Toward A Safe & Sustainable Transport Industry

Submission To ‘Safe Payments Inquiry’, National Transport Commission

Transport Workers Union of Australia

TWU Secretary Tony Sheldon • (02)9912 0700 • www.twu.com.au • 31 Cowper Street, Parramatta 2150

Contents

List of Appendices	ii
EXECUTIVE SUMMARY	1
A. EVIDENCE OF THE LINK BETWEEN PAY/CONDITIONS AND SAFETY	4
Pay and Related Conditions	4
Research, Reports and Judicial Findings	4
Driver Accounts and Evidence of Death, Injury and Dangerous Practices	7
Fatigue	10
Drug Usage	10
Excessive hours of work	10
Falsifying log books	11
Speeding	12
Death and injury in the road transport industry	12
CLIENT PRESSURE	14
Supreme Economic Power of Clients & Pressure on Transport Operators	14
Clients Contract Out of Responsibility For Safety	18
B. POLICY FRAMEWORK REQUIRED TO IMPROVE INDUSTRY CONDITIONS AND SAFETY PRACTICES	24
Existing Regulation	26
Employees	26
Employees - Modern Awards	26
The "One Market" Approach - Employees and Owner-Drivers in NSW	27
Summary of Existing Provisions	32
NSW	32
Victoria	33
Western Australia	34
Queensland	35
Australian Capital Territory	36
South Australia and Northern Territory	36
Tasmania	36
Regulatory Gaps	47
Conclusion - Legislative Proposals	38
Core of Terms of Reference	38
Option One	38
Employees	39
Owner Drivers	40
Option Two	41
Conclusion - The Need To Act	43

List of Appendices

Appendix 1: 45

Decision of the Industrial Relations Commission Of New South Wales
Transport Industry - Mutual Responsibility For Road Safety (State) Award
And Contract Determination: Application by Transport Workers' Union of
New South Wales for a new award and contract determination.

Appendix 2: 72

Statement of support: Bill Noonan, Federal Vice President & TWU Secretary, Vic/Tas Branch 72
Witness Statement: Lynden Ball Long Distance Owner Driver – Circus and Amusements Rye, VIC 74
Witness Statement: Ali Ibrahim – Long Distance Owner Driver General Freight, Merrigum VIC 75
Witness Statement: Gregg O'Toole - Employee truck driver - VIC 76
Witness Statement: Michael Hill - Owner driver - VIC 78

Appendix 3: 80

Statement of support: Hughie Williams, TWU Secretary, Queensland Branch 80
Witness Statement: Keith – Owner Driver – Hemmant QLD 82
Witness Statement: Bernie Owner Driver QLD 83
Witness Statement: Kenny Owner Driver Sherwood QLD 84
Witness Statement: David Moore Long Distance Owner Driver – Stockfeed Supplements Bowen QLD 85
Witness Statement: Ken - Long Distance Owner Driver, General Freight - Burpengary QLD Witness 87
Witness Statement: Frank Arcidiaco Long Distance Owner Driver Coopers Plains, QLD 89
Witness Statement: Ian Buckingham - employee truck driver - QLD 90
Witness Statement: Maurice John Cowen - employee truck driver - QLD 93
Witness Statement: Bradley Webster - employee truck driver - QLD 97

Appendix 4: 100

Statement of support: Alex Gallacher, Federal President & TWU Secretary, SA/NT Branch 100
Witness Statement: Charlie Iglio – Owner Driver – Milk Industry - SA 102
Witness Statement: Jennifer Selth - Owner Driver - SA 104
Witness Statement: Barry Myers – Owner Driver – Milk Industry - SA 107
Witness Statement: Rod Webb - employee truck driver - SA 110

Appendix 5: 112

Statement of support: Jim McGiveron, TWU Secretary, WA Branch 112
Witness Statement: Bruce Butler – employee truck driver - WA 113
Witness Statement: Andrew Carey - Owner Driver - WA 115
Witness Statement: N.G. Deanne – Owner Driver - WA 116

Appendix 6: 117

Witness statement: Martin Iffland, Executive Director, NSW Road Transport Association 117

Appendix 7: 131

Safe Rates - Inter- relational Provisions Between Industrial and Road Transport Law Clauses

Appendix 8: 136

Witness statement: Ken Clinton, employee truck driver - NSW

Appendix 9: 138

Transport Workers Union of Australia Submission to Senate Employment, Workplace Relations and Education Legislation Committee; INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

Witness Statement: Maurice Girotto – Owner Driver - NSW 185
Witness Statement: James Hallan - Employee Truck Driver - NSW 186
Witness Statement: Darren Jenkins Interstate & Intrastate, Long Distance Owner Driver Kempsey, NSW 187
Witness Statement: Paul Walsh PUD Owner Driver Hurstville, NSW 188
Witness Statement: Wayne 'Cookie" Cook Owner Driver Tamworth NSW 189
Witness Statement: Brian Longford Owner Driver Woollongabba NSW 190
Witness Statement: Paris Perdis Owner Driver NSW 191
Witness Statement: George Bechara Owner Driver Greenacre NSW 192
Witness Statement: David Barley Owner Driver Greenacre NSW 193
Witness Statement: Graeme Austin Owner Driver Corrimal NSW 194
Witness Statement: Glenn Wesley Owner Driver Mulbring NSW 195
Witness Statement: Shane Cassidy Owner Driver Hilltop NSW 196
Witness Statement: William Cakovski Owner Driver Yagoona NSW 197
Witness Statement: David Cardwell Owner Driver Macquarie Fields NSW 198
Witness Statement: John Brockman Owner Driver Whalan NSW 199
Witness Statement: James Bowen Owner Driver Lilli Pilli NSW 200
Witness Statement: Manuel Benjamin Owner Driver Plumpton NSW 201
Witness Statement: Russell Bonning Owner Driver St Clair NSW 202
Witness Statement: Barry Beach Owner Driver Blackalls Park NSW 203
Witness Statement: Raul Bassi Owner Driver Ashfield NSW 204
Witness Statement: Irma Cabana Owner Driver Mount Druitt NSW 205
Witness Statement: Richard Caldwell Owner Driver Randwick NSW 206
Witness Statement: Colin Callaghan Owner Driver Wyong NSW 207
Witness Statement: John Cameron Owner Driver Sylvania NSW 208
Witness Statement: Steven Camilleri Owner Driver Catherine Field NSW 209
Witness Statement: Shane Campbell Owner Driver Numbaa NSW 210
Witness Statement: Robert Byrnes Owner Driver Riverstone NSW 211
Witness Statement: Carey Owner Driver Plumpton NSW 212
Witness Statement: Iain Christall Owner Driver Padstow Heights NSW 213
Witness Statement: David Clark Owner Driver Mortlake NSW 214
Witness Statement: Anthony Caruana Owner Driver Bringelly NSW 215

Appendix 10: 216

Occupational Health and Safety Act 2000, Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005

Appendix 11: 226

Application by Transport Workers' Union of New South Wales, Industrial Organisation of Employees to the INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES. TRANSPORT INDUSTRY - MUTUAL RESPONSIBILITY FOR ROAD SAFETY (STATE) AWARD

Application by Transport Workers' Union of New South Wales, Industrial Organisation of Employees to the INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES. TRANSPORT INDUSTRY - TRANSPORT INDUSTRY - MUTUAL RESPONSIBILITY FOR ROAD SAFETY (STATE) CONTRACT DETERMINATION 233

Appendix 12: 240

Fair Work Contracts Bill 2004 as presented to THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Appendix 13: CONFIDENTIAL ATTACHMENT 264

Andrew Villis - Witness Statement Before The Industrial Relations Commission Of New South Wales Application by the Transport Workers' Union of NSW for a Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determinatio

Robert Ireland - Witness Statement Before The Industrial Relations Commission Of New South Wales Application by the Transport Workers' Union of NSW for a Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination 276

EXECUTIVE SUMMARY

1. The Transport Workers' Union of Australia ("TWUA") represents 85,000 men and women in Australia's aviation, oil, waste management, gas, road transport (including cash-in-transit) milk, passenger vehicles and freight logistics industries. With over one hundred years experience in conducting Australia's freight task, the TWU has been proactive in establishing efficient industry standards that improve the lives and safety of transport workers, their families and the road using public.

2. The TWU welcomes the opportunity to contribute to the National Transport Commission's inquiry into 'Safe Payments.' This submission complements previous TWU papers presented to other inquiries; including the '*Beyond the Midnight Oil*' Parliamentary inquiry and the 2001 landmark NSW Government '*Inquiry into Safety in the Long Haul Trucking Industry.*' It is submitted on behalf of the Transport Workers Union of Australia and is supported by all TWUA state Branches and their leaderships.

3. The TWUA notes that this inquiry is occurring in the context of an industry in the midst of a severe crisis in safety. In 2007, 235 people needlessly perished in articulated heavy vehicle and rigid heavy vehicle incidents. In the same period, the number of deaths in articulated heavy vehicle incidents increased by 5.4% when compared to the previous year.[1] In 2004-2005, 5 350 people suffered serious injuries at work in the transport industry, at the rate of 31 per day. In 2005-2006, 2.8% of the workforce in the industry suffered a serious injury at work.[2] Each road death costs $1.7 million. Each injury in an incident costs $408 000[3]. When the non monetised social impact of road deaths, injuries and illness, family breakdown, pain and suffering is included in the measurement of what road deaths and injuries cost the community, the need for regulatory intervention is obvious.

4. The foundation of this regulatory intervention must be full and proper recognition of the relationship between methods for the remuneration of drivers and, the poor safety practices that plague the transport industry and cause high levels of deaths and injuries. Judicial and coronial determinations, academic studies and government-commissioned inquiries have explained how these systems of remuneration result in low rates of pay that encourage inappropriate industry

---

1. *Fatal Heavy Vehicle Crashes Australia Quarterly Bulletin* (October – December 2007) Department of Infrastructure, Transport, Regional Development and Local Government

2. *Compendium of Workers' Compensation Statistics Australia 2005-06*, Australian Safety and Compensation Council

3. *Road crash costs in Australia, Report 102*, Bureau of Transport Economics. All figures in 1996 dollars. Accounting for inflation, this figure is considerably higher today.

practices. These practices include drivers being subject to the pressure to work excessive hours; the pressure to exceed legal speed limits; the pressure to drive through break and sleep times; and, in some circumstances, the professional use of illegal stimulants to combat fatigue.[4]

5. This evidence has been empirically scrutinised and subjected to extensive judicial and peer review. Persons and organisations offering an alternate opinion bear the onus of providing irrefutable evidence of a contrary position. It is not sufficient to merely assert that evidence of the strong relationship between systems of remuneration and poor safety practices do not exist. As this submission will demonstrate, that relationship has been independently verified in numerous forums and is supported by the actual experiences of many drivers across Australia.

6. The experiences of these drivers, and a body of academic, judicial and coronial evidence, demonstrates that a root cause of unsafe remuneration systems is the commercial dominance of the transport industry's powerful clients– especially the big retailers. Australia's three largest food-sellers have a 71% market share, worth approximately $140 billion in sales per annum.[5] Coles has "2 700 truck movements a day from existing distribution centres to stores."[6] Thousands of additional movements occur between Coles suppliers and their distribution centres. 10 000 subcontracted transport companies participate in the Coles logistical system.[7] A similar operation in the Woolworths' supply chain network requires over 1 million truck movements per year.[8]

---

4. *R v Randall John Harm*, District Court of New South Wales, per Graham J, 26th August 2005; *Long Distance Truck Drivers: On road performance and economic reward*, December 1991, Federal Department of Transport and Communications; In *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* [2006] NSWIRComm 328 the Full Bench of the Industrial Relations Commission of NSW said: "We consider that the evidence in the proceedings establishes that there is a direct link between methods of payment and/or rates of pay and safety outcomes"; *National Road Freight Industry Inquiry, Report of Inquiry* to the Minister for Transport, Commonwealth of Australia, (1984), Canberra; Beyond the Midnight Oil, An Inquiry into the Managing Fatigue in Transport, House of Representatives Standing Committee on Communication, Transport and the Arts, October 2000, Canberra; C. Jones, J. Dorrian and D. Dawson, 'Legal Implications of Fatigue in the Australian Transportation Industries', 45 *JIR* 344 at 351; Professor Michael Quinlan, *Report into Safety in the Long Haul Trucking Industry*, A report Commissioned by the Motor Accidents Authority of New South Wales, 2001, Sydney; R Johnstone, 'The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement', March 2002, National Research Centre for OHS Regulation, the ANU; *WorkCover Authority of NSW v Hitchcock* (2005) 139 IR 439.

5. *The facts about Grocery Retailing at Woolworths*, Woolworths Ltd, Autumn 2008.

6. *Submission to the Productivity Commission's Review of the Economic Costs of Freight Infrastructure and Efficient Approaches to Transport Pricing*, Coles Myer Ltd.

7. http://www.smh.com.au/news/National/MP-slams-big-retailer-over-drivers/2005/04/18/1113676704343.html

8. Ibid.

7. The same body of evidence that confirms the power major transport clients have to determine industry standards also identifies the policies needed to correct this market failure. These can be summarised as four related policy objectives:

   I. Enforceable rates of remuneration and related conditions for transport workers, including self-employed truck owner-drivers, which are "safe" - that is, which, by reason of quantum or structure of payment, do not compel or encourage unsafe driving practices;

   II. Enforceable requirements relating to planning for the safe and legal performance of road transport journeys (instead of employees and owner-drivers being compelled to perform the work within client parameters established without regard to legal requirements and safety);

   III. The establishment of a "chain of responsibility" in which all participants in the contractual chain, up to and including the ultimate client, are accountable for the safe and legal performance of road transport work and the payment of safe and reasonable rates of remuneration; and

   IV. An appropriate and adequate enforcement regime.

8. In addressing the information sought for the purposes of the review (including the examination of existing legislation), this paper identifies legislative options that would give rise to a framework that would permit these policy objectives to be met. It is structured to address both the questions asked on the "Safe Payments Submissions" page of the NTC website and also the Terms of Reference for The Hon Lance Wright QC and Professor Michael Quinlan. It commences by presenting evidence of the link between pay/conditions, safety and client pressure; followed by an examination of the existing legislative frameworks in Australian jurisdictions. It concludes by outlining options for reform that will assist the community in ending the carnage currently occurring on our Community's roads.

A. EVIDENCE OF THE LINK BETWEEN PAY/CONDITIONS AND SAFETY

Pay and Related Conditions

Research, Reports and Judicial Findings

1. A large body of national and international evidence has confirmed the link between rates of pay and safety in the transport industry. Judicial and coronial determinations, academic studies, and government-commissioned inquiries have explained how systems of remuneration that result in low rates of pay cause inappropriate industry practices. These practices include drivers being subject to the pressure to work excessive hours; the pressure to exceed legal speed limits; the pressure to drive through break and sleep times; and, in some circumstances, the professional use of illegal stimulants to combat fatigue.[9]

2. This dangerous relationship has been known for some time. The 1991 Federal Department of Transport and Communications (Commonwealth) study into on-road performance and economic reward found:

> *It is the rate per se which acts to stimulate road practices in various forms in order that an acceptable level of total earnings (net of truck-related expenses) is obtained. Any deviation from a fixed salary tends to encourage practices designed to increase economic reward which are not synergetic with reducing exposure to risk.*[10]

3. NSW Deputy Coroner Dorelle Pinch expressed the consequence of this heightened 'exposure to risk' in her 2005 findings regarding the tragic deaths of employee drivers Anthony Forsythe, Barry Supple and Timothy John Walsh. The Coroner highlighted the impact of inadequate rates:

---

9. *R v Randall John Harm*, District Court of New South Wales, per Graham J, 26th August 2005; *Long Distance Truck Drivers: On road performance and economic reward*, December 1991, Federal Department of Transport and Communications; In *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* [2006] NSWIRComm 328 the Full Bench of the Industrial Relations Commission of NSW said: "We consider that the evidence in the proceedings establishes that there is a direct link between methods of payment and/or rates of pay and safety outcomes"; *National Road Freight Industry Inquiry, Report of Inquiry* to the Minister for Transport, Commonwealth of Australia, (1984), Canberra; Beyond the Midnight Oil, An Inquiry into the Managing Fatigue in Transport, House of Representatives Standing Committee on Communication, Transport and the Arts, October 2000, Canberra; C. Jones, J. Dorrian and D. Dawson, 'Legal Implications of Fatigue in the Australian Transportation Industries', 45 *JIR* 344 at 351; Professor Michael Quinlan, *Report into Safety in the Long Haul Trucking Industry*, A report Commissioned by the Motor Accidents Authority of New South Wales, 2001, Sydney; R Johnstone, 'The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement', March 2002, National Research Centre for OHS Regulation, the ANU; *WorkCover Authority of NSW v Hitchcock* (2005) 139 IR 439.

10. *Long Distance Truck Drivers: On road performance and economic reward*, December 1991 at p102.

As long as driver payments are based on a (low) rate per kilometre there will always be an incentive for drivers to maximise the hours they drive, not because they are greedy but simply to earn a decent wage.[11]

4. This pressure to maximise hours to compensate for low levels of remuneration can result in dangerous levels of fatigue. The research of Williamson *et el* (2000) determined that drivers compensated through a 'payment-by-results' method were twice as likely to report being fatigued on at least half of their trips than drivers who are paid an hourly rate. The landmark 2001 '*Report Of Inquiry into Safety in the Long Haul Trucking Industry'* by Professor Michael Quinlan of the University of New South Wales found that these contingent payment systems applied to 82.3% of drivers in the Australian road transport industry. The Professor's report also highlighted studies confirming the association between 'payment by results' remuneration systems and the increased use of stimulant drugs.

5. The existence of the link between payment methods and safety has widespread acceptance in the transport industry. In cross-examination in the NSW Industrial Relations Commission *Mutual Responsibility For Road Safety* case, officers of the NSW Road Transport Association gave this evidence:

   Q. Can I give an example? If a company operates a payment system which rewards drivers not by time worked, but for the completion of the trip and that system doesn't adequately remunerate the driver for time worked, that might lead to a result where the driver simply tries to complete the work as quickly as he or she can in order to maximise their income. Is that right?

   A. That's right, I agree with that.[12]

   And later, when asked by Counsel to explicitly accept the link between lower prices and poor safety outcomes:

   A. By and large I do yes. It's not as simple as that but I think there certainly is a connection between low price and lower safety standards.[13]

6. The evidence of the NSW RTA officers received further validation by the sworn and accepted evidence, in the same case, of Associate Professor Michael Belzer of Wayne State University & Research Scientist Institute of Labor and Industrial Relations, University of Michigan. He established through an extensive driver survey, a strong relationship between the rate of remuneration, hours worked and safety practices. Referring to the results of this survey, he stated:

---

11. *State Coroner's Summation and Finding in relation to Anthony Forsythe, Barry Supple and Timothy John Walsh* (30 January 2003), file numbers 1575/00, 1455/00 and 1734/00,

12. Mutual Responsibility for Road Safety Case: Transcript [458]

13. Mutual Responsibility for Road Safety Case: Transcript [529-530]

Our measurement supports the hypothesis that drivers have target earnings and drivers paid lower than average seek to achieve [target] earnings by increasing their hours, in confirmation of the "sweatshop" hypothesis.

This can be explained by the idea that once drivers are paid a high enough rate and are already working long hours, further increases in the mileage rate are used to 'buy' more time off rather than purchase more goods and services. This also may be explained by joint decisions of drivers and firms at higher or lower rates of pay: firms that pay a high rate of pay may systematically prefer that their drivers obey the hours-of-service regulations, while firms that pay a low rate of pay may recognize that their drivers cannot make a living working no more hours than the regulations allow, and may encourage or coerce them to work more hours and drive more miles. The point estimates indicate that if the mileage rate were to increase to $0.37 per mile, drivers would reduce their weekly hours to be in compliance with the current regulations. At this rate, drivers are being compensated at a rate sufficient for them to be able to satisfy their income requirements without being induced to work in excess of those mandated by law.[14]

Belzer also examined the effects of unpaid or underpaid time on safety:

Another compensation issue that can influence driver behavior is the common practice to either underpay or not pay at all for non-driving time. This is particularly true for time spent loading and unloading, which represents a significant proportion of working time, according to results from the UMTIP (sample) *Drivers Survey. When drivers are not paid or are underpaid for loading and unloading, there is an incentive to underreport this unpaid time in order to drive for more hours …...This incentive exists even if there is some compensation for loading time, as long as it is less than the amount paid for driving.*[15]

7. There is also research demonstrating that *higher* rates of pay for truck drivers lead to a *lower* frequency of accidents. One such study from North America found that "higher rates of pay and pay raises are related to lower expected crash counts and to a higher probability of zero crash counts, all else held equal".[16] A recent case study found that:

the pay increase influenced safety by modifying the behavior of current drivers. The data indicate that drivers had better crash records after the pay increase, when the analysis controls for demographic, occupational, and human capital characteristics.[17]

14. Mutual Responsibility for Road Safety Case: Evidence of Mike Belzer

15. See Appendix 1

16. Rodríguez, Daniel A., Marta Rocha, Asad Khattak, and Michael H. Belzer (2003) *The Effects of Truck Driver Wages and Working Conditions on Highway Safety: A Case Study*, Transportation Research Record*,* Vol. 1883, pp. 95–102

17. Rodríguez, Daniel A, Felipe Targa and Michael H. Belzer (2006) *Pay Incentives and Truck Driver Safety: A Case Study*, Industrial and Labor Relations Review, Vol. 59, Issue 2, pp. 205-225

8. The Full Bench in the *Mutual Responsibility* Case heard this evidence from Belzer and found that:

> "*Higher pay produces superior safety performance for firms and drivers. The precise driver-level study of Hunt suggests this relationship may be as high as 1:4*."

and:

> "*...Every 10% more that drivers earn in pay rate is associated with an 18.7% lower probability of crash, and for every 10% more paid days off the probability of driver crashes declines 6.3%.*"[18]

9. Simply stated, unsafe rates, unsafe payment methods, and/or unpaid or underpaid time pressures drivers into making the shocking choice of either risking their road safety, and the road safety of the community, or bearing the burden of severe economic loss.

Driver Accounts and Evidence of Death, Injury and Dangerous Practices

10. There is much evidence of drivers being forced into daily decisions that betray their lack of control over their safety and conditions. The current spike in the price of fuel is the latest reminder of the life threatening burdens placed upon employees and owner-drivers by a market so totally dominated by the commercial imperatives of powerful industry clients. Drivers have to work additional hours, take extra loads and drive faster to feed their families and meet their next rent or mortgage repayment.

11. Below are seven accounts from drivers across Australia, a small sample of the statements made to the Transport Workers Union, attesting to the extraordinary pressures they currently face from the lack of a system of remuneration that provides them with adequate compensation:

Driver Accounts

Bruce, an employee driver in Western Australia, has faced the difficult choice between safety and an income:

> *In the past I have been offered - and accepted out of necessity, working conditions that I know were unsafe. I accepted them because I needed to feed my children.*
>
> *In some cases drivers are paid safe rates, in many cases however employers and principal contractors try to make as much profit as they can by reducing their labour costs.*

18. See Appendix 1

> *I personally know of many drivers who's extremely high running costs make it difficult to stay afloat.*
>
> *They cut a lot of corners to reduce their costs to keep their trucks on the road.*[19]

He has also experienced the consequences of unsafe systems of remuneration:

> *In my experience kilometer rates mean drivers work harder and faster which induces fatigue and increases the chance of accidents.*
>
> *I have personally experienced fatigue because I was being paid per kilometer. My only response however was to keep driving to make more money*
>
> *Safe enforceable systems that require planning of trips mean that drivers would be less likely to breach the law because it would be more easily identifiable.*
>
> *In the past I have worked well past a 'safe' point because I simply needed the money.*[20]

Greg from Port Melbourne has made the same difficult decision in the past:

> *I am paid by the hour, but know that there is no way you can survive on 7.6 hours pay a day so you work as much overtime as you can to survive. As a result, I have driven whilst I've felt fatigued in order to finish the job and earn more money.*
> *…*
>
> *I have experienced being pressured to accept lower rates in order to keep work, and was been told indirectly that I must do the job or face consequences such as termination* [21]

Keith, an owner driver from Hemmant in Queensland, puts this more starkly:

> *Blokes are dying because they can't get enough money no matter how hard they push themselves.*[22]

Lynden, a driver from Victoria, outlines the way in which hyper-competition in the industry drives rates down:

> *I know blokes that will take a load for $1200 that costs $1400 to do, you end up paying someone else just to get the work… people don't always realize that if I take the job cheap, then the next bloke has to do it cheaper.*[23]

19 See statement of Bruce Butler, attached to supporting letter from Jim McGiveron (Appendix 5).

20 Ibid.

21 See statement of Greg O'Toole, attached to supporting letter from Bill Noonan (Appendix 2)

22 See statement of Keith, attached to supporting letter from Hughie Williams (Appendix 3)

23 See statement of Lynden Ball, attached to supporting letter from Bill Noonan (Appendix 2)

Brad, an employee driver from Queensland, describes the pressures faced by the industry as follows:

> *I do not believe that owner drivers are paid rates that are safe and sustainable because of factors such as rising fuel costs and increasing loan repayments it is becoming an unscrupulous industry where contractors are paying less in order to lower prices in an attempt to do the work cheaper just to keep themselves afloat.*[24]

Ian, from Woodridge in Queensland, has himself accepted unsafe rates of pay:

> *On occasion I have had to work more hours than I felt were safe because of low rates of remuneration when I drove only under cents per kilometre rates for previous employers. In order to earn a decent level of income I had to do numerous long runs and on most trips I felt unable to take a rest break because I felt pressured to continue driving in order to meet the strict deadlines to get back.*
>
> *There is always pressure to accept lower rates in order to obtain and keep work when you are on a cents per kilometre rate because of the threat that if you don't do it cheap they'll find someone else.*[25]

Ali, also a long distance owner driver from Victoria, talks about the contribution of this competition to the destruction of small businesses:

> *I'm offered jobs (from Brisbane) back to Melbourne that won't even cover the fuel. You can't run a machine for that sort of money, you can't take loads for fuel money, fuel money doesn't pay your wages, fuel money doesn't pay registration or insurance, fuel money doesn't pay for maintenance. You can't take loads just to cover fuel; you'll still go bankrupt, just slower than someone else.*[26]

Those working in the industry see the effect of unsafe rates every day. They recognise the urgent need for change. As put by Maurice from Queensland:

> *There has to be a floor set that cannot be undercut and that operators and agents can't pressure owner drivers into working under unfair rates.*[27]

---

24. See statement of Brad Webster, attached to supporting letter from Hughie Williams (Appendix 3)

25. See statement of Ian Buckingham, attached to supporting letter from Hughie Williams (Appendix 3)

26. See statement of Ali Ibrahim, attached to supporting letter from Bill Noonan (Appendix 2)

27. See statement of Maurice Cohen, attached to supporting letter from Hughie Williams (Appendix 3)

12. Without a system of safe rates, the dangerous practices described in the following findings in the *Mutual Responsibility* case will continue:[28]

Fatigue

21 Associate Professor Anne Williamson was the Deputy Director of the NSW Injury Risk Management Research Centre at the University of New South Wales. Associate Professor Williamson gave evidence in the *Hitchcock* matter, and she also gave evidence during the proceedings as to the various studies which have compared the effects of sleep deprivation and fatigue with those of alcohol. She deposed that the problem for road safety of fatigue is of a similar magnitude to drink driving and that long-distance drivers who may be awake for long periods are likely to be at high risk of fatigue affecting their performance. We accept Professor Williamson's evidence.

Drug Usage

22 Two national surveys in 1991 and 1998 recorded that the use of 'stay awake' or stimulant drugs was cited by drivers as one of the two most helpful strategies for managing fatigue. Professor Quinlan's inquiry found that while the precise level of drug use in the long-distance trucking industry was unknown, the evidence led to a firm conclusion that it was widespread. He noted that prolonged sleep deprivation/fatigue and drug use may not only increase the risk of truck crashes but also will have long-term health effects on the drivers affected.

23 Of the 13 driver witnesses, a number openly admitted using stimulants to help them work; others gave evidence of having conversations with other drivers about the use of illicit drugs while working; three drivers spoke of management knowing or encouraging the use of drugs during the course of performing their work.

Excessive hours of work

24 All drivers gave evidence that they had breached the maximum number of hours drivers are allowed to work. It was conceded that this occurred on a regular and systematic basis. Drivers reported working between 80 - 100 hours each week, sometimes working 14 - 20 hours a day without breaks. One driver described his normal week as follows:

> *All up, I usually worked around 18 to 19 hours each day. I worked five or six days per week, doing five or six full return trips each fortnight, depending on whether or not they could get me loaded on Saturday. Usually, I would leave home on Sunday afternoon and travel overnight to Brisbane, load all day Monday and travel back to Sydney Monday night. I would repeat this twice more before getting home Saturday morning. Sometimes, I would not get home until the Monday after that. I would not get home at all mid-week.*

28. See Appendix 1

25 Some drivers gave examples of extreme breaches of driving hours: 85 hours in a 120 hour period, 20.5 hours in 24 hours, 30 hours in a 32 hour period and 53 hours without a break.

26 When taking breaks, the drivers' evidence was that it was often too short or taken in situations where the driver was deprived of a proper opportunity to rest. Other factors referred to as inhibiting proper rest were lack of heat and space in sleeper cabins and interruptions during rest time where rest was taken in the depot while waiting for more work.

27 Other drivers reported on the pressure they were under directions from management to work extreme hours including threats and financial penalties. Drivers reported that they became abusive and aggressive when placed under this pressure.

Falsifying log books

28 As a consequence of working excessive hours there was widespread evidence of drivers falsifying log books in order to keep legal records required by the *Road Transport (Safety and Traffic Management) (Driver Fatigue) Regulation* 1999 ("1999 Regulation").

29 Some of these measures included:

(a) not recording the beginning or end of trips;

(b) recording time spent performing pick ups or deliveries as breaks;

(c) falsifying start or finish times;

(d) using another driver's details to claim that there was a second driver in the truck;

(e) not recording local work in the logbook;

(f) possession of a second logbook; and

(g) falsifying the place of depot so as to avoid having to carry a logbook at all.

30 Other drivers found it preferable to carry no log book at all. There was evidence of managers encouraging drivers to falsify log books or management's disinterest in whether log books were correctly entered.

Speeding

31 The evidence disclosed that speeding is a regular part of the job for long distance truck drivers and drivers found ways of avoiding detection such as the use of radar detectors, distorting number plates, turning off lights, or "tailgating" other trucks to avoid detection by cameras.

32 The effects of these driving practices on the health, safety and well-being of drivers was described both in expert evidence and directly in the evidence of the drivers. Drivers reported the effects of long hours as akin to hallucinating or being drunk. The effects of the widespread use of illicit drugs are self-evident. Drivers reported traumatic health problems and pressure on families and personal relationships.

Death and injury in the road transport industry

13. With these practices prevalent it is not surprising that the road transport industry is Australia's most dangerous. There are 44% more deaths in the ABS 'transport and storage' industry than workers in the industry which is the closest rival for this unwanted statistic.[29] The overall trend in recent years has been for an increase in heavy vehicle-related road deaths.[30] The Commonwealth Department of Infrastructure, Transport, Regional Development and Local Government reported the following deaths involving heavy vehicle accidents for the 2007 calendar year:

State/territory	No. of deaths[31]
NSW	88
Victoria	48[32]
Queensland	52
South Australia	11
Western Australia	25
Tasmania	7
Northern Territory	4
Australian Capital Territory	0

29. *Compendium of Workers' Compensation Statistics Australia 2005-06*, Australian Safety and Compensation Council.

30. It is important to note that the deaths referred to include passengers and drivers of other vehicles involved the incident concerned. Heavy vehicle safety affects all road users.

31. Fatal Heavy Vehicle Crashes Australia Quarterly Bulletin (October – December 2007) Department of Infrastructure, Transport, Regional Development and Local Government

32. Victorian statistics are only collected for articulated vehicles, not heavy rigid vehicles.

14. In total, in the year 2007, the lives of 235 people were wasted in articulated heavy vehicle and rigid heavy vehicle incidents. In the same period, the number of deaths in articulated heavy vehicle incidents increased by 5.4% increase, when compared to the previous year.[33] In 2004-2005, 5 350 people suffered serious injuries at work in the transport industry, at the rate of 31 per day. In 2005-2006, 2.8% of the workforce in the industry suffered a serious injury at work.[34]. Each road death costs $1.7 million. Each injury in an accident costs $408 000[35]. When the non-monetised social impact of road deaths, injuries and illness, family breakdown, pain and suffering is included in the measurement of what road deaths and injuries cost the community, the cost of inaction outweighs any cost that would be incurred by forcing those who profit the most from transport services – the powerful transport clients to pay their fair share.

33. *Fatal Heavy Vehicle Crashes Australia Quarterly Bulletin* (October – December 2007) Department of Infrastructure, Transport, Regional Development and Local Government

34. *Compendium of Workers' Compensation Statistics Australia 2005-06*, Australian Safety and Compensation Council

35. *Road crash costs in Australia, Report 102*, Bureau of Transport Economics. All figures in 1996 dollars. Accounting for inflation, this figure is considerably higher today.

Client Pressure

Supreme Economic Power of Clients & Pressure on Transport Operators

15. The body of academic, judicial and coronial evidence demonstrates that a root cause of unsafe remuneration systems is the commercial dominance of the transport industry's powerful clients– especially the big retailers. Australia's three largest food-sellers have a 71% market share, worth approximately $140 billion in sales per annum.[36] The number of truck movements required to keep these retailers' shelves stocked is staggering. Coles has "2 700 truck movements a day from existing distribution centres to stores."[37] Thousands of additional movements occur between Coles suppliers and their distribution centres. 10 000 subcontracted transport companies participate in the Coles logistical system.[38] A similar operation in the Woolworths' supply chain network requires over 1 million truck movements per year.[39]

16. A core feature of the Coles and Woolworths business plans is to reduce supply chain costs. To this end, the power accrued by the mass amount of transport movements purchased creates a hyper-competitive market for transport services. Major transport users no longer maintain their own fleets. They contract out the transport function on a cost-competitive basis. The *intention* of this model is to achieve cost savings by taking advantage of the competitive market. The *effect* has been the development of extreme competition in the industry; where low prices are the primary determinant of securing enough work to continue to operate.

17. Transport operators all face the same bundle of costs, costs such as vehicle maintenance, real estate, fuel and wages. To be successful, companies competing for the work of the big retailers cut their profit margins and then, when those margins become too thin, find other ways to reduce their costs.

    Transport companies are price takers. They compete for a limited amount of work. Price is the main determining factor in deciding whether they win or lose contracts. Competition for work in the transport industry is so strong that there is an "acceptance

---

36. *The facts about Grocery Retailing at Woolworths*, Woolworths Ltd, Autumn 2008.

37. *Submission to the Productivity Commission's Review of the Economic Costs of Freight Infrastructure and Efficient Approaches to Transport Pricing*, Coles Myer Ltd.

38. http://www.smh.com.au/news/National/MP-slams-big-retailer-over-drivers/2005/04/18/1113676704343.html

39. Ibid.

of non-viable rates excessive and illegal working hours, and stressed and chronically fatigued drivers".[40] Transport companies regularly raise concerns that they have lost work by being 'undercut' by companies which they believe reduce costs by breaching the relevant industrial standards which apply to them.[41] The former executive director of the NSW Road Transport Association has stated on record that transport companies breach minimum rates of pay so that they can obtain work.[42] He also recognised in the same exchange the nexus between a company's need to 'balance the books' and a compulsion for drivers to breach safety laws.

18. Consecutive governments have recognised the resulting pressure faced by transport workers as a result of excessive competition.[43] Following the flow of money through the contracting chain is the only way for transport workers to receive redress from these pressures, since:

> *In the road transport industry there is a close association between freight rates and the level and type of payments made to truck drivers. The association operates at a number of levels. First, and most obviously, for owner/drivers the freight rate represent their 'pay' or at least the gross return that will determine earnings once operating and fixed costs (such as truck finance repayments) are deducted. Second, given the high labour cost component in road transport and since owner/drivers directly compete with operators using employee drivers for available work if owner drivers are prepared to accept rates that effectively translate into below award wages this places pressure on companies paying award wages*[44]

19. Economically powerful industry clients, like the major retailers, have the commercial influence to determine the price of transport services and, in many circumstances, key conditions relating to the performance of transport work. Successive instances of contracting out, combined with unpaid waiting time at

---

40 Mayhew, Claire and Quinlan, Michael (2006), *Economic pressure, multi-tiered subcontracting and occupational health and safety in Australian long-haul trucking*, Employee Relations, Vol. 28 No. 3, p. 225

41 See Appendix 1.

42 See Appendix 6.

43 See *New Protections In Independent Contractors Bill* (3 May 2006), Kevin Andrews, Media Statement

44 Professor Michael Quinlan, *Report of inquiry into safety in the long haul trucking industry* (2001) Motor Accidents Authority of New South Wales, p. 138

clients' premises, further exacerbate the harm caused by their excessive control of the transport market.[45]

20. As a consequence of power, drivers, who are obviously the very last link in the transport supply chain, in that they perform the work, have the weakest concentration of market power and must often take the wage/rate given to them or fail to receive work. This makes them prone to engaging in unsafe practices, such as driving for too long, in order to obtain for themselves and their families a decent living.

21. Owner drivers and employee drivers suffer from client control of the transport industry in equal measure. They operate in the same market doing the same work. While their remuneration systems differ in most circumstances, addressing the need for safe rates for one group and not the other would be counter-productive. It would simply shift the burden of work on to the group for which safe rates were not in place. To effectively correct the market failures caused by excessive client control, any regulatory intervention must equally protect owner drivers and employee drivers.

---

45. In the *Mutual Responsibility for Road Safety* case the Full Bench of the Industrial Relations Commission of New South Wales noted, amongst others, the following relevant characteristics of the industry [emphasis added]:

(a) there is widespread non-compliance with award and contract determination provisions and, in particular, underpayment of wages (a view supported by the Executive Director of the NSW Road Transport Association, Martin Iffland);

(b) it is not uncommon for transport companies, which themselves would not engage in conduct in breach of industrial instruments, to subcontract work of marginal viability to other transport companies, which are prepared to breach industrial instruments in order to make a profit;

(c) labour costs are the most significant component of transportation costs and there is an inherent incentive to achieve savings through non-compliance with industrial instruments or through the engagement of owner drivers or small fleet owners who are prepared to do what it takes to make the work profitable;

(d) the competitive pressures in the long distance sector have resulted in a situation where the major transport operators perform only a fraction of the work in the industry with the rest being contracted out;

(e) most companies performing long distance work resist enterprise bargaining because of the likelihood that an enterprise bargaining arrangement will price them out of the market by requiring the payment of labour costs measured against yardsticks other than that of financial viability;

(f) there is a link between remuneration and safety issues such as excessive hours of work;

(g) *commercial pressures, most notably from major retailers, have intensified, resulting in the major transport companies tendering for contracts at very low rates and leading to the result that they subcontract out any work that they cannot perform profitably. Commercial pressure is also exercised by major retailers in the form of directed delivery schedules placing stress and, at times, unrealistic expectations on the driver actually performing the work;*

(h) major retailers refuse to take responsibility for the consequences of the time restrictions that their delivery systems impose on subcontractors and major transport operators themselves contract out responsibility for the work and yet resist being called to account when things go wrong further down the chain;

(i) *the transport industry is characterised by chains of successive contracting out of work with commercial power decreasing with each successive step;* and

(j) those higher up the chain often contract out work for the express reason of transferring responsibility for the safe performance of the work to others.

22. The attainment of safe rates and conditions for employees and owner-drivers is contingent on clients making sufficient payment to their contracted transport companies to cover costs. In *Regina v Randall John Harm* (unreported, 26 August 2005) His Honour Justice Graham in sentencing a driver said:

> *In the present matter, the statement of facts refers to safety cams and log books. Restrictions on the maximum speed of heavy vehicles have also been implemented. Despite those measures, heavy vehicle truck drivers are still placed under what is, clearly, intolerable pressure in order to get produce to the markets or goods to their destination within a time fixed, not by any rational consideration of the risks involved in too tight a timetable, but by the dictates of the marketplace. Or, to put it bluntly, sheer greed on the part of the end users of these transport services.* [46]

23. In the year 2000, the House of Representatives Standing Committee on Communication, Transport and the Arts found that:

> *risks are compounded by the commercial imperative on transport operators to maximise the return on their investment, the demands of customers and by the pressure this places on transport workers to undertake longer hours with fewer rest breaks.* [47]

24. And in Professor Quinlan's 2001 study:

> *customer and consignor requirements on price, schedules and loading/unloading and freight contracts more generally, in conjunction with the atomistic and intensely competitive nature of the industry, encourage problematic tendering practices, unsustainable freight rates and dangerous work practices* [48]

---

46. Full extract *Regina v Randall John Harm* (unreported, 26 August 2005) His Honour Justice Graham:

In the present matter, the statement of facts refers to safety cams and log books. Restrictions on the maximum speed of heavy vehicles have also been implemented. Despite those measures, heavy vehicle truck drivers are still placed under what is, clearly, intolerable pressure in order to get produce to the markets or goods to their destination within a time fixed, not by any rational consideration of the risks involved in too tight a timetable, but by the dictates of the marketplace. Or, to put it bluntly, sheer greed on the part of the end users of these transport services. The time has come when those who are the beneficiaries of the interstate transport industry must take some blame for what happens at the sharp end of the interstate transport industry. The drivers are put under intolerable pressure. They drive when they are too tired, and when that becomes too difficult, they take drugs to try and prolong the state of awakening, albeit with risks that it can impede their concentration and actually make things worse.

When a collision occurs, such as happened here, who ends up in the dock? Who ends up behind bars? Not the operators. Not the transport companies. Not the big corporations who are the people who use those transport services. But the driver. It's the driver who goes to gaol. The companies still make the profits. The drivers become another casualty of the heavy transport industry. Their lives are ruined, in many ways just as badly as many of the victims lives are ruined, by the imperative of greed which lies at the heart of the interstate transport industry. Case after case in the Courts demonstrates the inadequacy of the government's response to these problems and the inadequacy of the transport industry's own response to these problems.

47. *Beyond the Midnight Oil: An inquiry into managing fatigue in transport* (October 2000), House of Representatives Standing Committee on Communication, Transport and the Arts, p. 1.

48. Professor Michael Quinlan, *Report of inquiry into safety in the long haul trucking industry* (2001) Motor Accidents Authority of New South Wales, p. 20

25. The Full Bench in the *Mutual Responsibility* case found that major industry clients exert enormous commercial power very much for the worse in the industry at the same time as contracting out the legal responsibility for the consequences:[49]

> *(g) commercial pressures, most notably from major retailers, have intensified, resulting in the major transport companies tendering for contracts at very low rates and leading to the result that they subcontract out any work that they cannot perform profitably. Commercial pressure is also exercised by major retailers in the form of directed delivery schedules placing stress and, at times, unrealistic expectations on the driver actually performing the work;*
>
> *(h) major retailers refuse to take responsibility for the consequences of the time restrictions that their delivery systems impose on subcontractors and major transport operators themselves contract out responsibility for the work and yet resist being called to account when things go wrong further down the chain;*
>
> *(i) the transport industry is characterised by chains of successive contracting out of work with commercial power decreasing with each successive step; and*
>
> *(j) those higher up the chain often contract out work for the express reason of transferring responsibility for the safe performance of the work to others.*

Clients Contract Out of Responsibility For Safety

26. The financial power of clients in the transport industry makes their involvement in a system of safe rates and conditions essential and mandatory. Evidence exists that industry clients do not consider themselves responsible at all for ensuring the legality of rates and conditions of transport workers. The following is an extract from the cross-examination of a manager of a major retailer in the *Mutual Responsibility* case; where they make clear their reluctance to take responsibility for the consequences of their supply chain's unsafe organisation:[50]

> *Q. In respect to any factor that is accepted by Woolworths, with respect to the rates tendered, does Woolworths undertake any analysis whether these rates would meet the work to be performed in a manner that complies with the relevant awards?*
>
> *A. Not directly to comply with the relevant awards. Before going into the tender we do an exercise to both estimate the cost of the process and to ensure likely carriers that are tendering are questioned in terms of safety. To answer your question - no, we don't.*
>
> *Q. Is this the case, persons who tender for Woolworths work are generally at liberty to sub-contract the work further?*
>
> *A. That's correct.*

49. Full extract in note above.

50. Transcript 27 March 2006 p625ff.

Q. Does Woolworths have any mechanism to check whether the prices against which the work may be further sub-contracted permit the appointment of employees in accordance with the necessity relevant awards?
A. No, we don't.

Q. That is a matter you regard beyond your area of responsibility?
A. It is the commercial responsibility of the parties so that we tender to our requirements.

Q. You will be aware the TWU has complained to Woolworths for some time that the delivery window and operation of other circumstances has led to situations where people speed and do not take regulation breaks in order to meet required times of delivery?
A. I am aware of the TWU's complaints, yes.

Q. Has that been directed to Woolworths to see whether that is so?
A. There has been an on going investigation for sometime.

Q. Has it been investigated, whether that complaint is true, that drivers have been breaching the law in order to meet slots?
A. To my knowledge no investigation has taken place.

Q. It is serious allegation?
A. Yes, it is.

Q. On one view it is a serious attack on Woolworth's reputation?
A. Yes, it is.

Q. Your evidence is Woolworths had made no attempt to investigate whether that allegation has been made out in fact or not?
A. That's correct?

27. Their stranglehold on price, however, is not the only means by which clients control the way in which goods are delivered. Clients, particularly the major retailers, regularly dictate delivery times and scheduling and impose penalties on transport companies for failing to meet those requirements. The effect of these punishments were described in an Industrial Relations Victoria report in 2005:

> *There is compelling evidence of an association between tight schedules, delivery time bonus/penalties and performance-based payment systems (e.g. kilometre-based rates) and both chronic injury and the propensity of drivers to engage in dangerous practices (such as speeding and excessive hours).*[51]

---

51. *Report of Inquiry: Owner Drivers and Forestry Contractors* (February 2005) Industrial Relations Victoria, Department of Innovation, Industry and Development, p. 16.

28. Some direct driver accounts in this regard are as follows:

> *"If I missed a delivery time for Safeway, Coles or K-mart, I would then need to stay overnight in Melbourne and have to deliver in the same time the next day. I recall situations where if I missed my delivery time by 10 – 15 minutes, I would be rejected by the load allocator and asked to come back the next day. This is despite the fact that I could wait up to 3 hours at each depot before they can unload me."*
>
> *"I was rarely unloaded within the half hour unloading window set. In my experience Coles and Woolworths would book in around 10 trucks for each half hour window even though it take around an hour to unload each truck and there was only ever 2 trucks being unloaded at one time. As a result, there was often up to 20 or 30 trucks waiting to be unloaded, with more on the street waiting to get in."*
>
> *"I usually had to wait for three (3) or four (4) hours and sometimes up to nine (9) hours before staff or docks were available for loading. On one occasion prior to Christmas 2004 I had to wait nine and a half hours to be unloaded at the Woolworths warehouse in Arndell Park. I was not paid for any time I spent waiting to be loaded or unloaded on this or any other occasion."*
>
> *"In addition to the long hours, I often had to speed in order to meet the time in which we were required to make the deliveries. I was told by Smith what time I had to get into Woolworths in Arndell Park. I was usually booked for 5am. That normally gave me around 11 hours to do what is roughly a 12 hour trip without breaks however I understood that this requirement stood even when I did not get out of Melbourne at 7 o'clock at night. Alex Smith told me, "If you are late twice in a month Woolworths will ban us from delivering. So I will be out of contract and you will be out of job."*
>
> *"If I did not get there by my allocated time, I was relegated to the back of the queue. As the Woolworths dock staff logged off at 1pm irrespective of whether there were trucks waiting or not, if I had not made it to the front of the queue by then I wasn't unloaded at all."*
>
> *"A 7am booking at Woolworths meant I had to be at Sydney by 5am because there were other customers freight on vehicle that I had to unload before Woolworths.*
>
> *I said*
>
> *" I had been loading and unloading all day in Melbourne. I needed to have some sleep."*
>
> *Smith:*
>
> *"This is how you work your logbook."*
>
> *He proceeded to show me what the RTA requirements were. He got on the Internet and pulled up the RTA rules and tried to show me how to rort it."*
>
> *"Also, Woolworths would not let me in before my allocated time if I was early and would often leave me waiting for a long time past the time allocated to me (even when I got there early) before I got unloaded or even got onto a dock. I was not paid for any of this work."* [52]

52. Uncontested evidence of drivers in the *Mutual Responsibility* case. Complete statements are part of the confidential attachment.

Drivers in the transport industry recognise the link between client pressure and unsafe work practices, and the need for any system of safe rates to be enforceable throughout the contracting chain.

