strategy proposed above. In this task, the support of a number of '5 Star' champions would be invaluable, to explain the concept and present the case for the Pilot.

Were it decided not to establish a Pilot at this point, the way forward then would best involve further conceptual development – in particular specification of the 5 Star Standards Rating Framework and related scoring rules and Audit Tool – supported by a targeted information and consultation strategy. This work would run in parallel with the creation of a national regulatory data framework, and be an important input to it.

APPENDIX 1 - ABBREVIATIONS

AAA	Australian Automobile Association
ABS	Australian Bureau of Statistics
ALC	Australian Logistics Council
ATA	Australian Trucking Association
ATC	Australian Transport Council
BITRE	Bureau of Infrastructure, Transport and Regional Economics
BTKM	Billion tonne kilometres
BTRE	Bureau of Transport and Regional Economics
COAG	Council of Australian Governments
COR	Chain of Responsibility
CSA	Compliance, Safety and Accountability
DEEWR	Department of Employment, Education and Workplace Relations
DITRDLG	Department of Infrastructure, Transport, Regional Development and Local Government
FMCSA	Federal Motor Carrier Safety Administration
5 Star SC	Five Star Trucking Safety Sub-Committee
GCM	Gross Combination Mass
GVM	Gross Vehicle Mass
IR	Industrial Relations
ISO	International Standards Organisation
KPI	Key Performance Indicator
LCV	Light Commercial Vehicle
NHVAS	National Heavy Vehicle Accreditation Scheme
NHVR	National Heavy Vehicle Regulator
NLSC	National Logistics Safety Code

NRTC	National Road Transport Commission
NSC	National Safety Code
NTC	National Transport Commission
NTI	National Transport Insurance
OBPR	Office of Best Practice Regulation
OH&S	Occupational Health and Safety
PBS	Performance-Based Standards
PC	Productivity Commission
PIC	Partners in Compliance
SCOTI	Standing Committee on Transport and Infrastructure
RFAC	Road Freight Advisory Committee
RFIC	Road Freight Industry Council
RMS	Roads and Maritime Services
RTA	Roads and Traffic Authority of NSW
T&L	Transport and Logistics
TALC	Transport and Logistics Centre
TI	Transport Ideas

APPENDIX 2 – INDUSTRY CONSULTATIONS

Discussions were held with a selected operator of a small (owner operator), medium (4-6 truck business) and larger (8+ trucks) business and two auditors of current accreditation schemes presently in existence.

The responses are presented below under each question.

With regard to the safety specific factor of Speed

a) What do you consider to be the best practices that are, or could be, present in the freight industry to manage speed?

** GPS Tracking came across from all operators as a means of demonstrating compliance. It was noted that 3 minute intervals for data may need to be checked, particularly when traversing a country township. Tracking of idling, stopped periods and speed are all KPIs worthy of inclusion*

** Electronic tachographs were considered too expensive to be viable for all operators at this stage, although as a black box for trucks, worth investment.*

** Speed limiters not supported as sole mechanism to control speed. Supports adherence to speed limits and may look at other benefits eg. lower fuel consumption as beneficial.*

** It would appear that the Fatigue accreditation has had a marked affect on speeding. It has implemented clear management procedures for all parties concerned and in doing so has included all parties in the 'chain of responsibility' and therefore liable to penalties. Before where only the driver was responsible, all other parties did not really care, as long as the load was delivered. The operators, freight forwarders and receivers etc are now managing their businesses in line with the Fatigue regulations and drivers are not being forced to conduct unreasonable schedules. A Speed type accreditation is the next logical step.*

** Camera, similar to those fitted to Highway Patrol vehicles, recording all driving in a 24 hour period the same as the Work Diary page for that date.*

- *Mandatory for each Company to have a speed policy*
- *Driver engagement & periodic refresher induction processes which reinforces speed policies and road laws*
- *Vehicle speed limiters devices fitment mandatory and regularly checked for accuracy*
- *Vehicle specification to driveline ratio to limit over speed capability*
- *Speed monitoring through GPS & vehicle on-board computer/sensors, transmitting speed data via web back to Company operations systems/visual displays*
- *Safe driving plans for specific and generic trips developed by driver and Company that comply road law legislation in relation to fatigue, speed and rest periods*
- *Regular daily communication process between scheduling supervisor and driver to judge fitness for task, fatigue and adequate and legal time compliance to complete driving task*

- *Company to be in National Heavy Vehicle Accreditation Scheme and TruckSafe for compliance to Vehicle Maintenance, Vehicle Mass Management and Driver Fatigue Management*
- *Company to allow road users to comment upon our professional drivers' driving performance – Safety Line, signs on rear of trailer inviting comment via phone number*
- *Must establish a safety culture within to have drivers advise the Company of confirmed or pending speeding offences*

b) What audit mechanisms, or compliance actions, would you recommend to accurately target drivers speed compliance?

** The ability to print speed exception reports at any time on current market based systems is great for reporting quarterly, randomly or post an incident from GPS Tracking systems or electronic tachographs.*

** Most operators have a very good knowledge of how long most trips take. There should be a detailed way of monitoring and recording driver's times and distances. Currently operators can check average times by dividing distance travelled by time works to get an average speed. This usually indicates a Work Diary problem rather than speed travelled. For example, I checked a work diary page for a driver travelling between Taree and Glenn Innes via Walcha and the average speed was 134 kph. Another example is a company, whose driver's average 96kph between Sydney, Melbourne, Sydney. Each case has to be judged on its circumstances and the system is not accurate over short distances. To make any speed audit system work it has to be accurate and fair.*

- *Speed reports generated via web and on-board vehicle computer and their speed sensors, measuring average speed, speed between sectors and over speed between stops*
- *Random audits of driver work diaries analysing work and rest time against safe driving plans*
- *Review regularly safe driving plan to account for season conditions, route disruption and road law & customer change*
- *Analysing information gathered from other road users via the Safety line number*
- *Analysing any received vehicle traffic infringements related to speed, identifying offenders, undertake appropriate disciplinary action in accordance to speed policy*
- *Analysing periodically driver licence for demerit points associated to speed offences*

c) Do you have any innovative suggestions to control speed as a factor in truck related crashes (injuries and deaths)? If so, what are they?

Some responses included:

** Regulations to take trucks off road for speeding.*

** Speeding on corners is considered main issue with regards accidents (NTI Research).*

** The issue of Summary Justice with regards to Log book infringements and or speeding related fines. The very nature of issuing fines for a breach of road rule compliance should not*

be accompanied by State Revenue expedience by offering a reduced fine if you do not contest the charge. This compromises the right to presumed innocence and the ethics and integrity of the entire road compliance structure. The focus should be on safety rather than revenue.

** The issue with regards to transport rates. I appreciate that we live in a free and open business environment. However, this does and should not translate into deliberate and systematic price gouging by either suppliers and or freight forwarders. This practice continually contributes to breaches by operators on issues of Vehicle roadworthiness, Unsafe work practices, Un-realistic time scheduling and a consistent strain and depression of drivers (the worst combination). In short these freight forwarders and or freight businesses need to be highlighted to society as contributing to the above transport infringements. These business entities, (once a complaint is brought to the attention of State Transport Associations, not the RTA) , need to be informed in writing that a complaint has been lodged and as a result should be given an opportunity to explain their costing structures. If found wanting in this area, then a commensurate fine should be issued.*

** The issue of log books and time scheduling. Instead of hounding drivers at every opportunity and supported by the averaging/ time provisions on the road, (contributing to stress and depression of Drivers). The majority of responsibility should be born by the person or business scheduling the truck in question (under the provisions of Chain of responsibility provisions). To this end the RTA, should have extended powers to perform on the spot and in the main random and scheduled audits at the home address of businesses. Hereby office staff can produce driver and or vehicle historical records to substantiate vehicle and driver compliance. This process alone will alleviate significant driver stress and shift the responsibility on vehicle scheduling back to where it belongs.*

**The issue of transport operator payment for work performed. I appreciate that you may think that this has nothing to do with speed and or safety . However, if transport operators are not paid and or are on 90 -120 day terms. It is little wonder that cost cutting on safety and trip times are put under pressure. Businesses are not stupid, they know the value of money and it discounting effect with time. They are also aware that transport cost are a current account cost. But 90 -120 days is well and truly pushing friendship and boarders on the cost being put on the balance sheet rather than current accounts. With the introduction of GST and quarterly payments requirements, the ever increasing pressure on cash flow and accountants creative reporting requirements. It's little wonder that some businesses are insolvent and still trading. Transport operators trade in an unsecured environment and as such need to be protected by either a nation standard on payment obligations and or a legislated liability insurance commensurate to the level of exposure in the market place by freight suppliers and or freight forwarders. To be activated in times of insolvency.*

**The bottom line is that the government continues over time to tighten the noose around drivers necks, hoping that likewise over time, market forces will streamline the transport industry by applying supply and demand principles and the survival of the fittest. It's what called coming in the back door and enforcing symptoms but not addressing the foundation problems of the industry. But it will do one thing and that is create max revenue for the respective state government.*

** Computer systems in all heavy vehicles which record all the drivers actions for a 7 day period and are easily accessible to all authorities who require the information. Train all drivers in speed requirements and accredit all heavy vehicles in a NHVAS Speed module.*

- *Would like law authorities to advise Company of any speeding offences committed by it employees*
- *Would like to see road traffic authorities publish current and when changed speed zones within their road networks*

At the same time as soliciting information about speed, a question was asked as to what concessions or benefits for participation in a 5 Star Trucking Safety Scheme operators would like included to attract participation.

If a new 5 Star Trucking Safety Scheme offered concessions or benefits for participation, what would you like to see included?

Responses included:

** A longer accreditation period of say 3 years instead of 2 years as a bonus for compliance.*

Additional issues raised covered:

** Codes of Practice provide the impetus to ensure owners are more responsible in in areas such as road worthiness.*

** Many operators are pressured to spend $ to gain accreditation or make compliance requirements, but there is little recognition from Insurance Companies, RTA or Police that an operator has jumped all the hurdles to provide a safer, better level of service to the industry and community.*

** The Scheme providers and regulators don't publicise or advertise the message that accredited operators have made considerable effort and gone to considerable expense to attain requirements.*

** An example of the poor treatment provided to operators is the 'agreed market value' insurance cover provided that lacks follow through if a claim is submitted as a result of an accident whereby only the insurers market value cover is paid.*

** If an accident occurs, the RTA, Workcover, Police don't provide any recognition that the driver is part of a scheme of accreditation that would provide an evidence base of information to show the operator has systems and policies and practices to ensure a smooth operation with a clean record.*

** Businesses that maintain fleets of less than 5 year old vehicles are doing right thing by driver, environment etc, but are penalised as trucks are heavier, use more fuel, run hotter and cost more. One avenue for a remedy was provided in the form of a higher diesel rebate for newer vehicles as a benefit.*

** The combination of auditors to check all schemes including mass would assist in the workload for operators.*

** All persons suggested the need for enforcement was paramount.*

** Implement a Speed Safety module within the NHVAS and include the following:*

a. Reduce the maximum speed of all heavy vehicle by 10 kph

b. Introduce a 3 tiered accreditation system, Speed Standard, Speed 1, Speed 2.

SPEED STANDARD for those operators who only require the speed limits with a maximum of 90kph. This will give local drivers the option of being accredited, but they will still have to meet speed requirements where applicable.

SPEED 1 is for operators who become accredited in an NHVAS Speed Safety module which includes detailed training of drivers and operator staff and accreditation of all vehicles. Computer systems in all heavy vehicles, which record all the drivers actions for a 7 day period and are easily accessible to all authorities who require the information. Training includes all service staff and companies involved in the maintenance and servicing of speed related equipment, ie. ADR 65/00. Operators and drivers/service staff are all accredited independently. Any operator/driver accredited in Speed 1 can travel at a maximum 100kph.

SPEED 2 operators to comply with all Speed 1 requirements but have the following requirements plus have a camera, similar to those fitted to Highway Patrol vehicles, recording all driving in a 24 hour period the same as the Work Diary page for that date.

These operators/drivers are able to travel at a maximum 105kph

Training is a major factor in any speed control mechanism for all parties concerned. The training must be relevant to the subject and must be the same for every person. The training must be ongoing, with retraining very 2-3 years. With fatigue, the requirements are only to have specific training. In future we will have drivers who have not had retraining in 10 years and they will have no idea what they were told at their initial training.

Benefits, as well as the speed exemptions, should include reductions in registration and insurance commensurate with their accreditations and conduct over a period of time. For companies that meet higher standards, a lengthened period of accreditation.

APPENDIX 3 – NSW AND NATIONAL RIS REQUIREMENTS

Requirements in New South Wales

In New South Wales, provisions for a Regulatory Impact Statement (RIS) are set out in the *Subordinate Legislation Act 1989*. In Schedule 2.1, the Act requires that where a principal regulation is to be introduced or remade, a RIS is to be prepared which must include:

> *"(a) A statement of the objectives sought to be achieved and the reasons for them.*
>
> *(b) An identification of the alternative options by which those objectives can be achieved (whether wholly or substantially).*
>
> *(c) An assessment of the costs and benefits of the proposed statutory rule, including the costs and benefits relating to resource allocation, administration and compliance.*
>
> *(d) An assessment of the costs and benefits of each alternative option to the making of the statutory rule (including the option of not proceeding with any action), including the costs and benefits relating to resource allocation, administration and compliance.*
>
> *(e) An assessment as to which of the alternative options involves the greatest net benefit or the least net cost to the community.*
>
> *(f) A statement of the consultation program to be undertaken."*[17]

Schedule 2.2 provides guidance as to costs and benefits – *"economic and social costs and benefits, both direct and indirect, are to be taken into account and given due consideration"*. Wherever possible, costs and benefits should be quantified, or otherwise the anticipated impacts of options presented in a format that permits a comparison of costs and benefits.

The Act sets out procedures to ensure that the RIS is carried out with due process, with appropriate public notice of the RIS in draft form, and a comment period of 21 days.

These requirements are reflected in the Guide provided for departments and agencies by the NSW Better Regulation Office.[18] The Guide sets out seven principles for Better Regulation, of which the first five are particularly relevant at this stage of the 5 Star project:

> *"Principle 1: The need for government action should be established*
>
> *Principle 2: The objective of government action should be clear*
>
> *Principle 3: The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options*
>
> *Principle 4: Government action should be effective and proportional*

[17] NSW Subordinate Legislation Act, 1989 No 146, Schedule 2.1
[18] Better Regulation Office NSW (2009), *Guide to Better Regulation*, Sydney

Principle 5: Consultation with business and the community should inform regulatory development"[19]

The Guide goes on to set out a template for Better Regulation Statements, essentially another title for a RIS, which are to be submitted with all *significant* new and amending regulatory proposals. A significant regulatory proposal is considered to be one which would

- *"introduce a major new regulatory regime*
- *have a significant impact on individuals, the community, or a sector of the community*
- *have a significant impact on business, including by imposing significant compliance costs*
- *impose a material restriction on competition, or*
- *impose a significant administrative cost to government"* [20]

A Better Regulation Statement need not be lengthy, but must address

- The need for government action
- The objective of government action
- Consideration of options (including coverage of compliance costs, administrative costs, competition impacts, any other costs, and implementation and compliance)
- Consultation
- Preferred option
- Evaluation and review

For a proposal judged as 'non-significant', Portfolio Ministers must show in Cabinet or Executive Council documentation that the Better Regulation principles have been applied.

The Better Regulation Office encourages agencies to seek its assistance and advice at any stage of development of a proposal with regulatory impacts. In this context, it is important to note that the readily available documentation from the Office does not address proposals which have a voluntary foundation, or procedures to apply for pilot or trial projects. If the early stages of a voluntary 5 Star system were to be trialed and/or implemented for NSW only, with or without national linkages, then consultation with the Office would be prudent to establish obligations for regulatory analysis.

National Requirements

As the intent for a 5 Star system is for it to have national application, at some stage regulatory impacts could be expected to require assessment within the framework required by the Council of Australian Governments (COAG). COAG has agreed a set of guidelines for Ministerial Councils and other national standard-setting bodies to apply in development of regulatory proposals and to

[19] Better Regulation Office (2009), Page 7
[20] Better Regulation Office (2009), Page 9

undertake the associated analysis of impacts.[21] The COAG framework, and related processes, is overseen by the Commonwealth Office of Best Practice Regulation (OBPR).

Under COAG there are eight Principles for Best Practice Regulation, covering the full span from development of proposals, through consultation, the decision stage, implementation, and ongoing review of effectiveness. Draft and final stages for the RIS are envisaged – the draft for the consultation phase, the final for the decision-making stage. At this stage of the 5 Star project, the first two Principles are especially relevant:

> *"Principle 1: Establishing a case for action before addressing a problem*
>
> *"Principle 2: A range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs considered"*[22]

The Best Practice Guide provides specific advice on the coverage of a RIS, and the process for each stage of the RIS process. Seven key elements must be part of a RIS. The first four of these elements relate most closely to the 5 Star project at its current level of development:

> Element 1: Statement of the Problem: This includes providing evidence on magnitude, demonstrating that existing regulation is not addressing the problem, identifying risks, and providing a clear case for action (related to Principle 1 above).
>
> Element 2: Objectives: Objectives, intended outcomes, goals or targets of action require clear articulation, in a manner that facilitates consideration of relevant alternatives without unduly broadening the task into an unworkable exercise.
>
> Element 3: Statement of Options: The status quo of continuing current approaches is one option, plus alternate options that preferably cover non-regulatory, self-regulatory and co-regulatory approaches. Consistent with Principle 2 above, it must be established that a range of policy options and costs and benefits has been considered in narrowing down to the particular options chosen for the RIS.
>
> Element 4: Impact Analysis (Costs and Benefits): An "adequate" analysis of costs and benefits is required in the RIS, which includes identification of affected groups, business impacts (particularly small business), relevant risk analysis, reference to relevant international standards and whether there would be impacts on competition. Analysis should include whether an appropriate regulatory model already exists in a participating jurisdiction and whether a uniform, harmonised, or jurisdiction-specific model would achieve the least burdensome outcome. The overall outcome of the analysis should be to identify the option that generates the greatest net benefit to the community.

COAG requires that the action contemplated should be *"effective and proportional to the issue being addressed"*[23].

[21] Council of Australian Governments (2007), Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies, Canberra
[22] COAG (2007), page 4
[23] COAG (2007), Principle 8, page 6

The COAG guidelines apply both to legally enforceable instruments that impose mandatory requirements, and to voluntary measures stemming from government where widespread compliance can be expected. The Guide goes on to state that … *"Development of voluntary codes and other advisory instruments should take account of these principles and assessment requirements where there is a reasonable expectation that their promotion and dissemination by standard-setting bodies or by government could be interpreted as requiring compliance"*[24].

The concept of 'quasi-regulation' is also brought out by the OBPR in general advice covering both Australian Government and COAG guidelines. The OBPR website defines quasi-regulation as including … *"a wide range of rules or arrangements where governments influence businesses and individuals to comply, but which do not form part of explicit government regulation. Broadly, whenever the government takes action that puts pressure on businesses to act in a particular way, the government action may be quasi-regulatory."*[25]

The OBPR suggests that the responsible agency should make contact with it if there is any doubt as to whether an action is quasi-regulatory – especially if it adds additional requirements or if there would be pressure on business to comply.

The COAG guidelines place particular emphasis on the need to carry out effective consultation throughout the development of proposals. Seven principles are identified for best practice consultation across the headings of[26]

- Continuity
- Targeting
- Appropriate timeliness
- Accessibility
- Transparency
- Consistency and flexibility
- Evaluation and review

The COAG Guide and supporting OBPR advice do not bring out issues related to Pilot projects or trials of policy/program initiatives.

As does the NSW Better Regulation Office, the OBPR encourages agencies to consult early in the development of proposals, and to seek advice about related RIS requirements. Given the case-by-case nature of interpretation related to quasi-regulation and voluntary initiatives, contact with the OBPR would be a sensible move before getting too far advanced with a national 5 Star system.

In terms of Ministerial oversight, development of a RIS related to national application of a 5 Star system to enhance trucking safety would come under the responsibilities of the Standing Committee on Transport and Infrastructure (SCOTI), a Council of Ministers which has replaced the Australian Transport Council (ATC).

