

**SAFE RATES
SAFE ROADS**

Directions Paper



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Parliamentary Secretary's Foreword

In December 2009, the Safe Rates Advisory Group met for the first time to provide advice on the recommendations of the National Transport Commission (NTC) in their 2008 report, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*. The NTC's report advocated implementation of a system of safe payments for employees and owner drivers via establishment of a specialised body, and reinforced by appropriate chain of responsibility provisions in model road transport law.

This Directions Paper, *Safe Rates, Safe Roads*, builds on the NTC's report by presenting possible methods to give effect to the preferred approach recommended by the NTC. The Department of Education, Employment and Workplace Relations is now seeking public comment on the feasibility of this approach as one option under consideration to address the complex issues raised in the NTC's report. Any approach considered for implementation will be subject to a rigorous regulatory impact assessment, as required by the Australian Government.

I encourage all parties to make submissions to this directions paper and ask that you provide supporting examples and evidence, where possible. Comment is particularly sought from road transport industry participants, including employee and owner drivers, transport businesses, and those in the supply chain. It is acknowledged that addressing the link between rates of payment and safety in the road transport sector is a multifaceted and complex task. As such, your contributions will be critical to ensuring an appropriate and measured response.

Lastly, I would like to acknowledge the assistance of the members of the Safe Rates Advisory Group, and their independent chair, Mr Scott Chamberlain, in contributing to the development of this directions paper.

Senator the Hon Jacinta Collins

Parliamentary Secretary for School Education and Workplace Relations



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Introduction

- 1 The road transport industry is vital to the ongoing growth of Australia's economy. In 2007–2008 road transport accounted for approximately 1.7 per cent (\$1 798 million) of Australia's total gross domestic product (GDP) (\$1 037 027 million) and approximately 2.3 per cent (246 100) of total Australian employment (10 673 400).¹ Australia's freight task has increased at an annual growth rate of 7.4 per cent from 5.4 billion tonne-kilometres (tkm) in 1972 to 64.7 billion tkm in 2007² and this growth is forecast to continue.³ See Appendix 1.
- 2 In contrast, over the last 30 years road freight rates have been steadily declining.⁴ Crucial to transport being able to meet the growing freight task is further improvements in efficiency, productivity and safety outcomes in the road transport industry, including maintaining real road freight rates.
- 3 The Australian Government is committed to improving road safety for all Australians. On average, around 330 people are killed each year on Australian roads in crashes involving heavy vehicles. Of these, around 16 per cent killed are the drivers of the heavy vehicle.^{5 6}
- 4 It is important to note, that crashes involving articulated trucks declined by 4.7 per cent each year over the three years to September 2009. However, within the same period, fatal crashes involving heavy rigid trucks increased by 9.4 per cent.⁷ In addition, the *Major Accident Investigation Report 2009*, carried out by the National Transport Insurance's (NTI) National Centre for Truck Accident Research, found that semi-trailers are unduly over-represented with 57.5 per cent of major crashes, though representing 41.2 per cent of the freight task (loaded tonne/km). This compares to 43.4 per cent of the freight task carried by B-doubles with only 21.8 per cent of major accidents.⁸
- 5 Speed and fatigue are widely known to be significant factors in these everyday tragedies. The *Major Accident Investigation Report 2009* found that two of the major causes of heavy vehicle truck crashes in Australia are inappropriate speed for the conditions (27.4 per cent) and fatigue (20 per cent).⁹
- 6 Over the years, reports have linked rates of pay, conditions and methods of payment to unsafe work practices and road accidents in the heavy vehicle sector. Speed and fatigue have been identified as symptoms of the pressure for drivers to work long hours to meet schedules to earn income.¹⁰
- 7 In a joint media statement on 25 July 2008, the Australian Government announced that the National Transport Commission (NTC) was investigating and reporting on driver income and payment methods and would be making recommendations for reform. The joint media statement was issued by the three relevant Ministers: the Hon Julia Gillard MP, then Deputy Prime

¹ Bureau of Infrastructure, Transport and Regional Economics (BITRE), *Australian Transport Statistics Yearbook 2009*

² BITRE Interstate freight in Australia Report 120, April 2010

³ The *Interstate freight in Australia report* forecasts growth to continue at an average of 3.8 per cent per annum from 70.4 billion tkm in 2008 to 159.1 billion tkm in 2030.

⁴ BITRE Freight Rates in Australia, 1964–65 to 2007–2008. Report suggests that between 1980–1981 and 2000–2001 real road freight rates declined by 22 per cent, relative to average consumer prices. Note that over the seven years since 2000–2001, real road freight rates have increased by 9 per cent, although the report attributes this increase to an increase in diesel fuel prices.

⁵ National Road Transport Commission (2003). *National Heavy Vehicle Safety Strategy 2003–2010*

⁶ Note that this data does not establish that the heavy vehicle driver was the cause of all accidents involving heavy vehicles.

⁷ BITRE Fatal heavy vehicle crashes Australia, July–September 2009

⁸ National Transport Insurance (National Centre for Truck Accident Research), *Major Investigation Report 2009*, p. 3

⁹ *ibid.*, p. 9

¹⁰ National Transport Commission Report, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, 2008

Minister and Minister for Employment and Workplace Relations; the Hon Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government; and the Hon Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy.

- 8 In October 2008, the NTC finalised its report with the assistance of Professor Michael Quinlan and Hon Lance Wright QC. The report, *Safe Payments Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry* (the NTC Report), found there was a link between driver remuneration and safety outcomes in the heavy vehicle industry.¹¹

The NTC Report recommended that the Australian Transport Council (ATC):¹²

- a) recognise that payment rates and methods create an incentive for, or encourage unsafe, on-road behaviours such as speeding, fatigue and use of illicit substances, which contribute to poor safety outcomes in the trucking industry;
- b) acknowledge that this link should be addressed through regulatory intervention;
- c) recognise that safe payments for truck drivers requires a whole of government approach due to linkages with transport law, workplace relations law and independent contractors/small business law;
- d) endorse the policy proposal in Option 3: implementation of a framework for the establishment and maintenance of safe payments for employees and owner drivers and amendments to model transport laws with respect to chain of responsibility obligations for safe payments; and
- e) request the federal Minister for Infrastructure, Transport, Regional Development and Local Government progress the issue in consultation with his Commonwealth Ministerial colleagues and report back to the ATC in May 2009.¹³

- 9 ATC considered the NTC Report and advice about a national framework for setting and maintaining safe payments systems in the road transport industry, including safe rates for owner drivers and employees. The potential flow-on effects from payment rates and methods to unsafe on road behaviours and poor safety outcomes in the trucking industry were noted. Ministers agreed that there is a case for investigating a whole of government regulatory approach to address this issue.

- 10 To assist in responding to the NTC Report, the Australian Government asked the Department of Education, Employment and Workplace Relations (the department) to consult with industry stakeholders and develop models for possible reform in the industry, building on the recommendations in the NTC Report. This paper sets out models for implementing the NTC recommendations, with the aim of addressing safety throughout the industry by developing legislative and other strategies designed to put in place pay rates and methods that result in safer work practices in the transport industry. These strategies, which cover both employees and owner drivers, aim to produce a safer industry, greater regulatory efficiency and more certainty for the transport industry.

¹¹ *ibid.*, p. 47

¹² The Australian Transport Council (ATC) was established in June 1993 to provide a forum for federal, state, territory and New Zealand ministers to consult and provide advice to governments on the coordination and integration of all surface transport and road policy issues at a national level [see www.atcouncil.gov.au for further information]

¹³ NTC Report, 2008, p. 46

- 11 The department acknowledges the input and support of the Safe Rates Advisory Group (SRAG) and its Chair, Mr Scott Chamberlain, in the development of the models in this paper.
- 12 The SRAG was formed to provide expert industry advice to the department. This advice has been used to develop a policy paper addressing the link between safety and payments in the road transport industry, as identified in the NTC Report. Meetings provided a forum for discussion on key policy and practical issues. The terms of reference and membership of the group are at Appendix 2.

The case for reform

- 13 The road transport sector is among the most dangerous industries to work in. The incidence of occupational injury in the industry is one of the highest in Australia, when compared to other industry sectors, including those involving manual and semi-skilled occupations.¹⁴ Australian Safety and Compensation Council (ASCC) statistics for 2007–2008 reported that the transport and storage industry had the highest number of compensated fatalities (68) of any industry, 52 of which were in the road freight industry. The transport and storage industry also recorded the highest fatality-incidence rate of 15.1 per 100,000 workers. This was followed by the agriculture, forestry and fishing industry, with a compensated fatality incidence rate of 12.6, and the construction industry with 5.6.¹⁵
- 14 Though safety outcomes within the transport sector remain an issue and fatality rates remain high, it is important to note that reform is occurring. Over the past 50 years, road-crash death rates have significantly decreased. In 1950, the death rate per 100 000 people was 20.1 and the death rate per 10 000 registered vehicles was 11.8. In 2009 the death rate per 100 000 people was 6.6 and the death rate per 10 000 registered vehicles was 1.0.¹⁶

What causes or encourages unsafe outcomes in the road transport industry?

Economic, commercial and industrial factors

- 15 In the NTC Report, Professor Michael Quinlan and the Hon Lance Wright QC found the existence of the link between rates and methods of remuneration and poor safety outcomes, concluding that economic factors create an incentive for truck drivers to speed, work long hours and use illicit substances to stay awake. In addition, commercial and industrial factors (including, for example, external time pressures imposed by members of the supply chain) can encourage unsafe driving practices.¹⁷ A summary of the recommendations of the NTC Report is available at Appendix 3.
- 16 As the NTC Report determined, these economic, commercial and industrial factors include:¹⁸
 - low rates of pay
 - incentive-based payment methods (such as per kilometre or per trip)
 - unpaid working time, loading or unloading, queuing and demurrage
 - unreasonable demands that encourage or give drivers an incentive to breach laws, leading to poor safety outcomes
 - back-loading (highlighted as a significant problem for owner drivers as they are paid significantly less on the ‘back leg’ of a trip).
- 17 Some stakeholders react to the arguments included in the NTC Report by highlighting that significant improvements have occurred following implementation and enforcement of the chain of responsibility laws.

¹⁴ *ibid*, p. 5

¹⁵ Safe Work Australia, *Compendium of Workers' Compensation Statistics Australia 2007–2008*

¹⁶ BITRE, *Road Deaths Australia*, March 2010, pp. 6 & 8

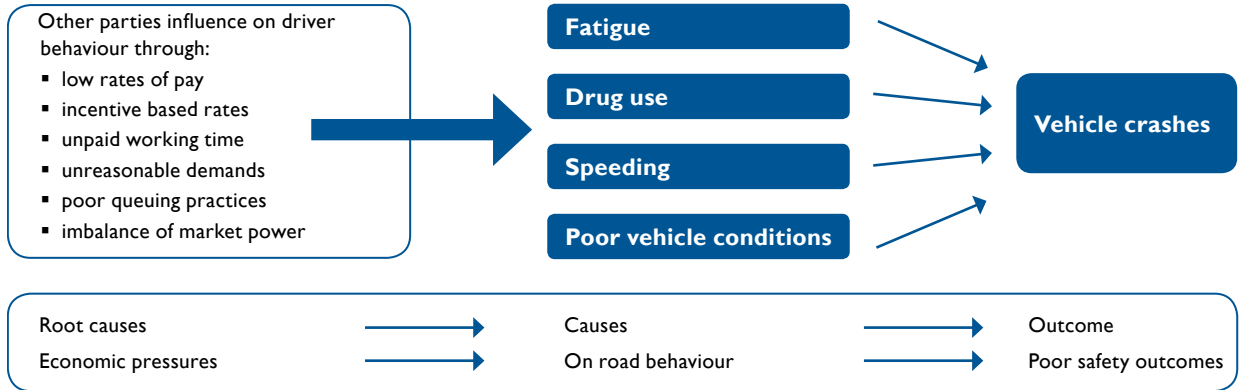
¹⁷ NTC Report, 2008, p.19

¹⁸ *ibid*, p. 14

18 The following figure is taken from the NTC Report and describes the link between safety outcomes and economic pressures.

Link between safety outcomes and economic pressures¹⁹

The NTC considers that this is a tripartite link:



On-road factors

19 There are a number of on-road factors that can contribute to the poor safety outcomes in the road transport industry, including:²⁰

- fatigue
- speeding
- drug use
- poor vehicle maintenance
- inattention
- road or environmental conditions
- lack of adequate rest stops
- the performance of other drivers.

20 Fatigue is one of the most significant risk factors in terms of heavy vehicle safety, with contributing factors identified as:²¹

- driving long distances
- overnight shifts
- industry payment practices
- historical work practices.

The unique nature of the road transport industry

21 Truck drivers have a unique work environment. Their workplace is mobile and interacts with public spaces shared by other motorists, the general public, pedestrians and other commercial road users. So, safety in the road transport industry has a direct and broader impact on the community when compared to safety issues in other workplaces, like an office, factory or construction site. Because of the interaction of heavy vehicles and public spaces, the transport industry has a unique and higher burden than other industries in relation to safety outcomes.²²

¹⁹ *ibid*, p. 19

²⁰ *ibid*, p. 7

²¹ NTC Report, 2008, p. 7

²² *ibid*, p. 5

22 The NTC Report states that:²³

The road transport market is a highly-competitive market, in that a limited number of operators compete for a defined amount of work. However, in direct contrast to other markets where that situation would lead to drivers being able to command higher rates due to the lack of availability of other services, the transport market operates in the opposite way, in which competition causes rates to fall rather than rise.

