



Submission to the Education and Employment Legislation Committee

Senate Inquiry into the provisions of the Fair Work Legislation Amendment  
(Closing Loopholes) Bill 2023

*29 September 2023*

## EXECUTIVE SUMMARY

This submission by the National Road Transport Association (NatRoad) responds to the request by the Education and Employment Legislation Committee (Committee) for submissions in relation to the provisions of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (the Bill). NatRoad represents road freight operators in Australia, including owner drivers and large fleet operators.

NatRoad's submission addresses Part 16 of the Bill (Provisions relating to regulated workers) to the extent that it deals with the road transport industry. NatRoad also makes a submission in relation to the new section 15AA proposed to be inserted by Part 15 of the Bill (Definition of employment).

The road transport industry in Australia is highly competitive, with increasing costs, including record high fuel costs and a lack of drivers. Profit margins in the industry have fallen to 2.3%, and any increases in wage costs would further reduce margins. The industry is also fragmented, with smaller operators making up the majority, but larger participants having a disproportionate influence through subcontracting of owner-operators.

Because of these considerations, it is vital that any legislative reform meets the objectives outlined in the Bill, including to ensure that the industry is 'safe, sustainable and viable' and to avoid 'unreasonable administrative and compliance costs for industry participants' (proposed new section 40D of the *Fair Work Act 2009* (Cth) (FWA)). NatRoad's submission is designed to assist in achieving these objectives.

NatRoad's submissions in relation to the Bill can be summarised as follows:

Issue Number	Issue	NatRoad's Response
1  See Section C	<p>The Bill permits the Fair Work Commission (FWC) to make orders and guidelines that apply to 'regulated road transport contractors'.</p> <p>The Bill does not give the FWC power to make 'road transport industry contractual chain orders' (RTICCOs). Such power may only be given pursuant to regulations, if and when the Minister decides to make such regulations.</p> <p>If orders are made that apply only to 'regulated road transport contractors' this is likely to cause the same kind of fragmentation in the road transport industry that occurred as a result of the <i>Road Safety Remuneration Act 2012</i>, disadvantaging owner drivers who fall within the definition of 'regulated road transport contractor'.</p>	<p>The Bill must grant the FWC specific and certain powers to make RTICCOs or Guidelines applying to the road transport industry contractual chain. Provisions setting out these powers must commence at the same time as any powers to make road transport minimum standards orders (RTMSOs), and any minimum standards set out in an RTMSO must also be reflected in RTICCOs that apply to other transport operators in the industry.</p>

Issue Number	Issue	NatRoad's Response
2  See <b>Section D</b>	'Regulated road transport contractor' is defined so that the proposed new protections will only apply to the individual performing transport services (whether a sole trader, a partner in a partnership, a director of a company or a director's family member) rather than the contracting entity. This raises questions as to how that individual's rights can, and should, be dealt with separately from the rights of the contracting entity (that is, the company or partnership that enters into the contract to provide transport services). The definition currently proposed has the potential to lead to loopholes, unusual outcomes, conflict with other areas of law and leave some contracting entities (which may include small businesses) without appropriate protections.	<p>The definition of 'regulated road transport contractor' should be reformulated in terms of contracting entities rather than in terms of individuals. The definition should also not refer or link to family members or family relationships.</p> <p>This would remove anomalies in the application of the definition, and better align with the proposed new regime relating to unfair terms in services contracts.</p>
3  See <b>Section E</b>	The Bill contemplates that the new minimum standards regime will co-exist with existing owner driver legislation in Victoria and New South Wales, and other legislation to be specified in regulations. There is potential for significant overlap between the proposed new FWA provisions and these owner driver laws, which is likely to lead to confusion, complexity and an excessive regulatory compliance burden on transport businesses.	Minimum regulation standards under the Bill should operate to the exclusion of any state owner driver legislation that might also be applicable to the person or entity in question.
4  See <b>Section F</b>	The Bill proposes to introduce powers for the FWC to make orders about unfair terms in transport services contracts. This has the potential to overlap with the unfair contracts regime under the Australian Consumer Law (ACL). Neither the Bill nor the Explanatory Memorandum outlines how these two regimes are intended to interact.	Consideration should be given to (fully or partially) exempting transport contracts covered by the proposed FWA unfair contracts regime from the application of the unfair contract terms provisions of the ACL. This can be achieved through making the relevant provisions of the FWA a 'prescribed law' for the purposes of s 28(4) of the ACL.

Issue Number	Issue	NatRoad's Response
5  See Section G	The proposed insertion of section 15AA, which modifies the definition of 'employment', will cause untenable uncertainty for transport businesses engaging independent contractors.	Section 15AA should not apply to any contract for services in the 'road transport industry' that involves the provision by the contractor of a vehicle.

## A. INTRODUCTION

NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tippers, express and car carriers, as well as tankers and refrigerated operators.

NatRoad welcomes the opportunity to provide submissions to the Committee on behalf of its members. NatRoad's submissions are confined to Parts 15 and 16 of the Bill insofar as they apply to the road transport industry.

## B. BACKGROUND

In a recent industry report, competition in the road transport industry has been classified as 'high' and 'increasing'.<sup>1</sup> The industry's profit margins have 'withered' in recent years and operators face significant problems including lack of drivers, record high fuel costs and intense competition, forcing them to attempt to absorb these rising costs.<sup>2</sup> Although revenue is projected to increase slightly, this is largely a result of increased costs, and profit margins have fallen to 2.3%.<sup>3</sup> Wage costs are relatively steady at 22.8% of industry revenue in 2022-23,<sup>4</sup> but any increases would further reduce margins.

The transport industry is 'highly fragmented' with most operators operating on a small scale and servicing a particular market or region.<sup>5</sup> Although the transport industry is composed predominately of smaller operators, the major participants have a 'disproportionate influence' through their sub-contracting of owner-operators.<sup>6</sup>

Four Australian states now have legislation regulating owner drivers (although Queensland's recent laws will require action by the Federal Government before they come into effect).<sup>7</sup> While Western Australia's laws largely resemble those of Victoria, and Queensland's largely match those of New South Wales, the two systems are quite different from one another. The *Independent Contractors Act 2006* (Cth) also applies to some aspects of road transport industry contracts and carves out some exceptions to allow state owner driver legislation to operate.<sup>8</sup> This means those operating in the road transport industry already have a wide range of different laws and regulations with which they must comply. The relevant state legislation regulating owner drivers is listed and discussed in further detail under Section E of these submissions.

<sup>1</sup> Schroeder N, IBISWorld, 'Road Freight Transport in Australia' Industry Report March 2023, p.22.

<sup>2</sup> Ibid p.9.

<sup>3</sup> Ibid p.19.

<sup>4</sup> Ibid p.20

<sup>5</sup> Ibid p.19.

<sup>6</sup> Ibid p.23.

<sup>7</sup> See *Industrial Relations and Other Legislation Amendment Act 2022* (Qld), section 2.

<sup>8</sup> *Independent Contractors Act 2006* (Cth), section 7(2).