29. In the words of Barry, an owner driver from Golden Grove in South Australia:

> *I have been offered work at rates that would not cover my fixed, variable or labour costs, I accepted this work, which involved delivering to small shops that are not covered by rates that are paid, because of the pressure from the company I am contracted to.*[53]

Rob, of Para Hills in South Australia, has provided similar evidence:

> *The clients of transport companies exert influence on the way on the way I am required to perform my work as then the transport companies exert pressure on drivers like me to perform extra duties, load at whatever their required time is, and to drive at any required hour.*[54]

Greg, an employee driver from Victoria, sees the direct the direct link between client pressures

> *I feel clients of Transport Company's control how work is performed to some degree, and there is no bargaining power to pressure my employer's client to increase the rates they pay for the work I do.*[55]

The clients' control of the industry affects drivers on a day-to-day basis, as described by Ken, an employee driver for carrying out work for Woolworths:

> *In my experience clients have a huge influence over the way we perform our duties. I find that Woolworths pushes delivery window. Each time we miss a delivery window our company is fined $500, even if it is because the warehouse has gotten behind in the unloading. This puts pressure on my employer to make sure the job gets done and in turn puts pressure on us. We do what we can to get the work done, to keep the contract and our jobs.*[56]

---

53. See statement of Barry Myers, attached to supporting letter from Alex Gallacher (Appendix 4).

54. See statement of Rod Webb, attached to supporting letter from Alex Gallacher (Appendix 4)

55. See statement of Greg O'Toole, attached to supporting letter from Bill Noonan (Appendix 2)

56. See statement of Ken Clinton, attached as Appendix 8.

Andrew Villis demonstrated the pressure to adhere to clients' requirements when he described his 31 hour shift to the NSW Industrial Relations Commission in 2005:

> *When I called Peter Gooding to say I was leaving, he said words to the effect of*
>
> *"You've got to get there. We can't fuck this up."*
>
> *I left Brisbane at 5pm and drove 12 hours straight until daylight when I pulled up in the middle of nowhere and had 5 hours sleep. I then drove into a town (I think it was Hay) where I had a shower and food. I was stopped for there for about 3 hours so as to avoid a SafeTCam I knew to be in the area and then drove straight to Adelaide with maybe only two or three more quick breaks on the way (just long enough to get a drink and something to eat). I arrived at my destination at around midnight, approximately 31 hours after I had started my trip.*[57]

30. The efficiency of a retailer's distribution centre has a direct impact upon the safety of rates received by drivers. With many drivers being paid per load or per kilometre travelled, unscheduled waiting time puts additional pressure on drivers who are already pressed for time. Transport companies are financially penalised if they fail to meet delivery windows, yet drivers are held up for hours on end when they do arrive on time. A recent TWU survey of drivers in Queensland found that:

- 76% of drivers surveyed are not paid for waiting time;
- The majority of spend 19 hours per week waiting to be loaded or unloaded;
- Some drivers spend 40-50 hours per week waiting.[58]

31. Applying the responsibility for safe rates throughout the contracting chain would better recognise the reality of the transport industry and the change that is needed:

> *While truck drivers have legal responsibilities that must be met, focusing enforcement activities at the driver fails to address the root cause of many serious safety problems, presumes this action can alter behavior (when there are strong pressures to evade), and represents a 'bottom of the chain' mentality. Evidence presented to the Inquiry makes it clear that even those involved in on-road enforcement, such as highway police, are only too aware of this limitation.*[59]

---

57. See statement of Andrew Villis, attached as Appendix 13: Confidential Attachment.

58. http://www.twuqld.asn.au/index.php?option=com_content&task=view&id=23&Itemid=28 accessed 20/8/08

59. Professor Michael Quinlan, *Report of inquiry into safety in the long haul trucking industry* (2001) Motor Accidents Authority of New South Wales, pp. 23, 24

32. The 1991 Federal Government report also summed up the need for broad change in the industry:

> "It is precisely because of the negative externalities aligned to safety that changes are required in the competitive practices in the industry. The transaction costs are sufficiently high to warrant some restrictions on competitive practices *in* the market. p. 103.

B. POLICY FRAMEWORK REQUIRED TO IMPROVE INDUSTRY CONDITIONS AND SAFETY PRACTICES

33. The evidence above shows that without external intervention the transport market is incapable of providing safe and reasonable rates and conditions. There is an urgent need long term need to finally restore integrity to payments in the transport industry.

34. Once this is accepted, the only conclusion, other than allowing the continuation of horrendous practices, is to establish a comprehensive framework for maintaining safe rates and conditions. That framework should have both the capacity to endorse any industry-wide agreement as to appropriate rates and conditions for employees and owner-drivers and, to the extent that industry-wide agreement cannot be reached, the capacity to test competing views before an independent body with the power to make binding decisions resulting in the establishment and on-going maintenance of those rates and conditions.

35. The evidence strongly indicates that at least four key elements are required in such a framework to effectively address this problem:

    (i) Safe Rates and Related Conditions for Employees and Owner-Drivers:

    Enforceable rates of remuneration and related conditions for transport workers, including self-employed truck owner-drivers, which are "safe" - that is, which, by reason of quantum or structure of payment, do not compel or encourage unsafe driving practices in order to counter unsafe competition in the industry;

    (ii) Appropriate and Adequate Planning to Ensure Safe Rates and Conditions Actually Applied:

    Enforceable requirements relating to planning for the safe and legal performance of road transport journeys (instead of employees and owner drivers being compelled to perform the work within client parameters established without regard to legal requirements and safety);

    (iii) Client Accountability for Safe Performance/Planning and Safe Rates:

    The establishment of a "chain of responsibility" in which all participants in the contractual chain, up to and including the ultimate client, are

accountable for the safe and legal performance of road transport work and the payment of safe and reasonable rates of remuneration; and

(iv) *Appropriate and Adequate Enforcement Regime:*

The TWU considers that the inspectors currently employed by the relevant authorities either lack the time or do not have the required investigative skills to apply the various laws applying to the road transport industry which are currently in operation. The TWU is prepared to provide specific examples of these confidentially in the stakeholder meetings.

The TWU suggests that it is necessary to adequately resource and empower regulators and registered employer and worker organisations within a proactive 'chain of responsibility' regime, which has been identified by unions, employers and regulators as one of the best value approaches to enforcement and which at the same time drives behavioural change. Without proactive chain of responsibility provisions enforcement is extremely inefficient and ineffective as the notion of "responsibility" is confined to a post-breach attempt to reassign blame for a past event in the hope that the threat of future sanction will result in voluntary behaviour modification.

36. What follows is:

- an examination of what aspects of these policy objectives already exist in legislation and where;
- identification of the regulatory gaps that are apparent as a result of that examination; and
- proposals aimed at ensuring that the policy objectives are achieved.

Existing Regulation

Employees

37. Across the country various awards, Federal and State (NAPSAs), apply to employees in the transport industry. Almost without exception, Federal transport awards provide not only for a lower rate of pay but also for a more restricted set of conditions of employment than state awards. The capacity to apply for variations to Federal Awards since 1996, and all awards since WorkChoices, has been limited to the point of being in practice non-existent by preventing the amendment of matters which were rendered prohibited after the introduction of WorkChoices.

38. The rates in the Federal Long Distance Award reward distance travelled rather than time spent driving, and consequently have effects on employee driver and employer behaviour similar to those observed with respect to owner-drivers and those who engage them. Such rates have been deemed "incentive" rates and, as a result, have not been increased since 2005. It follows from the restrictions on variation applications that there is no present capacity to apply for changes to the payment structures, or to include vital planning requirements to ensure the integrity of the payment structures in the award system.

39. No transport award presently extends any obligations or duties to parties other than employers in the industry. This inability to extend important safety obligations to parties outside the award framework results in an inability for the minimum rates notionally applicable to effectively protect drivers and road users from price pressure in the industry.

Employees - Modern Awards

40. The *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* 2008 was passed by the Federal Parliament on 18 March 2008. The transitional legislation, inter alia, creates a new Part 10A of the Workplace Relations Act 1996. The object of the Part is to empower the Australian Industrial Relations Commission to make "modern awards." [60] This is to be achieved through an award modernisation process. That process commenced with an award modernisation request from the Minister for Workplace Relations to the President of the Commission who is presently convening Full Benches to deal with the request.

41. The establishment and maintenance of safe rates and conditions, planning for the legal performance of the work (such as the safety measures endorsed

60. Section 576B *Workplace Relations Act 1996*.

by the Full Bench of the Industrial Relations Commission of NSW in the *Mutual Responsibility* case) and client responsibility are not matters that may be dealt with by modern awards.[61] This fact is not altered by pointing to the obligation upon the Commission to have regard for the safety, health and welfare of employees when making modern awards.[62] That mandatory obligation is referable solely to the requirements of the Act and does not operate to expand the category of matters to which the obligation applies.

42. The conclusion which follows is that, for transport employees (and the general public with whom they interface), there are two options: either the present regime is altered to accommodate the establishment and maintenance of provisions necessary to best ensure safe outcomes in the industry (and the transfer of such provisions where they presently exist); or existing safety provisions and capacity to reduce death and injury into the future are inadvertently wiped-out.

The "One Market" Approach – Employees and Owner-Drivers in NSW

43. The need for owner-driver regulation is now well established.[63] The most long-standing owner-driver protections exist in NSW. The rates and conditions system for owner-drivers in New South Wales is analysed extensively in this paper. The intention of this analysis is not to suggest that the NSW system contains all of the elements required to address the policy objectives – indeed there are areas in which it falls well short, such as:

- the failure of the system to recognise client accountability or to bind clients to safe and sustainable rates; and
- the lack of systems to apply liability for breaches in contract determinations on clients.

Rather the analysis aims demonstrate that there exists (subject to those limitations) a current system providing a framework for safe rates and conditions that has contributed considerable stability to the intra state transport market in that state (with industry-wide and bipartisan support) for a period of nearly 40 years.

61. See section576J of the *Workplace Relations Act 1996*

62. Award Modernisation Request: 3(g).

63 See attached submission of the TWU to the Senate Inquiry into the provisions of the *Independent Contractors Bill 2006* (Appendix 9).

44. It is worth devoting space to an explanation of the system so as to convey an understanding of the reasons that it has been such a stable system so widely supported.

45. Chapter 6 of the Industrial Relations Act 1996 (NSW) is characterised by the following:

- Enforceable standards providing the certainty of at least cost recovery;
- The prevention of unfair or destructive competition by preventing undercutting (below the cost recovery minima) across a site or industry sector;
- The capacity for incentive systems to flourish above the minima, either on an individual or enterprise (union or non-union) level;
- Protection against arbitrary termination of the contract;
- Quick, no cost access to the Industrial Relations Commission for the resolution of disputes about goodwill (amongst other matters), including the frequent successful oversight of contract transfer upon changeover of head contract to which the work relates;
- The capacity to recover goodwill where termination of the contract has resulted in that goodwill being unfairly extinguished (a provision enacted under a state Liberal government).

46. The New South Wales model flowed out of a Commission of inquiry set up by the state Liberal government in the late 1960s.[64] The inquiry concluded that there was "an overwhelming case" for the regulation of owner-drivers. It recognised that owner-drivers were contractors but their dependent nature nevertheless justified a minimal form of industrial regulation. It was overwhelming because,

> *Owner-drivers have been in the past exploited as to rates and subjected to oppressive and unreasonable working conditions. The truth is that an owner-driver with one vehicle (on which there is a heavy debt load) and no certainty of work is in a weak bargaining position and the transport industry is not lacking in operators prepared to take the fullest advantage of his vulnerability" (paragraph 30.17).*

---

64. *Report to the Honourable EA Willis on Section 88E of the Industrial Arbitration Act 1940-1968 in so far as it concerns Drivers of Taxi-cabs, Private Hire Cars, Motor Omnibuses, Public Motor Vehicles and Lorry Owner Drivers* 23 February 1970, Chapters 2 and 30.

47. Chapter 6 does not apply to genuinely independent transport companies that trade with a variety of clients and that have the power to set the price of the services they provide. Rather it applies to single vehicle owner-drivers who are tied to and dependent upon one company.

48. Chapter 6 is a model of proven sustainable balance between freedom to contract and encouragement of "entrepreneurship" on the one hand, and, on the other, proper protection for those choosing to contribute to Australian working life through independent contracting arrangements. Accordingly, it has, for nearly 30 years, had the support of workers, transport operators, industry bodies and both Labor and Liberal governments.

49. Through the NSW system owner-drivers and transport operators currently enjoy (and for much of the last 30 years have enjoyed) settled arrangements that have led to productive, efficient and harmonious execution of the transportation function. These arrangements are contained in a variety of industrial instruments at both the industry sector (contract determinations) and enterprise level (contract agreements).

50. Contract Determinations: Part 2 of Chapter 6 allows for the creation and protection of cost recovery standards through contract determinations. Contract determinations create a set of contracting standards established most often in consultation with industry groups and most commonly with the NSWRTA.

51. Contract determinations regulate only the basic conditions of engagement. They do **not**, for example, contain employee-like entitlements such as overtime, penalty rates or minimum hours of work, and there is no entitlement to leave (maximising the availability of the truck) compensation for which is contained in the rate structure. Rather determinations are incentive and mode-based and aim to provide basic minima upon which parties can negotiate *viable* contracting arrangements.

52. This minimalist approach ensures that the measures are not of such a nature as to unduly hinder the efficiency and productivity of the independent contract arrangements while providing the framework necessary to sustain the owner-driver small business model. In addition to covering off all foreseeable costs, the contract determination system also has the capacity to deal with unexpected events such as the recent dramatic fuel price increases. These can be dealt with

through a process of applying for variations to the cost models through the NSW Industrial Relations Commission.

53. Contract Agreements: Transport operators and groups of owner-drivers **(whether or not represented by the Union)** may enter into arrangements as to the terms and conditions best suited to their particular enterprise ('contract agreements'). These agreements set the desired agreed provisions for a given term, thereby allowing both operator and owner-drivers greater commercial certainty and operational efficiency.

54. At present there are over 170 contract agreements between groups of owner-drivers and specific enterprises and over 25 contract determinations, covering industry sectors including:

- General transport;
- Freight forwarding;
- Couriers;
- Concrete;
- Quarries;
- Waterfront;
- Excavated Materials;
- Waste Collection;
- Breweries;
- Taxis; and
- Car Carriers

55. One notable feature of Chapter 6 in NSW is that until the commencement of the *WorkChoices* legislation, the Industrial Relations Commission of NSW was able to seamlessly deal with issues relating to the establishment and maintenance of safe standards of remuneration and related conditions of *both* employees and owner-drivers performing intra state work.

56. The logic behind this approach is that drivers in the transport industry operate in one market and that owner-drivers, although independent contractors at law, are in fact highly dependent on those with whom they contract and are thus as vulnerable to exploitation (if not more so) than an employee driver.[65] In many cases employees and owner-drivers work for the same company and/or start at the same location each day and do the same work. The 1970 Willis Report put it this way:

> *It is illogical in every practical sense that within the one section of the industry and often within the one establishment that work, which is virtually identical, should be done by employees subject to industrial regulation and owner-drivers outside its scope.*[66]

---

65. See attached submission of the TWU to the Senate Inquiry into the provisions of the *Independent Contractors Bill 2006* (Appendix 9)

66. *Report to The Hon. E.A. Willis, B.A. M.L.A., Minister for Labour and Industry, on Section 88E of the Industrial Arbitrations Act, 1940-1968 in so far as it concerns Drivers of Taxi-cabs, Private hire Cars, Motor Omnibuses, Public Motor Vehicles, and Lorry Owner-Drivers* (23 February 1970) Industrial Commission of New South Wales, 30.16 (c).

57. It is also important to note that the commercial influences and pressures that cause the symptoms identified earlier in this submission exist without regard to whether the "victim" of the influence and pressure is an employee or an owner-driver. This was recognised in the 1991 Department of Transport report referred to above at page 103:

> *"Many of the influences on variations in on-road performance, pill taking and self-imposition of schedules which often lead to speeding are not correlated with whether a driver is an owner-driver or an employee driver. The distinction between owner-driver and employee driver is somewhat arbitrary and misleading in the current context. A much more useful classification is in terms of the nature of contracts"*

This suggests that any framework to address the pressures must apply equally to employees and owner-drivers or, if separate employee and owner-driver frameworks are to or do exist, that they provide for protection to substantially the same extent.

58. An example of this holistic approach in operation was the decision of the Full Bench of the Industrial Relations Commission in 2006 to make both a Mutual Responsibility Award and a Mutual Responsibility Contract Determination. Having decided that trip planning, supply chain transparency, occupational health and safety inductions and the establishment of parameters for the formulation of drug and alcohol policies were critical to the application and maintenance of safe rates and conditions, the Full Bench proceeded to apply those provisions to employees and owner-drivers. The NSW Government took a similar approach when it made an occupational health and safety fatigue management regulation in the industry to protect both owner-drivers and employees.[67]

67. Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005 (Appendix 10).

NSW – Summary of Existing Provisions

59. The following table provides a summary of the extent to which the evidence-backed policy objectives set out in paragraph 35, exist in NSW.

Policy Objective	*Capacity to establish and maintain enforceable safe rates & conditions applicable to all drivers*	*Capacity to establish and maintain enforceable requirements relating to planning for the safe and legal performance of the work applicable to all drivers*	*Capacity to establish and maintain enforceable obligations on industry clients for safe rates & conditions and in relation to planning for the safe and legal performance of the work of all drivers*	*Adequate and appropriate enforcement regime to ensure that safe rates and conditions and appropriate planning occurs*
Employees				
Capacity	No *Workplace Relations Act Cth* now applies (see above discussion). (NB prior to WorkChoices – Yes – NSW Act)	*Transport Industry - Mutual Responsibility Award* made in 2006. (Federal System has no capacity to facilitate these types of requirements.)	No. (NB however, client accountability provisions of the NSW OHS Long Distance Regulation with respect to fatigue and schedules)	Enforcement provisions exist in federal law but no existing framework for the establishment or transfer of safe rates & conditions and planning to enforce (NB however, client accountability under OHS regulation)
Owner-Drivers				
Capacity	Yes. In Chapter 6 of NSWIR Act. Applies to Intra State Work. Owner-drivers performing “contracts of carriage” as defined in section 309. Includes provisions providing certainty of contract such as protection from arbitrary termination of contract and cheap accessible and expert disputes procedures.	Yes. In Chapter 6 of the NSWIR Act. (NB: Current existing provisions of MRRS Contract Determination)[68] Applies to intra State Work of Owner-drivers performing “contracts of carriage” as defined in section 309.	No. (NB however, client accountability provisions of the NSW OHS Long Distance Regulation with respect to fatigue and scheduling)	Yes. (But not with respect to clients. NB however, client accountability under OHS regulation) *Industrial Relations Act NSW 1996* Intra State Work. Owner-drivers performing “contracts of carriage” as defined in section 309.

68. Transport Industry - *Mutual Responsibility for Road Safety Contract Determination* (Appendix 11)

Victoria

60. The Kennett referral of industrial relations powers to the Commonwealth meant that, even before *WorkChoices*, employees in Victoria were subject to the Federal industrial relations system. Accordingly, the above comments about the incapacity of the present framework to facilitate the achievement of the identified policy objectives apply in respect of Victoria.

61. There is no framework that facilitates client accountability with respect to rates, related conditions and planning for the legal performance of the work.

62. In 2003 the Victorian State Government established an owner-driver and forestry contractor inquiry. As mentioned above, the inquiry now forms part of the significant body of evidence regarding the rates and safety link and client pressure on contracts and the way in which work is performed. In 2005 the Labor Victorian Government acted on the inquiry report and established the *Owner Drivers and Forestry Contractors Act 2005 (VIC)*.

63. The approach and effect of the legislation is different from that taken in NSW. In the context having already referred industrial relations power, the Act was established in the Fair Trading jurisdiction. It is based, amongst other things, on the premise that provision of information to market participants will provide for rational decision-making. The main elements of the Victorian Act are as follows:

    (i) The Victorian Act seeks to redress the information imbalance existing between owner-drivers and hirers by:

    a. the provision of an information booklet to the owner driver prior to the entering of a contract;

    b. the provision of a published guidance rates and costs schedules to the owner-driver prior to the entering of a contract;

    c. a requirement that contracts must be recorded in writing and state the rates to be paid and the minimum period of notice applicable.

    (ii) A capacity for owner-drivers to appoint a negotiating agent to negotiate on behalf of an owner-driver or group of owner-drivers for the purposes of making, varying or terminating a contract.

(iii) The establishment of Codes of Practice in relation to owner-drivers and hirers.

(iv) A consequence of adopting a Fair Trading model is that the integrity of the system is based on the prevention of unfair business practices. The Act adopts many of the well-understood tests enunciated in the *Trade Practices Act 1974 (Cth)* and the *Fair Trading Act 1999 (Vic)* in relation to unconscionable conduct. It also introduces several new tests relating directly to owner-drivers' contracts, namely a comparison of the amount for which the owner driver could have supplied the services as an employee, and whether or not the contract allows for increases in fixed and variable overhead costs on a regular and systematic basis. These additional tests provide a framework in which both hires and owner-drivers can understand whether or not their conduct in relation to a contract represents unfair business practices. A good example would be a contract that provides for no review of fixed and variable costs, such as fuel, on a regular and systematic basis.

(v) One of the key foundations of the Victorian Act is the establishment of a low-cost, easily accessible dispute resolution procedure under the auspices of the Victorian Small Business Commissioner (VSBC). The Act provides for parties with a dispute to make an application to the VSBC for mediation over the dispute, and, although the legislation is young, to date the VSBC has experienced a settlement rate of around 85 to 90% of disputes through this process. In the event a dispute is not resolved in the VSBC, either party may obtain a certificate to proceed to the Victorian Civil and Administrative Tribunal in order to have the dispute arbitrated.

Western Australia

64. Employees – see paragraphs above dealing with the incapacity of the current Commonwealth employee framework to achieve the required policy objectives.

65. There is no framework that facilitates client accountability with respect to rates, related conditions and planning for the legal performance of the work.

66. In 2004 the WA government recognised the dire circumstances facing the owner-drivers and established a working group to address the formulation of safe sustainable rates the result being a Bill passed by the WA legislature, which the

Howard Government, through its *Independent Contractors Act 1996,* refused to allow to operate. In late July 2008, the new Labor Federal Government passed a regulation permitting the operation of the Road Freight Transport Industry (Contracts and Disputes) Act 2006 (WA).

67. The WA Act is part of a suite of legislation aimed at improving the safety and viability of the WA road freight transport industry. The Act is partly based on *Victoria's Owner-Drivers and Forestry Contractors Act 2005*. In summary the Act would:

- Provide owner-drivers with security of payment.
- Establish a Road Freight Transport Industry Council which would establish a Code of Conduct including guideline rates and other provisions regulating the relationship between the parties.
- Create a low-cost, conciliation focused, Road Freight Transport Industry Tribunal to hear disputes between the parties regarding breaches of contracts, the code of conduct and payments.
- Allow owner-drivers to appoint bargaining agents (Union or Non-Union, including an industry body).

Queensland

68. Up until the enactment of the *WorkChoices* and *Independent Contractors Act* by the Howard Government, Queensland had sought to address the required policy objectives through a robust state industrial relations system (including a robust award system) for employees which also allowed owner-drivers in certain circumstances (after appropriate determination of the matter) to access certain employee protections under the *Industrial Relations Act QLD* and also to access unfair contract provisions. Now owner-drivers have no state protections and employees are in the same position as others across the country – captured by the incapacity of the current Commonwealth employee framework to achieve the required policy objectives.

69. There is no framework that facilitates client accountability with respect to rates, related conditions and planning for the legal performance of the work.

Australian Capital Territory

70. Employees – see paragraphs above dealing with the incapacity of the current Commonwealth employee framework to achieve the required policy objectives.

71. There is no framework that facilitates client accountability with respect to rates, related conditions and planning for the legal performance of the work.

72. Tabled in the ACT parliament is the *Fair Work Contracts Bill*. This bill, like the Victorian legislation and the WA bill is set in the commercial context.[69]

South Australia and Northern Territory

73. In 2002 in South Australia and the Northern Territory a review was conducted into industrial laws which noted the growth of independent contractor arrangements, the increased competition in the industry and the need for owner drivers and employees to work longer hours to maintain their incomes. The review also noted the potential adverse consequences of these characteristics for industrial relations and occupational health and safety outcomes and the particular problems created for transport workers.

74. Although the aspect of the Bill which would have facilitated, amongst other things, the making of awards governing conditions of contract workers (such as truck drivers) did not pass, the underlying rationale for such capacity remains.

75. There is no framework that facilitates client accountability with respect to rates, related conditions and planning for the legal performance of the work.

Tasmania

76. Because of *WorkChoices* the situation regarding employees in the same as expressed above regard current Commonwealth incapacity to achieve the policy objectives. There is no relevant state legislation relating to owner-drivers or clients.

69. Copy of Bill attached at Appendix 12.

77. Paragraph 37, above, explain the significant regulatory gap with respect to employees. For employee drivers this means: no capacity to establish and maintain safe rates and conditions; no capacity to establish (whether from scratch or by transferring existing safety provisions) and maintain requirements relating to planning for the legal performance of the work; no capacity to hear and determine as necessary, by way of appropriately tested evidence, any competing views regarding the establishment and maintenance of safe rates and conditions and planning requirements; no capacity (with `respect to the transport industry) to incorporate into awards terms relating to clients.

78. NSW, Victoria and WA have owner-driver provisions which, to varying degrees, provide a framework consistent with the objective of establishing and maintaining safe rates and conditions for owner-drivers performing intra state work. There is no such operative framework in any other jurisdiction. There is no such framework applicable to interstate work.

79. The *Independent Contractors Act* does not *currently* provide the framework within which any of the policy objectives in respect of owner-drivers can be achieved. In addition, the Act suffers from deficiencies that render its use practically difficult even in pursuit of the limited remedies it contains.[70]

80. The NSW owner-driver framework facilitates the establishment of requirements relating to planning for the safe and legal performance of the work. No other jurisdiction has this capacity.

81. With the exception of the provisions regarding fatigue and schedules within the NSW Occupational Health and Safety regulation (noted above), no jurisdiction has contains a framework with the capacity to deal with client accountability.

82. Appropriate obligations in road transport law with respect to safe rates and conditions. The absence of reference to rates and conditions in transport law demonstrates a lack of recognition of the link between unsafe rates and road law compliance. Appendix 7 sets out the changes that could be made to road laws to complement theemployee and owner-driver 'safe rates' and conditions framework proposals that follow.

70. See paragraphs 12ff. This assertion is given weight by the recent decision in which the obvious conduct of a party could not be taken into account when considering unfairness [Keldote Pty Ltd & Ors v Riteway Transport Pty Ltd] forcing the applicant to assert and the magistrate to find unfairness in the terms of the contract itself.

Core of Terms of Reference

"To identify the means by which legislative systems applying (or to apply) to employees and independent contractors could/should accommodate a system of 'safe payments' (and related matters such as waiting times and unpaid work) for employees and owner-drivers."[71] (NTC Website)

83. The purpose of this section is to identify the means by which the Commonwealth could legislate to achieve the following policy objectives:

    (i) Rates of remuneration and related conditions for transport workers that are "safe" - that is, which, by reason of quantum or structure of payment, do not compel or encourage unsafe driving practices. (In the case of owner-drivers, this will require rates of remuneration which enable the proper recovery of standing and running truck costs and the return to the driver of remuneration not less than the safe award rate for an employed truck driver).

    (ii) Requirements relating to planning for the safe and legal performance of road transport journeys (instead of operators compelling employees and owner drivers to perform the work within client parameters established without regard to legal requirements and safety).

    (iii) The establishment of a "chain of responsibility" in which all participants in the contractual chain, up to and including the ultimate client are accountable for the safe and legal performance of road transport work and the payment of safe and reasonable rates of remuneration.

    (iv) Appropriate and adequate framework for enforcement of (i) – (iii) above.

84. Two options are identified by which these objectives may be achieved. The first option involves the amendment of existing legislative regimes applying to employee truck drivers and truck owners drivers, namely the *Workplace Relations Act* 1996 (Cth) and the *Independent Contractors Act* 1996 (Cth) respectively. The first option involves the utilisation of existing structures and institutions (in particular, the Australian Industrial Relations Commission) to achieve the policy objectives.

71. See above for detailed discussion of each of the matters the experts are asked to have regard to in approaching this task.

85. The second option would involve the enactment of a discrete piece of legislation, and the creation of new structures and institutions (in particular, the creation of a new tribunal specific to the road transport industry) in order to achieve the policy objectives. Some consequential amendments to the *Workplace Relations Act* would be necessary.

86. In each case, because of the current lack of publicly available information as to the detail of how the Commonwealth Government intends to legislatively implement its *Forward with Fairness* industrial relations policy, and because of the urgency of this matter, these proposals have been prepared by reference to the *Workplace Relations Act* and the *Independent Contractors Act* in their current form. In each case it is envisaged that the proposals will operate seamlessly with road transport laws.[72]

Option One

Employees

87. The amendments required to be made to the *Workplace Relations Act* to effect the legislative objectives with respect to employed truck drivers are relatively straightforward. In summary, it is proposed that the Australian Industrial Relations Commission would be empowered, in the case of "modern awards" which have application to employed truck drivers, to make and, at regular intervals, review award provisions concerning the matters identified in paragraphs 83(i)-(iv) above.

88. The specific changes to the *Workplace Relations Act* would be as follows:

(i) A new provision would be inserted into Part 10A Division 3 Subdivision A which, in respect of employed truck drivers, would prescribe the following matters additional to those in s 576J:

(a) such terms relating to the conditions under which an employer may employ transport workers to ensure their health and safety (including terms relating to the pay and conditions of employed truck drivers and the planning of the performance of their work in a safe and legal fashion); and

(b) such terms relating to the conditions under which an "eligible entity" (as defined in s 564) may arrange for road transport work to be carried

72. See Appendix 7.

out for the entity (either directly or indirectly) by transport workers which are necessary to ensure their health and safety (including terms relating to the pay and conditions of employed truck drivers and the planning of the performance of their work in a safe and legal fashion).

(ii) A new provision similar to s 576V(5) permitting a modern award to apply, in addition to relevant employers, employees and organisations, an "eligible entity" or an employer that operates in the road transport industry or in respect of which a term made in accordance with the new provisions identified in paragraph 88(i) above are expressed to apply.

(iii) A variation to s 576H to permit the AIRC to vary modern awards in order that any new provisions of the type identified in paragraph 88(i) above remain relevant in the light of any changed circumstances. Such power could be exercised by the AIRC acting on its own initiative or upon the application of an organisation bound by the relevant modern awards.

***Owner Drivers*[73]**

89. With respect to owner drivers, it is proposed that a new part be inserted into the *Independent Contractors Act* empowering the AIRC to made determinations applying to contracts under which owner drivers work providing for the matters identified in paragraphs 83(i)-(iv) above. Specifically, it is proposed that the new part would:

(i) apply to any "services contract", as defined in s 5 and of a type to which Part 3 of the Act applies in accordance with s 11, where the relevant services supplied are road transport services involving the use of a motor vehicle operated by the independent contractor;

(ii) confer power upon the AIRC to make a determination with respect to the remuneration of the independent contractor, and any condition, under such a services contract or class of such services contracts, and with respect to the termination of any such services contract;

(iii) additionally, confer power upon the AIRC to make a determination with respect to the conditions under which an eligible entity (defined in the same

73. Consistent with the examination of regulatory gaps, above, it is envisaged that these owner-driver proposals would apply to: all interstate work; intra state work in states & territories that have not enacted specific owner-driver protections; and intra state work also in NSW, WA and Victoria, but only to the extent that existing provisions in those states do not operate to achieve the identified policy objectives (for example, client accountability).

terms as in s 564 of the *Workplace Relations Act*, except that the words "*other than in the entity's capacity as an employer*" would be replaced with "*other than in the entity's capacity as one engaging an independent contractor working under a services contract*") may arrange for road transport to be carried out for the entity (either directly or indirectly) by an independent contractor working under such a services contract;

(iv) provide that such a determination may be made by the AIRC acting on its own initiative or upon the application of any organisation registered under the *Workplace Relations Act* which has as members independent contractors bound by any such services contracts;

(v) apply the provisions of the *Workplace Relations* concerning the AIRC's procedures, including but not limited to its procedures with respect to the conduct of hearings, appeals, representation and costs, to the AIRC's exercise of its powers under the new part of the *Independent Contractors Act*;

(vi) provide for enforcement procedures for determinations made by the AIRC that are relevantly the same as for awards under the *Workplace Relations Act*.

Option Two

90. The second option involves the creation of a new legislative regime, separate from the *Workplace Relations Act* and the *Independent Contractors Act*, to apply specifically to transport workers and owner-drivers. However, with respect to employees, the new Act would need to interact to a degree with the *Workplace Relations Act*. The constitutional foundations for the new Act would be the same as for the *Workplace Relations Act* and the *Independent Contractors Act*. Thus, in order to establish the requisite constitutional connection, the new Act would, with respect to employment relationships, utilise the same definitions of "employee", "employer" and "eligible entity" as contained in the *Workplace Relations Act* (see ss 5, 6 and 564), and with respect to independent contractors, it would utilise the definition of "services contract" in s 5 of the *Independent Contractors Act* (with such a services contract also being subject to restrictions the same as those contained in s 11 of the *Independent Contractors Act* and involving the performance by the independent contractor of road transport services involving the use of a motor vehicle operated by the independent contractor) and the modified definition of "eligible entity" referred to in paragraph 89(iii) above.

91. The new Act would require the establishment of a new tribunal to carry out the functions which, under the first option, are to be carried out by the AIRC. However, there would be no reason why appropriate personnel from the AIRC could not be dually appointed to the Tribunal, with the Australian Industrial Registry and other AIRC facilities used to support the Tribunal. This would render negligible any cost associated with the establishment of the Tribunal. It is envisaged that the Tribunal would consist of a President and two Deputy Presidents, all part-time, who would jointly exercise the Tribunal's powers. The new Act would make provision for the procedures of the new Tribunal, including as to the conduct of hearings, representation and costs, that are the same as applying to the AIRC under the *Workplace Relations Act*. The new Tribunal would be able to exercise its powers and functions on its own initiative or upon the application of any organisation registered under the *Workplace Relations Act* having as members employed truck drivers, employers of truck drivers, or independent contractors bound by services contracts.

92. The functions and powers of the new Tribunal would be as follows:

(i) to make award provisions applying to employed truck drivers, employers and eligible entities relating to:

(a) the conditions under which an employer may employ transport workers which are necessary to ensure their health and safety (including terms relating to the pay and conditions of employed truck drivers and the planning of the performance of their work in a safe and legal fashion); and

(b) the conditions under which an eligible entity may arrange for road transport work to be carried out for the entity (either directly or indirectly) by transport workers which are necessary to ensure their health and safety (including terms relating to the pay and conditions of employed truck drivers and the planning of the performance of their work in a safe and legal fashion); and

(ii) to make determinations applying to independent contractors, entities engaging independent contractors, and eligible entities (with the modified definition referred to in paragraph 89(iii) above) with respect to:

(a) the remuneration of an independent contractor, and any condition,

under a services contract or class of such services contracts, and the termination of any such services contract; and

(b) the conditions under which an eligible entity may arrange for road transport to be carried out for the entity (either directly or indirectly) by an independent contractor working under a services contract.

93. Any award provisions made by the new Tribunal as per paragraph 92(i) would be taken to be provisions of modern awards applicable to road transport for the purposes of the *Workplace Relations Act*, and would be enforceable under the award enforcement provisions of that Act. The new Act would also provide for enforcement procedures for determinations made by the new Tribunal as per paragraph 90(ii) above that are relevantly the same as for awards under the *Workplace Relations Act*.

Conclusion – The Need To Act

94. The TWUA has provided evidence that attests to the severe crisis in safety that is currently plaguing the transport industry. In 2007, this crisis claimed 235 people's lives in articulated heavy vehicle and rigid heavy vehicle incidents. Each road death costs $1.7 million. Each injury in an incident costs $408 000[74]. When the non monetised social impact of road deaths, injuries and illness, family breakdown, pain and suffering is included in the measurement of what road deaths and injuries cost the community, the need for regulatory intervention is obvious.

95. The TWUA has demonstrated how Judicial and coronial determinations, academic studies, and government-commissioned have recognised that the foundation of this regulatory intervention must be full and proper recognition of the relationship between methods for the remuneration of drivers and the poor safety practices that imperil the transport industry. These practices include drivers being subject to the pressure to work excessive hours; the pressure to exceed legal speed limits; the pressure to drive through break and sleep times; and, in some circumstances, the professional use of illegal stimulants to combat fatigue.

96. The TWUA has also demonstrated that the root cause of unsafe remuneration systems is the commercial dominance of the transport industry's powerful clients– especially the big retailers. Their power to determine industry standards mandates their involvement in a 'safe rates' framework that has four related policy objectives:

74. *Road crash costs in Australia, Report 102*, Bureau of Transport Economics. All figures in 1996 dollars. Accounting for inflation, this figure is considerably higher today.

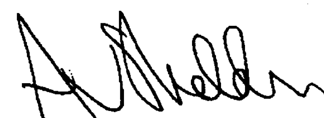
I. Enforceable rates of remuneration and related conditions for employed truck drivers and self-employed truck owner-drivers which are "safe" - that is, which, by reason of quantum or structure of payment, do not compel or encourage unsafe driving practices;

II. Enforceable requirements relating to planning for the safe and legal performance of road transport journeys (instead of employees and owner drivers being compelled to perform the work within client parameters established without regard to legal requirements and safety);

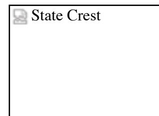
III. The establishment of a "chain of responsibility" in which all participants in the contractual chain, up to and including the ultimate client, are accountable for the safe and legal performance of road transport work and the payment of safe and reasonable rates of remuneration; and

IV. An appropriate and adequate enforcement regime.

97. The Transport Workers Union of Australia is committed to working with all Governments, industry bodies, regulators, transport operators and clients to implement and enforce a 'safe rates system', with these objectives' that can assist in ending the destruction and carnage currently occurring on Australian roads.



Tony Sheldon
NSW Secretary
National Secretary
Transport Workers Union



Industrial Relations Commission
of New South Wales

CITATION: **Transport Industry - Mutual Responsibility for Road Safety (State) Award and Contract Determination (No. 2), Re [2006] NSWIRComm 328**

PARTIES:

APPLICANT:
Transport Workers' Union of New South Wales

MAJOR RESPONDENTS:
Aldi Stores (A Limited Partnership)
Australian Business Industrial
Australian Industry Group
Australian Retailers Association of New South Wales
Boral Group of Companies
Employers First
New South Wales Road Transport Association Inc
Toll Transport Pty Ltd

INTERVENORS:
Minister for Industrial Relations
Woolworths Limited

FILE NUMBER(S): IRC 4219 of 2005

CORAM: Wright J President; Walton J Vice-President; Sams DP; Tabbaa C

CATCHWORDS: Applications for a new award and contract determination - health and safety in the long distance road transport industry - evidence of serious occupational health and safety issues affecting the industry and general public - excessive fatigue of truck drivers - use of illegal drugs to combat fatigue - excessive hours of work - falsifying of log books - speeding - link between remuneration systems and safety - most effective means of addressing and minimising health and safety problems - no dispute as to the extent and dimension of such problems - structure of the industry - chain of responsibility - who is responsible for ensuring compliance - major inquiries into long distance truck driving - legislative response - specific occupational health and safety regulation - pending federal initiatives - WorkCover prosecutions - various definitions of long distance trip - jurisdictional challenge - effect of WorkChoices legislation - whether reference to occupational health and safety applies only to legislation and not to industrial instruments - whether subject matter of application relates to occupational health and safety matters - safe driving plans - blue card training - induction training - drug and alcohol policies - Held: unnecessary to decide jurisdictional issue - Union's application relates to occupational health and safety matters - safe driving plans introduced - link between remuneration systems and fatigue issues - desirability of more specific industrial regulation - criticisms exaggerated - definition of long distance trip - review period - Bluecard training generally accepted - no requirement for Union involvement - induction training refused - all employers to have a drug and alcohol policy - need greatest for small to medium sized operators - preferred method of testing - method of testing not restricted - no prohibition on random testing - testing may be non-consensual - consequences of positive testing - six months to implement policy - avenue for disputes to be resolved - diverse nature of industry requires an award and contract determination - new award and contract determination to be made - Union to prepare draft instruments.

LEGISLATION CITED:

Building and Construction Industry Improvement Act 2005
Industrial Relations Act 1996
Migration Act 1958 (Cth)
Occupational Health and Safety Act 1983
Occupational Health and Safety Act 2000
Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005
Occupational Health and Safety Regulation 2001
Road Transport (Safety and Traffic Management) (Driver Fatigue) Regulation 1999
Workplace Relations Act 1996 (Cth)
Workplace Relations Amendment (WorkChoices) Act 2005 (Cth)

CASES CITED:

Australian Workers Union, New South Wales v BHP Steel (AIS) Pty Limited [2003] NSWIRComm 461
Beacham v Interface Manufacturing Pty Ltd and Another [2005] NSWIRComm 123
CFMEU v Newcrest Mining Limited (2005) 139 IR 50
Engine Drivers et (South Maitland Railways Ltd) Conciliation Committee, Re [1938] AR (NSW) 266
Ex parte McLean (1930) 43 CLR 472
Glass v Flexible Packaging (Australia) Pty Limited (2005) 144 IR 385
Glass Makers (State) Conciliation Committee, Re [1944] AR (NSW) 292
NAQF v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 781
Operational Ambulance Officers (State) Award, Re (2001) 113 IR 384
Pastoral Industry (State) Award, Re (2001) 104 IR 168
Regina v Randall John Harm, Unreported, District Court of New South Wales, 26 August 2005
Secure Employment Test Case (2006) 150 IR 1
Shop, Distributive and Allied Employees Association v Retail Traders' Association of Victoria (1998) 83

IR 352
Social and Community Services Employees (State) Award, Re (2001) 117 IR 458
Steel Works Employees (Broken Hill Pty Company Ltd) No.2 Award [1964] AR (NSW) 696
T and M Industries (Aust) Pty Ltd and Anor v WorkCover Authority (NSW) (Inspector Sequeira) (2006) 151 IR 130
Transport Industry - Cash in Transit (State) Interim Award [2001] NSWIRComm 220
Transport Industry - Mutual Responsibility for Road Safety (State) Award and Contract Determination, Re (2006) 152 IR 140
Transport Industry Motor Bus Drivers and Conductors (State) Award (2005) 353 IG 760
Unions NSW v Carter Holt Harvey (2006) 149 IR 361
WorkCover Authority (NSW) v T & Y Pty Ltd (2005) 146 IR 458
WorkCover Authority of New South Wales v Hitchcock (2004) 135 IR 377
WorkCover Authority of New South Wales v Hitchcock (2005) 139 IR 439

HEARING DATES:	21/02/2006; 22/02/2006; 23/02/2006; 24/02/2006; 7/03/2006; 8/03/2006; 9/03/2006; 27/03/2006; 3/04/2006; 4/04/2006
DATE OF JUDGMENT:	02/11/2006
LEGAL REPRESENTATIVES:	APPLICANT: Mr A A Hatcher of counsel Transport Workers' Union of New South Wales (Mr M Kaine) RESPONDENTS: Mr M Kimber SC for Australian Business Industrial, New South Wales Road Transport Association Inc, Toll Transport Pty Limited Clayton Utz, Solicitors (Mr J J Catanzariti) Mr R Warren of counsel Employers First (Mr T McDonald) Mr S Coleman of counsel for Western Freight Management Pty Limited Baldock Stacy & Niven, Solicitors (Mr D King-Christopher) Mr D Houligan IR Australia Pty Limited for Ruttley Freightlines Pty Limited Ms V Paul Australian Industry Group INTERVENORS: Mr A Searle of counsel for the Minister for Industrial Relations Crown Solicitor (I V Knight) Ms M Painter of counsel for Woolworths Limited Thomson Playford Lawyers (Mr M Davis)

JUDGMENT:
86

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

spacer
image

Matter No IRC 4219 of 2005

TRANSPORT INDUSTRY - MUTUAL RESPONSIBILITY FOR ROAD SAFETY (STATE) AWARD AND CONTRACT DETERMINATION

Application by Transport Workers' Union of New South Wales for a new award and contract determination

DECISION OF THE COMMISSION
[2006] NSWIRComm 328

TABLE OF CONTENTS Page

INTRODUCTION..3
NATURE OF THE INDUSTRY...9
EVIDENCE ON THESE ISSUES..11
The Quinlan Report...14
FURTHER EVIDENCE..20
Fatigue...20
Drug Usage..20
Excessive hours of work...21
Falsifying log books..22
Speeding...23
Link between remuneration and safety...24

LEGISLATIVE RESPONSE...29
New South Wales Initiatives...30

Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005...30

The Hitchcock judgment...32
Federal Initiatives...41
Definition of Long Distance Trip...42
THE APPLICATION..50
JURISDICTIONAL CHALLENGE..52
Conclusion to Jurisdictional issues...58
SAFE DRIVING PLANS...76
BLUECARD TRAINING..93
INDUCTION TRAINING..96
DRUG AND ALCOHOL POLICY..100

NATURE OF INDUST
ORDERS AND DIREC
ANNEXURE A: List c
ANNEXURE B: Safe

INTRODUCTION

1 We begin our consideration of this matter by referring to the comments made in the District Court by His Honour Judge *Graham* in August 2005 when sentencii collision which resulted in the deaths of two persons and the serious injury of another. In *Regina v Randall John Harm* (unreported, 26 August 2005) His Honour

> The evidence brought before the Court in this case is by no means unique. On many occasions the Courts have heard the same sad litany incident or collision arising out of fatigue, not uncommonly associated with the use of drugs such as amphetamines. Behind that scenario truck drivers are obliged, as in many respects are their operators, to maintain strict deadlines or timetables which make inadequate allowa similar incidents of life.
> Timetables and deadlines which make inadequate provision for rest for drivers, particularly if the deadline is at risk of being missed, and driving overnight from one capital city to another, six nights a week. Over the years, various measures have been implemented with a vie practices.
> In the present matter, the statement of facts refers to safety cams and log books. Restrictions on the maximum speed of heavy vehicles ha heavy vehicle truck drivers are still placed under what is, clearly, intolerable pressure in order to get produce to the markets or goods to t consideration of the risks involved in too tight a timetable, but by the dictates of the marketplace. Or, to put it bluntly, sheer greed on the time has come when those who are the beneficiaries of the interstate transport industry must take some blame for what happens at the sha are put under intolerable pressure. They drive when they are too tired, and when that becomes too difficult, they take drugs to try and pro

impede their concentration and actually make things worse.
When a collision occurs, such as happened here, who ends up in the dock? Who ends up behind bars? Not the operators. Not the transpor people who use those transport services. But the driver. It's the driver who goes to gaol. The companies still make the profits. The drivers industry. Their lives are ruined, in many ways just as badly as many of the victims lives are ruined, by the imperative of greed which lies after case in the Courts demonstrates the inadequacy of the government's response to these problems and the inadequacy of the transport point having a requirement that log books be kept, if they are not inspected so regularly that a driver would be foolish to omit to make an check of a log book, within an hour or so after a vehicle has passed through a safety cam, could reveal whether that log book was properl case after case has demonstrated the abject failure of such a policy. The time has clearly come, in the interests of all Australians, for prop The industry inevitably contains its own inherent risks. Heavy vehicles are difficult to control. If anything goes wrong mechanically, ther incidents is high. Australian roads are not the best in the world. The distances which are required to be covered to get goods from one cer another centre, where they are sold or processed further, are great in Australia. Inevitably, that itself will create circumstances where fatig not all of these risks, are unavoidable risks. The evidence in this case, and the numerous cases before the Courts, shows that, from the dri law and place the interests of heavy vehicle truck drivers and other users of the road at great risk by virtue of these practices.

2 His Honour's comments graphically illustrate some of the central issues which lie at the foundation of this matter. Similarly, what is clear from the evidence bef disregard for the health and safety of participants in the road transport industry of this State. This culture has, and continues to have, dire implications for the indu or owner drivers - and the road travelling public.

3 There is no doubt that the issues identified in this matter attract wide and unprecedented public interest considerations. We would wish to express at the outset, which emerged during the course of the evidence. Although, in one sense, this evidence should hardly be surprising or unexpected considering many of the issues in this jurisdiction and elsewhere, as the following extracts from decisions referred to us disclose.

4 In his sentencing judgment in *Workcover Authority of New South Wales v Hitchcock* (2004) 139 IR 439 (“the *Hitchcock* judgment”), *Walton* J, Vice-President sa

1 By the ordinary principles of sentencing, this case calls for a severe penalty. Not only did the Company fail to provide any effective me for its long-haul truck drivers, its operations exacerbated those risks - sometimes to the point of actual danger - by requiring drivers to m demands), ultimately leading to a man's death. The risks of fatigue were well-known in the trucking industry and capable of remedy by s regulations enacted for this very purpose. The seriousness of these offences, mitigated to an extent (but not substantially) by subjective fa from operating under systems which, by failing to manage the risk of fatigue, endanger both their employees and the public of New Sout

5 We shall refer in more detail to the *Hitchcock* judgment later in this decision.

6 In the 2003 inquest into the deaths of three long-distance truck drivers, the Deputy State Coroner, Dorelle Pinch, was asked to identify any common factors that

1. Fatigue

The underlying factor in all three fatalities was fatigue. All three drivers had been driving in excess of the legal hours, not only during the sleep debt was also a factor in terms of the number of days worked without a break. Supposed rest periods were spent either in loading/u metropolitan deliveries. All three fatalities occurred during the worst fatigue time, midnight to 6 am.

2. Drugs

Mr Walsh died at a truck stop from Methamphetamine Toxicity and Mr Supple had a fatal level of Methamphetamine in his blood at the both men were using this drug was to alleviate the effects of fatigue. I note that, while Mr Forsyth tested negative to drugs in his system, found in his wallet. I note that tests of Messrs. Supple and Walsh also revealed levels of cannabis. According to the evidence, cannabis is after they have used Methamphetamine.

3. Falsified Logbooks

The entries in the logbooks of Messrs Forsyth and Supple grossly underrepresented the hours they worked. Of particular concern was the in other trucking duties such as monitoring the vehicle, queuing at docks, loading or unloading and making other deliveries in the metrop checked by their employers. They were not concerned about deficiencies being discovered in the course of an audit because they were se two drivers are officially inspected was in the aftermath of their respective accidents.

Mr Walsh was in a separate category in respect of logbooks - he didn't keep one at all.

4. Pressure for Deliveries

All of the employer's representatives for these drivers indicated that they did not set deadlines but left it up to the driver. That was done v delivery because he had reached his legal hours driving limit, the consignor simply went elsewhere. Obviously, when the drivers were be the job regardless of the number of hours already worked. The other point is that it was the employers who scheduled the number of days

5. Medical Tests

No medical fitness tests were required for any of these drivers.

7 We stress that all of the major institutions representing interests or regulating activity in the road transport industry - the Transport Workers' Union (“the Union” operators and Government - recognise and accept that serious health and safety problems exist in the industry. However, the essence of the contest between the pa proceedings, related to the extent to which the Commission should act on the Union's claim and, if so, the most effective means of addressing the problems identi

8 These proceedings arose from the Union’s application for the making of two industrial instruments, an award and a contract determination, with the stated purp safety issues facing the road transport industry. In short, there are four aspects to the Union’s claim:

(a) a requirement, in respect of all long distance work as defined, for employers and principal contractors to formulate and apply a Safe Driving Plan, identifying performed can be undertaken safely and legally and the means by which it is remunerated;

(b) a regime of accountability with respect to the preparation and enforcement of Safe Driving Plans that applies, as far as is jurisdictionally possible, to all parties

(c) a compulsory basic training requirement for truck drivers in the form of Blue Card training covering occupational health and safety matters, and Induction trai requirements relating to remuneration, hours of work, rest breaks, safety and the like; and

(d) a requirement that employers and principal contractors be required to implement a drug and alcohol policy.