[24] COAG (2007), page 3
[25] Taken from http://www.finance.gov.au/obpr/faq.html#quasi_regulation
[26] COAG (2007), Appendix F, page 30

APPENDIX 4 – STAKEHOLDERS

STAKEHOLDER CATEGORY	STAKEHOLDER NAME	INTEREST (page references and excerpts taken from Chapter 12 of the previous TALC/TI report)
Users, Clients, Intermediaries and Benefit Providers	All 52 of the Australian Logistics Council (ALC) National Logistics Safety Code (NLSC), Retail (RLSC) and Steel Code signatories including major retailers, other client companies and transport companies Australian Food and Grocery Council National Farmers Federation Australian Meat Industry Council Minerals Council of Australia Australian Federation of International Forwarders Australian Livestock and Property Agents Association Department of Defence Government procurement agencies eg NSW Department of Finance and Services Government education and training agencies eg NSW Department of Education and Communities Australian stevedoring companies (Patrick, Asciano etc) Ports Authorities with port access roles	"The purchaser or client categories of users of rating systems, particularly in voluntary systems, are key drivers in its acceptance and use. A simplified, recognised rating system which incorporates existing regulatory requirements under "Chain of Responsibility" legislation will give these users the ability to select suppliers who are safer at transporting goods. A user who cannot judge which transport suppliers would best transport their products safely is more open to personal, commercial and financial loss. With a rating system in place, suppliers are under an obligation to maintain or enhance their safety rating." (page 75)

Employees	Australian Council of Trade Unions Transport Workers' Union	"Incentives to improve and maintain a safety rating may also permeate down to the staff employed by companies across the supply chain. A company culture focused on safety would encourage professionalism among its staff i.e. better trained and safer drivers, loading and support staff who would take pride in their safety record. A rating system will not only concentrate on the transport of goods on the road but also the ancillary activities such as loading and unloading, office management and other related work. The rating system should encourage and enforce an emphasis on occupational health and safety for staff across the supply chain. Staff joining safety rated companies would have an expectation of greater safety on the job. "The introduction of a rating system could result in the implementation of a culture of better paid, more professional drivers and associated staff. As a rating system develops and identifies companies that have good safety ratings and work practices this will encourage good staff to join the company in expectation of better than average work conditions and remuneration. It could also be a selling point for the company in hiring labour, particularly when asking governments to allow in labour from overseas. With an emphasis on safety, this could be expected to flow through to lower workers' compensation claims and industrial relations costs in general." (Pages 75-76)

Transport Operators (Service providers)	All 52 of the Australian Logistics Council (ALC) National Logistics Safety Code (NLSC) signatories including major retailers and transport companies Australian Trucking Association and TruckSafe members National Heavy Vehicle Accreditation Scheme participating companies Australian Livestock and Rural Transporters Association Livestock and Bulk Carriers Association Victorian Transport Association Queensland Trucking Association South Australian Road Transport Association Western Australian Road Transport Association Northern Territory Road Transport Association Natroad	Primarily interested in the commercial benefits outlined earlier in this report. "As service providers gain confidence in the rating system and it becomes a recognised standard of achievement in the industry, they will have the incentive to strive for a good safety record. This would involve focusing on better business performance in safety-critical areas like driver training, fatigue management or log book management. The incentive would be to ensure performance is to the required level, to ensure they have met all the requirements to obtain or keep their rating. "A rating system applying to sub-contractors could enable a more informed choice by service providers to ensure they engage companies that maintain their own safety ratings. This could even force sub-standard operators out of the industry. "In addition, because the information leading to a rating will be well known, a highly rated company could use its ratings in contract documentation. This could reduce the compliance documentation in a contract because their rating demonstrates that they are known to comply with transport requirements. " (Pages 75-76)

Regulators	*Of road transport laws* National Transport Commission National Heavy Vehicle Regulator (when operational) Roads and Maritime Services VicRoads Queensland Department of Transport and Main Roads Other state and territory road regulators *Of workplace health and safety laws* Safework Australia State based OHS authorities in each state and territory eg WorkCover NSW and WorkSafe Victoria	"From a regulator's perspective, introducing a safety rating has the potential to establish a clearer pathway to define the requirements for a safe operator. Regulators will be able to develop a "formula" of safety requirements that brings together all existing safety compliance such as mass limits, drug and alcohol policies, fatigue and the 'off-road' factors discussed earlier in the report. This in turn will enable regulators to establish simpler messages about what they want from companies. Regulators' requirements must be met, maintained and improved in order for a supplier to obtain and maintain a rating. Without a satisfactory rating, service providers may have difficulty competing in the market. "There is a likelihood of reduced compliance activity costs for regulators if overall standards improve across the supply chain. A simplified compliance regime combined with a strong desire by companies for a high rating could reduce audit and data collection costs for regulators. Some of the regulators' savings could be passed on to the companies." (Pages 75-76)
Broader Economy and Community	Central Government Agencies eg NSW Department of Premier and Cabinet and NSW Treasury Australian Local Government Association Motorists' Associations eg Australian Automobile Association	"The broader economy and community would also benefit potentially from the introduction of a safety rating system. If implemented correctly, the cost to society of road accidents should fall as heavy vehicle accidents, along with the trauma they bring, reduce. Other road users will also have more confidence using the road network and higher safety standards should ensure more certainty in product delivery. The broader economy and community may see Improved Gross Domestic Product as safety rating systems improve the efficiency of the transport and logistics tasks." (Pages 75-76)

Proposal for legal protections of on-demand gig workers in the road transport industry

A report prepared for the Transport Education Audit Compliance Health Organisation (TEACHO) by UTS Faculty of Law

Final Report January 2021

Report Authors

Dr Michael Rawling

Professor Joellen Riley Munton

For further information on this report please contact

Dr Michael Rawling

E: Michael.Rawling@uts.edu.au

Acknowledgements

Many thanks to Katie Johns for formatting, editing and referencing

Contents

Executive Summary

In Australia and other countries, on demand, digitally-mediated, gig work in the road transport industry is currently not being adequately regulated. A sizeable and growing workforce of delivery-riders/drivers, freight deliverers and ride-share drivers within this gig workforce are receiving substandard pay and conditions due to a lack of minimum standards for these workers. During the writing of this paper, there were five deaths of RT on demand delivery riders in two months. In Australia for more than a decade, wealthy and powerful global tech-companies have evaded employment protection regulation by engaging vulnerable workers (digitally through apps and platforms) as contractors. Until recently, policy debate concerning these tech companies has centred on whether these businesses can be regulated. However, in recent times the focus of debate has shifted to how, not if, these business operations should be regulated to protect the public interest (Nossar 2020:17). This paper presents the reasons for, a roadmap to, and proposals about effective regulation of businesses controlling digitally-mediated, gig economy arrangements in the road transport industry. Indeed the federal government can no longer ignore unregulated work in the gig economy which has created an underclass of exploited workers who have no choice but to accept low rates, unpaid work and an unsafe and unhealthy work environment (Bonyhady 2020). Furthermore, this exploitation of gig workers has flow on effects to contract workers and other workers in the road transport industry engaged by conventional means and is creating unfair competition for traditional transport businesses. National governments have taken a laissez-faire approach to the regulation of this gig work and have been complicit in the exploitation of road transport gig workers. None of this would be possible without their complicity, disadvantaging workers and endangering the sustainability of the transit systems those governments are supposed to fund and oversee (Srinivasan, 2019:115). Governments and Parliaments must start leading with effective regulation of the gig economy rather than following the market with ineffective and piecemeal measures (Koslowski 2019).

In light of current tribunal decisions on the work status of road transport gig workers and other factors, this Report endorses a ‘beyond employment’ approach (Johnstone et al 2012) to overcome the obstacle to more effective regulation of the contractor designation of these gig workers. Consequently, this Report proposes that there should be a new, federal, standard-setting body for the Australian road transport industry which would provide for minimum rates and safe conditions for all workers regardless of their formal work status associated with road transport including road transport gig workers operating within digitally mediated business arrangements.

Introduction

In Australia at present, on demand, digitally-mediated gig work in the road transport industry is not adequately regulated. Section 1 of this Report describes the exploitative working conditions of on demand road transport (RT) workers in Australia (including five recent deaths of vulnerable RT delivery riders), and Section 2 explains why they have been found to fall outside of the protections of the *Fair Work Act 2009* (Cth) and other legislation, including state-based workers' compensation laws. Although the conditions under which they work demonstrate a high level of vulnerability, and very few of the markers of any true entrepreneurship, these on demand workers have been characterised as 'independent contractors' for the purposes of our system of labour laws. The newness of the means of engaging on demand workers has – so far – blinded regulators to their needs as vulnerable workers. However, while work mediated through a digital platform may be a 21st century phenomenon, 'on demand' work is by no means new. It is no different in essence from the work of labourers who gathered each day at the notorious Hungry Mile on the docklands in Sydney in the early 20th century (now redeveloped as Barangaroo), hoping to be selected for a day's work loading and unloading ships. Those who missed out went home hungry. Their struggle to establish fixed rates of pay, and then weekly wages and secure employment, was a major challenge for the early trade unions, achieved only through harsh periods of industrial action (Bennett 1994).

Like the workers on the Hungry Mile, today's digital on demand workers also need legal protections to ensure that they enjoy decent working conditions. Those protections need not, however, be identical to the protections afforded to employees. As we outline in Section 2, our present conception of 'employment' does not reliably encompass app-mediated on-demand work, because that conception was developed to suit patterns of work established for a different geography of work, where workers attended at the employer's place of business to provide exclusive service. This does not, however, mean that we cannot regulate to provide appropriate labour market protections for on demand workers. As we shall also see in Section 2, specialist regulatory regimes have been devised to deal with non-employed work in the transport sector in the past. It is possible to also devise suitable regulation to meet the needs of today's RT on demand workers. In Section 3 of this Report, we therefore recommend a robust 'alternative' regulatory scheme which protects safe working conditions, adequate remuneration, income security, job security, collective bargaining and adequate dispute resolution and enforcement. For reasons detailed in this Report we argue that the federal Parliament should enact an industry-specific scheme of legislation which establishes a standard-setting tribunal for the road transport industry.

1 The need for regulation: Unfair and unsafe terms and conditions of work in the on- demand road transport industry

Introduction

This Section 1 of the paper examines pay and safety of work in the digitally-mediated on-demand sector of the road transport industry including food delivery, freight delivery and ride-sharing sub-sectors. It identifies a range of unacceptably exploitative conditions to which these on-demand road transport workers are subject. Indeed a whole, new sub-class of exploited workers in the gig economy has emerged in Australia and other countries around the world (Bonyhady 2020) and road transport on-demand workers have been at the forefront of this phenomena.

A 2019 Report found that over 7 per cent of persons in Australia surveyed are currently working or offering to work through digital platforms (McDonald et al 2019). There are two main forms of work in the digital platform gig economy: (i) crowd work, and (ii) work on demand via apps or digital platforms. In the road transport industry, the main concern is work on demand via apps, where the performance of traditional working activities is channelled through apps managed by firms that set minimum quality standards of service and select and manage the gig workforce (Peetz 2019: 169). The main form that this digitally-mediated, on demand work has taken in the road transport industry to date has been ride-share driving and delivery-rider/driving work. However, digitally-mediated work has more recently also emerged in the freight delivery sector.

The vast majority of these workers are designated as contractors by their work providers so do not receive any of the entitlements enjoyed by employees, including award rates of pay, paid sick leave entitlements or superannuation. They also have no right to collectively bargain (see Srinivasan 2019: 114). In addition, many of these workers are migrants who also may not be entitled to social security payments or the JobKeeper wages subsidy payments if they cease work due to a downturn in business.

How the oligopoly power of businesses controlling digital platforms/apps has undermined legal protections

An apparently vast financial backing of businesses controlling digital platforms and phone apps has seen the emergence of a business model for these operations centred upon rapid expansion of the consumer users for the particular online digital platform in a race for oligopoly dominance of the relevant online market (Nossar 2020: 18). This business model also involves the willingness of large digital platform/app businesses involved in the delivery of road transport services (such as Uber) to operate at a massive loss or at best with only razor thin profits (Sage and Sharma 2019; Nossar 2020). These commercial operations provide alternative forms of capital gains for the entrepreneurs and venture capitalists funding or controlling the business such as increased share values.

Additionally, venture capitalists and entrepreneurs value the accumulation of massive pools of data obtained from the users of the platforms/apps (Nossar 2020). Their consumer base is also used as leverage to undermine existing legal standards including those that provide minimum pay and conditions for workers (Nossar 2020; Pollman and Barry 2016). More specifically, the business model (and the lack of an effective governmental response) has empowered the oligopoly of platform/app controllers to impose terms and conditions on their workforce of vulnerable workers on the basis that those workers are contractors operating outside the legal protections of legislated employment protection regimes such as the *Fair Work Act 2009* (Cth). This has produced inadequate pay and unsafe conditions of work for the vulnerable ridesharing and delivery riding/driving workforce which we will turn to below in more detail.

Rideshare driving work

The Australian Taxation Office estimated in 2017 that 100,000 individuals have received a payment for a ride-sharing service since the Australian Taxation Office started collecting data in August 2015. Uber alone engages more than 60,000 drivers in Australia (Patty and Bonyhady 2020). There are 1 million Australians registered as Uber users (Khadem 2017; Smith 2019). The participation rate in this digital platform work is set to significantly grow as more precarious work turns digital (Srinivasan 2019: 123).

In the case of Uber, the true nature of its relationship with its drivers emerges from the terms of standard Uber-driver agreements (Nossar 2020: 96, 98). A number of legal decisions around the world concerning the status of Uber rideshare drivers suggest that Uber's various local entities use the same or very similar terms in their contracts with rideshare drivers.[1] The authors obtained a copy of the contract used by the organisation behind Uber, Rasier Pacific V.O.F, an unlimited partnership established in the Netherlands, and its Australian drivers.[2] Our observations reflect the terms of that contract, which we shall refer to as the Uber Contract.

The Uber Contract

Several clauses of the Uber Contract disclaim any employment relationship between Uber and the drivers. First, the contract declares at the outset that Uber is not providing transportation services, nor acting as the driver's agent in the provision of transportation services. The Uber Contract is drafted to characterise the drivers as purchasers of a communications tool (the 'app') under a commercial contract which gives them no guarantee of any work, no certainty of income, and no job security.

The Contract claims that Uber is offering nothing other than access to a communications tool. (We consider the legitimacy of these clauses disclaiming any employment or other work relationship below.)

It is apparent that those who drafted the Uber Contract anticipated the risk that a court or tribunal might see through these contractual assertions by including a clause purporting to require that any driver found to be an employee must indemnify Uber for any costs (including legal penalties) that Uber incurs as a consequence of being found to be an employer. This clause is unenforceable in Australia and in the United Kingdom, because in common law jurisdictions parties cannot contract out of the statutory obligations arising from an employment relationship. Unfortunately, drivers without legal advice may nevertheless be dissuaded from pursuing claims, believing that the clause would be effective to cast all of the costs of any

action back upon themselves. It is not uncommon for clauses to be added to contracts for their 'in terrorem' effect, even when the drafters recognise they are unenforceable.

Notwithstanding that the Uber Contract denies that Uber is in the passenger transport business, it includes many terms that purport to deal with matters relevant to the provision of transport services and with drivers' entitlements to charge for their driving services.

According to its terms, all the expenses and risks of operating as an Uber driver fall on the driver. The driver is required to provide and maintain a late model vehicle and all relevant insurances, and must also provide the necessary telecommunications devices, and meet the substantial cost of the data package required to use the global positioning system essential to the app. As the contract itself warns (in clause 2.6.2), these devices use a lot of data.

Although Uber's commitment under the contract is to permit the driver to use its app to connect with potential customers, it does not guarantee that the app will always work, and warns that it may be 'unavailable at any time and for any reason' (clause 9.3).

All of the power to determine the profitability of driving work remains with Uber. The contract reserves to Uber the right to set maximum fares. Drivers are permitted to negotiate lower fares with riders if they wish (cl 4.1), but will still have to pay Uber its percentage-based commission (of 25 per cent) on the full fare stipulated by Uber, and not the lower negotiated fare.

Uber is entitled to change maximum fares at any time without notice (clause 4.2), and it can also change its own percentage commission at any time without notice (clause 4.4). The contract stipulates that a driver who continues to drive after a fare cut agrees that they will be taken to have accepted the fare reduction. This essentially means that a driver's only means of objecting to fare reductions or commission increases is to stop driving, and hence cease earning.

Uber even reserves a right to change any of the terms in the contract, at its own discretion, at any time (clause 14.1).

The Uber platform uses a rating tool to enable riders to 'rate' their experience with a driver after each trip. Drivers' access to the app can be 'deactivated' if drivers' ratings from rideshare users fall below a level acceptable to Uber, and drivers have no right to any warning or opportunity to respond to the poor rating. In *Oze-Igiehon v Rasier Operations BV* (2016) the West Australian District Court found that the Uber Contract did not require Uber to provide any warnings or reasons before blocking a rideshare driver from using the app.

This aspect of the contract demonstrates that Uber is concerned to protect its own brand reputation. Uber is well aware that riders perceive that they are contracting directly with Uber, not with any specific driver, and will punish Uber for consistently poor experiences by ceasing to use the app. In claiming a right to block drivers with unacceptable ratings, Uber is implicitly acknowledging that the customer is doing business directly with Uber, and it is inconsequential to the rider which driver performs the work. This belies the contractual assertion that Uber is not in the passenger transport business.

If drivers do wish to contest a decision to block them from the app (or bring any other dispute under the Contract), an arbitration clause requires them to arbitrate the matter, at their own expense, in the Netherlands. This particular clause was found to be unconscionable in Canada : see *Heller v Uber Technologies Inc and Rasier Operations BV* (2019: [74]). The

Court refused to accept that the clause ousted the Canadian court's jurisdiction to hear the complaint.

In summary, the terms of the Uber Contract allow Uber to control maximum fares, vary fares without consulting drivers, and subtract Uber's own commission before payments are made to drivers. Furthermore, if an Uber driver's ratings (under the tool used by the Uber app to collect the views of customers) falls below an acceptable standard, Uber 'blocks' the driver from using the app (essentially dismissing the driver). There does not appear to be any mechanism available to drivers to contest either the ratings or the blocking. In any event drivers can be provided with seven days' notice of termination 'for any reason or no reason at all' (Riley 2017a: 63-66).

Consequences of this Uber Contract for drivers

A major survey of over 1,100 Ride-Share Drivers found that drivers working for Uber and other ride share companies were earning well below $16 per hour before costs (RideShare Drivers Co-operative and Transport Workers' Union 2018). Another more recent survey found that that ride share drivers earnt just over $12 an hour once costs were taken into account (Ride Share Network and Transport Workers Union 2020). This gives rise to an incentive for those low paid drivers to engage in hazardous practices so that they can get more work done faster at a lower cost. Some ride-share drivers were driving long hours across multiple on-demand operators to make ends meet. This leads to the hazardous practice of driving whilst fatigued and the risk of falling asleep at the wheel (Holland-McNair 2020).

According to the same major survey, over 60% of ride-share drivers say they cannot save enough to provide themselves with superannuation and annual leave. In the survey there were 969 reports of harassment and assault; 10 per cent of drivers say they were physically assaulted and 6 per cent of drivers say they were sexually assaulted (RideShare Drivers Co-operative and Transport Workers' Union 2018). These abuses of pay and safety standards in digitally-mediated, gig economy arrangements within the road transport industry reinforce the need for improved regulation of digitally-mediated, road transport industry arrangements.

Delivery riding/driving work

Digitally-mediated delivery riding/driving work consists of work undertaken by workers who use bicycles, small motor scooters, e-bikes, motorcycles and cars to transport food within Australian cities and are engaged through a phone app or platform by businesses who use the app or platform to manage the delivery riders (see Rouse 2019). During the recent COVID-19 pandemic this work has expanded into the delivery of pharmaceutical products. The media and empirical surveys have uncovered extreme exploitation of gig workers in this delivery industry (Karp 2019).

Most delivery riders/drivers are paid per delivery. Some work providers pay a flat rate per delivery while others pay a 'dynamic' per delivery rate based on distance and time travelled. (Bright and Fitzgerald 2018). Pay can be as low as the equivalent of $6.67-10.50 per hour (Bright and Fitzgerald 2018; Karp 2019). Almost all of these workers do not negotiate higher pay rates but are paid the rate set by the standard contract provided at the time of their engagement (On-Demand Workers Australia and the Transport Workers Union 2018). One Uber Eats worker stated there was no scope to bargain for higher pay. They are in the 'economically irrational' position of being 'free' to bargain with customers and restaurants to be paid a lower rate (Patty 2019). The vast majority of delivery riders have experienced a

decrease in pay over time and other frequently detrimental changes to the rules of their engagement (including rostering) with little or no consultation with workers (Delivery Riders Alliance and the TWU 2020; Bright and Fitzgerald:2018).

Delivery riders can also experience long waiting times at restaurants between jobs when riders must be ready to work but receive no pay for waiting time (Bright and Fitzgerald: 2018).

A survey of food delivery riders by the Transport Workers' Union and the Victoria Trades Hall council found they are being paid up to $322 a week less compared with minimum rates of pay and superannuation in the relevant award (The Road Transport and Distribution Award 2020) covering road transport employees (Karp 2019). This is clearly a significantly vulnerable, mainly migrant workforce with only one in ten of the riders surveyed being Australian citizens. The riders were largely temporary visa holders such as international students, or people on working holidays or bridging visas. Sixty per cent of the riders said it was not possible to negotiate a pay rise.

Safety issues

One-quarter of the surveyed couriers had been in an accident with one out of eight sustaining injuries such as concussions, knee injuries, broken bones or dislocations (Karp 2019). In addition, a Transport Workers Union survey of 160 Deliveroo, Uber Eats and Foodora riders found 46.5 per cent of these riders had been injured at work, or knew someone that had been injured at work (Johnson 2019).

Two Sydney food delivery riders (Dede Fredy who worked for UberEats and, Xiaojun Chen, who worked for Hungry Panda, a delivery co targeting Australia's Chinese community) were killed in road accidents in late September 2020 (Bonyhady and Rabe 2020). In November, three more riders were killed in separate incidents (Bonyhady and Chung 2020: 8). Prior to that four UberEats riders have been killed on the job since 2017 (Kelly 2019).

Decades of studies have shown that safety is closely linked to pay in the road transport industry (Belzer 2011; Belzer 2018; Belzer and Sedo 2018; Faulkiner and Belzer 2019; Hensher and Battellino 1990; Kudo and Belzer 2019; Quinlan and Wright 2008; Rodríguez Targa and Belzer 2006). As with other road transport workers, low pay leads to poor safety conditions for delivery riders (Marin-Guzman 2019). Food delivery riders routinely take risks on the road and engage in hazardous practices to meet unreasonable deadlines, endangering their own safety as well as the safety of pedestrians and other users of the public roads. Hazardous practices include riding on footpaths, weaving through traffic and pedestrians, failing to obey traffic lights, riding without lights at night and using a mobile phone whilst riding (Rouse 2019; Johnson 2019; Marin-Guzman 2019). The threat of termination of engagement for working too slowly can also contribute to poor safety for these workers. One delivery rider, Diego Franco, had his work contract terminated by Deliveroo because his deliveries were taking significantly longer to reach customers than expected (Bonyhady 2020).