## C. APPLICATION OF THE ROAD TRANSPORT MINIMUM STANDARDS ORDER REGIME

The proposed new Part 3A-2 of the FWA will allow the FWC to make RTMSOs for ‘regulated workers’. A proposed new section 15G defines a regulated worker as an ‘employee-like worker’ or a ‘regulated road transport contractor’.

The definition of ‘regulated road transport contractor’ proposed to be inserted as section 15Q of the FWA is worded so that it only applies to a limited class of individuals. NatRoad submits that any power to make orders and guidelines with respect to minimum standards must apply to all transport industry contracts and cannot be restricted to individual ‘regulated road transport contractors’, as this will have the effect of fragmenting the transport industry and lead to discrimination against owner drivers. To provide minimum standards that apply only to one section of the industry risks the problems that were encountered under the now repealed *Road Safety Remuneration Act 2012*. The previous application of minimum rates under that legislation to just one sector of the industry meant that ‘owner drivers and small transport businesses became unattractive in the market and lost work’.<sup>9</sup>

The current draft of the Bill proposes to insert section 40J(1), which provides that ‘the regulations may make provision for and in relation to matters relating to the road transport industry contractual chain’ or its participants. These orders are to be termed ‘road transport industry contractual chain orders’ (RTICCOs). The definition of a ‘road transport industry contractual chain participant’ under s40H is broad, and the definition can be extended by regulation.

In NatRoad’s view, the promised powers to make orders relating to parties in the ‘road transport industry contractual chain’ must be included in the Bill in more certain terms before the Bill is passed. NatRoad submits that the FWC should have power to make not just RTICCOs but also road transport guidelines to address pressures exerted by supply chains on transport operators generally (not just ‘regulated road transport contractors’).

NatRoad is particularly concerned about the indirect pressure exerted on operators by supply chains. This pressure is generally financial in nature and may result from:

- (a) paying rates that are not sufficient to allow the transport operator to make a profit;
- (b) making unreasonable or unjustified deductions from invoices payable to a transport operator;
- (c) paying invoices in an unreasonably long time period, with the result that the transport operator struggles to pay its own invoices within their payment terms;
- (d) requiring significant investment in assets where the transport operator has no guarantee of ongoing work; and
- (e) not including any provisions in agreements to permit price variations based on movements in the price of diesel fuel.

Indirect financial pressure is often exerted by, or as a result of, contractual terms that are routinely included in transport contracts. The table below illustrates how some common terms in transport contracts can result in indirect financial pressure on transport operators.

	Type of clause	Reason the clause creates indirect pressure
1	Payment term for invoices of more than 30 days from date of invoice.	This reduces cashflow and therefore liquidity, potentially contributing to the high insolvency rates that the industry suffers from. <sup>10</sup>

<sup>9</sup> Australian Small Business and Family Enterprise Ombudsman *Inquiry into the effect of the Road Safety Remuneration Tribunal’s Payment Order on Australian Small Business* (2016) p.16. Accessed at [https://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0006/243276/sub029-transport-attachment.pdf](https://www.pc.gov.au/__data/assets/pdf_file/0006/243276/sub029-transport-attachment.pdf).

<sup>10</sup> See ASIC Insolvency Statistics available at <https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-current/>.

	Type of clause	Reason the clause creates indirect pressure
2	'Service Level Credits' where a failure to deliver on time, or precisely in accordance with the contract, results in a monetary penalty or deduction.	Imposing penalties on operators for even small variations from targets seriously erodes already very thin margins.
3	'Meet the market' clauses where the transport operator, having already invested in vehicles, is then 'benchmarked' against other providers while the contract is still on foot and required to meet any lower price that the customer can obtain.	This creates a 'ratchet' effect where smaller players can only lose as a result of any market changes. It also allows large businesses to obtain ad hoc prices for particular routes/services without consideration of the entirety of the service being provided by the existing contracted operator.
4	Unbalanced rights to terminate for convenience. Contracts commonly allow the customer to terminate for convenience. It is also very common for the contract not to provide for any minimum level of work for the operator. This means, even without terminating, the customer can simply fail to supply any work, thereby effectively denying any income for the operator.	This creates a situation where the customer can unilaterally terminate the contract, without any need to provide a reason and even in circumstances where the operator has invested significantly in vehicles and/or equipment. This can have a similar result to a 'meet the market' clause – the customer becomes aware that it can source a lower price, so it simply terminates the existing agreement by giving a short period of notice.

Equally, indirect pressure may be created because certain provisions are **not** included in contracts. The following table sets out examples of such clauses.

	Type of clause	Reason why absence of such a clause creates indirect pressure
1	Price review mechanism, guaranteeing an adjustment, in any agreement for a term of one year or more.	In a period of one year, wages, vehicle costs, insurance costs and government charges are likely to change, and thereby erode any profit available to the operator.
2	Fuel levy mechanism, ensuring that the transport operator is appropriately compensated for any variation in the price of fuel.	Fuel prices vary markedly across the year and a transport operator will lose money if it cannot adjust its prices to compensate for this.

NatRoad submits that the Bill should include clear powers allowing the FWC to make RTICCOs or Guidelines applying to the whole road transport industry contractual chain which prohibit or require the kinds of clauses outlined above, as appropriate. NatRoad believes that the problems faced by transport operators described above could also be alleviated if the FWC has power to issue Guidelines which:

- (a) establish clear principles for fair and reasonable contract terms in the road transport industry, which can be used as a reference point in contract negotiations and dispute resolution processes; and
- (b) require transport contracts to include:
  - (i) a summary of the most important aspects of the proposed agreement; and
  - (ii) disclosure of particular potentially onerous terms.

NatRoad notes that both Victoria and Western Australia have introduced codes of practice,<sup>11</sup> pursuant to their existing state owner driver laws, that apply to dealings with owner drivers and that those codes deal with matters like:

- payment terms;
- passing on fuel levies;
- dispute resolution;
- conduct during negotiations;
- absences due to illness or carer responsibilities;
- misleading advertising; and
- when upgrades or updates to motor vehicles can be reasonably required.

The FWC should have clear powers to deal with similar issues by way of RTICCOs and Guidelines that apply to all transport operators in the road transport industry contractual chain.

#### **NatRoad's submission**

The legislation must grant the FWC specific and certain powers to make RTICCOs or Guidelines applying to the road transport industry contractual chain. The provisions setting out these powers must commence at the same time as any powers to make RTMSOs.

Any minimum standards set out in an RTMSO must also be reflected in RTICCOs that apply to others in the industry. To have Orders that apply only to a select group of the road transport industry will necessarily result in fragmentation of the industry and commercially disadvantage 'owner drivers'.

#### **D. DEFINITION OF 'REGULATED ROAD TRANSPORT CONTRACTOR'**

The Bill proposes to insert a new section 15Q in the FWA, which defines 'regulated road transport contractor' as a person who is:

- (i) an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract; or
- (ii) if a body corporate is a party to a services contract (other than as a principal)—an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract; or
- (iii) if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal)—an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or
- (iv) if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal)—an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract;

The individual person must perform all, or a significant majority, of the work to be performed under the services contract and must not be an employee or an employee-like worker. This definition is restrictive and means that only individuals can be regulated road transport contractors.