23 There are several factors that contribute to owner drivers being ‘price takers’ rather than ‘price setters’:²⁴

- length of the sub-contracting chain
- prevalence of ‘undercutting’ to win work
- poor business practices
- relative ease of entering industry for owner drivers (but high capital costs)
- tendering processes historically not addressing the safety of the transport task
- limited negotiating ability of owner drivers and pressure of customers in a strong bargaining position
- small number of large clients
- presence of a few, large dominant transport companies with the ability to make efficiency and price gains through purchasing power.

24 In an environment of fierce competition among operators and cost containment and reduction pressures from large and powerful clients, the result has been extensive use of subcontracted owner drivers at reduced and questionable, unsustainable rates. This has placed pressure on the payment of employed drivers, leading to widespread use of trip per kilometre-based rates. There are also problems with lack of compliance with awards and agreements, especially among smaller operators.²⁵

What has been done about the problems?

25 The Australian, state and territory governments have introduced significant reforms to improve safety outcomes in the industry. These reforms have used a systems-based approach, with a mix of behavioural, infrastructure and regulatory measures to achieve safer vehicles, roads, drivers and companies.

26 New technologies in modern heavy vehicles have increased their safety performance, providing help for drivers to manage trips and comply with regulation. Governments are also investing in road network improvements, with positive impacts on road safety. Accreditation and performance standards are being introduced to encourage vehicle innovation; enhance vehicle productivity and safety; and reduce the number of trucks on the roads to meet the transport task.

27 These advances have been changing the on-road behaviour of drivers and other responsible parties, with laws addressing speeding compliance, driver fatigue and other related offences. Chain of responsibility laws hold those parties that make demands contributing to breaches—such as setting unrealistic schedules, which could lead to speeding—legally accountable.

28 Participants in the road transport industry have also introduced their own measures, independent of government regulation. These have been proactive attempts to improve safety outcomes within the industry, despite significant commercial risks.²⁶

29 Information on the current regulatory legislative framework can be found at Appendix 4.

²³ *ibid*, p. 22

²⁴ *ibid*, p. 22

²⁵ *ibid*, p. 29

²⁶ For example, the Australia Logistics Council’s Retail Logistics Supply Chain Code of Conduct

- 30 These reforms, both led by government and industry, have been important in addressing some on-road behaviours. If the occupational health and safety of the transport industry is to be significantly improved, however, a range of additional measures will be needed.
- 31 The NTC Report found that:²⁷
- Some jurisdictions have sought to address some of these root causes through regulation aimed at dealing with the unequal bargaining power and information asymmetry faced by owner drivers. However, these reforms do not apply nationally and do not tackle issues faced by employee drivers who are an integral and interconnected part of the same market.*
- Despite a comprehensive enforcement system to require positive steps from chain of responsibility parties in regards to some of the underlying issues, allowing the market to impose unsustainable payment levels on employees and owner drivers at the same time as permitting payment systems which reward drivers who drive fast, or work long hours, are fundamentally at odds with other nationally agreed safety reforms.*
- 32 Some stakeholders, including the Australian Logistics Council, have suggested that recent initiatives, such as the chain of responsibility arrangements, if uniformly adopted and allowed to mature, may be sufficient to address some of the issues raised in the NTC Report. However, there is no current binding obligation on states and territories to introduce the reforms. The NTC Inter-Governmental Agreement obliges jurisdictions to advise the ATC where they make decisions not to adopt agreed reforms. Governments can vary from the agreed reform for “policy or practical constraints”.²⁸
- 33 The scope and number of regulators, the potential for overlap, and sometimes contradicting rules and standards, can hinder development of a consistent unified national system. A single national regulator administering national heavy vehicle laws has been agreed as a means to address this overlap and is scheduled to be in place from 1 January 2013.
- 34 According to some stakeholders, the diverse nature of the road transport industry means that establishment of the single national regulator for transport laws is unlikely to adequately address all the pressures that result in poor safety outcomes in the heavy vehicle industry. Instead, the industry may benefit from having one agency responsible for coordinating existing elements of the regulatory framework, including transport, employment, commercial arrangements and health and safety.
- 35 No national approach has been taken to address safe rates and payment methodologies for owner drivers. The NTC Report examined the existing systems implemented in two jurisdictions, which set guideline rates. The NTC Report supported findings of Professor Michael Quinlan and the Hon Lance Wright QC, who found that:²⁹
- ... attempts to set minimum rates for owner drivers on a voluntary or consensual basis, while they may exert some influence, have repeatedly failed since the late 1970s because they lacked the capacity to ensure meaningful coverage and compliance (inevitably breaking down under competitive pressure).*

²⁷ *ibid*, Executive Summary

²⁸ National Transport Commission, Inter-Governmental Agreement 2003, subclause 12.2. *However the Parties acknowledge that, in exceptional circumstances, a Proposed or Agreed Reform, or aspects of a Proposed or Agreed Reform, may not be able to be implemented by a Party, for example due to policy or practical constraints. In order to provide clarity to the transport industry and the community as a whole, where a Party:*
 (a) *does not intend or is unable to implement a Proposed or Agreed Reform (in full or in part); or*
 (b) *subsequently proposes or implements changes to an Agreed Reform;*
the relevant Minister will advise the Commission and the Council of the reasons for the decision at the earliest practicable opportunity.
 For example, the Western Australian Government has decided not to implement the National Driving Hours Regulations and has advised the ATC accordingly. Instead, Western Australia manages fatigue under its *Workplace Health and Safety Act 1995*.

²⁹ NTC Report, 2008, p. 43

- 36 The NTC Report also noted that a guideline system is limited as it only applies to the hirer and driver and not the client. It relies on an owner driver coming forward as a complainant through the dispute resolution system and does not include any enforcement mechanisms. Critically, a voluntary system is less likely to be applied consistently, increasing the risk that current issues will continue, particularly given the poor bargaining position of owner drivers.
- 37 The NTC Report provides further support for an option that addresses rates for both employees and owner drivers. A review of one arrangement in isolation of the other would introduce further inconsistencies and competition issues between the streams. The NTC Report noted that 'the NSW Chapter 6 system currently in place has that capacity, and there remains a healthily competitive market system for short haul drivers.'³⁰

What is the purpose of this Directions Paper?

- 38 The Directions Paper sets out practical national models for legislation covering employees and owner drivers working in the transport industry. These models aim to address the impact of pay rates and methods on safety in the industry. Having consulted extensively with the SRAG, the department is now seeking the views of industry and stakeholders on proposed models and any complementary measures that stakeholders may wish to propose.
- 39 The Directions Paper includes a series of questions to help provide feedback in response to this paper.
- 40 This paper also recognises that a great deal of research and work has already been undertaken in this field. The paper does not intend to go over that ground again, but use it as a platform to develop models. Additional information is available in the paper's attachments, including the current legislative framework, and other systems already being used to improve industry standards.
- 41 Feedback on the Directions Paper will be used to inform a regulatory and economic impact assessment, which is required by the Government before any major decisions are made.

How can you contribute?

- 42 The department is calling for feedback on the models canvassed in this paper. This feedback will be used to inform the development for Government consideration of the best structure and content of a national framework covering employees and owner drivers in the road transport industry.
- 43 The due date for feedback is 28 January 2011. Any feedback received after the due date will not be taken into consideration.
- 44 Your views on the issues raised in this paper are important to ensure that the framework developed to address current methods and rates of pay, and ultimately safety in the road transport industry, is effective and responsive to the needs of both the community and industry.
- 45 You can provide your comments as an individual or you may wish to contribute to a joint feedback paper through your employer or union organisation, professional association, safety group or community forum.

³⁰ NTC Report, 2008, p. 44

Feedback may be lodged by post or email:

Mail: Safe Rates Secretariat
Workplace Relations Policy Group
LOC CI48CW3
Department of Education, Employment and Workplace Relations
GPO Box 9880
CANBERRA ACT 2601

Email: srsecretariat@deewr.gov.au

- 46 An official cover sheet must be attached to, or sent with, all written feedback. The cover sheet may be downloaded from www.deewr.gov.au/saferatessaferoads.
- 47 Once your feedback is received, an acknowledgement will be sent to confirm receipt.

How will feedback be used?

- 48 All written feedback will be treated as a public document and placed on the department's consultation website.
- 49 All feedback will be subject to the *Freedom of Information Act 1982*.
- 50 If you wish to provide any information on a confidential basis, you should contact the Secretariat and discuss your feedback prior to lodgement.
- 51 Unless you advise us that you want your feedback to be confidential, your feedback may also be summarised or cited in materials produced by the department.

What happens after the public comment period closes?

- 52 The department will review and analyse all the written feedback that it receives.
- 53 In addition to the feedback received, the department will use a range of material in developing its recommendations to the Minister. This includes relevant Australian and international research and findings and recommendations from recent reviews.

Your opportunity

- 54 This process provides all members of the Australian community—particularly owner drivers, employees, employers, their respective organisations, other industry participants and regulators—with an opportunity to contribute to improving industry safety through a national framework that covers owner drivers and employee payment methodology and practices.

Enquiries

- 55 You are welcome to contact the department with any enquires about your feedback. Please direct any enquires to the department's Safe Rates Team at:

Email: srsecretariat@deewr.gov.au

Phone: (02) 6240 0933

Providing feedback

56 Below are a number of questions prompting feedback on specific issues on which the department is interested in hearing your views. Please keep these in mind as you read through and respond to this Directions Paper. Your feedback does not have to be limited to the questions. Comment on any other matters that you believe should be considered is welcome. Your written feedback should, wherever possible, include evidence and examples to justify your position on each issue.

- a) In the case for reform, are there any additional factors relating to payment systems that impact detrimentally on safety outcomes?
- b) What definition of 'owner driver' should be used for this national framework?
If a tribunal is established, what other definitions would be needed?
(see Appendix 5 for further information about owner driver definitions currently used in other settings).
- c) If a tribunal is established to set safe payment/payment methodologies, what would you anticipate to be the effect on safety under each model for:
 - owner drivers
 - employee drivers
 - the community?
- d) If a tribunal is established, what are the potential financial impacts for:
 - owner drivers
 - employee drivers
 - fleet owners and transport companies
 - others in the supply chain, such as suppliers and distributors
 - the community and the Australian economy?
- e) If a tribunal is to be established, are there any special arrangements needed:
 - to transition a particular sector or sectors within the industry to the new arrangements as a priority. That is, do some sectors require more urgent attention than others?
 - to address issues in particular sectors of the industry, for example, long haul/heavy vehicle or cash in transit
 - for industry participants, including owner drivers, employee drivers, small and large fleet owners, transport companies, and others in the supply chain?
- f) What scope or powers should a tribunal have to address the link between safety and payment/payment methodologies? What expertise would the members of a tribunal need to make sure that the link is addressed? How could a tribunal make sure the relevant expertise is available?
- g) Should a tribunal have broad powers to conciliate and arbitrate disputes involving road transport operators? How will these powers impact on owner drivers, employees, fleet operators and others in the supply chain? Are there other ways to effectively settle disputes in the road transport industry?
- h) Would coordinating regulatory responses across all levels of government be a useful complementary measure? If yes, who would be most appropriate to assume responsibility for this coordination role?
- i) Are there any other suggestions to address the link between safety and payment methods more effectively than the way outlined in this paper?

Implementing a framework for the establishment and maintenance of safe payments for employees and owner drivers

- 57 This paper canvasses possible ways of implementing a framework for the establishment and maintenance of safe payments for employees and owner drivers and amendments to model transport laws with respect to chain of responsibility obligations for safe payments, as recommended in the NTC Report. Three differing models of a tribunal are set out, all of which deal with safety and rates of pay. A tribunal could also settle disputes by including obligations with respect to rates or safe payments throughout the supply chain.
- 58 The following five principles were agreed by the SRAG and used to develop the framework outlined below. A tribunal must:
- provide national consistency
 - at the same time, consider employees and owner drivers, as they compete for, and perform, the same tasks
 - review pay rates and related conditions with safety at the same time
 - include the supply chains, which apply economic pressure, and also have the resources to adjust the way the supply chain operates to deal with safety issues
 - be the single decision-maker on pay/payment methodologies and safety in the road transport industry.
- 59 The three models of tribunal are:

- A new specialist tribunal with power to make orders regarding safe rates and related terms in the road transport industry (Specialist Tribunal)

- 60 Under this model a new Specialist Tribunal for road transport would be established under transport legislation. The Specialist Tribunal would be an independent statutory body.

- A safe rates panel within Fair Work Australia with power to make orders regarding safe rates and related terms in the road transport industry (Safe Rates Panel)

- 61 Another approach to establishing a tribunal could be setting up a Specialist Tribunal under the *Independent Contractors Act 2006* for owner drivers, which would operate alongside Fair Work Australia and the *Fair Work Act 2009* for employees in the road transport industry.

- 62 The Safe Rates Panel would consist of members drawn from Fair Work Australia sitting concurrently as two separate bodies, administering two separate sets of powers—the powers for employees drawn from the *Fair Work Act 2009* and for owner drivers from the *Independent Contractors Act 2006*.
- 63 The Safe Rates Panel could, for example, be a five-member panel, headed by the Fair Work Australia president, and including two Fair Work Australia members and two industry representatives. The industry representatives could be part-time appointments to Fair Work Australia.
- 64 This model would facilitate concurrent treatment of owner drivers and employee matters through a structure consistent with the current legislative approach to employees and independent contractors (the *Fair Work Act 2009* and the *Independent Contractors Act 2006*).

c) Extending the Fair Work Act 2009 to owner drivers, with Fair Work Australia empowered to make orders regarding safe rates and related terms in the road transport industry (Outworker Model)

- 65 This approach would extend the current framework in place for independent contractor outworkers in the textile, clothing and footwear industry to owner drivers. See Appendix 6.
- 66 Owner drivers would be covered by those parts of the *Fair Work Act 2009* that apply to outworkers and Fair Work Australia would be empowered to bring owner drivers within the award system (Outworker Model).
- 67 In addition, Fair Work Australia would be empowered to establish and maintain rates of pay and safe payment methodologies for employees in the road transport industry. The *Fair Work Act 2009* would need to be amended to allow greater scope to include terms of safe payment systems.