COVID-19 and food delivery work

COVID 19 changed the size and shape of the on-demand labour market in the road transport industry and created new entrants that are not adequately prepared for the health and safety risks. This is especially the case in the food delivery sector. Prior to the pandemic, around 4 million Australians consumers had a food delivery app. After the pandemic struck this rose to 8.9 million (Radio National 2020). As a result, there is more food delivery work to be done and

this has led to a flood of new workers into the sector. Many have joined the sector because of a lack of more secure work options in the Coronavirus recession. Some new entrants are inexperienced cyclists and do not cycle safely on the road. The pandemic has heightened the safety risks and intensified exploitation in the sector, reinforcing the need to establish improved legal protections for this workforce.

Employers around the world encourage workers to self-isolate, but this is not an option for some gig workers even though they have direct contact with members of the public. There is a major risk that workers who do not have access to sick leave entitlements might not report COVID-19 symptoms (Smyth 2020). The Victorian government has highlighted that insecure work (of which gig work is a prominent sub-set) is an important factor leading to 9 out of 10 people who catch COVID-19 continuing to work rather than self-isolate (Smyth 2020). Such occurrences have turned the spotlight on gig economy workers such as delivery riders. Indeed, significant health risks to delivery riders and those members of the public that receive their food deliveries have emerged during the pandemic. In the COVID-19 pandemic food delivery riders are faced with the dilemma whether to work whilst sick and possibly spread the virus or self-isolate and not be paid at all (Amin 2020; Smyth 2020). In April 2020, an Uber Eats Rider continued to deliver food after trying to get a COVID-19 test (Hanrahan 2020). As one delivery rider put the ethical dilemma they face: Do they continue to work so they can earn money or do they stop work so they don't infect other people but not earn any income? (Amin 2020). This highlights that contract labour with its lack of leave entitlements can also become a major public health issue, serving as a stark reminder of the "interconnection between occupational and public health" (Gregson and Quinlan 2020: 10). It also highlights that sick leave entitlements are not just "nice to have" but a social necessity for all workers who supply only their own labour regardless of their work status.

Uber and other food delivery companies have initiated 'no contact' delivery where workers can leave orders at the door and financial assistance for up to 14 days for its workers who are diagnosed with COVID-19 (Hanrahan 2020). However, contactless deliveries depend on customer co-operation which is frequently lacking due to some public ignorance about the health risks. Furthermore, food delivery riders claim that not enough is being done to protect them from COVID-19. A particular concern is that not enough personal protective equipment (PPE) such as disposable gloves, hand sanitisers and facemasks is being provided to delivery riders (Amin 2020). A recent survey found that 51% of food delivery riders were not provided with sufficient basic PPE (Delivery Riders Alliance and Transport Workers Union 2020).

On-demand freight delivery work

In the road transport industry, digitally-mediated, on-demand work is due to expand beyond ride-share and food delivery into road freight delivery. Uber freight is currently operating in overseas jurisdictions and intends to expand into Australian trucking shortly. Amazon Flex commenced in Australia in February 2020 (Amazon Commercial Services Pty Ltd 2020). It uses an app to engage a fleet of owner drivers but asserts that State-based owner driver laws in NSW and Victoria 'operate separately and do not form part of the contract with [the owner driver]' (Workplace Express 2020a). (This assertion is unlikely to be correct if it is taken to mean that the arrangement is not subject to owner-driver laws especially in relation to the Victorian legislation which has recently been amended to make explicit that digital arrangements between large tech companies and owner drivers are covered) (see Schofield-Georgeson and Rawling 2020).

The lack of national minimum standards for RT contractor drivers who are engaged by traditional means that drivers frequently have to accept pay rates and conditions dictated to them or forego work. There has consequently been a steady decline in pay rates in real terms over the last 30 years (Rawling, Johnstone and Nossar 2017: 308-309; Thornthwaite and O'Neill 2016: 16). Low rates for some contractor drivers have placed downward pressure on the pay of employee drivers. The rise of digital on-demand work intensified this downward trend already evident in the road transport industry.

The flow on effects of all three forms of on demand road transport industry work

It is clear from the analysis of terms and conditions of work in the on-demand sector that these digitally-mediated, gig economy arrangements should be better regulated because they have further exacerbated exploitation of workers and competition within the road transport industry. The current gap in legislative regulation is now more evident due to the expansion of these 'gig' economy arrangements, placing further downward pressure on rates and safety across the road transport industry. There is no doubt that entry of digitally mediated gig economy arrangements into the transport industry has adversely affected the wages and conditions of workers engaged by conventional means. As Srinivasan explains: 'With Uber, almost anybody can drive. As new unregistered drivers flood in, they increase competition, threatening wages and the availability of work. As a result, many registered and unionized taxi drivers have seen their wages drop and their hours increase.' (Srinivasan 2019: 114). Without governmental intervention this downward pressure is set to intensify.

2 An evaluation of existing forms of regulation

As has been outlined above, on-demand gig workers in the road transport industry require minimum terms and conditions/standards that cannot be undercut, to guard against the outcomes of low pay, poor conditions of work, poor safety at work, the lack of consultation and dispute resolution mechanisms and arbitrary dismissal by work providers. These outcomes are a direct consequence of inadequate government regulation of on-demand gig work; currently there is no system of legislative regulation in Australia that provides for adequate legal protections for RT gig workers. This Section 2 of this Report analyses existing systems (and one prior system) of legislative regulation to determine whether or not any of those systems could, if amended, adequately protect these RT gig workers or whether those systems might provide a model that could be adapted for future federal legislative regulation of RT on-demand work. We begin by explaining why the Fair Work system has been found not to cover this workforce, and we follow by considering state-based schemes dealing with road transport work.

Why does the *Fair Work Act* not deal adequately with the rights and entitlements of on demand road transport workers?

The *Fair Work Act 2009* (Cth) relies on the common law multifactorial or 'multiple indicia' test (set out by the High Court of Australia in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986 : 24, 36-37) and *Hollis v Vabu Pty Ltd* (2001)) for determining the employment status of the class of workers who enjoy most benefits under the Act. The National Employment Standards and modern awards cover only employees and not independent contractors, so it is only employees who can rely on the safety net of minimum wages, working hours, leave provisions and other protective conditions of employment provided by the Act. Likewise, only employees may collectively bargain to make an enterprise agreement under the Act. The unfair dismissal protections are also available only to employees, so only workers who fall within the common law definition of employment enjoy protection from capricious termination of their work contracts under the *Fair Work Act* Pt 3-2. While a wider range of workers can claim protections for relevant 'workplace rights' under the General Protections in *Fair Work Act* Pt 3-1 which purport to cover independent contractors, the *Fair Work Act* creates fewer rights for non-employed workers. Even the right against adverse action in Fair Work Act s 341(1)(c)(ii) taken because a person has raised a complaint or inquiry in relation to their employment applies only to employees.

Many of the cases alleging employment status for rideshare and food delivery drivers have been unfair dismissal cases, determined by the Fair Work Commission on the threshold question of whether the worker is a national system employee and thus eligible to bring a claim. In each case, the Commission considered the specific terms of the worker's contract of engagement because a worker's status will be determined by their particular contract with the platform, as manifested not only in the written terms in a contract document, but in the practices adopted by the parties in performing their agreement.

In one case of a food delivery cyclist, for example, the Commission determined that the worker was engaged under an employment contract. In *Klooger v Foodora Australia Pty Ltd* (2018)

('*Klooger*') a food delivery driver was found to be an employee for the purposes of an unfair dismissal complaint because the terms of his contract, as performed, indicated a sufficient level of control by the platform over his work. In most cases determined by the Commission, however, on demand road transport workers have been found to be independent contractors when applying the multifactorial test.

Summary of case law

In Australia no case concerning an on demand transport worker has yet been determined by the Federal Court, so presently we have only decisions of the Fair Work Commission to rely upon. The Federal Court would not be bound to follow any of these determinations.

The earliest Fair Work Commission decision on an Uber Contract (see above) was decided against the worker, on the basis that the Uber Contract was not a contract for the performance of work. In *Kaseris v Rasier Pacific VOF* (2017) (*'Kaseris'*), Uber's characterisation of the contract as a commercial contract for the provision of telecommunications services was largely accepted (*Kaseris* 2017: [51]). Deputy President Gostencik decided that there was no 'work for wages' bargain in the arrangement. With respect, this finding appears to be disingenuous, because it is clear that the arrangement under which the drivers were engaged involved their commitment to provide work, and Uber's entitlement to profit from their work. Uber's revenue was directly related to the services provided by the drivers. Absent the peculiarity that the work was mediated through a digital platform, the arrangement could have been characterised either as direct employment (of a transport company engaging drivers or carriers to undertake the work ordered by its clients), or as a labour hire arrangement (of a labour hire agency lending its drivers to clients to undertake services).

Fortunately, later decisions of the Commission have seen through the Uber Contract's 'cloud of words' (see *Cam & Sons Pty Ltd v Sargent* (1940:163). It is now recognised that the arrangement between the Uber and the drivers are contracts under which work is performed, although in most cases, they have been found to be independent contractors, after applying the multiple indicia test. The Commission tends to cite its own decision in *Abdalla v Viewdaze Pty Ltd* (2003: 229-31) for a catalogue of the factors set out by the High Court in *Hollis v Vabu Pty Ltd*.

In *Pallage v Rasier Pacific Pty Ltd* (2018) ('*Pallage*') and in *Suliman v Rasier Pacific Pty Ltd* (2019) ('*Suliman*'), the Fair Work Commission was willing to accept that the contract was one for the performance of work by the drivers for the benefit of Uber. Nevertheless, after weighing the various factors in the common law multiple indicia test, the Commission found that Pallage was an independent contractor (*Pallage* 2018: [35]-[54]). The determinative factors were that the driver could decide his own working hours, and could refuse to accept jobs; he provided all of his own equipment, including the vehicle, mobile phone and broadband connection; he was paid by the job, not by the hour; and he was not required to wear a uniform or place any signage in his car, so he was not an 'emanation of the business' of Uber (*Pallage* 2018: [46]).

A full bench of the Commission had the opportunity to consider the contract between UberEats and a food delivery driver in *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/as Uber Eats* (2020) ('*Gupta*'). The Commission determined that Ms Gupta was engaged under a contract for work, and was paid to perform services in UberEats' business, not her own (*Gupta* 2020: [44]). Nevertheless, the Commission found that on balance (again weighing up the factors in the multiple indicia test) she was an independent contractor. She

was found to be in control of her own working hours, she had no obligation to provide exclusive service, and she did not present as an 'emanation' of Uber Eats (*Gupta* 2020: [69]).

The Transport Workers' Union assisted Ms Gupta in taking this matter to the Federal Court of Australia, challenging the FWC's characterisation of her working relationship as 'not employment'. The matter settled (with Uber agreeing to pay an undisclosed sum to Ms Gupta) after argument in the court proceedings. The transcript of proceedings (Federal Court Registry No NSD 566 of 2020, O/N H-1358227) reveals that members of the bench (particularly Bromberg J and White J) grilled counsel for Uber on the nature of the arrangements involved in food delivery work. Bromberg J queried whether this work might be characterised as 'piecework' undertaken by employees (Transcript P-24). He also asked: 'Who would the public have perceived the worker as an emanation of, if not Uber? (Transcript P-49), indicating that the 'organisational integration' test for identifying an employment relationship may well capture this kind of working arrangement. White J stated in the course of question that the court operates in 'the real world', suggesting that he was unsatisfied by Uber's counsel's refusal to offer an acceptable characterisation of the relationship. In the end, however, these judicial observations have not borne any fruit in the form of a binding precedent finding that Ms Gupta was an employee. The settlement – while an important victory for the plaintiff herself – means that there is still no Federal Court decision illuminating whether the FWC's characterisation of the workers in these cases is correct. Without such a precedent, the FWC has no reason to alter its present approach to these matters.

In the main, the FWC has found on demand transport workers to be independent contractors. The only decision finding that an on-demand transport worker was an employee is *Klooger*. The determinative factors in that case were that the worker had been given supervisory responsibilities and worked on a roster system. These factors were held to outweigh some terms in the written contract which purported to permit him to subcontract work to others (which is often a determinative factor in finding that a contract is not a contract of personal service).

So long as the Commission continues to assess work relationships against its own checklist set out in *Abdalla v Viewdaze Pty Ltd* (2003: 229-31) they are likely to continue to find that most on demand transport workers are not employees. The weighing of these factors has tended to ignore whether the workers are engaged in any genuinely entrepreneurial activity. A different conclusion might result if the Commission asked only the broader question posed by the High Court of Australia in *Hollis v Vabu Pty Ltd*: whose business does the worker serve, their own, or the putative employer's?

Without a Federal Court decision determining that these working arrangements are employment relationships – or some legislative intervention to define these workers as employees for the purposes of the *Fair Work Act* – on demand transport workers are likely to continue to labour in hazardous conditions and earn below the minimum wage (Commonwealth Senate, 2018: 73-81; Stanford, 2018).

Why the case law is unlikely to change

The settlement of the Gupta proceedings in the Federal Court demonstrated that counsel on both sides of the argument, saw a risk in continuing the proceedings. The robust questioning of Uber's counsel by the bench does not indicate that the court would have found in favour of Gupta in this case. Courts can be critical of the arguments raised by counsel, and indeed critical of the existing principles of law, but still decide cases according to prevailing authority

. This was the case in *CFMMEU v Personnel Contracting Pty Ltd* [2020] FCAFC 122, where Allsop CJ and Lee J expressed serious reservations about the credibility of a independent contracting arrangement involving an unskilled young backpacker undertaking labouring work, but still found that he was an independent contractor because they were bound by earlier authority. We will now never know whether the Federal Court would have found Ms Gupta's relationship with UberEats was one of employment. There are feasible arguments that the level of control exercised by platforms over drivers warrants a finding that they are employees, however the cases decided in the Fair Work Commission demonstrate that there are also features of the relationship that tend towards characterisation of these drivers as independent contractors, at least according to the current multiple indicia test.

In the case of drivers of motor vehicles in particular, the fact that they are required to provide and maintain their own vehicles means that these cannot be said to be 'labour only' contracts. The significance of the worker's investment in substantial capital assets is apparent in the distinction made between the couriers in *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) (the '*Tax Case*') and the courier employed by the same enterprise in *Hollis v Vabu Pty Ltd* (2001). In the *Tax Case*, the workers included drivers of vans and trucks and they were held to be independent contractors because they provided expensive vehicles. In *Hollis v Vabu Pty Ltd*, a bicycle courier was held to be an employee, and one of the factors emphasized was the lack of any significant investment in a vehicle.

Perhaps more important even than the ownership of vehicles in the reasoning in the Fair Work Commission cases is that drivers were not required to commit to accepting any driving work. Cases regularly cite the lack of any 'mutuality of obligation' between the parties. This is an English concept, drawn from *Nethermere (St Neots) Ltd v Gardiner* (1984: 623). Australian law has not generally adopted the concept of 'mutuality of obligation' as one of the 'irreducible minima' of an employment relationship and does in fact recognise a form of employment – casual employment -- where there is no ongoing mutual obligation to provide shifts or attend for work.

Another factor tending towards a finding that the workers are independent contractors according to the current common law tests is that many of the platforms ostensibly permit drivers to perform other work while logged onto the app. There is no apparent prohibition on working simultaneously for rival platforms, nor indeed for taking on other kinds of work while driving (for instance, making parcel deliveries while chauffeuring riders). So the lack of any obligation of exclusive service has been held to be an obstacle to a finding of an employment relationship.

Another peculiar feature of these work arrangements is that a bloodless algorithm manages many of the human resources management decisions affecting the relationship. The platform controller delegates the supervision of work to the customer rating feature built into the app itself. The worker is 'blocked', not sacked by a human manager. For these, and possibly other reasons, it is likely that drivers taking work from the platforms will not meet the common law definition of employment as it is presently understood, because that definition is still tied to the labour engagement practices of the pre-digital industrial era. This is not a uniquely Australian problem. A special issue on *Crowdsourcing, the Gig-Economy and the Law* in (2016) 37(3) *Comparative Labor Law and Policy Journal*, contains a number of academic studies demonstrating the weakness of labour laws developed in earlier times in protecting workers undertaking digitally-sourced work.

Why legislative amendment to the Fair Work Act definition of 'national system employee' may not be the best approach

Some commentators have called for the enactment in the *Fair Work Act* of an expansion of the protections in the *Fair Work Act* to cover a broader class of workers. This might occur by way of a statutory presumption of employment or inserting into the Act an expanded definition of 'worker' (to replace the narrower work status of 'employee') (Hardy and McCrystal 2020; Stewart and McCrystal 2019). These kinds of arguments have been made for many years, predating the *Fair Work Act* and the rise of on demand work assigned through digital platforms (Stewart 2002; Roles and Stewart 2012). The enactment of a broader definition in legislation is the reason that the Uber drivers in *Uber BV v Aslam* (2017) in the United Kingdom won their case. They were found to be 'workers' under the second limb of the *Employment Rights Act 1996* (UK) s 230(3) which defines a worker as an individual who works under 'any other contract . . . whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'. This definition has been informed by the seminal work of Professor Mark Freedland and others (Freedland 2003; Freedland 2006; Freedland and Kountouris 2011), seeking to extend employment rights to a wider group of workers who provide their services under personal service contracts. This definition is replicated in the *Working Time Regulations 1998*, reg 36(1) and the *National Minimum Wages Act 1998*, s 54(3), and it explains why the rideshare drivers working in that jurisdiction succeeded in their claims.

Calls for enactment of a wider definition of 'employment' in the *Fair Work Act* have so far been ignored by legislators, and it seems clear from the decisions of the Fair Work Commission to date, that most on demand transport workers face an uphill battle in establishing employment status for the purposes of the *Fair Work Act*. While the *Fair Work Act* continues to lack a broader definition of employment including on demand work facilitated through digital platforms, these workers remain in a poorly regulated wilderness.

The proposals to expand the coverage of the *Fair Work Act* warrant serious consideration. If such reforms result in the platform companies and their on demand RT workers being covered by the Act so that on demand workers enjoy the minimum standards and other rights provided by the Fair Work system, then the problems identified in Section 1 of this Report might be addressed.

However, it is not clear that this would be the practical outcome of such reform. Firstly, there would be considerable stakeholder resistance to expanding the coverage of the Fair Work Act. There may be understandable *worker* resistance to affording the full range of employment protections to on demand workers, given that many of those protections have evolved to recognise the needs of workers who are tied, full-time, to exclusive service to a single employing entity which claims obedient and faithful service at all times. Certain individual RT ride-share drivers and other drivers at times express the view that they would prefer to retain the status of contractor (with rights and entitlements) rather than be pigeon-holed into the employee category. One survey found that only 47% of gig workers surveyed wanted to be classified as employees (Transport Workers Union 2020: p16) Also, it is clear that businesses engaging workers through digital platforms do not want their workers being designated as employees (see Adhikari 2019). Work providers such as Uber have made it part of their business model to avoid being covered by employment protection regimes such as the Fair

Work system. Given this commitment to evading employment protection regimes, it is possible that work providers would find more ingenious means to avoid the application of any statutory presumption of employment or expanded definition of worker inserted into the *Fair Work Act*.

This is why effective government action to protect gig economy workers cannot solely rely on changing the legal definition of employee in the *Fair Work Act*. This just sets up another artificial boundary that could be circumvented (Kaine 2018). By tweaking their arrangements with their workforce, gig companies could find new grounds to argue their workers are contractors, not employees (Rawling and Kaine 2018). Indeed, as is discussed more fully below, the NSW Parliament abandoned the approach of expanding employment in favour of directly regulating the contractor/principal arrangement (under Chapter 6 of the NSW *Industrial Relations Act*) because of problems with the deemed employment approach.

Finally, even if RT gig workers were brought within the Fair Work regime they would be likely to be treated as casual employees, given that they can choose when to access the digital platform and accept work. Casual employees are not entitled to key minimum standards such as paid sick leave (*Fair Work Act*, s 95). This means that on-demand workers would not necessarily receive key entitlements (such as paid sick leave) even if these reforms were implemented.

In any case, we argue that it is not necessary to squeeze the working arrangements of on demand workers in the digital economy into the industrial era's category of 'employment' in order to provide them with appropriately protective labour standards. Appropriate protections can be designed to meet the particular needs of workers undertaking this kind of work. A more effective method of ensuring that vulnerable RT gig workers are legally protected is to take a 'beyond employment' approach and institute a legislative regime that applies regardless of whether the workers are employees or contractors according to the common law definition. That is, rather than expanding the coverage of the Fair Work system, an *alternative* federal regime that explicitly applies to RT contractors including RT gig workers (as well as RT employees) might be established.

Enterprise Agreements

Before we turn to alternative legislative regimes, regulation by enterprise agreements under the *Fair Work Act* is worthy of mention.

To be a permitted term of an enterprise agreement the term must pertain to the relationship between employers and employees. Therefore, first and foremost, enterprise agreements have been used to protect the rights and entitlements of direct employees of the employer governed by an enterprise agreement. However, to an extent, it is possible to include some provisions in an agreement to regulate contractor labour. It has long been held that a prohibition on contractor labour is not permitted agreement content (*The Queen v The Judges of the Commonwealth Industrial Court and Others: Ex Parte Cocks and Others* (1968)). But a provision about the terms upon which contractor labour are engaged (a sites rates clause) can be included in an enterprise agreement provided it has a sufficient connection to the job security of direct employees. (See for example *KL Ballantyne and National Union of Workers (Laverton Site) Agreement 2004* (2004); *National Union of Workers v Phillip Leong Stores Pty Ltd* (2014: [123]). Some agreements clauses, such as those recently used in the road transport industry, produce a highly sophisticated regulatory mechanism which harness the ability of

core employers to raise the standards of outside labour hired by third parties (see for example Toll TWU enterprise agreement 2013-2017).

Two key issues raise doubts as to whether enterprise agreement regulation of RT on demand workers can adequately protect those workers.

The first is a technical point. As we understand it, Uber and similar companies hire their *entire* driver and delivery rider workforces as contractors, so there is no workforce of direct employees to satisfy the requirement that the terms dealing with contractor labour have a *sufficient connection to the job security of direct employees*.