NatRoad appreciates that the objective of the definition of 'regulated road transport contractor' is 'to capture individuals performing work under a services contract regardless of the type of entity they have

<sup>11</sup> *Code of Practice for Owner Drivers and Forestry Contractors* (Schedule 2 of *Owner Drivers and Forestry Contractors Regulations 2017* (Vic)) and *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* (WA).

adopted'.<sup>12</sup> However, in NatRoad's view, attempting to excise the individual from the corporate structure they have adopted is likely to cause more problems than it solves. This approach is inconsistent with owner driver legislation in Victoria, Western Australia, New South Wales and Queensland – in each of these jurisdictions, an 'owner driver' (or similarly regulated person) can be an individual sole trader, a body corporate or a partnership.<sup>13</sup>

The current definition of 'regulated road transport contractor' presents practical problems because:

- (a) the definition being restricted to individuals (either a sole trader, a partner in a partnership or the director of a company) raises questions as to how that individual's rights can, and should, be dealt with separately from the rights of the contracting entity (that is, the company or partnership that actually enters into the contract to provide the transport services); and
- (b) the reference to 'family members' within the definition requires very personal enquiries to be made of any entity that may be a 'regulated road transport contractor' as to any relationships between directors of a corporate entity and any driver used to provide services.

These problems are discussed further below.

### ***Availability and appropriateness of the remedies available for breach of an RTMSO or for unfair termination***

Defining a 'regulated road transport contractor' by reference to an individual rather than the contracting entity creates practical problems.

### ***Example of loopholes***

BB Transport Pty Ltd has an agreement to provide transport services to Tamworth Transport Pty Ltd. BB Transport Pty Ltd's shareholders are Bruce and Mary Brown. The director is Bruce Brown. All of the driving services are provided by their son, Jim Brown, who is paid a wage by BB Transport Pty Ltd.

As a consequence:

- (a) BB Transport Pty Ltd is not a 'regulated road transport contractor' as it is not an individual; and
- (b) Jim Brown is not a 'regulated road transport contractor' because he is an employee and as a result, cannot meet the definition of a 'regulated road transport contractor'.

### ***Issue 1 – creation of a loophole – no party has rights***

Linking the definition of 'regulated road transport contractor' to an individual appears to create a loophole. As a result, the legislative protection does not apply as soon as any person involved in driving a vehicle is, in fact, an employee (regardless of the size of the business or the family relationships involved).

### ***Issue 2 – creation of a loophole that can be used to avoid the operation of new provisions***

If a business wants to avoid falling within the present definition of a 'regulated road transport contractor' and thus to escape the new regime, all it needs to do is:

- (a) incorporate a company; and
- (b) have the sole director of that company, who is to drive any vehicle, enter into an employment agreement with the company.

<sup>12</sup> Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) 183.

<sup>13</sup> See Section E of these submissions for further details on the definition of 'owner driver' in each relevant piece of legislation.



This would have the effect that the director could not be a 'regulated road transport contractor' because he/she is an employee.

The employer (the company/contracting entity) also cannot be a 'regulated road transport contractor' under the present wording of the definition because it is not an individual.

***Examples of problems associated with a director personally bringing an action for unfair termination***

CC Transport Pty Ltd has three directors, Cheryl, Mandy and Thomas Clinton.

Thomas Clinton drives one of the company's vehicles and provides services to Tamworth Transport Pty Ltd.

Tamworth Transport Pty Ltd is unhappy with the fact that Thomas Clinton delivered two items late (even though he argues that there were traffic problems that caused this). In reliance on the late deliveries, Tamworth Transport Pty Ltd summarily and without notice terminates its contract for services with CC Transport Pty Ltd. Thomas decides that he has had enough of the road transport industry and is going to take an overseas holiday.

CC Transport Pty Ltd would like to apply to the FWC seeking reinstatement of the contract or another remedy, but cannot do so because CC Transport Pty Ltd does not fall within the definition of 'regulated road transport contractor'. The only person who can apply is Thomas Clinton and he is not prepared to make such an application.

***Issues of conflict of interest***

The proposed definition of 'regulated road transport contractor' also has the potential to create situations where there is a conflict between the interests of the person who is the 'regulated road transport contractor' and the interests of the actual contracting entity for the relevant transport services. For example, if the contracting entity is a corporation and the 'regulated road transport contractor' is one of the directors of that corporation, there is potential for conflicts to arise between the rights of that person as a 'regulated road transport contractor' under the FWA amendments, and their fiduciary duties owed to the corporation. An example is set out below.

***Example of conflict of interests/duties***

Bloggs Transport Pty Ltd has three directors (John, Jane and Joe) who all perform work under transport services contracts with different principal contractors. Bloggs Transport Pty Ltd has a contract to provide transport services to Macquarie Transport Pty Ltd. Joe performs all the work under this services contract using a vehicle owned by Bloggs Transport Pty Ltd. Recently, Macquarie Transport Pty Ltd has terminated its contract with Bloggs Transport Pty Ltd, and Joe believes that this termination was unfair and in breach of the Road Transport Industry Termination Code.

There have been longstanding problems in the relationship between Bloggs Transport Pty Ltd and Macquarie Transport Pty Ltd, and the work is not particularly profitable. John and Jane believe it is in Bloggs Transport Pty Ltd's best interests to seek work for the vehicle elsewhere and there are opportunities available for better paying work using the company vehicle. However, Joe enjoys doing the work for Macquarie Transport Pty Ltd because it suits his personal routine and he wants to apply to the FWC for an order reinstating the contract with Bloggs Transport Pty Ltd pursuant to the unfair termination provisions in the FWA.

In this situation, seeking reinstatement of the contract with Macquarie Transport Pty Ltd goes against the wishes of the other directors and, arguably, the best interests of Bloggs Transport Pty Ltd. Accordingly, there is a tension between:

- (a) Joe's rights as a regulated road transport contractor; and
- (b) his duties as a director to act in good faith in the best interests of Bloggs Transport Pty Ltd.<sup>14</sup>

A further complication is that any remedy for unfair termination may require Macquarie Transport Pty Ltd to enter into a new contract with Bloggs Transport Pty Ltd (see proposed section 536LS). It is not clear how the FWC can make this order in circumstances where Bloggs Transport Pty Ltd is not a party to the unfair termination application (because Bloggs Transport Pty Ltd is not a 'regulated road transport contractor').

*The conflict between the reference to 'individuals' in the definition of 'regulated road transport contractor' and the remedies for unfair contract terms*

While the definition of 'regulated road transport contractor' links to an individual rather than the contracting entity, the provisions of the Bill dealing with unfair contract terms do not apply in the same manner. Instead, protection from unfair terms under proposed section 536ND is afforded to 'a person who is **party to a services contract**' (our emphasis). In many cases, including the hypothetical scenarios explored above, the person who is a party to that services contract will not be the same person as the 'regulated road transport contractor'. This creates an incongruous scenario where some remedies under Chapter 16 are available only to individuals performing work under services contracts ('regulated road transport contractors' under s 15Q), and some remedies are available only to the entity (for example, a business or partnership) that is a party to the services contract.