9 We will outline the claims in more detail shortly. At this stage, we note that the Union has expressed the purpose of each aspect as being to seek to address and r
safety issues in the road transport industry. As already mentioned, we consider that all parties accepted that these issues exist in the industry and the existence of t
transport industry is beset with problems that require earnest and deliberate attention.

10 Whilst it is clear that there are absolute obligations on employers under the *Occupational Health and Safety Act* 2000 ("the OH&S Act") and the NSW Govern
industry's safety problems by recently introducing new regulations, the question arises whether more can be done - particularly in a wider industrial context? This
proceedings. Before turning to the extensive array of evidence presented, it is instructive to outline the nature and characteristics of the contemporary road transpo

NATURE OF THE INDUSTRY

11 The road transport industry has an important feature known as a contractual chain or chain of responsibility. The four tiers of the chain were identified as Head
Carrier. These were defined in the Union's amended application as:

> "Head consignor" shall mean any person, not being a transport operator, who enters into a contract with a transport operator under which
> consignor. Note: the head consignor will usually be at the head of the contracting chain.
>
> "Consignor" shall mean any person, being a transport operator, who enters into a transport contract with another transport operator under
> consignor. Note: the consignor may itself be subject to a contractual obligation to arrange for the carriage of the same freight.
>
> "Transport Operator" shall mean any employer or principal contractor engaged in the business of transport of freight by road, or who em
> freight by road.
>
> "Contract Carrier" shall be as defined in s309 of the Act, and includes, where the context requires, a reference to the person driving the c
> corporation or partnership.

12 At the top of the contractual chain is the Head Consignor - large companies with very substantial transport requirements - such as Woolworths and Coles. Trad
directly, but contract out their requirements on a cost competitive basis. The next tier of the chain is the Consignor, the major transport companies such as Toll Tra
utilise their own direct labour or subcontract out the work to the third tier in the chain - the smaller transport companies. These companies may then contract out t

13 The Union submitted that while the main problem areas for safety are to be found at the third and fourth levels of the chain, the competitive pressures exerted b
entities must bear some responsibility for the problems which exist down the line.

14 At this juncture, we observe that there is no doubt that these arrangements lie at the core of the safety issues which have been clearly identified in the industry.

(a) driving long and excessive hours, resulting in sleep deprivation and fatigue;

(b) widespread use of illicit drugs to combat the effects of fatigue;

(c) regular and systematic breaches by drivers of the maximum number of hours allowed to be driven each day;

(d) too short rest breaks or breaks are taken in circumstances where the driver does not have a proper opportunity to rest;

(e) working excessive hours encourages falsification of log books; and

(f) speeding is a regular part of the job for long-distance truck drivers.

EVIDENCE ON THESE ISSUES

15 A list of the witnesses who provided evidence in the proceedings is to be found at Annexure A.

16 The largely uncontested evidence of Mr Wayne Forno, the Assistant State Secretary of the Union, described the industry in the following terms:

(a) there is widespread non-compliance with award and contract determination provisions and, in particular, underpayment of wages (a view supporte
Association, Martin Iffland);

(b) it is not uncommon for transport companies, which themselves would not engage in conduct in breach of industrial instruments, to subcontract wo
which are prepared to breach industrial instruments in order to make a profit;

(c) labour costs are the most significant component of transportation costs and there is an inherent incentive to achieve savings through non-complian
engagement of owner drivers or small fleet owners who are prepared to "do what it takes" to make the work profitable;

(d) the competitive pressures in the long distance sector have resulted in a situation where the major transport operators perform only a fraction of the

(e) most companies performing long distance work resist enterprise bargaining because of the likelihood that an enterprise bargaining arrangement w
of labour costs measured against yardsticks other than that of financial viability;

(f) there is a link between remuneration and safety issues such as excessive hours of work;

(g) commercial pressures, most notably from major retailers, have intensified, resulting in the major transport companies tendering for contracts at ve
subcontract out any work that they cannot perform profitably. Commercial pressure is also exercised by major retailers in the form of directed deliver
expectations on the driver actually performing the work;

(h) major retailers refuse to take responsibility for the consequences of the time restrictions that their delivery systems impose on subcontractors and
responsibility for the work and yet resist being called to account when things go wrong further down the chain;

(i) the transport industry is characterised by chains of successive contracting out of work with commercial power decreasing with each successive ste

(j) those higher up the chain often contract out work for the express reason of transfering responsibility for the safe performance of the work to others

The Quinlan Report

17 The Union's application relied, to a significant extent, on the findings of a 2001 Inquiry into safety in the long haul trucking industry ('the Quinlan report') und
Quinlan was called as an expert witness in occupational health and safety and, in particular, to give evidence about his 2001 Inquiry.

18 The Quinlan Inquiry was commissioned by the then Motor Accidents Authority of New South Wales and its terms of reference were:

1) Impact of clients' and consignors' requirements on the drivers including:

· Industry tendering practices;
· Transport contracts between road transport companies and major clients;
· Methods of pricing;
· Lack of client responsibility for driving hours, driver performance and remuneration for drivers;
· Clients/consignor requirements as to delivery times.

2) Extent of proper enforcement in the industry of driving hours, speeding and drug use.
3) Current forms of regulation in the industry, whether a self regulation or external regulation model is most appropriate to the road trans
4) Whether current regulatory bodies with responsibility for the industry are properly co-ordinated with each other and sufficiently resou

19 The Union asked Professor Quinlan to comment on the following six questions:

(a) What evidence exists, if any, regarding the nature and extent of health and safety problems in the long distance sector or of the transport industry?

(b) What evidence exists, if any, regarding the nature and extent of crashes involving heavy vehicles in NSW?

(c) What evidence exists, if any, about the relationship, if any, between commercial and/or industrial practices and safety in the transport industry?

(d) What evidence exists, if any, regarding the relationship, if any, between pay levels and/or systems of remuneration and safety outcomes in the tran

(e) What evidence exists, if any, regarding the adequacy or otherwise of current forms of regulation in ensuring the safety of truck drivers?

(f) What evidence exists, if any, regarding the measures necessary to ensure/improve safety outcomes in the transport industry?

20 In his affidavit evidence Professor Quinlan summarised his findings as follows:

13. The Inquiry I undertook in 2000/1 identified considerable evidence of serious health and safety problems in the long distance truckin
crash-related injuries that attracts most public attention, including health problems, psychological wellbeing and exposure to occupationa
Report to presenting this evidence. I identified a number of areas (particularly those relating to health effects, premature death/suicide an
sufficiently troubling to indicate more research was needed. These gaps suggested the evidence I presented might actually understate the
industry. Summarising the available evidence I made the following points.

14. Compared to other modes of transport or other industries more generally, long distance road transport has a poor safety record. Truck
and these risks extend, in a substantial way, to other road users.

...

the Inquiry collected evidence of serious risks to health and safety, including excessive hours of work and other dangerous practices.

(16.1) As indicated in the recent federal House of Representatives Inquiry, long hours of work and fatigue remain a significant concern in
and having other health effects. For the years 1993 to 1998 the RTA has estimated that fatigued heavy truck drivers accounted for an annu
annual average casualty crashes involving heavy trucks) in NSW and fatigued articulated truck drivers accounted for 58.7 (or 5.6% of av
casualty crashes. The RTA identified an upward trend in both the numbers of crashes and casualties over time. These concerns are echoed
long distance drivers undertaken by Dr Ann Williamson and colleagues and benchmarked against an earlier (1991) survey. The survey fo
distance drivers, entailing longer trips and with a reported earlier onset of fatigue. Most drivers did some midnight to dawn driving (when
exceeded the 72 hour working hour limit in the last week and around a quarter admitted breaking driving hours regulations on every trip.
hours and the situation is if anything, getting worse. Long hours also make it very difficult for drivers to juggle work and family commitm
(16.2) A direct consequence of the long hours worked by drivers is resort to stimulant drugs. Drivers use drugs not for pleasure but to con
precise level of drug use in the long distance trucking industry is unknown, the evidence available to this Inquiry leads to a firm conclusi
(a police raid on a major drug distribution network for truck drivers) is indicative of the elaborate supply chains that service this use. Mo
effects, the consequences of drug use by drivers has been graphically illustrated by the tragedies at Cowper (NSW) in 1989 and Blanchet
feature of the industry and are structured into the work process in a way that can be found in no other occupation (except perhaps prostitu
(16.3) Speeding heavy vehicles are significantly over-represented in crashes. Despite the use of speed limiting devices, speeding by long
using Culway sites indicating that the proportion of trucks exceeding the speed limit ranges from 30 to 50%, depending on the route/high
show that speeding trucks represented a pervasive and serious safety issue.
(16.4) In addition to these issues the Inquiry received evidence on a range of other safety and health issues including overloading of truck
design/configuration and maintenance, excessive noise, vibration and exposure to hazardous substances (chemicals, fumes and particulat
work/family balance, hazardous loads as well as hazards associated with subcontracting/labour hire. Logistical constraints meant I was u
have liked, although most appeared serious enough to warrant further investigation. For example, submissions from drivers and their part
extended hours were a serious threat to driver wellbeing was supported by evidence from the survey of 300 drivers conducted for the inq

...

(56.1) The Inquiry I undertook in 2000/1 identified an array of significant OHS problems in the road transport industry, not simply crash-
compensation data seriously understated these problems. Although a number of OHS indices require further research (such as those relat
balance and suicide/premature death) I think it is fair to say the available evidence indicates that the industry has a poor OHS record (ma
Information I have collected since I undertook the Inquiry would suggest that, overall, there appears to have been no significant improve

(56.2) The Inquiry I undertook collected considerable evidence (both in terms of submissions and independent research), the weight of w

the industry and commercial and industrial practices (widespread use of elaborate subcontracting chains involving small firms and owner payments and delays at warehouses etc] from industry clients, and widespread use of trip-based payments as well as award evasion) was practices in the industry (including excessive hours, speeding, drug use and cuts to vehicle maintenance). Although there are differences and Europe information I was able to obtain suggested essentially similar issues were adversely affecting road transport OHS in these co with overseas researchers since the Inquiry has reinforced rather than undermined this interpretation.

(56.3) The Inquiry I undertook identified a number of serious deficiencies in the regulatory framework that ostensibly sought to safeguar other road users) including a lack of coordination amongst key agencies; a tendency to address symptoms rather than underlying structur and strategic focus in enforcement; and a flirtation with voluntarist measures that had conspicuously failed in the past. My recommendat regulatory regime, make more use of OHS legislation, provide tools for more effective and encompassing monitoring of the behaviour o in relation to entry/continuance in the industry and ensure uniform standards that did not compromise safety, and to ensure these measure activities. Since the Inquiry Report was released a number of measures have been undertaken that address in part some of these recomme measures (sic) are yet to be addressed in any sustained way. Others have pointed to the failure to address underlying structural issues, inc

(56.4) In my view, the present claim for new award provisions picks up a number of these issues and in so doing would help bring about industry. The claim addresses a number of matters that my Inquiry and subsequent research identified as of particular importance to bette of other road users (or persons coming into contact with trucking activities, notably:

> (56.4.1) Measures to ensure safety is not compromised due to under-payment of employee and contract carriers.
> (56.4.2) Measures to better ensure that consignors, consignees, the union and others (aside from transport operators and emp claim would reinforce and make more effective other regulatory measures aiming to implement 'Chain of Responsibility" (C
>
> (56.4.3) Importantly, the award provisions seek to implement the use of safe driving plans very much in accordance with the as remuneration, trip times and loading schedules identified as critical to OHS). Providing a mechanism that will, in my view logbook system and provide an enforcement tool/contractual tracking mechanism to implement COR is especially vital. Lin added advantage as is enabling the union to monitor compliance with the scheme.
>
> (56.4.4) I would also support the introduction of a 'bluecard' program if this is designed to ensure all drivers (employee, lab induction into the industry (including OHS).
> (56.4.5) The introduction of a drug and alcohol policy by all transport operators also has considerable merit as I believe it wi it clear that the use of stimulants is not an acceptable form of fatigue management and making it harder for some operators t

FURTHER EVIDENCE

Fatigue

21 Associate Professor Anne Williamson was the Deputy Director of the NSW Injury Risk Management Research Centre at the University of New South Wales. *Hitchcock* matter, and she also gave evidence during the proceedings as to the various studies which have compared the effects of sleep deprivation and fatigue w road safety of fatigue is of a similar magnitude to drink driving and that long-distance drivers who may be awake for long periods are likely to be at high risk of f Williamson's evidence.

Drug Usage

22 Two national surveys in 1991 and 1998 recorded that the use of 'stay awake' or stimulant drugs was cited by drivers as one of the two most helpful strategies f that while the precise level of drug use in the long-distance trucking industry was unknown, the evidence led to a firm conclusion that it was widespread. He note may not only increase the risk of truck crashes but also will have long-term health effects on the drivers affected.

23 Of the 13 driver witnesses, a number openly admitted using stimulants to help them work; others gave evidence of having conversations with other drivers abo spoke of management knowing or encouraging the use of drugs during the course of performing their work.

Excessive hours of work

24 All drivers gave evidence that they had breached the maximum number of hours drivers are allowed to work. It was conceded that this occurred on a regular a 80 - 100 hours each week, sometimes working 14 - 20 hours a day without breaks. One driver described his normal week as follows:

> All up, I usually worked around 18 to 19 hours each day. I worked five or six days per week, doing five or six full return trips each fortn loaded on Saturday. Usually, I would leave home on Sunday afternoon and travel overnight to Brisbane, load all day Monday and travel more before getting home Saturday morning. Sometimes, I would not get home until the Monday after that. I would not get home at all n

25 Some drivers gave examples of extreme breaches of driving hours: 85 hours in a 120 hour period, 20.5 hours in 24 hours, 30 hours in a 32 hour period and 53

26 When taking breaks, the drivers' evidence was that it was often too short or taken in situations where the driver was deprived of a proper opportunity to rest. O lack of heat and space in sleeper cabins and interruptions during rest time where rest was taken in the depot while waiting for more work.

27 Other drivers reported on the pressure they were under from management to work extreme hours including threats and financial penalties. Drivers reported tha this pressure.

Falsifying log books

28 As a consequence of working excessive hours there was widespread evidence of drivers falsifying log books in order to keep legal records required by the *Roa Fatigue) Regulation* 1999 ("1999 Regulation").

29 Some of these measures included:

(a) not recording the beginning or end of trips;

(b) recording time spent performing pick ups or deliveries as breaks;

(c) falsifying start or finish times;

(d) using another driver's details to claim that there was a second driver in the truck;

(e) not recording local work in the logbook;

(f) possession of a second logbook; and

(g) falsifying the place of depot so as to avoid having to carry a logbook at all.

30 Other drivers found it preferable to carry no log book at all. There was evidence of managers encouraging drivers to falsify log books or management's disinte

Speeding

31 The evidence disclosed that speeding is a regular part of the job for long-distance truck drivers and drivers found ways of avoiding detection such as the use of lights, or "tailgating" other trucks to avoid detection by cameras.

32 The effects of these driving practices on the health, safety and well-being of drivers was described both in expert evidence and directly in the evidence of the d to hallucinating or being drunk. The effects of the widespread use of illicit drugs are self-evident. Drivers reported traumatic health problems and pressure on fam

Link between remuneration and safety

33 In the 2003 Deputy State Coroner's inquest referred to earlier, the following observation was made (emphasis added):

> My main areas of concern arising in the Inquests, namely, working hours, fatigue and drug use are to the forefront of current policy discu observation, it seems to me as if the focus is on finding solutions to the symptoms of the basic problem rather than dealing with what I pe *payments are based on a (low) rate per kilometre there will always be an incentive for drivers to maximise the hours they drive, not beca* anticipate that this incentive will remain an overriding concern for drivers irrespective of legal and safety considerations. This is obvious has already been placed on the agenda by Professor Quinlan. However, structural changes do not feature prominently in current initiative

34 We consider that the evidence in the proceedings establishes that there is a direct link between methods of payment and/or rates of pay and safety outcomes. W regard:

> The evidence has shown a direct link between the rate of pay and/or the method of payment on the one hand and safety outcomes on the Michael Belzer [Ex 45] in the context of long distance trucking in the United States is that driver pay has a strong effect on safety outcon *performance for firms and drivers. The precise driver-level study of Hunt suggests this relationship may be as high as 1:4*." He also conc driver crashes in the sector, that "…*every 10% more that drivers earn in pay rate is associated with an 18.7% lower probability of crash, driver crashes declines 6.3%*." [Ex 45, p 105].
>
> Belzer also examined, using an extensive driver survey, the relationship between the rate of remuneration and hours worked [Ex 45, p 11 104]:
>
> > "Our measurement supports the hypothesis that drivers have target earnings and drivers paid lower than average seek to achi hours, in confirmation of the "sweatshop" hypothesis."

35 And [at p 59]:

> "This can be explained by the idea that once drivers are paid a high enough rate and are already working long hours, further increases in than purchase more goods and services. This also may be explained by joint decisions of drivers and firms at higher or lower rates of pay prefer that their drivers obey the hours-of-service regulations, while firms that pay a low rate of pay may recognize that their drivers cann regulations allow, and may encourage or coerce them to work more hours and drive more miles. The point estimates indicate that if the n would reduce their weekly hours to be in compliance with the current regulations. At this rate, drivers are being compensated at a rate su requirements without being induced to work in excess of those mandated by law."
>
> Belzer also examined the effects of *method* of pay on safety. At [Ex 45, pp 52-54] he stated:
>
> > "Another compensation issue that can influence driver behavior is the common practice to either underpay or not pay at all f spent loading and unloading, which represents a significant proportion of working time, according to results from the UMTI underpaid for loading and unloading, there is an incentive to underreport this unpaid time in order to drive for more hours … compensation for loading time, as long as it is less than the amount paid for driving."
>
> Given the obvious geographical and market similarities between the United States and Australia, it is unsurprising that examination of th type of conclusions. Professor Michael Quinlan, in his principal statement in the proceedings [Ex 14], cited research indicating the prima industry in Australia: [Ex 14, pp 18-19]. In particular he noted that the research found that trip and performance-based payment systems method) were applied to the vast majority of drivers 82.3%. Quinlan summarised Australian research of Williamson *et el* (2000) which fo were more likely to report fatigue and that such systems can be seen as an influence on drivers to break working hours regulations: [Ex 1 association between payment by results and increased use of stimulant drugs [Ex 14, p 20].
>
> The conclusion that there is an association between payment and safety was acknowledged by the two NSW Road Transport Association
>
> (i) Rod Grace, Employment Relations Manager, New South Wales Road Transport Association [T 458]:
>
> > "Q. Can I give an example. If a company operates a payment system which rewards drivers not by time worked, but for the c remunerate the driver for time worked, that might lead to a result where the driver simply tries to complete the work as quick that right?
> >
> > A. That's right, I agree with that."
>
> (ii) Hugh McMaster, Corporate Relations Manager, New South Wales Road Transport Association [T 529-530]:
>
> > "Q. And you would agree with me that Mr Sheldon drew it directly between rates of remuneration and safety issues?
> > A. Yes I do.
> >
> > Q. And among other things he said this, "The lowest price means the ... in case of long distance"?
> > A. Yes.
> >
> > Q. And you agree with that as a proposition?
> > A. By and large I do yes. It's not as simple as that but I think there certainly is a connection between low price and lower saf

The general evidence from Forno evidence about the link between remuneration and safety issues such as excessive hours of work was u

"In my experience, there is a direct linkage between underpayment of remuneration and safety issues. This arises because drivers who ar
with a rate which allows for cost recovery and a decent return (in the case of owner drivers) will often either succumb to pressure or sim
remuneration.

Some systems of remuneration provided for in awards, such as the kilometre basis of payment provided for in the Federal Award and in t
complied with, will if used irresponsibly by employers encourage unsafe practices. A driver who is being paid a fixed rate for, say, a Syd
takes to perform it, will have a natural incentive to finish the trip as quickly as possible and will often do so in the absence of appropriate
when, as often happens, the employer pays the correct trip rate but does not pay the hourly rate for loading and unloading time at either e
premises and the like, large amounts of time will usually be spent by drivers loading and unloading, in addition to driving time. If emplo
tend to try to cut corners on driving time (either by speeding, and/or, more commonly these days, by failing to take the required or any re

The vast majority of the driver witnesses indicated that they and/or others they worked with did not get paid for time spent loading and u
par 12; Ex 17, par 52; Ex 27, par 21 & Ex 46, par 14]. A common theme throughout the driver evidence (both employee and owner-drive
far as the GPO of the city to which they were travelling. The kilometres travelled once in town in order to perform the necessary deliveri
calculating remuneration, effectively equating to a system of flat "trip rates" which remained static irrespective of the actual distance tra
32 and 34; Ex 10, pars 7, 8, 10-12; Ex 11, pars 11, 15, 16, 20 and 22; Ex 12, pars 6-7; Ex 46, par 23 and Ex 48, par 24]. This amounted t
some cases entire days of work that were unpaid.

A number of the drivers also gave evidence of being paid below-award rates [Ex 12, pars 30, 32-34; Ex 32, par 12]. Owner-drivers were
too scared to confront management about it in case they were not given any more work [eg Ex 27, par 22]. However, employee drivers d
the employer to pay the correct rates, with the evidence disclosing the attitude of one employer as follows [Ex 17 par 67]:

> "The award does not apply to us. You are employed under my conditions."

In some instances, drivers found that companies were either unable or unwilling to pay them. Ireland stated that he was engaged to perfo
asked for money replied that they were insolvent and others that would only pay the money they owed him once threatened with violenc

LEGISLATIVE RESPONSE

36 All of the evidence we have earlier recited was largely uncontested and we accept the nature and dimension of the health and safety problems which beset the i

37 The general thrust of the employers' opposition to the Union's claims hinged on the argument that the existing OH&S Act and associated regulations, particula
Truck Driver Fatigue) Regulation 2005, were sufficient to address the safety problems in the industry. It was argued that the existing legislation makes the grant o
the industry and may lead to even more breaches of the regulations as drivers seek to avoid duplication and unnecessary paperwork.

38 In addition, the employer respondents pointed to pending federal initiatives which also make the grant of the Union's claim at best, premature, and more likely,

39 It was further argued that the recent decision of the Court in *Hitchcock* set a new and higher benchmark in the industry which has received widespread acknow
acutely, the industry's attention on safety issues. Moreover, WorkCover have a further 25 prosecutions pending of the *Hitchcock* type.

40 It is therefore appropriate to set out the basis of these arguments in some detail.

New South Wales initiatives

***Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation* 2005 ("The 2005 Regulation")**

41 During the proceedings, considerable attention was given to the introduction by the New South Wales Government on 1 March 2006 of the 2005 Regulation.

42 The 2005 Regulation, made under the *OH&S Act*, was introduced after extensive consultation with the industry stakeholders. All parties have welcomed the 2(
Union claims that it is deficient in certain respects.

43 In the Explanatory Note to the 2005 Regulation, the primary objective is expressed as being to reduce:

> the fatigue of drivers of heavy trucks. In order to do this, this Regulation imposes obligations on an employer whose employee drives a h
> employer is required to assess the risk of harm from fatigue to the driver's health and safety and to take steps to eliminate or control that
> eliminate or control risks to the extent that the employer's activities contribute to that risk. A similar obligation is placed on head carriers
> (including their agents and persons acting on their behalf) who enter into a contract with a self-employed carrier for the transportation of
> persons on whom the obligation is placed are also required to prepare driver fatigue management plans for certain drivers and to make th
>
> This Regulation also requires certain consignors and consignees of freight (including their agents and persons acting on their behalf) not
> freight long distance by means of a heavy truck unless they are satisfied that the delivery timetables are reasonable and that each driver w
> contract is covered by a driver fatigue management plan.
>
> This Regulation also requires certain documents to be retained for up to 5 years and to be made available to an inspector or an authorised
>
> This Regulation is made under the Occupational Health and Safety Act 2000, including sections 33 (the general regulation-making powe

44 Clause 81A of the Regulation contains the definitions in the 2005 Regulation, in particular the definition of long distance, to which we will refer later in this de

45 Clause 81B(1) prohibits an employer from causing or permitting its employees to transport freight long distance unless the employer has assessed the risk of h
employer's activities contribute to that risk, the employer has eliminated the risk, or (if that is not reasonably practicable) has controlled the risk. The same obligat
when entering into contracts with self-employed carriers, by virtue of clauses 81B(2) and (3).

46 Individual driver fatigue management plans are required by cl 81D of the Regulation. This means head carriers, consignors and consignees must prepare such
81D(4):

(a) trip schedules and driver rosters, taking into account the following:
- (i) times required to perform tasks safely,
- (ii) times actually taken to perform tasks,
- (iii) rest periods required to recover from the fatigue effects of work,
- (iv) the cumulative effects of fatigue over more than one day,

(v) the effect of the time of day or night on fatigue,
(b) management practices, including the following:
(i) methods for assessing the suitability of drivers,
(ii) systems for reporting hazards and incidents,
(iii) systems for monitoring driver's health and safety,
(c) work environment and amenities,
(d) training and information about fatigue that is provided to drivers,
(e) loading and unloading schedules, practices and systems, including queuing practices and systems,
(f) accidents or mechanical failures.

47 A person who prepares a driver fatigue management plan must ensure that their activities are consistent with the plan (cl 6(b)) and must make a copy of the pla
Clause 81F requires records to be kept and retained for up to five years and to be made available to an inspector or authorised representative of the driver.

The Hitchcock judgment

48 All parties relied on the two recent judgments of *Walton* J in what are collectively referred to as the Hitchcock judgment (*WorkCover Authority of New South V*
Authority of New South Wales v Hitchcock (2005) 139 IR 439).

49 The judgment concerned two prosecutions brought under ss 15, 16 and 50 of the *OH&S Act* following the death of a long haul driver, Mr Darri Haynes, after a
September 1999. At paragraph [3] of the first judgment, His Honour said:

> 3 The evidence painted a sobering picture of the risk for long distance truck drivers of driving when fatigued, the very real danger attend
> little (if any) heed to the risk either to its employed drivers or to anyone else at risk of an accident due to proximity to a fatigued truck dri
> against the risk, as it was legally obliged to do under the Act, the systems of work operated by the Company (which did not include any e
> them. A significant part of the defendant's answer to the overwhelming evidence of failures in the Company's systems of work, supported
> evidence given by other drivers employed by the Company at the time of the accident, was that a risk of fatigue, albeit caused by a failur
> failed if it could not establish that Mr Haynes was actually fatigued at the time of the accident. As I discuss later, this contention was wro
> ultimately disclosed beyond reasonable doubt that Mr Haynes was fatigued at the time of the accident.

50 At paragraph [12], His Honour records the persons who gave evidence in the proceedings:

> 12 The court received evidence from four long haul truck drivers (Mr Walker and three former employees of the Company: Messrs McL
> (Messrs McFarlane**,** Clarke and Fennell); Inspector Templeton of the WorkCover Authority of New South Wales ("WorkCover"); four of
> O'Neill, Martin, Montgomery and May); Mr Haynes's partner of nineteen years, Ms Campbell; a depot manager, Mr Cooper, of Scotts Tr
> consultant pharmacologist; Mr Dick van den Dool, traffic engineer; and Associate Professor Ann Williamson, fatigue expert.

51 His Honour relied on the expert evidence of Associate Professor Williamson in concluding:

> 42 It is clear from Associate Professor Williamson's expert evidence, and I have no hesitation in finding beyond reasonable doubt, that dr
> particular, I find that:
> (a) Long hours of working, especially at night, lead to fatigue;
> (b) Six hours of sleep during the core period of midnight to 6am (or an equivalent restorative sleep during day time, which n
> is the bare minimum to manage fatigue appropriately;
> (c) The high levels of attention required for driving will also contribute to fatigue;
> (d) Chronic fatigue can develop over a series of long work days in the absence of adequate rest;
> (e) Sleep is the only way to effectively alleviate fatigue;
> (f) The most beneficial, restorative sleep is taken between midnight and 6am. Longer periods of day-time sleep are necessary
> (g) Driving when fatigued is extremely dangerous because the skills necessary for driving - paying attention moment by mo
> (h) The nature of fatigue makes this situation even more dangerous: the more tired a driver becomes, the less able they are to
> appropriate rest-breaks, or to stop; and
> (i) Fatigued drivers have a higher risk of crashing.

52 *Walton* J undertook a detailed examination of Mr Haynes' last week of work and said at paragraphs [160] and [161]:

> 160 It is important to realise that, during the preceding analysis of Mr Haynes's last week, every assumption was made in favour of the de
> opportunities for rest. No allowance was made for queuing (despite the consistent evidence of three other drivers employed by the Comp
> their work during which sleep was not possible), nor was anything other than the minimum (the time nominated by the Company, except
> and unloading, despite the evidence of Associate Professor Williamson, based on two national surveys of 1,000 truck drivers, that drivers
> loading and unloading. No allowance was made for other necessary work, such as time spent making or receiving work telephone calls, o
> no allowance was made for necessary personal activities such as eating, grooming, washing, and, given the weekly long absences from h
> reject the suggestion in the defendant's submissions that such telephone calls were a luxury that should never have been given precedence
> been made or received while Mr Haynes was driving.
> 161 Notwithstanding these unrealistic assumptions (when applied unremittingly over seven days), and despite my acceptance that Mr Ha
> 1999 cancelled all fatigue which may have accrued, in my detailed analysis of one week of Mr Haynes's employment with the Company
> typical in terms of work loads and practices), I have found (at paragraphs [91], [132] and [133]) beyond reasonable doubt that on two occ
> requisite 6 hour continuous break in every 24 hour period. Quite the contrary: in both instances, I have found, to the criminal standard, th
> fatigued: he was in fact fatigued and that this significantly impaired both his ability to drive safely, and his ability to respond safely to tha
> to stop.

53 At paragraph 165, His Honour said:

> Ultimately, of course, the Court must determine whether there was a risk to Mr Haynes's health and safety: I have found (at paragraphs [9
> risk (the risk of driving when fatigued) on several occasions including at the time of the accident. Moreover, I have found to the criminal
> merely a risk: he was in fact fatigued at the time of the accident (at paragraph [159]), and this fatigue could not have been alleviated by f
> without interruption. Whether or not the fatal accident was directly caused by Mr Haynes's fatigue is not determinative of the charges. N
> will record my conclusions following an overview of the evidence concerning the accident.

54 His Honour referred to the fact that medical evidence disclosed that Mr Haynes' body was later found to contain methamphetamine. Medical evidence from Dr

> 181 Under cross-examination, Dr Perl agreed that methamphetamine was psychologically addictive, and that a long-term user may believ
> when in fact this may not be the case.
>
> 182 According to Dr Perl, during the acute stimulant phase following use of amphetamines there is a marked increase in wakefulness, ale

altered and there is commonly an increase in risk-taking behaviours. High doses lead to hyper-reflexia, restlessness, talkativeness, sleep d
palpitations. The user may experience hallucinations and paranoid thoughts. When the over-stimulation of the brain wears off there is a r
most common symptoms of which include extreme fatigue, sleepiness and depression.

183 Methamphetamine can impair driving abilities in two different ways: by impairing judgement and increasing risk-taking behaviour, o
withdrawal. Often, this second stage impairs driving ability to a greater extent than the initial stimulation. The drug-induced fatigue or de
was masking in the first place. Like all stimulants, it produces physiological effects such as palpitations and hypertension, thereby increa
cardiac arrest or stroke).

184 Dr Perl agreed under cross-examination that even low doses of methamphetamine in some individuals could produce a stroke or som
presence of methamphetamine in Mr Haynes's liver, a cardiovascular accident may have been a factor in the crash.

55 Evidence was also accepted of the driver's payment structure:

196 Finally, the evidence as to the drivers' payment structure was not disputed. They were not paid for washing the truck, queuing to load
such as filling up with fuel, inspecting the truck, making telephone calls or completing paperwork. They were paid a fixed rate for each k
and unloading each load, regardless of how long it actually took. The system provided a clear incentive for drivers to maximise kilometre
extending driving hours; but little scope for reducing the time taken to perform other necessary work for which they were not paid. Loadi
necessarily took a certain, substantial, amount of time. Indeed, the only real scope for drivers to reduce this "unpaid" time was to arrive a
queuing behind other trucks, thus reinforcing the pattern of driving at night. There was an obvious temptation for drivers to increase their
McLennan's evidence below illustrates the point well.

56 *Walton* J found that the Company did not have any real system of fatigue management in place and concluded:

233 I am satisfied beyond reasonable doubt that the Company failed to ensure that driving rosters were prepared which properly or adequ
deprivation. I reject the defendant's submission that "the driving duties of Mr Haynes gave him ample opportunities for rest" and that "the
effect of sleep deprivation and fatigue was taken into account". This submission is incorrect for several reasons, some of which I will me
to delivery times also put paid to it): first, it is limited to driving duties - the evidence clearly established that drivers had other, time-cons
queuing, washing the truck) which must be taken into account when assessing fatigue. So much is apparent from the log-book definition
drivers and Associate Professor Williamson. Secondly, it is not pertinent whether Mr Haynes had "ample opportunities for rest" (which I
his last week): the Company could not discharge its duties simply by expecting the drivers to manage their own affairs in compliance wit
from the fact that this proposition is inconsistent with employers' duties for proactive management and supervision of health and safety u
Associate Professor Williamson's evidence that fatigued drivers cannot be relied upon to make sensible decisions in relation to rest-break
dangerously fatigued on two occasions in a period of just one week shows that whatever the theoretical flaws of self-regulation (which ar
practice. Rest-breaks were not taken in a manner to prevent or cure fatigue (nor indeed were they required by the supervision or enforcem
evidence of regularly flouting the breaks prescribed by the log-book regime, as I discuss below.

57 As to the Company's other work practices, His Honour said at paragraph [260]:

260 In summary, I have made the following findings beyond reasonable doubt as to the Company's work practices: that there was no Com
from the log-book regime; that such policy as there was ("to abide by the log-book") may not have been communicated to the drivers (an
commencement of employment); that the "policy" was not enforced or supervised; that the Company did not collect any oral information
conduct any review of the relevant written information (the duplicate log-book pages); and that "compliance" with the "policy" such as it
totally to the drivers in a system which provided incentives (through pay) to increase driving hours. I have further found, beyond reasona
the effects of fatigue and sleep deprivation when preparing rosters. Finally, I have found that the Company pressured its drivers to meet d
regime - either due to specific time slots for particular depots, as mentioned by Mr McLennan, or to Company imposed deadlines to be th
jobs or income if they failed to comply. This pressure may have been to meet client expectations, or to manage excessive workloads, or a
Needless to say, even the most superficial fatigue management system would have picked up the falsified log-books handed in by the dri
recorded on their daily worksheets or with the deliveries they were directed to make. Clearly, the failures alleged in the particulars relatin
Company's system of work have been made out to the requisite criminal standard of proof.

58 At paragraph [262], *Walton* J concluded:

262 In order to establish liability on these grounds, it remains to consider causation (subject to any defence). I am satisfied beyond reason
drivers took sufficient rest-stops; to record and audit driving hours properly; to provide a safe system of work to minimise the risk of fati
account when preparing driving rosters caused the risk to Mr Haynes's health and safety of driving whilst fatigued. The defendant only ra
rosters - in his written submissions, but in my view the causal nexus is obvious. Had the Company taken into account the effects of fatigu
information of driving hours and rest-breaks) in accordance with its statutory obligations it would not have allocated work to fatigued dri
means of minimising the risk of its employed drivers driving whilst fatigued: withholding work until appropriate rest-breaks had been tak
stated in cross-examination, "You're not going to crash if you're not on the road".

59 His Honour also discussed the Company's training and supervision of its drivers in the following terms (at paragraph [270]):

270 I am satisfied beyond reasonable doubt that the Company's failures to provide information, instruction, training and supervision of it
Haynes's health and safety of driving when fatigued. The evidence of Associate Professor Williamson made it clear that drivers suffering
necessary for their safety: it follows that supervision was essential. It was also apparent from her evidence of the manner in which fatigue
night of no sleep or interrupted sleep during the core period) and of the effects of fatigue on driving, that training, information and instruc
seriousness of the risk, the importance of taking appropriate rest-breaks to avoid it, and how best to do so. Matters relating to circadian rh
quality of sleep depending upon when it is taken; and the consequences when driving in the absence of sleep for 18 hours tantamount to d
of common knowledge and yet are critical to long distance truck drivers. It may be said to be even more critical for the Company's driver
to Nowra).

60 Finally, at paragraph [291] His Honour held:

291 The facts of this case do not permit a reasonable doubt as to the causal connection between the risk to Mr Haynes of driving when fa
Company's failures to ensure that its drivers (including Mr Haynes) took sufficient rest-stops; to record and audit driving hours properly;
into account when preparing driving rosters caused the risk to Mr Haynes's health and safety of driving when fatigued in the manner disc
(Inspector Glass) v Kellogg (Aust.) Pty Ltd (No 1) (1999) 101 IR 239 at 253. Implementation of any one of these measures would have h
absence of all of them, in the context of incentives and pressure to drive without appropriate rest-breaks, guaranteed that drivers, includin
Inter-state truck drivers, driving long distances (frequently at night, with the consequences for fatigue described by Associate-Professor W
becoming fatigued (and therefore the risk of driving when fatigued) in the absence of appropriate fatigue management systems.

61 We observe that the *Hitchcock* judgment is the seminal case under the Act as it applies to the long distance transport industry in this State. We accept the subm
Hitchcock has served as a "wake up call" for employers in the industry as to their absolute obligations to provide a safe working environment for their employees

Federal initiatives

62 In February 2006, the National Transport Commission issued Guidelines for Managing Heavy Vehicle Driver Fatigue (Exhibit 62). The voluntary Guidelines v
implementation of new heavy vehicle driver fatigue laws consistent with current occupational health and safety legislation. It is intended that following the trial, i
approval of the final package of new laws in late 2006 for implementation in 2007.

63 The intended new laws are proposed to include:

(a) a general duty in road transport law to manage fatigue, consistent with current occupational health and safety laws;

(b) chain-of-responsibility provisions extending to parties in the supply chain whose actions, inactions or demands influence conduct on the road incl
managers, loaders, schedulers, consignors and consignees (receivers), as well as agents of any of these parties;

(c) a much greater emphasis on opportunities for sleep and rest;

(d) strengthened record-keeping provisions, including replacement of log books with a new driver work diary;

(e) enhanced enforcement powers; and

(f) three fatigue-management options providing alternative drive, work and rest hour requirements with variable levels of flexibility in return for incr
responsibilities on operators and drivers.

Definition of Long Distance Trip

64 At issue between the parties was the definition of what constituted a long distance trip. This issue arose from the various definitions relied upon by the parties a
awards.

65 The definition in the 2005 Regulation is as follows:

> transport freight long distance means transport freight by means of a heavy truck (whether by means of a single journey or a series of jou
> journey or journeys where no freight is transported because the heavy truck is being driven to collect freight or to return to base after tran

66 In the 1999 Regulation which established the requirement for log books, 100 kms is used as a basis for that requirement and is defined as follows:

> the 100 kilometer limit is the circumference of a national circle of which
> (a) the centre is the drivers' base
> (b) the radius is 100 kilometers.

67 Under the *Transport Industry (State) Award* long distance work is defined in clause 13.1 as:

> driving work on return trips which are always in excess of 500 road kilometers.

68 The federal *Transport Workers (Long Distance Drivers) Award* 2000 defines long distance operation as:

> any interstate operation (as defined) as any return journey where the distance traveled exceeds 500 kms and the operation involves the ve
> manufactured state from a principal point of commencement to a principal point of destination.

69 In the 1984 National Road Freight Industry Inquiry long distance haulage was described as "freight haulage over any distance in excess of 80-100 kms." The I

> owner drivers, fleet operators, freight forwarders, agents and brokers... where they operate in the course of trade, trucks with a gross vehi
> than 100 km in a radial distance from loading point to unloading point. (s 7.22)

70 For the purposes of his 2001 Inquiry, Professor Quinlan defined long haul trucking as:

> ...a truck travelling with a load on a single trip to an unloading destination of over 100 kilometers. This definition corresponds with the re
> carried and the definition used in the National Road Freight Industry Inquiry (May et al, 1984). Further, to confine consideration to inters
> intrastate trucking. There was no logical reason to do this since intrastate trucking is significant, involves single trips of which could typi
> within NSW (and even longer distances in larger states), and arguably entails the same issues as interstate trucking. The term long haul a

71 The Union's amended application defined the term as follows:

> "Long distance trip" means any trip carried out by a heavy vehicle going beyond a radius of 100 km from the starting point in which:
> (i) any freight is picked up within the County of Cumberland and delivered outside the County of Cumberland;
>
> (ii) any freight is picked up outside the County of Cumberland and delivered within the County of Cumberland; or
>
> (iii) any freight is picked up outside the County of Cumberland and delivered outside the County of Cumberland.

72 In his submissions on the issue, Mr *A Hatcher* of counsel, who appeared for the Union, submitted that the definition of long distance trip cannot be determined
referred to in the Awards or the Regulations, that is, any trips in excess of 500 kilometres.

73 We observe that the Union's approach is derived from the 1984 National Road Freight Industry Inquiry, the log book system itself and the practicalities of the i
For example, a driver who undertakes three or four Sydney to Newcastle (and return) trips a day is as much a long distance driver as one who does a single long d
issues in both circumstances will be similar. Mr *Hatcher* also pointed to the example of Mr Driscoll, a driver who worked for Linfox. Mr Driscoll deposed that he
number of times a day. Relying on a definition that referred to a 500 kilometre requirement would exclude Mr Driscoll from being regarded as a long distance dri
least 500 kilometres in one day.

74 Mr *Hatcher* also submitted that the definition in the 2005 Regulation is deficient as it does not capture discrete trips undertaken after a driver has returned to ba
submitted that the 2005 Regulation fails to indicate whether the 500 kilometres requirement is to be assessed by reference to any particular time frame. In summa
construction, the 2005 Regulation is deficient in that it does not recognise genuine long distance work and the risks involved.

75 The approach to the interpretation and application of this aspect of the 2005 Regulation taken by the WorkCover Authority was explained by Mr Watson. Spec
specified in the definition applies to a journey measured from departure from base and ending upon return to base – and thus excluded any number of return trips

where no single return trip exceeded 500 kilometres. Mr Watson confirmed that this interpretation of the scope of the 2005 Regulation is one that Workcover has l
sessions. Mr Kettle, a senior manager with Toll Transport, Australia's largest road transport business, took the same approach when he deposed:

> "I might not have made myself clear but the question I'm asking you about the scope of the regulation is that you recall that the regulatio
> 500kms?
> A. Yes.
>
> Q. How is that in a practical sense being applied to the work performed by Toll SPD - are you doing it on 500 kilometres on a single trip
> A. 500 kilometres in a single trip.
>
> Q. I see. So if someone does a number of shorter trips in a day which add up to 500, as far as you are concerned they don't account for th
> A. That's our understanding, it doesn't count.
>
> Q. Where do you derive that understanding from?
> A. The instruction received in the training with regard to that Act.
>
> Q. Who provided that training.
> A. The RTA.
>
> Q. For example, on the basis of the RTA training, if you do, say, three Sydney/Newcastle return trips in a day, because each trip alone is l
> regulation; is that the approach you're taking?
> A. I believe that's how it's read."

76 Mr *Hatcher* submitted that this interpretation of the definition in the 2005 Regulation excludes a driver who completes three return trips from a Sydney base to
900 kilometres - on a notoriously treacherous stretch of road. That is, drivers who drive very long distances each day will, in many cases, be excluded from the sc
consistent with the guidance material provided by Workcover [Ex 91] which, despite the bracketed words in the definition "whether by means of a single journey

> "This definition means that the 500 kilometres or more distance is calculated as a single journey that may consist of more than one delive
> base after a delivery."

77 Mr Grace, in his evidence, advanced a broader interpretation. Specifically, he deposed that he believed that the 500 kilometres is measured as a series of journe
day of work whether or not there has been a return to base. This view was mirrored by Mr Upton, citing in support of his position information provided by a Work
and/or a series of journeys completed within the same shift constitute a calculation for the 500kms". Mr Simpson's view appears to accord with this. During his ev
more than 500km a day, that is relevant".

78 Mr *Kimber* SC, who appeared for the employers, submitted that the 2005 Regulation, properly construed, applies to trips of 250 kilometres return and multiple
the industry has viewed and applied the 2005 Regulation and that if clarification is required, the industry has agreed that it applies to work on any one shift and ap
kilometres.

79 While Mr *Kimber* accepted that 100 kilometres is derived from the log book history there was nothing in the evidence, including that of Professor Quinlan, As
suggest there is a fatigue problem in journeys between 105-110 kilometres.

80 The 500 kilometres figure was consistent with the 2005 Regulation, how the industry viewed it, overseas studies and the industry's federal and State awards. T
the definition in the Australian and New Zealand Standard Industry Classification. Mr *Kimber* submitted that Professor Quinlan had accepted that he had adopted
Freight Transport Inquiry. He did not assert any driver fatigue problems in journeys of between 100 and 500 kilometres.

81 Mr *Kimber* further submitted that whether or not long hours are accumulated over one trip or a series of trips is adequately covered by the 2005 Regulation anc
within the County of Cumberland would create an immediate anomaly where an operator just outside the border of the County of Cumberland would be covered i

82 Mr *Warren* of counsel, who appeared for Employers First, submitted that the overseas studies referred to by Professor Williamson related to journeys far in exc
Professor Williamson considered long distance journeys to be "at least 300 kms" in her report.

83 Mr *Warren* referred to Mr Forno's evidence that the real focus of the Union's application was drivers who drove long distances at high speed on rural roads anc
been regarded in the industry as involving distances in excess of 500 kilometres.

84 Mr *Searle* of counsel, who appeared for the Minister, submitted that the 2005 Regulation had sought to clarify the scope of the definition to ensure that journey
kilometres calculation. This distance had been chosen on the basis that it was consistent with the Australian and New Zealand Standard Industry Classification an
the Australian Bureau of Statistics and WorkCover for the calculation of workers' compensation premiums. It was also consistent with the definition in relevant in

85 Mr *Searle* relied extensively on Professor Williamson's evidence that the measure had been traditionally used in the context of "long haul trucking". She had u
this was probably too short in characterising the Australian experience. She was also at pains to indicate that drawing a line in the definition was difficult, and hac

> "The issues are more not so much about how many kilometers long haul drivers do, but a combination of different factors, including how
> on."

86 Mr *Searle* referred to the evidence of Mr Watson from WorkCover and various fact sheets available from WorkCover. In these documents the following explan

> "The definition means that the distance (more than 500 kms) is calculated as a single journey that may consist of more than one delivery
> after a delivery."

87 This comprehends a journey or series of journeys, the trigger being whether the distance of 500 kilometres is exceeded in the aggregate. Thus, the scenario of r
day would be covered, notwithstanding Mr Watson's understanding.

88 Mr *Searle* submitted that even if the aggregate was not reached it would still be expected of employers to properly manage any risks associated with their work
9, 10, 11 and 12 of the 2005 Regulation.

THE APPLICATION

89 The Union has applied for the making of two industrial instruments under ss 10 and 313 of the *Industrial Relations Act* 1996 ("the IR Act"), in the form of an a
serious occupational health and safety issues facing the industry. The application seeks an award be made to be known as the Transport Industry - Mutual Respons
determination in similar terms under Ch 6 Pt 2 of the *IR Act*. The Union described the four main components of its application as follows:

(a) a requirement, in respect of all long distance work as defined, for employers and principal contractors to formulate and apply what amounts to a safe working r
Driving Plan. The objective is that transport operators are required to fill out a short document identifying how any long distance trip required to be performed ma

which it is remunerated so as to ensure the work is carried out safely and legally;

(b) a regime of accountability with respect to the preparation and enforcement of Safe Driving Plans that applies, as far as is jurisdictionally possible, to all parties to ensure that parties in the contracting chain take responsibility for the safe performance of work by truck drivers actually performing the work at the bottom of t employers or principal contractors of those drivers. It was emphasised that the claim does not seek to impose any obligations upon the head consignor where that itself or does not engage truck drivers as employees or owner/drivers;

(c) a compulsory basic training requirement for truck drivers in the form of Blue Card training and Induction training. The Bluecard training provides a basic leve health and safety matters. It is already used and well established in the transport industry. It provides a portable and easily recognisable training passport. Inductio and other requirements relating to remuneration, hours of work, rest breaks, safety and the like; and

(d) a requirement that employers and principal contractors are required to implement a drug and alcohol policy. The application sets out parameters with respect to parameters to apply to the testing of drivers where necessary, and focuses on the primary area of drug use in the road transport industry, namely professional drug

90 We shall return to detail the arguments in support of and against these claims shortly. However, before doing so, it is necessary to outline the jurisdictional argu industrial instruments sought as a matter of discretion.

JURISDICTIONAL CHALLENGE

91 By notice of motion filed on 11 November 2005, the various employer respondents challenged the jurisdiction of the Commission to make an award and contra delivered a decision on the motion on 20 February 2006 in *Re Transport Industry - Mutual Responsibility for Road Safety (State Award and Contract Determinati* the notice of motion as the jurisdictional challenge had been brought prematurely.