The second, broader, point is that even if a valid enterprise agreement clause could be crafted which applied to RT on-demand workers, such protections would have limited application in an enterprise-based system of collective bargaining. Since the decentralisation of the industrial relations system, initiated by the Keating Labor government in 1993, employers bargain at an enterprise rather than industry level for market rates and conditions above a safety net of minimum standards. Setting market rates and conditions at an enterprise, rather than industry, level enables other operators to offer their frequently non-unionised workforces the minimum safety net rates. Any employer in a competitive industry (such as the RT industry) who enters into registered enterprise agreements with market rates higher than the safety net as well as more favourable conditions (including sites rates clauses) have found it increasingly difficult to compete with operators who merely offer the minima. Consequently, as it stands currently, favourable enterprise agreement terms and conditions such as site rates clauses are isolated examples of adequate regulation. They only regulate work at a particular company. Enterprise level regulation does not flow through to workers throughout an industry but is confined to enterprises where unions have been strong enough to negotiate protective clauses. This is a particularly significant failing given that the majority of Australian workers – especially contractors - are not represented by a union in collective bargaining, or do not collectively bargain at all, including some of the weakest and most vulnerable workers (van Wanrooy, Wright and 2009*;* Sheldon 2008: 239-240).

Existing models of alternative regulation

We now turn to consider other models of regulation, outside of the federal Fair Work system. Although it did not specifically apply to on-demand workers, the Road Safety Remuneration Act (RSR Act) which established the Road Safety Remuneration Tribunal (RSRT) is a best practice model of industry-specific workplace regulation which covered both RT contractor and employee drivers. However, as is discussed more fully below, the RSR Act was repealed and the RSRT abolished. Following the abolition of the RSRT there is no national scheme providing for the pay and safety of RT contractors. There are specific State schemes in New South Wales, Victoria and Western Australia, but no specific legislative systems for the protection of contractor drivers in Queensland, South Australia, the Australian Capital Territory or the Northern Territory. As is explained below, the schemes in Western Australia and Victoria do not provide an effective, pro-active mechanism for setting minimum wages and conditions. Although it also has some limitations, the NSW scheme under the *Industrial Relations Act 1996* (NSW) Chapter 6 emerges as the best *existing* model for future national regulation of on-demand RT work. The key difference between the NSW and Victorian/WA schemes is that

the NSW scheme allows for the setting of mandatory minimum rates and conditions whereas the Victorian and Western Australian models provide for recommended rates only.

Victorian Owner-Driver Scheme

The *Owner Drivers and Forestry Contractors Act 2005* (Vic) *(*ODFC Act*)* regulates owner-driver arrangements including gig on demand work involving the delivery of goods. The substance of the Victorian legislation has two key aspects. First, it empowers the Minister, in consultation with an industry council, to determine recommended (as opposed to mandatory) rates of pay and costs schedules for owner drivers (Riley 2017b: 681). Secondly, the Act contains mandatory information obligations. Hirers as well as freight brokers must provide written copies of rates and costs schedules to owner drivers before entering into contracts for road transport work. After recent amendment, this obligation applies explicitly to persons who provide an online platform to engage drivers (Schofield-Georgeson and Rawling 2020). Under ODFC Act s 45, where the hirer or broker fails to provide the rates to the driver, the relevant State tribunal can order that the driver be paid the recommended rates.

This is perhaps one of the only pieces of industrial legislation in Australia explicitly regulating businesses which control online platforms or phone apps who engage RT on-demand workers.

Unfortunately, this Victorian scheme has not proved capable of rolling out minimum rates on a large scale to Victorian drivers. Drivers do not have the bargaining power to insist on the recommended rates and instead have to undertake sometimes lengthy litigation under s45 on an individual basis for rates to apply (see, in particular, Victorian Civil and Administrative Tribunal (VCAT) 2016; VCAT 2016a). In any case, such litigation has rarely succeeded in imposing the recommended rates. Furthermore, another key deficiency of the Victorian legislation is that s 45 litigation is undertaken in relation to a *particular work contract* pertaining to individual drivers which does not have the potential to produce sector-wide standards. As a result, to date, the Victorian legislation has not been an effective method of providing RT contractor workers with adequate cost recovery to avoid undue driver exploitation and owner-driver insolvencies.

Western Australian owner-driver scheme

The *Owner Driver (Contracts and Disputes) Act 2007* (WA) is based on the Victorian *Owner Drivers and Forestry Contractors Act 2005* (Quinlan and Wright 2008: 75). Similar to the Victorian legislation, the WA owner-driver legislation, empowers the Minister to make a code of conduct in consultation with an industry council (named the Road Freight Transport Industry Council). Such a code of conduct has been made under the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* which specifies recommended rates for heavy vehicle owner drivers with a connection to Western Australia (and who are not already covered by the NSW or Victorian legislation): ss 4, 5, s26, 27). These rates are not mandatory. The code of conduct also specifies that hirers must provide information about the recommended rates to owner-drivers covered by the legislation. The Industry Council is also charged with the responsibility of promoting compliance with the guideline rates, and an owner-driver can appoint a rates negotiation agent which a hirer must recognise: ss 19, 28). The Act also includes important security of payment provisions (see in particular s 13) and an individual driver can make a claim to a WA tribunal about non-payment.

Presently, there is a lack of reliable data to indicate the impact of the WA Act (Government of Western Australia 2014). However, overall, like the Victorian Act, it appears that the WA

legislation largely consists of relatively weak, process obligations that arguably do not represent a best practice, programmatic approach to the implementation of safe rates for owner-drivers. In a competitive industry such as the RT industry, guideline rates do not effectively prevent the undercutting of driver rates in the same manner as mandatory minima clearly can, if backed up by an effective enforcement regime. Furthermore, the coverage of the WA Act is fairly limited as it only applies to certain heavy vehicle drivers and does not apply to a range of RT workers including on-demand ride-share drivers and delivery riders.

Best Practice Model A: Chapter 6 of the NSW *Industrial Relations Act*

By contrast with the Victorian and WA owner-driver schemes, Chapter 6 of the NSW *IR Act* currently provides an effective, mandatory scheme of sustainable minimum rates and conditions protecting the interests of a broad range of contract road transport workers engaged in the NSW short haul sector.

History of Chapter 6

It is important to briefly outline the history of the introduction of Chapter 6 in order to properly convey why Chapter 6 regulation was introduced and why it took the form of direct regulation of contracts of carriage and bailment (and the contractors that entered into those contracts) instead of a mere extension of the employment protection model.

In 1959 the NSW Parliament inserted provisions into the *Industrial Arbitration Act 1940* (NSW). Those provisions deemed certain categories of workers to be employees for the purposes of that Act and the *Long Service Leave Act 1955* (NSW) and *Annual Holidays Act 1944* (NSW). However, these amendments provoked an outburst of litigation and political lobbying and consequently failed to adequately address the issues they were designed to solve (TWU PB piece). As a result, in 1967, the Minister for Labour and Industry in the Askin Liberal government requested the Industrial Relations Commission of NSW to investigate the operation of these deeming provisions. The resulting inquiry reported to the Minister, E.A. Willis MP. Part C of that report examined truck owner drivers (TWU 2011: 5).

The report found evidence of a connection between truck owner driver rates and methods of pay and the ability of those drivers to perform their work safely. It found that the vulnerable position of truck owner-drivers in relation to those who engaged them produced poor safety practices and outcomes (Industrial Relations Commission of NSW 1970: [30.24]).

Following this report, the NSW Parliament in 1979 inserted provisions into the then *Industrial Arbitration Act* which provided for the conciliation and arbitration of industrial disputes involving truck owner-drivers. This legislative regime applied to truck owner-drivers who were vulnerable contractors. Significantly, the Willis report had concluded that responding to the vulnerable position of owner-drivers by way of deemed employment provisions was not going to fully resolve the issues involved. It therefore recommended a legislative regime that recognised owner-drivers as independent contractors, whilst providing a floor of minimum standards for those drivers.

In the early 1990s the then NSW Liberal government decided to not only maintain these owner-driver provisions but expand them in the new *Industrial Relations Act 1991* (Chapter 6, ss 678-685). Amongst other things, the expansion of the provisions involved extending the scheme to ensure that the scheme encompassed owner-drivers who used motor vehicles and bicycles in addition to truck owner drivers. In 1996, the Carr Labor government carried over the owner-driver provisions into Chapter 6 of the new *Industrial Relations Act 1996*. Chapter

6 was specifically exempted from the federal takeover of independent contractor regulation by the *Independent Contracts Act 2006* (Cth) (IC Act) (see IC Act s 7(2)(b)(i).) 2005/2006) (TWU 2011: 8; Kaine and Rawling 2010: 191; Rawling et al report 2017: 41). The Chapter 6 provisions remain in operation today. This NSW scheme has therefore enjoyed bipartisan support at both State and federal level for four decades.

The current Chapter 6 regime

Under Chapter 6, a system of 'contract determinations' (akin to industrial awards) and 'contract agreements' (similar to collective agreements) govern the direct contractor driver-principal relationship (including both contracts of carriage and bailment) in a range of industry subsectors including general transport, waste collection, couriers, breweries, waterfront, concrete, quarries, excavated material carriage, taxis and car carriage (Rawling and Kaine 2012: 248; Quinlan and Wright 2008: 74). In each of these sub-sectors there are minimum rates and conditions tailored to the particular sector. Those minimum rates take the form of cost recovery rates of pay that take account of all costs incurred by owner-drivers in providing road transport services. The system of contract agreements allows groups of owner-drivers to negotiate agreements above these minimum rates (Part 3 Chapter 6). These contract agreements can be registered with the NSW Industrial Relations Commission and must provide conditions that are no less favourable than those available under the applicable contract determinations.

In addition to setting driver remuneration, contract determinations and contract agreements can provide for almost any condition of engagement: ss 312-313, 322. Chapter 6 also provides remedies for unfair or arbitrary termination of owner-driver contracts : s 314. The separate legislative provisions also include specific provision for representation of owner-drivers by the relevant union:ss 333-342. Furthermore, Chapter 6 includes a simple and effective tribunal system for resolution of disputes between owner-drivers and the businesses which directly hire them (Part 4; Nossar and Rawling 2017: 3). Finally, chapter 6 is supported by an effective enforcement regime. There are applied provisions included in Chapter 6 which have the effect of extending all of the employee enforcement provisions under the *Industrial Relations Act* 1996 (NSW) (IR Act) to contract drivers : ss 343-344. As a result, there has generally been compliance by direct hirers of contractor drivers with terms and conditions mandated under Chapter 6 instruments (Quinlan and Wright 2008: p29; Rawling and Kaine 2012: 248-249). Therefore, Chapter 6 has created certainty for owner-drivers and principals who engage those owner-drivers (Rawling and Kaine 2012: 249**)**. Many long-term agreements have been negotiated on the basis of the standards established under Chapter 6. In particular, the Transport Workers Union has negotiated numerous contract agreements with major transport companies.

A broad 'trade practices' exemption is included in Chapter 6 which specifically authorises for the purposes of the *Competition and Consumer Act 2010* (Cth) s 51 (and the NSW Competition Code) the exercise of tribunal powers under Chapter 6, anything done by a person in order to comply with a contract determination, including entering into and doing anything preparatory or incidental to the determination, and anything done under a contract agreement (IR Act s 310A.)

As presently enacted Chapter 6 specifically excludes food delivery drivers and cyclists, because 'a contract of carriage' does not include a contract 'for the delivery of meals by couriers to home or other premises for consumption': IR Act s 309(4)(i). (Chapter 6 does not

explicitly include or exclude ride share driving). No doubt when this legislation was first enacted any person delivering meals to homes would have been a 'meals on wheels' charity worker, or an employed servant of a restaurant or other meal provider. Bread and milk delivery drivers were already deemed to be employees for the purposes of the IR Act by Schedule 1, cl 1(a) and (e). The existence of today's fleets of delivery workers picking up food from restaurants for delivery to customers was unimaginable when this legislation was enacted. Nevertheless, these are the very kind of workers who Chapter 6 was designed to protect. If IR Act s 309(4) were amended to remove the exclusion of these workers from this scheme, on demand RT workers in NSW might be covered by this scheme.

However, for a range of reasons, it is preferable to enact new, federal legislation. Firstly, due to State jurisdictional limitations, Chapter 6 does not cover any road transport work beyond NSW local work (Rawling and Kaine 2012: 249). Also (post Work Choices) the NSW system has been unable to regulate anything other than terms and conditions for owner-drivers: it can no longer regulate the pay and conditions of employee drivers (these are now mainly regulated by the federal Fair Work system). Additionally, Chapter 6 is confined to regulating the direct contract worker/hirer arrangement and does not extend to provide transparency regulation covering clients at the top of the transport supply chain. As such, a new federal scheme of regulation might be designed to incorporate a similar method of providing for minimum rates and conditions but overcome the shortcomings and limited reach of the NSW legislation.

Best practice model B: the Road Safety Remuneration Tribunal (Cth)

At the federal level, a review headed by the National Transport Commission in 2008 examined the relationship between remuneration systems and workplace safety in the road transport industry. That review found evidence for the link between driver remuneration and safety outcomes and recommended a national scheme for mandatory safe rates that would cover employee as well as owner drivers (Nossar and Rawling 2017: 9 citing Quinlan and Wright 2008: 61). The review also recommended the creation of a specialized body that could set rates of remuneration and govern safety issues in the industry. It also suggested adequate enforcement measures; a supply chain payment system in the case that a driver does not receive their wages; and the creation of escalating penalties for failure to pay mandated rates (Nossar and Rawling 2017 citing Quinlan and Wright 2008). Following these findings, a Safe Rates Advisory Group was established to advise the federal government on the implementation of these recommendations (Nossar and Rawling 2017: 10).

Subsequently, in March 2012, the federal Parliament enacted the Road Safety Remuneration Act 2012 (Cth) (RSR Act). This legislation established the Road Safety Remuneration Tribunal (RSRT) which commenced operation on 1 July 2012 (RSR Act s 79, s 2). The RSR Act was repealed by the *Road Safety Remuneration Repeal Act 2016* (Cth) in mid-April 2016. This dissolved the RSRT (Nossar and Rawling 2017: 10).

Despite the abolition of the RSRT, this paper discusses the various components of the *RSR Act* (and some initiatives of the RSRT) as these remain a best practice model of a federal, industry-specific regime which can adequately address the root causes of pressures on the road transport industry and road transport workers. Indeed, a number of key features of the RSR Act provided a valuable model which could be adapted to create national regulation of on-demand gig work in the road transport industry, especially since the persuasive explanation for why the RSRT was abolished is that it was for political expediency. There was no lack of

evidence for the need for the tribunal or indeed any lack of evidence that it could be effective (Rawling et al 2017).

The principal object of the *RSR Act* was to promote safety and fairness in the RT industry (RSR Act s3). The RSRT's role in meeting this principal object was to address the relationship between pay and safety in the RT industry by, amongst other things, developing and applying reasonable and enforceable standards throughout the RT supply chain to ensure the safety of road transport workers (*RSR Act* s 3; Acton 2012: 2). The main functions of the RSRT were: making road safety remuneration orders; approving road transport collective agreements; and dealing with disputes between road transport industry participants (*RSR Act* s 80; Acton 2012: 2; Rawling et al 2017:19).

RSRT orders, agreements and disputes could relate to road transport drivers who were employees and independent contractors (including those operating via a corporation) (Rawling and Kaine 2012: 252). For employees, RSRT order, agreements or dispute arbitration orders applied to the extent that any relevant federal award, agreement, or instrument was less beneficial than the RSRT right and entitlements: *RSR Act* s 12. For contractors, these binding RSRT decisions or instruments applied regardless of the terms of any road transport contract to which they were a party: *RSR Act* s 13. Despite the broad coverage of the *RSR Act*, it was not intended to exclude or limit the operation of Chapter 6 of the *IR Act* NSW (*RSR Act* s 10).

Road Safety remuneration orders

The RSRT could make binding orders. In deciding whether to make an order, the tribunal was to consider the safety and fair treatment of road transport drivers and the likely impact of the order on the viability of businesses in the road transport industry: *RSR Act* s 39). However, the Act did not impose any substantive threshold to the making of orders. (Rawling and Kaine 2012: 251; Rawling et al 2017: 20). In particular, there was no requirement to re-inquire as to whether or not there was a link between pay and safety every time an order was made or whether or not the order was necessary for the safety of the particular workers to be covered by the order (Rawling and Kaine 2012: 251; Rawling et al 2017: 20).

The *RSR Act* used the broad scope of the Commonwealth Parliament's legislative powers with respect to industrial legislation so that tribunal orders could have been validly imposed on employers, hirers of road transport contractor drivers and all other participants in the road transport supply chain including clients or lead firms at the apex of conventional road transport supply chains: *RSR Act* s 27(3), s 9.

The tribunal's orders could have included any provision the RSRT considered appropriate in relation to remuneration and related conditions for road transport drivers to whom the order might have applied: *RSR Act* s 27(1). Such provisions might have included but were not limited to:

- Conditions about minimum remuneration and other entitlements for RT employee drivers and conditions about minimum rates of remuneration and conditions of engagement for RT contractor drivers;
- Conditions for the loading and unloading of vehicles; waiting times, working hours, load limits, payment methods and payment periods; and
- Methods of reducing or removing 'remuneration-related incentives, pressures or practices that contribute to unsafe working practices' (*RSR Act* s 27(2); Rawling et al 2017: 20-21).

In its time the RSRT made two orders. The first order covering the long haul and supermarket sectors of the road transport industry was relatively weak and did not deal with pay rates for independent contractor drivers. (Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014; for details see Johnstone et al 2015). By contrast the second order (also covering the long haul and supermarket sectors) set minimum payments for contractor drivers; and imposed substantive obligations upon certain supply chain businesses to conduct audits of their subcontractor businesses who were the direct hirers of contractor drivers (Contractor driver Minimum Payments Road Safety Remuneration Order 2016). The second order took effect on 7 April 2016 after a Federal Court stay was lifted. Thus the second order only lasted for a matter of days before it was dissolved when the *RSR Act* was repealed and the RSRT was abolished in mid-April 2016. This prevented the second order from ever being properly implemented. (Rawling et al November 2017 : 24-25; for details see Rawling Johnstone Nossar 2017).

A cost benefit analysis commissioned by the federal Coalition government found that it was anticipated that there would be a 28 per cent reduction in heavy vehicle crashes as a result of the first two orders made by the RSRT (Price Waterhouse Coopers 2016: 83, 86).

By the time of its abolition, the RSRT had developed well advanced plans to regulate a number of key RT industry sub-sectors including those involving the transport of oil, fuel and gas and the transport of cash and valuable and waste as well as developing plans to regulate intermodal hubs (such as maritime ports) (Nossar and Amoresano 2019: 13).

Road Transport Collective Agreements

Instead of extending collective bargaining rights to contractors by treating them as employees, the RSR Act maintained the contractor status of RT drivers but created a separate collective agreement-making system which applied to them as contractors. (Johnstone et al 2012:149) Critically, the Act created both a mechanism for the enforcement of collective agreements and a safety net of minimum remuneration and related conditions (in the form of the RSRT orders) against which those agreements could have been negotiated (Johnstone et al 2012: 149). The RSRT could have approved collective agreements which were negotiated between a collective of contractor drivers and a hirer (or potential hirer) and which specified remuneration or related conditions for those drivers: *RSR Act* s 33;). Such an approval might have only been made where an order that applied to the relevant drivers was in effect; a majority of the drivers approved of the agreement and would have been better off overall under the agreement than under the order; and there was an agreement method for adjusting pay levels (where the agreement operated for more than 1 year: *RSR Act* s 34). Finally, there was a 'trade practices' exemption for action taken in bargaining or pursuant to a collective agreement. That is, anything done by a participating hirer or contractor driver in bargaining or in accordance with an approved agreement was specifically authorised for the purposes of sub-section 51(1) of the *Competition and Consumer Act 2010* (Cth) (*RSR Act* s37A; Rawling et al 2017: 21; Rawling and Kaine 2012: 255).

RSRT dispute resolution

The RSRT could have dealt with disputes by mediation or conciliation, by making a recommendation or by expressing an opinion, or where the parties to the dispute agreed, by arbitration. The main types of disputes that the RSRT could deal with in this way were: disputes about pay or related conditions that might have affected whether a road transport driver worked in an unsafe manner; disputes about the practices of participants in the supply

chain beyond the employer or hirer where it was contended that those practices affected the employer or hirer's ability to provide safe rates and conditions; and disputes about the dismissal of an employee or contractor driver because the driver refused to work in an unsafe manner: RSR Act ss 40-43 (Rawling et al 2017: 21-22).

RSR Act Compliance and Enforcement

The Fair Work Ombudsman (FWO) had the responsibility of monitoring compliance with the RSR Act and orders and agreements made under the Act. FWO also had the power to inquire into and investigate any practice or act that might be contrary to the *RSR Act* or instruments made under that Act and its inspectors could exercise inspection and enforcement powers to determine whether relevant stakeholders were complying with the RSR Act or an enforceable instrument: *RSR Act* ss 73, 74) The FWO could also commence court proceedings to enforce the Act and instruments made under the Act and represent drivers who might have been party to any such proceedings: *RSR Act* s 73).The relevant union could also initiate enforcement proceedings for contraventions of the *RSR Act* and instruments made under that Act as well as exercise powers of inspection for suspected contraventions: RSR Act ss46; 78 (Rawling et al 2017 : 23).

Greens Bill – a Hybrid model?

The Greens member of Parliament, Adam Bandt, tabled a bill titled the *Fair Work Amendment (Making Australia More Equal) Bill 2018* (Cth) in federal Parliament. The Bill was not passed by Parliament but represents an interesting proposal to reform the *Fair Work Act 2009* (Cth) in order to protect precarious workers who may not be employees. If the Bill had been enacted the Fair Work Commission would have been able to make 'minimum entitlements orders' to extend provisions of the *Fair Work Act*, a modern award or an enterprise agreement so that they applied to work performed by 'workers' to whom the order might have applied and the businesses for which those workers directly or indirectly performed work. The worker would have performed work for the business 'irrespective of the legal relationship' between the worker and the business. The orders might have applied to 'a class of workers' such as those that perform work in a particular industry or a particular part of an industry.