*The need to seek personal information about relationships in order to determine whether a person is covered by the definition of 'regulated road transport contractor'*

The definition of 'regulated road transport contractor' also has the potential to cause uncertainty for principal contractors, who will need to undertake detailed (and potentially awkward) enquiries to determine whether a driver is in fact a 'regulated road transport contractor' to whom they owe duties under a RTMSO. To make this determination, principal contractors will be required to ascertain the directorships of any contractors they engage and to enquire (on a continuing basis) about any family relationships between directors and drivers.

NatRoad submits that it is impractical and intrusive to require a principal contractor to make enquiries about personal/family relationships in order to determine the scope of their obligations under a RTMSO.

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<sup>14</sup> *Corporations Act 2001* (Cth), s 181(1)(a).

*Example of the difficulty in applying the definition of ‘regulated road transport contractor’*

Bloggs Transport Pty Ltd operates five vehicles and has three directors (John, Jane and Joe) who all perform work under transport services contracts with different principal contractors. Three of those vehicles are driven by John, Jane and Joe. The other two vehicles are driven by Max (who is the stepson of Joe) and by Mary (who is the wife of John).

With the services to be provided using Max and Mary, the principal contractor will not be able to determine whether these services are covered by any RTMSO unless they obtain an ASIC company search and ask Max and Mary respectively about their personal relationships with the directors John, Jane and Joe.

In addition, this enquiry is not restricted to a single point in time. If, for example, Mary ends up becoming divorced from John, any contract between the principal contractor and Bloggs Transport Pty Ltd where Mary is the main driver will no longer be covered by an RTMSO. This is because Mary will no longer be a ‘regulated road transport contractor’ as she is no longer a ‘family member’ of a director of Bloggs Transport Pty Ltd. Here, the principal contractor has no reasonable method of continuously verifying whether Mary satisfies the definition and thus, whether she is covered under an RTMSO.

**NatRoad’s submission**

The proposed definition of ‘regulated road transport contractor’ creates uncertainty, unexpected outcomes and loopholes. NatRoad submits that:

- (a) the definition of ‘regulated road transport contractor’ should link to the contracting entity, not to an individual (who may or may not be the contracting party); and
- (b) any definition of ‘regulated road transport contractor’ should not refer to, or link to, family members or family relationships.

This amendment would also align better with the proposed new regime relating to unfair terms in services contracts.

**E. INTERACTION OF THE BILL WITH EXISTING OWNER DRIVER LEGISLATION**

NatRoad is concerned about the interaction between the FWC’s proposed power to issue RTMSOs covering ‘regulated road transport contractors’ and the legislation in force in various Australian states that deals with owner driver contracts. The relevant state legislation includes:

- (a) *Owner Drivers and Forestry Contractors Act 2005* (Vic);
- (b) *Owner-Drivers (Contracts and Disputes) Act 2007* (WA);
- (c) *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* (WA);
- (d) *Industrial Relations Act 2016* (Qld); and
- (e) *Industrial Relations Act 1996* (NSW).

The proposed new section 536JP of the FWA provides that some state and territory laws that cover similar matters to Chapter 16 of the Bill will not affect the rights, entitlements, obligations and liabilities of regulated workers, businesses or parties to services contracts. However, this exclusion does not apply to some of the existing state owner driver laws, including:

- (a) Chapter 6 of the *Industrial Relations Act 1996* (NSW); and
- (b) *Owner Drivers and Forestry Contractors Act 2005* (Vic).

It is unclear why section 536JP only refers to the owner driver legislation in New South Wales and Victoria, and not the Queensland and Western Australian legislation listed above.<sup>15</sup>

Paragraph 1171 of the Explanatory Memorandum to the Bill states that, to the extent that both a state regime and a RTMSO apply, the RTMSO cannot diminish, but can supplement, rights and obligations under the state regime. In other words, the Bill contemplates that owner driver legislation (at least in Victoria and New South Wales) will co-exist with the new laws and continue to apply to regulated road transport contractors who are covered by a RTMSO.

NatRoad is concerned that the coexistence of these regimes may create complexity and confusion. One issue is that each piece of legislation referred to above contains a slightly different definition of an 'owner driver', each of which is different again from the definition of 'regulated road transport contractor' in the Bill. The different definitions are summarised in the table below.

Jurisdiction	Legislation	Regulated parties
Federal	Fair Work Legislation (Closing Loopholes) Bill 2023, s 15Q(1)	<p>A person is a '<b>regulated road transport contractor</b>' if:</p> <ul style="list-style-type: none"> <li>(a) the person is: <ul style="list-style-type: none"> <li>(i) an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract; or</li> <li>(ii) if a body corporate is a party to a services contract (other than as a principal) – an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract; or</li> <li>(iii) if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal) – an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or</li> <li>(iv) if a partner in a partnership is a party to the services contract in their capacity as a partner (other than as a principal) – an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract; and</li> </ul> </li> <li>(b) the person performs all, or a significant majority, of the work to be performed under the services contract; and</li> <li>(c) the person does not perform any work under the services contract as an employee; and</li> <li>(d) the work performed under the services contract is work in the road transport industry; and</li> <li>(e) the person is not an employee-like worker who performs work in the road transport industry under the services contract.</li> </ul>

<sup>15</sup> It may be that the intention is that this legislation will be specified in regulations made pursuant to the proposed new section 536JP(3)(c).

Jurisdiction	Legislation	Regulated parties
Victoria	<p><i>Owner Drivers and Forestry Contractors Act 2005</i>, s 4(1)</p> <p><i>Owner Drivers and Forestry Contractors Regulations 2017</i>, s 6(a)</p>	<p>For the purposes of this Act, an <b><i>owner driver</i></b> is—</p> <p>(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</p> <p>(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</p> <p>(c) a partnership of persons referred to in paragraph (a)—but does not include a haulage contractor.</p> <p>The regulations prescribe that a business that operates four or more vehicles is not an owner driver.</p>
Western Australia	<p><i>Owner-Divers (Contracts and Disputes) Act 2007</i>, s 4</p>	<p>For the purposes of this Act, an <b><i>owner-driver</i></b> is —</p> <p>(a) a natural person —</p> <p>(i) who carries on the business of transporting goods in one or more heavy vehicles supplied by that person; and</p> <p>(ii) whose principal occupation is the operation of those vehicles (whether solely or with the use of other operators); or</p> <p>(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 —</p> <p>(i) supplied by the body corporate or an officer of the body corporate; and</p> <p>(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</p> <p>(c) a partnership of persons, at least one of whom is a person referred to in paragraph (a).</p>