Key features of a tribunal, such as the Specialist Tribunal, the Safe Rates Panel or Fair Work Australia

Jurisdiction

- a) Decisions have a binding effect on employers, employees, owner drivers, clients and other industry participants across the Australian road transport industry.

Safe rates for employees

- b) Powers to set and maintain safe payments and payment methodologies for employees, taking into account health and safety implications.
- c) Decisions binding on employers, employees and clients across the road transport industry.

Safe rates for owner drivers

- d) Powers to set and maintain safe payments and payment methodologies for owner drivers, taking into account health and safety implications.
- e) Capacity to set different rates for different industry sectors and different rates for different truck types and configurations within the same industry sector.
- f) Decisions bind industry participants in the supply chain, as well as owner drivers across the road transport industry.

Supply chain practices

- g) Subject to constitutional limitations, decisions about matters, including the payment of mandated safe rates of pay, setting accreditation requirements for industry participants, chain-of-responsibility measures (for example, record keeping and safe driving plans), apply to others in the transport supply chain, as necessary.

Dispute settlement

- h) Parties seek assistance to resolve disputes about safe payments and payment methodologies.

Activation

- i) Parties, such as the tribunal itself, registered organisations, other organisations by leave with suitable interest, commence proceedings.

Education, compliance and enforcement

- j) The legislation is enforced by the Fair Work Ombudsman.
- k) Information and advice provided to employers, employees and owner drivers, as well as others within the supply chain, about compliance with the arrangements.
- l) Resources developed for use within the industry, such as model contracts for owner drivers, as well as researching and evaluating initiatives.

68 All three models would involve interaction with other legislative frameworks and this would require resolution. This legislation includes the *Fair Work Act 2009*, the *Independent Contractors Act 2006* and the *Trade Practices Act 1974*, as well as occupational health and safety (OHS) laws of the states and the Australian Government.

69 The principles common to each of the models are discussed in greater detail below.

Jurisdiction

- 70 Decisions of the Specialist Tribunal, Safe Rates Panel or Fair Work Australia would have a binding effect on employers, employees, owner drivers and clients across the Australian road transport industry. All tribunal models would also have the power (subject to constitutional limitations) to bind other industry participants in the supply chain, as well as owner drivers.
- 71 All three models would establish mechanisms to ensure that minimum safe rates, payment methodologies and related conditions exist and are maintained for both employees and owner drivers. These may involve requiring planning systems to be in place for the performance of work in a safe and legal manner (for example, safe driving plans). Under each model, the tribunal would also be empowered to inquire into and address practices adversely affecting the way work is performed in the road transport industry (for example, loading practices).

- 72 Under each model, when exercising its powers, a tribunal would take the following matters into consideration:
- uniformity of safety outcomes and minimise duplication with other laws affecting road safety outcomes
 - the economic influence of the various actors within the supply chain, and their relative ability to ensure that employees and owner drivers have safe payments and payment methodologies and related conditions, and
 - consistency between industrial instruments, such as awards and agreements, and other safe rates' determinations of the tribunal.
- 73 If the Outworker Model is adopted for owner drivers, the current extensions applying to contract outworkers could be replicated for owner drivers. Fair Work Australia would be able to extend minimum terms and conditions in the relevant modern award to owner drivers, as well employees.
- 74 The tribunal could be required to make recommendations to relevant ministerial councils if there is an issue requiring a broader government response, such as transport or OHS laws.

Safe rates for employees

- 75 A Specialist Tribunal or Safe Rates Panel would also have the ability to consider and, if necessary, adjust, the amount of pay in industrial instruments by reference to the interaction between take-home pay and driving hours. This capacity would be of particular importance if the Specialist Tribunal or Safe Rates Panel forms the view that improving safety in a particular sector means reducing the maximum driving hours.
- 76 If the Outworker Model is used, Fair Work Australia would be empowered to establish and maintain rates of pay and safe payment methodologies for employees in the road transport industry. The *Fair Work Act 2009* would need to be amended to allow greater scope to include terms of safe payment systems.
- 77 Fair Work Australia would also consider related issues. Fair Work Australia would be able to vary relevant modern awards as required to include the determined safe rates clauses and supply chain obligations. The *Fair Work Act 2009* would need to provide a system enabling recovery of unpaid contracts up the supply chain. This would ensure the recovery of unpaid minimum rates from those who do not take reasonable steps to ensure they are engaging compliant operators.
- 78 For example, Fair Work Australia currently has broad scope to include terms in modern awards dealing with outworkers. Most notably, terms deal with chain-of-responsibility arrangements, registration of employers, employer record keeping and inspection to be included in modern awards.
- 79 Responsibility for making modern awards for employees in the road transport industry may need to be established in the legislative framework for the Specialist Tribunal or Safe Rates Panel and, accordingly, amended in the *Fair Work Act 2009*.

Safe rates for owner drivers

- 80 All three models would see a tribunal have the power to enquire into, establish and maintain rates of pay and payment methodologies and related conditions, which do not compromise safety (that is, safe rates) for owner drivers in the road transport industry. All models would need to provide a tribunal with the capacity to set different rates for different industry sectors and different rates for different truck types and configurations within the same industry sector.
- 81 Safe rates would be for a Specialist Tribunal or Safe Rates Panel to consider as the minimum rate necessary for an owner driver to recover costs and earn at least the equivalent, relevant award wage, while driving reasonable and safe hours. The labour rate would be set with reference to the relevant safe rate for employee drivers. In all cases, the labour component of any safe rate for owner drivers would be derived from the rates and conditions in the relevant transport industry modern award.
- 82 Safe rate determinations for owner drivers would (subject to constitutional limitations) be binding on all road transport industry participants throughout the supply chain (that is, consignors, consignees, freight forwarders etc.).
- 83 Owner drivers would have protection against adverse action taken because of a workplace right. For example, an adverse action could be contract termination because the owner driver refused to work in an unsafe manner.
- 84 If the Outworker Model is used, the *Fair Work Act 2009* would have to be amended to extend coverage of the Act to owner drivers and industry participants in the road transport supply chain, in the same way independent contractor outworkers in the textile, clothing and footwear (TCF) industry and outworker entities are covered.
- 85 This model would enable the applicable modern award for employees in the road transport industry to contain owner driver terms. This would ensure minimum contract rates and conditions for owner drivers would be sufficient to cover operating costs and earn at least the equivalent minimum award wage, while driving reasonable hours in a safe manner.
- 86 Fair Work Australia could also have broad scope to include other terms in the modern awards dealing with truck drivers, such as chain-of-responsibility arrangements, employer registration, employer record keeping and inspection. As noted above, the Act would need to provide a system enabling recovery of unpaid contracts up the supply chain.
- 87 In the Outworker Model, owner driver terms could also include 'employment' entitlements, for example, minimum wages and entitlements equivalent to the National Employment Standards (NES).³¹

³¹ For outworker terms, see section 140 of the *Fair Work Act 2009*.

Safe rates within the supply chain

- 88 In order to maintain the integrity of the safe payments system for employees and owner drivers, under the three models, a tribunal would have the power to grant rights and establish and maintain obligations on others within the supply chain consistent with their economic influence within the chain.
- 89 In this regard, a tribunal's powers would include the scope to make orders with respect to:
- taking reasonable steps to ensure that companies engaged to provide transport services are 'safe' and are engaged on terms that make it possible to pay safe rates
 - developing 'safe rates' accreditation requirements for industry participants; (refer to Appendix 7 for further information)
 - implementing safe driving plan obligations
 - codifying chain of responsibility arrangements and obligations, including rates and safety obligations on all entities in the chain, and
 - establishing record keeping obligations.
- 90 A tribunal should have the capacity to determine the way it carries out its functions.

Safe rates agreement ratification function

- 91 In addition to ensuring minimum safe rates for owner drivers across the industry or industry sectors, a Specialist Tribunal or Safe Rates Panel would have the flexibility to ratify single company agreements regarding safe rates and payment methodologies. A Specialist Tribunal or Safe Rates Panel could only ratify agreements if satisfied that owner drivers affected would be better off overall and safer when compared with the relevant sector or industry standard established by the tribunal or panel.
- 92 If the Outworker Model was used, agreements would be based on terms and conditions set out in modern awards or minimum payment orders, as issued by Fair Work Australia, ensuring agreements adhere to safe rates and safe payment methodologies. Terms and conditions would be those set out in the relevant modern award.

Establishing and maintaining safe competition

- 93 The powers established for a tribunal under each model would be designed and exercised to ensure that competition does not undermine safety. It would do this by focusing on establishing and maintaining safe minimum rates and related conditions for employees and owner drivers, and by ensuring that all parties in the transport contract supply chain have the appropriate level of responsibility to ensure that those rates and related conditions are provided. This task would not include the power to set prices paid by customers to transport companies.
- 94 While a Specialist Tribunal or Safe Rates Panel must ensure that pay and payment methodologies relating to owner drivers do not provide an incentive to drive unsafely, the tribunal or panel would not apply employment-specific entitlements to owner drivers other than by costing them into the labour component of the safe rate to be established. For example, the NES applicable to employees will not apply to owner drivers.
- 95 However, if the Outworker Model is adopted, Fair Work Australia would be able to set employment-like terms and conditions for owner drivers in the relevant modern award, including equivalents to the NES. However, existing bargaining and industrial action provisions of the *Fair Work Act 2009* would not apply to owner drivers.

Dispute settlement function

- 96 A tribunal could have dispute settlement functions.
- 97 A tribunal would be able to settle disputes regarding matters within its jurisdiction through conciliation and mediation, including matters involving maintenance of safe rates of pay, payment methodologies and related conditions.
- 98 In conciliating a dispute, a tribunal would be able to direct a third party, such as another member of the supply chain, to attend dispute settlement proceedings, if it is satisfied that the third party exercises a significant degree of control over the terms and conditions relevant to the dispute.
- 99 If all parties to a dispute consent, a tribunal could settle disputes by arbitration.
- 100 Where consent for arbitration is not given to the tribunal, parties would be able to enforce their rights and obligations in the courts, including through the small claims proceedings. This would include claims that a party has breached an order of the tribunal or breached general protection laws designed to ensure industry participants are not treated adversely for refusing to engage in unsafe practices or for possessing or exercising rights under the legislation.
- 101 Subject to limits in the Constitution concerning the exercise of judicial power, the Tribunal could settle any such dispute by arbitration where the parties to the dispute consent to this occurring. Compulsory arbitration could also occur in relation to owner driver contacts with respect to unfairness that has the potential to undermine safe rates and conditions in the industry or safety on public roads.
- 102 If the Outworker Model was used, enforcement of modern award terms dealing with owner drivers could also be through the small claims proceedings of the courts. Currently, the Fair Work Ombudsman can initiate proceedings about breaches involving outworkers and industry participants could be ordered by eligible state or territory courts to pay amounts (including interest) to, or on behalf of, owner drivers if such amounts were payable under a modern award and were not paid in breach of a civil remedy provision.

Activation of a tribunal's powers

- 103 All three models enable the relevant body to activate its powers on its own motion.
- 104 If the Outworker Model is adopted, a 'special' review process would need to be initiated, so the modern awards included terms relevant to owner drivers. Once the modern award is updated, issues and maintenance could be dealt with by the current system for varying awards as set down in the *Fair Work Act 2009* (sections 157 and 158).
- 105 In all models, the relevant registered industrial organisations (being organisations registered under the *Fair Work (Registered Organisations) Act 2009* with coverage of persons falling within the scope of the proceedings or the proposed orders) and the responsible minister would have some rights to appear in any proceedings and have the capacity to initiate proceedings before a Specialist Tribunal, Safe Rates Panel or Fair Work Australia.
- 106 Other organisations, companies and persons, if affected by the proposed orders, could make application to a Specialist Tribunal, Safe Rates Panel or Fair Work Australia to appear in proceedings on the basis of having a suitable interest in the relevant proceedings.

Compliance and enforcement

- I07 The legislation would be enforced by the Fair Work Ombudsman.
- I08 The Fair Work Ombudsman would be given power to investigate breaches of the Specialist Tribunal, Safe Rates Panel or Fair Work Australia orders and initiate proceedings if a breach has occurred.
- I09 All models include the right of registered organisations to investigate and take action in respect of breaches, or suspected breaches, of the Specialist Tribunal's orders or those of the Safe Rates Panel under the establishing legislation, in a manner similar to the *Fair Work Act 2009*.
- I10 Under the Outworker Model, it is envisaged that registered organisations representing owner drivers may have rights of entry to investigate suspected breaches of the legislation.
- I11 Enforcement powers and rights would need to be appropriately adapted to the supply chain context.

Implementation considerations

- I 12 There are a number of broad implementation issues, which are consistent across the three models, and should be considered.

Constitutional considerations

- I 13 Any legislation to implement one of the three options described in the main body of the paper would need to be supported by appropriate heads of Commonwealth constitutional power.
- I 14 The corporations power of the Constitution could support a regulatory framework for owner drivers in respect of constitutional corporations (that is, trading, financial and foreign corporations). Other powers including the trade and commerce power and the territories power may also need to be considered.
- I 15 For example, the framework could regulate aspects of owner driver relationships where:
- a constitutional corporation is a member of the supply chain
 - an owner driver, principal or client is incorporated in a territory or is based in a territory, or
 - they involve interstate trade.
- I 16 All states and territories, but particularly those which have legislative regimes in place for owner drivers, will need to be involved with any proposed national regulation of owner drivers.