This bill represented a hybrid model of regulation falling somewhere in between the best practice models discussed above (such as the 'alternative' legislative model of NSW Chapter 6) on the one hand, and the proposals to extend the definition of worker in the *Fair Work Act*, on the other. With some more explicit provisions about the category of 'workers' entitled to be covered by FWC orders, (including a provision which specifically states that workers designated as contractors could be so covered), the Bill, if enacted, may have formed an interesting method of (partially) protecting RT on demand workers. Although we recommend below a fuller set of legal protections for RT on-demand workers, this proposed hybrid method of regulation deserves to be investigated further.

Work Health and Safety legislation

Another regulatory model that escapes dependence on the common law definition of employment for its coverage in the harmonized Model Work Health and Safety regime, adopted by most Australian states (except for Victoria and Western Australia). The *Model Work Health and Safety Act* is supported by the *Model Work Health and Safety Regulation*, and the National Compliance and Enforcement Policy, to which all WHS regulators are signatories. (See *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011*

(Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT)) While this legislative framework is an important measure designed to promote worker health and safety it does not provide a solution to the whole problem of worker safety, because it largely ignores the economic pressures experienced by road transport workers (Rawling and Kaine 2012: 246). It has nothing to say about the means for setting pay and conditions so ignores the economic drivers of behaviours affecting safe working practices. The current 'bifurcation' (Quinlan 1993) of laws regulating pay and conditions from safety regulation is a persistent problem, that must be addressed in a new and more effective system for regulating on demand road transport work.

Some features of the model legislation nevertheless offer useful lessons for the potential creation of a new legislative regime to cover on demand workers, the main ones being the broad definitions of the persons bearing duties, the persons protected, and the places of work governed by the scheme. (Section number references are to the *Work Health and Safety Act 2011* (NSW) ('*WHS Act*') but the same section numbers are generally used in the other states adopting the law.)

Key definitions: 'PCBUs', 'workers' and 'workplaces'

A key feature of the *WHS Act* is that it escapes the limitations inherent in the *Fair Work Act* by extending liability for ensuring work health and safety beyond parties to employment contracts. All 'Persons Conducting a Business or Undertakings' (PCBUs) (defined inclusively in WHS s 5) are responsible for ensuring work health and safety. The PCBU's primary duty, set out in s 19, is to ensure 'as far as is reasonably practicable' the workplace health and safety of all workers carrying out work that is influenced or directed by that person.

'Worker' is also defined broadly in s 7(1) to include employees, contractors, subcontractors, labour hire workers, outworkers, apprentices, trainees, work experience students, and volunteers.

The 'workplace' is defined to include 'any place where a worker goes or is likely to be while at work' and includes vehicles, vessels and aircraft: WHS s 8.

These broad definitions of PCBU, worker and workplace mean that there need be no direct contractual relationship (let alone an employment contract) between the PCBU and the worker before the PCBU becomes responsible for ensuring safe working conditions. This scheme demonstrates that when an interest as important as work health and safety is concerned, regulators have been prepared to extend coverage of responsibilities outside of the confines a binary employment relationship.

Other features of the WHS legislation also demonstrate the adoption of useful regulatory tools, although they tend to have been framed in the context of a particular geography of work that assumes workers congregate in common places. For example, PCBUs are subject to extensive obligations to consult with workers about safety matters, because the workers themselves, and also any other persons at the workplace, also bear a duty to take reasonable care for their own and others' health and safety, and must cooperate in compliance with policies and procedures: WHS ss 28-29. PCBUs must consult, so far as is 'reasonably practicable', with the workers who are likely to be affected by safety management practices: WHS ss 47-49. Consultation requires that the PCBU provides workers with relevant information and an opportunity to express views, and also requires that their views are taken

into account and they are advised of any outcomes of the consultation. A mechanism provided in the Act for orderly consultation is the appointment of Health and Safety Representatives (HSRs), elected by members of work groups. A worker in a business or undertaking is able to request that the PCBU undertake an election to appoint one or more HSRs to represent the workers in the enterprise: WHS s 50. If a request is made, then within 14 days the PCBU must negotiate with workers to establish work groups for the purposes of electing HSRs from among their members to represent those groups: WHS s 52.

The role of HSRs is set out in s 68 and includes:

- Representing workers in the work group in WHS matters;
- Investigating WHS complaints;
- Monitoring WHS measures taken by PCBUs;
- Inquiring into potential risks arising from the conduct of the business; and
- Issuing 'provisional improvement notices' where appropriate: WHS s 90.

PCBUs are required to provide HSRs with training (WHS s 72) resources, assistance, and paid time to perform their duties: WHS s 79.

Enforcement

The HSRs at a workplace participate in monitoring and enforcement of safety standards, as do unions, and the statutory inspectorates. These include SafeWork NSW; Workplace Health and Safety Queensland; SafeWork SA; WorkSafe Tasmania, WorkSafe ACT, NT WorkSafe. (WorkSafe Victoria and WorkSafe WA have not yet joined the model scheme.)

Statutory inspectorates wield a wide range of powers, including powers of entry to inspect and collect evidence of potential health and safety breaches: WHS ss 163-175. They may also issue improvement notices requiring PCBUs to take steps to address risks (WHS s 191); prohibition notices requiring unsafe activities to cease (WHS s 195); and 'non-disturbance notices' to prevent any clean-up or other disturbance of a site that would hinder the collection of evidence of a contravention: WHS ss 198-200. They also have powers to copy and retain documents (WHS s 174) and seize other evidence that may be relevant to a contravention: WHS s 175.

Remedies for breach

A breach of the *WHS Act* need not result in actual harm. Creation of a hazard is an offence, even before the hazard has resulted in an accident. Offences under the *WHS Act* are 'risk-based, not harm-based': *Keilor Melton Quarries v R* (2020:[50], citing *Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd* (2016: [90].

The WHS legislation provides for a wide range of sanctions, depending on the seriousness of the breach, and the interest in prevention as well as punishment. Punitive remedies include three categories of criminal offences, Category 1 being the most serious, and Category 3 the least.

Category 1 (WHS s 31) involves conduct by a duty-bearer that exposes a person to a risk of death or serious injury or illness, in circumstances where the duty-bearer was reckless as to the serious potential consequences of their conduct. In NSW, individual PCBUs or officers of PCBUs who commit Category 1 offences are liable for fines of up to $600,000 and/or five years' imprisonment. Other individuals, for example workers who are not officers, are liable to

fines of up to $300,000 and/or five years in prison. Corporate bodies who commit a Category 1 offence are liable for a fine of up to $3 million.

Category 2 (WHS s 32) involves conduct by a duty-bearer that exposes a person to a risk of death or serious injury or illness, but with no requirement for the prosecution to establish recklessness. The maximum fine for an ordinary worker is $150,000, and for a PCBU or officer of a PCBU is $300,000 (without any prison sentence). The maximum fine for a body corporate is $1.5 million.

Category 3 involves any failure of a health and safety duty by a duty-bearer.[1] The maximum fine for an individual worker is $50,000, for a PCBU or officer is $100,000, and for a body corporate is $500,000.

The Act also nominates a range of provisions as 'civil remedy provisions', breach of which attract civil penalties. As these are treated as civil matters, civil procedure and the burden of proof for civil proceedings applies.

A range of more prophylactic remedies aimed at correction and prevention are also provided. These include:

- Adverse publicity orders, to 'name and shame' persons who breach their obligations (WHS s 236);
- Restoration orders, requiring an offender to rectify any matter caused by their breach (WHS s 237);
- WHS project orders requiring the offender to undertake a specified improvement project (WHS s 238);
- Injunctions requiring persons to cease contraventions (WHS s 240); and
- Training orders requiring persons to undertake training or provide training for workers (WHS s 241).

The Act also permits the regulator to negotiate enforceable undertakings with any person involved in a contravention of the Act *(WHS Act* Pt 11). Examples of enforceable undertakings are listed at http://www.safework.nsw.gov.au under 'Enforceable undertakings'. Breach of an enforceable undertaking also attracts potential penalties and injunctive orders (WHS s 220).

Summary

WHS legislation offers some guidelines for developing a regulatory model for on demand transport workers:

- Duty bearers must be defined broadly, and not restricted to parties to employment contracts;
- There must be a mechanism for consultation with workers about matters that affect their interests;
- Enforcement must be rigorous, and include a range of remedies designed to encourage and support compliance, as well as punish breach;
- A supervisory body or inspectorate is needed to support enforcement.

---

[1] *WHS Act* s 33.

WHS legislation is not presently sufficient to address on demand transport workers needs because it fails to address the link between the terms and conditions affecting remuneration of work and safety risks, and it is predicated on assumptions about the usual geography of work, being conducted in certain places where managers and workers congregate, and where inspectors can visit. A form of regulation that respects the more chaotic nature of on demand work is necessary.

Workers Compensation Laws

Workers compensation eligibility

Another gap in the protection of on demand road transport industry workers is their ability to access workers' compensation benefits when injured or killed in the course of work. As these workers have been found not to be 'employees', working under a 'contract of service' the potential for them to enjoy workers' compensation coverage depends on whether the extended coverage in State Workers' Compensation statutes can be stretched to cover on demand independent contractors. To date, two decisions in NSW (*Hassan v Uber Australia Pty Ltd* (2018) and *Kahin v Uber Australia Pty Ltd* (2020))suggest that Uber drivers will not meet the extended definition in the NSW legislation. (These are discussed below.)

Workers' compensation statutes generally rely on the common law definition of employment (the 'contract of service') to determine which workers are covered, and extend coverage to a range of dependent workers who are either defined, 'deemed' or 'presumed' to be workers for the purpose of the legislation. Each state's statute provides its own definitions. The following paragraphs provide a survey of the provisions in different state and territory workers' compensation statutes which have some bearing on the work of on demand road transport workers.

New South Wales

The *Workplace Injury Management and Workers Compensation Act 1988* (NSW) Section 5 and Schedule 1 deems certain persons to be workers. Two clauses in this Schedule are relevant to on demand work.

Clause 2 – Other contractors – provides that a contractor is a worker for the purpose of workers' compensation coverage if the contractor performs work worth more than $10, and is not performing that work as part of any trade or business regularly carried on by the contractor in their own name, or does not subcontract the work or hire their own employees to perform the work. This provision has been interpreted in a regularly cited case, *Malivanek v Ring Group Pty Ltd* (2014) ('*Malivanek*'). It was found in that case that a contractor did not perform the work in his own trade or business because (*Malivanek* 2014: [235]-[243]:

(1) He employed no workers;
(2) Although he used a business name and held an Australian Business Number (ABN) he had obtained that only because he was required to do so by the principal engaging him;
(3) He had no tangible assets of his own other than hand tools;
(4) He did not advertise for work and his vehicle was not badged with any business name;
(5) He was engaged for his own personal skill and experience and was not permitted to delegate work to others;
(6) He had no identifiable goodwill in his business name;

(7) His invoices were handwritten and had not letterhead, business address or other information typical on business invoices;
(8) He did not systematically and regularly accept work from any other principal.

Only item (3) in this list would create difficulties for an on demand road transport worker (provision of tangible assets), given that on demand drivers and cyclists provide their own vehicle. In *McLean v Shoalhaven City Council* (2015) it was held that a contract driver who performed delivery work for a local council was not a deemed worker under this provision, because his contract was for the hire of a truck with a driver (and not, presumably, for the hire of a driver with a truck).

Clause 10 of Schedule 1 provides that drivers of hire vehicles or vessels under contracts of bailment (which would include taxi drivers or hire care drivers) are taken to be workers, but these drivers do not own or lease their own vehicles. They are deemed to be workers only if they take possession of a vehicle under a bailment contract with the owner or lessee of the vehicle. This provision, as it presently stands, would not cover on demand drivers who own their own vehicles.

Two decisions concerning on-demand food delivery workers in NSW have found that the workers could not bring claims against Uber. In *Hassan v Uber Australia Pty Ltd* (2018) an Uber driver was unable to bring a claim when he was in a car accident, because he was not able to establish that he was in a contract of service with Uber Australia Pty Ltd. The contract he had signed was with Rasier Pacific VOF, an unlimited partnership registered in the Netherlands. In *Kahin v Uber Australia Pty Ltd* (2020: [81]) an UberEats rider who was assaulted while picking up a delivery was refused access to documents to assist her in bringing her claim, and in the course of refusing the application the arbitrator observed that the Fair Work Ombudsman had already found that these on demand workers were not in employment relationships.

Victoria

The *Workers Compensation Act 1958* (Vic), Section 3(6), provides that a contractor who enters into an agreement to perform work for a principal is a worker, so long as the work is not 'incidental to a trade or business regularly carried on by the contractor in his own name or under a firm or business name', and where the contractor performs some or all of the work themselves. This provision is comparable to the *Workplace Injury Management and Workers Compensation Act 1988* (NSW) Schedule 1, Clause 2 described above.

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3(b) and Schedule 1, Clause 7 – Drivers carrying passengers for reward – provides that drivers who have the use of a motor vehicle under a contract of bailment (other than a hire purchase arrangement) to carry passengers for reward, and are required to make payment to the operator for the use of the vehicle will be workers for the purpose of the Act. As with the NSW legislation, this provision depends upon the driver not owning the vehicle themselves (see above.)

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3(b) and Schedule 1, Clause 8 – Owner drivers carrying goods for reward – does contemplate that an owner driver may be a worker covered by the Act. Individual (that is, unincorporated) owner drivers are deemed workers if they drive their own vehicle 'mainly for the purposes of providing transport services to the principal': clause 8(1). This will not apply, however, if the Authority (Work Safe Victoria) determines that the owner-driver is carrying on an independent trade or business:

clause 8(2). The Authority has published a 'Premium Guideline' on Owner Drivers, effective from 1 July 2014. This guideline identifies the following principles:

- In order to be a deemed worker the owner-driver must be unincorporated.
- They must not engage relief drivers to perform 20 per cent or more of the contracted work.
- They must not earn less than 80 percent of their income from the hirer.
- They must not provide services for fewer than 180 days a year (six months), or for fewer than three days per week.

Australian Capital Territory

The *Workers Compensation Act 1951* (ACT), s 8 deals with the definition of worker. Section 8(b) provides that a person who works under a contract, or at piece work rates, for labour only or substantially for labour only is a worker. Section 8(c) provides that a person who works under a contract is a worker, unless the individual is paid to achieve a stated outcome, has to supply the plant and equipment or tools of trade needed to carry out the work, and would be liable for the cost of rectifying defects in the work. These replicate common factors for identifying an independent contractor. Section 11 – Regular contractors and casuals – provides that individuals are workers for the purposes of the Act if they are engaged to work for a principal, and do part or all of the work personally, and the work is regular and systematic. Among the examples listed of individuals who are workers are the owner-driver of a truck who is regularly engaged (leaving regularly for trips on the same day each week); however an owner-driver undertaking irregular engagements for a principal is listed among the examples of those who are not workers. Regularity of work for the same principal appears to be the crucial factor.

Queensland

The *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 11(2) and Schedule 2 Part 1, clause 3 deals with contractors who perform work that is not part of their own regularly carried on trade or business, and who do not subcontract the work or employ any workers (or at least they perform some of the work personally). The Queensland legislation also uses the determinations made under the *Taxation Administration Act 1953* (Cth) Schedule 1, Part 2-5 to identify workers covered by the workers' compensation legislation. A worker who falls within the requirements to deduct PAYG withholding tax is a worker (s 11(1)(b)), and a worker who does not fall with those requirements is not a worker: Schedule 2, Part 2 clause 6(b).

South Australia

The *Return to Work Act 2014* (SA), s 4(c) defines a worker to include a 'self-employed worker', and this is defined as a person to whom the Return to Work Corporation has extended the protection of the Act, so this legislation leaves the determination of coverage of workers who are not employees to the Return to Work Corporation.

Tasmania

The *Workers Rehabilitation and Compensation Act 1988* (Tas) s 4B provides that a contractor is a worker covered by the Act if the contractor performs work exceeding $100 in value, which is not work incidental to their own trade or business carried out under their own name, and the contractor does not subcontract the work or employ any other person. This will not however be the case if the worker has taken out their own personal accident insurance. Section 4DA deals with luxury hire car drivers, and s 4DB deals with taxi drivers, engaged by persons who

are licensed under the *Taxi and Hire Vehicle Industries Act 2008* (Tas). These are similar to the bailment provisions in the NSW and Victorian legislation and depend upon the driver not owning the vehicle themselves. Section 4E also makes provision for prescription of relationships to be worker/employer relationships, so there is apparently scope within the Act for the making of regulations to include on demand workers, should the legislature be minded to do so.

Western Australia

The *Workers' Compensation and Injury Management Act 1981* (WA) s 5(b) includes as a worker 'any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services'.

Northern Territory

Similarly to the Queensland legislation (see above) the *Return to Work Act 1986* (NT) s 3B definition of worker includes any person who should be treated as an employee for the purposes of PAYG withholding tax: s 3B(1)(b)(ii). There is an exclusion, however, for any person who employs another person to perform the work: s 3B(2)(b). Also, s 3B(17)(a) provides that other persons or classes of persons may be prescribed as workers. Section 3B(18) provides that the fact that a person has an Australian Business Number (ABN) is not determinative of their status as a worker.

Summary of Workers Compensation Laws

The review of the state and territory provisions above indicate that legislatures have been willing to define or deem certain workers to be covered by workers' compensation insurance, and to deem the entity engaging them as the person obliged to take out cover, whenever the worker is performing the service personally, as an unincorporated individual with no trade or business identity of their own. The obstacles to inclusion of on demand road transport workers in these extended definitions largely relate to two matters: the nature of the contract with the platform, and the fact that the drivers/riders provide their own vehicles, phones and data packs.

It is also apparent, however, that it would be a straightforward matter for state legislatures to enact further deeming provisions – or to clarify the general contractor provisions already in the Acts – to provide that on demand road transport workers are covered by workers compensation, and the platforms engaging them should be deemed to be their 'employer' for the purpose of workers' compensation premiums. Stories about workers killed or injured in the course of their work are depressingly frequent. See for example the reports of the deaths of five food delivery drivers in the space of a month in late 2020 (Bonyhady Rabe 2020: 24; Bonyhady and Chung 2020). Given the low rates of pay that these workers receive, and their highly dangerous working conditions, it would be appropriate, and economically efficient, if the platforms taking substantial commissions from their work were required to hold workers' compensation policies to cover them in cases of accident. One policy taken out on behalf of a whole class of workers is more efficient than requiring each of them to take out personal injury insurance individually.

This is not a radical proposal. It is entirely consistent with decisions made in the past about ensuring that certain categories of workers who are not employees should nevertheless be covered by the general workers' compensation system managed by the State. The categories

of deemed workers for the purpose of workers' compensation statutes tend to share a common characteristic: they are workers who are paid only for their labour, and have no organizational structure of their own to carry workers' compensation insurance. For example, among the extensive list of deemed workers in the *Workers Compensation Act 1958* (Vic) s 3(3) are tributers, who undertake mining work for mine owners on the basis that they are paid with a fraction of the minerals they extract. Tributers are also deemed to be workers under the *Workers Compensation and Injury Management Act 1981* (WA) s 7. The mine owner or lessee is deemed to be the employer for the purposes of liability to take out workers' compensation insurance. The decision to include tributers in the coverage of workers' compensation statutes demonstrates that, in the past, legislators have seen a need to ensure that workers who provide their labour for the benefit of property owners, without operating any independent business of their own, should nevertheless be covered by workers' compensation, and the appropriate person to bear responsibility for taking out workers' compensation coverage should be the property owner who profits from their labour. From a broad policy point of view, it would be consistent for workers' compensation coverage to be extended to on demand road transport workers who provide labour without operating their own independent businesses.

According to media reports published late in 2020, the New South Wales government is presently considering proposals to provide some form of workers' compensation coverage for on demand food delivery workers (Cormack and Bonyhady 2020). It appears that consideration of these proposals has emerged from the *Inquiry into the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales*, currently being undertaken by a Select Committee chaired by the Hon Daniel Mookhey. The proposals include the imposition of a special levy on food delivery transactions to fund a form of accident insurance for these workers. While establishing a source of funds for providing compensation to injured workers and their dependants would certainly be an improvement on current arrangements, any proposal that falls short of providing full workers' compensation benefits will fail to address the root of the problem. A workers' compensation system that requires payment of premiums by the business controller who determines the systems of work is far better suited to providing an incentive to improve safety standards, than a system that merely compensates victims after accidents have occurred. And a system that provides for rehabilitation of workers, income maintenance during time off, and facilitates a return to work after recovery, deals more comprehensively with workers' need for economic security.

Other less effective regulation requiring brief explanation

Certain forms of regulation applying to the RT industry are at times invoked by some stakeholders to suggest that RT workers do not require any further legal protections. An explanation of this regulation serves to reveal that it does not adequately protect RT workers (especially RT on-demand workers) and does not constitute a good model for future regulation of RT on-demand work. These forms of regulation are the Heavy Vehicle National Law (HVNL), state-based commercial passenger vehicle legislation and self-regulation.

HVNL and NHVR

The Heavy Vehicle National Law is contained in a schedule to the *Heavy Vehicle National Law Act 2012* (Qld). There are also five HVNL Regulations. In addition to the HVNL applying in Queensland, each of the ACT, NSW, South Australia, Tasmania and Victoria have passed modified heavy vehicle legislation that applies in that State or Territory

(https://www.nhvr.gov.au/law-policies/heavy-vehicle-national-law-and-regulations). Western Australia and the Northern Territory have not adopted the HVNL (Thornthwaite 2016: p60; https://www.nhvr.gov.au/law-policies/heavy-vehicle-national-law-and-regulations).

The HVNL only applies to heavy vehicles over 4.5 tonnes gross vehicle mass. It does not apply to other vehicles including the cars operated by those RT on-demand workers who are ride-share drivers and does not apply to the bicycles, e-bikes, motor scooters, motorbikes and cars operated by most delivery riders and drivers.