Jurisdiction	Legislation	Regulated parties
New South Wales	<i>Industrial Relations Act 1996</i> , s 309(1)	<p>A <b><i>contract of carriage</i></b> is a contract for the transportation of goods by means of a motor vehicle in the course of a business of transporting goods of that kind by motor vehicle, but only—</p> <ul style="list-style-type: none"> <li>(a) where the carrier is not a partnership or body corporate— <ul style="list-style-type: none"> <li>if no person except the carrier is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the carrier or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business, or</li> </ul> </li> <li>(b) where the carrier is a partnership—if no person other than a partner is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the partnership or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business, or</li> <li>(c) where the carrier is a body corporate—if no person is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the body corporate or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business unless the person is— <ul style="list-style-type: none"> <li>(i) a director of the body corporate or a member of the family of a director of the body corporate, or</li> <li>(ii) a person who, together with the members of his or her family, has a controlling interest in the body corporate, or</li> <li>(iii) a member of the family of a person who, together with the members of his or her family, has a controlling interest in the body corporate.</li> </ul> </li> </ul>
Queensland	<p><i>Industrial Relations Act 2016</i></p> <p>Yet to commence</p>	<p>An <b><i>independent courier</i></b> is a person who provides a services transporting goods using a courier vehicle if, in the course of providing the service, the courier vehicle is driven only by—</p> <ul style="list-style-type: none"> <li>(a) if the person is an individual—the individual; or</li> <li>(b) if the person is a partnership—a partner in the partnership; or</li> <li>(c) if the person is a corporation— <ul style="list-style-type: none"> <li>(i) an executive officer of the corporation; or</li> <li>(ii) a member of the family of an executive officer of the corporation.</li> </ul> </li> </ul>

These different but overlapping definitions mean that situations are likely to arise where an individual is covered both by owner driver legislation in the relevant state and entitled to protections under a RTMSO or the proposed unfair termination provisions of the FWA.

#### *Examples of practical issues with respect to overlapping legislation*

##### ***Issue 1 - double compensation***

Jamie Lee is a sole trader who provides transport services in Victoria using her heavy vehicle under a services contract with Curtis Transport Pty Ltd. She has been providing services to Curtis Transport

Pty Ltd for just over a year, meaning she is protected from 'unfair termination' under proposed section 536LE of the FWA.

Section 21 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic) states that the minimum period of notice of termination for an owner driver of a heavy vehicle is three months. Curtis Transport Pty Ltd decides to terminate Jamie's services contract with three months' notice due to a general downturn in work. Jamie is given a payment for three months' notice, in accordance with the Victorian legislation.

Jamie applies to the FWC for reinstatement of the services contract on the basis that she has been unfairly terminated. In this scenario, even though Curtis Transport Pty Ltd has complied with the provisions regulating termination of Jamie's contract under the relevant state owner driver legislation, Curtis Transport Pty Ltd may still be open to an action for unfair termination under the FWA.

*Issue 2 – two possible jurisdictions/applicable laws*

Assume Curtis Transport Pty Ltd terminates the engagement of Jamie Lee **without** giving the required three-month notice period under section 21 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic). This is an offence under section 22A of the Act. Jamie Lee applies to the Victorian Civil and Administrative Tribunal under section 41 of the Act, and the Tribunal orders Curtis Transport Pty Ltd to pay an amount to Jamie Lee equivalent to the three-month notice period, plus interest and exemplary damages (pursuant to section 44 of the Act). Curtis Transport Pty Ltd is also fined for breaching the Act.

In this scenario, are Jamie Lee's rights against Curtis Transport Pty Ltd exhausted, or can she make a further application to the FWC claiming that she is entitled to be reinstated, or to further compensation for unfair termination?

In NatRoad's view, the minimum standards regime set out under the new Bill should operate as a single port of call for the regulation of standards that apply to owner drivers across Australia. The creation of a further regulatory scheme that overlaps with existing state and federal legislation will create confusion and dilute the benefits that might otherwise result from the Bill, such as uniform minimum standards applying across Australia. Multiple regimes and standards have the result that transport operators are accountable under various regimes and to multiple regulators. This is contrary to the road transport objective outlined in the proposed new section 40D of the FWA, which emphasises the need to avoid unreasonable adverse impacts upon:

- (a) road transport industry business viability and productivity; and
- (b) administrative and compliance costs for road transport industry participants.

To allow existing state owner driver legislation to continue to operate in circumstances where a RTMSO covers an owner driver will add complexity and confusion.

**NatRoad's submission**

NatRoad's submits that, once a RTMSO is in place that covers an individual or (as NatRoad has submitted in Section D of these submissions, a contracting entity), that Order should operate to the exclusion of any state owner driver legislation that might also be applicable to that individual or entity.

## F. INTERACTION OF THE BILL WITH THE UNFAIR CONTRACT TERMS REGIME UNDER THE AUSTRALIAN CONSUMER LAW

NatRoad is also concerned about the Bill's interaction with the unfair contract terms regime set out in Part 2-3 of the ACL. Part 2-3 provides that a term of a consumer contract or small business contract (which is also a standard form contract) is void if the term is unfair. Pursuant to section 24(1) of the ACL, a term is 'unfair' if:

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Importantly, significant amendments to the ACL are coming into effect on 9 November 2023, which will have the effect of:

- (a) expanding the definition of 'small business' so that the regime will apply to a wider range of contracts (including many more contracts for transport services);
- (b) updating the criteria for what constitutes a 'standard form contract'; and
- (c) introducing extensive new remedies and penalties, including significant fines for corporations and individuals found to be relying on unfair contract terms.

The Bill proposes to add new provisions to the FWA which allow the FWC to make orders in relation to a services contract if the FWC is satisfied that the services contract includes one or more unfair contract terms. Under the proposed new section 536NB, in determining whether a term is 'unfair', the FWC may take into account:

- (a) the relative bargaining power of the parties to the contract;
- (b) whether the contract as a whole displays a significant imbalance between the rights and obligations of the parties;
- (c) whether the term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract;
- (d) whether the term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract;
- (e) whether the contract as a whole provides for a total remuneration for performing work that is:
  - (i) less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines; or
  - (ii) less than employees performing the same or similar work would receive; and
- (f) any other matter the FWC considers relevant.

If the FWC, in its discretion, is satisfied that a term is unfair, it can make orders setting aside, amending or varying all or part of the contract. Only independent contractors who earn below the prescribed high income threshold may seek remedies under these provisions.

Section 28(4) of the ACL states that Part 2-3 'does not apply to a small business contract to which a prescribed law of the Commonwealth, a State or a Territory applies'. The *Competition and Consumer Regulations 2010* (Cth) do not currently prescribe any laws for the purposes of this section.

The Explanatory Memorandum to the Bill explains how the new provisions will interact with the unfair contracts protections under the *Independent Contractors Act 2006* (Cth). However, neither the Bill nor the Explanatory Memorandum contemplates how these provisions will interact with Part 2-3 of the ACL.



It is likely that a services contract between a regulated road transport contractor and a principal contractor, or between parties in the road transport industry contractual chain, will also be a 'standard form small business contract' that attracts the operation of Part 2-3 of the ACL. The factors that the FWC may take into account under section 536NB in determining whether a term is unfair overlap with, but are not identical to, the criteria for classifying a term as 'unfair' under the ACL. It also appears that the FWC has more discretion in determining whether a term is 'unfair' under the proposed FWA provisions than is currently allowed under Part 2-3 of the ACL.