Legislation

- I 17 The models canvassed in this paper all require amendment of current laws, and possible introduction of new legislation particularly to support a new Specialist Tribunal. Consultation on the proposed policy option will need to occur. Jurisdictional agreement may also be needed including, where possible, agreement to develop a Commonwealth regulatory scheme and common transitional arrangements.
- I 18 The Australian Government also requires rigorous regulatory and economic analysis on the policy approach agreed with jurisdictions to address unsafe rates. This analysis will be used to develop a regulation impact statement, as required by the Government for all legislative proposals. In particular, the Government will need to assess the potential impact of safe payment and payment methodologies on all industry participants. In addition, it will have to carefully assess whether there will be an impact on other sectors of the Australian economy.

Resourcing

- I 19 Each of the options presented involve establishing a new body, or a specialist panel within an existing body, to deliver a coordinated response to safe rates and payment methodologies for employees and owner drivers throughout the supply chain.
- I 20 If the Government decides that an option proposed in this paper represents an appropriate regulatory response to create a system of safe rates and related conditions, adequate funding for the new body or panel will need to be determined. Establishing a new body is likely to require more resources than using an existing body.

- 121 This funding will need to be offset in the current budget and appropriated in future budgets. Current regulatory responsibilities and government activities will need to be examined, with careful consideration given the transfer of those responsibilities and funding.
- 122 Establishment of the new body or panel will require development of an institutional framework to ensure that the public is provided with a streamlined and accessible service that is efficiently integrated within the chosen legislative area.

Complementary measures to support a safe rates system

- I23 A range of implementation measures could also be used in conjunction with any of the three options outlined in this paper. The measures, addressing supply-chain practices and overcoming information gaps, are likely to assist with changing some industry practices reported to have an adverse impact on road safety.
- I24 In some instances, these measures could complement a major overhaul of the system for setting safe payments and payment methodologies that may expedite the process of making the roads safer for all users. However, the SRAG have advised they believe that the additional initiatives outlined below would not, in their own right, lead to the cultural change necessary to improve safety in the road transport industry.
- I25 The department would also be pleased to receive any other suggestions for measures beyond those set out below that could be used to assist with generating change in behaviours adversely impacting on safety in the road transport industry. Feedback on the measures included here would also be appreciated.

Initiatives to support effective implementation

Supply chain practices

- a) The Australian Government could consider facilitating development of an industry code of practice as a centralised set of standards to be met by operators in the road transport industry.
- b) The NTC could investigate the feasibility of a voluntary accreditation scheme for application to the road transport industry.
- c) Australian Government procurement guidelines could be amended to require contractors and sub-contractors be accredited before tendering for government-funded projects to support industry participation.

Education, compliance and enforcement

- d) Provide information and advice to employers and employees, as well as others within the supply chain, about compliance with the arrangements.

Supply chain practices—the Australian Government could consider facilitating development of an industry code of practice as a centralised set of standards to be met by operators in the road transport industry

- I26 Currently, industry codes of practice applying to certain sectors of the logistics and transport industry have been introduced. Effective voluntary industry codes have the potential to improve protection for consumers and industry participants and reduce the regulatory burden on business. While they have contributed to significant improvements in large sectors of the industry, the current codes do not address all issues in the road transport industry. See Appendix 8 for more detailed information on current codes of practice.

- 127 The NTC Report advocated voluntary industry standards and government standards as a complementary method to improve road safety through provision assurance to freight customers that these operators have management systems in place.³²
- 128 A possible enhancement to the current arrangement could be for the Government to lead development of a code of practice for the road transport industry. The *Trade Practices Act 1974* provides for prescribed voluntary or mandatory codes of practice to be declared by regulations. The Australian Competition and Consumer Commission (ACCC) administers codes prescribed by the Australian Government under the Act. The ACCC is also responsible for any code enforcement activities.
- 129 In deciding to prescribe a code of practice, guidelines issued by the Treasurer require that a number of criteria are satisfied, including:³³
- the code would remedy an identified market failure or promote a social policy objective, such as safety
 - the code would be the most effective means of remedying that market failure or promoting that policy objective
 - the benefits of the code to the community as a whole would outweigh any costs;
 - a systematic enforcement issue exists because there is a history of breaches of voluntary codes, and
 - a range of self-regulatory and light-handed, quasi-regulatory options have been examined and demonstrated to be ineffective.
- 130 A code of practice for the road transport industry could be developed and implemented to:
- consolidate laws and best practice arrangements for the industry, including chain of responsibility provisions, in one central location
 - establish principles to govern safe payments along the lines of the code of conduct established by the Australian Logistics Council, including guideline safe rates and model contracts, for owner drivers
 - establish a commercial dispute resolution procedure, and
 - form the basis of a possible voluntary accreditation scheme applying to the industry.
- 131 As per arrangements under the Trade Practices Act, any Australian Government department can be allocated responsibility for assisting industry to develop a voluntary code of practice. In this case, the department with portfolio responsibility for the industry is the Department of Infrastructure and Transport (DIT).
- 132 Accordingly, DIT could be asked to investigate the feasibility of a code of practice for the road transport industry, which could be integrated with the national heavy vehicle regulator. This could be done with the assistance of jurisdictions and the Department of Innovation, Industry, Science and Research (DIISR), which has responsibility for independent contractors, such as owner drivers.

Supply chain practices—the NTC could investigate developing an improved voluntary accreditation scheme for application to the road transport industry

- 133 There are currently two main government accreditation systems operating in the heavy vehicle sector; the first has been developed by the Australian Government via the NTC—the National Heavy Vehicle Accreditation Scheme (NHVAS). This scheme is operated by participating states and territories. It is voluntary and seeks to improve efficiency and road safety, raise levels of

³² NTC Report, 2008, p. 38

³³ The Treasury, Prescribed codes of conduct, Policy guidelines on making industry codes of conduct enforceable under the *Trade Practices Act 1974*, May 1999

compliance and increase the productivity of the transport industry through adoption of good management by responsible operators. The Western Australian Government has also introduced mandatory heavy vehicle accreditation, which works in conjunction with a permit system for heavy vehicles operating in the jurisdiction.

- I34 Compliance measures, including the NHVAS, will soon be reviewed and consolidated for delivery by the new National Heavy Vehicle Regulator (NHVR). This will include consideration of initiatives proposed for Australia by industry and those successfully used overseas. For example, they may consider such programs as the United Kingdom's Operator Compliance Risk Score, and industry-based accreditation systems such as the Australian Trucking Associations' TruckSafe and the 5-star trucking concept proposed by the Transport Workers' Union. See Appendix 7 for further information about accreditation and licensing schemes.
- I35 In 2008, Austroads published a report analysing the safety benefits of heavy vehicle accreditation schemes, finding that transport operators who manage their safety risks through a scheme have 50 to 75 per cent less crashes.³⁴ The potential benefits in terms of safety outcomes and business performance that can be derived from competency training provided via accreditation scheme are clear. However, low participation rates in current schemes would appear to require an accreditation scheme be mandated or accompanied by incentives to maximise the benefits.
- I36 This improved awareness and understanding will address the information imbalance highlighted in the NTC Report on safe payment, a measure they considered essential.³⁵ Accordingly, in consolidating the arrangements to be administered by the NHVAS, the NTC should be asked to consider development of a suitable accreditation system for application to the broader road transport industry.
- I37 This approach will increase costs for business and government, however, it will improve safety and business outcomes for industry participants and the public. It will also go some way to addressing the information asymmetry identified by the NTC.

Supply chain practices—Australian Government procurement guidelines could be amended to require contractors and sub-contractors be accredited before tendering for government-funded projects to support industry participation

- I38 As discussed above, a voluntary accreditation scheme could be used to assist businesses to demonstrate compliance with the laws and best practices for the road transport industry. A policy could be applied to the Australian Government's procurement guidelines to ensure industry participation in the scheme requires all contractors and sub-contractors be accredited, or demonstrate they meet applicable standards equivalent to accreditation, before tendering for government contracts.
- I39 This is consistent with existing government procurement policies that seek to encourage best practice in the private sector. For example, those wishing to tender for government-funded projects are required to demonstrate compliance with the Fair Work Principles. These principles are designed to address situations where contracts may be used to undermine employee entitlements. In this manner, the Australian Government supports the creation of quality jobs and decent work.
- I40 Making accreditation a prerequisite for tendering will ensure that only those who have sufficiently demonstrated that they can and do comply with the applicable laws are permitted to provide services for the Government. The provisions should also apply to sub-contractors, ensuring that those further down the contractual chain are also encouraged to gain accreditation.

³⁴ Austroads Research Report: Analysis of the safety benefits of heavy vehicles accreditation schemes, 2008, p. ii

³⁵ NTC Report, 2008, p. 37

141 This measure would be an indirect tool used to support other, more direct education and compliance initiatives for safe rates and payment methodologies proposed in earlier options.

Education—provide information and advice to employers and employees, as well as others within the supply chain, about compliance with the arrangements

142 Issues associated with education are twofold. In the first instance, the current information irregularity identified in the NTC Report, contributing to the poor-driver bargaining position needs to be addressed. To do this the NTC Report suggested ‘an education and training system which provides:³⁶

- owner drivers with information on running a business
- employees with information on awards and employer obligations
- drivers with cost models to enable them to better estimate and understand the cost structures within their business, and
- information on entering into contracts, and model contracts.’

143 This paucity of information and training accessible by owner drivers, in particular, will need to be conclusively addressed by the body that is chosen to be responsible for safe rates. However, the information gap could equally be addressed by those agencies that currently have responsibility for education in this area; those being the Fair Work Ombudsman for employees and the DIISR for independent contractors. Industry bodies should also have a role providing education and information to industry participants.

144 There will be a role for agencies to ensure that the industry participants are adequately informed of changes as part of transitional arrangements. It will also be necessary for government agencies to carry out regular monitoring, compliance and enforcement activities to ensure the new provisions are used properly and having the desired effects. The NTC will have a greater role in ensuring these activities are synchronised and appropriate under its enhanced, coordination role.

The department welcomes feedback on the tribunal models and the complementary measures outlined above.

On page 10 you will find a number of questions prompting feedback on specific issues, on which the department is interested in hearing your views.

Feedback does not have to be limited to the questions. Comment on any other matters that you believe should be considered is welcome. Your written feedback should, wherever possible, include evidence and examples to justify your position on each issue.

You can provide your comments as an individual or you may wish to contribute to a joint feedback paper through your employer or union organisation, professional association, safety group or community forum.

³⁶ ibid

APPENDIX 1:

The road transport industry in Australia

In 2007–2008 road transport accounted for approximately 1.7 per cent (\$17 988 million) of Australia's total GDP (\$1 037 027 million) and approximately 2.3 per cent (246 100) of total Australian employment (10 673 400).³⁷

Australia's freight task has increased at an annual growth rate of 7.4 per cent from 5.4 billion tonne-kilometres (tkm) in 1972 to 64.7 billion tkm in 2007³⁸ and this growth is forecast to continue.³⁹ Interestingly, in a similar 30-year period, the opposite can be said for real road freight rates, which have been steadily declining.⁴⁰ The road transport industry is vital to the ongoing growth of Australia's economy. Further improvements in efficiency, productivity and safety outcomes in the road transport industry, including consideration of the sustainability of real road freight rates, are imperative to transport being able to meet the growing freight task.

Below are some additional overview statistics relating to the road transport industry:

Total freight carried by road 2006–2007 (billion tonne kilometres)*

Total freight carried by road: 182.4	
Total bulk	Total non-bulk
54.7	127.7
Total carried by articulated trucks	Total carried by rigid trucks
140.9	32.8 **
Total carried intrastate	Total carried interstate
117.5	64.9

* One tonne kilometre is equivalent to one tonne moved one kilometre

** Remaining carried by other vehicles

Source: Australian Transport Statistics Yearbook 2009

Distance travelled by road vehicles in Australia 2007–2008 (billion kilometres)

Total distance travelled by road vehicles 224.35		
Rigid trucks	Articulated trucks	Other vehicles
8.70	6.90	226.15

Source: Australian Transport Statistics Yearbook 2009

³⁷ BITRE Australian Transport Statistics Yearbook 2009

³⁸ BITRE Interstate freight in Australia Report 120, April 2010

³⁹ The interstate freight in Australia report forecasts growth to continue at an average of 3.8 per cent per annum from 70.4 billion tkm in 2008 to 159.1 billion tkm in 2030.

⁴⁰ BITRE Freight Rates in Australia, 1964–65 to 2007–2008. Report suggests that between 1980–1981 and 2000–2001 real road freight rates declined by 22 per cent, relative to average consumer prices. Note that over the seven years since 2000–2001, real road freight rates have increased by 9 per cent, although the report attributes this increase to an increase in diesel fuel prices.

Vehicles registered across Australia 2006 (thousands)

Total registered vehicles 14 359	
Rigid trucks	Articulated trucks
384	72

Source: ABS Yearbook Australia 2008

Registered articulated and rigid trucks by state 2006 (thousands)

	Rigid	Articulated
NSW	114	16
VIC	92	22
QLD	84	16
SA	27	6
WA	50	9
TAS	10	1
NT	4	1
ACT	2	0

Source: ABS Yearbook Australia 2008

Average weekly earnings in the transport sector 2006 (\$ earned)

Road	Rail	Water	Air and Space	Australia
920.80	1,470.30	1,098.00	1,218.50	852.30

Source: BITRE Australian Transport Statistics Yearbook 2009

Average age of trucks in 2006 (years)

Type of truck	Age
Articulated	11.2
Heavy Rigid	15.9

Source: ABS Yearbook Australia 2008

APPENDIX 2: Safe Rates Advisory Group

Membership

Independent Chair—Scott Chamberlain

Scott Chamberlain is a lawyer and academic with expertise in issues affecting independent contractors. He was Executive Director of Workplace and Small Business Policy for the Housing Industry Association from 2007 until 2010.