The HVNL contains detailed provisions for heavy vehicle road freight transport. The HVNL prescribes standards including fatigue management requirements (Chapter 6), speed limits (Chapter 5), and mass, dimension and loading requirements (Chapter 4). The standards also include detailed requirements for drivers to record long distance trips in a work diary (Thornthwaite and O'Niell 2016: 60). The HVNL then imposes 'chain of responsibility' requirements on those with the capacity to control or influence whether drivers and their vehicles comply with those standards even where those parties have no direct role as a driver or road transport operator (Thornthwaite and O'Neill 2016: 60; Rawling et al 2017: 26-27). Parties owing these chain of responsibility obligations include employers, drivers (including owner-drivers), prime contractors of drivers, consignors, consignees and receivers of goods, loading managers and loaders and unloaders of goods and schedulers of goods or passengers and the scheduler of the driver (Rawling et al 2017: 27).

The HVNL established the NHVR which oversees the enforcement of the HVNL (Thornthwaite and O'Neill 2016: 60-61). Police officers also have powers to inspect, monitor and enforce compliance with the HVNL (HVNL Chapter 9; Thornthwaite and O'Neill 2016: 61).

There is an overlap between the HVNL and WHS laws with both imposing safety obligations on road transport operators (Thornthwaite and O'Neill 2016: 62). Recent amendments to the HVNL - to provide that every party in the heavy vehicle road transport supply chain has a duty to ensure the safety of transport activities (https://www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility/changes-to-cor) were intended to align it with WHS Acts (Rawling et al 2017: 33). In recognition of this overlap, some WHS regulators – for example WorkCover Authority of NSW – defer to the HVNL provisions on road issues and leave inspections and enforcement activities to the NHVR (Rawling et al 2017: 28).

A key issue is how the HVNL is enforced by the NHVR, the police and the various state road inspectorates around the country. In 2014 an ABC Four Corners program on the trucking industry showed that

> 'whilst the law formally regulated all participants in the road transport supply chain the burden of the regulation was disproportionately born by truck drivers. The program depicted government regulators and police handing down fines and infringement notices to truck drivers on a mass scale.' (Rawling et al 2017:29).

That Four Corners program stated that: 'Chain of responsibility laws are supposed to make everyone in the chain responsible for safety. But so far no major retailer or manufacturer and no major trucking firm has ever been prosecuted' (cited in Rawling 2017: 29). Thornthwaite (2016: 62) also advises of the limitations of the HVNL in that the focus remains foremost on the driver, the HVNL is overly complex and requires extensive monitoring for detection.

More recently, there is some indication that at least one government regulator is taking proactive measures to ensure that all parties in the supply chain comply with the NHVL. That regulator has identified that the heart of the problem is pressure from off-road parties and therefore uses on road enforcement data to investigate all of the parties in the chain (Rawling et al 2017: 29). However, despite such efforts, the HVNL regulatory framework remains predominately directed towards post-breach enforcement activity (Rawling and Kaine 2012:11). Like WHS laws, the NHVL does not deal with how hazardous work practices (including driving whilst fatigued) arise out of remuneration problems. Given that antecedent factors to unsafe on-road behaviour (including low pay) are not adequately dealt with by the NHVL, the National Transport Commission in its assessment of these reactive road laws concluded that 'further reforms are needed in relation to low remuneration and inappropriate payment systems." (cited in Rawling and Kaine 2012: 247)**.** As such the HVNL is not a preferred model for future regulation of the road transport on-demand sector as the HVNL does not include the minimum pay and conditions provisions needed to ensure adequate pay and safety for RT on demand workers.

Commercial passenger vehicle legislation

The *Commercial Passenger Vehicle Act 2017* (Vic) was designed to promote the creation of uniform commercial regulation for taxi services, hire-car services and rideshare services. Previous Victorian commercial regulation of passenger vehicle services has been replaced with a scheme covering all commercial passenger services including ridesharing. Every trip conducted by any these services is now subject to a $2 levy. Taxi licence fees have been abolished and an existing accreditation process for taxi drivers has been extended to rideshare services. Overall, the Act appears to deregulate existing taxi services to some extent, whilst subjecting ridesharing services to light touch commercial regulation (Rawling and Schofield-Georgeson 2018: 392). While it may be important to begin to create a uniform commercial regulatory regime for taxis and ride-share services, it must be recognised that this legislation is not industrial regulation and will not address the root causes of low pay and poor safety experienced by RT on-demand workers. Similar recent attempts at uniform regulation of commercial passenger vehicle services such as the *On-Demand Passenger Transport Services Industry (Miscellaneous Amendments Act) 2020* (Tas) (which imposes fees on ride-share providers) may also be a step in the right direction, but, still fall short of levelling the industry's playing field (Cootes 2020) because they do not address the cost of labour. Under other parallel state legislation such as the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* (NSW), rideshare drivers are required to hold a NSW Private Hire Vehicle driver authority, register their vehicle for business use, and comply with certain safety standards. This is even less interventionist than the Victorian owner driver legislation discussed above. The main effect of the NSW legislation (and arguably all the recent changes to commercial passenger vehicle legislation in Australia) is to legalise ride-share services such as Uber. It is legislation designed to protect industry stakeholders and consumers, but not workers.

Self regulation

Pure self-regulation describes voluntary codes, whereby a firm or industry make rules with no direct government involvement (Thornthwaite and O'Neill 2016: 37). Examples of self-regulation include unilateral corporate codes of conduct.

Self-regulation is perhaps the most unsuitable form of regulation for the purpose of promoting improved pay and safety of workers. First and foremost, in competitive industries such as the

road transport industry, self-regulation does not prevent a race to the bottom. More ethical companies who put in place a corporate code of conduct which improves rules relating to working conditions for workers are placed at a considerable competitive disadvantage if the cost of their labour is any higher as a result of compliance with their own code. This form of unilateral regulation can be retracted at any time, such as when adverse media ceases or consumer pressure wains. In any case, many companies engage in self-regulation as a purely promotional exercise frequently to dissuade the state from imposing more robust forms of regulation upon them. Furthermore, a previous report on the road transport industry found that self-regulation might establish new company rules but change 'practices very little because of insufficient accountability and enforcement' (Thornthwaite and O'Neill 2016:37). As such we concur with the conclusion of that report that 'voluntary regulation on its own is not the solution: strong state regulation is necessary' (Thornthwaite and O'Neill 2017: 18).

Table 1: Summary of Regulatory Features of Existing (and Prior) Legislative Schemes

	Road Safety Remuneration Act	**Chapter 6 NSW IR Act**	**Victorian ODFC Act**	**Western Australian Owner Driver Act**	**Work Health and Safety legislation**	**Fair Work Act**	**Heavy Vehicle National Law**
National application	Yes	NSW application only	Victorian application only	WA application only	Model uniform laws	Yes	Model uniform laws
applies to RT on demand gig workers	No	No	Applies to arrangements involving delivery of goods only (not ride share)	No	Yes any person in control of a business or undertaking who engages their services would bear WHS duties	No	No
Applies to all conventional RT workers including contractors	Applied to contractors and employees	Currently applies to contractors	applies to contractors	applies to contractors	applies to contractors and employees	Almost exclusively applies to employees only	Applies to all heavy vehicle employee and contractor drivers
mandatory minimum rates for RT contractors	Yes	Yes	Recommended rates only	Recommended rates only	No	No – minimum pay for employees only	No
mandatory minimum working conditions for RT contractors	Tribunal could have made orders about 'related conditions'	Can provide for almost any condition	No	No	WHS only	No (minimum conditions for RT employees only)	No

comprehensive collective agreement making and bargaining for contractors	Yes tribunal could have approved agreements for contractors; trade practices exemption	Yes approval of agreements for contractors and trade practices exemption	Right to representation and trade practices exemption	Right to representation and trade practices exemption (similar to Victorian legislation)	No	No – (agreement making etc only provided for employees)	No
Protection for contractors from unfair termination	Disputes about dismissal due to refusal to work in unsafe manner	Yes	yes can get order regarding a contract term which is unconscionable, harsh or oppressive	Yes similar to Victorian unfair contracts jurisdiction but no power to vary a contract except by declaring a term void (s47)	No	Unfair dismissal for employees only; but general protections may apply to contractors	No
Supply chain accountability	Yes	No	No	No	yes	No	yes
Dispute resolution system and enforcement	yes	yes	Yes for enforcement see Division 3	No parallel enforcement provisions to Victorian division 3?	Enforcement only	Almost exclusively for employees only	Enforcement only

3 Regulation required to adequately protect on-demand workers

Objectives for regulation of on demand road transport work

In Section 1 we described the features of the on demand RT industry, and in Section 2 we interrogated the various legislative schemes that deal (to some extent) with road transport work. As we have seen, none of these regimes presently addresses the needs of on demand RT workers. In this Section, we consider the necessary features of an appropriate new scheme.

In order to devise an appropriate regulatory scheme, we must first decide the regulatory objectives we wish to achieve. What interests require protection? Since technology has transformed the ways in which labour is now engaged, we need to interrogate the nature of the work and the interests of the workers when designing regulation, and not tie regulation to a particular form of contract.

> 'If regulation is to transcend the artificial legal distinctions between different classifications of work, the focus of regulation needs to shift. The question for regulation should not be 'what kind of contract is this' but 'what interests are at risk in this relationship, and how are those interests best recognised and respected within this kind of relationship?' (Johnstone et al 2012: 195)

In this section of the Report we outline the objectives of a system of regulation suitable to address the particular vulnerabilities of on demand road transport workers. What, essentially, are the interests of these workers that require protection? What needs must be met by a system of regulation suitable to the particular circumstances of their work? We commence with an explanation of the International Labour Organisation's fundamental principles for ensuring decent work, as these reflect the baseline for any regulatory regime protecting decent work. We also reflect on the observations drawn from a Rideshare Driver Survey conducted by the Rideshare Driver Cooperative and the TWU in October 2018, to indicate what the workers themselves consider to be their most important needs. Finally, we draw on and extend the recommendations made in *Beyond Employment* (Johnstone et al. 2012: 197 ff) to frame a set of core principles that any new system of regulation must address in order to ensure that on demand workers enjoy the basic protections demanded by others in the Australian labour market.

Core principles of the International Labour Organisation.

Our report proceeds from the foundational assumption of the International Labour Organisation (ILO) that 'labour is not a commodity'. The negotiation of the cost of labour ought not to be left to the invisible hand of an unregulated market, because decent wages and working conditions are essential to the sustenance of workers and their dependants, and are crucial to the maintenance of a civilised democracy. Our system of labour laws must respect the human dignity of all workers, whether or not the arrangements under which they provide their labour conform to common law notions of 'employment'.

Australia is a foundation member of the ILO, and except during a short period of the Howard government's time in office, it has held a seat on the ILO's Governing Body (Kent 2001: 267). The ILO's initial Constitution, set out in Part XIII of the *Treaty of Versailles* (1920), recognised that a lasting peace, and global economic and political stability, depended upon the establishment of socially just conditions for the working people of the world. The fundamental principles of this initial Constitution were reaffirmed in a revision in 1944 (the *Declaration of Philadelphia*) and again in the 1998 *Declaration on Fundamental Principles and Rights at Work*, and the 2008 *Declaration on Social Justice for a Fair Globalisation*. They include that labour is not to be treated as a commodity or article of commerce; respect for freedom of association and the effective recognition of rights to collective bargaining; abolition of all forms of forced labour (slavery) and child labour; and in the more recent declarations, the elimination of discrimination in employment. These principles were recently reaffirmed when the ILO marked its centenary with the *ILO Centenary Declaration for the Future of Work*.

In its publication *Work for a Brighter Future*, the ILO's Global Commission on the Future of Work (GCFW) asserts that the guarantee of these fundamental rights, including an adequate living wage, maximum limits on working hours, and protection of health and safety at work, should be enjoyed by all workers 'regardless of their contractual arrangement or employment status' (Global Commission on the Future of Work 2019: 12). The GCFW specifically refers to the need to extend ILO principles to on demand work negotiated through digital platforms (GCFW 2019: 14):

> 'We further recommend that particular attention be given to the universality of the ILO mandate. This implies scaling up its activities to include those who have historically remained excluded from social justice and decent work, notably those working in the informal economy. It equally implies innovative action to address the growing diversity of situations in which work is performed, in particular, the emerging phenomenon of digitally mediated work in the platform economy. We view a Universal Labour Guarantee as an appropriate tool to deal with these challenges and recommend that the ILO give urgent attention to its implementation.'

According to the ILO's founders, humane working conditions require:

> 'the regulation of the hours of work, including the establishment of a maximum working day and week, . . . the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of employment, the protection of children young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association' (Preamble ILO Constitution 1919).

For on demand workers this means earning a sufficient hourly rate from their work to preclude the need to work excessive hours. They should be insured against work-related illness and injury. Their earnings should take account of a need to provide a retirement income. These rights should be available also to migrant workers and those on temporary working visas. And all workers should enjoy the freedom to join worker associations and act collectively in the pursuit of these entitlements.

Freedom of association is a particularly important fundamental principle because it is instrumental in allowing workers to pursue their own best interests collectively. The two key

ILO Conventions dealing with freedom of association rights are ILO C 87 *Freedom of Association and the Protection of the Right to Organise Convention 1948* which affirms workers' rights to form associations, free of interference from employers or government, for the purpose of furthering their own collective interests; and ILO C 98 *Right to Organise and Collective Bargaining Convention 1949* which purports to guarantee workers a right to engage in trade union activity, free of the interference of employers, and to engage in collective bargaining. Although the right to withdraw labour is not explicit in these Conventions, they have been interpreted to encompass a right to strike, subject only to reasonable controls to protect the public interest.

The GCFW recognises that platform based on demand work presents particular challenges for worker organisation and collective bargaining, and proposes that 'workers' and employers' organizations must strengthen their representative legitimacy through innovative organizing techniques that reach those who are engaged in the platform economy, including through the use of technology' (GCFW 2019: 12)

Rideshare survey results

Beyond the fundamental principles of decent work promulgated by the ILO, our principal source of information about the needs and interests of workers should be the experience of the workers themselves. The Rideshare Driver Survey, conducted by Rideshare Driver Cooperative and TWU in October 2018, provided answers from more than 1100 respondents. The survey indicated that drivers want:

- A fair rate of pay, sufficient for them to save enough to permit them to take annual leave;
- Protection from capricious sacking ('blocking') without being given any right of reply;
- No changes to their contract terms and conditions without meaningful consultation;
- Superannuation entitlements, so that they can prepare for ultimate retirement;
- Protections from threats of assault, including sexual assault, while working.
- Protection from racial and sex discrimination;
- Insurance for losses suffered due to property damage caused by clients;
- Paid time off to recover from workplace assaults and injuries.

These needs can be divided into four broad categories: safe working conditions; adequate remuneration; income security and job security. These categories are interrelated. An adequate hourly rate for work assists in the provision of safe working conditions because it alleviates pressure to work excessive hours and risk exhaustion-related illness and injury. Job security enables workers to refuse unsafe working conditions without the threat of job loss. Income security (notwithstanding absences from work due to illness or injury) supports an adequate level of overall remuneration, sufficient to allow for annual recreation breaks and to prepare for retirement. Implicit in these four interests are also the need for appropriate mechanisms for setting rates of pay; for consulting on the terms and conditions of work; and for resolving disputes and adequate enforcement. We consider each of these interests in turn.

Safe working conditions

Safe working conditions, and support when accidents occur, are particularly urgent concerns for transport workers. Stories about workers killed or injured in the course of their work are depressingly frequent. See for example the distressingly frequent reports of deaths of food

delivery drivers (Bonyhady and Rabe 2020; Bonyhady and Chung 2020, 8). Workers also suffer assaults while working. See the report concerning Menulog worker, 'Mohammed', who was seriously assaulted (breaking his front teeth) by a bystander while he was working, and there was no insurance to assist with his medical costs, or time away from work (Bonyhady and Rabe 2020).

So there are two aspects to regulating for safety at work: ensuring that the conditions of work are as safe as possible; and ensuring that where any accidents do occur, workers have prompt access to workers' compensation entitlements, including medical costs, income support, and rehabilitation services. There is an urgent need for on demand road transport workers to have access to workers' compensation coverage.

Adequate remuneration

Workers need to be able to earn rates of pay for their work that allow them a decent standard of living in the present, and if they do not have any entitlement to paid sick and annual leave, they need a sufficient income from working time to enable them to prepare for times when they need to take breaks from work. (Alternatively, as we discuss below, if the model of regulation we propose is adopted, a tribunal may decide that sick leave is one particular condition of work that needs to be provided to RT on-demand workers.) Likewise, if they are not entitled to receive the benefit of employer contributions to a superannuation scheme, they should be paid at a rate that permits them to make those savings themselves. It is not enough, however, to simply assert that workers need an adequate level of remuneration from their work. A system of regulation also needs to address the means by which remuneration levels should be set.

Presently, on demand workers are subject to the terms of 'take it or leave it' contracts determined by the platforms. As these contracts have been deemed to be commercial contracts, they are not subject to any supervision on the grounds that they set adequate rates of remuneration (such as compliance with mandatory minimum rates as is the case with employed workers covered by modern awards). In order to ensure that these contracts provide for adequate rates of remuneration on demand workers will require a mechanism for scrutinising pay rates, and, if necessary, mandating minimum rates of pay. This might be by way of a government body authorised to fix minimum rates (in the way that the Fair Work Commission sets minimum rates of pay in modern awards). A system providing for standard minimum entitlements for classes of workers is needed, not merely a scheme for unfair contracts review of individual contracts as is provided by the federal *Independent Contracts Act 2006* (Cth), or the *ODFC Act* (Vic) discussed above. Low paid workers do not access individual unfair contracts review scheme. A right to adequate remuneration from the outset is a core interest that must be supported by a regulatory scheme.

Income security

The need for income security means that workers need a predictable income, and assurance that they will receive income if they are not able to work as a result of illness or injury. Income security involves a guarantee of a minimum 'wage' (either from work or through access to social security payments) and a guarantee of regular receipt of pay and other entitlements (ie security of payment) (Johnstone et al 2012: 197). A right to income security assumes access to workers' compensation insurance, to ensure income maintenance during a period off work due to workplace injury.

Job security

One of the main complaints of rideshare workers (after safety concerns) is that their contracts can be terminated suddenly and without warning. The unfair dismissal cases described in Section 1 concerned drivers or cyclists who had been blocked from access to the app, and hence deprived work. With the exception of the applicant in *Klooger,* these workers were refused any opportunity to contest their dismissal, on the basis that they were not employees and so had none of the rights to be given a valid reason for dismissal, and to be afforded procedural fairness. They had no entitlement to reasons, warnings or opportunities to respond before their livelihood was taken away. They had no entitlement to reasonable notice of the termination of their work contract. The right to reasonable notice to termination of a work contract – and even of a commercial contract – is a standard feature of Australian law.

As one example, the provisions of the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) provides that franchisees are entitled to reasonable notice and reasons before a franchise agreement can be terminated (cl 28). Even when the franchisee is in breach of the franchise agreement, the franchisor cannot terminate the agreement without giving the franchisee a warning and opportunity to correct the breach before terminating on reasonable notice: cl 27. The legislation introducing the original version of these protections for franchisees was enacted in 1998 by the Howard government when Peter Reith was Minister for Small Business. It followed several enquiries concerned about abusive practices in the franchising sector. Even if on demand transport workers are to be regulated as independent owners of their own small businesses, they must surely be afforded similar regulatory protection as other small businesses, such as franchisees. The right to reasonable notice of termination of a work contract, and the right to be given reasons and an opportunity to contest a capricious dismissal, is an essential component of a regulatory system.

Two other rights are necessary to secure workers' interests in safe work, adequate remuneration, and income and job security. They are the right to bargain collectively, and the right to accessible and affordable dispute resolution and enforcement.

Collective bargaining

A right to collective bargaining secures an avenue for workers to have a say in establishing their rights to adequate remuneration and other conditions of work. The right to 'freedom of association' alone is not sufficient. The right must encompass the right recognised by ILO Conventions to act as a collective in pursuing improved working conditions (ILO Convention 98 *Right to Organise and Collective Bargaining Convention* 1949). A right to collective bargaining is only meaningful when it permits withdrawal of labour with immunity from suit for economic torts and any sanctions for allegedly anti-competitive conduct in the *Competition and Consumer Act* 2010 (Cth).

The anti-trust provisions in the *Competition and Consumer Act* 2010 (Cth) operate to curtail the scope for independent contractors to engage in collective industrial action (McCrystal 2012: 139). Some specialist legislation is already granted an exemption from these restrictions. See the *Owner Drivers and Forestry Contractors Act* (Vic) s 64(1)(c)-(e). Also, in October 2020 the Australian Competition and Consumer Commission (ACCC) issued a new class exemption for independent contractors (and businesses with a turnover of less than $10 million) to collectively bargain without having to apply to the ACCC. From early 2021 such

contractors wanting to collectively bargain will only have to lodge a simple one-page notice with the ACCC and with each business to be bargained with. This will allow RT on demand workers to engage in some forms of collective bargaining. But there are some significant limitations compared to the collective bargaining rights of employees. While the exemption provides immunity from competition and consumer statute law, it does little to address other legal liabilities that arise under the common law. Also, the exemption does not permit collective boycott conduct or withdrawal of labour and limits information-sharing among a group of contractors. (Workplace Express 2020b; Hardy and McCrystal 2020). Moreover, there is no bargaining infrastructure like the agreement-making provisions in the *Fair Work Act*. In particular, there are no mechanisms such as bargaining orders, good faith provisions or majority support determinations to compel a work provider to bargain in good faith with workers. Additionally, there is no mechanism to register a collective agreement.