92 Nevertheless the Full Bench observed:

> 24. That is not to say that there may well be significant jurisdictional barriers to some, or all, of the relief sought by the TWU, but those i Full Bench considers whether relief should be granted and, if so, what relief. These determinations will be made at the conclusion of the

93 In these proceedings, the parties relied to a significant extent on their earlier written submissions which were summarised in the interlocutory decision in the fo

> 12 It was submitted that, properly construed, a contract determination under s 313 of the *Industrial Relations Act* can only be made with contract" between the principal contractor and the carrier acting in their respective capacities. For a condition to be under a contract, the as between the parties to the contract (compare, for example *Federal Commissioner of Taxation v Sara Lee Household and Body Care* (2 (1989) 168 CLR 242 at 249). A condition that regulates the relationship between a principal contractor and the contractor to that principa consignor") is not a "condition under such a contract" between the principal contractor and the carrier.
> 13 Thus, for this reason, it is said that these and the other various obligations sought to be imposed on the consignor are outside the jurisd
> 14 Mr *Hatcher*, in response, observed that the respondent employers' submissions now conceded that certain of the claimed provisions m operators which are employers. It is well established that award provisions may be made in certain circumstances which regulate the circ employer may engage and utilise subcontractors: see *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) *Australia; Ex parte Master Builders Association of South Australia Incorporated* (1981) 26 SASR 535; *Lend Lease Hotel Intercontinenta Electrical Contractors Association of NSW v Electrical Trades Union of Australia, NSW Branch* (2003) 130 IR 284.
>
> ...
>
> 16 The proposed clauses have a similar primary purpose: to ensure that employers and principal contractors do not avoid the obligations employees and contract carriers by the use of subcontractors. A fundamental point of the TWU's application is that, in the long distance s chains are used by employers and principal contractors to avoid responsibility for a range of legal obligations which would otherwise app employees and contract carriers. Unless there is industrial regulation of those subcontracting chains, provisions limited in application to t will be rendered largely ineffective.
> 17 Mr *Hatcher* also dealt with the definition of "with respect to" in s313(1) of the Act. The section is expressed as follows:
>
> > The Commission may inquire into any matter arising under contracts of carriage and may make a contract determination wit condition, under such a contract.
>
> 18 By referring to the authority in *Solomons v District Court* (2002) 76 ALJR 1601, Mr *Hatcher* concluded that:
>
> > [T]he claimed provisions seeking to place conditions on the use of subcontractors by principal contractors are clearly within and also the necessary "discernible and rational link" with conditions under contracts of carriage. Indeed, just as the claimed in a "close and obvious way", so also would they relate to conditions under contracts of carriage.
>
> 19 Mr *Taylor* of counsel, for the Minister for Industrial Relations generally supported the TWU's submissions and submitted:
>
> > a) the respondent employers do not challenge at this time the said clauses to the extent that they are sought to be placed in an
> > b) even if the Commission did not have jurisdiction to include the said clauses in a contract determination, the Commission determine the claim for a contract determination, including hearing such evidence as is relevant to that claim;
> >
> > ...
> >
> > f) the provisions challenged are put in issue on the basis that the Commission's jurisdiction under s 313 is not broad enough
> > g) given the breadth of s 313, there is at least a good argument that the section is wide enough to provide to the Commission provisions which establish a mechanism for the protection of the terms and conditions of those working under a contract dete with decisions of the Commission as to the extent to which an award can contain provisions which impose obligations on an see *Electrical Contractors Association v ETU* (2003) 130 IR 284 at [173]; and *Lend Lease Hotel Intercontinental (Stage 1) I*
> > h) the question whether the particular clauses sought to be included in the contract determination are ones that can be proper terms and conditions of those engaged pursuant to a contract determination is a matter which would ordinarily be determined Accordingly, this is not the appropriate stage to determine that question.

94 During the substantive proceedings the employer respondents conceded that the Commission had jurisdiction to make an award and a contract determination in comments of Mr *Kimber* at p 683 of the transcript. It follows that the Commission need not be required to determine the question of jurisdiction in this case. Neve should be mindful of recent amendments to the *Workplace Relations Act* and the current industrial relations environment when determining this claim.

95 Mr *Kimber* submitted that the *Workplace Relations Amendment (WorkChoices) Act* 2005 ('the *WorkChoices Act*') had the effect of excluding from operation the corporations and their employees. Any industrial instrument made by the Commission pursuant to jurisdiction derived from the *IR Act* that purported to have effe effect unless it came within one of the exceptions contained in ss16(2) - (5) of the *Workplace Relations Act.* The employer respondents further submitted that as th constitutional corporations, any award sought by the applicant would only apply to a relatively limited number of employers and employees in New South Wales. achieving its desired objective and it would be undesirable to burden smaller employers, such as sole traders and partnerships, with additional extensive obligatio constitutional corporations.

96 The respondents referred to the exclusion of the *Workplace Relations Act* insofar as it applies to constitutional corporations (s4(1) of the *Workplace Relations A* a State or Territory law which deals with non-excluded matters in s16(3) - which includes occupational health and safety - the respondents submitted that a State A

Rather, a State Award is an industrial instrument made pursuant to and enforceable under a law; namely, the *IR Act*.

97 Reliance was also placed on paras 18 and 82 of the WorkChoices Explanatory Memorandum. It was said that the Explanatory Memorandum makes it clear tha preserves a particular subject matter to the extent that the subject matter is prescribed in a State law, rather than a State award.

98 Employers First supported Mr *Kimber*'s submission and submitted that insofar as a State law which deals with occupational health and safety is concerned, onl *WorkChoices Act*. The *IR Act* is not so exempted. It was further submitted that the *IR Act* does not deal with occupational health and safety in the way that the *OH* health and safety in the transport industry should be left to the exclusive domain of the *OH&S Act* in order that a consistent approach is adopted throughout the St

99 Mr *Searle* agreed with the employer parties that the issue of jurisdiction and the *WorkChoices Act* need not be determined in these proceedings. However, Mr *S* proceedings; namely, occupational health and safety in the long-distance transport industry, fell comfortably within the exceptions provided for in ss16(2) and (3) *Act* deals with occupational health and safety, it is not excluded from operation, even against constitutional corporations. As a consequence, he submitted that the instrument that deals with occupational health and safety is not impaired by the operation of the *Workplace Relations Act.* Mr *Searle* further submitted that this po *Act* as it repeats the traditional approach that Commonwealth industrial instruments apply to the exclusion of any State instrument to the extent of any inconsisten

100 Mr *Searle* also submitted that the jurisdiction of the Commission to deal with occupational health and safety matters relates not only to its award making func Pts 1 and 2 of the *IR Act*. See *Unions New South Wales v Carter Holt Harvey* (2006) 149 IR 361.

101 Mr *Hatcher* for the Union supported Mr *Searle*'s submissions as to the effect and operation of the WorkChoices legislation.

Conclusion on Jurisdictional Issues

102 The only matter remaining to be resolved regarding the challenge to the Commission's jurisdiction relates to the impact of the *Workplace Relations Act*. The c make a contract determination in the manner sought was ultimately not pressed after the Union amended its application to clarify the meaning of "Head Consigno sought to be included in the contract determination could be included in an award. Those objections may, however, be relevant in the Commission's consideration

103 A question of the application of the *Workplace Relations Act* arises as the proposed industrial instrument is expressed to apply to all transport operators opera employees and contract carriers engaged by such transport operators (and to all labour hire employees utilised by such transport operators in their business). This corporations (as defined under the *Workplace Relations Act*).

104 Initially, the question arose whether the Commission's power to make an award which purported to apply to constitutional corporations and their employees v *Relations Act*. In their written submissions, the employer respondents submitted that the *Workplace Relations Act* meant that the Commission could not make a St corporations or their employees.

105 However, as Mr *Kimber* properly conceded during the hearing, the employer respondents' contention regarding this issue is not one of jurisdiction but rather r while the award may be expressed to apply across an industry, it will operate only so far as permissible by law as a result of the federal legislation and s109 of the that this does not mean, as was conceded, that the Commission lacks jurisdiction to make a general award.

106 On this basis, the Commission's jurisdiction to make the industrial instruments sought was not ultimately challenged. We note also that the *Workplace Relatio* to make a contract determination as it only applies to employees.

107 Nevertheless, the parties submitted that the Commission should make some observations regarding the operation of the *Workplace Relations Act* in this conte: regarding the operation of the relevant exclusion in s16. In deference to these submissions, we propose to make the following observations.

108 The relevant provisions of the *Workplace Relations Act* are ss 16 and 17, which relevantly provide:

> **16 Act excludes some State and Territory laws**
> (1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in
> (a) a State or Territory industrial law;
> ...
>
> **(2) State and Territory laws that are not excluded**
> However, subsection (1) does not apply to a law of a State or Territory so far as:
>
> ...
>
> (c) the law deals with any of the matters (the **non-excluded matters**) described in subsection (3).
>
> ...
>
> (3) The non-excluded matters are as follows:
>
> ...
>
> (c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected w
>
> ...
>
> **17 Awards, agreements and Commission orders prevail over State and Territory law etc.**
> (1) An award or workplace agreement prevails over a law of a State or Territory, a State award or a State employment agreement, to the e
> (2) However, a term of an award or workplace agreement dealing with any of the following matters has effect subject to a law of a State o prescribed by the regulations as a law to which awards and workplace agreements are not subject:
> (a) occupational health and safety.
> ...
> (3) An order of the Commission under Part 12 prevails over a law of a State or Territory, a State award or a State employment agreement
> Note: part 12 is about minimum entitlements of employees.

109 The argument before us related to one of the exceptions to s16(1). Given the conclusion we have reached regarding the Commission’s jurisdiction, we note th including the extent to which it may not operate in this context. In this regard, it is unnecessary for us to examine the extent to which s16(1) may be merely facilit to consider all of the exceptions to s16(1).

110 The relevant exception to s16(1) is found in ss16(2) and (3). The argument in these proceedings focused on s16(3)(c), which in combination with s16(2) prov State or Territory so far as it deals with occupational health and safety.

111 At the outset, we consider that the subsection should be read beneficially and broadly given that the subject matter of the exception is occupational health and laws which address an important public policy issue, occupational health and safety protection. The Full Bench of this Commission has made a number of recent

Occupational Health and Safety Act 1983 and its successor: see, for example, the Full Bench decision in *WorkCover Authority (NSW) v T & Y Pty Ltd* (2005) 146
Ltd and Another [2005] NSWIRComm 123 at [27]; *WorkCover Authority of NSW (Inspector Glass) v Flexible Packaging (Australia) Pty Limited* (2005) 144 IR 3
Anor v WorkCover Authority (NSW) (Inspector Sequeira) (2006) 151 IR 130 at [77]). While these observations have been made in the context of specific state leg
and its successor), they are nevertheless pertinent to occupational health and safety issues generally. We consider that these social purposes of occupational health
interpretation of the exception to the extent that any particular aspect of the exception is unclear.

112 In summary, the issues arising from the submissions are:

(1) whether the reference to occupational health and safety was only to occupational health and safety legislation and not to instruments made under the *IR Act* tha
issues;

(2) whether the exception actually applied to the present application as the exception in ss16(2) and (3)(c) relates to "laws" dealing with occupational health and s
Union in its application are not laws, the instruments do not fall within the exception; and

(3) the subject matter of the Union's application does not relate completely to occupational health and safety matters.

We shall consider each of these arguments in turn.

Issue 1: Is the reference to "occupational health and safety" confined to the OH&S Act?

113 Employers First had contended that the reference to occupational health and safety was only to Acts of Parliament making specific occupational health and sa
the making of instruments that create obligations relating to occupational health and safety matters. We reject this contention for the following reasons.

114 First, we accept Mr Hatcher's submission that s16(3)(c) does not appear to relate to the *OH&S Act* as the *OH&S Act* itself is not listed in s16(1) and so, by im
(3).

115 Secondly, there is nothing in the plain words of s16(3)(c) which would require such a limitation being placed on the phrase "occupational health and safety".
as a "non-excluded matter". The relevant subject is an occupational health and safety matter, not specific occupational health and safety legislation. We note also t
representative of a trade union to premises for a purpose connected with occupational health and safety. This is instructive as the reference is to the entry of a repr

116 Thirdly, a narrow reading of the phrase ignores the wording of s16(2) that "subsection (1) does not apply to a law of a State or Territory *so far as* …" (empha
parts, but not all, of a law may deal with occupational health and safety matters. To limit this reference to specific occupational health and safety legislation would
only partly deals with occupational health and safety matters. We do not believe that the legislature intended such an approach. On the contrary, we consider the c
the exclusion in s16(1) that deal with the "non-excluded matters".

117 Finally, we consider that the context implies a broader reading: the exclusion operates to protect and preserve parts of legislation caught by the exclusion in s
safety. As already mentioned, occupational health and safety statutory provisions serve an important social purpose and it is clear that the legislature has sought to
are no other provisions in the *Workplace Relations Act* dealing with occupational health and safety matters. Having provided an exception in this area, we do not c
that would fall within this exception but rather would have intended to include all of the existing regulation in this area.

118 For these reasons, we are satisfied that the phrase "occupational health and safety" is not limited to reference to specific occupational health and safety legisla
with, or otherwise relate to, occupational health and safety.

Issue 2: Does the Union's application for an industrial instrument fall within the exception in ss16(2) and (3)(c)?

119 We do not accept the contention that as the application relates to an industrial instrument and as an industrial instrument is not a law, then the exception in s16
reasons.

120 In addressing this contention, a preliminary question must be addressed: what is the "law" that is relevant for the purposes of applying ss16(1) and (2) to the p

121 There are two possibilities:

(a) the award the Union is seeking is the "law" for the purposes of applying ss16(1) and (2); or

(b) the Commission's power to make an award that includes provisions regulating occupational health and safety matters is the "law" for the purpose

122 For the reasons we will now outline, we are satisfied that the relevant "law" for the present purposes is the Commission's power under s10 of the *IR Act* to ma
occupational health and safety matters.

123 Mr *Kimber* contended that the relevant "law" was the award and submitted that a State Award is not a law for the purposes of the exclusion (but rather is an in
under a law; namely, the *IR Act*). Further, Mr *Kimber* submitted that by reference to paras 18 and 82 of the WorkChoices Explanatory Memorandum, ss16(2) and
particular subject matter to the extent that the subject matter is prescribed in a State law, rather than a State award. The implication being that as an award is not a

124 Counsel for the employer respondents referred us to some authorities which had considered the question whether an award was a "law". In *Unions NSW v Ca*
(2006) 149 IR 361 at [94], the Full Bench of this Commission stated that "the federal Award is not a law of the Commonwealth".

125 Similarly, in *CFMEU v Newcrest Mining Limited* (2005) 139 IR 50, the Full Bench had to consider whether an AWA was a law of the Commonwealth and he
neither an award nor an AWA is a law of the Commonwealth".

126 Mr *Kimber* also referred to the decision of the High Court in *Ex parte McLean* (1930) 43 CLR 472 in which *Isaacs* CJ and *Starke* J held, in the context of con
itself is, of course, not law, it is a factum merely".

127 Relying on these authorities, Mr *Kimber* submitted that as is the situation with an award made under the *Workplace Relations Act*, a State award is not a law;
pursuant to, and enforceable under a "law", namely the *IR Act*. Mr *Kimber* also drew attention to the references to "law" and "state award" in s17(1) as demonstrat

128 Mr *Searle* submitted that it is unnecessary to address whether or not a State award is a law of the State as the reference to law in ss16(1) and (2) is to the *IR A*
the law deals with excluded matters and whether it would therefore come within the exception in that way.

129 Mr *Hatcher* agreed with Mr *Searle* that it was not necessary to consider whether a State award was a law for the purposes of s16(1) and (2). He further submi
relate to awards at all, which in his submission defeats the very proposition Mr *Kimber* seeks to advance.

130 The starting point in addressing this issue is to consider the plain words of s16(1). Section 16(1) provides that the *Workplace Relations Act* is intended to appl
would otherwise apply in relation to an employee and employer. Included in that list is "a State or Territory industrial law". "Industrial law" is defined in s4 of the

separately defined.

131 We consider that the relevant point of enquiry is the notion of "laws". Viewed in the context of s16, it is clear that the section is directed towards laws and s16
"non-excluded matters". We note that it is without doubt that the same meaning must be given to "law" in both ss16(1) and (2).

132 Accordingly, if Mr *Kimber* is correct in contending that a State award is not a law, then we agree with the submissions of Mr *Hatcher* that s16 has no applicat
point of enquiry is whether the award is affected by s16.

133 Notwithstanding this, contrary to the submissions of Mr *Kimber*, we do not consider it is necessary for us to decide whether an award made under the *IR Act* i
that the reference to "law" in ss16(1) and (2) is to the *IR Act* and not an award made under that law. The context of s16(1) supports this conclusion: the relevant qu
with excluded matters and whether it would therefore come within the exception.

134 We consider that the plain legislative intention involves there being a distinction between "laws" and awards or instruments made under a law. Section 17(1) p
over "a law of a State or Territory, a State award …". Similarly, s18(1) provides:

> Sections 16 and 17 are not a complete statement of the circumstances in which this Act and instruments made under it are intended to ap
> and Territories or instruments made under those laws.

135 On this basis, we are satisfied that s16 is directed to laws rather than an award. The question is then whether this impacts on the ability of the Commission to
proceedings is whether the *Workplace Relations Act* affects the Commission's ability to make the award sought.

136 The Commission's power to make the proposed award is derived from s10 of the *IR Act*, which provides:

> The Commission may make an award in accordance with this Act setting fair and reasonable conditions of employment for employees.

137 "Conditions of employment" is defined in the *IR Act* as:

> ***conditions of employment*** includes any provisions about an industrial matter.

138 Accordingly, the question turns on whether s10 can fall within the exception in ss16(2) and (3)(c), that is, whether s10 of the *IR Act* "deals with" an occupatio

139 While the parties did not refer us to any authorities on the meaning of the phrase "deals with", it is instructive to briefly refer to some authorities in this area.
and Indigenous Affairs [2003] FCA 781, *Lindgren J* was required to consider the meaning of the expression "the requirements of the natural justice hearing rule in
particular, the words "the matters [Div 5] deals with" in s357A of the *Migration Act* 1958 (Cth). In obiter, *Lindgren* J found that the expression was intended to re
than the exact text of the procedural fairness requirements to be found in Div 5. By reference to the context of the section, his Honour was inclined to the view tha
operative provisions within Div 5 for a provision "dealing with" a relevant "matter". Given the precise facts of the case, his Honour was not required to resolve th
reach of the expression "the matters it deals with", that is, how explicitly the matter had to be dealt with.

140 In *Shop, Distributive and Allied Employees Association v Retail Traders' Association of Victoria* (1998) 83 IR 352, the Full Bench of the Australian Industrial
expression "deals with allowable award matters" was wide enough to permit the AIRC to retain award provisions which were incidental to allowable award matte

141 In the present context, therefore, it is necessary to consider the extent to which the *IR Act* deals with occupational health and safety in the context of making a

142 It is well established that the Commission may have regard to considerations of health and safety when making an award and the parties in this matter did not
Ambulance Officers (State) Award (2001) 113 IR 384, the Full Bench concluded:

> [184]... The authorities cited above indicate that it is appropriate for the Commission to have regard to considerations of the health and sa
> and reasonable conditions of employment. This approach is consistent with the approach which has been adopted by this Commission ov
> where possible, threats to the health and safety of employees in the workplace.
> [185] One consideration that may be relevant to the exercise of the Commission's discretion to make an award in light of considerations o
> obligations under other legislation, particularly the *Occupational Health and Safety Act*. In our view, the existence of general obligations
> common law, should not operate to limit the Commission's jurisdiction to make awards which also address health and safety concerns. Th
> duties imposed by the *Occupational Health and Safety Act*. Generally speaking, an award is intended to prospectively provide for the gen
> enterprise, occupation or industry. An award, by its nature, lays down relatively specific conditions to be provided in the future by emplo
> contrast, the *Occupational Health and Safety Act* imposes an absolute duty on an employer to ensure the health and safety at work of all
> *Occupational Health and Safety Act* require an employer to take a continuously pro-active approach to issues relating to health and safety
> requirements which can be laid down in an award: see *Re NSW Department of Community Services Community Living and Residential (*
> [186] Thus, one matter to which the Commission should properly have regard when determining what are fair and reasonable conditions
> doing so, the award is not seeking to replicate or diminish the much broader obligations of an employer under the *Occupational Health a*
> an employer to take in compliance with its obligations under the *Occupational Health and Safety Act* will not ordinarily be apt for inclus
> employees in an industry as a common rule, there may be limits to the extent to which award provisions requiring measures to be adopte
> circumstances of an individual employee. It would, for example, be difficult to make provision in an award for the detailed systems of wo
> there are measures of the nature of conditions of work having general effect, which are applicable for an award and which are available to
> covered by an award, provision should be made in the award for those measures to be adopted. Further, we have little doubt that an appli
> variation of an award based on occupational health and safety considerations pursuant to s 10 of the Act, ordinarily demonstrate that case
> special case principle.

143 The relevance of occupational health and safety matters also arises from the definition of "industrial matter". "Industrial matters" is defined in s6 of the IR Ac

> In this Act, ***industrial matters*** means matters or things affecting or relating to work done or to be done in any industry, or the privileges,
> in any industry.

144 A non-exhaustive list of examples of industrial matters is also included in s6. This definition has been judicially considered on many occasions, including in t
from those authorities that "industrial matters" has included matters which would be considered occupational health and safety matters, including time to be allow
Engine Drivers et (South Maitland Railways Ltd) Conciliation Committee [1938] AR (NSW) 266 at 290-92) and measures for the protection of the safety and hea
their employment, eg compulsory medical examinations at the employer's expense (*Re Glass Makers (State) Conciliation Committee* [1944] AR (NSW) 292 at 30

145 The link between "industrial matters" and the Commission's award making jurisdiction is also well established. In *Re Pastoral Industry (State) Award* (2001)

> It follows that the Commission's jurisdiction as to the subject matters about which it may make an award are extremely wide, particularly

146 For present purposes, therefore, we consider that s10, at least to the extent it has been interpreted as allowing the Commission to make award provisions relat
the exception in ss16(2) and (3)(c). Section 10 therefore, for this purpose, deals with occupational health and safety matters. Accordingly, we are satisfied that s16
making award provisions relating to occupational health and safety matters.

147 We are fortified in reaching this conclusion by reference to the purpose of the exception in ss16(2) and (3)(c). As already mentioned, it is clear that the legisla those relating to occupational health and safety, from the operation of s16(1). We consider that there is a clear public policy reason for doing so, namely the ongoi health and safety of employees in the workplace. The legislature has referred generally to occupational health and safety laws and has not sought to narrow that re retain all existing laws relating to occupational health and safety that would otherwise be ousted by the exclusion in s16(1). We repeat our view that this purpose i *Relations Act* does not purport to regulate occupational health and safety matters as there are no specific provisions in the *Workplace Relations Act* regulating sucl

148 The respondents referred us to extracts from the Explanatory Memorandum to the amending bill to support the contention that the purpose of s16, and the *Wo* awards would not apply to constitutional corporations and their employees. For the reasons already given and to the extent that this may have been the legislative achieve it. The evident purpose of ss16(2) and 16(3)(c) was to protect and preserve existing occupational health and safety laws wherever appearing. We are satisi State awards with conditions dealing with occupational health and safety.

149 In this regard, we agree with Mr *Searle* and Mr *Hatcher* that the interpretation that State awards are not completely ousted by s16(1) is supported by s17 of th approach that Commonwealth industrial instruments apply to the exclusion of any State instrument to the extent of any inconsistency. In other words, s17 clearly State awards, at least in some circumstances.

Issue 3: Does the Union's application relate to occupational health and safety matters?

150 The application, contentions in support, and evidence going to the specific claims in the Union's application leave no doubt that each of the specific claims in occupational health and safety matter. The only matter possibly in contention is the requirement in the safe driving plan relating to methods of remuneration. How establishes a clear link between methods of remuneration, fatigue, and safety which leaves no doubt that the subject matter of this aspect of the claim also relates claim is successful will be considered later in this decision).

151 While argument against this proposition was not strongly pressed during the proceedings, the employer respondents had contended that the aspect of the safe an occupational health and safety matter. Mr *Searle*, who appeared for the Minister, submitted that the subject matter of these proceedings was conditions of work part of the transport industry dealing with long distance truck driving.

152 We note that the phrase "occupational health and safety" is not defined in the *Workplace Relations* Act. However, we consider that it is well understood that o promoting the health, safety and welfare of people at work and protecting persons at a place of work against risks to health or safety arising out of the activities of there is a clear legislative intent expressed in s 16 to protect and preserve existing laws, or parts of laws, that deal with occupational health and safety.

153 We note finally that the employer respondents had sought to demonstrate that while the Commission had jurisdiction to make awards that included occupatior the past, been reluctant to exercise that power, instead allowing the *OH&S Act* (and related regulations) to deal with such matters. However, the operative word is favour of making an award where it considers it appropriate to provide regulation in relation to a particular occupational health and safety issue: see *Re Operation and Community Services Employees (State) Award* (2001) 117 IR 458. This is usually where there is some particular feature of the industry or employment which exceptional case.

SAFE DRIVING PLANS

154 The central focus of the Union's amended application concerned the proposal for safe driving plans to be a requirement for all work performed by employees, long haul transport contract (see clauses 3, 4 and 5).

3. Safe Driving Plans

3.1 A transport operator must prepare a safe driving plan in relation to any work performed by its employees and/or contract carriers and transport contract to which the transport operator is a party.

3.2 A safe driving plan must:

(i) identify the name and address of the relevant transport operator, and of the consignor or head consignor party to the relev
(ii) identify the period in which work is required to be performed under the long haul transport contract to which the safe dri

(iii) identify the relevant pick up and delivery locations;

(iv) demonstrate how the work to be performed is to be remunerated in accordance with any applicable industrial instrument
(v) identify the remuneration method chosen (having regard to the health and safety of relevant employees, contract carriers
(vi) identify the system(s) by which the effect of the chosen method of remuneration on driver fatigue may be monitored anc
(vii) identify the means by which the amount of hours and work to be performed by employees, contract carriers and labour fatigue occurring and excessive hours being worked, and the means by which such limitations are to be enforced;
(viii) set out how the work is be (sic) performed and rest breaks taken in a manner consistent with the Regulation and any pr concerning hours of work, limitations upon hours of work, meal breaks, rest breaks, crib breaks and like matters;
(ix) identify the means by which the transport operator will ensure that any persons performing the work will be doing so fre limited to the transport operator's drug and alcohol policy implemented in accordance with clause 8 of this Award);

3.3 A safe driving plan must, as far as practicable, be prepared in consultation with the employees, contract carriers and labour hire empl safe driving plan, and each such employee, contract carrier and labour hire employee performing work the subject of the safe driving plar
3.4 Insofar as the safe driving plan is to have application to labour hire employees, the transport operator will also consult with the labou preparation of the plan as far as practicable.
3.5 A safe driving plan must be reviewed regularly and updated when there is any change to the circumstances applicable to the work.
3.6 A copy of the safe driving plan must be provided to the consignor or head consignor party to the long-haul transport contract.
3.7 A consignor which is provided with a copy of a safe driving plan pursuant to subclause 3.6 hereof shall send a copy of such safe drivi the cartage of the freight the subject of the safe driving plan.
3.8 Where the cartage of freight is to be sub-contracted by any consignor, it must be a condition of the sub-contracting arrangement that which conforms with the requirements of subclause 3.2 above has been provided to such consignor prior to the performance of any carta
3.9 Nothing in this clause is intended to affect or detract from any obligation or responsibility upon an employer or principal contractor u the *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005.*

4. Records and Inspection of Safe Driving Plans

4.1 A transport operator who is required to prepare a safe driving plan, and any consignor who is required to be provided with a copy of keep a copy of the safe driving plan during the period in which the cartage of the freight the subject of the safe driving plan is being carri
4.2 An accredited official of the Union is entitled to inspect a safe driving plan at the premises of any transport operator or consignor, wh plan under subclause 4.1 above upon the provision of 24 hours written notice.

5. Compliance with Safe Driving Plans and Applicable Laws

5.1 Consignors shall enter into long haul transport contracts with transport operators on the basis that strict compliance with applicable s

instruments is a condition of the contract.
5.2 Consignors and transport operators must ensure that all work undertaken pursuant to a long haul transport contract to which they are
safe driving plan, the Regulation, and any applicable industrial instrument.
5.3 Employees, contract carriers and labour hire employees must comply with any safe driving plan applicable to the work they are requi
compliance with a safe driving plan impracticable, they shall notify thir (sic) employer/principal contractor as soon as possible.
5.4 Where a consignor becomes aware that a transport operator it has contracted with under a long haul transport contract has breached a
applicable industrial instrument, the consignor must take such action as is necessary to ensure that such a breach is rectified and is not re
haul transport contract.
5.5 Consignors must take pro-active steps to monitor compliance by transport operators carrying freight put out to consignment by the co
Regulation and any applicable industrial instruments.
5.6 Where the Union becomes aware of any breach by a transport operator party to a long haul transport contract of any applicable safe d
instrument, it shall notify the transport operator, the consignor, and the head consignor, of such breach, with such notification to include t
it thinks is necessary to ensure such breach is rectified and not repeated.
5.7 Where any dispute arises between the Union and a transport operator or a consignor about whether a breach of any applicable safe dr
instrument has occurred, or about what action is necessary to ensure that any such breach is rectified and not repeated, the disputes proce

155 During the course of these proceedings, the Union modified its safe driving plan proposal (Ex 57) to a one-page form (annexed as Annexure B to this decisio
witnesses as to the difficulty and complexity of the proposal was significantly exaggerated and ill founded. Mr *Hatcher* referred particularly to the evidence of M
Mr Crook from Toll and Mr Upton from Patrick Autocare who each was concerned about too much paperwork. Mr Upton, however, acknowledged that the plan c
handheld computer.

156 Mr *Hatcher* submitted that responsibility for the plan would be at all levels of the chain of responsibility with the exception of the Head Consignor. Those hig
compliance with the plan.

157 The Union contended that a significant reason for supporting that part of its application relating to safe driving plans was because the 2005 Regulation was de

(a) it does not deal with the fundamentally important issue of the effects of remuneration and remuneration systems on fatigue. Mr Watson, the Gener
Division of the Workcover Authority of New South Wales said in his statement "*A deliberate decision was made not to include the impact of remune*
under cross-examination. Importantly, Mr Watson also gave evidence that the Industrial Relations Commission was the proper province to deal with t

(b) it is limited in the scope of its application in that, because of the definition of "Transport Freight Long Distance" in clause 81A, it does not appear
which is properly characterised as long distance in nature and which carries with it the safety risks of that kind of work.

(c) Mr Upton and Mr Crook gave evidence that the Fatigue Regulation did not necessarily require the formulation of a plan for each trip the subject o
achieved merely through a global Driver Fatigue Management Plan, in the nature of a general policy, applying to the entire range of work as opposed

158 The employer respondents strenuously opposed the Union's safe driving plan proposal. Mr *Kimber* submitted that the most effective tool for dealing with safe
associated regulations. He put that the general tendency of the Commission over many years was not to make substantive awards dealing with occupational health
itself (see *Steel Works Employees (Broken Hill Pty Company Ltd) No.2 Award* [1964] AR (NSW) 696, *Transport Industry - Cash in Transit (State) Interim Award*
Case (2006) 150 IR 1).

159 This principle was also expressed in the evidence of Mr Watson from WorkCover and the Minister's submissions concerning the undesirability of duplication
and associated regulations. Mr *Kimber* noted that, for the first time, Head Consignors were covered by the 2005 Regulation and this was a "ground breaking" dev
fatigue which was comprehensively addressed in the Quinlan report. Following extensive consultation with relevant stakeholders, the New South Wales Governm
designed to deal with driver fatigue.

160 Mr *Kimber* submitted that the 2005 Regulation, when considered in conjunction with the impact of the Commission's recent decision in *Hitchcock,* will have
respect to the management of fatigue. At the very least, any further regulation should be deferred until the full impact of these matters and pending Federal initiati

161 Mr *Kimber* further submitted that there was a significant level of duplication between the requirements under the 2005 Regulation and the proposed award su
greater potential for avoidance. In addition, the Union's proposal sought to go beyond the reach of the 2005 Regulation, most notably by picking up journeys in ex
the 2005 Regulation) and by requiring transport operator assessment and monitoring of the connection between chosen remuneration systems and the incidence o

162 In seeking to demonstrate the differences between the Union's proposal and the 2005 Regulation, Mr *Kimber* relied on a comparison chart (annexure C to his
Regulation and submitted that if policed and enforced properly would effectively address issues of driver fatigue.

163 Mr *Kimber* pointed out that if the industrial instruments as sought were made it could result in both a breach of the Act or its regulations with potential crimir
with the potential for civil penalties. A defendant could be penalised twice for the same act and prosecuted by two separate authorities. This would create confusio
would be contrary to the public interest.

164 Mr *Kimber* submitted that the proposal for safe driving plans was not only unnecessary and inappropriate, but also impractical and imposes an unreasonable b
this respect reliance was placed on the evidence of Mr Grace, Mr Colin Handock (TNT Logistics), Mr Tony Yule (TNT Logistics) and Mr Phillip Crook (Toll).

165 Mr *Kimber* further relied on the evidence which disclosed that there is a degree of self regulation of the industry. For example, evidence was presented that To
matters and the industry generally has been preparing for the anticipated changes in Federal legislation. He also noted that a very large warning had been given to
gave evidence that WorkCover was looking at a further 25 cases in the transport sector.

166 As to the relationship between rates of remuneration and safety, Mr *Kimber* submitted it was open to the Union at any time to lodge an application in which it
were not safe rates. In relation to underpayment, Mr *Kimber* submitted that if there has not been a proper attempt at enforcement, further industrial prescription is

167 Mr *Kimber* referred to the evidence of Professor Quinlan and Associate Professor Williamson concerning performance based or incentive based systems of re
encourages drivers to break the law and engage in unsafe practices. Mr *Kimber* further submitted that it was open to the Union to ask the Commission to consider
matters that link driver fatigue with safety but are not matters the Commission is being asked to consider in this case.

168 Mr *Warren* also opposed the Union's claim by submitting that the Union's amended award application and the occupational health and safety regulation "cann
definitions for consignor and long distances and the confusion which would be created if employers were expected to comply with both the proposed Award and t
different safe driving plans with different enforcement provisions.

169 Mr *Warren* referred to Mr Upton's evidence which was not simply about more paperwork. Mr Upton had said that it was common practice for additional pick
amending the predetermined safe driving plan en route. Mr *Warren* also highlighted the evidence of Mr Robertson from Readymix who detailed the variety of cus
day for its drivers which would make a strict safe driving plan very difficult to comply with.

170 Mr *Warren* submitted that the disclosure on a safe driving plan of the financial arrangements between it and a contract driver may give rise to the disclosure o province of the Union.

171 Mr *Searle* submitted that the Minister opposed the Union's application to the extent that the claim included matters already encompassed in existing occupatio includes matters outside existing regulation, the Minister supports the jurisdiction of the Commission to hear and determine these matters.

172 In developing this argument, Mr *Searle* submitted that the occupational health and safety legislation:

> (a) establishes an obligation on an employer to ensure the health, safety and welfare at work of all the employees of the employer: s8(1) of the Act. T ensure the safety of their employees;
>
> (b) requires all employers to ensure that people (other than the employees of the employer) are not exposed to risks to their health or safety arising fro are at the employer's place of work: s8(2) of the Act; and
>
> (c) requires any person who has control of premises used by people as a place of work to ensure that the premises are safe and without risk to health:

173 The nature of these responsibilities is dealt with further in the 2005 Regulation, particularly at clauses 9 to 20. For example, clause 11(1) requires an employe health and safety of a person at the employer's place of work that arises from the conduct of the employer's undertaking. Where it is not reasonably practicable to clause 11(2).

174 In addition, Mr *Searle* submitted that the 2005 Regulation that commenced operation on 1 March 2006, deals specifically with the issues and difficulties iden Memorandum and the WorkCover presentational material contained in Exhibits 88 and 91 also provide a useful overview of the provisions of the 2005 Regulation

175 These responsibilities cannot be derogated from, notwithstanding the fact that more than one person has a responsibility for the occupational health and safety person retains responsibility and needs to coordinate efforts with the other person(s).

176 The *OH&S Act* 2000 and the 2001 Regulation introduced legislative changes which formalise the joint and several responsibilities to ensure occupational hea where a consignor engages a company to transport freight, or a freight transporting company engages drivers of trucks in arrangements other than employment. Ir

> If more than one person has a responsibility with respect to a particular occupational health and safety matter under this Regulation:
> (a) each such person retains responsibility for the matter, and
> (b) the responsibility is to be discharged in a coordinated manner.

177 Mr *Searle* further submitted that a key component in ensuring safety in the industry in what the Union refers to as the "chain of responsibility" is the role of t aspect is not dealt with in the Union's application, but is covered in the 2005 Regulation at clauses 81B(3), 81C, 81D(3)-(6), 81E and 81F.

178 In oral submissions, Mr *Searle* submitted there was a real concern of the risk of confusion arising from two obligations which overlap on the same subject ma regard. The Minister proposed a model clause in the following form:

> All parties to the Award have obligations imposed upon them by the *Occupational Health and Safety Act 2000* and the *Occupational Hea* responsibilities under OHS law include the requirement for an employer to identify, assess and eliminate or control risks to health and sa

179 Mr *Searle* accepted that the issue of remuneration was outside the scope of the occupational health and safety legislation and could appropriately be dealt wit regulation does not specifically require a new and different safety plan for each specific trip.

180 Mr *Searle* added that it was very unlikely that the New South Wales Government would agree to any national regime which detracts from the 2005 Regulatio

181 Ms *Painter* of Counsel, who appeared for Woolworths, accepted that the Union's amended application did not seek to bind her client. However, Woolworths r checked that its contract operators are acting legally or that it should somehow be responsible for the drug taking or falsification of documents by the Union's mer more regulation, but rather on compliance with existing laws and regulations.

182 We reiterate that we have grave concerns with the impact of the serious and unacceptable occupational health and safety issues revealed during these proceed participants and the general public.

183 We accept that these issues are not new, nor have they gone unnoticed or unattended to by the industry itself and Government through recent and pending init these initiatives have gone far enough; whether existing regulation is sufficient and whether the Union's proposed award and contract determination will adequate confusion, duplication or even avoidance.

184 This brings us to consider the desirability of award and contract determination provisions for the introduction of safe driving plans as proposed in the Union's believe there is much to commend in the Union's proposal, particularly as it was modified in significant respects during the course of the proceedings, in light of v

185 In our opinion, the Union has established that there exists a clear relationship between driver fatigue and the remuneration systems which are used to pay long does not include the impact of remuneration systems on driver fatigue, nor was it intended to, (see evidence of Mr Watson from WorkCover), we consider that the the employer's evidence that compliance with the 2005 Regulation does not necessarily require the formulation of a safe driving plan for each trip undertaken by a application.

186 On the other hand, we have carefully considered the employers' and the New South Wales Government's submissions concerning the undesirability of duplica dealt with under the *Occupational Health And Safety Act* and associated regulations, particularly the 2005 Regulation. We would agree with the industry's acknow initiatives in introducing the 2005 Regulation. The Regulation together with a greater awareness of the need to manage fatigue arising from the *Hitchcock* judgme industry's attention on its safety responsibilities. However, the fact there may be duplication or phasing in difficulties with what is required by the 2005 Regulation sufficient basis for rejecting the Union's claim.

187 Indeed, the very fact that the New South Wales Government introduced a discrete and specifically focused Regulation to address driver fatigue in the industry obligations under the *Occupational Health and Safety Act* would be assisted by further regulation to meet the industry needs and, in the public interest. Any furthe greater emphasis and focus for the parties as to their obligations and duties to provide a safe working environment for employees is to be encouraged particularly accepting of course that such further obligations should not be in conflict with other legislative or regulatory requirements. In this regard, we do not consider that which we will shortly refer.

188 It is to be observed that much of the criticism of the Union's proposal during the course of the employer's evidence was a concern about "too much paperwork the Union's proposal would require the filling out of a simple one page form. (See Annexure B). Secondly, the industry is already well accustomed to the filling in requirement for log books to be maintained. Thirdly, there was a recognition that a safe driving plan could be directly communicated through the drivers' handheld

189 While we consider the problems identified by the employers as to duplication and confusion may be much overstated and exaggerated, we are prepared to acc arrangements. We consider that a period of 12 months from the date of this decision would be sufficient to satisfactorily establish whether the problems identified

application being granted. We will therefore require that a review of the new award arrangements should be undertaken upon application by any of the parties afte advantage of reviewing the effectiveness of the award and contract determination provisions, the 2005 Regulation, any future federal initiatives and what we earn culture in the industry.

190 The one area of significant departure from the Union's proposal with the existing practice in the industry was the definition of long distance work. We detaile paras [64] to [88].

191 As we understand the argument, the issue is not whether the concept of long distance is based on a single journey travelled of 100 km or 500 km, but whether driver, without appropriate breaks, is such as to be a major factor in driver fatigue and consequently driver and public safety.

192 It was apparent from the submissions of the parties that there was considerable confusion as to the interpretation of the definition in the various transport awa *Zealand Standard Industry Classification,* all of which use the measure of 500 km, albeit in different contexts.

193 We consider that the evidence of the employers and of WorkCover as to the industry's understanding of how the 500 km is applied, very much supported the r be measured as a single journey or series of journeys completed in excess of 500 km within the same shift.

194 However, we note that this broader approach is not supported by the language of the definition in the 2005 Regulation. The definition is based on the cartage which might be travelled by a driver in a single trip or, for that matter, during any other period of time.

195 On the other hand, we do not consider that the definition proposed by the Union in its amended application is consistent with the industry's long held understa work and would cause confusion with existing award and regulatory provisions.

196 In order to address what we understand to be the real basis of the Union's submissions we propose to award the following definition of long distance work:

> "any single journey or series of journeys in any one shift of more that 500 km, including the distances travelled in delivering freight and

BLUECARD TRAINING

197 The Union's claim on this issue was expressed in the following terms:

> All new and existing employees and contract carriers engaged by transport operators, and any labour hire employees utilised by transport Bluecard, shall undertake a Bluecard Program paid for by the transport operator, and conducted by a licensed Bluecard Program training a Union representative. Existing employees, contract carriers and labour hire employees will be so trained within 3 months of the date of All employees, contract carriers and labour hire employees shall be paid no less than their usual rate of pay whilst attending a Bluecard P any expenses reasonably incurred in attending such a course.
>
> From 3 months after the date of operation of this Award, no employee, contract carrier or labour hire employee shall be permitted by a tra transport contract unless in possession of a valid Bluecard.

198 Bluecard training is a basic occupational health and safety training system at accreditation which is fully supported by the Road Transport Association. The re in the industry with nearly 10000 issued to transport workers as at November 2005. The Union described the Bluecard as a recognisable portable occupational hea worker as a ready, recognisable indicator of occupational health and safety basic skills possessed by the worker.

199 The Union pointed to the evidence of Mr Watson from WorkCover who supported the existence of the portable qualification in the industry.

200 Mr *Hatcher* submitted that the only employer objection to the proposed Bluecard system was the involvement of the Union in the training. He said that if the underlying principle of the claim should still be approved as it is already widely supported in the industry as the RTA's involvement attests.

201 Mr *Kimber* said there was no need for prescription for Bluecard training as it was common ground that the system was extensively used within the transport i in the process.

202 Mr *Kimber* said there were many forms of effective training other than Bluecard which are currently used and should continue to be open for transport operat evidence of Mr Arnel who deposed to unnecessary logistical problems in arranging training involving a Union representative. This would limit a company's abilit awards in the transport industry which have been made by consent and which do not necessarily involve the Union.

203 Mr *Warren* also expressed concern that the involvement of the Union in the training process for Bluecard accreditation may exclude transport operators from construction projects.

204 Mr *Warren* further submitted that Employers First did not oppose the system of Bluecard but expressed reservations with duplication and that it may be an ins Employers First also strongly opposed Union involvement in the process.

205 As will be apparent there was no substantive employer opposition to the principle or detail of the Union's proposed clause relating to Bluecard training; save

206 It is obvious that Bluecard training is widely supported in the industry as a recognizable portable occupational health and safety skills passport.

207 In view of its wide acceptance and application in the industry we see no basis for refusing to grant the Union's application that such training be incorporated a However, we do not consider it necessary to include an award requirement for a union representative to be involved in the training. We decline that aspect of the U

§ Bluecard training has been provided by employers for a number of years without the mandatory involvement of the Union;

§ there was no evidence of any disputation as to the accessibility, delivery or quality of the training provided;

§ the existing training requirement applies in other transport awards, made with the consent of the Union;

§ the Transport Workers' Union conceded that the principle of Bluecard training being included in the award should be accepted, even if the inclusion of union rep

INDUCTION TRAINING

208 The Union proposed to include within the individual instruments a clause dealing with induction training:

> A transport operator shall allow an authorised workplace delegate of the Union (or for any workplace that does not have an authorised wo person authorised by the Union) to provide all new and existing employees, contract carriers and labour hire employees with induction tr Such induction training shall consist of a presentation of at least 30 minutes (to groups of not more than 15 persons) and shall include the
>
> (i) the rights of employees, contract carriers and labour hire employees under relevant industrial instruments;

(ii) explanation of provisions in industrial instruments specific to safe driving (including applicable payment systems, meal breaks, break
provisions of this industrial instrument);
(iii) the requirements of the Regulation, and fatigue management and medical assessment issues generally;
(iv) the organisation, role and structure of the Union, including how to join the Union if the employee, contract carrier or labour hire emp
and any additional topics as agreed between the transport operator and the Union.
Transport Operators shall:
(i) provide a suitable venue for induction training to be delivered;
(ii) consult with the Union to establish a mutually convenient timetable for the delivery of induction training to employees and contract c
(iii) pay all employees and contract carriers for all time spent in such induction training.

209 Mr *Hatcher* relied on Mr Forno's uncontested evidence that there is widespread ignorance amongst employees and contract drivers of their industrial entitlem
that basic training at the time of employment on these issues would assist in combating these problems. Mr Forno also gave evidence of an existing industry-wide
Industry Motor Bus Drivers and Conductors (State) Award.

210 Mr *Hatcher* submitted that no employer had led evidence against the value of such induction training. Rather, the thrust of the employer's objections was only
process. Mr *Hatcher* noted Mr Forno's evidence of a link between unionisation and better safety outcomes. Mr *Hatcher* submitted that if the employer was concer
would supply the training at no cost to the employer.

211 Mr *Kimber* submitted that there was no need for induction training to be included in an industrial instrument as this was properly the prerogative of managem
should be left to individual transport operators, and should in any event not require Union involvement. In this regard Mr *Kimber* relied on the following evidence

> The Application states at clause 7, that induction training must be carried out by "an authorised workplace delegate of the Union" ("TWU
> involved in induction training, makes this part of the Application inappropriate and untenable for labour hire employees. Firstly, the TWU
> Labourforce and/ or its client's businesses to facilitate induction training to the level currently provided by our own staff. Secondly, as lab
> clients and positions, either driving a truck or forklift, carrying out yard duties etc in any industry (not specifically transport), to have a T
> the labour hire employee arrived at work, would result in the work for which they are being paid, never being completed. Thirdly, the fac
> Application at clause 7.2 to discuss non-safety related issues, such as how to join the TWU, will likely lead to significant time wasting ar
> Labourforce and our clients, due to the undue delay in induction training will likely involve. This would also irritate other Union bodies w
> employees, who also have coverage.

212 Mr *Warren* also submitted that the Union should not be involved in the process that is paid for by the employers or that the Union might be paid to conduct su
concern that the inclusion of this provision may preclude the transport operator from participation in federal Government projects by force of the *Building and Co*

213 While we accept that there are benefits for employees and employers in the induction training of employees, we do not consider that a case has sufficiently be
award or contract determination. We consider that the matters relating to health and safety, which are set out within the proposed induction training program, shou
which we have earlier referred.

214 In addition, we consider that such other induction training as may be required by the employer for the necessary induction of its new employees is properly a
operational requirements. That is not to say that the Union should not be able to co-operate with the employer and participate with any such training. Indeed, that
manner of delivery, timing and subject matters included in such training should be at the employer's discretion.

DRUG AND ALCOHOL POLICY

215 The Union's proposal for all transport operators to develop and implement a drug and alcohol policy was as follows:

> All transport operators shall, within six months of the date of operation of this Award, develop and implement a written drug and alcohol
> (i) professional drug-taking amongst its employees, contract carriers and labour hire employees is entirely eliminated; and
>
> (ii) no employee, contract carrier or labour hire employee performs work whilst impaired by the effects of drugs or alcohol;
>
> and which otherwise conforms with the requirements of this clause.
> The drug and alcohol policy to be developed and introduced by a transport operator shall:
>
> (i) be tailored to correlate with the transport operator's size, resources, and the nature of its operations;
>
> (ii) make provision for the implementation of a fair and transparent system for testing for the presence of drugs and alcohol in employees
>
> (iii) provide for paid training of employees, contract carriers and labour hire employees in relation to the requirements of the policy and s
> generally, with such training being carried out in conjunction with a Union representative; and
> (iv) be integrated with any safe driving plans developed pursuant to clause 3 of this Award.
> The drug and alcohol policy to be developed and introduced by a transport operator shall be consistent with the following principles:
> (i) Professional drug use is the major cause of impairment to the driving and general work performance of employees, contract carriers an
> its elimination must therefore be the primary focus of the policy to be developed.
> (ii) Professional drug use occurs because of driver fatigue, so that to eliminate professional drug use it is necessary to ensure that employ
> required to, and do not, perform work in such a way or to such an extent that driver fatigue occurs.
>
> (iii) Alcohol and/or drug problems arising from recreational use should be dealt with as health problems, with an emphasis on education
>
> (iv) Transport operators should provide training and guidance to their managers and supervisors to ensure that they:
>
> (a) do not impose work pressure on employees, contract carriers and labour hire employees which may lead to professional d
>
> (b) recognise when employees, contract carriers and labour hire employees are becoming fatigued to the extent that professio
>
> (c) know how to satisfactorily and fairly deal with employees, contract carriers and labour hire employees whose work perfo
>
> (v) Transport operators, managers, supervisors, employees, contract carriers and labour hire employees must all comply with the policy c
> prevent incidents arising from the consumption or use of alcohol and other drivers.
>
> (vi) Transport operators have an obligation to respond to and investigate any information provided to them which suggest that either its e
> are engaging in professional drug use, or that work pressures on employees, contract carries or labour hire employees are such as to make
>
> (vii) Personal information received from or about employees, contract carriers or labour hire employees as a result of self disclosure, test
> treated with the strictest confidence.
> (viii) Drug and alcohol testing shall be carried out in a way which:

(a) responds to signs of impairment on the part of the employee, contract carrier, or labour hire employee;

(b) is consensual;

(c) respects the privacy of the person being tested;

(d) is as least personally invasive as possible (e.g. by use of saliva testing);

(e) conforms with accepted scientific standards;

(f) involves a secure chain of custody procedure with respect to any samples taken;

(g) allows a second sample to be provided to the employee/contract carrier/labour hire employee to allow independent testin
(ix) Employees, contract carriers and labour hire employees who voluntarily disclose professional drug use or a personal drug or alcohol
but shall be provided with counselling, training, and if necessary, treatment and rehabilitation.
Transport operators shall develop their drug and alcohol policies in consultation with employees, contract carriers, labour hire employees
aspect of the drug and alcohol policy being developed, the policy shall not be implemented until the dispute has been resolved in accorda
instrument.