Mr John Berger

Assistant Branch Secretary,
Transport Workers Union (TWU) Victorian/Tasmanian Branch

Mr Laurie D'Apice

President, Human Resources, Linfox
President, Australian Road Transport Industrial Organisation, NSW Branch

Mr Ingilby Dickson

General Manager, Supply Chain and Logistics, BlueScope Steel
Chairperson of the National Logistics Code of Conduct for the Australian Logistics Council (ex-Chair of the Retail Code, Board Member ALC)

Mr Adam Hatcher

Barrister, HB Higgins Chambers

Mr Michael Kaine

National Assistant Secretary, TWU

Mr Ron Kuczmarski

Group Human Resource Manager, Scott Group of Companies

Mr Philip Lovel

CEO, Victorian Transport Association (VTA) and Secretary of the Australian Road Transport Industrial Organisation

Mr Daniel Mookhey

Chief of Staff, Transport Workers Union

Mr Paul Ryan

Industrial Relations Advisor, VTA
National Industrial Advisor, Australian Road Transport Industrial Organisation

Mr Tim Squires

President, Queensland Trucking Association
Director, Tothag Transport Group Queensland

Professor Ann Williamson

University of New South Wales

Observing Member

Mr Paul Sullivan

Chief Officer Strategy, National Transport Commission

Terms of reference

Advise Government in the preparation of a detailed policy paper, setting out practical national strategies and detailed options for national legislation covering employees and independent contractors work in the transport industry that:

- addresses the recommendation made by the Wright/Quinlan Review concerning the impact of payment rates and methods on road safety in the transport industry
- considers the finding of other reviews and inquiries, and
- considers the potential impact on safety and well-being of drivers as well as the productivity, efficiency and employment levels within the transport industry.

In preparing the policy paper, the SRAG will consider:

- the findings of recent reviews into the impact of rates and payment methods and safety in the heavy vehicle industry, including the Wright/Quinlan Review
- effectiveness of current regulations, at the state and federal level, covering safety in the heavy vehicle industry, including whether there is scope for greater coordination across jurisdictions, and
- recent policy and legislative developments in areas associated with safety and regulation in the heavy vehicle industry.

The policy paper will also outline the regulatory impact, supporting data and implementation and compliance strategies.

APPENDIX 3:

National Transport Commission Report

As required by the terms of reference, the SRAG has considered the recommendations of *Safe Payments—Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, a report prepared by the National Transport Commission (NTC) with Professor Michael Quinlan (FSIA) and the Hon Lance Wright QC. The report examined, in broad terms, safety in the road transport industry, the contribution of payments to unsafe behaviour, the nature of Australia’s transport market and provided options for the implementation of a safe rates system. The NTC consulted a range of stakeholders and also put out a request for written submissions for information to prepare the report. The report did not identify specific monetary values or amounts for driver remuneration, or a process for making such determinations.⁴¹

‘Safe Payments System’⁴²

In undertaking the review, the NTC considered that the term, ‘safe payments’, best reflected the scope of the project, although many submissions and stakeholders referred to ‘safe rates’. According to the report, the NTC’s view was that ‘safe rates’ did not accurately reflect the complete issue that the NTC should consider, as related to the safety performance of drivers, and therefore considered:

- the amount received by drivers (for example, 36 cents per kilometre)
- the method by which that unit is calculated (for example, a per-kilometre or per-trip rate)
- other factors that affect the take-home figure received by drivers, including unpaid working time, late and non-payment of invoices and back-loading, and
- conditions on engagement or employment necessary to implement a system of safe payments.

NTC Report recommendations⁴³

From the recommendations presented by Professor Quinlan and the Hon Lance Wright QC and following consultations with stakeholders, the NTC developed four options for a regulatory response for addressing the safety/payments link along the spectrum as follows:

1. status quo—no new legislative reforms but implementation of existing NTC reforms
2. state-based regulatory system—current regulatory system and the implementation of owner- driver legislation in those jurisdictions that do not currently have it. No new Commonwealth regulation
3. national framework for employee and owner drivers—the establishment of a specialised body under Australian Government transport legislation
4. national industrial relations scheme for all drivers—creation of a new chapter in the Workplace Relations Act to establish and maintain safe payments for owner drivers and employees.⁴⁴

⁴¹ NTC Report, 2008, p. 3

⁴² *ibid.*, p. 3

⁴³ *ibid.*, p. 36, 40–42

⁴⁴ *ibid.*, p. 40

The NTC Report recommended that the Australian Transport Council (ATC):

1. Recognise that payment rates and methods create an incentive for, or encourage, unsafe on-road behaviours, such as speeding, fatigue and use of illicit substances, which contribute to poor safety outcomes in the trucking industry.
2. Acknowledge that this link should be addressed through regulatory intervention.
3. Recognise that safe payments for truck drivers requires a whole of government approach due to linkages with transport law, workplace relations law and independent contractors/small business law.
4. Endorse the policy proposal in Option 3: implementation of a framework for the establishment and maintenance of safe payments for employees and owner drivers and amendments to model transport laws with respect to chain of responsibility obligations for safe payments.
5. Request the federal Minister for Infrastructure, Transport, Regional Development and Local Government progress the issue in consultation with his Commonwealth ministerial colleagues and report back to the ATC in May 2009.⁴⁵

Option 3 was the NTC's preferred option and is based on the recommendation from Professor Michael Quinlan and the Hon Lance Wright QC that this is the optimal model for addressing the link between payments and safety outcomes.

Option 3 recommends the establishment of a specialised body under federal transport legislation:

- to establish and maintain enforceable safe payments for employees
- to establish and maintain enforceable safe payments for owner drivers
- to settle disputes in a low-cost, accessible manner
- to consider and, if necessary, bestow rights and impose obligations regarding safe payments on other parties in the transport supply chain, and
- to consider and, if necessary, bestow rights and impose obligations with respect to enforcement of safe payments.

The body would exercise these functions of its own volition or, on application, by a relevant employer/employee association. The body would have regard to industry views in undertaking the above.

In addition to the establishment of a national framework to support safe payments for owner drivers and employee drivers, this option recommends an amendment to model road transport law to include chain-of-responsibility obligations on parties in the supply chain with respect to safe payments.

This option envisages the creation of some practical mechanism to allow some flexibility for operators to undertake separate, safe arrangements

⁴⁵ NTC Report, 2008, p. 46

Australian Transport Council response

The ATC considered the NTC report recommendations and noted the potential flow-on effects for the road transport industry and agreed that there is a case for investigating a whole of government regulatory approach to address the issue.

As noted above, the ATC agreed to the issue being progressed within the Australian Government, with reports being provided to future ATC meetings.

APPENDIX 4:

Current regulatory framework

The current legislative/regulatory system has evolved over a number of years and reflects the diverse range of issues facing the transport industry today.

In order to provide context for the options presented, information on the major legislative frameworks is provided below. This information is not meant to be comprehensive.

4.1 Transport industry regulation ⁴⁶

4.1.1 States and territories

As constitutional responsibility for the regulation of road transport lies with state and territory governments, each state and territory has implemented its own road, vehicle and driver regulation in line with vehicle technology and improvements to road infrastructure. Different state and territory legislation is required to be observed by all vehicles operating in, or through, that state, no matter where the vehicle is registered.

A 1954 Privy Council ruling that governments did not have the right to regulate trucking to protect state rail businesses removed the need for permits for interstate operation and enabled an interstate, road transport industry to emerge.⁴⁷ Efficiency gains from interstate transport and vehicle and road network improvement enabled manufacturing consolidation and reinforced interstate transport growth.

State and territory differences existed in road rules, driver-licence categories, registration classifications and charges, vehicle mass and dimensions, driving hours and a range of other operating conditions and enforcement practices. These regulatory inconsistencies led to an emerging acceptance that microeconomic reform of transport legislation was needed to reduce costs. The National Road Transport Commission (NRTC) was formed in 1991 (the precursor to the National Transport Commission (NTC)—refer 4.1.2 below) to develop and coordinate regulatory reform for nationally-consistent, road transport policies and laws.

4.1.2 National Transport Commission

As mentioned above, the NRTC was formed by inter-governmental agreement in 1991. In 2004, its scope was extended to rail and inter-modal transport, when it became the NTC.

As an independent statutory body, NTC develops and submits reform recommendations to the Australian Transport Council (ATC), comprising federal, state and territory transport ministers, for approval. The NTC consults widely with industry, unions, the community and all levels of government to improve safety, productivity and environmental outcomes for Australia.

⁴⁶ Information provided by the Australian Government Department of Infrastructure and Transport

⁴⁷ NSW Railways (RailCorp) Thematic History www.nswrailheritage.com.au/history/AppendixI.pdf, page XVI

Model laws

The NTC has primarily sought to influence behaviour in the transport sector via development and implementation of model, national transport laws for adoption in each state and territory. Transport sector productivity and safety reform, proposed by transport ministers or industry, are referred to the NTC for development and assessment.

To that end, the NTC has developed a suite of road transport law reforms, approved by the ATC, aimed at addressing unsafe on-road behaviours. These reforms have focused on changing the on-road behaviours of drivers, and other parties in the supply chain, including employers and customers, who influence driver behaviour. The series of chain of responsibility (CoR) reforms that have been implemented for vehicle mass weight, load, restraint, fatigue and speed require all parties in the supply chain to take 'reasonable steps'⁴⁸ to ensure their actions or inactions does not cause unsafe, on-road behaviour (for example, delivery deadlines that encourage drivers to speed or drive while fatigued).

The transport laws operate alongside existing OHS laws in each state and territory. Reform development has sought to ensure consistency with OHS laws and avoid unnecessary duplication or overlap.

Other key safety reforms include laws to:

- manage heavy vehicle driver fatigue risks
- ensure trucks are not overloaded
- prevent truck speeding
- move dangerous goods safely
- improve Australian road rules (for example, safe mobile phone use)
- improve safety compliance through audited accreditation, and
- ensure compliance of high-risk applications (Intelligent Access Program to track the movement of heavy loads near vulnerable bridges).

While the Inter-Governmental Agreement (IGA) establishing the NTC encourages adoption of the model legislation, there is no legal obligation on jurisdictions to do so. Where jurisdictions have adopted model laws, inconsistencies persist because jurisdictions implement reforms in accordance with their own legislative priorities, do not adopt particular reforms or implement reforms in a modified form.

⁴⁸ www.NTC.gov.au

The NTC has provided the following table which reflects the current status of implementation of existing reforms:

NTC reform	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Mass & loading (M&L)	✓	✓	✓	✓	✓	✓	✓	✓
Oversize/overmass vehicles (OSOM)	Does not use legislation	✓	Does not use legislation	Does not use legislation	Does not use legislation	Does not use legislation	✓	✓
Restricted access vehicles (RAV)	Does not use legislation	✓	Does not use legislation	Does not use legislation	Does not use legislation	Does not use legislation	✓	✓
Compliance & Enforcement Bill (ATC 11/03)	✓	✓	In progress	✓	✓	✓	✓	In progress
Intelligent Access Program (IAP) (ATC 12/05)	-	✓	-	✓	✓	-	✓	-
Fatigue (ATC 02/07)	-	✓	In progress	✓	✓	In progress	✓	Not implementing
Speeding (ATC 01/08)	-	✓	-	✓	✓	In progress	✓	-
Dangerous goods	In progress	In progress	✓	In progress	In progress	In progress	✓	✓

4.1.3 Australian Government

The Australian Government works with state and territory jurisdictions through the Australian Transport Council, relying on implementation by jurisdictions following consensus decisions to achieve legislative consistency. As a result, it has limited, direct transport legislation. There are two principle exceptions.

The Federal Interstate Registration Scheme (FIRS), a partial regulatory scheme for heavy vehicles engaged in interstate trade, commenced in 1987, using Australian Government constitutional powers over interstate trade. The scheme was established as a voluntary alternative to state registration for heavy vehicles engaged solely in interstate operations to provide uniform charges and operating conditions. Enforcement relies on state and territory structures and has not replaced state schemes. While an instrument to influence national regulation, it is seen by some stakeholders as another jurisdiction with regulation different from the others.

Differences in vehicle standards were reduced with the development of the Australian Design Rules. The Australian Government now regulates the national design and construction standards for new vehicles under the *Motor Vehicle Standards Act 1989*, using the corporation powers for vehicles constructed by companies in Australia and external affairs power to regulate imported vehicles.

4.1.4 National Heavy Vehicle Regulator

In July 2009, the Council of Australian Governments (COAG) agreed to establish a National Heavy Vehicle Regulator (NHVR) at the end of 2012. The regulator will cover vehicles with a gross vehicle mass (GVM) of 4.5 tonnes or greater.

The NHVR is planned to provide a single, national heavy vehicle registration and road regulation system, including compliance and enforcement activities. Importantly, the new regulator will administer national heavy vehicle road transport laws, improving clarity and consistency and streamlining the regulatory requirements for operators, reducing business costs and improving safety and efficiency.

The national laws will be developed by the NTC as template legislation. It is intended that these laws will be passed by each state and territory without amendment. This will address current issues of inconsistent take-up of model NTC laws. Higher productivity initiatives of individual jurisdictions will be preserved.