Accordingly, NatRoad is concerned about the potential for overlap between the two regimes:

- (a) Will both regimes apply to services contracts?
- (b) Will parties need to elect to seek remedies either in the FWC (relying on the FWA provisions) or in a court (relying on the ACL provisions)?
- (c) If the FWC finds that a term is not unfair, can an independent contractor seek remedies in relation to that term under the ACL (and vice versa)?
- (d) If the FWC has found that a term is unfair and made orders, can an independent contractor still seek remedies under the ACL (and vice versa)?
- (e) Can fines be imposed under the ACL in addition to any orders made under the FWA (and vice versa)?

#### **NatRoad's submission**

To avoid the complexity inherent in having two regimes potentially applying to the same contracts, NatRoad submits that consideration should be given to exempting, or partially exempting, transport contracts covered by the proposed FWA unfair contract terms regime from the application of the unfair contract terms provisions of the ACL. This could be achieved by making the relevant provisions of the FWA a 'prescribed law' for the purposes of section 28(4) of the ACL.

## **G. CHANGE TO DEFINITION OF EMPLOYEE**

NatRoad is concerned that the proposed new section 15AA of the FWA will create significant uncertainty for transport businesses who engage owner drivers as contractors. The decision of the High Court of Australia in *ZG Operations Australia Pty Ltd v Jamsek*<sup>16</sup> provided much needed certainty to the transport industry that formal contractual arrangements will be given priority in determining the nature of business arrangements between transport businesses and owner drivers. The proposed new section 15AA expressly seeks to reverse the decision of the High Court in *Jamsek* and re-instate the Full Federal Court's approach in that case of looking beyond the parties' contractual arrangements to the 'real substance, practical reality and true nature' of the relationship.

The decision of the Full Federal Court in *Jamsek* is itself a good illustration of the uncertainty that will be created in the transport industry by section 15AA. In *Jamsek*, the Full Federal Court found that an employment relationship existed in circumstances where a contractor used a partnership structure and provided transport services using a vehicle which they supplied. Justice Wigney in the Full Federal Court observed that:

While they continued to have some flexibility in the way they carried out their work, they had no real or effective control in respect of the key aspects of the work relationship. The business effectively continued to dictate the hours during which the men were to be available for work, what they were to

<sup>16</sup> [2022] HCA 2 ('*Jamsek*').

do, the remuneration that they were to receive, the annual leave that they could take, the paperwork they had to complete and other key rights and obligations.<sup>17</sup>

Many arrangements comparable to this exist in the road transport industry and are intended by both parties to operate as independent contractor relationships.

NatRoad agrees with the criticisms levied by members of the High Court against the ‘multi-factor test’ applied by the Full Federal Court in *Jamsek* (which section 15AA effectively seeks to reinstate) and in *CFMMEU v Personnel Contracting Pty Ltd*,<sup>18</sup> including that this sort of approach is ‘inevitably productive of inconsistency’, ‘subjective’ and ‘apt to generate considerable uncertainty, both for parties and for the courts’.

***Issues that arise because of the extent of ‘control’ that is exercised in the road transport industry for safety reasons***

In NatRoad’s view, these concerns as to the uncertainty created by section 15AA are particularly serious in the transport industry. One of the factors that courts (including the Full Federal Court in *Jamsek*) have historically considered in determining whether a person is an employee is the ‘right to control’.

In recent years, the road transport industry has increased its focus on safety outcomes and the duties of all parties in the ‘chain of responsibility’ under the Heavy Vehicle National Law. As a consequence, both principal contractors and their supply chain customers have increased the extent and sophistication of the compliance systems required of their subcontractors. Many supply chain contracts require:

- (a) written approval in advance of any subcontractors who are to be used to provide services;
- (b) subcontractors’ vehicles to have particular compliance systems such as online monitoring and fatigue detection systems; and
- (c) any contracts with subcontractors to include detailed provisions about safety, quality assurance, inductions, audits and vehicle type and maintenance.

The level of ‘control’ that is necessarily involved in order to meet these sorts of demands puts the contractual relationship between any owner driver and their principal contractor at risk of being found to be an employment relationship rather than one of principal and contractor.

The uncertainty that proposed section 15AA creates for the road transport industry is likely to result in principal contractors avoiding engaging owner drivers because of the associated legal risk.

***Example of uncertainty created by application of proposed section 15AA***

DD Furniture Transport Pty Ltd operates a business transporting new furniture from retail stores to people’s homes. To do this, it engages various ‘owner drivers’ who each provide their own vehicle and driver. Most of these vehicles are driven by a sole trader or the director of a Pty Ltd entity that owns the vehicle. These contractors wear uniforms and generally (though not always) only perform work for DD Furniture Transport Pty Ltd. For safety reasons they all undergo a comprehensive induction program with DD Furniture Transport Pty Ltd and there are strict guidelines they must comply with. They receive instructions via text message as to the jobs they are required to undertake.

The new Bill sets up a comprehensive legislative regime to deal with these sorts of contractors. However, there is a threshold question that needs to be satisfied before this regime applies. Are these ‘owner drivers’ employees or contractors? If they are ‘employees’ they are not ‘regulated road transport contractors’ (because of the definition in the proposed new section 15Q).

<sup>17</sup> *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 [16].

<sup>18</sup> [2022] HCA 1, [39], [189].

The application of the definition in section 15AA results in considerable uncertainty as to whether these contractors are, or are not, caught by Part 16. This uncertainty is not in the interests of DD Furniture Transport Pty Ltd or the various owner drivers. If DD Furniture Transport Pty Ltd wrongly terminates an agreement with one of the owner drivers, that owner driver may face a situation where they apply for relief under section 536LR, only, many months later, to be denied that relief on the basis that the FWC finds that they are not a 'regulated road transport contractor' but are, in fact, an employee. The owner driver then needs to start proceedings all over again, as an 'employee'.

Similarly, DD Furniture Transport Pty Ltd may organise its business affairs on the basis that its 'owner drivers' are 'regulated road transport contractors' only to have the FWC later find that some or all of them are in fact employees with the consequence that DD Furniture Transport Pty Ltd owes significant employee entitlements to the 'owner drivers'.

***The potential for transport contractors to be exempt from the application of proposed section 15AA***

NatRoad submits that the Bill clearly sets up a regime designed to protect 'regulated workers, specifically, employee-like workers and regulated road transport contractors' (see section 536JV) and to grant them rights to minimum standards and remedies for unfair termination (see section 536LC). In these circumstances, it would be reasonable and practical to remove the potential uncertainty associated with section 15AA by including an appropriate carve out. NatRoad submits that this carve out could provide that section 15AA does not apply to any contract for services in the 'road transport industry' (as defined in the proposed new section 15S of the FWA) that involves the provision of:

- (a) transport services; and
- (b) a vehicle supplied by the entity contracted to provide the transport services, for the purpose of providing those transport services.

**NatRoad's submission**

The application the proposed new section 15AA to the road transport industry has the potential to create massive uncertainty and to result in principal contractors avoiding engaging 'owner drivers' because of the risk of those 'owner drivers' later being classified by a court or a tribunal as 'employees'.

NatRoad submits that the proposed new section 15AA should not apply to any contract for services in the 'road transport industry' that involves the provision by the 'contractor' of a vehicle.