216 Mr *Hatcher* submitted that in view of the uncontested evidence of the widespread driver use of drugs to combat fatigue, there was no evidence from the empl
transport operators should be required to have a drug and alcohol policy.

217 Mr Forno responded to the main criticisms of the Union's claim in this way:

“The main criticisms appear to be: firstly, that the proposed clause would prevent certain methods of testing; secondly, that t
thirdly that the clause would allow the TWU to hold up or obstruct the implementation of drug and alcohol policies.

In relation to the method of testing the application does not intend to be prescriptive, or to prohibit any particular mode of testing. If there
the less invasive position. Transport Workers, in my experience find Urine testing extremely personally invasive, so where a less invasive
preferred.

I refer to the criticism in the evidence that suggests that the parameters put forward would not allow random testing. Nothing in the appli
have proposed is a basic testing system, under which a response is required to any signs of impairment. We want a uniform system across
individual employers want something additional to that, which might be more costly, then, as long as it is fair and consistent with the par
We are parties to agreements which permit random testing, such as the Linfox policy, a copy of which is attached to my principal stateme
acceptable in that where there is a decision to test a site, the entire site, from management down is tested, including any outside hire work

Drug and alcohol testing is a charged issue and for obvious reasons is taken very personally. It has to happen in a fair way with consultat
suggestion in some of the evidence that the proposed clause will give the Union the capacity to stop the implementation of policy is absu
forward. It is outrageous for Grace (paragraph 42) and others to criticise us when we are the first to propose this type of regulation. The N
something in conciliation in around April last year but nothing further was heard about it. It is simply disingenuous to now attach that pro
to apply for a clause. In any event the proposal was totally inadequate because it was based on drug and alcohol policies applicable in oth
consumption and recreational use. It totally ignored the major problem in the transport industry, namely professional drug use. Any drug
industry needs to focus on eliminating profession drug use, which requires a much more holistic approach to the problems underlying suc

218 As to the method of testing, Mr *Hatcher* submitted that the evidence of both Dr Perl and Dr Marshall was that no method of testing, ie urine or saliva, could p
be preferred in so far as the advantages of urine testing over saliva testing as urine testing may detect drug use over significant periods of time.

219 During the hearing, Mr *Hatcher* submitted that the Union's proposal was not meant to be prescriptive and that its application accommodates a range of policie
exigencies of the business.

220 This proposal should be seen as part of the package to remove excessive hours, remove fatigue and remove the need for drugs to be used.

221 While Mr *Warren* had suggested that the drug and alcohol policy was too onerous on small operators, Mr *Hatcher* replied that there was no evidence that sma
implement such a policy. Moreover, the evidence reveals that the preponderance of drug use was to be found in the small companies, making application of such a

222 Mr *Hatcher* referred to the debate between Dr Perl and Dr Marshall about the preferred method of testing. He emphasised that the application does not seek to
where the methods of testing can achieve the intended purpose, the least invasive method should be used. Dr Perl's comprehensive expert evidence demonstrated t
drug use, than urine testing, although both tests cannot determine impairment.

223 As to whether a test is to be consensual, Mr *Hatcher* submitted that the intention was that an employee cannot be physically forced to take a test and that so lo
there may be consequences which flow from an employee's refusal to undertake a test. In this context Mr *Hatcher* relied on the Commission's decision in *Australi
Pty Limited* [2003] NSWIRComm 461 (Exhibit 96) and in particular the following paragraphs:

19.31 The AWU submitted that this clause in its existing form is liable to cause confusion and that on its face, it contains an element of d
a test on the one hand is deemed to be a positive test result with the accompanying consequences and then further or additionally, it is to
any other refusal on the part of an employee "to comply with a Company Policy or procedure".

19.32 For its part, BHP argued that no evidence had been led pointing to elements of confusion and secondly, that this clause is clearly re
positive result) and a further refusal (which has other connotations). We would observe that the comma after the word "Further" in the se
lends itself to a different construction than that for which BHP contends and adds weight to the AWU contention. The comma has the eff
meaning as the words "in addition to the foregoing". If the comma were removed, the word "Further" would be given its adjectival mean
word "refusal". We are of the view that there should be a form of disciplinary sanction available for appropriate use in cases where there
so when it is considered that the AWU has adopted a position in support of a testing regime per se.

19.33 For clarity, we recommend the removal of the comma after the word "Further" at the beginning of the second sentence of the existi
change to this clause. Again, however, we point to the need for considerable care to be exercised by BHP in the implementation of this as
employee may refuse to undertake a test. A clear example of the inappropriate application of disciplinary sanctions is to be found in the d
Industrial Relations Commission in Larkin v Boral Construction Materials Group Ltd 2003 (WAIRC 07963, 20 March 2003). In that case
refusal to undertake a drug test was an oppressive exercise of the employer's right to dismiss and it seems to us that the case stands as oth
approach the use of disciplinary sanctions within the context of the Policy with due care and caution.

19.34 Finally, we recommend that the Policy may be reviewed in 12 months upon an application to that effect.

224 Mr *Hatcher* rejected any suggestion that the Union's application prohibited random testing. Subject to proposed controls and safeguards, the policy does prov

225 Mr *Hatcher* proposed that there be a period of 6 months for employers to implement the policy with any disagreement being dealt with under the disputes prc

226 Finally, Mr *Hatcher* submitted that the problem with the RTA's proposal was that it left to the employer's discretion whether a policy was used or not. This wo and alcohol testing.

227 Mr *Kimber* submitted that the respondent accepted that there is a level of drug abuse amongst drivers which is unacceptable. He criticised the Union's propos testing of drivers and requires any testing to be consensual. He proposed an alternative draft which attended to these matters (see exhibit 56).

228 Mr *Kimber* also submitted that there was no reason why drug and alcohol training need be carried out in conjunction with a Union representative. He also sai dispute the content of a drug and alcohol policy which could result in indefinitely delaying implementation of a policy. This was likely given the historical relucta the work places of its members.

229 Mr *Warren* submitted that the Union's proposal would significantly weaken existing drug and alcohol policies, either in force or being constructed by transpo provisions of Australian Standard AS/N25 4308 : 2001. This is the only recognised standard for such testing and collection in Australia. Mr *Warren* added that th method of saliva testing.

230 Mr *Warren* also criticised the Union's proposal based on it being only applied with the consent of the drivers. This would create a drug and alcohol regime wh Commission should not grant an application which would lessen a transport operator's ability to ensure a safe workplace in accordance with its responsibilities un

231 In oral submissions Mr *Warren* submitted that it would be a significant burden on small transport operators to have a drug and alcohol policy of the type cons that implemented by Patricks or Boral which applied the Australian Standard. The approach should be on a case by case basis.

232 We do not consider it could seriously be suggested that the requirement for all transport operators to have a drug and alcohol policy, which includes drug and the widespread use of drugs by employees in the road transport industry. In many ways, it is most surprising that the initiative in this regard has been from the Un resistance from Unions on behalf of their members for drug and alcohol testing sought to be introduced by employers.

233 We would suggest that rather than criticising the proposal, the Union's acknowledgement of the need to address this issue should be welcomed. Such criticisn

234 We do not consider that the employers' criticism of the Union's proposal based on a failure to provide for random testing and an insistence on a preferred meth draft proposal. We accept Mr *Hatcher*'s submission that the draft proposal is not meant to be prescriptive and does not prevent random testing. We consider, howe testing. We also consider that the policy should also contain the following additional features:

(a) testing may be non-consensual;

(b) para (viii)(d) of the provisions should also allow for urine testing;

(c) the provisions should specify what is to occur where a positive test result is recorded and verified.

235 We note that provision is made for any dispute concerning the development of an individual policy is to be dealt with according to the disputes procedure in t sufficient in addressing any practical difficulty which might arise as to the policy itself or its application.

236 We would particularly reject the employers' objection to the proposal as placing an onerous burden on small transport operators. The evidence was abundantl drivers is more acute and widespread in smaller transport operations where the delivery and costs pressures are greater.

NATURE OF INDUSTRIAL INSTRUMENT

237 As we observed in Re *Transport Industry - Mutual Responsibility for Road Safety (State) Award and Contract Determination* (2006) 152 IR 140 at paras [20]

> 20 It must be accepted that the industrial regulation of the transport industry in this State, and the legislation underpinning that regulation utilises two primary forms of working arrangements: on the one hand, the relationship of employer and employee, and on the other, of pr contractor.
>
> 21 Often an employer who employs employees will also utilise independent contractors; others will compete with one company using on and others may use a combination of both.
>
> 22 The different forms of industrial regulation have been a response to the way the different forms of "employment" in the transport indu twentieth century. In this case, without determining the correctness or merits, or otherwise, of the TWU application, it is plain that the iss is not limited to one sector of the industry but is an industry wide issue. To uphold the jurisdictional argument of the respondents at this s artificially constrain the orderly presentation and testing of the evidence in what may be a very significant case; particularly, as we have forms of regulation.

238 While it hardly needs restating, the issues we have identified in this case are not confined to a particular sector of the industry or class of driver, be they empl

239 That being so, it would be illogical not to incorporate the proposals we have approved in this decision in both an Award made under s 10 of the Act and a Co make orders and award accordingly.

ORDERS AND DIRECTIONS

240 The Full Bench of the Industrial Relations Commission makes the following orders and directions:

1. A new Award shall be made pursuant to s 10 of the *Industrial Relations Act* 1996 to be known as the *Transport Industry - Mutual Responsibility fo* findings in this decision.

2. A new Contract Determination shall be made pursuant to s 316 of the Act to be known as the *Transport Industry - Mutual Responsibility for Road* consistent with the findings in this decision.

3. The new Award and Contract Determination shall take effect from the date of this decision.

4. The Transport Workers' Union is directed to file and serve a draft award and contract determination reflecting the above orders within 14 days.

5. Settlement of the terms of the new award and contract determination will occur at 9:30am on Tuesday 21 November 2006 before the Full Bench.

Annexure A
List of Witnesses

For the Union

Mr Grahame Batten - Truck Driver

Mr John Zader - Truck Driver

Mr Gregory Bulmer - Truck Driver

Mr Robert Burles - Truck Driver

Mr David Travers - Truck Driver

Professor Michael - Professor of the School of Organisation and
Quinlan Management at the University of NSW

Mr Kevin Russell - Truck Driver

Mr Wayne Forno - TWU Assistant Secretary

Associate Professor - Deputy Director of the NSW Injury
Anne Williamson Risk Management Research Centre,
University of NSW

Mr Ray Driscoll - Truck Driver

Mr Robert Ireland - Truck Driver

Mr Ken Hurst - Truck Driver and TWU Delegate

Mr Richard Olsen - TWU South Coast and Southern Sub Branch
Secretary

Mr Glen Whittick - Truck Driver

Mr Mark Crosdale - TWU Newcastle and Northern Sub Branch
Secretary

Mr David Tritton - TWU Industrial Officer

Associate Professor Associate Professor of Wayne State
Michael Belzer University, USA

Mr Trevor Brown - Truck Driver

Mr Andrew Villis - Truck Driver

Mr Greg Selig - TWU Official

Dr Judith Perl - Consultant Pharmacologist

Mr Michael Kaine - TWU Chief Legal Advisor

For the Minister of Industrial Relations

Mr John Watson - General Manager of the Occupational Health and Safety Division of WorkCover

For Australian Business Industrial, Roads and Traffic Authority and Toll Transport

Mr Rod Grace - (NSW) RTA Employment Relations Manager

Mr Phillip Crook - General Manager Industry Liaison - On Road Compliance for Toll Networks Division

Mr Hugh McMaster - (NSW) RTA Corporate Relations Manager

Mr Jeffrey Kettle - Toll SPD State Manager

Mr Martin Green - TNT National Road Linehaul Manager

Mr Aaron Leach - New Zealand Transport Manager for Linfox Australia

Mr George - JW Express Managing Director Wolstenholme

Mr Ross Coleman - General Manager, Coastal Transport Services, Warenvale

Mr Colin Hancock - TNT Vehicle Logistics National Operations Manager

Mr Tony Yule - TNT Logistics Regional Transport Manager

Mr David Arnel - Director of Corporate Services of Labourforce Solutions

Mr Bob MacKenzie - TNT Australia National Manager, Industrial Relations

Mr Don Hughes - NSW Grocery Manager for Toll Food and Beverages

Mr Darren Loughhead - Toll SPD PM Fleet Controller

Mr Nigel Ward - General Manager Human Resources and Employee Relations for Australian Construction Materials Division of Boral Ltd

Mr Phillip Robertson - Readymix Transport Manager - Raw Materials

Mr Douglas Harris - Boral Transport Limited, Southern NSW Regional Manager

Mr Leo Upton - Projects Manager for Patrick Autocare

For Employer's First

Mr Andrew Simpson - National Linehaul Manager for Patrick Corporation

Mr Norman Marshall - Chairman of Australian Drug Management and Education

For Woolworths

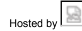
Mr Brian Warry - Woolworths Limited, National Transport Consultant

Safe Driving Plan (Example)

Operator/Consignor Identification	Delivery Period and PUD Details	Remuneration
		How Work is Remunerated having regard to health and safety Kilometre rates for driving and hourly rate for loading/unloading /queuing time
Consignor:	XYZ <Address>	**Pick Up Location**: Toll Minchinbury Distribution Centre**Remuneration Method and Rate:** *Transport Industry (State) Award* - Grade 7 Long Distance Rates (29.54 cents per km) plus Hourly rate of ($17.25 base) for all time loading/unloading/queuing.
Transport Operator:	Toll <Address>	**Delivery Location:** XYZ**Remuneration Monitoring/Measuring Systems:** GPS, On Board Computer, Auditing cross checks of pay, log book, timesheet, consignment note, GPS & Engine Records, SDP
		Period: 12.30 pm Delivery Window**Means to Limit Work Hours and Work** Contact with manager (<insert phone number>) for reporting unexpected delays and rescheduling journey if necessary

Planned Application of Hours	
Planned Total Trip Time: 11.75 hours **7am - 15 minute pre-trip inspection** **7.15 am to 12.00 pm (Minchinbury - Wagga Wagga) 4.45 hrs driving** **30 minutes break prior to unloading** **12.30 - 1.30 pm loading unloading** **1.30pm to 4.15pm (Wagga Wagga/Marulan)** **30 minutes Marulan (4:45pm)** **4.45 - 6.45 Marulan - Minchinbury 2 hours**	
Confirmation that driver has been inducted and trained in OHS policy	
Confirmation that driver has been inducted and trained in company D&A policy	

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

TRANSPORT WORKERS UNION OF AUSTRALIA
VICTORIAN/TASMANIAN BRANCH
ABN 47 634 608 538

52-56 Rouse Street, Port Melbourne
P.O. Box 203, Port Melbourne, Vic. 3207
Tel: 1300 727 614 Fax: (03) 9646 1792
Email: info@twu.asn.au
Website: www.twu.asn.au

President: Kevin Hoey
Vice President: David White
Branch Secretary: Bill Noonan
Branch Assistant Secretary: Wayne Mader
Trustees: Anna Gileno, Michael Nealer

Nick Dimopoulos, CEO
National Transport Commission
Level 15/628 Bourke Street
Melbourne Vic 3000
Fax: (03) 9642 8922

Dear Mr Dimopoulos

Review into truck driver pay and remuneration methods

I write to you in my capacity as the Branch Secretary of the Transport Workers' Union (Victorian/Tasmanian Branch) on behalf of my members who work as both owner drivers and employees in the transport industry.

We welcome this investigation of implementation options for safe rates and conditions. For many years I, along with officials, delegates and members of the TWU, have worked hard for increased road safety and measures to assist owner drivers and employees. In particular, we have consistently promoted the importance of the chain of responsibility in the transport industry and the need for all participants in the transport chain to be responsible for safe practices. Without this the symptoms such as fatigue, speeding, driving hours breaches and other unsafe practices will not only continue but worsen – meaning more tragic death and injury. Victoria consistently has the second highest number of deaths resulting from heavy vehicle incidents of any state. In 2007 alone, 48 people lost their lives as a result of incidents involving an articulated vehicle.

When employee drivers are not making enough to pay the bills for their family or are forced to work for large chunks of unpaid time waiting in client's queues, they face a terrible decision – allow their family to suffer, or attempt to earn more by working even more hours and/or driving in an unsafe manner – that is not a decision that anyone should be forced to make, it must be addressed.

In relation to owner drivers the Transport Workers' Union (Victorian/Tasmanian Branch) has successfully made the case for the establishment of legislation in the form of the *Owner Drivers and Forestry Contractors Act 2005* (Vic). The Act has made a promising start. The Act applies to intra state owner drivers and not to employees, interstate owner drivers or chain of responsibility issues, but the inquiry which supported the making of the legislation now forms part of a large body of evidence pointing to the numerous additional aspects of the transport supply chain which must be addressed in order to maintain a stable industry and to save lives.

A fundamental factor emphasised by the evidence is the chain of responsibility: not only must there be safe rates and conditions for owner drivers and employees but they must be enforceable, and responsibility to ensure that those safe rates and conditions are actually applied to all drivers

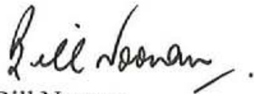
100 Years of Australian Transport Unionism

must not only be borne by transport operators but by consignors/clients. The industry's customers must be compelled to use their economic influence for the good of the industry.

I support the TWU submission to this important review and urge adoption of the recommendations it contains. I also attach statements from owner drivers and employees which detail their experiences of various pay and remuneration methods and the impact on safety.

I look forward to making a presentation to the inquiry at a later date.

Yours sincerely,



Bill Noonan
Branch Secretary &
Federal Vice President

Lynden Ball Long Distance Owner Driver – Circus and Amusements Rye, VIC

Lynden has been a long distance driver for 29 years. In that time he has worked delivering underground fuel tanks and manufactured steel. He now spends most of his year driving for Circus Oz across Australia where tight delivery times are an expectation on every job.

He considers himself to be in a good position compared to most in the industry. He gets a good kilometre rate and is paid for his standing time. He knows that for most other drivers this is not the case;

"You spend all of your time chasing work, and it's near impossible to work for decent money. (However), If you can't get decent money you'll go broke. The last truck I bought was repossession, it's never happened to me but I can understand how it happens to others."

He knows that one of the industry's biggest problems is not getting paid accurately for the work.

"I know blokes that will take a load for $1200 that costs $1400 to do, you end up paying someone else just to get the work… people don't always realize that if I take the job cheap, then the next bloke has to do it cheaper."

"A cost recovery system is vital for us, why should anyone work if they are not going to get paid for the work. It just doesn't seem fair."

"When you go broke they lose everything. I imagine it would be pretty hard you hear stories about relationships falling down all the time because blokes are away from home all the time."

"it's near impossible to be married with kids away from home battling for a buck, then he blows a tyre and he's stuck for even more money."

"The inability to pay your bills on time has a big impact on safety. I've just paid $2600 mechanics bill, a lot of blokes can't afford it. If they can't afford to repair their trucks, they will plumb it up and just make do until they can afford it. Blokes don't want to drive around in a broken down truck, they just have no other option, they just can't afford to fix it."

"You can't save on registration, insurance and fuel and we're working on the same rates we were getting 20 years ago – how can anyone be expected to have a viable business."

"if we don't do something dramatic soon only the huge companies will survive, they're the only ones who can wear the costs, I think that will be a really sad day."

Ali Ibrahim – Long Distance Owner Driver General Freight, Merrigum VIC

"I've been in this game for 30 years and if the money's right I'll work Australia wide."

"I've been away for a few months now and I'm heading home. I try not to stay away for so long now. I like to be home once or twice a month"

Ali is 51 years old with one son and 2 daughters he is looking forward to the day when he can retire and stay at home with grandchildren. He'd like to make up for lost time.

"It was really tough on my wife when the kids were younger; I was a part time dad and a part time husband."

"I was away to pay the bills. Now we're in a better position, we're no millionaires but I can at least pick jobs that don't send me broke."

"I'm offered jobs (from Brisbane) back to Melbourne that won't even cover the fuel. You can't run a machine for that sort of money, you can't take loads for fuel money, fuel money doesn't pay your wages, fuel money doesn't pay registration or insurance, fuel money doesn't pay for maintenance. You can't take loads just to cover fuel, you'll still go bankrupt, just slower than someone else."

"I've been sitting in Brisbane for two days now waiting to get a load home. Guaranteed the loads I've knocked back because the rates are too low are all gone now and someone is doing it cheaper than me."

"I got offered a load from Brisbane to Geelong for $1300 and was told that's the going rate. It's over two days work legally because of the loading and unloading required. The fuel alone will cost me $1150. So, over two days work for $150. That's what a casual drive can make in one day without overtime."

"The major companies don't want us to get a decent rate because it will cut into their profit. They control the work through a loading agent. The Majors have enough freight to cover any losses, we don't. Guaranteed any freight they can't move at a profit you'll find a subbie doing the work."

"Drivers are forced into a position where they have to do shit work. Aussie truck drivers are hard workers. Hard working people deserve to be rewarded. There's a lot of hard workers in transport but someone else is getting the reward."

"Why would you want to be away from your family for the same money as someone who works in a factory?"

NATIONAL TRANSPORT COMMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Gregg O'Toole, 52-56 Rouse Street, Port Melbourne, VIC 3207, state as follows:

1. I am an employee truck driver and work for national transport company that works in the sensitive freight area and has about 300 employees.

2. In my experience, the rates of pay I receive are not sufficient to cover my living expenses, and as a result I work in conditions that create an unsafe driving environment. The rates I receive are not what I would describe as safe and sustainable because they are too low.

3. The way that work is structured means that there is an incentive for drivers to drive unsafely in order to maximise income. This is only when we're on the country work which is paid by a cents kilometre method. I am paid by the hour, but know that there is no way you can survive on 7.6 hours pay a day so you work as much overtime as you can to survive. As a result, I have driven whilst I've felt fatigued in order to finish the job and earn more money.

4. From my experience of the industry the cents per kilometre method of payment causes drivers to try to complete the job quicker so they can get home. I think there need to be minimum enforceable requirements for planning trips so they are legal and have proper breaks provided for.

5. I have experienced being pressured to accept lower rates in order to keep work, and was been told indirectly that I must do the job or face consequences such as termination. I have also been threatened when I have involved the TWU in negotiations over wages and conditions.

6. I feel clients of transport companies control how work is performed to some degree, and there is no bargaining power to pressure my employer's client to increase the rates they pay for the work I do.

7. I don't think I have received proper training in driver fatigue, driving hours and chain of responsibility.

8. I have experienced pressure from transport managers, clients, loaders and consigners to breach driving hours regulations because we must complete the job or lose the contract. Often you would start at 7am and still be working at 5.30pm with extra jobs that have been added during the day by clients, which results in extended working hours. A 5.30pm finish for us is an early day.

9. I think the TWU should be able to enforce safe and sustainable rates and conditions and make sure all the parties in the transport chain are complying with those obligations.

GREGG O'TOOLE
3 September 2008

NATIONAL TRANSPORT COMMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Michael Hill, of 62 McKenzie Crescent, Roxburgh Park, VIC 3064, state as follows:

1. I am an owner driver and have worked in the transport industry for over 20 years.

2. I previously worked as an employee for over 16 years before becoming an owner driver.

3. I drive an Argsy B-double tanker, and the rates I currently receive for the work I perform barely covers my fixed, variable or labour costs.

4. In my experience I have been offered work at rates that would not cover my fixed, variable and labour costs, and accepted this work because it was the only work available. Owner drivers generally earn less in their labour rate than employees performing the same work, and as a result working as an owner driver is often unsustainable. I have previously been required to perform work at rates that weren't sustainable but don't do that anymore.

5. In my experience larger companies dictate the prices of transport and force smaller companies to cut corners to make up the money which creates a situation that isn't safe or sustainable. I work on a cents per kilometre payment method, and can drive extra kilometres because of the mass management system that I work under. This method of payment doesn't allow me to recover increases in fuel costs. In my experience in the general freight area there is pressure to accept lower rates in order to obtain or keep work.

1

6. I believe there needs to be enforceable safe rates and conditions created for owner drivers and employees, and that the TWU should be able to enforce my rights to safe and sustainable rates.

MICHAEL HILL
3 September 2008

2

TRANSPORT WORKERS' UNION OF AUSTRALIA
QUEENSLAND BRANCH

ABN: 80 519 643 130

11 Alexandra Place
MURARRIE QLD 4172
Telephone: (07) 3890 3066
Toll Free: 1800 804 533
Fax: (07) 3890 1105
Email: info@twuqld.asn.au
Web: www.qld.twu.com.au

All correspondence to:-
HUGHIE WILLIAMS
BRANCH SECRETARY
PO BOX 452
CANNON HILL
QLD 4170

"TWU WORKING FOR ITS MEMBERS"

4th September 2008

Nick Dimopoulos, CEO
National Transport Commission
Level15/628 Bourke Street
MELBOURNE VIC 3000
Fax: (03) 9642 8922

Dear Mr Dimopoulos

OPTIONS FOR IMPLEMENTING SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

The Transport Workers' Union (Queensland Branch) welcomes the review regarding the above matter and fully supports measures that will improve safety on our roads.

For many years I have advocated the need for strong and decisive action against companies (including the industry's clients), that directly or indirectly, through act or omission, force or promote a breach of driving hours regulations or safety laws. Too many innocent lives have been lost because the culture and structure of the industry lead to profit being put ahead of the safety of TWU members and the general road using public.

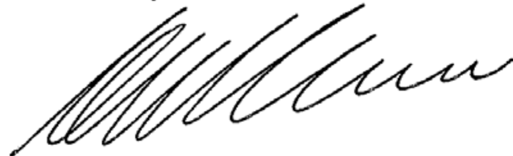
The link between low rates of remuneration and low safety standards has now been well established, and on behalf of members of the Queensland branch who work as both owner drivers and employees in the transport industry I support the establishment of a system that provides for safe and sustainable rates and conditions in the transport industry.

Queensland has been a leader in chain of responsibility concepts in the industry but it has become clear through recent cases that much more needs to be done. In 2007, 41 people died in articulated vehicle incidents and 11 more in heavy rigid incidents in the State of Queensland (Department of Infrastructure, Transport Regional Development and Local Government). The number of deaths is disproportionately high – giving Queensland the unwanted distinction of being the State with the greatest number of heavy vehicle deaths per capita of any state.

In recent time the leaders of unregistered groups, such as ALDODA, have advocated a response to these problems with rhetoric that could be interpreted as threats of violence. While we understand the outstanding issues in the industry are urgent and intensely felt, we strongly disagree with that approach. Rather, what is needed is a system that allows for the formulation of rates and conditions, and which places the obligation on applying and maintaining those rates on all parties in the transport chain.

We support this submission to the inquiry and will be available for further meetings.

Yours faithfully



<u>HUGHIE WILLIAMS</u>
Branch Secretary
Transport Workers Union Queensland Branch

Keith – Owner Driver –Hemmant QLD

Keith does container work and usually does the Cairns to Sydney run. Keith is 62 years of age and has been an owner driver for 35 years. He invested $60,000 into the business and cant believe how little the industry is willing to pay.

Blokes are dying because they cant get enough money no matter how hard they push themselves.

It is important that owner drivers are paid decent rates and paid in a reasonable timeframe, often drivers are not paid when they are meant to be paid, our bills need to be paid as well. It is not reasonable to ask us to budget for extended payment times.

Keith explains that the relationship between safety and rates is very important. If guys are not getting the rates they will compromise on the safety of the vehicle. Keith says 'they'll do what it takes to get some money in, blokes are left with no money at the end of the day to keep up the maintenance on their truck'.

There needs to be legislation that is fair for both the Owner Driver and the company. The legislation needs to apply to all states to stop the big firms taking advantage of the drivers in the states with no access to the legislation. 'Be fair and give us what we deserve'.

Bernie Owner Driver QLD

Bernie is married with 4 kids and has been an owner driver for 28 years. His family had been in the trucking business and he decided to give it a go.

At 44 years of age Bernie drives a petrol tanker long distance from Emerald to Brisbane return. Bernie does not mind working for himself even though it is hard work it is better then working for a boss.

Bernie is one of the lucky ones he does not believe in working for a low rate there would be 'no point to having the business for no money, I would just sell the truck'. Bernie explains 'I negotiate a good rate, I have a good job now it pays well'.

It is obvious Bernie says, that a lot of owner drivers work for the wrong people and don't get paid enough or work cheaply just getting paid enough to cover their repayments. People cant live like that.

Bernie wants the industry treated fairly instead of putting owner drivers in the too hard basket. Bernie explain 'If we stop the country is stuffed, politicians just don't appreciate how we hold the country together'. 'The good decent drivers are leaving'.

Kenny Owner Driver Sherwood QLD

Kenny is an owner driver and has been for the last 30 years. He sub-contracts for a furniture removalists and also for Brambles.

Kenny finds the biggest challenge of being an Owner Driver is being paid on time, 'I am usually paid half on pick up and half on completion'.

People need to realise that safety is important to everyone , 'we have got to be able to be paid to cover all costs not some- if you don't it falls back to maintenance, owners will take short cuts'. These 'Safety short cuts and dangers fall effect everyone. Its everyone's responsibility, if something goes wrong due to safety cuts it effects everyone'.

Kenny is not in as much debt as some other owner drivers, he said 'I can pick and choose work, I could work harder if I wanted to but I am not in a hurry'. Young ones to the business 'need to be prepared to work, set yourself up with a good truck and make sure you cover your costs otherwise its not worth it'.

David Moore Long Distance Owner Driver – Stockfeed Supplements Bowen QLD

David is a long distance owner driver who travels across northern and north-western Queensland, he is away from his family for up to 3 weeks at a time. He's 42 and has been an owner driver since the age of 19 (23 years).

David has specialized equipment and for the most part is a tied contractor in that it is difficult for him to go out and work for someone else.

When he has worked outside he has found on time payments to be incredibly difficult. On most occasions it takes over 2 months to receive payment for his work.

"I can't wait that long – I have to pay my accounts within 7 days – that's a pretty ordinary cash flow in anyone's standards – I just won't do that sort of work in future, I can't afford to."

"I know guys who have to wait for the next cheque to come in before they can go to work. They need the money from one cheques to put the fuel in the truck for the next one."

"I'm lucky that hasn't happened to me yet, its been close though. I've seen it happen to others, it's a really stressful situation for the whole family and really frustrating for the wife if she has to work just to put food on the table."

"If I could afford to I'd stay home more than I do, I would put a driver in the truck one week a month so I could spend time with my young fella. Take him to football and things like that. You need to spend time with them while they are young."

I know that some (principal contractors) put unrealistic demands on drivers – that's really tough on families."

"At the moment it's a bit quiet so I'm a bit behind on my maintenance – waiting for the money to come in so we can get on top of the maintenance. This will happened before I go back out again. I would like to be in a position where you're forced to drive unsafe. Its good to know you've got the money to fix something if you need to, its good for everyone."

If we had a cost recovery system blokes would go broke because they are not doing their job properly, not because they're not being paid properly."

If we had a cost recovery system it would remove rate cutters, I wouldn't be competing against guys who aren't doing the right thing – everyone could afford to do the right thing. "

At the moment I wouldn't recommend anyone enter the transport industry because you're not guaranteed a payment on time and that's as big an issue as not being paid the right amount.

It means big losses, your family, your family home, big losses personal and financial."

Ken - Long Distance Owner Driver, General Freight - Burpengary QLD

Ken has been an owner driver for the past five years. For the eighteen years prior to this he was an interstate driver across Australia and the Northern Territory.

Ken was 38 when he decided to become an owner driver. "I was running someone else's truck, why work to pay off someone else's debt when I can work for myself.... There are opportunities out there if you are prepared to have a go."

While Ken is positive about the industry he is also aware of the obstacles imposed. "fuel prices and cost cutting... fuel prices have gone through the roof at the moment we are breaking even because our freight rates haven't gone up and back-loading rates are killing us as well."

"Back-loading" is a serious concern for most owner drivers. It is the rate paid for freight on the return leg of a trip. "Back-loading" is largely used as a mechanism by freight contractors to drive down rates. However the impact on owner drivers is significant. "Back-loading" does not take into consideration the actually running costs of the vehicle and labour are the same from A to B are the same as B to A. As ken puts it "A load is a load no matter which way you are going and our rates need to reflect this."

Ken links the "back-loading" problem to industry safety concerns ""if you get the same rates both ways blokes won't go as hard. It's the only thing o fix industry safety."

Ken recognizes that it has been a struggle for him and his family as an owner driver. "I've gone a long way into debt to build something in the industry – I'm just breaking even – it's a real struggle – every time we turn a corner there's trouble."

"I have a wife, been married 23 years, and we have 5 kids. We lead separate lives and she's bought up the kids on her own. In an average week I'm away from Wednesday through to Monday and Tuesday is spent repairing the truck, chasing money owed and trying to squeeze in sleep. It doesn't leave much time to be a dad."

"Before I was an owner driver I was never home. I was away 2 to 3 weeks at a time. The more work I did the more money I got, so I had to be away to work."

"its really tough on the family, most of the kids are grown now and I've never had a relationship with them, I was never home for things at school or important stuff in their lives. When I was home, I just got in the way, they had their lives and I was never around."

"It's bloody hard (being an owner driver), wondering when we'll get money for fuel – we need to get money just for fuel. Spend so much time figuring out who owes us money and chasing them so we can get money for fuel. My wife tries first (to get the money) and when she has no luck I call. I'm not as polite as she is."

Ken talks about one of the low points of being an owner driver "I've had someone turn up on my doorstep about to take everything we owned... this happened a

couple of weeks ago. It was pretty scary. I had to get out and work hard to get in some money so we could pay them."

"I can't turn around fast enough to keep in front of the bills."

"Last year I made $440 000, but I had to spend $390 000 to make it."

Ken describes what impact the pressure of mounting bills has on his work, "you automatically drive a bit faster or longer to load up and go again."

"I'd like to be able to drive into a depot, have them unload and reload and for me to sleep and be able to pick up the truck and drive home. But I can't. most times when I get to Melbourne I have 4 or 5 drops offs all over Melbourne in a semi, then 3 or 4 pick ups before I can get loaded to leave again. I usually drop off again in Mooree and then another 2 or 3 in Brisbane."

"When I leave Brisbane I zigzag my way down to Melbourne, picking up work along the way, but I have to be in Melbourne first thing Friday morning no matter what."

"I've had a few near misses. I nodded off once hit the gravel, woke up with a start, reefed the truck back onto the road and headed for the nearest rest stop. I shouldn't have to drive until I'm so tired my eyes burn. But I can't sleep I have deliveries to make, the more deliveries I make the more bills I can pay."

"I go as hard as I can to pay the finance company, the repair company and the fuel companies – then there is no money left over so we start all over again."

"I had a holiday once, we went to Tasmania for a week. Haven't been able to do that again, it put me two repayments behind on everything and nearly sent us broke."

"To get paid the right rates would make a big difference. It would mean, instead of driving 30 kilometers and getting paid for 10, I could drive 30 and get paid for the 30. I shouldn't have to work seven days a week to make a living. I worked seven days to make 50 grand. If I got paid the right rates I could have a few days off."

Frank Arcidiaco Long Distance Owner Driver Coopers Plains, QLD

Frank has worked as an owner-driver for 20 years, averaging over 120 000 km per year between North Queensland and Adelaide. He works for various companies carting a wide variety of goods, anything from steel to show rides or seasonal produce, all dependent on the work available, the time of year and where his last job took him.

Frank's concern is with the unsustainable rates paid to drivers.

Frank re-tells countless stories of drivers who are carting for less than fuel money. "They think they're surviving, they're not, and they're just prolonging the agony."

"They (freight companies) tell you 'this is what we're paying for the load', you can try and negotiate, but 9 times out of 10 they'll tell you 'this is the rate, if you don't want it we'll get someone else."

"You take someone who's paying a truck off, and they are being pushed into it. What choice do they really have? Leave it, and not make any money or take it, make just enough to make the next truck payment. But, put yourself further back because you're not covering the running costs of the truck, the maintenance or even your own wage."

"It's so easy to get it and the guys with the newer trucks are blind to start off with. For the first twelve months they don't have to replace much, all the maintenance is covered by the dealer in the sale, then reality hits with replacements and there's not enough money to go around."

Frank drives regularly between Brisbane and Townsville. To cover the running costs of this 1470km trip, Frank estimates a minimum $2 per km rate, or $2940 for the trip one way.

The north bound going rate is between $1700 and $2200. The fuel component alone of this trip is at a bear minimum $1027. However, the return load is paying on average $700, with the best rate of $1100 barely covering the fuel costs let alone maintenance, insurance and wages.

"There are major North Queensland freight operations, divisions of national companies, who are charging the client the same amount to move the freight north as south. Who are not paying enough to cover the costs of the trip for the driver?"

"They're making their profit out of squeezing the drivers"

"Cost recovery is very important, for maintenance of the truck and even basic survival of the person. There are guys out there who can't even afford a feed at a truck stop; they are taking along cookers for their meals on the side of the road."

"Drivers in Queensland should not be treated as any different to a driver in New South Wales. Cost recovery means we can have a sustainable industry for the transport companies and the drivers."

NATIONAL TRANSPORT COMMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Ian Buckingham, of 9 Burke Street, WOODRIDGE in the state of Queensland state as follows:

1. I am employed by Toll North Pty Ltd t/as Toll NQX where I currently drive a B'Double.

2. I have worked in the transport industry for 29 years and depending on everything going well, I expect to continue working in the transport industry as an employee well beyond the next 5 years.

3. The rate of remuneration I currently receive $21.07/hr plus penalties

4. In my experience I have not been offered work at rates that would not cover my fixed, variable and/or labour costs. I have always worked as a direct employee on Union sites.

5. I believe that the rates that I receive are enough to allow me to work in a safe and sustainable manner because I am a company driver and my EBA ensures a good rate of pay.

6. From my knowledge of the industry employees who work under Union Agreements are paid rates that are safe and sustainable but this is not the case for employees who are not covered by Union Agreements.

7. From my knowledge of the industry owner drivers are not always paid rates that are safe and sustainable. Contract Determination helps in NSW but that is not the case everywhere else.

1

8. I believe that there is a need to introduce enforceable safe rates and conditions for employees and owner drivers because we need these regulations to stop employers from pushing 'slave labour'.

9. I am currently paid an hourly rate for local work (including shift penalties) and a cents per kilometre rate for any long distance work that I do.

10. In my experience the cents per kilometre method of payment increases the pressure on drivers to breach driving hours regulation because the more you drive the more you earn.

11. I agree that minimum enforceable requirements are needed to require planning for the safe and legal performance of work because it will place more responsibility on the company to plan out the work.

12. On occasion I have had to work more hours than I felt were safe because of low rates of remuneration when I drove only under cents per kilometre rates for previous employers. In order to earn a decent level of income I had to do numerous long runs and on most trips I felt unable to take a rest break because I felt pressured to continue driving in order to meet the strict deadlines to get back.

13. There is always pressure to accept lower rates in order to obtain and keep work when you are on a cents per kilometre rate because of the threat that if you don't do it cheap they'll find someone else.

14. I have not experienced threats of reduced work or termination of employment unless I work for lower rates because I have always had the protection of the Union. Although I have had my employer threatened to cut overtime if we pushed for a higher rate of pay.

2

15. Whenever I have a dispute with my employer it is normally resolved by first talking to the boss directly and if that doesn't work then bringing in the Union. If the dispute can't be resolved in the workplace it usually ends up in the Australian Industrial Relations Commission.

16. In my experience clients do control my working conditions to a certain extent but my employer does put their foot down on most occasions. Where the clients have the most control is when they open and close which can sometimes lead to unsafe working hours.

17. Being a member of the Transport Workers Union in a highly unionised worksite has had a definite impact on our bargaining position and has allowed us to maintain safe work practices. I have received sufficient training in driver fatigue, driving hours and chain of responsibility from my Union.

18. Personally I do not experience pressure from transport managers, clients, loaders, consigners or anyone else to breach driving hours regulations, load limits or axle weights. In my experience I do am aware that drivers in other companies are pushed where the employer knows that they can get away with it.

19. I agree that the TWU should be able to enforce our rights to safe and sustainable rates, and make sure all parties in the supply chain are complying with safety requirements in the transport industry. I have experienced first hand the differences between working in union and non-union sites and where there is a strong union presence there is less pressure from the employer to engage in unsafe work practices.

IAN BUCKINGHAM
4 September 2008

3

NATIONAL TRANSPORT COMMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Maurice John Cowen of 3 Carnoustie Court Victoria Point Queensland (4165), state as follows:

1. I am an owner driver working currently working in the heavy transport industry under the business name MJ Cowen Holdings Pty Ltd.

2. I have worked in the transport industry as an owner driver for 16 years.

3. I drive an articulated semi trailer with a side lifter.

4. The rate of remuneration I currently receive for the work I perform for my principal contractor at present covers my fixed cost subject to some difficulty of being able to manage competing payments arising from variable costs which are not currently met by the rate I presently receive.

5. At present the rates I currently receive equate to a rate for my labour as an owner driver of about $1000 a week before tax.

6. In my experience I have been offered work at rates that would not cover my fixed, variable and/or labour costs. Not withstanding my present situation I have never chosen to accept this work because it was unsustainable, unfair and not worth it.

7. When I have been offered work on lower rates, it has often been on conditions that had the potential to create an unsafe work environment in which I would

have been forced to drive longer, harder or faster to enable me to make up my earnings.

8. At present I think that the fluctuating fuel prices make it impossible for the rates I currently receive to be enough to enable me to operate a sustainable business.

9. At present I expect to be an owner driver for the next two to five years.

10. In my years as an owner driver I have on occasion been required to work for rates that were not sustainable.

11. From my years as an owner driver and experience in the industry, it is my belief that very few owner drivers are paid rates that are safe and sustainable. In particular, it has been my experience that not being able to recover costs, especially fluctuating cost of living increases (CPI), GST and fuel increase have made this impossible in my time in the industry.

12. I fundamentally believe that it is critical that the Government introduces enforceable safe rates and conditions for owner drivers as a matter of urgency. The current situation of owner drivers being forced out of business or worse still to unsustainable extremes has to stop. There has to be a floor set that cannot be undercut and that operators and agents can't pressure owners drivers into working under unfair rates.

13. I am currently paid on an hourly basis.

14. My present remuneration method does not allow me to recover increases in fuels costs by increasing my rates.

15. In the past I have previously experienced fatigue while driving and continued driving to be able to maintain my earnings.

2

16. It is my experience that a system of paying owner drivers rates per kilometres' significantly increases the pressures on drivers to break the rules to make a living.

17. I believe that a system of minimum enforceable requirements to plan for the safe performance of legal work is a must if we are ever going to make our industry safer.

18. In my previous experience as both an employee and owner driver in the industry I had on occasion had to work more hours than I felt were safe in order to be able to take home a liveable income at the end of the week.

19. When previously working as a employee driver in the industry I have on occasion not taken rest breaks and felt pressured to work long hours in order to maintain my income.

20. I have previously experienced pressures from both employers and principal contractors while both an employee driver and owner driver working in the industry to accept lower rates and wages to keep work. In my experience this pressure has really only been successfully applied in non-union yards. In unionised companies the contractors and employers generally don't get away with pressuring guys to accept lower rates or perform work outside the regulations.

21. In the event of any disputes with a contractor my first reference point has always been the TWU who have worked with me and my fellow drivers to resolve our claims. In most cases these claims are successfully resolved with the assistance of the union.

3

22. The way clients control delivery slot times in our industry is definitely a big problem. You can spend hours waiting around, and if you are not being paid by the hour you're losing money from the time you pull up.

23. In my years in the industry I do not believe that I have ever received enough training or support from regulators, employers or principals in driver fatigue, driving hours and chain of responsibility requirements.

24. From my experience of the transport industry, I believe that the TWU should be able to enforce my rights to a safe and sustainable rate to be able to do my job and recover my costs without having to put myself or my business at risk. The TWU should be able to make sure all parties in the transport supply chain are doing the right thing and the assist regulators and Government improving our industry.

MAURICE COWEN
4 September 2008

NATIONAL TRANSPORT COMMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Bradley Webster of 50 Swallow Street, INALA in the State of Queensland state as follows:

1. I am employed by Linfox Australia Pty Ltd.

2. I have worked in the transport industry for 32 years and I expect to be still working in the transport industry as an employee in 5 or more years.

3. I have never been offered employment with conditions that in my opinion would create an unsafe working environment because I have always chosen to work in fully unionised yards.

4. I drive a B Double and the rate of remuneration that I currently receive is $20.49/hr.

5. I believe that I am currently receiving enough to allow me to work in a safe and sustainable manner however, I have previously been required to work for remuneration which created an unsafe working environment.

6. In 1987 I worked for a company called Carrs Park Refrigerated Transport where I had to work 16 hours a day and drive on country roads all over NSW in order to keep my employers' company afloat.

7. I do not believe that employees who work in non-unionised yards are paid rates that are safe and sustainable because they have to work excessive hours just to earn a liveable wage.

8. I do not believe that owner drivers are paid rates that are safe and sustainable because of factors such as rising fuel costs and increasing loan repayments it is becoming an unscrupulous industry where contractors are paying less in order to lower prices in an attempt to do the work cheaper just to keep themselves afloat.

9. I believe that there is a need to introduce enforceable safe rates and conditions for employees and owner drivers because it is not safe the way that the 'free market' is pushing individuals to earn a living.

10. In my opinion the cents per kilometre method of payment increases pressure on drivers to breach driving hours regulations because the more kilometres they do the more they get paid.

11. I feel that minimum enforceable requirements are needed to require planning for the safe and legal performance of work. Currently drivers are given a task and told to meet it regardless of what it takes.

12. Whenever I have had a dispute with my employer it is usually dealt with through my union at the workplace.

13. On occasions where the dispute has not been able to be resolved at the workplace it has been taken to the Industrial Relations Commission.

14. In my experience my employer has control over my working conditions however the clients that they work for do have a significant amount of influence over my activities on the job.

15. As a Union member I believe that I have received sufficient training in relation to driver fatigue, driving hours and chain of responsibility however I know that many drivers haven't had sufficient training and in some cases haven't received any training at all.

2

16. The TWU should be able to enforce my rights to safe and sustainable rates, and make sure that all parties in the supply chain are complying with safety requirements in the transport industry.

BRAD WEBSTER
4 September 2008

3

Transport Workers Union of Australia
SA/NT Branch

4 September 2008

Nick Dimopoulos
CEO
National Transport Commission
Level 15/628 Bourke Street
Melbourne Vic 3000
Fax: (03) 9642 8922

Dear Mr Dimopoulos

SAFE RATES AND CONDITIONS FOR TRASNPORT WORKERS

The Transport Workers' Union (SA/NT Branch) welcomes the review to identify the means by which safe rates and conditions for owner drivers and employee truck drivers will be implemented.

There is overwhelming evidence from years of reviews, inquiries, and litigation that supports the need for proper safe and sustainable rates and conditions to be established for truck drivers and maintained through proactive client responsibility provisions and adequate expert enforcement to avoid the adverse safety outcomes that are otherwise created. According to the South Australian Department of Transport, Energy and Infrastructure there were 98 serious injuries resulting from heavy vehicle incidents in 2007 in my home state.

Attached are statements from owner drivers and employees showing the connection between low remuneration and a lowering of safety standards, and also demonstrate the pervasive economic power of those at the top of the transport supply chain.

For many years the TWU in all states and territories has been seeking to address the fundamental problems created by the unchecked economic power of major industry clients that places unavoidable pressure on transport operators to bid low thereby limiting the capacity to provide safe and fair rates of remuneration to owner drivers and employees. Competition is good, but destructive competition on the basis of wages and rates is not only unfair but dangerous. Unsafe rates and systems of payment can cause fatigue. As noted in the *South Australian Road Safety Strategy 2003-2010*, 'fatigue is a significant factor in crashes involving heavy vehicles'.

The progressive introduction of chain of responsibility strategies is a positive step but there is still a long way to go to make these strategies truly effective so that they operate to modify industry behaviour. One obvious and necessary measure that must be implemented is safe rates and conditions.

In South Australia and the Northern Territory there have been attempts to establish a system by which safe and sustainable rates and related conditions could be required to be paid to truck drivers. In 2002 a review was conducted into industrial laws in South Australia (the Stevens Review) which noted the

Transport Workers Union of Australia - South Australia/Northern Territory Branch
Branch Secretary - Alex Gallacher
SA: PO Box 137 Welland SA 5007 T: 08 8346 4177 F: 08 8346 8580 E: info@sa-nt.twu.com.au W: www.sa-nt.twu.com.au
NT: PO Box 39721 Winnellie NT 0821 T: 08 8947 2194 F: 08 8947 2217 E: nt@sa-nt.twu.com.au

Transport Workers Union of Australia
SA/NT Branch

growth of independent contractor arrangements, the increased competition in the industry and the need for owner drivers and employees to work longer hours to maintain their incomes. The review also noted the potential adverse consequences of these characteristics for industrial relations and occupational health and safety outcomes and the particular problems created for transport workers.

As a result, the *Industrial Law Reform (Fair Work) Bill 2004* (SA) was submitted to Parliament and in its unamended form contained powers to provided for, amongst other things, the making of awards governing conditions of contract workers (such as truck drivers). Unfortunately, these provisions were removed after the Bill was amended, but the solution identified by the inquiry - being the need to implement safe rates and related conditions - is even more urgent today.

I commend this submission to you and will be available to participate in future hearings.

Yours sincerely,

Alex Gallacher
Federal President
Transport Workers' Union of Australia

Branch Secretary
Transport Workers' Union (SA/NT Branch)

TWU Secure the Future
Transport Workers Union of Australia - South Australia/Northern Territory Branch
Branch Secretary - Alex Gallacher
SA: PO Box 137 Welland SA 5007 T: 08 8346 4177 F: 08 8346 8580 E: info@sa-nt.twu.com.au W: www.sa-nt.twu.com.au
NT: PO Box 39721 Winnellie NT 0821 T: 08 8947 2194 F: 08 8947 2217 E: nt@sa-nt.twu.com.au

NATIONAL TRANSPORT COMMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Charlie Iglio, of 46 Fourth Ave Cheltenham in the State of South Australia, state as follows:

1. I am an owner driver in the milk industry

2. I have worked in the transport industry for 26 years

3. The rate of remuneration I currently receive is not good enough to allow me to operate in a safe and sustainable manner, and has been eroded over the years.