Laws likely to be consolidated under the NHVR include:

- heavy vehicle registration
- vehicle standards
- heavy vehicle charges
- mass and loading
- oversize and overmass vehicles
- restricted access vehicles
- higher mass limits
- compliance and enforcement
- heavy vehicle driver fatigue
- heavy vehicle speeding compliance
- Intelligent Access Program
- alternative compliance (NHVAS)

NTC is currently developing a national compliance strategy to support the establishment of a NHVR and a long-term cultural change in the industry. In developing the strategy, the NTC will consider industry proposals, such as the 5-star trucking model and successful international developments, including operator licensing, accreditation and rating systems.

4.2 Owner drivers

Owner drivers⁴⁹ in the trucking industry operate as independent contractors providing services subject to a contract for services. Independent contractors run their own business, and hire out their time to businesses and other organisations as a service. Owner drivers make up part of the small business sector.

Owner drivers are regulated by Commonwealth and state and territory legislation. This legislation includes general commercial law and specific owner driver legislation.

4.2.1 Australian Government

As small businesses, owner drivers are subject to various Commonwealth laws, for example, the *Trade Practices Act 1974*. Owner drivers may also be subject to the *Independent Contractors Act 2006 (ICAct)*.

The Independent Contractors Act 2006

The IC Act gives effect to Government policy that independent contractors should be subject to commercial, and not industrial relations, law. To the extent that it is constitutionally possible, the

⁴⁹ Information provided by the Australian Government Department of Innovation, Industry, Science and Research

IC Act overrides state and territory laws that require independent contractors to be treated as employees or provide employment-like entitlements, unless a specific exemption has been granted.

Even if an owner driver is an independent contractor under common law, certain state and Commonwealth legislation may still classify the owner driver as an employee for specific purposes. This includes superannuation, occupational health and safety, workers compensation and payroll tax. The IC Act does not override these laws.

For the IC Act to apply to a services contract, one of the parties to the contract must be either the Commonwealth, or a corporation incorporated in Australia, or the contract must refer to work carried out in a territory. The contract must be for services to be provided by the independent contractor. In the case of owner drivers, this service is the provision of transport services. It is estimated that there are up to 81 000 owner drivers operating as independent contractors.⁵⁰

The IC Act allows for the Federal Court or the Federal Magistrates Court to review contracts, and to vary, or set aside, the contract if it is found to be unfair or harsh. In deciding whether a contract is unfair or harsh, the Court may consider the following:

- the terms of the contract when it was made
- the relative bargaining strengths of the parties to the contract
- any undue influence, pressure or unfair tactics which may have been used
- whether the total remuneration paid to the independent contractor is less than an employee doing the same work would have received, and
- any other relevant matters.

Every owner driver in Australia has access to the unfair contract regime under the IC Act, provided their service contract falls within the scope of the IC Act. Owner drivers in Victoria, New South Wales and Western Australia may have additional unfair contract protections created under specific, state-based, owner driver legislation.

Independent contractor disputes that involve general commercial matters are usually heard in state or territory courts or tribunals, including small claims divisions. Small claims processes are informal and aim to keep costs low.

In New South Wales, Victoria and Western Australia, the rights of owner drivers are protected by state-specific, owner driver legislation. The IC Act specifies that these laws are exempt from being overridden by the IC Act. Without the exemption, the IC Act would prevent these state-based laws applying to owner drivers (independent contractors) because they provide employee-like entitlements for owner drivers.

Department of Innovation, Industry, Science and Research⁵¹

The Department of Innovation, Industry, Science and Research (DIISR) has policy responsibility for independent contractors and the *Independent Contractors Act 2006*. This responsibility extends to assessing the impact that any commercial or industrial relations regulation may have on owner drivers and their ability to operate as business entities. Heavy-handed regulation can be an impediment to innovation, business growth and success.

DIISR's approach to independent contracting is guided by the department's industry policy framework. The framework focuses on the efficiency and effectiveness of any proposed interventions from the point of view of the economy as a whole. This perspective is likely to produce policies that strengthen industry and economic growth and contribute to improved living standards,

⁵⁰ Australian Bureau of Statistics, Forms of Employment Survey, November 2009. Cat. No. 6359.0

⁵¹ See www.innovation.gov.au

than would policies developed with narrow firm or sectoral perspectives. The framework addresses the existence of a market failure and the impact it has on the economy as a whole, rather than the specific failure of individual industry sectors.

Discussions with stakeholders have shown that many independent contractors and their hirers do not fully understand their rights and obligations under a contracting relationship. It is also evident that some independent contractors, including owner drivers, lack basic business skills to understand the nature of their agreements.

DIISR has developed an information strategy to address these issues—the development of the strategy included a detailed consideration of the best policy measures and an assessment of associated costs and benefits. This approach is consistent with the Government's industry policy, to increase prosperity through competitive business, sustainable economic growth and low-level regulation.

The strategy includes the release of *Independent Contractors: The Essential Handbook*, which was launched by the Hon Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy, on 27 April 2010. The handbook provides information to stakeholders on what to consider when entering into a contracting relationship. The Government funds the independent contractors' hotline, which provides advice on all matters relating to contracting, including sham contracting. The Government also provides an online, interactive decision tool to provide stakeholders with an easy way to assess their contracting relationship. Further products are planned under this strategy, including a guide to better contracting and a guide to dispute resolution.

The information products launched to date have received positive feedback from independent contractors and their hirers. DIISR will continue to engage with independent contractors, recognising the commercial environment within which contractors operate and the challenges that environment presents.

4.2.2 State and territory governments

In New South Wales, Victoria and Western Australia, there is legislation that deals specifically with owner drivers and their ability to make contracts.

New South Wales — Industrial Relations Act 1996

Chapter 6 of the *Industrial Relations Act 1996* (the Act) regulates contracts between owner drivers and their hirers. The Act applies to single vehicle owner drivers and provides for contract determinations for cost-recovery rates of pay across transport sectors, vehicle classes and vehicle ages, and enterprise-specific incentives.

The Act covers contracts of carriage (contracts between transport companies and motor vehicle and bicycle owner drivers) and contracts of bailment.

The Act prevents undercutting of prices, but allows owner drivers to contract above the minimum standards. The Act protects owner drivers against the arbitrary termination of a contract, and gives them the capacity to recover compensation in certain circumstances.

The New South Wales Industrial Relations Commission (NSWIRC) resolves disputes and gives enforceable effect to industry or sector arrangements in contract determinations. The NSWIRC makes contract determinations, setting rates and other employee like conditions for independent contractors in the transport industry. This means that truck owner drivers and bailee taxi drivers are provided with award-style protections.

The Act allows contract agreements, which are arrangements dealing with terms and conditions specific to a particular enterprise. It only imposes liability for breaches of contract determinations between principal contractors and owner drivers.

Victoria — Owner Drivers and Forestry Contractors Act 2005

The Victorian *Owner Drivers and Forestry Contractors Act 2005* (the Act) regulates contractual dealings between owner drivers⁵², hirers and freight brokers. The Act is a mixture of industrial relations, trade practices and consumer/small business law. It recognises that owner drivers are small business operators that share characteristics of employee drivers.

Under the Act, the Minister must publish rates and costs schedules on advice from the Transport Industry Council. The schedules set out operating (variable) costs, fixed costs and do not represent minimum rates.

The Act creates the Transport Industry Council, which advises the Minister on matters relevant to owner drivers. It also establishes processes, such as publication of information booklets and codes of practice. The Council advises the Minister and provides a dedicated dispute resolution process.

The Act provides owner drivers with protections, such as the prohibition of unconscionable conduct. It also provides contractors and hirers with the right to appoint agents and allows for collective bargaining. The Act imposes contracting and termination requirements.

Western Australia — Owner Drivers (Contracts and Disputes) Act 2007

The Western Australian *Owner Drivers (Contracts and Disputes) Act 2007* regulates a number of supply chain parties. It provides owner drivers with sustainable guideline rates and a practical framework, through which they are allowed to appoint bargaining agents (union or other) to negotiate collectively. The legislation also prohibits unconscionable conduct.

The Act applies to owner drivers, who operate a vehicle with a gross mass of more than 4.5 tonnes and are natural persons, partnerships, or companies engaged:

- under a West Australian owner driver contract, or
- to transport goods wholly within Western Australia, or
- to transport goods from Western Australia to another place, or from another place to Western Australia if a 'substantial part' of the services under the owner driver contract takes place in Western Australia.

The Act does not apply to owner drivers covered by the New South Wales or Victorian Acts.

The Act provides owner drivers with security of payment. It establishes a Road Freight Transport Industry Council, which administers a code of conduct that includes guideline rates, and provisions regulating the relationship between parties. The Act includes a conciliation and arbitration mechanism, under the Road Freight Transport Industry Tribunal, to hear disputes between the parties on breaches of contracts, the code of conduct and breaches of the security of payment provisions. The tribunal cannot insert new terms into owner driver contracts (even where the contract is found to be unfair) and cannot require hirers of owner drivers to provide notice if they terminate an owner driver contract.

The legislation confers powers on government officials to investigate and prosecute breaches of security of payment provisions or the code of conduct; and provides for right of entry, inspection and access to records for owner drivers or their representatives.

⁵² The Act applies to owner driver businesses (including sole traders, non-public companies or partnerships) that operate up to a maximum of three vehicles in providing services in transporting goods. The Act only applies where the owner of the business also drives one of the vehicles. Owner drivers are also referred to in the Act and the Code of Practice as "contractors" (See *Owner Drivers and Forestry Contractors Regulations 2006*, available from www.irv.vic.gov.au).

4.3 Employee drivers

4.3.1 Australian Government

Currently, employee drivers are afforded a safety net under workplace relations law as set out under the *Fair Work Act 2009*. The Act, Modern Awards and any applicable agreements and instruments are administered and enforced through the Fair Work Ombudsman and Fair Work Australia.

The *Fair Work Act 2009* sets out the National Employment Standards (NES), which are the minimum standards afforded to all employees. These include:

- maximum weekly hours of work
- the right to request flexible working arrangements
- parental leave and related entitlements
- annual leave
- personal/carer's leave and compassionate leave
- community service leave
- long service leave
- public holidays
- notice of termination and redundancy pay
- provision of a Fair Work Information Statement, which details the rights and entitlements of employees under the new system and how to seek advice and assistance.

Minimum standards in the NES can be built upon by Modern Awards or by enterprise agreements. Modern Awards set industry and occupation standards specifically for employees, including minimum wages and conditions. A full list of Modern Awards applying to employee drivers is in Appendix 9 along with a chronology tracking development of the safe rates issue.

As set out in the *Fair Work Act 2009*, the Modern Award provides for minimum wages and conditions, including:

- type of employment
- arrangements for when work is performed
- overtime rates
- penalty rates
- annualised wage arrangements
- allowances
- leave, leave loadings and arrangements for taking leave
- superannuation
- procedures for consultation, representation and dispute settlement.

Employers and their employees are also free to negotiate an enterprise agreement, the terms of which must leave the employee better off overall than the applicable modern award.

Award or agreement free employees derive their wages from the national minimum wage order.

4.3.2 States and territories

All states, except Western Australia, referred workplace relations powers for the private sector to the Australian Government, starting on 1 January 2010. For more information on referral in each state, please see Appendix 4a.

4.4 Other relevant legislative frameworks

Occupational health and safety⁵³

As with transport laws, state and territory governments have constitutional responsibility for occupational health and safety (OHS).

Safe Work Australia is responsible for developing model work, health and safety (WHS) laws. The model laws will consist of the model WHS Act, supported by model WHS regulations and model codes of practice that can be readily adopted around Australia. In this context, codes of practice are used to assist duty holders to comply with their obligations under the Act and regulations.

Codes of practice are not mandatory in that non-compliance does not, of itself, give rise to any civil or criminal liability. Instead, in any proceeding, codes of practice may be used by the court to establish what is known about a particular hazard or risk to determine what is reasonably practicable in the circumstances to which the code relates.

To that end, the Strategic Issues Group for OHS has proposed development of a model code of practice on fatigue generally. As the NTC is primarily responsible for evaluating proposed new legislative safety measures for the road transport industry, Safe Work Australia has not developed any codes of practice specific to transport. The proposed code, nevertheless, will assist duty holders to apply practical principles to manage fatigue issues in the workplace.

The Strategic Issues Group has also proposed development of model work health and safety regulations on fatigue in long-haul trucking.

⁵³ Information provided by Safe Work Australia

APPENDIX 4a: State referral of workplace relations powers⁵⁴

The Australian Government has put in place a national workplace relations system for the private sector. Approximately 96 per cent of all private sector employers and employees are covered by the *Fair Work Act 2009*.

The Fair Work Act is principally supported by the Commonwealth's constitutional powers in relation to constitutional corporations (that is, trading, financial and foreign corporations), interstate trade and commerce and the territories.

The Act's operation is extended by referrals of workplace relations power from all states except Western Australia to the Commonwealth in relation to private sector employers otherwise outside Commonwealth power (e.g. unincorporated employers) with effect from 1 January 2010.

Most states have retained workplace relations coverage of public sector and local government employees and some states also have coverage of specified public sector corporations.

Western Australia has elected not to join the national system at this stage. In Western Australia the *Fair Work Act 2009* applies to employers that:

- are constitutional corporations;
- employ certain flight crew, maritime or waterside employees in interstate or international trade or commerce; and
- are Commonwealth agencies or authorities.

State referrals of workplace relations powers relate to employees and in some circumstances, outworkers in the textiles, clothing and footwear sector. Referrals do not relate to owner drivers that are independent contractors.

The Commonwealth, referring states and the territories signed the *Multilateral Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector (IGA)*, which outlines the principles of the national system and the roles and responsibilities of the parties. Under the IGA, any amendment to the Fair Work Act requires consultation between the Commonwealth, referring states and the territories.