29 SEPTEMBER 2023

# ROAD TRANSPORT INDUSTRY POSITION STATEMENT: CLOSING LOOPHOLES ROAD TRANSPORT REFORMS



This statement is written on behalf of the thousands of road transport industry businesses & workers which keep Australia moving. Represented in this statement are the peak representatives for transport employers, businesses and workers which include the Australian Road Transport Industrial Organisation (**ARTIO**), the Transport Workers Union (**TWU**), National Road Transport Association (**NatRoad**), and the National Road Freighters Association (**NRFA**).

Together, we represent over 575 transport companies, 30,000 owner drivers and small businesses, and 650,000 transport workers across Australia.

As an industry, we welcome the opportunity to contribute to the Senate Committee inquiry into the "Fair Work Legislation Amendment (Closing Loopholes) Bill 2023" and specifically, the road transport provisions of the draft Bill. We tender this joint statement to provide the Government and all members of Parliament with our strong support for these road transport reforms, while advancing a number of important amendments.



## NEED FOR SAFETY, SUSTAINABILITY AND VIABILITY

The road transport industry is vital to Australia. It accounts for between 4-5% of GDP, supports over 650,000 transport workers and is integral to the functioning of all other industries. In recent years, the pandemic, natural disasters—such as floods shutting down key supply routes through the centre of the country— and global supply chain disruptions have made abundantly clear the importance of a smooth-running and efficient transport industry for our economy, our society and regional Australia. Ensuring a safe, sustainable and viable road transport industry is thereby central to all aspects of Australian life.

Without reform, the industry is in crisis.

Industry standards have been eroded by unsustainable commercial pressures arising from unregulated industry contractual chains, the structure of transport markets, and the rapid development of gig transportation models which are exploitative by nature under Australia's outdated system. This has caused a race to the bottom, leading to poor safety outcomes, razor-thin margins, and fragile transport supply chains. These pressures manifest through various sectors and transport modes in complex ways, however, their impact is the same.



Transport businesses are collapsing at an alarming rate – with 347 insolvencies in the last financial year. Decades of research has demonstrated the link between low pay and poor safety outcomes. Operators and drivers are pushed to the limit with no safety net of industry standards to fall back on. In 2022, this led to 185 truck-related fatalities, including 44 truck drivers.

Regulation that does exist in transport is disproportionately applied to those with the lowest commercial power, being transport operators and truck drivers. Those with the most commercial power – the clients at the top of contractual chains – are not bound by any regulatory obligations to ensure their freight can be moved safely and sustainably. Responsible clients wanting to do the right thing are at risk in an unregulated market where others squeeze transport to boost profits and gain competitive advantage.

The erosion of transport industry standards is also limiting the ability to respond to future challenges. These challenges include ensuring a just transition to net zero in an industry which accounts for approximately 7% of Australia's total greenhouse gas emissions, expanding our workforce to address skill shortages and meet growing demand, and investing in new technologies to increase productivity and deliver a more dynamic transport system.

These issues have been examined in detail through an in-depth inquiry from the Senate Select Committee on Rural and Regional Affairs and Transport. The recommendations of the Senate report included reform such as that which has been tabled under the Closing the Loopholes Bill.

Enacting this reform would provide for a transport industry that is safer, fairer and more sustainable for all industry participants, road users and the communities that rely on this essential industry to survive.

## STRENGTHS OF THE PROPOSED LEGISLATION

The road transport industry welcomes the transport reforms contained within the draft Bill and commends the Government on its work to date. We note that, notwithstanding the need for some important amendments, these reforms are largely consistent with the recommendations of the three-year Senate Inquiry mentioned above, which inquired into the "Importance of a viable, safe, sustainable and efficient road transport industry" and subsequent calls for reform which have been supported by the road transport industry.

## Oddball Imaging Studio

### **In particular, the road transport industry welcomes the provisions contained within the draft Bill which:**

- Establishes an 'Expert Panel', within the Fair Work Commission, with the capacity to set enforceable industry standards to ensure a safe, sustainable and viable road transport industry.
- Ensures the capacity of the Expert Panel to deliver safe, sustainable and viable outcomes is not limited by narrowing the types of standards which can be set (with the exceptions of rostering and overtime arrangements) or by excluding sections of the road transport industry.
- Provides for standards to be set on an industry-wide basis, across what are commonly interchangeable road transport modes (i.e. owner-drivers, employees and gig transport workers) through Modern Awards, Regulated Worker Orders, and Contract Chain Orders.
- Institutionalises industry consultation in the 'Expert Panel' by ensuring that standards cannot be enacted without consultation with industry through a Road Transport Advisory Group and its subcommittees and that Commissioners have industry expertise.
- Recognises the need for a capacity to resolve disputes and enforce standards through the Fair Work Commission.
- Provides protections from Unfair Terminations and Unfair Deactivations to ensure standards are enforced, noting that a failure to do so would lead to workers being terminated for seeking compliance with any standards.
- Provides an accessible unfair contracts jurisdiction, in the Fair Work Commission, to support those who may seek relief where standards do not exist.



These elements, subject to actioning the amendments that are listed below, are fundamental to ensuring that these transport reforms can meet the objectives of safety, sustainability and viability. Any changes which undermine these provisions will otherwise threaten the functioning of the entire system and lead to unintended consequences including more deaths and insolvencies.

## PROPOSED AMENDMENTS

Notwithstanding the strengths of the transport reform provisions noted above, there remain critical amendments which must be made to ensure these reforms meet their objectives. These critical amendments to ensure the integrity of the system are as follows:

### Amendment 1 - Road Transport Industry Contractual Chain

#### Issue

In order to meet the Road Transport Objective and deal with the current issues in the road transport industry that the draft Bill is designed to address, the Road Transport Industry Contractual Chain Provisions are essential. As it stands the draft Bill only refers to what regulations may do which provides a large degree of uncertainty and is wholly inadequate for its lack of enforceability. Unless every participant in a contractual chain is obliged to meet safe, fair and sustainable standards, regulation will continue to unfairly target operators and drivers and disadvantage responsible clients.

#### Solution

The proper approach is to have the powers and functions of the FWC enshrined in legislation based on the following principles:

- The Road Transport Expert Panel (**Expert Panel**) must have the power to make Contractual Chain Orders (**CC Order**) that apply to any and all Contractual Chain Participants as specified in the CC Order and provide for enforceable standards and achieve at least cost recovery;
- The matters that must, may or must not be dealt with should reflect those contained in ss 536KJ-536KN;
- The process of application, consultation and operation should reflect those involved in the making of a Road Transport Minimum Standards Order (**RT Order**) (with relevant amendments as contained below);
- The Expert Panel must have the power to deal with disputes between any contractual chain participants, not only where a CC Order is in place (as currently contained in s 40J(2)(d));
- The ability for the Expert Panel to vary other relevant fair work instruments in line with the making, varying or revoking of a CC Order to ensure they meet the Road Transport Objective;
- There must be the ability for Contractual chain Participants to reach a Contractual Chain Agreement with the process reflecting Part 3A-4 (with relevant amendments as contained below); and

Relevant references to this section to be added to the s 40C Guide, road transport objective, Road Transport Advisory Group (**RTAG**) and the Expert Panel.



