

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 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markets, and the rapid development of gig transportation models which are exploitative by nature under Australia's outdated system.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.

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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.

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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.