All on demand road transport workers need full protection from all legal liability arising out of competition laws and the common law so that they can act collectively. This requires explicit statutory exemption as well as provisions establishing an agreement-making and bargaining infrastructure (such as those provisions in *Fair Work Act 2009* (Cth) or Chapter 6 of the NSW *Industrial Relations Act*) to establish full collective bargaining rights for RT on-demand workers.

Accessible dispute resolution

A right to accessible dispute resolution means that on demand workers need an affordable and prompt avenue for raising grievances and having them resolved impartially. Just as unfairly dismissed employees can approach the Fair Work Commission by filling in a simple form and paying a minimal filing fee to access impartial and prompt conciliation of unfair dismissal grievances, so too, on demand transport workers should have access to an equally affordable and informal avenue to resolve grievances. It is intolerable that they should be held to a commercial dispute resolution clause in a contract like the Uber Contract, requiring them to arbitrate disputes at their own cost in the Netherlands. It is also intolerable that they should be left to the expense and delay of proceedings in a Federal Court to have these matters resolved.

Adequate Enforcement

In relation to enforcement, for over a century now a gap between the ‘law in the books’ and the ‘law in action’ has been identified as a (potentially worrying) feature of legal systems (Pound 1910; Halperin 2011). It is important to ensure not only that the formal legal and structural arrangements are adequate, but that there is minimal gap between the expectation and the actual outcomes, so people actually receive their lawful entitlements. Successful enforcement of minimum working protections for workers depends upon regulators, (such as the relevant union and the FWO) knowing the location of these workers during their work, and also key details of their working conditions (including pay rates and hours of work) (Nossar and Amoresano, 2019: 7).

What form should this regulation take? The need for an RT industry tribunal

An industry specific scheme

The rise of what has been called the 'gig economy', encompassing on demand work mediated through digital apps in a wide range of industry sectors (for example in odd jobbing, the care sector, and other forms of freelance work), has prompted calls for regulation of all kinds of work negotiated through these platforms. While there are arguments in favour of addressing the wider problem of adequate regulation of worker engagement through these platforms, we argue here that there are good reasons for establishing a specific scheme for on demand RT work. We argue that this new scheme should take the form of an RT industry-specific, tribunal-based regime. To attempt to provide a common form of regulation for all kinds of work negotiated through an app-based platforms would be to emphasise a false commonality between workers in different industries. The means of contracting the workers is peripheral to the nature of the work they perform. Providing appropriate regulation that recognises the particular risks and features of certain kinds of work is more important than focusing on the means by which workers initiate work contracts.

To illustrate this point, we refer to the following analysis of on-demand passenger vehicle work. Uber argues it is a technology business not a transport company, but it is clearly in competition with transport companies (Peetz, 2019: 175). When considering such company statements the focus should be on the work being performed and the services being delivered rather than the company's own characterisation of the business which has centred on the method of engagement. When this approach is applied to ride-share driving and on-demand freight delivery work, the service being delivered and the labour performed by workers engaged through platforms are almost identical to the work performed by workers engaged through traditional work arrangements in the road transport industry. For example, an Uber driver delivers the same or similar service for passengers and performs the same labour as conventional cab drivers. If we focus on the nature of the work undertaken for profit, large international tech companies – despite their protestations that they are principally tech companies – are rightly characterised as transport companies.

At least in relation to the road transport industry, digitally-mediated, gig economy arrangements are most accurately characterised as work embedded in the transport industry rather than in a separate 'gig economy'. This reinforces our recommendation that RT gig economy arrangements should be covered by an industry specific legislative scheme for the road transport industry.

Subjecting business controllers of online digital platforms (and associated apps) such as Uber Freight and Amazon Flex who engage freight haulage drivers to the same, similar or a parallel level of regulation as conventional road transport industry businesses promotes a level playing field across the industry and the sustainability of road transport businesses (see ILO 2015). This is critical given that these large digital platform/app businesses involved in the delivery of road transport industry services are currently not even close to being profitable but operate at a massive loss (Sage and Sharma, 2019).

Furthermore, there is a need to provide for minimum pay and conditions of all road transport workers in Australia given the major gaps in the current system. Currently, as we saw in Section 2 of this Report there is no nation-wide legislation that adequately protects the

interests of road transport contractor workers. The road transport industry (is one of the most dangerous, with 28 per cent of all work fatalities occurring in the transport, postal and warehousing industries (Australian Bureau of Statistics 2018; Safe Work Australia 2018). Many owner-drivers/sub-contractors are labouring in conditions where there are no enforceable minimum rates or other standards. Consequently, many of those subcontractors are unable to earn enough to recover costs (Thornthwaite and O'Neill 2017: 16) and insolvency is more frequent in the Australian road transport industry than many other Australian industries. Indeed, the transport, postal and warehousing industry was one of the top industries for the highest number of business insolvencies in 2018 (ASIC 2019: 3).

Road transport is by no means the only industry where there is inadequate regulation of contractor arrangements. Contractors in other industries such as the construction and cleaning industries also require better protections. However, the road transport industry has been at the vanguard of the rise in precarious work as a consequence of widespread use of contractors. A failure to address these issues in the road transport industry has led to the death or injury of the workers, and also members of the road using public. The broader public safety dimension reinforces the need for a road transport industry scheme which protects all classes of workers in the road transport industry and promotes safety on national roads.

Responsive tribunal regulation

There is a history of successful tribunal regulation during the (now largely past) federal and State conciliation and arbitration phase of industrial regulation in Australia which produced a substantial element of fairness for Australian workers (Hancock and Richardson 2004: 203). Prior research has found this form of tribunal regulation is responsive in the sense that it is able to tailor orders to industry needs and address the specific vulnerabilities of road transport workers in different sectors of the industry (Rawling, Johnstone, Nossar 2017; see previously Cooney, Howe and Murray 2006: 226-8). Also as indicated immediately below, it is vitally necessary for road transport industry regulation to cover all types of business network structures and a tribunal is well placed to undertake this task. By legislating for the establishment of a tribunal with broad powers to inquire into and make orders about such industry structures and all forms of road transport work, regulation could be sufficiently tailored to address prevailing circumstances and therefore could be more effective. It is for these reasons of responsiveness and effectiveness that we suggest that industry specific regulation take the form of a standard-setting industrial tribunal.

The need for supply chain/business network regulation

The implementation of a regulatory scheme to provide safe working conditions, adequate remuneration, income security, job security, collective bargaining rights and adequate dispute resolution and enforcement, requires the establishment of a standard setting body (such as an industrial tribunal) with the ability to inquire into, and make orders about, any supply chain or business network relationships that RT direct work providers enter into or are connected with, including but not limited to the business-to-business relationships that online platform companies have with their clients to provide RT delivery services. This is important, notwithstanding that the businesses controlling the digital platforms/apps who directly engage vulnerable gig workers will generally be the main financial beneficiary of the work performed by those workers.

The reasoning behind this additional network regulation feature is as follows:

This first point relates to conventional RT supply chains. An essential feature of a new national RT legislative scheme is adequate remuneration in the form of enforceable minimum rates for all on-demand road transport workers including freight delivery owner drivers, rideshare drivers and delivery riders. Such a scheme, in order for all RT businesses to be subject to the same regulation, would also apply to all employee and contractor road transport workers hired or employed by conventional means beyond those engaged and managed digitally. Contract network regulation - especially the regulation of supply chains - is crucial to address the commercial pressures that are the root cause of low pay and poor safety in conventional RT industry supply chains. Contract network regulation may also be important if businesses controlling apps and digital platforms develop more elaborate means of inserting intermediaries into their arrangements to avoid a future form of regulation.

The second point relates to effective enforcement (see Kaine 2019). Actually achieving the provision of minimum pay and conditions to on-demand RT workers may be contingent on achieving contract network regulation so that regulators including the relevant union can track the flow of RT work and locate and access the relevant on-demand RT workers to ascertain the conditions under which they labour (Nossar 2020: 14). This underscores the continued importance of regulation of whole business networks - even in regards to those networks involving on demand gig workers. Already we have seen examples of more complex arrangements such as those involving Coles (a conventional road transport industry, off-road client) giving out work as part of their supply chain to Uber Eats (an entity owned and controlled by Uber, a global technology company). Woolworths has also recently partnered with Uber to provide home delivery of Woolworths groceries (Retail World 2020). The co-operation of these type of supply chain participants, such as large retailers and fast food outlets, although not necessarily the main financial beneficiaries of the road transport work, could be utilised to make the enforcement of adequate terms and conditions against the large tech direct hirers of gig workers easier and more effective. Mandatory supply chain/business network responsibilities can enhance the ability of regulators to enforce legal minimum entitlements even where the main subject of regulation is the direct work provider – in this case the relevant business controlling the digital platforms/apps.

If a regulatory scheme for the entire road transport industry was sufficiently flexible, regulation could be tailored to regulate both more conventional road transport supply chains as well as these more complex hybrid structures involving both elements of more traditional supply chains and more recent business structures utilising digital platforms/apps (see Coles-Transport Workers Union 2018). Although at this point it is difficult to predict the formation of new commercial avoidance mechanisms beyond supply chains and such contractual networks, the scheme of regulation established should be flexible enough to allow inquiry into, and regulation of, all possible future evolutions of such industry structures.

Constitutional questions

The proposals presented in this Report raise two potential constitutional law questions. The first is the extent to which the Commonwealth has power (under *Australian Constitution* s 51) to legislate for a national scheme to regulate working conditions for non-employed transport workers, bearing in mind that presently the specific schemes covering the transport industry described above are State-based. The second is whether the proposal for conferring certain responsibilities or powers on an administrative tribunal such as the Fair Work Commission or some other specialist tribunal would fall foul of the *Boilermakers*' doctrine, bearing in mind that

presently the only federal legislation dealing with non-employed work, the *Independent Contracts Act 2006* (Cth), has conferred powers for varying unfair independent contracts upon courts in the federal system, and not upon an administrative tribunal. We address each of these issues separately, to conclude that there are no constitutional objections to a national scheme based on Commonwealth legislation, nor to the conferral of dispute resolution powers on a tribunal rather than courts.

Commonwealth power to regulate non-employed work

The *Fair Work Act's* reliance on the concept of a 'national system employer' demonstrates the scope for regulating the rights and responsibilities of entities that engage workers on the basis of the corporations power in s 51 (xx) complemented by the trade and commerce (s 51(ii)) and Territories powers.

This has been found to be constitutionally valid, most recently in the *Work Choices* case *New South Wales v Commonwealth* (2006) (Stewart and Williams 2007) and before that in *Victoria v Commonwealth* (1996) which considered challenges to the *Industrial Relations Reform Act 1993* (Cth).

Victoria v Commonwealth and the *Work Choices* cases followed earlier decisions finding that the Commonwealth has power under s 51(xx) to pass laws affecting corporations either by imposing responsibilities upon them, or protecting them. For example, in *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982), ('*Actors*') the High Court found that the secondary boycott provisions in the *Trade Practices Act 1974* (Cth) (now renamed the *Competition and Consumer Act 2010* (Cth)) were a valid excise of Commonwealth power. In that case, Murphy J expressly stated that s 51(xx) would support legislation about 'industrial matters' affecting trading and financial corporations (Actors 1982: 212). So we are confident that legislation expressed to affect the responsibilities or interests of trading or financial corporations in respect of their dealings with non-employed transport workers will be constitutionally valid. Given the extensive use of incorporated forms of business entity such legislation should be effective to cover most of work arrangements.

In the case of the *Fair Work Act*, some private sector employers escaped coverage because they were unincorporated sole traders or partnerships, but in all States bar Western Australia, these employers are now covered by virtue of State legislation referring powers over industrial matters to the Commonwealth.[3] State cooperation in referring powers over these matters to the Commonwealth might also be sought to close any remaining gaps in legislation, if necessary.

Other federal regimes dealing with non-employed workers that have been underpinned by the sources of Commonwealth power include the *Independent Contracts Act 2006* (Cth), and the now repealed *Road Safety Remuneration Act 2012* (Cth).

Reliance on external affairs power

As we explained in Section 1 of this Report, our proposals are based on and consistent with International Labour Organisation fundamental principles and Conventions. On the basis that the Commonwealth has power under the external affairs power in Constitution s 51 (xxix) to make laws that are appropriate and adapted to giving effect to Australia's obligations under international instruments, proposals for federal legislation extending the protections promoted by international instruments will also be constitutionally valid (see *Koowarta v Bjelke-Peterson* (1982: 258); *Victoria v Commonwealth* (1996: 487).

In combination, the corporations power, extended by the trade and commerce and Territories powers, and the external affairs power, provide adequate constitutional support for the enactment of federal legislation in this field. It would not be necessary to take the alternate path of a cooperative or harmonised system such as has been adopted in the field of work health and safety, although a model Act adopted by each of the States would be another means of creating a national scheme.

Constitutional validity of a tribunal-based dispute resolution system

The second constitutional issue raised by the proposals in this Report is the viability of a tribunal-based system of dispute resolution. When the early proposals for the Fair Work system (raised in the *Forward with Fairness* proposals immediate wake of the 2007 federal election, Kevin Rudd and Julia Gillard *Forward with Fairness – Policy Implementation Plan*, ALP, August 2007) suggested a 'one stop shop' for all matters dealing with employment, constitutional lawyers raised the spectre of the *Boilermakers*' doctrine (from *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956: 323 (Webb J), 296 (Dixon CJ, McTiernan, Fullager and Kitto JJ) which establishes that only courts can exercise the judicial power of the Commonwealth. The *Boilermaker's* doctrine draws a crucial distinction between an interests dispute and a rights dispute in our system of federal workplace laws. Interests disputes can be arbitrated by a body exercising administrative power, but rights disputes can only be determined by a court exercising judicial power. (See also *Brandy v Human Rights and Equal Opportunity Commission* (1995: 267-8; Sawer 1961; Wheeler 1996). The traditional system of conciliation and arbitration of industrial awards (abandoned when the *Workplace Relations Amendment* (*Work Choices) Act 2006* (Cth) was enacted) depended upon the resolution of interests disputes to create new rights in the form of binding awards determining the conditions of employment in particular industries. Likewise, unfair dismissal arbitrations involve the exercise of administrative power by a tribunal to resolve an interests dispute by determining an outcome to produce a 'fair go all round' for the parties concerned, and so establish a new right to reinstatement or compensation. Such rights, if denied, may be enforced in the federal court system. Properly drafted, laws permitting the resolution of disputes (particularly disputes concerning the capricious termination of work contracts) should be able to confer dispute resolution powers on an administrative tribunal, on the basis that the tribunal is settling an interests dispute in the public interest. This approach was found to be constitutionally valid in the case of legislation empowering a tribunal – the Takeovers Panel – to resolve disputes arising in the context of corporate mergers and acquisitions.

In *Attorney-General of the Commonwealth of Australia v Alinta Limited (the Takeovers Panel Case) (*2008) the High Court held that parliament may confer a dispute resolution role on a body exercising non-judicial power whenever resolution of that dispute requires the consideration of matters of public policy (Armson 2007). Resolution of takeovers disputes was considered to require quicker processes than were available in the court system, given the public interest in maintaining an 'efficient, competitive and informed market' for corporate securities. (See *Corporations Act 2001* (Cth) s 602(a) and *Takeovers Panel Case* (2008: [6])

Even though the challenged legislation permitted the Panel to make remedial orders (which might suggest the exercise of judicial power) the High Court held that it was playing a supervisory and regulatory function, and exercised its powers to create 'new rights and obligations' (Gleeson CJ, [2]; Gummow J, [14]; Kirby J, [42]) and not simply to determine 'conclusively (as a court might do) controversies over past suggested contraventions of the

Act' (Kirby J, [42]). So long as the exercise of the powers of the Panel in any given case remained subject to the scrutiny of the courts as a matter of judicial review under s 75(v) of the *Constitution*, the regime did not fall foul of the *Boilermakers'* doctrine. The Australian Constitution s 75 (v) provides that the High Court of Australia has original jurisdiction to grant a writ of mandamus, prohibition or injunction against an act of an officer of the Commonwealth. The same findings can be anticipated for the dispute resolution mechanism proposed in this Report.

Conclusions

The challenge of regulating app-mediated on demand RT work is that this kind of work is not easily described in terms of the common law multiple indicia test for employment. That test is the product of the industrial era, and is most suitable to describing the working relationships typical of the Fordist era of industrial organisation (See Stone 2004). The means by which on demand transport workers are subjugated to the enterprise goals of the digital platforms who profit from their labour are more subtle than the old forms of industrial management. In order to fit this kind of work into the old mould of employment we would need either to ignore some features of their working relationships (such as their ability to serve many platforms simultaneously), or we must alter the definition of employment. This definition still serves as an apt description of the working relationships of those permanently engaged employees who are tied indefinitely to exclusive service of one employer. Alternatively, we can begin afresh by designing an appropriate regulatory regime to address the needs of these workers in a way that recognises and respects the particular features of their working arrangements.

> 'The underlying economic reality of the relationships between these new enterprises and the workers who generate their revenue is not substantially different from the industrial factories of the past. The new app intermediaries earn their profits by harvesting a share of the workers' wages. Just as systems of labour law evolved throughout the industrial era to ensure that those who profit from the work of others meet certain obligations to provide decent wages and working conditions, so should our general commercial laws develop to ensure that the business structures enabled by digital technology do not permit unregulated exploitation of precarious workers.' (Riley 2017b: 683).

This is not an unreasonable demand. In the language of the organisational integration test for determining employment status, on demand transport workers perform work that is integral and not merely an accessory to the business enterprises of their platform masters. Theses apps are means for generating revenue from the passenger transport business. The service of the drivers is absolutely essential to the platforms' 'core business'.

Federal government inaction in the face of evasion of mandatory laws by large powerful tech companies has facilitated the exploitation of road transport on-demand workers. This is not right and should be immediately rectified. RT on demand workers deserve the same or similar protection from 'commodification' of their labour as the employed class (Aloisi 2016). To address the exploitation of on-demand RT workers outlined in Section 1 of this Report, we proposed (in Section 3) robust national legislative regulation of on-demand road transport work in the form of an industry-specific, standard-setting tribunal. This new regulatory scheme should provide for the necessary protections regarding safe working conditions, adequate remuneration, income security, job security, collective bargaining and adequate dispute resolution and enforcement. Extended liability may also be required as against the clients

(such as large supermarkets and fast food chains) of on-demand road transport services businesses (such as Uber and Uber Eats) in the form of contract documentation transparency and rights of entry for the purpose of effectively enforcing minimum legal requirements against the road transport services businesses. In Section 2 of this Report we identified some best practice models of regulation which might be considered. Policy-makers could do no better than to consider how the regulatory design of the RSR Act and Chapter 6 of the NSW IR Act might be adapted into a new, federal, road transport industry legislative scheme to protect on-demand RT workers as well as other RT workers. If such a legislative scheme is enacted, this RT industry legislation could be adapted and applied to other industries where vulnerable workers are engaged digitally.

Recommendations

Recommendation 1

The federal Parliament should use the full extent of its constitutional powers to pass legislation which establishes a national industrial tribunal (or a Fair Work Commission jurisdiction) to regulate all work contracts in the road transport industry (including arrangements for the engagement of on demand gig workers in that industry) regardless of work status of those workers and regardless of the means by which those workers are engaged. That regulatory scheme should empower the tribunal to make binding awards providing for safe working conditions and adequate remuneration for all workers.

Recommendation 2

The federal tribunal should be empowered to hear and determine (by conciliation and arbitration) complaints concerning the unfair termination of work contracts for all road transport workers (whether employed or not),

Recommendation 3

Federal legislation should be enacted to establish collective bargaining rights for all road transport workers (whether employed or not).

Recommendation 4

Enforcement provisions ensuring the enforcement of awards and orders of the tribunal should provide for supply chain accountability where road transport workers including on demand gig workers are engaged by subcontractors.

Recommendation 5

State and territory parliaments should amend workers' compensation legislation in order to make it explicit that businesses controlling digital platforms/apps engaging gig workers are covered by that legislation, so that on-demand gig workers are eligible for workers compensation entitlements if killed or injured at work, and businesses controlling the platforms are liable to meet the obligations of employers under those schemes.

[1] See *Heller v Uber Technologies Inc and Rasier Operations BV* 2019 ONCA 1 (Canada); *Uber BV et al v Aslam et al* (2017) UKEAT/0056/17/DA (England); *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 and *Kaseris v Rasier Pacific VOF* [2017] FWC 6610 (Australia).

[2] Contract dated 23 December 2015, copy on file with the author: Joellen.Munton@uts.edu.au.

[3] See *Fair Work Act 2009* (Cth) ss 30A-30S; *Industrial Relations (Commonwealth Powers) Act 2009* (NSW); *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld); *Fair Work (Commonwealth Powers) Act 2009* (SA); *Industrial Relations (Commonwealth Powers) Act 2009* (Tas). Note that Victoria had already referred powers over industrial matters to the Commonwealth in 1996 at the time of the enactment of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). See *Commonwealth Powers (Industrial Relations) Act 1996* (Vic); *Workplace Relations and Other Legislation Amendment Act (No 2)* 1996 (Cth).

References

Cases

Abdalla v Viewdaze Pty Ltd (2003) 122 IR 215

Actors and Announcers Equity Association v Fontana Films Pty Ltd (1982) 150 CLR 169

Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats [2020] FWCFB 1698 (21 April 2020)

Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats, Federal Court Transcript (Federal Court Registry No NSD 566 of 2020, O/N H-1358227)

*Attorney-General of the Commonwealth of Australia v Alinta Limited (the Takeovers Panel Case) [*2008] HCA 2

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245

Cam & Sons Pty Ltd v Sargent (1940) 14 ALJ 162

CFMMEU v Personnel Contracting Pty Ltd [2020] FCAFC 122

Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd [2016] VSCA 55; (2016) 49 VR 676

Hassan v Uber Australia Pty Ltd [2018] NSWWCC 21

Heller v Uber Technologies Inc and Rasier Operations BV 2019 ONCA 1

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

Kahin v Uber Australia Pty Ltd [2020] NSWWCC 118

Kaseris v Rasier Pacific VOF [2017] FWC 6610

Keilor Melton Quarries v R [2020] VSCA 169

KL Ballantyne and National Union of Workers (Laverton Site) Agreement 2004 (2004) 145 IR 1

Klooger v Foodora Australia Pty Ltd [2018] FWC 6836

Koowarta v Bjelke-Peterson (1982) 153 CLR 168

Malivanek v Ring Group Pty Ltd [2014] NSWWCCPD 4

McLean v Shoalhaven City Council [2015] NSWWCC 186

National Union of Workers v Phillip Leong Stores Pty Ltd [2014] FWC 6459

Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612

New South Wales v Commonwealth (2006) 229 CLR 1

Oze-Igiehon v Rasier Operations BV [2016] WADC 174 (9 December 2016)

Pallage v Rasier Pacific Pty Ltd [2018] FWC 2579

R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16.