## **Amendment 2 - Road Transport Objective**

### **Issue**

A confusing double reference to 'standards' in s 40D could mean the reference to 'standards' in s 40D(a) is read down and is limited to only 'minimum standards' referred to in stanza above. There is also a lack of contractual chain reference which will be at the heart of this system.

### **Solution**

Make clear s 40D(a) are 'industry standards.'

Add the following to paragraphs:

- minimum standards for regulated road transport workers and employees in the road transport industry are complied with and enforceable and not undermined by road transport contractual chains; and
- all participants in road transport industry contractual chains take responsibility for implementing and maintaining minimum standards for regulated road transport workers and employees.

## **Amendment 3 – Road Transport Advisory Group (RTAG) Functions**

### **Issue**

It should be made clear that RTAG has functions beyond Awards, Standards and the prioritisation of work. While it is noted that in s 40E that the RTAG's work is not limited to these functions, it would be useful to include a reference to a broader remit.

### **Solution**

Include in s 40E(2) 'to provide advice to the FWC in relation to road transport industry matters.'

## **Amendment 4 – Operation of Road Transport (RT) Orders**

### **Issue**

At s 536JF(3) an RT Order does not come into operation until 24 months after the relevant notice of intent for the order was published.' In order to reach this point the following steps must have taken place:

- An application must be made to the Expert Panel – s 536JZ;
- There must have been genuine engagement with parties to be covered – s 536KA(2)(a);
- The RTAG must have been consulted – s 536KA(2)(b);
- Further consultation must have taken place, including publishing a draft notice of intent and the draft of the proposed Order as well as any affected person being able to make written submissions – ss 536KA(2)(c), 536KB and 536KC; and
- The ability for FWC to hold hearings on the matter – s 536KD.

Once an RT Order is made, there are significant review mechanisms and powers to vary or revoke the RT Order. These include:

- There being a further 12 months prior to operation if FWC makes significant changes - s 536KE(c) (discussed further below);
- the ability for FWC to not make an RT Order at all or set guidelines instead - s 536KG(1)(c) and (d);
- the ability for FWC to vary or revoke an RT Order - s 536KQ; and
- FWC being able to conduct an internal merits review on an RT Order - s 536LA.

Given the process to have an RT Order made and the ability for the FWC to vary or revoke an RT Order, 24 months is far too long a period before an RT Order becomes operational following a relevant notice of intent.

### **Solution**

There should be a default 12 month period for an RT order to become operational, with the ability for FWC to change this period to 6 months if FWC deems appropriate. There should also be an ability for FWC to make orders applicable in a very short time period where failure to do so would undermine the Road Transport Objective.

### **Issue**

At s 536KE(c) there is a further 12 month delay in the operation of an RT Order if FWC makes significant changes to an RT Order after the publishing of a notice of intent. Given the consultation process and ability for any decisions to be reviewed as above, this is far too long.

### **Solution**

FWC should be given discretion as to whether any further delays in the operation of an RT Order are necessary which may include a period of 'up to 6 months'.

## **Amendment 5 - Ability to Vary Modern Awards**

### **Issue**

The Road Transport Objective includes 'the need for an appropriate safety net of minimum standards for regulated road transport workers and employees' (emphasis added) and 'the need to avoid unreasonable adverse impacts upon... sustainable competition among road transport participants.' In order to achieve these objectives it is necessary to ensure that any minimum standards orders made in the road transport industry are able to be reflected where necessary on employee standards and thus the creation and variation of Modern Awards.

As it stands there are references to the ability of the FWC to make and vary Modern Awards (see ss 40E(2)(a), 582(4A), 617(10B)(a) and (b) and 157(1) Note 4). While s 157(1) Note 4 takes into account the Road Transport Objective, it is unclear how this would interact with s 157(2) in order to achieve the Road Transport Objective.

### **Solution**

To ensure that the Road Transport Objective is able to be achieved, the FWC should only consider the Road Transport Objective in the making, variation or revocation of a road transport industry Modern Award.

### **Amendment 5 - Ability to Vary Modern Awards**

#### **Issue**

The Road Transport Objective includes 'the need for an appropriate safety net of minimum standards for regulated road transport workers and employees' (emphasis added) and 'the need to avoid unreasonable adverse impacts upon... sustainable competition among road transport participants.' In order to achieve these objectives it is necessary to ensure that any minimum standards orders made in the road transport industry are able to be reflected where necessary on employee standards and thus the creation and variation of Modern Awards.

As it stands there are references to the ability of the FWC to make and vary Modern Awards (see ss 40E(2)(a), 582(4A), 617(10B)(a) and (b) and 157(1) Note 4). While s 157(1) Note 4 takes into account the Road Transport Objective, it is unclear how this would interact with s 157(2) in order to achieve the Road Transport Objective.

#### **Solution**

To ensure that the Road Transport Objective is able to be achieved, the FWC should only consider the Road Transport Objective in the making, variation or revocation of a road transport industry Modern Award.

### **Amendment 6 - Protection from Unfair Termination of Contract**

#### **Issue**

There are two issues in s 536LE in relation to when a person is protected from unfair termination. The first is that the section needs to be clarified to include a 'services contract or series of services contracts'. In the road transport industry, each different job can be deemed a separate services contract even if performed with the same road transport business, which would mean no road transport contractor would receive protection in relation to the minimum qualifying period. The second is that the minimum qualifying period of 12 months is too long considering both employee unfair dismissal and unfair deactivation have minimum periods of 6 months.

#### **Solution**

The section should be amended to reflect these changes.

### **Issue**

As it stands to be unfairly terminated at s 536LK the termination needs to be both unfair and inconsistent with the Code. In considering whether a termination was unfair at s 536LM the FWC must take into account whether processes in the Code were followed. In making an unfairness assessment at s 536LM it follows that the FWC could find that the Code was complied with in accordance with s 536LM(1)(b) but due to a lack of valid reason at s 536LM(1)(a) and other relevant matters at s 536LM(1)(c) the dismissal was unfair. In these circumstances, a person may not be found to have been 'unfairly terminated' because the Code was complied with at s 536LK(d). The same logic applies in relation to unfair deactivations.

### **Solution**

The criteria in s 536LK(d) should be removed to prevent the absurd outcome where persons dismissed for no valid reason and with no other adverse factors are denied protection in the Bill. The provisions in s 536LF(c) should be removed for the same reason.

## **Amendment 7 - Collective Agreements**

### **Issue**

Only negotiating parties may apply for FWC to deal with a dispute and must contain the consent of the other party in accordance with s 536MP. This broadly reflects the pre-reform position in relation to s 240 of the Fair Work Act 2009, which provides a very narrow avenue with which to seek the assistance of FWC during bargaining. This was addressed by Parliament in the 2022 amendments.

The formulation is even more problematic here given there are no methods under the draft Bill for one party to initiate bargaining (such as a Majority Support Determination), nor any avenue for the taking of Protected Industrial Action in order to support any claims made during the course of bargaining.

### **Solution**

While it is understood that the intent of the draft Bill is that collective bargaining is to be light touch and consent based, there should be the ability for either party to refer a dispute to FWC either before or during bargaining under the same parameters as exist in the current s 240 of the Fair Work Act 2009.