Employers and employees in New South Wales, Queensland, South Australia and Tasmania who joined the Fair Work system as a result of referrals are covered by special arrangements to ensure a smooth transition to the new system.

Many private sector employees and employers in Victoria have worked under the federal system since 1996. The Victorian Parliament passed legislation in 2009 giving effect to a new referral of workplace relations matters to the Commonwealth from 1 July 2009.

More on information on referrals is available at Fair Work Online:

www.fairwork.gov.au/Things-everyone-should-know/Pages/What-is-happening-in-my-state.aspx?role=employees#nsw

⁵⁴ As at 30 June 2010

APPENDIX 5:

Definitions – Owner driver

5.1 Independent Contractor Act 2006 (IC Act)

The IC Act specifies the class of independent contractor, to which that Act applies by reference to the definition of ‘Service Contract’.

Clause 11: “This Part applies to a services contract, other than:

- (a); or*
- (b) a services contract to which an independent contractor that is a body corporate is a party, unless the work to which the contract relates is wholly or mainly performed by:*
 - (i) a director of the body corporate; or*
 - (ii) a member of the family of a director of the body corporate.*

5.2 New South Wales

New South Wales has established a system, via Part 6 of the *Industrial Relations Act 1996*, that applies to owner drivers. However, owner driver is not specifically defined. Instead, the laws apply to particular contract arrangements, including bailment and carriage contracts.

5.3 Victoria

The following definition of owner driver applies under their *Owner Driver and Forestry Contractors Act 2005*.

Section 4 – Owner drivers and owner driver contracts

(1) For the purposes of this Act, an owner driver is-

- (a) a natural person who carries on a business of transporting goods in one or more vehicles supplied by him or her and operated by him or her (whether solely or with the use of additional or relief operators); or*
- (b) a corporation (other than a listed public company) that carries on a business of transporting goods in one or more vehicles supplied by the corporation or an officer of the corporation and operated by an officer of the corporation (whether solely or with the use of additional or relief operators); or*
- (c) a partnership of persons referred to in paragraph (a)-*

but does not include a haulage contractor.

The regulations further specify that the laws do not apply to persons or businesses operating four or more vehicles [see section 4 of the Owner Driver and Forestry Contractors Regulations 2006]

5.4 Western Australia

The following definition of owner drivers applies under the *Owner Driver (Contract and Disputes) Act 2007*:

Section 4 – Meaning of “owner driver”

(2) ...An “owner driver” is —

(a) a natural person —

(i) who carries on the business of transporting goods in one or more heavy vehicles supplied by that person; and

(ii) whose principal occupation is the operation of those vehicles (whether solely or with the use of other operators); or

(b) a body corporate (other than a listed public company) that carries on the business of transporting goods in one or more heavy vehicles that are —

(i) supplied by the body corporate or an officer of the body corporate; and

(ii) operated by an officer of the body corporate (whether solely or with the use of other operators) whose principal occupation is the operation of those vehicles; or

(c) a partnership of persons, at least one of whom is a person referred to in paragraph (a).

The Act further clarifies, at section 5, that owner driver contracts do not include employee contracts.

5.5 National Transport Commission

The model laws developed by the National Transport Commission uses the concept of a ‘self-employed driver’, thus there is no requirement for the driver to own the vehicle being operated. For example, the *Heavy Vehicle Driver Fatigue National Model Legislation* states:

Section 11 – Who is a driver

(1) A reference to a driver is a reference to the driver of a regulated heavy vehicle and includes an employed driver and a self-employed driver.

Note Driver is defined in the C & E Act.

(2) An employed driver is a driver who is employed by someone else to drive a regulated heavy vehicle.

(3) A driver who is not an employed driver but is driving a regulated heavy vehicle is a self-employed driver.

And from the National Transport Commission (Road Transport Legislation – Compliance and Enforcement Bill) Regulations 2006, referred to above:

Clause 6: Definitions

...driver of a vehicle or combination includes:

- (a) a two-up driver of the vehicle or combination who is present in or near the vehicle or combination; and*
- (b) a person who is driving the vehicle or combination as a driver under instruction or under an appropriate learner licence or learner permit.*

APPENDIX 6:

Textile, clothing and footwear industry and outworkers

6.1 Background

Previous research⁵⁵ and the NTC report outline the parallels between the textile, clothing and footwear (TCF) industry and the transport industry. Like transport, the TCF industry can be characterised as:

- utilising a casual/contract workforce
- using incentive or performance-based payment systems (piece rate)
- involving long working hours
- having work undertaken not in a 'workplace' but often from a remote location such as a person's home, and
- having poor safety outcomes and a 'sweatshop' image.⁵⁶

In particular, it is the length of sub-contracting chains that links the industries closely. Like transport, outworkers are often at the bottom of a contracting chain, which can include three to four other parties. The length of this chain means that the parties at the top of the chain—usually retailers or large clothing manufacturers—are able to distance themselves from the other parties in the chain, resulting in those parties at the bottom of the chain being in an unequal bargaining position.⁵⁷

Modern award provisions of the Act apply to outworkers and to outworker entities in the TCF industry. This approach could be extended to owner drivers and to other industry participants in the supply chain.

6.2 Fair Work Act 2009 and outworkers

For the purposes of the *Fair Work Act 2009*, an outworker is:

- a contractor who works in the textile, clothing or footwear industry, or
- an employee who, for the purpose of business of his or her employer, works at residential premises (for example, in their own home) that would not normally be regarded as being business premises.

Minimum workplace conditions for outworkers

From 1 January 2010, the National Employment Standards (NES) replaced the non-pay rate provisions of the Australian Fair Pay and Conditions Standard (the Standard).

Employers in the national system, who employ outworkers, must provide them with the entitlements set out by the NES from 1 January 2010. Outworkers who are not employees are also entitled to the NES under the terms of the *Textile, Clothing, Footwear and Associated Industries Award 2010*.

In addition, outworkers must be paid the rate of pay under any relevant modern award.

⁵⁵ Belzer, M.H. (2000), *Sweatshops on Wheels: Winners and Losers in Trucking Deregulation*, Oxford University Press, Oxford. (pp.6–8)

⁵⁶ *Safe Payments Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry* (NTC Report), 2008, p. 27

⁵⁷ *ibid*

Outworkers and award conditions

Some modern awards and award-based transitional instruments contain special conditions (known as 'outworker terms') for outworkers. Outworker conditions include the following and more:

- chain-of-contracts (for example, where a subcontractor employs an outworker)
- registering employers who employ outworkers
- employment records and inspection
- minimum wages.

Outworkers and enterprise agreement conditions

Where a modern award containing outworker terms covers an employee deciding whether or not to approve an enterprise agreement, Fair Work Australia must be satisfied both of the following apply:

- The agreement includes terms dealing with the conditions of outworker employees.
- Those terms are not detrimental, in comparison to the outworker terms in the modern award.

These requirements are in addition to the usual requirements for Fair Work Australia to approve an enterprise agreement (see Division 4 of Part 2-4 of the *Fair Work Act 2009*). Please note that independent contractor outworkers are not covered by enterprise agreements.

If Fair Work Australia considers that the outworker terms in the agreement are detrimental to the employee, then the agreement will not be approved.

Current 'outworker terms' apply in relation to all outworkers in the TCF sector—whether employee or contractor—and may deal with matters beyond the list of 'allowable matters'. Outworker terms may include, but are not limited to, terms relating to pay and conditions of outworkers. Fair Work Australia has broad scope to include terms in modern awards dealing with outworkers. Most notably, terms deal with chain-of-responsibility arrangements, registration of employers, employer recordkeeping and inspection to be included in modern awards. Outworker terms may also include 'employment' type entitlements, for example minimum wages and entitlements equivalent to the National Employment Standards.

In addition, modern award terms that deal with outworkers can be enforced through small claims proceedings, outworkers can be represented in proceedings by the Fair Work Ombudsman and outworker entities can be ordered by eligible state or territory courts to pay amounts (including interest) to, or on behalf of, outworkers if such amounts were payable under a modern award and were not paid in breach of a civil remedy provision.

Different conditions for outworkers

Some state laws contain conditions about outworkers, such as allowing unions to enter an employer's building to look at outworker records. These laws continue to apply. In addition, the *Fair Work Act 2009* has special right-of-entry requirements for textile, clothing and footwear outworkers.

Ethical Clothing Australia

Ethical Clothing Australia (formerly known as the homeworkers' code of practice and the No Sweat Shop label) raises awareness of the rights of Australian clothing and footwear workers—particularly home-based workers—and ensures they are protected from exploitation. The Australian Government firmly believes that all workers should receive fair pay and decent working conditions.

The Australian Government has committed to provide financial assistance over four years (2008 to 2011) to the Homeworker Code Committee Inc. (the Committee) to support the promotion of Ethical Clothing Australia by increasing awareness and voluntary adoption of the accreditation program by businesses. Funding for the program commenced on 1 May 2008.

Ethical Clothing Australia promotes ethical Australian manufacturers, retailers and designers and assists consumers to make informed purchasing decisions. It is administered by the Committee which has both union and business representatives from major stakeholders in the textile, clothing and footwear industry. The Committee works closely with other stakeholders in the industry to promote the accreditation program and good employment practices more generally.

Further information on Ethical Clothing Australia and the Committee can be obtained from Ethical Clothing Australia.

APPENDIX 7:

Accreditation and licensing schemes

An industry licensing and/or accreditation system could be used to ensure that industry standards, including use of a safe rates payment system, are met by fleet operators, other truck owners and employees, as well as other industry participants (for example, load agents). A scheme could be voluntary or mandatory. Some examples of accreditation and licensing systems are outlined below:

7.1 National

There are currently two main, Australia-wide accreditation systems operating in the heavy vehicle sector; the National Heavy Vehicle Accreditation Scheme and TruckSafe. Both are voluntary and seek to improve efficiency and road safety, raise levels of compliance and increase the productivity of the transport industry through adoption of good management by responsible operators.

National Heavy Vehicle Accreditation Scheme (NHVAS)

NHVAS was developed by the National Transport Commission and first offered to industry in 1999. The scheme allows heavy vehicle operators to demonstrate, through audit of their compliance management systems, that their vehicles and drivers comply with regulatory standards for maintenance, mass and fatigue management. Compliant operators can access a range of regulatory concessions, such as higher mass limits (HML), and the advanced fatigue management options⁵⁸.

The NHVAS is administered through the state-based road and transport authorities of participating jurisdictions, using a common set of standards, audit procedures and business rules. In 2005, 6844 powered units had successfully gained mass management accreditation, and 11 856 had been accredited for maintenance management under the NHVAS⁵⁹. This represents 1.6 per cent and 2.7 per cent, respectively, of qualifying registered vehicles in 2005⁶⁰.

TruckSafe⁶¹

TruckSafe Pty Ltd is a wholly-owned subsidiary company of the Australian Trucking Association. TruckSafe is a business and risk management system that is aimed at improving the safety and professionalism of trucking operators nationwide.

TruckSafe accreditation is based on four key standards: management; maintenance; workplace and driver health; and training. These represent the minimum standards a trucking business should meet for it to be a safe, responsible operation.

For operators, accreditation shows that they are meeting due diligence and duty of care.

For customers, TruckSafe is said to provide confidence that contractors have responsible work practices, well-maintained vehicles, healthy and trained drivers and management systems to meet their transport needs. This also helps customers to meet their due diligence requirements.

⁵⁸ Austroads Research Report: Analysis of the Safety Benefits of Heavy Vehicle Accreditation schemes, 2008

⁵⁹ *ibid*

⁶⁰ ABS Motor Vehicle Census, March 2005

⁶¹ See www.trucksafe.com.au

7.2 State

Western Australian Heavy Vehicle Accreditation scheme (WAHVA)⁶²

The Western Australian Government has introduced a mandatory accreditation and permit scheme applying to heavy vehicles, which deals with maintenance and fatigue management.

WAHVA enables heavy vehicle operators to demonstrate, through audit of their management systems, that their vehicles and drivers comply with regulatory standards.

WA Heavy Vehicle Accreditation is mandatory for individuals and organisations that:

- operate a B-double or road train, or
- operate a truck and trailer over 42.5 tonnes gross mass, or
- operate under a concessional loading scheme, or
- require an annual permit or notice, or
- require more than 4 single-trip permits (oversize and extra mass only), and
- perform transport tasks for hire or reward. This includes interstate operators.

Accreditation does not apply to:

- vehicles such as buses, special purpose vehicles and agricultural equipment
- vehicles with a gross vehicle mass (GVM) of eight tonne or less.

Eligibility for accreditation will be subject to evidence of:

- a certificate of roadworthiness of all vehicles operating under the accreditation
- a fatigue management plan that requires all commercial vehicle drivers to have a current NTC-approved medical and training in WA fatigue regulations to ensure all drivers are operating within the Western Australian Occupational Safety and Health Regulations 1996.

7.3 International

United States Licensing Model⁶³

Licensing in the USA is regulated by the Federal Motor Carrier Safety Administration. To obtain a licence, operators must submit to a safety rating process. The factors considered in determining safety rating include:

- adequacy of safety management controls
- frequency and severity of regulatory violations
- frequency and severity of driver/vehicle regulatory violations identified during roadside inspections of motor-carrier operations in commerce and, if the motor carrier operates in the United States, operations in Canada and Mexico
- number and frequency of out-of-service driver/vehicle violations of motor-carrier operations in commerce and, if the motor carrier operates in the United States, operations in Canada and Mexico
- increase or decrease in similar types of regulatory violations discovered during safety or compliance reviews

⁶² Western Australian Heavy Vehicle Accreditation Business Rules, 2010

⁶³ See www.fmcsa.dot.gov

- frequency of accidents; hazardous materials incidents; accident rate per million miles; indicators of preventable accidents; and whether such accidents, hazardous materials incidents, and preventable accident indicators have increased or declined over time
- number and severity of violations of CMV and motor-carrier safety rules, regulations, standards and orders that are both issued by a state, Canada, or Mexico and compatible with federal rules, regulations, standards, and orders.