4. In my experience of the industry, owner drivers are not paid safe and sustainable rates. Over the years the rates have been eroded so that we are forced to do more work for less money. There is definitely a need to introduce sustainable safe rates for owner drivers and employees, which would in turn make it safer for other road users.

5. In my experience, due to the hours worked in my industry, I have often felt fatigued whilst driving. In the milk industry drivers do not have rest breaks, as the product has to be delivered within time limits.

6. I have often had to work hours that I felt were unsafe due to the time constraints from customers, who can be quite demanding.

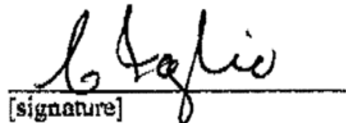
7. I have often experienced pressure from the companies to accept lower rates of pay in order to keep work. I have also experienced threats from companies if I refused to sign an unsafe contract.

1

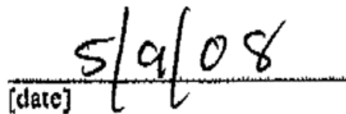
8. If I have a dispute with the companies. I have not had any choice-it has been a "take it or leave it" situation. I have no bargaining power due to the lopsided contracting arrangements I work under.

9. I have never received any training in driver fatigue, driving hours or chain of responsibility.

10. I agree that the TWU should be able to enforce my rights to safe and sustainable rates, and ensure that every party in the supply chain complies with safety requirements.



[signature]



[date]

2

NATIONAL TRANSPORT COMMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Jennifer Selth, of Flat 2, 303 The Esplanade Henley Beach in the State of South Australia, state as follows:

1. I am an owner driver.
2. I have worked in the transport industry for eight years
3. I drive a Toyota utility vehicle
4. The rate of remuneration I currently receive covers my fixed costs, but I find that over time it is getting harder. My variable costs are covered, however as fuel and maintenance costs rise the rates will need to be increased to cover my variable costs. My labour costs are covered for the basic work I do, however it would be nice to be able to make enough money to afford to take a holiday, or to cover public holidays or sick leave as required.
5. In my experience I have been offered work at rates that would not cover my fixed, variable and/or labour costs. I accepted/rejected this work because I cannot afford to accept work that is not sustainable. I have been required to work for unsustainable rates but it is rare as I do not generally accept this work.
6. When I have been offered/performed work on lower rates, it has often been on conditions that have created an unsafe work environment. I have had experience with working conditions that caused me to experience considerable tiredness and fatigue however I continued to work because I needed the money to cover personal and business expenses.

1

7. The remuneration that I receive allows my business to be sustainable, but it is not a profitable business. From my knowledge of the industry, some owner driver rates seem high, but are not profitable for the business. I think it is important to enforce safe and sustainable rates for owner drivers.

8. I am paid under various methods, however none of the payment methods allow me to increase my rate to compensate for increased costs such as fuel. The cents per kilometre method in particular increases pressure on drivers, and encourages drivers to breach driving hours regulations, as the more hours you drive, the greater return you receive.

9. Minimum requirements are need to require planning for the safe and legal performance of work. However, a method needs to be found so that drivers cannot breach the regulations.

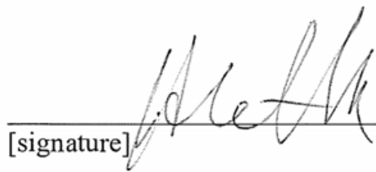
10. In my experience, I have had to work more hours than I felt was safe due to the low rates of remuneration, especially as I had to maintain a sustainable business, and had to ensure ongoing goodwill with the company so as to ensure ongoing work.

11. I have also felt pressure to accept low rates of remuneration to keep the goodwill of the company and to ensure my business remains sustainable. I have experienced veiled threats that unless I accepted low rates, my work would not continue.

12. I have not received any training in driver fatigue, driving hours or chain of responsibility.

13. I have experienced pressure from companies to breach loading regulations. Companies need to be held accountable if they knowingly "suggest" to drivers that they should breach the law. Companies should not be allowed to force contractors to accept load weighs that overload the vehicle.

14. The TWU should be able to enforce the rights to safe, sustainable and profitable rates and make sure all areas of the supply chain are compliant with the law.



[signature]

5.9.08

[date]

3

NATIONAL TRANSPORT COMMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Barry Myers, of 12 Unique Crt Golden Grove in the state of South Australia, state as follows:

1. I am an owner driver working in the milk industry
2. I have worked in the transport industry for 22 years as an owner operator
3. I drive a 5 ton Hino vehicle
4. The rate of remuneration I currently receive covers my fixed costs and my variable costs. However as variable costs rise it has gotten to the point where rates need to be increased. My labour costs are covered but the owner operator takes the hit if rates do not increase.
5. In my experience I have been offered work at rates that would not cover my fixed, variable and/or labour costs, I accepted this work, which involved delivering to small shops that are not covered by rates that are paid, because of pressure from the company I am contracted to.
6. If I had performed this work as an employee I would have received more money for my labour that I did as an owner driver, especially due to the hours worked as an owner operator.
7. The rates that I receive do not allow me to operate a sustainable business as I am forced to work very long hours to make good money.

1

8. In the milk industry, owner operators are paid rates that are sustainable, however as our variable costs rise, the rates will need to increase to cover this.

9. I agree that there is a need for enforceable safe rates and conditions for owner drivers, as this would allow me to not work extreme hours to earn a reasonable income.

10. I am paid a margin per litre delivered rate of pay. This method of payment and the system of contracts in the milk industry do not allow for rates to be increased to cover fuel costs. I am able to put a fuel levy or increase the margin on my own invoice, however.

11. As a self employed milk vendor fatigue is a fact of life due to the hours that we work and the pressure that is applied by the company to deliver to customers on time.

12. I agree that minimum enforceable requirements are needed to require planning for the safe and legal performance of work, but any regulations need to be such that they are not easy to breach.

13. I often have to work excessive hours as an owner operator. If margins were increased it would allow me to employ another driver to work some of the hours, allowing me more down time away from driving.

14. It is a well known fact in the milk industry that drivers do not take rest breaks. This is not due to low rates, but due to the pressure out onto drivers by the companies to make the deliveries on time, and also the demand of direct customers.

15. The clients of the companies influence the way we work. The company also dictates out loading times, and we are being forced to load on Sundays (our only day off) for the Monday morning deliveries.

16. We are often put under pressure from the companies to deliver to small outlets which are unsustainable in order to continue with the larger more sustainable work.

17. I have received threats from the companies to perform more services for customers such as merchandising in order to keep my contract.

18. My bargaining position does affect my ability to maintain safe work practices. Although we have a collective bargaining arrangement, there are too many individuals who want to do their own thing.

19. I do not feel I have received sufficient training in driver fatigue, driving hours and the chain of responsibility. OHS training in the milk industry focuses on the product and has nothing to do with drivers.

20. I agree that the right to safe and sustainable rates should be able to be enforced by the TWU, and absolutely ALL parties in the supply chain should be made to comply as well.

BJ Myers
[signature]

4-9-08
[date]

3

NATIONAL TRANSPORT COMMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Rod Webb, of 39 Duke St Para Hills in the State of South Australia, state as follows:

1. I was formerly an owner driver and am currently an employee of a transport company.

2. I have worked in the transport industry for 28 years

3. I drive an eight ton Hino truck

4. The rate of remuneration I currently receive is adequate to cover my costs, but it could be much better.

5. In my experience as an owner driver, I have been offered work at rates that would not cover my fixed, variable and/or labour costs. I accepted this work because of the pressure that the company placed on me to accept it. The rates of remuneration I received were not enough to allow me to operate a sustainable business. As an employee the remuneration is only adequate.

6. From my knowledge of the industry, I believe that the rates received by owner drivers are not adequate and need to be raised to make businesses sustainable and safe.

7. I believe that there is a real need for enforceable safe and sustainable rates for owner drivers,

1

8. I have experienced considerable fatigue whilst driving, but have continued driving due to company pressure to continue. In the milk industry there are no rest breaks, we have to continue driving until the product is delivered.

9. I believe that the cents per kilometre payment method increases the pressure on drivers to breach driving hours regulations.

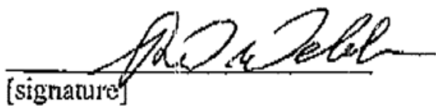
10. I agree that minimum enforceable requirements are needed to require planning for the safe and legal performance of work, but any regulations need to be such that they are not easy to breach.

11. As an owner driver, I have experienced pressure from companies to accept work at lower rates in order to keep the work.

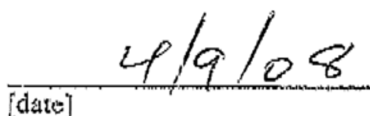
12. The clients of transport companies exert influence on the way I am required to perform my work as then the transport companies exert pressure on drivers like me to perform extra duties, load at whatever their required time is, and to drive at any required hour.

13. My bargaining position has influenced my ability to maintain safe work practices, as we have not been united, and therefore have less bargaining power.

14. I agree that the TWU should have the power to enforce the right to safe and sustainable rates of pay, and definitely make ALL in the supply chain comply with regulations.



[signature]



[date]

2

Jim McGiveron
Branch Secretary

Transport Workers Union
Western Australian Branch
ABN 37 494 080 681

3rd Floor, 82 Beaufort Street Perth Western Australia
PO Box 8497 Perth Business Centre Perth 6849
Phone: **(08) 9328 7477** • Facsimile: (08) 9227 8320

Nick Dimopoulos, CEO
National Transport Commission
Level 15/628 Bourke Street
Melbourne Vic 3000
Fax: (03) 9642 8922

Dear Mr Dimoploulos,

Truck driver pay and remunerations methods

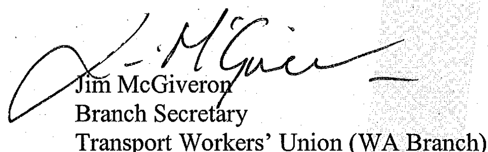
On behalf of our members who work as both owner drivers and employees in the transport industry, the Transport Workers' Union (WA Branch) welcomes the review relating to truck driver pay and remuneration methods. There is still too much carnage on our roads. There is still too much focus on symptoms of the problem rather than the causes.

In 2007 the Western Australian Parliament passed the *Owner-Drivers (Contracts and Disputes) Act 2007 (WA)*. The legislation which applies to the intra state work of owner drivers in Western Australia establishes a Road Freight Transport Industry Council to amongst other things: advise the Minister on the development and review a Code of Conduct; prepare and review guideline rates; and develop, publish and review model owner-driver contracts. It also prohibits the inclusion of certain terms into contracts and includes requirements relating to the timely payment of invoices. The Act, which was denied operation by the former Howard Government but was given effect from 31 July 2008 by the new Labor Government, is an acknowledgment that owner driver protections are an important part of making the industry safer.

However, the industry issues identified in the lead up to the passing of the legislation (such as the downward pressure placed on rates and conditions by those with the economic power in the industry, the clients), are not confined to the contracts entered into by intra state owner drivers. As all of the evidence has shown over the years, it is critical to ensure that safe rates and conditions exist for all employees and owner drivers (including those performing interstate work) and that proper enforcement frameworks and consignor responsibilities exist to ensure that the safe rates and conditions are actually provided to drivers. This review is directed at identifying the legislative approaches that could give effect to safety objective.

On behalf of employees and owner drivers in WA I strongly support this TWU submission and attach for your consideration statements from employees and owner drivers confirming the need for these steps to be urgently taken.

Yours sincerely,



Jim McGiveron
Branch Secretary
Transport Workers' Union (WA Branch)

National Transport Commission Inquiry into Safe Rates and Conditions For Employees and Owner Drivers

Witness Statement

I, Bruce Butler TWU member in Western Australia, state as follows:

I am currently employed on a union agreement that pay safe rates and allow me to recover my costs.

I have worked in the transport industry for more than 5 years.

In the past I have been offered - and accepted out of necessity, working conditions that I know were unsafe. I accepted them because I needed to feed my children.

In some cases drivers are paid safe rates, in many cases however employers and principle contractors try to make as much profit as they can by reducing their labour costs.

I personally know of many drivers who's extremely high running costs make it difficult to stay afloat.

They cut a lot of corners to reduce their costs to keep their trucks on the road.

A system of enforceable safe rates would mean drivers could pay for the maintenance that their trucks need.

I am currently paid hourly however I have been paid trip rates (by the km) in the past.

In my experience kilometer rates mean drivers work harder and faster which induces fatigue and increases the chance of accidents.

I have personally experienced fatigue because I was being paid per kilometer. My only response however was to keep driving to make more money.

Safe enforceable systems that require planning of trips mean that drivers would be less likely to breach the law because it would be more easily identifiable.

In the past I have worked well past a 'safe' point because I simply needed the money.

Disputes with my employer are currently resolved through my union and the EBA's dispute resolution procedure.

Many drivers however do not have access to either a union or a good EBA and get bullied, harassed and intimidated into driving longer than they know is right.

Although I'm technically an owner driver and an independent contractor I don't have much control over my work.

My clients dictate terms and conditions of each trip and just follow.

In the past this has amounted to pressure to breach driving hours and speed limits.

If the TWU was able to enforce safe and sustainable rates across the industry I think we'd be much safer.

NATIONAL TRANSPORT COMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Andrew Carey, of WA, state as follows:

1. I am an owner driver in Western Australia operating a pocket road train and currently work for Stevenson Logistics. I have worked in the transport industry for over 20 years and an employee and an owner driver. I still expect to be business as an owner driver in 5 years time.
2. Currently the rate I receive for the work I perfom covers my fixed and variable costs but does not cover my labour costs. I believe I am just able to operate a sustainable business.
3. In my experience I have been offered work at a rate that does not cover my costs. I rejected the offer of this work. I decided I would not work for anyone if I was going to go broke.
4. From my knowledge of the industry not all owner drivers are paid rates that are safe and sustainable. For this reason and to protect owner drivers I believe there is a need to introduce enforceable safe rates and conditions.
5. I also agree that minimum enforceable requirements are needed to require planning for the safe and legal performance of work.
6. In my experience I have also been threatened with reduction in work and termination of contract unless I performed work for a lower rate. I have refused to work under these circumstances. Blokes I know are pressured to accept lower rates in order to obtain or keep work.
7. This pressure has come from transport managers, clients, loaders and consignors.
8. I believe the TWU should be able to enforce safe and sustainable rates and conditions with all parties in the supply chain.

Andrew Carey
2 September 2008

NATIONAL TRANSPORT COMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, N.G. Deanne, of WA, state as follows:

1. I have worked in the transport industry for 35 years and currently work for Toll West as an owner driver. I drive a Kenworth Double Road Train, a highly specialised piece of equipment. I am currently paid on a cents per kilometre rate.
2. I believe that this method of payment increases presure on drivers to breach driving hours regulation.
3. The rates I currently receive for the work I perfom does not cover my fixed, variable and labour costs and do not allow me to operate a sustainable business. From my knowledge of the industry this is not an uncommon practice. I believe in 50% of cases drivers are paid rates that do not cover their running costs.
4. I have previously been offered work at rates that in my opinion would create an unsafe working environment, I did not accept this work.
5. If I performed the same work as an employee I would be receiving a far higher wage than I am curently.
6. I agree there is a need to introduce enforceable safe rates and conditions for owner drivers and that all parties in the supply chain comply with safety requirements – it should not be the sole responsibility of the owner drivers.

N.G. Deanne
2 September 2008

"A"

SMT:PM:

<WITNESS RETIRED

<MARTIN GERARD IFFLAND(2.50PM)
SWORN AND EXAMINED

5

BRITT: Q. Your full name is Martin Gerard Iffland?
A. Correct.

Q. Your work address is 162 Goulburn Street, Sydney?
10 A. Yes.

Q. You are the executive director of the New South Wales Road Transport Association?
A. I am.

15

Q. You have sworn an affidavit for these proceedings on 6 April 2004?
A. I have.

20 Q. Do you have a copy of that affidavit in the witness box?
A. Yes.

BRITT: I tender that affidavit.

25

WALTON VP: Exhibit 239.

EXHIBIT #239 AFFIDAVIT OF MARTIN GERARD IFFLAND DATED 6 APRIL 2004 TENDERED, ADMITTED WITHOUT OBJECTION

30

<CROSS-EXAMINATION

HATCHER: Q. Can I take you to paragraphs 18 and 19 of your affidavit on page 4.
35 A. Yes.

Q. There you have the award history?
A. I do.

40 Q. I suggest that history you have given is wrong at least insofar as there is a permanent casual ratio in the award that has been there since 1972?
A. What I say in my affidavit is correct. I disagree with you. The permanent casual ratio is in respect to
45 casual employees. That has been there since the early 70s. My affidavit does not say that. It refers to part-time. I stand by what I say in my affidavit.

Q. I suggest that is also wrong in that the part-time
50 aspect of that ratio was introduced in 1989 when part-time division was first introduced into the award as a result of the structural efficiency process?
A. To the best of my recollection it is 1996 and 1997 as I say in the affidavit.

55

Q. You examined the award?
A. Yes.

.22/09/04 1456 IFFLAND XX (HATCHER)

SMT:PM:

Q. You were not with the Association in 1996 or 1989?
A. I was not.

Q. Can I suggest this is the position. In 1989 part-time
5 provisions for non-driving classifications were introduced
for the first time?
A. My recollection of seeing the documents that were
presented to me, which I thought were correct, it was 1996
and 1997.
10

Q. Did you examine the award provisions applying in 1989?
A. I did - I think it was 1989 I saw it come in. To my
recollection it is as I say in my affidavit.

15 Q. I put the position to you part-time work for non-
driving classifications was first introduced in 1989, and
that was when the ratio was notified to include part-time
employees. The only change which occurred in 96 is part-
time provisions were extended.
20 A. I may be incorrect on that but I think I am right.

Q. In paragraph 21 you talk about what you say are
benefits for casual employees which are similar to those
received by permanent employees?
25 A. Yes.

Q. That is to say casual employees in all sectors of
industry, they receive a loading which is said to be in
lieu of a range of benefits which are applicable to
30 permanent employment?
A. That is correct.

Q. That is all you are saying?
A. Yes, that is what I am saying.
35

Q. In paragraph 22 you say that "the members of the
Association held the view that many drivers and other ...
casuals"?
A. Yes.
40

Q. When you say "members of the Association ... view"
this is simply based upon opinions which your
organisation's members have expressed to you?
A. Yes, many members of the Road Transport Association
45 from time to time over a number of years have expressed
that to me, yes.

Q. It is simply a recounting of what some employee
members of your organisation have said to you about what
50 they think the position is with casuals?
A. What they think, but what their drivers tell them they
are telling me.

Q. It is what they tell you?
55 A. Correct.

Q. It is not based on any survey or analysis of what
employees think?

.22/09/04 1457 IFFLAND XX (HATCHER)

SMT:PM:

A. That is correct.

Q. In any event, you would not dispute the proposition by the same token there would be a proportion of casual
5 employees who would want permanent employment?
A. I do not dispute that.

Q. Is this the case? You seem to be indicating in your affidavit, particularly with respect to driving work?
10 A. At what paragraph?

Q. Paragraphs 22 and 11. There seems to be a theme in your affidavit that there is a shortage of truck drivers in the industry?
15 A. It is more than a theme. I expressly say it, and it is a fact.

Q. You say the position is in the transport industry that there is a lack of drivers to perform work in the
20 industry?
A. Staff labour generally, staff generally, but it is more acute in drivers and logistics areas.

Q. Do I take it, with some possible exceptions, for the
25 most part most casuals who want permanent work in the industry can probably get it?
A. Yes, probably, as a generalisation.

Q. Because of this shortage which you say exists insofar
30 as the Labor Council's claim may involve conversion of casuals to permanents that is something that would be welcomed by employers because they are looking at ways in which they can increase the number of their permanent work force?
35 A. It is partly right. I do not want to say yes. Because of the industry I have to clarify that because the industry has seasonal aspects, cyclical aspects, they can get work at short notice, they need casuals to fill those business requirements. It would not be practical to have
40 full-time or permanent weekly employees on stand-by in case they got a new contract or extra work or for some seasonal reason.

Q. This is the position, the transport industry needs a
45 pool of casuals that it can access to meet intermittent and fluctuating work?
A. Yes.

Q. It want to suggest by the same token there are some
50 casuals who do not have intermittent work, they do regular work week in and week out?
A. Yes, but I have to qualify that again. It may be implied in your question it is five days a week. That is not necessarily so. There are some people in that
55 category. There are other people in the industry who make work one, two or three days casual a week.

.22/09/04 1458 IPPLAND XX (HATCHER)

AFM:TJT:12

HATCHER: Q. In either case there is a capacity to employ such employees either on a full time or part time permanent basis?
A. No if somebody is working one or two days a week you
5 can't employ that person as a part timer under the present award because there is a minimum of twenty hours a week.

Q. You are aware of the capacity to enter into part time work agreements under the Industrial Relations Act?
10 A. Yes.

Q. And businesses if they wanted to could employ persons working one day a week on a permanent part time capacity under the IRC- ?
15 A. I am not aware of that.

Q. If you are not aware of it it is not something you have been able to educate your members about?
A. I am not in an education role for my members.
20

Q. To the extent you say there is a labour shortage in the transport industry a greater use of permanent employment would encourage career development in the industry which would retain people in the industry, that
25 is right, isn't it?
A. Yes.

Q. Part of the problem the industry has is it doesn't retain enough employees because it doesn't offer them
30 enough career options?
A. The industry offers career options, I don't know if I would agree with your open ended question, I think you should qualify that, there are career options now in the industry. If there are even more career options that would
35 be a good idea but I am not conceding there is no career path now.

Q. Insufficient career options, do you understand that?
A. Yes.
40

Q. To have a proper career option in the transport industry you need permanent employment, you can't expect them to build a career in the transport industry on casual employment, can you?
45 A. It is more difficult.

Q. In paragraphs 23 to 25 you have a brief discussion about the use of labour hire in the transport industry?
A. Yes I do.
50

Q. I take you to 25. Do I take it for the most part your members take steps to ensure where they use labour hire the labour hire employees are paid at the award rate if the award rate is used at the site or the enterprise
55 agreement rate if there is an enterprise agreement on site?
A. That is my understanding.

.22/09/04 1459 IFFLAND XX (HATCHER)

Q. I take it that would be, so far as the Road Transport Association is concerned, its preference as to the way in which labour hire employees should be paid, is that right?
A. That is what I say paragraph 25.

5

Q. And the association takes that view because situations where labour hire employees are working at the same site as employees paid at lower rates of pay have been known in the past to start industrial disputes?
10 A. It has.

Q. You might recall a recent example in December last year. P&O Transport Port Botany?
A. No, I don't recall that.

15

Q. In paragraph 26 you begin to discuss the use of contractors and contracting out in the transport industry. No doubt you have had an opportunity since swearing your affidavit to read the Labour Council's amended claim?
20 A. Yes.

Q. You would understand that the type of use of contractors which you discuss in paragraph 26 would not fall within the definition of contracting out work as
25 contained in the Labour Council's amended claim?
A. No, that is not right. I disagree with you.

Q. Which type of contracting out referred to in paragraph 6 would fall within the scope of the Labour Council's
30 claim as amended?
A. I don't understand your question I am sorry.

Q. In paragraph 26 you give examples of the way in which contractors are used in the transport industry, you see
35 that?
A. Yes.

Q. What I am putting to you is that the various usages of contractors which you describe in paragraph 26 would not
40 fall within the definition of contracting out work in the Labour Council's amended claim?
A. No, I think it does.

Q. By reference to the types of contracting out you
45 describe in paragraph 26, which of those do you say would fall within the scope of the amended claim?
A. I thought all of them would be.

Q. All ?
50 A. Yes.

Q. You say it is often used to cover shortages in employment requirements?
A. Yes.

55

Q. Although this is generally related to a shortage of trucks and available drivers?
A. Not necessarily all of that.

AFM:TJT:12

Q. That is where you have work which can't be serviced by the transport companies existing work force and truck fleet?
5 A. Yes.

Q. So you get someone else in to help you handle the overload?
A. Yes.
10

Q. You understand that is not covered by the claim?
A. I would have thought it is arguable, I am not sure I think it could apply to it.

15 Q. (Shown exhibit 2 page 12). You will see there is a definition of contracting out work in the second half of the page (v) and the requirements through different criteria differently met?
A. Yes.
20

Q. This overlay situation which we have been discussing would not fall within that definition there, would it?
A. It might, what does an ongoing requirement mean? I don't know.
25

Q. It couldn't possibly meet B or C could it?
A. Existing employees of the employer? Why couldn't it? I think it could apply to B.

30 Q. By definition your example was talking about overload work which could not be handled by the existing employees?
A. What is in my mind, and there are quite a few scenarios, but one would be a transport company has a contract with a company A and it is to do a certain amount
35 of work. They get an additional contract for the same supplier or client, the same A, to do more work, that is the same employer and they haven't got the capacity to service that additional contract with the additional employer. It might be X tonnage or 2X, twice as much, so
40 they have to contract that additional work out. I would have thought it could apply in that circumstance.

Q. How would criteria B and C be met?
A. The same employer, employees of the same employer.
45

Q. How do you say in that circumstance - ?
A. C - because the client, the customer A in my example, might have existing people doing part of that work.

50 Q. You are talking about the application of the clause, not to the transport company but to the client?
A. Both I would have thought.

Q. Lets deal with the transport company itself, contracts
55 work out itself because it can't deal with all its work?
A. Yes.

Q. That won't fall within the definition, will it?

AFM:TJT:12

A. No, not likely.

Q. The scenario you have raised is not the transport company contracting out work but the client contracting
5 out work to the transport company?
A. Yes, to the same transport company.

Q. There we are talking about not how it applies to the transport company but to the client?
10 A. I would have thought it applies to the transport company too.

Q. Why?
A. Because they have an existing contract with that
15 company.

Q. In paragraphs 27 and 28 you talk about what you say would be the consequences for the contracting out of work by principal contractors to logistic companies?
20 A. Yes.

Q. By logistic companies you mean transport companies who run an integrated service which may involve some element of ware housing, something of that nature?
25 A. Yes.

Q. And you say the application of the claim in that circumstance would have some adverse consequences?
A. Yes, it may.
30
Q. You say that in that scenario the clause would impose requirements of the industry to notify and deal with another union, in this case the National Union of Workers?
A. Yes.
35
Q. Can I suggest in the case where a client contracts out work to what you describe as a logistics company the obligation for consultation with the Labour Council arises not with respect to the logistics company but with the
40 client?
A. No, I haven't read it that way, I didn't understand it that way.

Q. How do you say the claim operates to require the
45 entity receiving the contract, the logistics company, to deal with the union representing displaced employees?
A. That was my understanding. That is my reading of the amended claim.

50 Q. And the figures you expressed are based upon that reading of the claim?
A. Yes.

Q. In a case where company X contracts out work and that
55 contracting out causes some of its employees to be displaced and the work is contracted out to logistic company Y, you understood the claim as requiring logistic company Y to consult with the union which represents the

.22/09/04 1462 IFFLAND XX (HATCHER)

displaced workers, did you?
A. Yes.

Q. Can I suggest that is a misreading of the claim, that
5 the claim imposes the obligation on the company
contracting out not the contractor itself. Do you accept
that?
A. No, I don't. You say I am wrong, I accept that.

10 Q. Assume what I say about the claim is correct, does
that deal with the issue you raise in paragraph 27?
A. If you are correct.

Q. It does. You concede that logistic companies to a
15 large extent already have dealings with the NUW in a range
of contexts?
A. Yes.

Q. And companies like First Fleet and Toll have at
20 various work locations enterprise agreements with the NUW?
A. I understand so.

Q. In paragraph 27 the last sentence you make reference
to demarcation issues arising, can I suggest there is
25 nothing in the application which would have any bearing on
the issues?
A. It is good that you say that, I am concerned it would.

Q. How do you say it does?
30 A. Because of the consultation and the possibility of
raising those issues. If you say I am wrong, that is good
news, we don't want demarcation disputes.

Q. What part of the claim do you say gives rise to
35 demarcation?
A. The notification requirement.

Q. How does that give rise to a demarcation issue?
A. Because of the two unions involved.
40
Q. What does that mean?
A. Because most of the larger medium size transport
companies have enterprise agreements with the Transport
Workers Union and some of them have agreements with the
45 NUW as well for some sites and some circumstances.

Q. There is nothing in the claim which has any bearing on
that fact one way or the other, is there?
A. I would have thought so on the consultation but -
50
Q. A simple requirement to consult simply means you
consult with employees affected by contracting out and
whatever union affects them?
A. That is how we do it in practice.
55
Q. That wouldn't give rise to demarcation, would it?
A. That simple fact by itself no.

AFM:TJT:12

Q. It is a furphy raised by you?
A. No.

Q. It is a red herring?
5 A. No.

Q. In paragraph 28 you talk about what you say is the burden of complying with the consultation procedures in the contracting out aspect of the Labour Council's claims?
10 A. Yes.

Q. You have expressed the view you do in paragraph 28 on the assumption the consultation provisions of the Labour Council's claim would apply to the contractor as well as
15 the entity which is contracting out the work?
A. The transport company, as well as the client too, yes.

Q. If I ask you to assume you are wrong about that and the consultation procedure only applies to the client who
20 is contracting out work in the first place, that would deal with the issue you raise in paragraph 28?
A. No. Even if it is the client the wholesaler or manufacturer, the fact it would affect my members because of the twelve weeks notice requirement, in the real world
25 out there it can happen a lot quicker than that. Sometimes they only get a week or two notice to pick up a new contract, not twelve weeks plus which seems to be envisaged in the amended application.

30 Q. If as a result of the claim the clients now say sorry, we want to take the contract but take it up in twelve weeks from now, that has no consequence whatsoever to the transport company ?
A. They are likely to miss out on the work. Instead of
35 being in a position to take up the work next week or a short time period like that which is often the case in the industry they wouldn't be able to take it up. They would have to wait another so many weeks.

40 Q. They would have the operation ready when the contract is ready to start?
A. There would be a lost contract, lost opportunity.

Q. In the real world when contracts are let which fit
45 within the Labour Council's definition, those type of contracts usually have a very long lead time attached, not one or two weeks?
A. I wouldn't say "usually", sometimes, sometimes a long lead time, sometimes short.
50

Q. It would always be the case clients if they let out a contract with consequences for their own employees, they would consult and try to ameliorate the consequences?
A. A new contract?
55

Q. If a client chooses to contract out work for a contract company so that it would have consequences for the existing employees they would, as a matter of

.22/09/04 1464 IFFLAND XX (HATCHER)

AFM:TJT:12

practice, consult with employees and try and ameliorate the consequences for their own employees and that would take time?
A. That is often the case, yes.

5

Q. In paragraph 29 you say, "It would seem a natural conclusion that principal contractors may decide that the additional burdens make outsourcing of work an unprofitable exercise". Are you talking about the
10 consultation provisions in the claim?
A. Just generally the claim, but the consultation becomes too hard and uncommercial.

Q. A proposal to contract out work in a way which would
15 affect existing employees would become uncommercial because the requirement to consult for a long period is ludicrous?
A. A certain period is twelve weeks in your amended application and that is a very long time in the commercial
20 world.

Q. But not when you are talking about letting out transport contracts which tend to run for some years - ?
A. Not necessarily.

25

Q. Where they have the consequence of displacing existing employees and usually involve a considerable investment in terms of capital of buying trucks, in that context it is usual there would be a lead time before the contract was
30 let out, that is right, isn't it?
A. I agree there is a lead time, I don't agree with your assertion it may be twelve weeks plus as a usual situation.

35 Q. The type of contracting out work defined in the Labour Council's application, it is silly to say you let out a transport contract which would require the transport company to get the trucks and the workers ready with a lead time of two weeks, that is absurd?
40 A. It does happen.

Q. It does happen?
A. Yes.

45 Q. That is not a contracting issue which would fall within the definition of contracting out work in the union's claim, is it, contracting out work, displacing existing employees?
A. It may involve that.

50

Q. You are talking about contracting out to transport companies with short term work requirements that can't be met by the clients existing work force, aren't you?
A. Generally, yes.

55

Q. In paragraph 30 you express concern about the flow on effects to contract determinations and contract agreements applying to owner drivers?

.22/09/04 1465 IFFLAND XX (HATCHER)

A. Yes.

Q. Have you had the opportunity to read the transcript of evidence given by Mr Forno in these proceedings?
5 A. No, I haven't.

Q. If I ask you to assume the claim does not and is not intended to have any consequences for contract agreements and contract determinations?
10 A. I can read what your application is but I am concerned about flow on of what may happen in the future, what precedent may be set here.

Q. Assuming the Labour Council's position is the claim is
15 not intended to flow on to contract agreements and contract determinations, would that affect your position?
A. If you are giving that undertaking that is not going to happen, then I will be happy.

20 Q. Go to your summary paragraph 31?
A. Yes.

Q. "The proposals would impose restrictive practices on to employers, customers and operators who use particular
25 areas of the transport industry". Are you talking about the consultation requirements of the contracting out provision?
A. Yes, as well as the casual provisions too.

30 Q. What is the problem with the casual conversion provision?
A. After six months employment having the right to become a permanent employee.

35 Q. What is wrong with that?
A. I gave you some examples before - I am sorry the microphone is buzzing in my ear.

Q. I was taking you to the second sentence where you
40 referred to restrictive practices. You said one aspect was the consultation procedures which we have discussed and you said another was the casual provisions, casual conversion provisions?
A. Yes.
45

Q. How do you say casual conversion provisions would operate as a restrictive practice for the transport industry?
A. Because we have quite a few, I can't quantify, we use
50 casuals a fair bit, seasonal, cyclical and business requirements requiring an employee after a certain period of time to have the right to be employed as a weekly employee would be difficult in the business. There is some casuals, as I said earlier today, that only work one day a
55 week or maybe two days a week for a period of time, one day, a Friday or Saturday or only every Saturday. How do you convert that person into a weekly employee?

AFM:TJT:12

Q. You don't know any way that can be done?
A. That is right.

Q. Is there any other issue of conversion apart from that
5 scenario that would cause a problem?
A. Those sort of scenarios would cause a problem.

Q. Apart from the one or two day a week example, are
there any other scenarios which would cause problems for
10 the industry?
A. No, that type of example would cause a big problem for
the industry.

Q. That is the only example?
15 A. That type of example.

Q. Where they work one or two days a week and they can't
be accommodated?
A. That is correct, or work for three or four days a week
20 for some period, and maybe work once every two weeks,
there are some people like that I understand or a couple
of days a month, things of that nature which I understand
is regular, systematic, I don't understand where it starts
and finishes in terms of regular and systematic. Catch
25 that and that example and the example area are of a
concern and still are.

Q. The second area of concern is more infrequent work,
you have uncertainties whether the casual conversion
30 requirement would apply to that scenario?
A. You said infrequent work, I don't know the definition
of infrequent or regular and systematic. In practice what
does that mean? I can read what it says here. I am
concerned about the scenarios impacting adversely on the
35 industry.

Q. That is simply a case about being unclear as to what
scenarios the proposed divisions apply to?
A. Yes.
40

Q. Presumably if that was made clearer then subject to
the other issue you raised earlier about part time
employees the industry could easily accommodate that, is
that right?
45 A. Not easily accommodate.

Q. Could accommodate?
A. Could accommodate.

22/09/04 1467 IFFLAND XX (HATCHER)

HATCHER: Q. Could accommodate?
A. Could accommodate.

Q. In paragraph 33 you say that there is a prospect of
5 transport turning into a cutthroat industry. Do you see
that?
A. Yes.

Q. Can I suggest to you that people who know something
10 about the industry would regard it already as being a
cutthroat industry, that's right, isn't it?
A. I wouldn't agree with that. It's a fairly robust
industry.

15 Q. Intensely competitive?
A. Certainly intensely competitive. Very competitive.

Q. And it is an industry which is featured by business
failures because of unprofitable contracts?
20 A. There's business failures, yes.

Q. There's instances of companies, because of intense
competition, entering into contracts which turn out to be
unprofitable?
25 A. Yes.

Q. There are - particularly in regional areas - companies
which, in order to obtain work, breach the relevant awards
in various ways?
30 A. Unfortunately I am aware of that. We would like that
to stop. I don't know of any of my members who breach
awards as you say.

Q. And there are companies, in order to make the books
35 balance, who have their drivers engage in breach of
driving safety laws. That happens, doesn't it?
A. Yes. People have been prosecuted in the courts at
times for that and there should be more of it because it
shouldn't occur.
40
Q. We know it does occur?
A. It does occur.

Q. And those are, I suggest to you, features of what is
45 and could be fairly described as a cutthroat industry?
A. A robust and very competitive industry.

Q. Can I suggest to you that there is nothing in the
Labor Council's claim which would, as you say, turn the
50 industry into a cutthroat industry? To the contrary, many
of the aspects are designed to create a level playing
field. What do you say about that?
A. I'm glad you say that. I hope that's correct.

55 Q. How do you say the claim would turn the industry into
a cutthroat industry?
A. I feel that it would put more pressure on some of the
companies to stay competitive or become competitive and in

MAG:BB:6

those sorts of scenarios, non-compliance with certain laws goes out the window sometimes and I don't want that to occur.

5 Q. It is already occurring, isn't it?
A. It is already occurring in some sectors but it's not in the majority of industry but that's certainly occurring.

10 Q. Far from doing that, the Labor Council's claim - especially as it seeks to require the payment of no inferior wages and conditions to labour hire employees and upon contracting out of work occurring, will serve to create a more level playing field in the industry
15 consistent with the way your Association would prefer the industry to operate?
A. As I say in my affidavit, my members pay the award rate or enterprise agreement rate now.

20 Q. And your reputable members take that approach but unfortunately they have to compete with some other employers who choose not to take that approach?
A. Yes.

25 Q. And sometimes don't even pay award wages at all, that's correct, isn't it?
A. Yes.

Q. And it would help establish a fairer level playing
30 field in the industry if that marginal element in the industry were required to do what reputable members of your association prefer to do with respect to the payment of labour hire, contractors - that's right, isn't it?
A. In theory, yes, but if they are already disobeying
35 industrial instruments now, why won't they continue to disobey any industrial instruments or another industrial regulation?

Q. That's a fair point because there's people flouting
40 the law already and there's no reason to think that would change in the future, is that your approach?
A. I don't support that.

Q. No, I'm not suggesting you do?
45 A. Yes, it may occur, yes.

Q. And that element will continue to exist, regardless of the outcome of the Labor Council's claim, that's right, isn't it?
50 A. Yes.

Q. In paragraph 34 in the last sentence you say "If the proposals" - that is the Labor Council's claim - "are successful, I am of the view that the transport industry
55 should be exempt from the application of the proposals"?
A. Yes.

Q. Can I suggest to you that in your affidavit with

.22/09/04 1469 IFFLAND XX (HATCHER)

Safe Rates - Inter- relational Provisions Between Industrial and Road Transport Law Clauses

Proposed changes to Model Law

30 Duties on employers, prime contractors and operators

(1) This section applies to:

(a) the employer of an employed driver of a regulated heavy vehicle; and

(b) the prime contractor of a self-employed driver of a regulated heavy vehicle; and

(c) the operator of the regulated heavy vehicle if the driver is to make a journey for the operator.

(2) The employer, prime contractor and operator each must take all reasonable steps to ensure that her or his business practices:

(a) will not cause the driver to drive while impaired by fatigue; or

(b) will not cause the driver to drive while in breach of his or her work/rest hours option; or

(c) will not cause the driver to drive in breach of another law in order to avoid driving while impaired by fatigue or while in breach of his or her work/rest hours option.

(d) will not result in a breach of any *law* that is concerned with the relationship between remuneration and safety.

Penalty: the penalty for a severe risk offence.

Note 1 Section 23 explains what ***reasonable steps*** are.

Note 2 Section 27 explains what ***impaired by fatigue*** means.

Note 3 Section 35 explains what a ***work/rest hours option*** is.

Note 4 Section 106 explains how an offence is specified as a ***severe risk offence***. Section 110 sets out the penalties for severe risk offences.

(2A) In subsection (2), ***business practices*** means the practices of the employer, prime contractor or operator in running her or his business, and includes:

(a) the operating policies and procedures of the business; and

(b) the human resource and contract management arrangements of the business; and

(c) arrangements for managing safety.

(3) The employer must not cause the driver to drive the vehicle unless:

(a) the employer has complied with subsection (2); and

(b) the employer, after making reasonable inquiries, is satisfied that the scheduler has complied with section 31.

Penalty: the penalty for a substantial risk offence.

Note Section 106 explains how an offence is specified as a ***substantial risk offence***. Section 110 sets out the penalties for substantial risk offences.

(4) The prime contractor and operator each must not cause the driver to drive the vehicle, or enter into a contract or agreement with the driver to that effect, unless:

(a) the prime contractor or operator has complied with subsection (2); and

Transport Workers' Union of Australia Page 1

(b) the prime contractor or operator, after making reasonable inquiries, is satisfied that the scheduler has complied with section 31.

Penalty: the penalty for a substantial risk offence.

Note Section 106 explains how an offence is specified as a ***substantial risk offence***. Section 110 sets out the penalties for substantial risk offences.

(5) An offence against subsection (2), (3) or (4) is an offence of absolute liability.

(6) For the purposes of this clause *any law* includes an industrial instrument.

32 Duties on consignors and consignees

(1) This section applies to:

(a) the consignor of goods for transport by a regulated heavy vehicle; and

(b) the consignee of goods for transport by a regulated heavy vehicle.

(2) The consignor and consignee each must take all reasonable steps to ensure that the terms of consignment (e.g. delivery times) will not result in, encourage or provide an incentive to the driver to:

(a) drive while impaired by fatigue; or

(b) drive while in breach of his or her work/rest hours option; or

(c) drive in breach of another law in order to avoid driving while impaired by fatigue or while in breach of his or her work/rest hours option.

Penalty: the penalty for a severe risk offence.

Note 1 Section 23 explains what ***reasonable steps*** are.

Note 2 Section 27 explains what ***impaired by fatigue*** means.

Note 3 Section 36 explains what a ***work/rest hours option*** is.

Note 4 Section 106 explains how an offence is specified as a ***severe risk offence***. Section 110 sets out the penalties for severe risk offences.

(3) The consignor and consignee each must take all reasonable steps to ensure that the terms of consignment (e.g. delivery times) will not result in, encourage or provide an incentive to the employer of an employed driver, prime contractor of a self-employed driver or operator of the regulated heavy vehicle to cause the driver to:

(a) drive while impaired by fatigue; or

(b) drive while in breach of his or her work/rest hours option; or

(c) drive in breach of another law to avoid driving while impaired by fatigue or while in breach of his or her work/rest hours option.

Penalty: the penalty for a severe risk offence.

Note 1 Section 23 explains what ***reasonable steps*** are.

Note 2 Section 27 explains what ***impaired by fatigue*** means.

Note 3 Section 36 explains what a ***work/rest hours option*** is.

Note 4 Section 106 explains how an offence is specified as a ***severe risk offence***. Section 110 sets out the penalties for severe risk offences.

(4) The consignor and consignee each must take all reasonable steps to ensure that the conduct of their business undertaking will not result in, encourage or provide an incentive to the employer of an employed driver, prime contractor of a self-employed driver or operator of the regulated heavy vehicle:

(a) to cause the driver to drive while impaired by fatigue; or

(b) to cause the driver to drive while in breach of his or her work/rest hours option; or

(c) to cause the driver to drive in breach of another law in order to avoid driving while impaired by fatigue or while in breach of his or her work/rest hours option.

(d) to breach any *law* that is concerned with the relationship between remuneration and safety.

Penalty: the penalty for a severe risk offence.

Note 1 Section 23 explains what ***reasonable steps*** are.

Note 2 Section 27 explains what ***impaired by fatigue*** means.

Note 3 Section 36 explains what a ***work/rest hours option*** is.

Note 4 Section 106 explains how an offence is specified as a ***severe risk offence***. Section 110 sets out the penalties for severe risk offences.

(5) The consignor and consignee each must not cause the driver to drive the vehicle, or enter into a contract or agreement to that effect, unless:

(a) the consignor or consignee has complied with subsection (2) and (3); and

(b) the consignor or consignor has complied with any relevant provision of an *any law* that is concerned with the relationship between remuneration and safety; and

(c) in the case of an employed driver — the consignor or consignee, after making reasonable inquiries, is satisfied that:

(i) the driver's employer and the operator of the driver's vehicle have each complied with section 30; and

(ii) the scheduler has complied with section 31; and

(d) in the case of a self-employed driver — the consignor or consignee, after making reasonable inquiries, is satisfied that:

(i) if the driver has a prime contractor— the prime contractor of the driver has complied with section 30; and

(ii) the scheduler has complied with section 31.

Penalty: the penalty for a substantial risk offence.

Note 4 Section 106 explains how an offence is specified as a ***substantial risk offence***. Section 110 sets out the penalties for substantial risk offences.

(6) The consignor and consignee each must not make a demand that affects, or that may affect, a time in a schedule for the transport of the consigned goods and that may cause the driver to:

(a) drive while impaired by fatigue; or

(b) drive while in breach of his or her work/rest hours option; or

(c) drive in breach of another law to avoid driving while impaired by fatigue or while in breach of his or her work/rest hours option.

Penalty: the penalty for a severe risk offence.

Note 1 Section 23 explains what ***reasonable steps*** are.

Note 2 Section 26 explains what ***impaired by fatigue*** means.

Note 3 Section 35 explains what a ***work/rest hours option*** is.

Note 4 Section 106 explains how an offence is specified as a ***severe risk offence***. Section 110 sets out the penalties for severe risk offences.

(7)Subsection (6) does not apply if the consignor or consignee, before making the demand:

(a) has complied with subsections (2) and (3); and

(b) is satisfied, after making reasonable inquiries, that the making of the demand will not cause a person to fail to comply with section 31 (Duties on schedulers).

(8) An offence against subsection (2), (3), (4) or (6) is an offence of absolute liability.

(9) For the purposes of this clause *any law* includes an industrial instrument.

NATIONAL TRANSPORT COMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Ken Clinton, of Gosford NSW, state as follows:

1. I am employed by Linfox performing work for Woolworths. I have worked in the transport industry for 30 years and hope to be in the industry until I retire.
2. In my expereince I have been offered work with conditions that created an unsafe driving environment. I accepted this work because I was desparate at the time and needed to take care of my family. I would work all day from 8am making local deliveries and freight pick ups, my truck would need to be loaded out by 7pm and I would drive 5 hours to Tarcutta for a midnight changeover. I would then turnaround and drive home, arriving about 5am. Getting about 2 or 3 hours sleep a night. The faster I did this the more time I got at home to sleep.
3. One night while performing this work I can recall pulling off the road in the middle of nowhere because I was going to sleep and didn't want to have an accident. I went to sleep as soon as the truck stopped. When I got back to the depot I was abused because the freight was late. I quit because of that.
4. In my opinion, many employee drivers are paid rates that are unsafe. Drivers who are paid low rates are forced to do more trips to earn a decent living. Those who are paid on kilometre rates are the ones pushing the hours up. Kilometre rates are the worst method of payment because you've got to do the kilometres to get your wage. The quicker you do the work the quicker you get home or the quicker you get another job. Because you are not being paid for the hours you'll find guys stretching to get the work done.
5. In my expereince clients have a huge influence over the way we perform our duties. I find that Woolworths pushes delivery window. Each time we miss a delivery window our company is fined $500, even if it is because the warehouse has gotten behind in the unloading. This puts pressure on my employer to make sure the job gets done and inturn puts pressure on us. We do what we can to get the work done, to keep the contract and our jobs.
6. I support indusry wide safe rates and conditions for employees and owner drivers. Owner drivers are desparate for work. I see them arrive on site two hours early just to make sure they get the days work. Because they are paid per kilometre they have to get as much work as possible to cover their increasing costs. Companies take advantage of this desparation and put

reduce rates whereever they can, they are always trying to find someone who will do it cheaper. This pressure doesn't threaten my employer to remain competitive it threatens our ability to maintain safe conditions.

Ken Clinton
4 September 2008

Submission to Senate Employment, Workplace Relations and Education Legislation Committee

INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

25 July 2006
The Transport Workers Union of Australia

NSW/ACT State Secretary Tony Sheldon | Vic/Tas State Secretary Bill Noonan | Qld State Secretary Hughie Williams | WA State Secretary Jim McGiveron | SA/NT State Secretary Alex Gallacher

Submitted by: Transport Workers' Union of Australia

Organisation: Transport Workers' Union of Australia

Address: Quinn House
31 Cowper Street
Parramatta NSW 2150

Phone: 02 9912 0788
Fax: 02 9689 1844
Email: tony.sheldon@nsw.twu.com.au

Emailed to: **John Carter**
Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
eet.sen@aph.gov.au

Submission to Senate Employment, Workplace Relations and Education Legislation Committee

INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

Contents

A. EXECUTIVE SUMMARY ---------- 5

B. TWU REPRESENTATION OF OWNER-DRIVERS ---------- 10

C. THE UNIQUE STATUS OF OWNER-DRIVER SMALL BUSINESSES ---------- 11

D. ADDRESSING VULNERABILITY - MINIMUM STANDARDS AND PROTECTIONS ---------- 12

Current Arrangements for Owner-Drivers in New South Wales ---------- 13
- Chapter 6 of the Industrial Relations Act 1996 (NSW) ---------- 13
- Contract Determinations ---------- 17
- Contract Agreements ---------- 17
- Settled Transport Industry Arrangements in NSW ---------- 18

Current arrangements for owner-drivers in Victoria ---------- 19
- Owner Drivers and Forestry Contractors Act 2005 (VIC) ---------- 19
- Addressing the information imbalance ---------- 20
- Joint Negotiations ---------- 21
- Code of Practice ---------- 21
- Preventing unfair business practices and unconscionable conduct ---------- 22
- Dispute Resolution ---------- 22

Proposed arrangements for owner-drivers in Western Australia ---------- 23
- Road Freight Transport Industry (Contracts and Disputes Bill) 2006 (WA) ---------- 23

Queensland and the Australian Capital Territory ---------- 25

D: COST RECOVERY, STABILITY AND SAFETY ---------- 26

Cost Recovery and Stability ---------- 26

Safety ---------- 28

NSW/ACT State Secretary Tony Sheldon | Vic/Tas State Secretary Bill Noonan | Qld State Secretary Hughie Williams | WA State Secretary Jim McGiveron | SA/NT State Secretary Alex Gallacher

E: PRODUCTIVITY AND COMPETITION REMAIN STRONG --------------------------------31

G: UNFAIR CONTRACTS THE REGULATION MAKING POWER --------------------------32

Unfair Contracts --32

Regulation Making Power --33

G: CONCLUSION --33

ATTACHMENT "A" --35

Details of Owner-Driver Minimum Standards in NSW --35

Current Arrangements for Owner-Drivers in NSW --36

Contract Determinations --36

Contract Agreements --36

Dispute Resolution --37

Associations of Employing Contractors and Associations of Drivers & Carriers ---------------------37

Remedies --37

Case Studies Illustrating Value of the Scheme --38

ATTACHMENT"B" --46

STATEMENT OF JAMES MCGIVERON --47

Submission to Senate Employment, Workplace Relations and Education Legislation Committee

INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

A. EXECUTIVE SUMMARY

1. The Transport Workers' Union of Australia ("TWU") represents the interests of thousands of small businesses in the form of owner-drivers. This representation has a history stretching back to the 1920s. Around 80-85% of these owner-drivers operate as corporations, and it is estimated that the remaining 15-20% are sole traders or partnerships.