Suliman v Rasier Pacific Pty Ltd [2019] FWC 4807

The Queen v The Judges of the Commonwealth Industrial Court and Others: Ex Parte Cocks and Others (1968) 121 CLR 313

Uber BV v Aslam (2017) UKEAT/0056/17/DA Case Nos 2202551/2015

Vabu Pty Ltd v Federal Commissioner of Taxation (1996) 33 ATR 537

Victoria v Commonwealth (1996) 187 CLR 416

Victorian Civil and Administrative Tribunal (VCAT) (2016) *Willogistics Pty Ltd v Cut Fresh Salads Pty Ltd (Review and Regulation)* [2016] VCAT 1668 (29 September 2016)

VCAT (2016a) Willogistics Pty Ltd v Cut Fresh Salads Pty Ltd (Review and Regulation) [2016] VCAT 2211 (30 November 2016)

Legislation

Australian Commonwealth

Acts

Competition and Consumer Act 2010 (Cth) s 51 (and the NSW Competition Code)

Corporations Act 2001 (Cth)

Fair Work Act 2009 (Cth)

Independent Contracts Act 2006 (Cth)

Industrial Relations Reform Act 1993 (Cth)

Model Work Health and Safety Act

Road Safety Remuneration Act 2012 (Cth).

Road Safety Remuneration Repeal Act 2016 (Cth)

Taxation Administration Act 1953 (Cth)

Trade Practices Act 1974 (Cth)

Workplace Relations Amendment (*Work Choices) Act 2006* (Cth)

Tribunal Orders and Awards

Road Safety Remuneration Tribunal Contractor driver Minimum Payments Road Safety Remuneration Order 2016

Road Safety Remuneration Tribunal, (RSRT) (2014) *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014*.

Road Transport and Distribution Award

Enterprise Agreements

Toll Group – TWU Enterprise Agreement 2013-2017

Bills

Fair Work Amendment (Making Australia More Equal) Bill 2018 (Cth)

Regulation

Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth)

Model Work Health and Safety Regulation

Australian Capital Territory

Work Health and Safety Act 2011 (ACT)

Workers Compensation Act 1951 (ACT)

New South Wales

Annual Holidays Act 1944 (NSW)

Industrial Arbitration Act 1940 (NSW)

Industrial Relations Act 1991 (NSW)

Industrial Relations Act 1996 (NSW)

Long Service Leave Act 1955 (NSW)

Point to Point Transport (Taxis and Hire Vehicles) Act 2016 (NSW)

Work Health and Safety Act 2011 (NSW)

Workplace Injury Management and Workers Compensation Act 1988 (NSW)

Northern Territory

Return to Work Act 1986 (NT)

Work Health and Safety (National Uniform Legislation) Act 2011 (NT)

Queensland

Heavy Vehicle National Law Act 2012 (Qld)

Work Health and Safety Act 2011 (Qld)

Workers' Compensation and Rehabilitation Act 2003 (Qld)

South Australia

Return to Work Act 2014 (SA)

Work Health and Safety Act 2012 (SA)

Tasmania

On-Demand Passenger Transport Services Industry (Miscellaneous Amendments Act) 2020 (Tas)

Taxi and Hire Vehicle Industries Act 2008 (Tas)

Work Health and Safety Act 2012 (Tas)

Workers Rehabilitation and Compensation Act 1988 (Tas)

Victoria

Commercial Passenger Vehicle Act 2017 (Vic)

Owner Drivers and Forestry Contractors Act 2005 (Vic)

Workers Compensation Act 1958 (Vic)

Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)

Western Australia

Owner Driver (Contracts and Disputes) Act 2007 (WA)

Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010 (WA)

Workers' Compensation and Injury Management Act 1981 (WA)

International

Employment Rights Act 1996 (UK)

Working Time Regulations 1998 (UK), reg 36(1)

National Minimum Wages Act 1998 (UK), s 54(3)

Secondary Sources

Acton J (2012) 'Complementary jurisdictions: the Road Safety Remuneration Tribunal and occupational health and safety laws' (Address to the Australian Council of Trade Unions OHS/Workers' Compensation Conference, 6 September 2012, Sydney)

Adhikari S (2019) 'Old Labour Laws 'don't work in gig economy", *The Australian* (Online, 12 February 2019) <https://www.theaustralian.com.au/business/technology/old-labour-laws-dont-work-in-gig-economy/news-story/ee8e937ff27155ed823eea1359f86aec>.

Aloisi, A (2016) 'Commoditized Workers: Case Study research on labour law issues arising from a set of "on-demand/gig economy" platforms' 37(3) *Comparative Labor Law and Policy Journal* 620.

Amazon Commercial Services Pty Ltd (2020) *Submission to the Senate Standing Committee on Rural and Regional Affairs and Transport Inquiry on the Importance of a viable, safe, sustainable and efficient road transport industry.* (Canberra, ACT, Australia: Commonwealth of Australia).

Amin M (2020) 'Food delivery riders say employers not doing enough to protect them from Coronavirus', *ABC News* (Online, 4 April 2020) <https://www.abc.net.au/news/2020-04-04/food-delivery-riders-not-being-supported-in-coronavirus-response/12120480>.

Armson E (2007) '*Attorney-General (Commonwealth) v Alinta Limited*: Will the Takeovers Panel Survive Constitutional Challenge?', 29 *Sydney Law Review* 495.

Australian Bureau of Statistics (ABS) (2018) *Australian Transport Economic Account: An Experimental Transport Satellite Account 2010-11 to 2015-2016* (31 October 2018). Available at: https://www.abs.gov.au/AUSSTATS/abs@.nsf/0/3F860FAB90D16494CA258336000CF487?Opendocument (last accessed 17 January 2020)

Australian Securities and Investment Commission (ASIC) (2019) *Insolvency statistics: External administrators' reports (July 2018 to June 2019)*, Report 645, (December 2019, ASIC).

Belzer M (2011) ‘The Economics of Safety: How Compensation Affects Commercial Motor Vehicle Driver Safety’ (Paper presented at Safe Rates Summit, Canberra, 21 November 2011).

Belzer M (2018) ‘Work-stress factors associated with truck crashes: An exploratory analysis’, 29(3) *The Economic and Labour Relations Review* 289.

Belzer M and Sedo S. (2018) ‘Why Do Long Distance Truck Drivers Work Extremely Long Hours?’, 29(1) *The Economic and Labour Relations Review* 59.

Bennett L (1994) *Making Labour Law in Australia: Industrial Relations, Politics and the Law* (Sydney, Law Book Company).

Bonyhady N (2020) ‘Driver’s Dismissal embodies gig economy issues’, *Sydney Morning Herald* (Sydney, 27 May 2020).

Bonyhady N (2020) ‘Restrictions on gig economy could hurt stood-down workers: Airtasker founder’, The Age, 24 June 2020

Bonyhady N and Chung L (2020) ‘Fifth Food Delivery Driver Dies’ *Sydney Morning Herald* (Sydney, 24 November 2020).

Bonyhady, N and Rabe T (2020) ‘Rider deaths reveal risky safety practices’ *Sydney Morning Herald* (Sydney, 3-4 October 2020) 24.

Brights S and Fitzgerald A (2018) Survey conducted for the On-Demand Workers Australia

Coles-Transport Workers’ Union (2018) MOU Principles to Ensure the Safety and Fairness of On Demand Workers 23 May 2018.(copy on file with author)

Commonwealth Senate (2018) Select Committee on the Future of Work and Workers Report *Hope is not a Strategy – Our Shared Responsibility for the Future of Work and Workers*, September 2018. Canberra ACT, Australia. Commonwealth Senate, Commonwealth of Australia.

Cooney S, Howe J and Murray J (2006) ‘Time and Money under WorkChoices: Understanding the New *Workplace Relations Act* as a Scheme of Regulation’, 29(1) *University of New South Wales Law Journal* 215.

Cootes (2020) 'Steering closer' to reform’ *Launceston Examiner* (Launceston, 15 September 2020).

Cormack, L and Bonyhady, N (2020) ‘Food delivery levy proposed to pay for workers' comp for the gig economy’ *Sydney Morning Herald*, (Sydney, 17 December 2020)

Delivery Riders Alliance and Transport Workers Union (2020) Food Delivery Rider/Driver Survey

Faulkiner M, and Belzer M (2019) ‘Returns to compensation in trucking: Does safety pay?’ 30(2) *The Economic and Labour Relations Review*: 262-284.

Freedland M (2003) *The Personal Employment Contract* (Oxford University Press).

Freedland M (2006) ‘From the Contract of Employment to the Personal Work Nexus’ 35 *Industrial Law Journal* 1.

Freedland M and Kountouris N (2011) *The Legal Construction of Personal Work Relations* (Oxford University Press).

Government of Western Australia, Department of Transport (2014) *Report of the review of the Owner-Drivers (Contracts and Disputes) Act 2007* (Report, June 2014).

Gregson S and Quinlan M (2020) 'Subcontracting and low pay kill: Lessons from the health and safety consequences of sweated labour in the garment industry, 1880-1920' Labor History.

Halperin J (2011) 'Law in Books and Law in Action: The Problem of Legal Change', 64(1) *Maine Law Review* 45.

Hancock K and Richardson S (2004) 'Economic and Social Effects' in Isaac, J and Macintyre S, *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press) 139.

Hanrahan J (2020) 'Why you must be wary of food deliveries during the Coranavirus Crisis' Daily Mail (Online, 8 April 2020) < https://www.dailymail.co.uk/news/article-8199613/Uber-Eats-driver-delivers-food-attending-coronavirus-testing-clinic-Bondi.html>.

Hardy T and McCrystal S (2020) **'**Bargaining in a Vacuum? An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses', 42(3) *Sydney Law Review* 311.

Hensher D and Battellino H (1990) 'Long-Distance Trucking: Why Do Truckies Speed?' 15(2) *Papers of the Australasian Transport Research Forum* 537.

Holland-McNair, Lisa (2020) 'Rideshare Zombies Behind the Wheel' *The West Australian*, (13 January 2020).

International Labour Organisation (ILO)

(2015) Resolution on transport network companies – "Transporting tomorrow", International Labour Organisation Tripartite Sectoral Meeting on Safety and Health in the Road Transport Sector, Geneva, 12-15 October 2015, TSMRTS/2015/14.

(1998) *Declaration on Fundamental Principles and Rights at Work*

(2008) *Declaration on Social Justice for a Fair Globalisation*. Adopted by the International Labour Conference at its 97th Session, Geneva, 10 June 2008

C 87 *Freedom of Association and the Protection of the Right to Organise Convention 1948*

C 98 *Right to Organise and Collective Bargaining Convention 1949*

Constitution 1919.

Declaration of Philadelphia

Global Commission of the Future of Work, Work for a Brighter Future, ILO Geneva 2019. Adopted at the 108th Session in Geneva, 21 June 2019

Industrial Relations Commission of New South Wales in Court Session (*Beattie* P, *Sheehy* and *Sheldon* JJ)(1970) Report to the Honourable E.A Willis, Minister for Labour and Industry, on Section 88E of the *Industrial Relations Act*, 1940-1968 in so far as it concerns drivers of taxi cabs, private hire cars, motor omnibuses, public vehicles and lorry owner drivers, 23 February 1970.

Johnson S (2019) ‘Deliveroo tackles rider safety – as thousands of workers complain about being injured on the job – following the death of four Uber Eats deliverers’ *Mail Online* (Online, 16 October 2019) < https://www.dailymail.co.uk/news/article-7573137/Uber-Eats-delivery-drivers-killed-forces-Deliveroo-set-safety-panel.html>.

Johnstone R, Nossar I and Rawling M (2015) ‘Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal’, 43(3) *Federal Law Review* 397-421.

Johnstone R, McCrystal S, Nossar I, Quinlan M, Rawling M and Riley J (2012) , *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press).

Kaine M (2018) ‘Celebrations in Foodora case may be short-lived’, *Sydney Morning Herald* (Sydney, 12 November 2018).

Kaine S (2019) *A Review Of Supply Chain Auditors and Safe Work Training in the Transport Sector: A Report Prepared for TEACHO* (Report, 14 November 2019).

Kaine S and Rawling M (2010) '"Comprehensive Campaigning" in the NSW Transport Industry: Bridging the Divide between Regulation and Union Organizing', 52(3) *Journal of Industrial Relations* 183.

Karp P (2019) ‘Food Delivery bike couriers in Australia being underpaid by up to $322 a week’ *The Guardian* (Online, 19 November 2019) < https://www.theguardian.com/australia-news/2019/nov/20/food-delivery-bike-couriers-in-australia-being-underpaid-by-up-to-322-a-week>.

Kent A (2001) ‘Australia and the International Human Rights Regime’ in J Cotton and J Ravenhill (eds) *The National Interest in a Global Era: Australia in World Affairs 1996-2000* (Oxford University Press).

Khadem N (2017) ‘ATO writes to 60,000 Uber and other ride-sharing drivers asking them to get tax affairs in order’, *Sydney Morning Herald* (Sydney, 29 June 2017).

Koslowski M (2019) ‘Global tech giants ‘failing our economy’’, *Sydney Morning Herald* (Sydney, 1 August 2019).

Kudo T and Belzer M (2019) ‘The association between truck driver compensation and safety performance’, 120 (December 2019) *Safety Science* 447.

Marin-Guzman D (2019) ‘Deliveroo seeks driver safety advice’ *The Australian Financial Review* (Sydney, 15 October 2019).

McCrystal Shae (2012) ‘Organising Independent Contractors: The Impact of Competition Law’ in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation*, Hart, Oxford, 139.

McDonald P, Williams P, Stewart A, Oliver D and Mayes R (2019) *Digital Platform Work in Australia: Preliminary findings from a national survey. Preliminary Report based on research commissioned by the Victorian government* (Report, 18 June 2019).

Nossar I (2020) ‘Protecting ‘Gig Economy’ Workers Through Regulatory Innovation’ in Sheldon P (ed) *The Regulation and Management of Workplace Health and Safety: Historical and Emerging Trends* (Routledge).

Nossar I and Amoresano L (2019) *Delivering "Safe Rates" in Today's Road Transport Supply chains.* (Working Paper, International Transport Workers' Federation (ITF) 20 September 2019, 11-19) (copy on file with author).

Nossar I and Rawling M (2017) *The Australian Safe Rates Approach* (Report, Unpublished ILO archives, 2017).

Patty A (2019) 'Uber Eats Drivers 'only free to negotiate lower pay" *Sydney Morning Herald* (Sydney, 19 November 2019).

Patty A and Bonyhady N (2020) Fair Work delivers for Uber with driver ruling. *Sydney Morning Herald* (Sydney, 22 April 2020) 10.

Peetz D (2019) *The Realities and Future of Work* (Australian National University Press).

Pollman E and Barry J (2016) 'Regulatory Entrepreneurship' 90(3) *Southern California Law Review* 383

Pound R (1910) 'Law in Books and Law in Action', 44(1) *American Law Review* 12.

Price Waterhouse Coopers (2016) Review of the Road Safety remuneration system: Final Report. (Departmental document No EM16, January 2016, Department of Employment, Commonwealth of Australia).

Quinlan M (1993) 'The Industrial Relations of Occupational Health and Safety' in M Quinlan (ed) *Work and Health* (Macmillan, Melbourne, 1993)140-169

Quinlan M and Wright L (2008) *Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission* (Report, October 2008).

Rawling M and Kaine S (2012) 'Regulating supply chains to provide a safe rate for road transport workers', 25(3) *Australian Journal of Labour Law* 237.

Rawling M and Kaine S (2018) 'How to stop workers being exploited in the gig economy' *The Conversation* (Online, 5 October 2018) <https://theconversation.com/how-to-stop-workers-being-exploited-in-the-gig-economy-103673>.

Rawling M and Schofield-Georgeson E (2018) 'Industrial Legislation in Australia in 2017' 60(3) *Journal of Industrial Relations* 378

Rawling M et al (2017) *Australian Supply Chain Regulation Discovery Project: Draft Report on Road Transport Sector Regulation* (Report).

Rawling M, Johnstone R and Nossar I (2017) 'Compromising Road Transport Regulation: The Abolition of the Road Safety Remuneration Tribunal', 39(3) *Sydney Law Review* 303.

Retail World (2020) 'Woolworths Boosts Delivery Service With Uber', 1 May 2020.

Ride-share Drivers' Co-operative and Transport Workers' Union (2018) Survey conducted for Ride-share Drivers' Co-operative and Transport Workers Union, October 2018.

Ride Share Network and Transport Workers Union (2020) Ride Share Driver Survey

Riley J (2017a) 'Brand New 'Sharing' or Plain Old 'Sweating'? A proposal for Regulating the New 'Gig Economy' in: Levy R, O'Brien M, Rice S, Ridge P and Thornton M (eds) *New Directions for Law in Australia: Essays on Contemporary Law Reform* (Australian National University Press).

Riley J (2017b) 'Regulating Work in the Gig Economy' in Roennmar M, Julen Votinius J (eds), *Festskrift Till Ann Numhauser-Henning*, (Juristfoerlaget i Lund) 669.

Rodríguez D, Targa F and Belzer M (2006) 'Pay Incentives and Truck Driver Safety: A Case Study', 59(2) *Industrial and Labor Relations Review* 205.

Rouse A (2019) 'Blitz on food delivery riders working for companies like Uber Eats and Deliveroo results in more than 200 fines in five hours' *Mail Online* (Online, 28 November 2019) <https://www.dailymail.co.uk/news/article-7736745/Crackdown-sees-hundreds-delivery-riders-working-likes-Uber-Eats-Deliveroo-given-fines.html>.

Safe Work Australia (2018) *Work Related Traumatic Injury Fatalities, Australia 2017* (Report, 21 December 2018).

Sage A and Sharma V (2019) 'Uber loses $5 billion, misses Wall Street targets despite easing price war', *Reuters Online*, (Online, 9 August 2019) <https://www.reuters.com/article/us-uber-results/uber-loses-5-billion-misses-wall-street-targets-despite-easing-price-war-idUSKCN1UY2NG?feedType=RSS&feedName=technologyNews>.

Sawer G (1961) 'The Separation of Powers in Australian Federalism', 35 *Australian Law Journal* 177

Schofield-Georgeson E and Rawling M (2020) 'Industrial Legislation in Australia in 2019', 62(3) *Journal of Industrial Relations*.

Sheldon P (2008) 'What Collective Bargaining Future for Australia? Lessons from International Experience' in Riley J and Sheldon P (eds) *Remaking Industrial Relations* (CCH Australia, 2008) 235, 239-240.

Smyth J (2020) 'Australia gives 'paid pandemic leave' to casual care home staff' Financial Times (Australia, 28 July 2020).

Srinivasan R (2019) *Beyond the Valley: How Innovators Around the World are Overcoming Inequality and Creating the Technologies of Tomorrow* (MIT Press).

Stanford J (2018) *Subsidising Billionaires Simulating the Net Incomes of UberX Drivers in Australia* (Report, March 2018).

Stewart 2002 'Redefining employment? Meeting the challenge of contract and agency labour', 15(3) *Australian Journal of Labour Law* 235-276

Stewart A and McCrystal S (2019) Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker? 32 *Australian Journal of Labour Law*.

Stewart A and Williams G (2007) *Work Choices: What the High Court Said***.**

Stone Katherine van Wezel (2004) *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press).

Thornthwaite L and O'Neill S (2017) *Summary Report to the Transport Education, Audit and Compliance Health Organisation Ltd (TEACHO)* (Report, January 2017).

Thornthwaite, L and O'Neill, S (2016) *Evaluating Approaches to Regulating WHS in the Australian Road Freight Industry:* Final Report to the *Transport Education, Audit and Compliance Health Organisation Ltd (TEACHO) November 2016* (report, November 2016).

Transport Workers Union (TWU) *PB – Chapter 6 Briefing Note* (copy on file with author)

TWU (2020) Submission to Inquiry Into Impact Of Technological And Other Change On The Future Of Work And Workers In New South Wales, 14 October 2020.

TWU (2011) *Submission to the Inquiry into Opportunities to Consolidate Tribunals in NSW* (Submission to Inquiry into Opportunities to Consolidate Tribunals in NSW, NSW Legislative Council Standing Committee on Law and Justice, 25 November 2011)

Treaty of Peace between the Allied and Associated Powers and Germany (Pt XIII Labour) [1920] ATS 1.(Treaty of Versailles)

van Wanrooy B, Wright S and Buchanan J. (2009) *Who Bargains? A Report Prepared for the NSW Office of Industrial Relations* (Report, 2009).

Wheeler F (1996) 'Original Intent and the Doctrine of the Separation of Powers in Australia' 7 *Public law Review* 96.

Willis Report see Industrial Relations Commission of NSW above

Workplace Express (2020a) 'Amazon reveals details of 'Flex' but unions, employers leery.' 23 January 2020

Workplace Express (2020b) 'Bargaining go-ahead a 'big step forward' for gig workers' 23 October 2020

Contact UTS

For more information about this report, contact:

Michael Rawling
Senior Lecturer
Faculty of Law
University of Technology Sydney
E: Michael.Rawling@uts.edu.au

law.uts.edu.au

UTS Faculty of Law
PO Box 123
Broadway NSW 2007