This rating is subject to audit. The rating does not necessarily prevent an operator from operating but will affect where they can operate as well as their ability to attract customers. A motor carrier with an 'unsatisfactory' rating is ineligible to contract or subcontract transportation services with federal government agencies.

Note: The Comprehensive Safety Analysis 2010 (CSA 2010) is underway. This is a review of the current US regulatory system around heavy vehicles. A field test of CSA 2010 began in February and results of this are awaited.

United Kingdom Licensing Model

Individuals carrying goods connected with any trade or business in the United Kingdom (UK) must have an operator's licence. There are a number of conditions associated with gaining an operator's licence such as, the operator:

- is fit to hold a licence (this will take into account any past convictions), including any partners or directors
- has proper maintenance facilities, or arrangements, with a garage and enough money to keep vehicles fit and serviceable
- has an operating centre suitable for their vehicles, bearing in mind such things as its size, location, availability and means of access
- has proper arrangements to ensure that the rules about drivers' hours are followed and that vehicles are not overloaded.⁶⁴

Each licence holder will also be given an operator compliance risk score (OCRS). The OCRS system has been developed by the Vehicle and Operator Services Agency (VOSA) as a way of assigning goods and passenger-vehicle operators a rating that allows enforcement officers to identify vehicles most likely to be non-compliant.⁶⁵

OCRS is calculated using two distinct methods, which give either a historic or predictive score. Historic data includes initial/annual test data, fleet check inspections, roadside inspections and prosecution and legal records. Predictive scores will only be used if no historic data exists for the relevant period and is based on the type of operator licence, age of operator licence and the size of the fleet.⁶⁶

VOSA will use the system at the roadside to identify which vehicles should be checked. The system flags operators as having a green, amber or red status, with those that are green most likely to be compliant and those that are red least likely. Generally, an operator with a red score is more likely to be stopped and checked than an operator with a green score.⁶⁷

⁶⁴ Goods Vehicle Operator Licensing: Guide for Operators, 2008

⁶⁵ Operator Compliance Risk Score: FTA Support Guide

⁶⁶ *ibid*

⁶⁷ *ibid*

APPENDIX 8:

Examples of codes of practice

8.1 National

Industry codes of practice applying to certain sectors of the logistics and transport industry have been introduced. Effective voluntary industry codes have the potential to improve protections for consumers and industry participants, and to reduce the regulatory burden on business. While likely to contribute to industry improvements, the current codes applying in the sector have not conclusively addressed issues in the transport sector.

Trade Practices Act 1974⁶⁸

Part IVB of the *Trade Practice Act 1974* defines industry codes, including mandatory and voluntary codes declared by regulations. The Australian Competition and Consumer Commission (ACCC) administers codes prescribed or made law by the Australian Government under the Trade Practices Act.

A prescribed, mandatory industry code of conduct is binding on all industry participants. There are currently four of these codes—franchising, oil, horticulture and unit pricing.

Example — franchising code of conduct

The franchising code of conduct is contained in the Trade Practices (Industry Code – Franchising) Regulations 1998. The franchising code of conduct was originally a voluntary code introduced in 1993 and administered by the Franchising Code Administration Council. In 1997, the House of Representatives Standing Committee on Industry, Science and Technology (Reid Committee) held an inquiry into 'business conduct issues arising out of commercial dealings between firms'. Among other things, this report suggested that self-regulation of the franchise industry has not been effective. One reason provided was that it does not offer a viable regulatory strategy when there is such a disparity in the powers of the parties (similar in the owner driver situation). As a result of this report, the mandatory franchising code of conduct came into effect in July 1998.

A prescribed voluntary industry code of conduct is binding only on those that are signatories to the code. There are currently none of these codes in place under the Trade Practices Act.

If a court finds that a breach of the prescribed code has occurred, a range of remedies is available, including damages, rescission, setting aside or variation of contracts, community service orders and corrective advertising.

⁶⁸ www.accc.gov.au

Australian Logistics Council⁶⁹

As the peak industry association, the Australian Logistics Council (ALC) administers a number of logistics industry safety codes. The codes are designed to cover the entire supply chain including consignors, carriers, and customers. In particular, the ALC has the National Logistics Safety Code which addresses:

- chain of responsibility
- occupational health and safety
- scheduling and transit times
- time slot management
- safe loading practices, including mass, dimension and load restraint
- driver fatigue management, including driver health and fitness for duty
- speed compliance
- vehicle safety

Industry-specific material has also been developed to support implementation in sectors with particular regulatory arrangements, such as the retail and steel sectors.

In addition, the ALC has recently issued a code of practice for safe payments by steel and retail companies. Signatories to the code are required to apply safe payment principles designed to eliminate practices that put the wellbeing of employees, or the wider public, at risk. The code complements existing labour and contract laws. It seeks to ensure commercial arrangements within the supply chain do not promote unsafe practices.

Occupational health and safety—in development⁷⁰

Safe Work Australia is responsible for developing model work health and safety (WHS) laws. The model laws will consist of the model WHS Act, supported by model WHS regulations and model codes of practice that can be readily adopted around Australia. In this context, codes of practice are used to assist duty holders to comply with their obligations under the Act and regulations.

Codes of practice are not mandatory in that non-compliance does not, of itself, give rise to any civil or criminal liability. Instead, in any proceeding, codes of practice may be used by the court to establish what is known about a particular hazard or risk in determining what is reasonably practicable in the circumstances to which the code relates.

To that end, the Strategic Issues Group for OHS has proposed development of a model code of practice on fatigue generally. As the NTC is primarily responsible for evaluating proposed new legislative safety measures for the road transport industry, Safe Work Australia has not developed any codes of practice specific to transport. The proposed code should assist duty holders to apply practical principles to manage fatigue issues in the workplace.

⁶⁹ www.austlogistics.com.au

⁷⁰ www.safeworkaustralia.gov.au

8.2 State

Victoria – Owner Driver Forestry Contractors code of practice

The *Owner Drivers and Forestry Contractors Act 2005* allows for industry codes of practice to be prescribed by regulation. After an extensive consultation and development process, the Transport Industry Council and the Forestry Industry Council jointly recommended to the Minister for Industrial Relations making the *Owner Drivers and Forestry Contractors Regulations 2006*.⁷¹

The objectives of these regulations are:⁷²

- to prescribe persons of a specified class not to be contractors for the purposes of the *Owner Drivers and Forestry Contractors Act 2005* and these regulations, and
- to prescribe a code of practice in relation to the engagement of contractors who are owner drivers or forestry contractors.

The code does three things:⁷³

- establishes some mandatory requirements
- provides guidance around the kinds of conduct that are prohibited by the Act and conduct that is likely to be found to be unconscionable in a range of specific circumstances, and
- describes industry best practice.

The code contains relatively few mandatory requirements, with the focus largely being on providing guidance around the provisions of the Act.⁷⁴

Western Australia—Fatigue Management for Commercial Vehicle Drivers code of practice

The *Occupational Safety and Health Act 1984* defines a code of conduct as a document prepared for the purpose of providing:⁷⁵

- practical advice on preventive strategies
- a practical means of achieving any code, standard, rule, provision or specification relating to occupational safety and health in Western Australia.

The *Code of Practice: Fatigue Management for Commercial Vehicle Drivers* provides practical guidance for commercial vehicle drivers and for those who are responsible for the operation of commercial vehicles in workplaces on meeting their duties under the relevant legislation. The code does not prescribe any mandatory requirements, however it does set out an operator's main requirements as per the relevant legislation.⁷⁶

The difference between the Victorian and Western Australian models is that the Victorian code of practice was developed as a part-mandatory, part-explanatory document to a whole piece of legislation (the *Owner Drivers and Forestry Contractors Act 2005*) whereas the Western Australian code was developed as an addition to the *Occupational Safety and Health Act 1984*, to give guidance on one specific aspect of the Act and guidance for one specific cohort covered by the Act.

⁷¹ Business Victoria - www.business.vic.gov.au/BUSVIC/STANDARD.HTML/PC_61954.html

⁷² *Owner Drivers and Forestry Contractors Regulations 2006*

⁷³ *Owner Drivers and Forestry Contractors Code of Practice 2006*

⁷⁴ *ibid*

⁷⁵ *Code of Practice: Fatigue Management for Commercial Vehicle Drivers*, 2004

⁷⁶ *ibid*

APPENDIX 9: Chronology

Date	Event
1979	<p>The Industrial Commission of NSW conducted an inquiry into the operation of relevant provisions, at that time contained in s.88E of the <i>Industrial Arbitration Act 1940</i>. In examining the position of owner drivers, the report recommended the creation of specific provisions to deal with contracts of bailment for taxi drivers and contracts of carriage involving motor lorries.</p> <p>Recommendations were given effect in the 1979 legislation, which introduced the regulated contracts provisions⁷⁷. These provisions were carried forward as Chapter 6 of the <i>Industrial Relations Act 1991</i> and then as Chapter 6 of the <i>Industrial Relations Act 1996</i>.</p>
1999	National Heavy Vehicle Accreditation Scheme first offered to industry
Oct 2000	<p>The House of Representatives Standing Committee report <i>Beyond the Midnight Oil</i> was released, examining the management of fatigue in transport, including the economic causes of fatigue.</p> <p>Draft, voluntary code of conduct for commercial practices in the trucking industry distributed for consultation.</p>
Nov 2001	Report of the <i>Inquiry into Safety in the Long Haul Trucking Industry</i> (the Quinlan Report – NSW) released.
2002	<p>Second draft, voluntary code of conduct for commercial practices in the trucking industry released.</p> <p>Western Australian Heavy Vehicle Accreditation Scheme introduced.</p>
Aug 2002	A Standing Committee on Transport (SCOT) working group was formed and engaged a consultant to investigate the issue of heavy vehicle safety, including the consideration of sustainable rates for owner drivers.
Apr 2003	A report was delivered by the consultants enlisted by the SCOT working group, titled <i>Freight Rates and Safety Performance in the Road Freight Industry</i> .
May 2003	The SCOT Working Group issued a discussion paper, incorporating the main findings of the April 2003 report entitled <i>Heavy Vehicle Safety and Safe Sustainable Rates for Owner drivers</i> .
Dec 2003	The National Transport Commission (NTC) replaced the National Road Transport Commission.
2004	<p><i>Fatigue Management for Commercial Drivers</i> code of conduct released in WA.</p> <p>Heavy vehicle driver fatigue policy proposal released by NTC.</p>
Nov 2006	NSW Industrial Relations Commission made the <i>Transport Industry – Mutual Responsibility for Road Safety (State) Award</i> and the <i>Transport Industry – Mutual Responsibility for Road Safety Contract Determination</i> .
Dec 2006	The <i>Owner-drivers and Forestry Contractors Act (2005)</i> and <i>Owner-drivers and Forestry Contractors Code of Practice</i> came into force in Victoria.
Mar 2007	<i>Independent Contractors Act 2006</i> came into effect

⁷⁷ The Industrial Arbitration (Amendment) Act 1979 introduced the regulated contracts provisions into the Industrial Arbitration Act 1940.

Date	Event
Feb 2008	The Australian Transport Council (ATC) agreed on the need to develop a National Transport Plan and Policy Framework. It also foreshadowed a review into heavy vehicle safety.
Jul 2008	An announcement was made that the NTC would investigate and report back to the ATC on driver remuneration and payment methods in the Australian trucking industry and make recommendations for reform.
Aug 2008	<i>Owner Driver (Contracts and Disputes) Act 2007</i> came into effect in Western Australia.
Aug– Oct 2008	The Hon Lance Wright QC and Professor Michael Quinlan were engaged to assist the NTC in undertaking a report for the ATC into the link between payments and safety in the heavy-vehicle sector.
Sep 2008	Australian Industrial Relations Commission sought submissions from industry stakeholders regarding the award modernisation process and the drafting of modern awards for the road transport industry.
Nov 2008	The <i>Safe Payments Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry</i> report was submitted to the ATC for review.
Dec 2008	An Interdepartmental Committee was established to progress the issue of safety in the transport industry.
Jan 2009	The Australian Industrial Relations Commission released three exposure draft awards for the road transport industry.
Mar 2009	The Government moved an amendment to the Fair Work Bill 2008 that would have enabled a modern award to include requirements relating to safe driving plans, safety awareness training in the sector and drug and alcohol policies. This amendment was rejected by the Senate.
Apr 2009	The Australian Industrial Relations Commission published final drafts of the modern awards for the road transport industry. Transport Industry (Cash in Transit) Award 2010 Road Transport (Long Distance Operations) Award 2010 Road Transport and Distribution Award 2010 Waste Management Award 2010
Jun 2009	The Hon Julia Gillard MP, Deputy Prime Minister, addressed the ACTU congress on the topic of challenges within Australian workplaces and confirmed that the Government would be working with industry stakeholders on the issue of safe rates.
Jul 2009	The <i>Fair Work Act 2009</i> came into operation with the exception of modern awards and the National Employment Standards. Council of Australian Governments (COAG) decided to establish a single, national heavy vehicle regulator.
Nov 2009	The ATC recommended Queensland as a host jurisdiction for the national, heavy vehicle regulator to the COAG.
Dec 2009	The Deputy Prime Minister announced the establishment of the Safe Rates Advisory Group. Inaugural meeting of the Safe Rates Advisory Group
Jan 2010	Modern awards come into operation.