2. Owner-drivers are single vehicle operations the vast majority of which perform work exclusively for a single transport operator (principal contractor). Owner-drivers are often highly dependent upon those with whom they contract. Owner-drivers are price takers in the market place. This dependence leads to inequality of bargaining power and the associated potential for exploitation.

3. The Minister's announcement of 3 May 2006 and his second reading speech regarding the Bill recognises that owner-drivers, like outworkers, have particular vulnerabilities which merit specific protection. In his second reading speech the Minister said this about the Owner-Driver exemptions:

   > "The Principal Bill will maintain existing legislation in NSW and Victoria with respect to owner-drivers in the road transport industry.
   >
   > While the Victorian legislation has only recently been passed, in NSW there has been bi-partisan support for special arrangements for owner-

drivers. These arrangements include allowing owner-drivers to bargain collectively with transport operators, and have minimum rates of pay and goodwill compensation set by a tribunal. These provisions in State legislation will remain, given the special circumstances of owner-drivers in having to operate within very tight business margins because of the large loans they have to take out to pay for their vehicles."

Accordingly, the Bill expressly preserves owner-driver provisions in NSW and Victorian Legislation which help make the owner-driver small business model economically viable and safe.

4. In New South Wales and Victoria there is a degree of basic regulatory protection for owner-drivers which minimises exploitation in a manner which does not hinder competition and which, in fact, contributes tangible productivity and efficiency benefits to transport companies and the transport sector as a whole.

5. Importantly, the protections include provisions aimed at ensuring that owner-drivers are at least able to cover their costs. This is in the public interest not only as it contributes to a stable, sustainable and productive industry but because it operates against the now well established link between inadequate systems of remuneration and road safety concerns such as driver fatigue and the use of artificial stimulants. Government commissioned inquiries at both state and federal levels have called for additional regulatory protections to address road safety in the transport industry.

6. In New South Wales benefits are delivered, in large measure, through the many and settled enterprise and industry sector arrangements established through the New South Wales system, arrangements which have the support of the industry. There are over 170 enterprise specific arrangements relating to owner-drivers. The regulatory protections in New South Wales have received consistent industry-wide and bipartisan political support. Indeed, the

only significant additions to the protections since their inception were enacted by a Liberal government.

7. The Victorian system is based on a small business model that establishes a framework of protection for owner-drivers to prevent unconscionable conduct and the use of unjust terms in contracts. This legislation draws on the consumer protection provisions in Part V of the *Trade Practices Act 1974 (Cth)*, the *Fair Trading Act 1999 (Vic)* and the *Retail Leases Act 2003 (Vic)*. This model is supported by the Victorian Transport Association (the main peak body for transport operators in the state), and is currently being implemented by a Transport Industry Council comprising amongst others, representatives of the Victorian Employers' Chamber of Commerce and Industry (VECCI) and the Australian Industry Group.

8. In Western Australian and the Australian Capital Territory the broad nationwide base of industry support is again seen in the industry consultation processes that have led to legislation of the same character imminent in Western Australia and tabled in the ACT. The Bill as presently drafted will override the operation of those pending State laws. In Queensland there are currently legislative provisions utitlised by owner-drivers.[1]

9. The TWU notes with concern that section 10 of the Independent Contractors Bill confers a broad regulation making power which makes express reference to the NSW and Victorian exemption provision.[2]

10. The Unfair Contracts provision of the Independent Contractors Bill envisages a system which in a number of key respects is inferior to the current NSW and Queensland provisions which it will override.[3]

---

[1] See paragraphs 23-59, below, for detail.
[2] See paragraph 81, below, for detail.
[3] See paragraph 80, below, for detail.

11. The Workplace Relations Amendment (Independent Contractors) Bill contains provisions relating to sham independent contracting arrangements. The Union is concerned that the provisions guarding against misrepresentation of the nature of the relationship are undermined by a defence which operates as an "out clause." In addition it is concerned that those supposedly protective provisions are too narrowly confined when they refer to representations made to an "individual."

12. Accordingly, **the TWU calls upon the Committee to recommend the following** in relation to the Bills:

    (i) Retention of the exemption provisions preserving the operation of the NSW and Victorian schemes, contained in subsection (2) of section 7 of the Independent Contractors Bill;

    (ii) Expansion of the exemption provisions of the Independent Contractors Bill to permit the continued operation of Queensland laws and to permit future State and Territory Laws to provide protections for owner-drivers against the vulnerabilities identified by the Minister in his 3 May press release and second reading speech. In this regard the Union in particular notes the pending enactment in Western Australia and the tabled legislation in the ACT.

    (iii) Amendment of the Unfair Contracts provisions of the Independent Contractors Bill to:

        (a) Permit the unfair contracts provisions of the NSW and Queensland Acts to continue to apply to actions brought by or on behalf of owner-drivers; and/or

        (b) Provide the Court with the **express** power to do the following:

- Make an order for compensation;

- Make an order with respect to a contract which has come to an end; and

- Examine and make an order with respect to a contract that has become unfair through the conduct of a party or parties to the contract or through the operation of the contract for some other reason.

(iv) Amend the Workplace Relations Amendment (Independent Contractors) Bill to:

- Clarify the meaning and effect of the reference to "individual" in section 900 (1) and 901(1) to ensure that the provision is not circumvented simply by the person making the representation to another person or entity as opposed to an "individual"; and

- Delete subsections (2) of both section 900 and section 901 or Amend paragraphs (a) of each of those subsections to ensure that the belief held by a person when making the representation was reasonable in all of the circumstances and by deleting paragraphs (b) of both of those subsections.

B. TWU REPRESENTATION OF OWNER-DRIVERS

13. The TWU has been the subject of some uninformed and therefore unjustified criticism in respect of its representation of owner-drivers. Owner-drivers have been choosing the TWU to represent their interests since the 1920s. Nationally, a significant number of TWU members (around 30%) operate as small businesses in the form of owner-drivers. Around 80-85% of these businesses are corporations; the remainder operate as sole traders or partnerships.

14. By virtue of this long representational history the TWU has established a unique understanding of the commercial and operational realities within which these small businesses operate and has taken on the corresponding unique responsibility of assisting owner-drivers to become and/or remain viable small business entities. It follows that the TWU supports the right of people to choose to constitute their work arrangements in the form of businesses contracting their services rather than performing work pursuant to a contract of service (that is, a contract of employment) - provided that such arrangements are genuine and legitimate and are not employment contracts dressed up as something else to avoid the payment of standard minimum industrial entitlements.

15. The TWU is committed to protecting the important benefits which flow from appropriately maintained small business structures in the transport industry. The TWU has, with the widespread support of industry, most recently sought that owner-driver vulnerabilities be addressed through legislation in Victoria, and substantially similar pending legislation in Western Australia and tabled in the ACT.

16. On behalf of the owner-drivers that are a core component of its constituency, the TWU makes this submission regarding the *Independent Contractors Bill*

2006 and the *Workplace Relations Amendment Bill (Independent Contractors) Bill 2006.*

C. THE UNIQUE STATUS OF OWNER-DRIVER SMALL BUSINESSES

17. It is important for the committee to acknowledge at the outset that independent contracting arrangements in fact are best viewed as a continuum of differing arrangements ranging from genuinely independent business arrangements which determine their own priorities and have some market power through to arrangements like the owner-driver model, which although providing tangible productivity and efficiency benefits has many of the hallmarks of exploitable dependency. Accordingly, some of these small businesses have attracted, and ought continue to attract, a degree of regulatory protection. Owner-drivers are a discrete category of small business, vulnerable to exploitation because of the dependent nature of the contractual relationships pursuant to which they perform work.

18. The very real efficiencies attaching to the owner-driver – principal contractor model flow not from the independence of the relationship but from precisely the opposite. Ease of entry via financing arrangements leading to high levels of debt encourage owner-drivers to establish and/or maintain highly dependent relationships with principals for whom they work necessarily hard in order to service debt and make a living for themselves and their families.

19. The degree of practical independence that most owner-drivers exercise in the day-to-day operation of their businesses is minimal. For example, the overwhelming majority of owner-drivers - almost without exception:

   - perform work for a single transport operator;

- perform work at the behest of that operator in accordance with very specific priorities (including specific delivery/pick-up priorities) set by the directors and management of that operator;

- are usually required to hold themselves available to perform work for a single contractor thus rendering them unavailable for anyone else;

- take direction from that operator on a day to day basis as if they were employees of the operator;

- are required to paint or otherwise mark the vehicles they provide with the operator's colours and/or insignia;

- have little or no power to set price, rather they take the price they are given; and

- operate with very tight margins

These are indicators not of independence but of dependency and reliance.

20. This dependence brings with it vulnerability. The necessity for owner-drivers to receive a steady stream of work to meet their financial commitment on their truck and, in addition, earn a decent living for themselves and their families places the principal contractor in a very powerful position.

D. ADDRESSING VULNERABILITY - MINIMUM STANDARDS AND PROTECTIONS

21. On 24 January 2005, the Workplace Relations and Workforce Participation Committee stated:

"Entrepreneurship is an important part of the Australian culture and many Australians choose to work as independent contractors. It's vital to support that flexibility, but also *to ensure that proper protections are in place that clarify obligations such as health and safety, tax arrangements and other entitlements* for both contractors and those employed through labour hire agencies."

22. The statement acknowledges the need for flexibility with appropriate protection acknowledging owner-drivers are in a uniquely vulnerable position. In New South Wales and Victoria (with legislation pending in Western Australia and the ACT) that vulnerability has been acknowledged and addressed in a manner that provides appropriate, well-directed protections with minimal intrusion upon productivity, resulting in a net positive result for the public interest in terms of road safety and maintenance of thousands of owner-driver businesses.

Current Arrangements for Owner-Drivers in New South Wales

Chapter 6 of the Industrial Relations Act 1996 (NSW)

23. Chapter 6 of the *Industrial Relations Act 1996 (NSW)* is characterised by the following:

- Enforceable, minimum standards providing he certainty of at least cost recovery;

- The prevention of unfair or destructive competition by preventing undercutting (below the cost recovery minima) across a site or industry sector;

- The capacity for incentive systems to flourish above the minima, either on an individual or enterprise level;

- Protection against arbitrary termination of the contract;

- Quick, no cost access to the Industrial Relations Commission for the resolution of disputes about goodwill (amongst other matters), including the frequent successful oversight of contract transfer upon changeover of head contract to which the work relates;

- The capacity to recover goodwill where termination of the contract has resulted in that goodwill being unfairly extinguished (a provision enacted under a state liberal government).

24. The New South Wales model flowed out of a Commission of inquiry set up by the state Liberal government in the late 1960s. The inquiry concluded that there was "an overwhelming case" for the regulation of owner-drivers. (Industrial Relations Commission of New South Wales *Report to the Honourable EA Willis on Section 88E of the Industrial Arbitration Act 1940-1968 in so far as it concerns Drivers of Taxi-cabs, Private Hire Cars, Motor Omnibuses, Public Motor Vehicles and Lorry Owner Drivers* 23 February 1970, Chapters 2 and 30). That is, the section 88E inquiry recognised that owner-drivers were contractors but their dependent nature nevertheless justified a minimal form of industrial regulation. It was overwhelming because,

> *"Owner-drivers have been in the past exploited as to rates and subjected to oppressive and unreasonable working conditions. The truth is that an owner-driver with one vehicle (on which there is a heavy debt load) and no certainty of work is in a weak bargaining position and the transport industry is not lacking in operators prepared to take the fullest advantage of his vulnerability" (Industrial Relations Commission of NSW 1970 at paragraph 30.17).*

25. **Chapter 6 does <u>not</u> apply to genuinely independent transport companies** that trade with a variety of clients and that have the power to set the price of the services they provide. Rather it applies to single vehicle owner-drivers who are tied to and dependent upon one company.

26. Chapter 6 of the *Industrial Relations Act 1996 (NSW)* is a model of proven sustainable balance between freedom to contract and encouragement of "entrepreneurship" on the one hand, and, on the other, proper protection for those choosing to contribute to Australian working life through independent contracting arrangements. Accordingly, it has, for nearly 30 years, had the support of workers, transport operators, industry bodies and both Labor and Liberal governments.

27. Transport operators (principal contractors) and their industry representatives have traditionally supported the current system as it provides transport operators, some of whom engage hundreds of owner-drivers, with logistical and economic certainty. The NSW Road Transport Association ('NSWRTA') is the main transport employer body in the state. For decades it has represented the principal contractors who engage owner-drivers. The NSWRTA is consistently on the record as supporting the NSW system regarding owner-drivers. NSWRTA opposition to the owner-driver protections is very recent. It is at odds with its Victorian and West Australian equivalents and it coincides with recent and pending prosecutions of NSWRTA members, particularly in the long distance sector, for breaches of OH&S standards and underpayment of wages.

28. The traditionally broad industry support has flowed through to effect bipartisan political support. For example the owner-driver scheme was examined by the Liberal government in the early 1990s and retained. In retaining the system, the Liberal government expanded it by the introduction of non-union collective bargaining for owner-drivers and the plugging of the Motor Lorry Loophole through amendment of the Act's definition of 'contract of carriage'. The system was thereby greatly broadened under the Liberals from coverage of

only those contracts of carriage performed by motor lorries to all those performed by means of motor vehicle or bicycle. The system was further expanded by the same government in 1994 to include the capacity to recover, in appropriate circumstances, the often-significant goodwill payments made upon entry into businesses.

29. Liberal/Coalition support for such owner-driver protections was not equivocal, for example:

> "The Government appreciates the financial predicament of lorry owner-drivers who have made a large investment in such premiums and then find their contracts terminated without compensation."
> *[The Hon Virginia Chadwick. Hansard 12/05/94. Industrial Relations (Contracts of Carriage) Amendment Bill.]*

> "When I was an engineer I had a great deal to do with lorry owner drivers and grew to understand and have affection for them. They are salt of the earth, very hard working people, who often find themselves in extraordinarily difficult commercial circumstances. That is a longstanding facet of the industry."

> "I took the time to meet some of the wives of the lorry owner drivers. Once could only be absolutely struck by the terrible circumstances in which they found themselves. Whilst one could take the view that in a hard, commercial, laissez faire world it is "buyer beware" and they should have known better, I took the view that the circumstances were unjust and unfair. This Parliament ought to be able to help them."
> *[The Hon E.P Pickering. Hansard 12/05/94. Industrial Relations (Contracts of Carriage) Amendment Bill.]*

> "Lorry Owner Drivers make this country work."
> *[The Hon D. J Gay. Hansard 12/05/94. Industrial Relations (Contracts of Carriage) Amendment Bill.]*

> "New South Wales has engaged in industrial regulation of contracts of bailment and carriage for many years. The reasons have been mainly social and have reflected concerns to prevent exploitation of individual drivers who have been regarded as having little bargaining power."
> *[The Hon K. Chikarovski. Hansard 21/05/1993. Industrial Relations (Contracts of Carriage) Amendment Bill.]*

"I have every sympathy for the hard working drivers. I know that the Minister for Industrial Relations and Employment and all members of the Government share that degree of sympathy."
[Mr Malcolm Kerr MP (Member for Cronulla). Hansard 21/04/1994. Industrial Relations (Contracts of Carriage) Amendment Bill.]

30. The following is a sample of the measures which enjoy broad support and are aimed specifically at mitigating the vulnerabilities owner drivers[4]:

Contract Determinations

31. Part 2 of Chapter 6 allows for the creation and protection of minimum standards through contract determinations. Contract determinations create a set of minimum contracting standards established most often in consultation with industry groups and most commonly with the NSWRTA.

32. Contract determinations regulate only the basic conditions of engagement. <u>They do **not**, for example, contain employee-like entitlements</u> such as overtime, penalty rates or minimum hours of work, and there is no entitlement to leave (maximising the availability of the truck) compensation for which is contained in the minimum rate structure. Rather determinations are incentive and mode-based and aim to provide basic minima upon which parties can negotiate *viable* contracting arrangements.

33. This minimalist approach ensures that the measures are not of such a nature as to unduly hinder the efficiency and productivity of the independent contract arrangements while providing the framework necessary to sustain the owner-driver small business model.

Contract Agreements

[4] For a detailed summary of the each of the provisions and their rationale see attachment A to this submission.

34. Transport operators and groups of owner-drivers **(whether or not represented by the Union)** may enter into arrangements as to the terms and conditions best suited to their particular enterprise ('contract agreements'). These agreements set the desired agreed provisions for a given term, thereby allowing both operator and owner-drivers greater commercial certainty and operational efficiency.

Settled Transport Industry Arrangements in NSW

35. Through the NSW system owner-drivers and transport operators currently enjoy (and for much of the last 30 years have enjoyed) settled arrangements that have led to productive, efficient and harmonious execution of the transportation function. These arrangements have had industry-wide acceptance and are contained in a variety of industrial instruments at both the industry sector (contract determinations) and enterprise level (contract agreements).

36. At present there are over 170 contract agreements between groups of owner-drivers and specific enterprises and over 25 contract determinations, covering industry sectors including:

- General transport/freight forwarding;
- Couriers;
- Concrete;
- Quarries;
- Waterfront;
- Excavated Materials;
- Waste Collection;
- Breweries;
- Taxis; and

- Car Carriers

Current arrangements for owner-drivers in Victoria

Owner Drivers and Forestry Contractors Act 2005 (VIC)

37. In February 2003 the Victorian State Government established an Inquiry to be conducted by Industrial Relations Victoria into the Owner Driver and Forestry Contractor sectors. The terms of reference required an examination of the nature of the industry, how laws applying in Victoria compare to other relevant laws in Australian jurisdictions, and whether there is any disadvantage incurred by owner drivers employed under a contract for services, as compared to drivers engaged under a contract of service. The terms of reference therefore covered very similar territory to that covered by the Federal Inquiry into independent contracting and labour hire arrangements which resulted in the report, *Making it Work*.[5] The notable difference between the two inquiries was the focus on owner-drivers in the Victorian inquiry and the analysis of the relative disadvantage experienced by owner-drivers in Victoria vis-à-vis employee drivers.

38. The Victorian *Report of Inquiry*, *Owner Drivers and Forestry Contractors* found significant disadvantage exists amongst owner-drivers, and that legislative intervention was necessary to remedy this disadvantage. The *Report of Inquiry* noted that owner drivers:

    - are price-takers;

    - have experienced declining rates over the last decade, and increasing business overhead costs;

[5] *Making it Work,* House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, August 2005, AGPS, Canberra.

- experience significant periods of unpaid waiting time;

- often experience flat or 'all-in' rates that do not compensate for labour, let alone delivering any profit on significant capital investment or reward for risk;

- experience a significant information imbalance compared with those who engage them;

- are able to be terminated with no or minimal notice, but are unable to effectively challenge termination of their contracts on the basis of harshness or unfairness.[6]

39. As a result of the *Report of Inquiry*, the Victorian Parliament passed the *Owner Driver and Forestry Contractors Act 2005 (Vic)*. The main elements of the Victorian Act are as follows:

Addressing the information imbalance

40. The Victorian Act seeks to address the information imbalance found to exist between owner drivers and hirers by implementing several requirements:

    a. The provision of an information booklet to the owner driver prior to the entering of a contract;

    b. The provision of a published rates and costs schedule to the owner-driver prior to the entering of a contract. The rates and cost schedule identifies the typical fixed and variable overhead costs for that class of contractor and the base hourly and casual rate that would typically

[6] *Report of Inquiry, Owner Drivers and Forestry Contractors*, Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, Chapter E.

apply to that class of contractor if they were performing substantially similar work as an employee;

c. contracts must be recorded in writing and state the guaranteed number of minimum hours of work or income the owner-driver will receive (if any), the rates to be paid and the minimum period of notice applicable.

41. These requirements are directed at establishing or promoting full disclosure of information to market participants in order to allow rational decision making to occur. This is an essential pre-requisite in order for a market to function effectively, and also represents a touchstone of the neo-classical economic system.

Joint Negotiations

42. An important provision of the Victorian legislation is the creation of the capacity for owner-drivers to appoint a negotiating agent to negotiate on behalf of an owner-driver or group of owner-drivers for the purposes of making, varying or terminating a contract. This provision enables owner-drivers to more efficiently negotiate contracts with a mutual hirer, and utilise the services of representative organisations such as the TWU in order to achieve fair contractual outcomes.

Code of Practice

43. The Victorian Act provides for the establishment of Codes of Practice in relation to owner-drivers and hirers. The Code of Practice for the transport industry is being developed by the Transport Industry Council which includes representatives of the TWU, the Victorian Trades Hall Council, and representatives from the Victorian Transport Association (VTA), Victorian Employers' Chamber of Commerce and Industry (VECCI) and the Australian Industry Group.

44. This industry-based consensus approach is yet more evidence of the widespread support for measures which ensure the viability of owner-drivers and the owner-driver small business model. The TWU has always been of the view that a consensus industry approach is bound to foster more productive and representative arrangements in the industry.

Preventing unfair business practices and unconscionable conduct

45. The prevention of unfair business practices is central to the purpose of the Victorian Act. The Act adopts many of the well-understood tests enunciated in the *Trade Practices Act 1974 (Cth)* and the *Fair Trading Act 1999 (Vic)* in relation to unconscionable conduct. It also introduces several new tests relating directly to owner-drivers' contracts, namely a comparison of the amount for which the owner driver could have supplied the services as an employee, and whether or not the contract allows for increases in fixed and variable overhead costs on a regular and systematic basis.

46. These additional tests provide a framework in which both hires and owner-drivers can understand whether or not their conduct in relation to a contract represents unfair business practices. A good example would be a contract that provides for no review of fixed and variable costs, such as fuel, on a regular and systematic basis.

Dispute Resolution

47. One of the key foundations of the Victorian Act is the establishment of a low-cost, easily accessible dispute resolution procedure under the auspices of the Victorian Small Business Commissioner. The Act provides for parties with a dispute to make an application to the VSBC for a mediation over the dispute, and to date the VSBC has experienced a settlement rate of around 85 to 90%

of disputes through this process. Previously, parties in dispute needed to either 'create' a jurisdiction in the Australian Industrial Relations Commission by involving employees, or seek remedy in a Court over a breach of contract which invariably resulted in excessive costs to both parties with unpredictable outcomes.

48. In the event a dispute is not resolved in the VSBC, either party may obtain a certificate to proceed to the Victorian Civil and Administrative Tribunal in order to have the dispute arbitrated.

49. It is significant that the Standing Committee on Employment, Workplace Relations and Workforce Participation that produced the *Making it Work* Report in 2005 considered that there were advantages to the approach taken under the Victorian Bill, and went on to make Recommendations that picked up many elements of the now Victorian *Owner Drivers and Forestry Contractors Act 2005 (Vic)*.

50. Accordingly, the TWU submits that the Victorian legislation provides important and necessary legislative protection for owner drivers tailored to the circumstances and practices in Victoria, and that the exemption from the *Independent Contractor's Bill 2006 (Cth)* for the Victorian legislation is appropriate and well-founded, particularly considering the broad-based employer and Union support for the legislation.

Proposed arrangements for owner-drivers in Western Australia

Road Freight Transport Industry (Contracts and Disputes Bill) 2006 (WA)

51. In 2004, the Western Australia road freight industry faced enormous financial strain. Principal contractors were struggling to stay afloat in an open market where rates had been driven down. These rates were considered unsafe and unsustainable by many owner-drivers increasingly facing bankruptcy.

52. In 2004 the WA government recognised the dire circumstances facing the owner-drivers and established a working group to address the formulation of safe sustainable rates. In addition the Western Australian government committed to the drafting of the Road Freight Transport Industry (Contracts and Disputes) Bill. That Bill is now in the final stages. **The TWU understands that** the Minister for Planning & Infrastructure has instructed her department to have the Bill ready for tabling in August 2006.

53. The state government has informed the TWU it will make a submission to the Senate Inquiry into the Independent Contractors Act (ICA). This submission will alert the Committee to its concern that the Independent Contractors Act could render ineffective, the Road Freight Bill's (RFB) ability to deal with unfair contracts, dispute resolution and the setting of guideline safe and sustainable rates.

54. The RFB is part of a suite of imminent legislation aimed at improving the safety and viability of the WA road freight transport industry. The Bill is partly based on Victoria's Owner-Drivers and Forestry Contractors Act 2005 which the Independent Contractor Act does not override.

55. In summary the RFB would:

- Provide owner-drivers with security of payment.
- Require principal contractors to pay owner-drivers a sustainable rate enabling them to operate safely.
- Establish a Road Freight Transport Industry Council which would establish a Code of Conduct including guideline rates and other provisions regulating the relationship between the parties.

- Create a low-cost, conciliation focused, Road Freight Transport Industry Tribunal to hear disputes between the parties regarding breaches of contracts, the code of conduct and payments.

- Allow owner-drivers to appoint bargaining agents (Union or Non-Union, including an industry body).

56. The RFB is not deeming legislation – It is set to be cast in the commercial context and is aimed at resolving contractual disputes and minimising them by ensuring the application of sustainable, viable minimum conditions.

57. In summary, the WA laws aim to:
    - Help avoid disputation and disruption to commerce in Western Australia.

    - Together with other laws about to be introduced in WA, such as Change of Responsibility legislation, will reduce road trauma and the WA road toll which is currently being impacted upon by road crashes involving heavy vehicles.

    - Enable thousands of struggling WA small owner-driver businesses to be become financially sustainable, viable and safe operations

    - Improve the health and well-being of WA truck drivers who currently suffer poorer health than community standards.[7]

Queensland and the Australian Capital Territory

58. In Queensland, the industry has sought to address vulnerability through legislative provisions allowing owner-drivers in certain circumstances, after an appropriate determination of the matter, to access protections under the

[7] See also the statement of James McGiveron, TWU National President, which is attachment B to this submission.

Industrial Relations Act 1999 (QLD) and also through the unfair contracts provisions of that Act.

59. Tabled in the ACT parliament is the *Fair Work Contracts Bill*. This bill, like the Victorian legislation and the WA bill is set in the commercial context and adopts a similar approach.

D: COST RECOVERY, STABILITY AND SAFETY

Cost Recovery and Stability

60. The primary purpose of these legislative and pending legislative arrangements is the payment of rates which, as a minimum, allow drivers to recover all costs of the truck and labour. That is, they operate to prevent exploitation to the extent of not even recovering everyday costs thereby fostering: sustainability of the owner-driver; the stability of the transport operator and industry; and the safety of industry participants and general road-using public.

61. Ease of entry into the independent contract driver market has caused a prevalence of owner-drivers with little unencumbered financial backing and a high level of financial vulnerability. The low start-up costs, but quick acquisition of large debts in the form of hire-purchase agreements or bank loans, means that there is a prevalence of owner-drivers relying on the current guarantee of at least cost recovery to support themselves and their families.

62. In the absence of minimum standards, the defining aspect of the vulnerability suffered by owner-drivers, being inequality of bargaining power, dominates resulting in unsustainable terms and conditions of engagement.

63. The Victorian *Report of Inquiry* found that road and rail transport drivers had the fourth highest rate of business related bankruptcies.[8] Business related bankruptcies were defined as being one in which an individual's bankruptcy is directly related to his or her proprietary interest in a business. This statistic reveals both the high level of financial insecurity experienced by owner-drivers as well as the impact on safety that the financial stress of a small business produces.

64. Further to, and flowing from this financial vulnerability of owner-drivers, is a practice known as '<u>destructive competition</u>'. In transport this occurs where competing transport operators win commercial contracts by charging prices that are below actual cost. Without at least minimal protections operators are able to force upon owner-drivers rates that do not even cover vehicle and labour costs. This has flow-on effects for employee drivers, whose employers are then encouraged to cut their terms and conditions in order to compete. As Bray succinctly concluded in his 2002 report regarding the NSW scheme,

> *"There was market failure in road transport when contract carrier rates were unregulated because the price mechanism did not effectively regulate the supply and demand of contract carriers. Furthermore, this market failure had significant and adverse consequences for industrial relations, occupational health and safety, road safety and quality of service" (Bray et al 2002, p49)*

65. Harking back to the prevalence of destructive competition practices prior to the scheme's introduction in 1979, the Secretary of the Furniture Removalists' Association said in 2002,

> *"Mechanisms such as minimum rates (and Chapter 6) that put a floor under the income of drivers, whether employees or contractors, and*

[8] Note 2, 60.

provides them with basic entitlements are necessary to prevent a return to the bad old days of the 1970s" (cited Bray, Macdonald and Waring NCP Review of Chapter 6 of Industrial Relations Act Employment Studies Centre, University of Newcastle 2002 p20).

66. Failure to ensure at least cost recovery leads not only to jeopardising the owner-driver business model and a stable market within which operators can compete fairly, but leads to the proliferation of unsafe systems of remuneration by putting downward pressure on pay rates in the transport industry as a whole. This is not in the public interest because inadequate systems of remuneration lead drivers to work faster and/or longer in order to survive.

Safety

67. It might seem an obvious statement to make but the remuneration of owner-drivers must be inclusive of and adequately compensate for the fixed and variable costs of running the business. The legislative schemes outlined above each have mechanisms for ensuring that this occurs. Where it does not occur there is a significant impact on the operator's capacity to maintain vehicle to a safe and legal standard and there is pressure for drivers to work too fast or too long in pursuit of an adequate return. This is a scenario which afflicts owner-drivers in the long-distance sector.

68. Owner-drivers operate as a significant component of that sector. The Australian Transport Council Study *Heavy Vehicle Safety and Safe Sustainable Rates for Owner Drivers*, May 2003 indicated that:

    a. 60% of businesses operating in the road freight transport industry have no employees;

b. Own-account, non-employing businesses only accounted for 11% of the income earned in the industry, yet represent the majority of businesses;

The average profit before tax in 1999 – 2000 of these businesses was $20,637 which was lower than the average earnings paid to employees in the lowest paid segment of the employed business group.

69. The National Transport Commission Information Paper *Driver Fatigue – A Survey of Long Distance Heavy Vehicle Drivers in Australia, September 2001* found that owner-drivers were more likely to report the need to do more trips to earn a living as the reason for breaking road rules (46.6%).

70. In NSW, there has been judicial (*Inspector Campbell v. James Gordon Hitchcock* [2004] NSW *IR Comm* 87, Walton J, hereafter "*Hitchcock*") and coronial recognition that low rates of pay and poor conditions lead to speeding, other unsafe practices and fatigue and thereby contribute to road fatalities.

71. In Hitchcock His Honour the Vice President found "beyond reasonable doubt that driving whilst fatigued is a risk to health and safety" since "Fatigued drivers have a higher risk of crashing": (para 42, page 29). His Honour also found that "driving whilst fatigued" was clearly exacerbated by requirements of "directed delivery and pick up times" for truck journeys "*in the context of a clear monetary incentive to drive for excessive hours*" in combination with "excessive workloads" (para 20, page 12) – [TWU emphasis].

72. In January 2003 the Deputy State Coroner, Magistrate Dorelle Pinch, conducted an inquest and made findings in respect of the deaths of Barry Supple, Timothy Walsh and Anthony Forsyth. Amongst other relevant matters, the Deputy State Coroner found, that fatigue was the underlying factor in all three fatalities, that all three drivers had been consistently driving in excess of

the legal hours and that they had been encouraged to do so by the system of remuneration in place at the company in question.

73. This recognition by the courts is supported by government-commissioned inquiries. At the state level is the substantial and wide-ranging *Quinlan Inquiry Report*: Professor Michael Quinlan *Report of Inquiry into Safety in the Long Haul Trucking Industry 2001.* At the federal level, the October 2000 federal parliamentary inquiry by the House of Representatives Standing Committee on Communication, Transport and the Arts - *Beyond the Midnight Oil* commissioned by the then Deputy Prime Minister, the Hon John Anderson, then Minister for Transport and Regional Services.

74. What these reports strongly suggest is that safety in the transport industry is inextricably linked with the financial and commercial arrangements pursuant to which work is performed. Accordingly, both reports support calls for more guidance and regulation.

75. The Quinlan report for instance found that:

> *"Customer and consignor requirements on price, schedules and loading/unloading and freight contracts more generally, in conjunction with the atomistic and intensely competitive nature of the industry, encourage problematic tendering practices, unsustainable freight rates and dangerous work practices.*
>
> *These practices along with the ease of entry into the industry, pressure from customers in a strong bargaining position to demand cheaper rates as well as poor business practices of a number of operators all lead to safety being sacrificed first to compensate for these demands."*

76. *Beyond the Midnight Oil* states:

"Unreasonable or ill-informed demands from those who use the transport industry or from agents who organise the movement of freight, have been cited as one of the greatest contributing factors to fatigue in the road transport industry (page xxxvii). Identification of the practice of "fining" drivers for being late "We were quite shocked by some of the stories told to us by drivers of their experiences of having to wait many hours to unload, unable to leave their vehicle or get proper rest, and then being expected to still be on time at their next destination……The practice of penalising drivers for being late, while customers are not penalised for making drivers wait is not an acceptable or equitable practice" (p 133);

E: PRODUCTIVITY AND COMPETITION REMAIN STRONG

77. No evidence exists to suggest that the transport industry in NSW or Victoria is less competitive, productive or efficient than in other states which do not have yet have protections for owner-drivers. In interviewing a wide spectrum of industry participants in 2002, Bray, Waring and MacDonald found interviewees to be universally adamant that Chapter 6 "did little to reduce the intensity of competition in the industry" (Bray et al, 2002 at 75). Indeed research shows that far from extinguishing market forces, the regulation prevents market failure in the transport industry and fosters maximum market efficiency and competition.

78. This is supported by the *Report of Inquiry* in Victoria which analysed all Australian legislative approaches, and found that, "regulation is justified where market failure occurs and the regulation provides a more efficient outcome than non-regulatory alternatives."[9] The Report then considered the National Competition Council Guidelines for NCP Reviews, and found the issues of imperfect competition, the impact on health and safety, driver well-being and

---

[9] Note 2, 101.

family life, and impacts on investment all supported the establishment of appropriate legislative intervention.

79. Minimum protections for owner-drivers have not extinguished the power of market forces in the transport industry. The high level of competition between owner-drivers caused by relative ease of entry and oversupply, the financial instability/dependency of drivers and the isolation of drivers from colleagues (because the nature of the driving function) means that market individualism has remained high notwithstanding the existence of owner-driver protections. Further, owner-driver conditions and rates are forever capped by the operators' choice as to the form of labour engaged. Should contractor prices increase too much, transport operators can turn to employed labour.

G: UNFAIR CONTRACTS THE REGULATION MAKING POWER

Unfair Contracts

80. Unfortunately there are times when companies will arbitrarily and unfairly terminate owner-driver contracts; foreshadow such termination or engage in conduct which renders the contract unfair. The Independent Contractors Bill contains an "unfair contracts provision". That provision is set to override NSW and Queensland unfair contracts provisions. However, the provisions in the Bill do not contain the following characteristics of the state provisions which may have profound implications for owner-drivers seeking access to a remedy:

(i) Unlike the State provisions there is no **express** power to order compensation directly. This means rather than simply order that an amount be paid as a consequence of the unfairness, the court will have to make an order to vary the contract to the require payment. This inserts an additional and costly step into the enforcement process if there is failure to pay in accordance with the reviewed contract. That is, first a breach of contract claim (for the non-payment) must be brought to seek an order for the payment of damages for breach of the varied contract and then any required enforcement proceedings relating to continued non-payment must be undertaken.

(ii) The provision in the Bill precludes, on its face, the making of orders after the contract has come to an end – this has profound implications for goodwill claims. If there is no power to make a retrospective order then there may be no capacity for owner-drivers to claim goodwill after the contract has come to an end.

(iii) There is no power in the Bill to make an order in circumstances where unfairness has arisen by virtue of the conduct of a party or parties or through the operation of the contract or some other reason. This leads to a purely legalistic review of the contract divorced from the reality which may be that unfairness exists because of the way in which or the context in which the contract is being applied.

Regulation Making Power

81. Section 10 of the Independent Contractors Bill is a very broad regulation making power containing express references to the owner-driver legislation exemptions. This raises a concern that the regulations might be made which impinge upon the exemptions effected by subsection (2) of section 7 of the Bill. The TWU calls upon the Committee to provide owner-drivers and the industry in general with certainty by recommending that the section be amended to delete the regulation making power at least in as far as its express reference to subsection (2) of section 7.

G: CONCLUSION

82. The Senate committee is considering the provisions contained within the *Independent Contractors Bill 2006* and the *Workplace Relations Amendment (Independent Contractors) Bill 2006.* The TWU welcomes the decision of the government to exclude NSW and Victorian legislative protections from the operation of the Bills. *However, f*or the reasons outlined in this submission and on the basis of the information it contains, the TWU calls upon the Committee make recommendations as set out in the Executive Summary, above, at paragraph 12.

83. The TWU notes that the government has also announced a review to achieve national consistency of current legislative owner-driver protections. The TWU, on behalf of the thousands of owner-drivers it represents, looks forward to being an active participant in any such review.

Tony Sheldon

Acting Federal Secretary - Transport Workers Union

Attachment "A"

Submission to Senate Employment, Workplace Relations and Education Legislation Committee

INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

Details of Owner-Driver Minimum Standards in NSW

25 JULY 2006

The Transport Workers Union
Of Australia

Current Arrangements for Owner-Drivers in NSW

Contract Determinations

1. Part 2 of Chapter 6 allows for the creation and protection of minimum standards through contract determinations. Contract determinations create a set of minimum contracting standards established most often in consultation with industry groups and most commonly with the NSW Road Transport Association (NSWRTA).

2. Contract determinations regulate only the basic conditions of engagement. They do not, for example, contain employee-like entitlements such as overtime, penalty rates or minimum hours of work, and there is no entitlement to leave (maximising the availability of the truck) compensation for which is contained in the minimum rate structure. Rather determinations are incentive and mode-based and aim to guarantee the basic minima upon which parties can negotiate viable contracting arrangements.

3. This minimalist approach ensures that the measures are not of such a nature as to unduly hinder the efficiency and productivity of the independent contract arrangements while providing the framework necessary to sustain the owner-driver small business model. In other words contract determinations promote stability by establishing industry agreed parameters for sustainability of the owner-driver – principal contractor model but above which competition is free to flourish.

Contract Agreements

4. Transport operators and groups of owner-drivers (whether or not represented by the Union) may enter into arrangements as to the terms and conditions best suited to their particular enterprise ('contract agreements'). These agreements set the desired agreed provisions for a given term, thereby allowing both operator and owner-drivers greater commercial certainty and operational efficiency.

Dispute Resolution

5. The scheme provides for a dispute resolution mechanism focused on preventing any disruption to the transport function and ensuring that business productivity and efficiency is not injured by any disagreements between the parties. By allowing parties to bring disputes immediately before an independent member of the Commission with relevant industry knowledge and expertise, the system facilitates fast and fair resolution of disputes.

Associations of Employing Contractors and Associations of Drivers & Carriers

6. The provisions allow for the registration of associations of employing contractors and associations of drivers & carriers, to mirror employer/employee associations.

7. The TWU has bargained on a collective basis for owner-drivers since the 1920s. Similarly, employer associations have represented the interests of transport operators engaging independent contractors for decades. The formalisation of this representation in Chapter 6 merely recognises these historical roles of unions and employer associations and at the same time imposes obligations, safeguards and standards of behaviour to ensure proper behaviour by representative groups in accordance with community standards.

Remedies

8. Two important remedies exist in the Chapter 6 scheme which go to the heart of redressing inequality of bargaining power by creating disincentives for the principal contractor to terminate the contractual relationship without adequate reference to the risk undertaken by the owner-driver.

9. The first is the capacity of the Commission to order reinstatement of contracts of carriage. This gives statutory recognition to the fact that the relationship between independent contractor and operator is often long-term, stable and exclusive, with large capital investments required of the owner-driver, and therefore deserving of protection against arbitrary termination.

10. The second provides a mechanism for the recovery of goodwill paid by owner-drivers for entry to particular work. Goodwill transactions for owner-driver businesses usually occurs in the circumstances where a prospective owner-driver makes a payment to an existing owner driver consisting of the market value of the vehicle used to perform the work plus an additional amount as a premium or fee (the goodwill) for entry into an ongoing arrangement with the existing owner-driver's principal contractor.

11. The capacity to claim compensation for goodwill was introduced with bipartisan political support under a Liberal state government in 1994 to enable owner-drivers to protect their goodwill investment when it has been unreasonably and unfairly stripped from them. It is important to note that the goodwill compensation scheme is one that involves numerous and significant hurdles for the applicant. The hurdles ensure that the principal is not the target of frivolous, readily proven claims.

12. Hurdles notwithstanding, the provisions provide the capacity to recover investments heavily relied upon by owner-drivers for financial security in retirement and for the repayment of loans. Without the provisions the drivers are left only with an ordinary civil claim which is usually untenable because the financial risks associated with such a claim in terms of costs far outweigh the potential benefits of succeeding.

13. The second reading speech recounted the story of Mr Davey, an owner driver whose contract was sold by the head contractor to TNT in 1984. In an attempt to recover the ensuing loss to his business, he brought a common law suit against the Egg Corporation and TNT but, faced with a far larger legal team than he could afford, Davey lost the case and was ordered to pay costs. These totalled $190,000, with the Respondents' bill being $160,000 and his own $30,000 (Hansard, Industrial Relations (Contracts of Carriage) Amendment Bill, Second Reading per Mr Nagle (the Honourable Member for Auburn), 14 April 1994, Assembly at 1171). As recognised by the government of the time, this type of risk is unacceptable in order to simply pursue fairness of bargain and works as a great deterrent to entrepreneurial pursuit.

Case Studies Illustrating Value of the Scheme

Category 1 – Contract Agreements

14. The Union, on behalf of owner-drivers has negotiated long-term enterprise specific contract agreements with many operators in the general transport/freight forwarding/waterfront sector including the major operators such as:

    a. Toll;
    b. TNT;
    c. Linfox;
    d. Startrack; and
    e. Westgate.

15. In the courier sector also, enterprise arrangements exist (Toll, Allied, and Yellow Express). These agreements influence the terms and conditions of engagement of owner-drivers tied to these entities for periods of 3 years and more.

16. In the readymix concrete industry the financial investment of owner-driver small businesses is at a very high level because of the expenses involved with the purchase and running of specialised vehicles. Enterprise specific arrangements involving quite complex costing provisions taking account of the level of investment and risk have been negotiated. These deals are long-term - between eight and ten years and have been settled in major companies including:

    Boral;
    Metromix;
    Pioneer (Hanson); and
    CSR;

17. Other sectors involving similarly large investments in vehicle and/or goodwill and lengthy settled arrangements include:

    breweries (Linfox & Toll);
    waste collection (e.g. Sita & Collex); and
    quarries (Boral & CSR)
    car carriers (TNT).

18. Importantly, from the perspective of both owner-driver and principal contractor alike, these arrangements have been negotiated, and the relevant commercial risks assessed, within the context of and by reference to the provisions in the NSW system. There are currently over 170 such agreements covering all sectors of the transport industry.

Category 2 – Contract Determinations

19. GST Contract Determination - an outcome facilitating the government's legislative agenda

20. In 2000 the Coalition government introduced the GST. Leading up to the commencement date of 1 July 2000, there was great industry uncertainty as to how the new tax would interact with owner-driver rates of pay. The TWU on behalf of **all owner-drivers in NSW** made application for the *Transport Industry – GST Facilitation Contract Determination*. The determination specified the way in which the GST would be applied to owner-driver rates. The determination was made by consent on an industry wide basis. It avoided what was promising to be great uncertainty and disputation surrounding the issue. The NSW approach was then used as a model around the country.

The Courier Determination

21. There is a large and growing number of people seeking an easily accessible avenue for self-employment by the use of their own car or small van in the courier industry in Sydney. The *Transport Industry – Courier and Taxi Truck Contract Determination* applies to courier work performed by owner-drivers. It establishes minimum contracting provisions which allow principal contractors to freely implement incentive systems of remuneration while at the same time providing a basic cost recovery safety net.

22. This determination therefore gives new entrants unfamiliar with the work a fair go at establishing themselves without the pressure of being unable to recover costs, while rewarding more experienced couriers by facilitating higher earnings for more work performed through the incentive system. The benefits for courier companies are important and include the retention of owner-drivers that they train and the promotion of efficient execution of the courier task through the rewards available in the incentive scheme.

Other primary industry tailored contract determinations:

Transport Industry – Car Carriers Contract Determination;

Transport Industry – Concrete Haulage Contract Determination;

Transport Industry – Concrete Haulage (Mini Trucks) Contract Determination;

Transport Industry – Excavated Materials Contract Determination;

Transport Industry – General Carriers Contract Determination;

Transport Industry (GST Facilitation) Contract Determination;

Transport Industry – Quarried Materials &c., Carriers Contract Determination; and

Transport Industry – Waste Collection & Recycling Contract Determination

Category 3 – Dispute Processes

23. In NSW the Industrial Relations Act provides for cheap, quick and efficient conciliation of disputes relating to owner-drivers.

Boral

24. In 2001 owner-drivers performing work for Boral Country who had paid hundreds of thousands of dollars for runs on the agreed basis that they would have a right to sell those runs were the subject of a unilateral and arbitrary decision by the company to terminate those runs without compensation.

25. The TWU took the matter to the Industrial Relations Commission of NSW and, in conciliation, without the need for costly arbitrated proceedings, an outcome was quickly achieved that restored drivers to their runs at the same time as delivering to the company more productivity.

26. In very recent times, the same approach through the dispute resolution procedures of the NSW Commission with the Union at the helm has led to settlement of new contractual arrangements for Boral's Sydney metropolitan fleet and for the owner-driver fleets of all of the other major concrete cartage companies.

27. By contrast when Boral made a decision to terminate its ACT fleet of concrete owner-drivers in the same arbitrary way, the avenues for addressing the dispute were few with the result that the matter dragged on for three years thereby extending the time and cost (both financial and personal) of resolution. Upon being interviewed about his experience of the ordeal, one former ACT Boral driver recounted the following:

i. *"When the contracts were terminated by Boral the stress at home has been unbelievable for most of us, the emotional stress plus the financial stress…. Because we had lost our jobs and our goodwill money we had to go out and had to take whatever get jobs we could get, for some this meant a 40% drop in wages - we've had to reorganise our lives and for those with kids, their kids lives. We had to renegotiate our loans to make ends meet. In my case I had to sell my house because I couldn't make the payments with the new job that I have. For others, their wives had to go out and get a job.*

ii. *"The Boral ACT concrete blokes were long term people and we felt like once you've paid it, goodwill is your portability so when you lose it you lose your options to do another things – for some they would have used it to buy into another business or it would have given them time to get another job – we didn't have that option now — this affects your life, your wife and your kids"*

iii. *"There's also been the disharmony at home with the uncertainty about if and when we would get the money – husbands and wives have been arguing about this. For the older blokes they looked at the goodwill as their superannuation and now that this is gone they have been left with nothing and have to go out, at their age, and now have to start over again which is hard."*

iv. (Dave Morgan)

Network Distribution Company

28. A change of the overarching legal entity engaging 18 owner-drivers performing *Network Distribution Company* work (magazine deliveries including Women's Weekly) resulted in potential loss of goodwill paid because assignment of the business was prohibited by the proposed new contract. Settlement was reached through conciliation proceedings resulting in a satisfactory financial outcome for the owner-drivers and on-going engagement performing the same work.

Category 4 – Recourse for Arbitrary Termination of Contracts

Australian Postal Corporation v Purcells Pty Ltd

29. Mr Purcell, the director and courier "owner-driver" of Purcells Pty Ltd was engaged by Federation Couriers. In February 2002, Federation couriers was sold to Australian Postal Corporation. Upon take-over Australia Post required all of the owner-drivers to sign contracts. As at the date that Australia Post required the contracts to be signed, rates that would apply to the work had not been finalised through negotiations between the drivers committee (which included union member Mr Purcell) and Australia Post. Despite this, the contract required owner-drivers to invest money in a new or near new vehicle. Mr Purcell refused to update the vehicle until he knew what he was going to be paid for the work. At that stage on his calculations he was being paid only $8 per hour above the fixed and running costs of his vehicle. Australia Post terminated his engagement.

30. The TWU applied to the Industrial Relations Commission of New South Wales on behalf of Purcells Pty Ltd for his reinstatement on the basis that the termination of the engagement was unjust. The Commission ordered that his engagement be reinstated with backpay to the date of termination.

Category 5 – Protection of Goodwill Investments

31. Since enactment in1994 by the state liberal government owner-drivers have consistently used the goodwill compensation provisions where there investment has been arbitrarily extinguished. Some cases include:

32. *Truckbug v Blue Circle Southern Cement:* To insulate companies from unjustified claims, the goodwill provisions do not apply unless the termination be unfair, harsh or

unconscionable (section 349(1)). In this case the company alleged that the owner-driver was guilty of serious misconduct and terminated his engagement and thereby denied him the capacity to recover the goodwill he had paid which was around $90 000 - $100 000. The tribunal found the termination unfair because the company, amongst other things had required "blind adherence [to policy] without regard for developing circumstances." The tribunal awarded $70 000 payment for investment in goodwill paid upon entry to the business.

33. *Quintrell and Belprana v Monier Roofing Pty Ltd* – Goodwill investments of $53 000 and $42 000 respectively recovered by order of the Tribunal.

34. *7 TWU members v Visy*: Visy imposed 1 year contract on long standing owner-drivers who had paid goodwill for businesses. At the end of the year, contrary to any previous indication, the company terminated the long-standing engagement of each of the owner-drivers, without any compensation for the goodwill paid (claims of between $60 000 and $120 000), and engaged a fleet operator. The Owner-drivers received an order for compensation from the Tribunal.

35. Compulsory Conciliation of Goodwill Matters

36. A number of other cases have been decided by the tribunal in favour of owner-drivers and some (although it must be said, relatively few) in favour of principal contractors. Most cases initiated are settled because the goodwill provisions also require compulsory conciliation. Conciliation is usually conducted before the Chair of the Contract of Carriage Tribunal who has the benefit of the specific experience of the provisions and can guide the parties in realistic and persuasive ways.

37. One example of a conciliated outcome was in relation to 9 owner-drivers carting out of *Bowral Brickworks*. A new contract attempted to wipe-out goodwill investments of up to $190 000. Settlement reached through conciliation of goodwill claim which included (as a non-confidential term) on-going contracts for 7 years.

<u>Category 6 – Unfair Contracts</u>

38. In *Stowar v Myer Stores Limited (t/as Grace Bros)* (50 *IR* 9) contracts between the first respondent (the principal contractor) and the second respondent purported to transfer the engagement of the owner-drivers to the second respondent complete with all entitlements attaching to the original contracts, including goodwill. The second respondent then sought to change the terms of engagement which would have had the effect of wiping out the goodwill entitlement. The court had express regard to the inequality of bargaining power in finding the contracts unfair.

39. In *Darren John Palmer v TNT Australia* [1995] NSWIRC 24, Justice Hungerford order $90 000 compensation for loss of goodwill in circumstances where Mr Palmer, an owner-driver was forced by the company to change yards. There was not enough work at the new yard to sustain his business and there was therefore, no opportunity to sell the truck and goodwill to recover the investment.

Attachment“B”

Submission to Senate Employment, Workplace Relations and Education Legislation Committee

INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006

Statement of Jim McGiveron
TWU National President and WA Branch Secretary

26 JULY 2006

The Transport Workers Union
Of Australia

STATEMENT OF JAMES MCGIVERON

Under no circumstances could anyone truthfully describe the vast majority of owner-drivers in Western Australia as 'independent contractors'

The TWU in WA has approximately 2000 owner-driver members and only a mere handful of them could be put under that heading.

Most owner-drivers in WA are 'dependent' upon a single prime contractor in the same way as they are in NSW and Victoria – in fact as they are in all states and territories. Our submission has fully canvassed the extensive nature of this dependence and there is ample evidence of it for all to see.

The industry in WA, owner-drivers and their families and the TWU anticipate the imminent tabling of the Road Freight Transport Industry (Contracts and Disputes) Bill. This Bill seeks to address the very vulnerabilities expressed by the Minister in his recent press releases media statements. To override its benefits, (which have the full support of the transport industry in WA) through the Independent Contractors Act would cut from under the feet of owner-drivers and the broader industry agreed solutions for fair, sustainable and therefore, safe minimum standards and derail the constructive basis upon which the industry has been tackling the problems facing owner-drivers.

We ask the Committee to recommend an amendment that will permit the imminent industry agreed WA provisions to have full operation.

James McGiveron
National President
Transport workers Union of Australia

Pages 185 - 215: Statements of transport workers to the Submission to Senate Employment, Workplace Relations and Education Legislation Committee: INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006 supporting NSW owner-driver system

NATIONAL TRANSPORT COMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, Maurice Girotto, of Werrington NSW, state as follows:

1. I am an owner driver and have worked in the industry for over twenty years.
2. I drive a specialised truck and tanker trailer, carting bitumen locally, intrastate and interstate. I am paid a rate equivalent to tonnage per kilometre, plus waiting time and other services.
3. the rate of remuneration I currently receive is just enough to cover my fixed and variable costs. I am able to cover these cost only because I am in a financial position where I own my equipment and do not have any finance owing. I am also in a position where I am able to do a lot of my own maintenance and repairs. Compared to a driver who has additional cost I'm in a better position. They have to cut down or cut out wages and vehicle maintenance. If your in trouble you'll accept ower rates to get the work.
4. The rate I receive is enough to cover my labour costs as long as I don't pay myself more than $50 000 per year. If I paid myself acurately for all hours worked I could double this salary. By keeping my wages low I am able to keep the business running in a sustainable fashion. But with cost of living increasing it is becoming more difficult.
5. I have previously been offered work at rates that would not cover my fixed, variable and labour costs. I rejected this work because I am financially not in a position where I am forced to accept this work.
6. I agree there is a need to introduce enforceable safe rates and conditions for owner drivers. People need to earn a living, if they are going to go into business they need to come out at the end in a decent position. If not it goes from being about earning a decent living to keeping your home.

Maurice Girotto
2 September 2008

NATIONAL TRANSPORT COMISSION INQUIRY INTO SAFE RATES AND CONDITIONS FOR EMPLOYEES AND OWNER DRIVERS

WITNESS STATEMENT

I, James Hallan of Bradbury NSW, state as follows:

1. I am employed by Toll, and work on the NSW Coca Cola contract delivering product to customer sites across Sydney.
2. I have worked in the transport industry for 6 years.
3. I currently receive a rate of remuneration consistent with my enterprise agreement. This includes a base rate, plus overtime and an incentive payment.
4. I am currently paid for all hours worked, including overtime. Being paid overtime ensures that I am able to receive a sufficient income to work in a safe and sustainable manner.
5. Previously I have worked in a manner that allowed me to receive the incentive payment. This incentive payment was based on the number of product (boxes) I was able to deliver above a certain level. I was paid more to deliver faster, it was incentive to work faster.
6. I have compared my work conditions to others in the transport industry. There are other jobs out there that pay half of what I can earn – I can only imagine what they have to do to earn enough to keep out of (financial) trouble.
7. For this reason I believe there is a need to introduce an enforceable safe rate and conditions for employees in the transport industry.

James Hallan
2 September 2008

Darren Jenkins Interstate and Intrastate Long Distance Owner Driver Kempsey, NSW

Darren 41, father of three has worked for Boral Bricks as an interstate and intrastate brick carter for 6 years. He has been an owner driver for 10 years, with 20 years experience.

In 2000 he "bought in" to Boral Bricks as one of 5 trucks. Paying for a trailer, fork lift and goodwill. The goodwill premium representing the "understanding" that he would be assured a 1/5th share in the work generated from the yard.

This "understanding" has been assured to him on 5 separate occasions during the past 6 years by the general manager of the yard.

While the company may not formally acknowledge the goodwill paid they assure the drivers of their "understanding" for work preference. Recently the yard has expanded from 5 to 9 trucks, without a corresponding increase to work volume; this has significantly affected the distribution of work and the value of the goodwill investment.

Darren, like the other drivers in his yard is 90% reliant on Boral Bricks for their work. They are in a vulnerable negotiating position. The company has complete control over the rates paid and the drivers have no formal influence or consultation process.

The impact of the lack of influence has been compounded for Darren in the rising cost of fuel. The combined impact of an increased fuel cost with a downturn in the construction industry has forced Darren further a field for work. Because Darren works interstate he is not covered by the NSW provisions.

Unlike those drivers who have an industry negotiated and agreed rise and fall formulae built into their contract. Darren and the other drivers at Boral Bricks have no mechanism to recover this increasing cost in their operating rate.

In the past few months Darren's cost of fuel has increased from a third of his operating costs to over half. This is cutting into his maintenance expenditure and his wage component.

Darren has built the value of his business up to $430 000 however, for the first time in ten years he is considering an overdraft to cover the running costs.

Cost recovery is essential for drivers like Darren.

Paul Walsh PUD Owner Driver Hurstville, NSW

Paul Walsh has been a contractor with TNT for 17 years. He is married with three children under 16 years of age. His wife assists with the administration aspects of his business and is a relief driver.

He operates out of the Mascot yard where there are 111 contractors.

Paul financed the goodwill component of his contract purchase in 1989 by personal bank loan. He financed his vehicle via lease finance. Current contract purchases are financed by a combination of lease finance (for the vehicle) and personal bank loans , home loan extensions and family assistance for the goodwill component . Interest rates on such finance have recently ranged from 7%pa to 12%pa.

Incoming owner-drivers, using a reasonable business plan, are attracted to the prospect of recovering costs and of earning a reasonable income with the protection of NSW contract determination. There is also protection against arbitrary variation or termination without proper consultation. TNT Carriers tend to work from 10 to 20 years under these contracts

The Contractor has benefited from these contracts as follows:

- They have resulted in a stable labour force in an industry where there is a serious labour shortage
- Reduced labour turnover produces more efficiency , productivity and lower training costs
- Contract costs are less than employee driver costs particularly in the area of overtime , management supervision and employee on costs (the Carrier incurs the work cover premiums of approx $5,000 pa) and
- The elimination of fleet maintenance costs and removal of fleet finance liabilities from the Contractor's financial statements .

Wayne 'Cookie" Cook Owner Driver Tamworth NSW

Wayne is 48 years old and has been an owner driver for 23 years. Wayne usually does the Brisbane to Melbourne run for GR George Refrigeration and delivers goods for Woolworths and Metcash.

'Cookie' as he is known to his mates is concerned about unpaid waiting times and the trip rate. He says that 'it took 6 hours in Melbourne to get unloaded and we did not get paid for it'.

Cookie says that the unpaid waiting times and delays in getting unloaded means that there will be many flow on effects, this means drivers will have to push themselves harder to get back on time. This causes them undue pressure and stress, it's really unsafe.

Sitting around waiting to get loaded is not resting, you are not sleeping you are just worried about getting where you have to go. We need a rates system that covers all the costs and is 'safe'.

Brian Longford Owner Driver Woollongabba NSW

Brian has been driving for almost half of his life. Brian is 63 years of age and has been in the industry for 30 years.

Brian does jobs for Toll and says he can get $2007 to go from Melbourne to Brisbane, 'I can sometimes get $3000 - $4000 for a job to Adelaide'. Brian explains that driving becomes a disease 'a bit like alcoholism' you have to keep going and going'.

Brian says 'sometimes you run the gauntlet' , 'guys are pushing to get places on time'. We need rates of pay that allow us to pay our bills, pay relief drivers a reasonable rate of pay, and afford proper maintenance'. If owner drivers received decent rates of pay it would bring stress levels down and make a whole lot of difference to the life of ordinary Australians.

Paris Perdis Owner Driver NSW

Paris has been an owner driver for 25 years and currently carts windows for Indy cars interstate. At the age of 65 he has his family and children to look out for.

Paris says that Rates must go up, he explains that 'if you get a good rate you are able to maintain everything on the truck and provide for your family. He says better money means better living conditions for my family and make sure my bills are paid. Some people just cant survive or make ends meet on the wage they get.

Being an owner driver is hard we get no holidays we work all the time, I would love to get the rates I deserve so that I could take my family on holidays it would make a big difference.

George Bechara Owner Driver Greenacre NSW

George is 34 years of Age and has been in business for four and a half years. He invested $40,000 into the business and does courier work- delivery and pick up.

George has a growing family with 2 children already and one on the way George knows the importance of working and earning a decent living. George Currently pays $400 a week on his mortgage, and knows how difficult it is to keep up with the daily bills.

George Says that pre determined rates are the most important part of the NSW Owner Driver Conditions "cause that way you know how much you get for each load. Owner Drivers need to make enough money to pay the mortgage and support your family. If the money was to cut back I would have to look at the situation and contemplate selling the business."

Over the past few years George has taken part in activities in the past couple of years to protect NSW owner driver conditions, it was important to him to join the Union and give the support that he would want in return.

George Tells Owners drivers 'Don't give up, we keep fighting till we get what we deserve'.

David Barley Owner Driver Greenacre NSW

David Barley is a 54 year old owner driver and has had his own business for the last 20 years.

David says pre determined rates, rates that cover the cost of running the truck, protection of good will, access to the Commission if you are underpaid, the right to collectively organise and reinstatement if unfairly treated are all the most important parts of the NSW owner driver conditions. 'If all this was taken away from me the business would collapse'.

The ability to operate safely would be compromised if these owner driver laws were taken away because there would be 'more pressure, longer hours, less sleep which will affect everyone's safety ob the road'. We need this system in every state, so everyone has the same – highest safety standards.

He says to all the owner drivers out there 'Lets all stick together and we will be a stronger unit'.

Graeme Austin Owner Driver Corrimal NSW

Graeme invested $500,000 into his business 27 years ago. At the age of 47 with three children and paying of a $5000 a month Mortgage, Graeme knows how hard it is to keep your head above water as an owner driver.

‘If we don’t get paid enough there wont be safety, because the drivers will be working twice as hard and have no time to have the vehicle off the road to do any repairs on it, so safety and general maintenance of the vehicle disappears’.

‘Give owner drivers a break, and give us a fair go’.

Glenn Wesley Owner Driver Mulbring NSW

‘If we loose any money we will go backwards, people on the road are also going to go backwards, companies are going to keep pushing us times and log books, and safety. People are going to have to drive longer hours, if your not getting the money to maintain your trucks its just going to result in bad breaks, bad tyres, its just going to get really dangerous, the public cant afford that’.

Glenn Wesley is a man with 20 years experience as an owner driver, he has grown up children but says he is lucky that he does not have the stress of a mortgage like other drivers. When Glenn invested $100,000 into the business the 49 year old did not think he would be pleading for the rates we deserve.

Glenn says predetermined rates are an important part of being an owner driver, so they know what they will earn for each load, ‘the rates are pretty low as it is not just here but in other states as well. If they keep pushing down the rates it would make a difficult job even harder’.

Glenn explains if the NSW legislation was taken away from him he would just have to shut up his business, ‘we would loose everything, we are like anyone else we work for a living and if that is taken away what do we have left? Nothing’

Shane Cassidy Owner Driver Hilltop NSW

Shane has a couple of trucks at 47 years of age, he has been an owner driver for 30 years and invested $1000 000 into his trucks. Shane has 4 children and currently has a mortgage to the value of $500,000. He does work for Linfox- Goodchain and finds the life of an owner driver is a constant battle.

Shane says that predetermined rates and contract determination are very important for his business. Shane says 'We have got poor conditions already, if we lost the current conditions, we'd all go down the gurgler'.

What we need to be worried about it is safety 'people will cut costs where they can, have old tyres, old breaks and run the risk of no rego, driving will become very dangerous'. Although Shane would love to help with the NSW owner driver activities he simply says 'I cant afford to do it, if I don't work I don't get paid, and with my mortgage I just cant afford it'.

Shane wants all politicians to 'come out and walk a mile in my shoes, drive a truck for a week before you change anything'.

William Cakovski Owner Driver Yagoona NSW

At 62 William says 'I am working on the same rates I was 6 years ago' We need a cost recovery system 'We are paying our own way now its not enough'.

'I have been in the business for 43 years and invested $200,000 into my flat top trailer truck. With three children and a mortgage taken out to cover his truck William can not afford to earn any less then he already does.

He explains that 'We have got nothing to take, take more and you'll see a lot of drivers leave the industry'. If NSW owner driver conditions were taken away from us 'guys would be cutting corners, drivers would be under pressure and accidents would occur'.

'Have a look at the rates we work under now, how can you make us or expect us to work for anything less'.

David Cardwell Owner Driver Macquarie Fields NSW

After investing $90,000 into his business 27 years ago, 46 year old David Cardwell did not think he would see the day he was saying ‘we need a fair wage for what we do’.

With two children to look out for and support, David says that ‘So I am not cutting corners cost recovery is really important, it is really expensive running a truck and costs of fuel and maintenance are only going to increase’.

If the NSW owner driver laws are changes David says ‘I just would not be in business, I just had to sell one truck and if rates go down again I will have to sell everything. The rest of the country should come up to NSW’s system- not the other way around.”

People need to realise that if rates are cut, drivers are put under a great deal of pressure, which in turn cause mistakes to be made and owner drivers to cut corners to cut costs’. David says that people outside the industry have no idea how hard it is, they should think about it before they change our conditions’.

The public need to realise that ‘owner drivers give companies a service, where they are available when needed. It would be expensive for companies to operate with more company drivers and less owner drivers, companies need us too, without us Australia stops, give us what we deserve’.

John Brockman Owner Driver Whalan NSW

John does work for Star Track he invested $27,000 into the business 20 years ago and enjoys what he does. 'Star Track is a good company to work for , but we are still just scraping through'.

John has the same view of many NSW owner drivers he says 'it costs so much these days to run a business, to get the truck out on the road, it is getting close to the point that being an owner driver is not worth it'.

He has a simple message; 'Let us get what we deserve and what we work hard for and let us do our job'.

James Bowen Owner Driver Lilli Pilli NSW

James has a family a mortgage and when he invested $200,000 into his business 15 years ago he thought he would be on easy street.

James says that owner drivers need to have access to legislation that protects them. He says rates that cover the cost of running a truck are extremely important. 'The cost of petrol is ridiculous, I have to pay $700 a week to run my van, the cost of living has sky rocketed, when do we get the wage increases to subsidise the increases? We don't'.

Manuel Benjamin Owner Driver Plumpton NSW

Manuel is 46 years old and invested $50,000 into his business 25 years ago, he is currently paying off a mortgage and knows how hard being an owner driver can be.

Manuel believes owner drivers should have same rights as everyone else, he also believes that Superannuation should not come out of his own pocket. He says that without access to laws that regulate the industry 'the business would be impossible to operate. At the moment a lot of the money is already coming out of our own pockets to keep the business operating. I spend at least $100 per week on maintenance, $200 pr week for Super. Subbies don't get any super contributions from their employer, meanwhile the other employees are getting 7% of their wages put into their Superannuation, its not fair how can we afford to pay super for our retirement with such low rates'?

Manuel believes that 'courier owner drivers should be given different conditions, the hours you put in and the people you deal with, we should have different demerit systems cause if you loose demerit points you lose your licence and therefore you lose your business'.

There are many expenses with owner drivers $500 to $800 needs to be put aside each week for repayments, 30% of your wage needs to put aside for Tax, then you have mobile bill which are $100 a week and many other expenses. 'Manuel asks so out of this what is left for us to live, there is not much work available out there so pay can be limited'.

Russell Bonning Owner Driver St Clair NSW

Russell invested $80,000 into his business 21 years ago and delivers newspapers. Russell has a family to support says that if the current conditions for NSW owner Drivers it will really do some damage to his situation. Russell Says ‘I am doing alright at the moment, but I am just scraping through’.

A cost recovery system is the most important part of the NSW owner driver legislation for me if we don’t get the rates to cover the cost of running the truck there is no point in working.

Barry Beach Owner Driver Blackalls Park NSW

Barry enjoys the access to the Industrial Relations Commission under the Current NSW Owner Driver legislation. 'All owner drivers across the country should have the access to the commission we don't want to go back to litigation'.

Barry has children and works extremely hard. He invested $60,000 into the business 20 years ago and knows that if the NSW owner driver laws are taken away from him 'There will be more pressure on us, most guys are already doing it tough, they don't need it made worse'.

Raul Bassi Owner Driver Ashfield NSW

Raul has been in the business for 10 years and has invested $30,000 into starting his own Courier business.

Raul says the important part of the current NSW owner driver legislation is ‘salary, it is nice to get the wage that allows you to have a safety net, there are a lot of guys in bad financial situations out there, they deserve to get what they are paid for’.

‘Obviously your in this business, if you can earn a good return on what you have invested then that’s what you set out to achieve is you start loosing money you may as well just pack up and sell up’.

Raul says ‘please understand we are not only hard workers, but we are doing it tough, we don’t want to end up in the situation where we have to leave our business’.

Irma Cabana Owner Driver Mount Druitt NSW

Irma had had his own Courier business for 7 years and invested $11 000 into doing what he loves.

To Irma the most important part of the NSW owner driver legislation is predetermined rates, so he knows exactly how much he will get for each load.

Although Irma is not very fluent in English he understands that owner drivers need the safe rates that they are entitled to or his business wont survive.

Richard Caldwell Owner Driver Randwick NSW

Richard Caldwell invested $30,000 into his business 19 years ago and has been working hard ever since.

Richard Says the owner Driver laws are very important: 'I am one of the lucky ones I am on an EBA, so I am not affected by any changes in the laws, I feel though for the guys who are, they are going to loose everything'.

Colin Callaghan Owner Driver Wyong NSW

Colin has not been an owner driver courier for too long, but already knows that if the conditions for NSW owner drivers are watered down it means heartache.

After having a business for 2 years, Colin says ‘We don’t get many rights as it is being an owner driver we couldn’t survive on less. People are afraid of getting together and being in a Union, but they need to stand up for themselves, be in a Union, be collective and fight for their rights’.

John Cameron Owner Driver Sylvania NSW

John invested $20,000 into his air freighting business 24 years ago. Although John has no children or a mortgage he knows how hard it is to stay a float in business.

John believes 'safety is very important, I believe in what Tony Sheldon has said in the past , if you try to drive down rates then safety becomes a serious issue. If our current conditions are taken away 'I would have to find another job'.

John knows he is in a fortunate position compared to other people. He says 'We need to continue the fight to Help Each other. Rates impact on safety, we need national safe rates."

Steven Camilleri Owner Driver Catherine Field NSW

With a family and a mortgage Steven knows how important legislation for Owner Drivers. He brought his business 15 years ago and finds it constantly hard to get decent rates.

Steven says that the most important part of the NSW Owner Driver Legislation is the cost recovery system. 'If we don't get the rates to cover costs then it will be hard to survive, its already hard enough with the stresses we have to go through on the roads, we don't need the extra stress of worrying about putting food on the table'.

Steven sends this message to the public 'as fuel goes up our profit margins drop, we don't need anymore pressure, what we need is a set of national laws that mean our costs can be recovered no matter where you live'.

Shane Campbell Owner Driver Numbaa NSW

Shane has been an owner Driver for 10 years and invested $100,000 into the business. Shane has 1 son and is currently paying off a mortgage.

Rates that tell you what you get for each load in advance and a complete cost recovery, so you get rates that cover all the costs of running the truck are very important to Shane. 'If I don't get decent rates then I would have to walk away, if the safety of your business and yourself and others are compromised because of rates taken away from us then being in business is not worth it'.

Robert Byrnes Owner Driver Riverstone NSW

Robert works in construction and invested a couple of hundred thousand dollars into his business 15 years ago.

Robert has one child and although he is not under a contract determination, he knows he is lucky because he still gets reasonable pay. 'I am one of the lucky ones many other guys are in a bad position'. A lot of the guys do it really tough out there, and when they do it tough, you know they're cutting corners on safety and stuff like that. Leaving it longer between services, not changing tyres as frequently as they should, stuff like that. It effects their safety and in turn, that effects me and my family.

Mr Carey Owner Driver Plumpton NSW

Mr Carey invested $100,000 into his business 2 years ago because he was tired of working for bosses.

'Fuel and red tape are the most challenging aspects of owning your own business'.

Legislation protecting our rights and rates would lessen the chance of us going bankrupt and losing everything.

Iain Christall Owner Driver Padstow Heights NSW

After nine years, 3 Trucks and investing half a million dollars into his business Iain says 'Owner Drivers need protection'. Iain has 2 children and a large mortgage 'I am paying out $6000 a month, I have a mortgage of $1.25 million, you need decent pay to pay for these things'.

Iain wants the conditions for NSW owner drivers extended to all other sates. He says that 'Rate protection across the board is extremely important everyone'. For Iain if rate protection did not exist then it could make very difficult for him.

Iain says if pay rates go down then maintenance gets pushed aside, cheap products would be used compromising safety. He says that 'we all need to stick together and stand up and stop our rates and conditions being eroded'. I don't know how blokes in other states can do it. We all need safe rates, it's the only way forward.

David Clark Owner Driver Mortlake NSW

David has been an owner driver for 5 years, he invested $100,000 into the business and currently delivers goods for Parts on time. David needs to ensure that he gets a decent pay each week with a mortgage of $320,000, David needs to keep up with the payments.

Protection of Good will, your Superannuation and reinstatement of unfairly terminated contracts are very important parts of the NSW Owner driver conditions that David wants extended to other states. Without these provisions 'I would be faced with less money in my pocket with no protection. Vehicle safety would go by the wayside, the road would become very unsafe'.

Anthony Caruana Owner Driver Bringelly NSW

Decent rates are the most important part of the NSW owner driver conditions for Anthony, and why wouldn't it be with 3 children and a mortgage to the value of $400,000, getting paid for what you do is high on the priority list. 'I invested $1 million into the business 26 years ago, I work hard, so I deserve to get the rates that will provide my family with a good life'.

'If we don't have enough money to reinvest into our trucks to maintain safety, then more accidents occur, cause we need to work longer hours to make ends meet'.

2265

Government Gazette
OF THE STATE OF
NEW SOUTH WALES

Number 70
Friday, 10 June 2005

Published under authority by Government Advertising and Information

SPECIAL SUPPLEMENT

New South Wales

Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005

under the

Occupational Health and Safety Act 2000

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Occupational Health and Safety Act 2000*.

JOHN DELLA BOSCA, M.L.C.,
Minister for Commerce

Explanatory note

The object of this Regulation is to reduce the fatigue of drivers of heavy trucks. In order to do this, this Regulation imposes obligations on an employer whose employee drives a heavy truck that transports freight long distance. Such an employer is required to assess the risk of harm from fatigue to the driver's health and safety and to take steps to eliminate or control that risk. However, the employer is only required to eliminate or control risks to the extent that the employer's activities contribute to that risk. A similar obligation is placed on head carriers and certain consignors and consignees of freight (including their agents and persons acting on their behalf) who enter into a contract with a self-employed carrier for the transportation of freight long distance by means of a heavy truck. Those persons on whom the obligation is placed are also required to prepare driver fatigue management plans for certain drivers and to make those plans available to those drivers.

This Regulation also requires certain consignors and consignees of freight (including their agents and persons acting on their behalf) not to enter a contract with a carrier for the transport of freight long distance by means of a heavy truck unless they are satisfied that the delivery timetables are reasonable and that each driver who will transport the freight long distance under the contract is covered by a driver fatigue management plan.

This Regulation also requires certain documents to be retained for up to 5 years and to be made available to an inspector or an authorised representative of a driver.

This Regulation is made under the *Occupational Health and Safety Act 2000*, including sections 33 (the general regulation-making power), 34 and 39.

s03-666-31.p02 Page 1

Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005

under the

Occupational Health and Safety Act 2000

1 Name of Regulation

This Regulation is the *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005*.

2 Commencement

This Regulation commences on 1 March 2006.

3 Amendment of Occupational Health and Safety Regulation 2001

The *Occupational Health and Safety Regulation 2001* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Clause 3)

[1] Chapter 4 Work premises and working environment

Omit “This Chapter is divided into 4 Parts.” from the note following the heading to the Chapter.

Insert instead “This Chapter is divided into 5 Parts.”.

[2] Chapter 4, Note

Insert “Part 4.5 deals with long distance truck driver fatigue.” at the end of the note following the heading to the Chapter.

[3] Chapter 4, Part 4.5

Insert after Part 4.4:

Part 4.5 Long distance truck driver fatigue

81A Definitions

In this Part:

activities of a person include anything done or omitted to be done by the person, anything done or omitted to be done under the terms of a contract to which the person is a party, anything done or omitted to be done by the person’s employee or agent in the course of his or her employment or agency and anything done or omitted to be done in accordance with a work practice over which the person has control.

carrier means a person who in the course of the person’s business (including a business carried on under a franchise or other arrangement) transports freight for another person by means of a motor vehicle.

combination means a group of vehicles consisting of a motor vehicle connected to one or more vehicles.

consignee means a person to whom a consignment of freight is to be delivered, being a person who carries on business of which a substantial part is prescribed business.

consignor means a person from whom a consignment of freight is to be delivered, being a person who carries on business of which a substantial part is prescribed business.

contract includes a series of contracts.

driver fatigue management plan means a plan that sets out how the person required to prepare the plan will meet its obligations under the Act and this Regulation in relation to any risk associated with the fatigue of drivers that transport freight long distance.

freight includes goods, materials, livestock or any other things, but does not include persons.

GVM has the same meaning as in the *Road Transport (Vehicle Registration) Act 1997*.

head carrier means a carrier other than a self employed carrier.

heavy truck means:

(a) a motor vehicle with a GVM over 4.5 tonnes, or

(b) a motor vehicle forming part of a combination if the total of the GVMs of the vehicles in the combination is over 4.5 tonnes.

motor vehicle means a vehicle that is built to be propelled by a motor that forms part of the vehicle.

prescribed business means business that falls within one or more of the following Divisions recognised in the *Australian and New Zealand Standard Industrial Classification* (ANZSIC), 1993 edition (Australian Bureau of Statistics publication, Catalogue No 1292.0):

(a) Agriculture, Forestry and Fishing (Division A),

(b) Mining (Division B),

(c) Manufacturing (Division C),

(d) Construction (Division E),

(e) Wholesale Trade (Division F),

(f) Retail Trade (Division G),

(g) Accommodation, Cafes and Restaurants (Division H),

(h) Transport and Storage (Division I),

(i) Communication Services (Division J),

(j) Property and Business Services (Division L),

(k) Cultural and Recreational Services (Division P).

self-employed carrier means:

(a) a partnership that carries on business as a carrier, being a business in which any heavy truck used for the transport of freight is driven only by a partner of the business, or

(b) a body corporate that carries on business as a carrier, being a business in which any heavy truck used for the transport of freight is driven only by:

(i) a director of the body corporate or a member of the family of a director of the body corporate, or

(ii) a person who, together with the members of his or her family, has a controlling interest in the body corporate, or

(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, or

(c) an individual who carries on business as a carrier, being a business in which any heavy truck used for the transport of freight is driven only by the individual.

Note. The classes of persons that are taken to be self-employed carriers for the purposes of this Part are based on those specified in section 309 of the *Industrial Relations Act 1996*.

transport freight long distance means transport freight by means of a heavy truck (whether by means of a single journey or a series of journeys) more than 500 kilometres, including any part of the journey or journeys where no freight is transported because the heavy truck is being driven to collect freight or to return to base after transporting freight.

81B Duty to assess and manage fatigue of drivers

(1) An employer must not cause or permit any of its employees to transport freight long distance unless:

(a) the employer has assessed the risk of harm from fatigue to the employee's health or safety in doing so, and

(b) to the extent to which the employer's activities contribute to that risk:

(i) the employer has eliminated the risk, or

(ii) if elimination of the risk is not reasonably practicable, the employer has controlled the risk.

Maximum penalty: Level 4.

Note. Employers of drivers are also covered by clauses 10 and 11 of this Regulation. Clause 11 provides that an employer must eliminate any reasonably foreseeable risk to the health or safety of any employee of the employer or if it is not reasonably practicable to eliminate the risk, then the employer must control the risk.

(2) A head carrier must not enter into a contract with a self-employed carrier under which the self-employed carrier undertakes to transport freight long distance unless:

(a) the head carrier has assessed the risk of harm from fatigue to the health or safety of any driver who transports freight long distance under the contract, and

(b) to the extent to which the head carrier's activities contribute to that risk:

(i) the head carrier has eliminated the risk, or

(ii) if elimination of the risk is not reasonably practicable, the head carrier has controlled the risk.

Maximum penalty: Level 4.

(3) A consignor or consignee must not enter into a contract with a self-employed carrier under which the self-employed carrier undertakes to transport freight long distance unless:

(a) the consignor or consignee has assessed the risk of harm from fatigue to the health or safety of any driver that transports freight long distance under the contract, and

(b) to the extent to which the consignor or consignee's activities contribute to that risk:

(i) the consignor or consignee has eliminated the risk, or

(ii) if elimination of the risk is not reasonably practicable, the consignor or consignee has controlled the risk.

Maximum penalty: Level 4.

81C Duty of consignors and consignees to make inquiries as to likely fatigue of drivers

A consignor or consignee must not enter a contract with a head carrier for the transport of freight long distance unless the consignor or consignee has satisfied itself on reasonable grounds:

(a) that any delivery timetable is reasonable as regards the fatigue of any driver transporting freight long distance under the contract, taking into account industry knowledge of a reasonable time for the making of such a trip (including loading, unloading and queuing times), and

(b) that each driver who will transport freight long distance under the contract is covered by a driver fatigue management plan.

Maximum penalty: Level 4.

81D Driver fatigue management plans

(1) An employer (other than a self-employed carrier) must prepare a driver fatigue management plan for all its employees who are drivers who, in the course of their employment, transport freight long distance.

Maximum penalty: Level 3.

(2) A head carrier that enters into a contract with a self-employed carrier under which the self-employed carrier undertakes to transport freight long distance must prepare a driver fatigue management plan for all drivers who transport freight long distance under the contract.

Maximum penalty: Level 3.

(3) A consignor or consignee that enters into a contract with a self-employed carrier under which the self-employed carrier undertakes to transport freight long distance must prepare a driver fatigue management plan for all drivers who transport freight long distance under the contract.

Maximum penalty: Level 3.

(4) A driver fatigue management plan prepared under this clause must address each of the following matters to the extent to which they may affect driver fatigue:

(a) trip schedules and driver rosters, taking into account the following:

(i) times required to perform tasks safely,

(ii) times actually taken to perform tasks,

(iii) rest periods required to recover from the fatigue effects of work,

(iv) the cumulative effects of fatigue over more than one day,

(v) the effect of the time of day or night on fatigue,

(b) management practices, including the following:

(i) methods for assessing the suitability of drivers,

(ii) systems for reporting hazards and incidents,

(iii) systems for monitoring driver's health and safety,

(c) work environment and amenities,

(d) training and information about fatigue that is provided to drivers,

(e) loading and unloading schedules, practices and systems, including queuing practices and systems,

(f) accidents or mechanical failures.

(5) A person who is required to prepare a driver fatigue management plan may amend or replace the plan at any time.

(6) A person who is required to prepare a driver fatigue management plan:

(a) must consult in accordance with Division 2 of Part 2 of the Act during the preparation of the plan and at each time the person proposes to amend or replace the plan (except if the proposed amendment or replacement would only change the effect of the plan in a minor way), and

(b) must ensure that the person's activities are consistent with that plan, and

(c) must make a copy of the plan available to each driver covered by the plan.

Maximum penalty: Level 1.

81E Application of Part to consignors and consignees and their agents

(1) Clauses 81B (3), 81C and 81D (3) apply to an agent or other person acting on behalf of a consignor or consignee in the same way as they apply to a consignor or consignee.

(2) If an offence under clause 81B (3), 81C or 81D (3) is committed by an agent or other person acting on behalf of a consignor or consignee, the consignor or consignee is also guilty of the offence.

(3) Clauses 81B (3), 81C and 81D (3) do not apply to or in respect of either of the following:

(a) a consignor or consignee that employs fewer than 200 employees (including persons carrying out work for the consignor or consignee under labour hire arrangements),

(b) an agent or other person acting on behalf of a consignor or consignee referred to in paragraph (a).

81F Records

(1) A person who is required to prepare a driver fatigue management plan is to keep the following documents:

(a) all driver fatigue management plans prepared by the person,

(b) all contracts entered into in the course of the person's business (including any contracts of employment) that relate to the transportation of freight long distance,

(c) all trip schedules, delivery timetables and driver rosters prepared by or on behalf of the person or to which the person has access, but only for those drivers for whom the person was required to prepare a driver fatigue management plan,

(d) any risk assessments made by or on behalf of the person that relate to the fatigue of drivers of heavy trucks.

Maximum penalty: Level 1.

(2) A person who is required to be satisfied of the matters set out in clause 81C is to keep all documents that the person relied on to be satisfied of those matters including the relevant contract and any relevant trip schedules, delivery timetables and driver rosters to which the person has access.

Maximum penalty: Level 1.

(3) Despite subclauses (1) and (2), a person:

(a) is not required to keep a driver fatigue management plan or a contract for more than 5 years after the plan or contract ceases to have effect, and

(b) is not required to keep a trip schedule, delivery timetable or driver roster for more than 5 years after the end of the period covered by the schedule, timetable or roster, and

(c) is not required to keep a risk assessment for more than 5 years after the assessment is made, and

(d) is not required to keep any document that is required to be kept under subclause (2) for more than 5 years after the relevant contract ceases to have effect.

(4) For the purposes of this clause, if a document is amended in a material way, each version of the document as amended is to be dealt with as a separate document.

(5) A person who is required to keep documents under this clause must make those documents available for inspection by an inspector or an authorised representative in accordance with a request by the inspector or authorised representative and, in any event, no later than 7 days after the date of the request.

Maximum penalty: Level 1.

(6) In this clause:

authorised representative means an authorised representative within the meaning of Division 3 of Part 5 of the Act who is exercising functions under that Division.

Authorised to be printed
ISSN 0155-6320 ROBERT J. GALLAGHER, Government Printer.

(1875) SERIAL C5263

TRANSPORT INDUSTRY - MUTUAL RESPONSIBILITY FOR ROAD SAFETY (STATE) AWARD

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

FULL BENCH

Application by Transport Workers' Union of New South Wales, Industrial Organisation of Employees.

(No. IRC 4219 of 2005)

Before The Honourable Justice Wright, President — 2 and 21 November 2006
The Honourable Justice Walton, Vice-President
Mr Deputy President Sams
Commissioner Tabbaa

AWARD

1. Purposes of this Industrial Instrument

The purposes of this industrial instrument are to ensure that:

1.1 all parties connected with the road transport of goods, including consignors, transport operators, employees, and the Union take responsibility for health and safety issues;

1.2 long distance road transport work is carried out safely and in accordance with applicable laws and industrial instruments;

1.3 the performance of long distance road transport work is properly planned in order to prevent driver fatigue;

1.4 employees are properly trained in matters relating to health and safety;

1.5 safety is not compromised as a result of underpayment of employees; and

1.6 professional drug taking is eliminated from the transport industry, and employees do not otherwise perform work whilst affected by drugs and alcohol.

2. Definitions

2.1 "Accredited official of the Union" means an officer or employee of the Union with a current instrument of authority issued under section 299 of the Act.

2.2 "Act" shall mean the *Industrial Relations Act* 1996.

2.3 "Bluecard Program" means the safety awareness program aligned to the Transport Industry National Competency Standard TDT F1 197B "Follow Occupational Health and Safety Procedures".

2.4 "Bluecard" means the standard-form card issued by a Bluecard Program training provider to certify that a person has completed a Blue Card Program training course.

2.5 "Consignor" shall mean any person, being a transport operator, who enters into a transport contract with another transport operator under which that other transport operator carries freight for the consignor. Note: the consignor may itself be subject to a contractual obligation to arrange for the carriage of the same freight.

2.6 "Drugs" means any drugs, whether lawfully or unlawfully taken, which affect the safe performance of work performed pursuant to a transport contract.

2.7 "Freight" means goods, materials and substances of all descriptions, and includes waste products, cash, livestock, and shipping and other containers (whether packed or empty).

2.8 "Head consignor" shall mean any person, not being a transport operator, who enters into a contract with a transport operator under which the transport operator carries freight for the head consignor. Note: the head consignor will usually be at the head of the contracting chain.

2.9 "Heavy vehicle" means a motor vehicle with a GVM of over 4.5 tonnes.

2.10 "Labour hire employee" means an employee of a labour hire business who, by arrangement between a transport operator and the labour hire business, is assigned to perform work for the transport operator in the transport operator's business.

2.11 "Long distance work" means any single journey or series of journeys in any one shift of more than 500km (including the distances travelled in delivering freight and travelling after the delivery of freight) carried out in a heavy vehicle.

2.12 "Long haul transport contract" shall mean any transport contract pursuant to which a transport operator regularly requires any employee engaged, or any Labour Hire Employee utilised, by it to perform long distance work.

2.13 "Professional drug use" means the use of drugs by truck drivers to combat fatigue and to stay awake and alert whilst working.

2.14 "Regulation" means the Road Transport (Safety and Traffic Management) (Driver Fatigue) Regulation 1999.

2.15 "Transport contract" shall mean any contract, arrangement or understanding between a transport operator and a consignor or head consignor under which the transport operator carries freight for the consignor or head consignor.

2.16 "Transport operator" shall mean any employer engaged in the business of the transport of freight by road, or who employs persons to transport freight by road.

2.17 "Union" shall mean the Transport Workers Union of New South Wales, registered under the Act as an industrial organisation of employees.

2.18 "Work" shall mean all work performed by the driver of a heavy vehicle in or in connection with long distance work, including driving work, loading and unloading work, and queueing work.

3. Safe Driving Plans

3.1 A transport operator must prepare a safe driving plan in relation to any work performed by its employees and/or by labour hire employees pursuant to a long haul transport contract to which the transport operator is a party.

3.2 A safe driving plan must:

(i) identify the name and address of the relevant transport operator, and of the consignor or head consignor party to the relevant long haul transport contract;

(ii) identify the period in which work is required to be performed under the long haul transport contract to which the safe driving plan applies;

(iii) identify the relevant pick up and delivery locations;

(iv) demonstrate how the work to be performed is to be remunerated in accordance with any applicable industrial instrument;

(v) identify the remuneration method chosen (having regard to the health and safety of relevant employees, and labour hire employees), and the rate;

(vi) identify the system(s) by which the effect of the chosen method of remuneration on driver fatigue may be monitored and measured;

(vii) identify the means by which the amount of hours and work to be performed by employees, and labour hire employees is to be limited in order to prevent driver fatigue occurring and excessive hours being worked, and the means by which such limitations are to be enforced;

(viii) set out how the work is be performed and rest breaks taken in a manner consistent with the Regulation and any provisions of any applicable industrial instrument concerning hours of work, limitations upon hours of work, meal breaks, rest breaks, crib breaks and like matters;

(ix) identify the means by which the transport operator will ensure that any persons performing the work will be doing so free of drugs and alcohol (which shall include but not be limited to the transport operator's drug and alcohol policy implemented in accordance with clause 7 of this Award);

3.3 A safe driving plan must, as far as practicable, be prepared in consultation with the employees, and labour hire employees who are to perform the work the subject of the safe driving plan, and each such employee, and labour hire employee performing work the subject of the safe driving plan is to be supplied with a copy of it.

3.4 Insofar as the safe driving plan is to have application to labour hire employees, the transport operator will also consult with the labour hire business employing such employees in the preparation of the plan as far as practicable.

3.5 A safe driving plan must be reviewed regularly and updated when there is any change to the circumstances applicable to the work.

3.6 A copy of the safe driving plan must be provided to the consignor or head consignor party to the long-haul transport contract.

3.7 A consignor which is provided with a copy of a safe driving plan pursuant to subclause 3.6 hereof shall send a copy of such safe driving plan to any head consignor who has sub-contracted the cartage of the freight the subject of the safe driving plan.

3.8 Where the cartage of freight is to be sub-contracted by any consignor, it must be a condition of the sub-contracting arrangement that a safe driving plan applying to the cartage of such freight which conforms with the requirements of subclause 3.2 above has been provided to such consignor prior to the performance of any cartage work.

3.9 Nothing in this clause is intended to affect or detract from any obligation or responsibility upon an employer under the *Occupational Health and Safety Act* 2000 or the Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005.

3.10 The transport operator may use a form consistent with that appearing in Annexure A provided that the use of the form complies with the terms of this Award.

4. Records and Inspection of Safe Driving Plans

4.1 A transport operator who is required to prepare a safe driving plan, and any consignor who is required to be provided with a copy of a safe driving plan pursuant to subclause 3.6 above shall keep a copy of the safe driving plan during the period in which the cartage of the freight the subject of the safe driving plan is being carried out, and for 6 years thereafter.

4.2 An accredited official of the Union is entitled to inspect a safe driving plan at the premises of any transport operator or consignor, which is required to maintain a copy of such safe driving plan under subclause 4.1 above upon the provision of 24 hours written notice.

5. Compliance With Safe Driving Plans and Applicable Laws

5.1 Consignors shall enter into long haul transport contracts with transport operators on the basis that strict compliance with applicable safe driving plans, the Regulation and relevant industrial instruments is a condition of the contract.

5.2 Consignors and transport operators must ensure that all work undertaken pursuant to a long haul transport contract to which they are party is carried out in conformity with the applicable safe driving plan, the Regulation, and any applicable industrial instrument.

5.3 Employees and labour hire employees must comply with any safe driving plan applicable to the work they are required to perform. If any circumstances arise which make compliance with a safe driving plan impracticable, they shall notify their employer as soon as possible.

5.4 Where a consignor becomes aware that a transport operator it has contracted with under a long haul transport contract has breached any applicable safe driving plan, the Regulation, or any applicable industrial instrument, the consignor must take such action as is necessary to ensure that such a breach is rectified and is not repeated. Such action may include termination of the long haul transport contract.

5.5 Consignors must take pro-active steps to monitor compliance by transport operators carrying freight put out to consignment by the consignor with the relevant safe driving plan, the Regulation and any applicable industrial instruments.

5.6 Where the Union becomes aware of any breach by a transport operator party to a long haul transport contract of any applicable safe driving plan, the Regulation, or any applicable industrial instrument, it shall notify the transport operator, the consignor, and the head consignor, of such breach, with such notification to include the necessary particulars, and shall advise of what action it thinks is necessary to ensure such breach is rectified and not repeated.

5.7 Where any dispute arises between the Union and a transport operator or a consignor about whether a breach of any applicable safe driving plan, the Regulation, or any applicable industrial instrument has occurred, or about what action is necessary to ensure that any such breach is rectified and not repeated, the disputes procedure set out in clause 8 of this Award shall be followed.

6. Bluecard

6.1 All new and existing employees engaged by transport operators, and any labour hire employees utilised by transport operators, unless currently in possession of a valid Bluecard, shall undertake a Bluecard Program paid for by the transport operator, and conducted by a licensed Bluecard Program training provider in conjunction with the transport operator. Existing employees and labour hire employees will be so trained within 3 months of the date of operation of this Award.

6.2 All employees and labour hire employees shall be paid no less than their usual rate of pay whilst attending a Bluecard Program training course, and shall also be reimbursed for any expenses reasonably incurred in attending such a course.

6.3 From 3 months after the date of operation of this Award, no employee or labour hire employee shall be permitted by a transport operator to perform work under a long haul transport contract unless in possession of a valid Bluecard.

7. Drug and Alcohol Policy

7.1 All transport operators shall, within six months of the date of operation of this Award, develop and implement a written drug and alcohol policy which is designed to ensure that:

(i) professional drug-taking amongst its employees and labour hire employees is entirely eliminated; and

(ii) no employee or labour hire employee performs work whilst impaired by the effects of drugs or alcohol;

and which otherwise conforms with the requirements of this clause.

7.2 The drug and alcohol policy to be developed and introduced by a transport operator shall:

(i) be tailored to correlate with the transport operator's size, resources, and the nature of its operations;

(ii) make provision for the implementation of a fair and transparent system for testing for the presence of drugs and alcohol in employees and labour hire employees;

(iii) specify what procedure shall apply if a positive test result is recorded and verified;

(iv) provide for paid training of employees and labour hire employees in relation to the requirements of the policy and safety issues associated with drug and alcohol use generally, with such training being carried out in conjunction with a Union representative; and

(v) be integrated with any safe driving plans developed pursuant to clause 3 of this Award.

7.3 The drug and alcohol policy to be developed and introduced by a transport operator shall be consistent with the following principles:

(i) Professional drug use (as defined in clause 2.14 of this Award) is the major cause of impairment to the driving and general work performance of employees, contract carriers and labour hire employees in the transport industry, and its elimination must therefore be the primary focus of the policy to be developed.

(ii) Professional drug use occurs because of driver fatigue, so that to eliminate professional drug use it is necessary to ensure that employees, contract carriers and labour hire employees are not required to, and do not, perform work in such a way or to such an extent that driver fatigue occurs.

(iii) Alcohol and/or drug problems arising from recreational use should be dealt with as health problems, with an emphasis on education and rehabilitation.

(iv) Transport operators should provide training and guidance to their managers and supervisors to ensure that they:

(a) do not impose work pressure on employees and labour hire employees which may lead to professional drug use;

(b) recognise when employees and labour hire employees are becoming fatigued to the extent that professional drug use may become necessary; and

(c) know how to satisfactorily and fairly deal with employees and labour hire employees whose work performance or conduct is affected by alcohol or drugs.

(v) Transport operators, managers, supervisors, employees and labour hire employees must all comply with the policy once it is in place and must cooperate with each other to prevent incidents arising from the consumption or use of alcohol and other drivers.

(vi) Transport operators have an obligation to respond to and investigate any information provided to them which suggests that either its employees or labour hire employees are engaging in

professional drug use, or that work pressures on employees or labour hire employees are such as to make it likely that professional drug use will occur.

(vii) Personal information received from or about employees or labour hire employees as a result of self disclosure, testing, counselling, treatment and/or rehabilitation shall be treated with the strictest confidence.

(viii) Drug and alcohol testing shall be carried out in a way which:

(a) is either responsive to signs of impairment on the part of the employee or labour hire employee, and/or is genuinely random;

(b) permits consensual and non-consensual testing;

(c) respects the privacy of the person being tested;

(d) is as least personally invasive as possible (e.g. by use of saliva testing, but may also involve urine testing);

(e) conforms with accepted scientific standards;

(f) involves a secure chain of custody procedure with respect to any samples taken;

(g) allows a second sample to be provided to the employee or labour hire employee to allow independent testing to be carried out if necessary.

(ix) Employees and labour hire employees who voluntarily disclose professional drug use or a personal drug or alcohol use problem shall not be subject to disciplinary action but shall be provided with counselling, training, and if necessary, treatment and rehabilitation.

7.4 Transport operators shall develop their drug and alcohol policies in consultation with employees labour hire employees and the Union. Where there is a dispute about any aspect of the drug and alcohol policy being developed, the policy shall not be implemented until the dispute has been resolved in accordance with the disputes procedure of this industrial instrument.

8. Disputes Procedure

8.1 In the event of any dispute arising in relation to the obligations imposed by this Award (including the matters referred to in clause 5.7 and 7.4 above), senior representatives of the Union and of the transport operator or consignor (as relevant) shall meet to discuss the dispute.

8.2 If such discussions do not resolve the dispute, it shall be referred to the Industrial Relations Commission of New South Wales for conciliation and, if necessary, arbitration.

9. Area, Incidence and Duration

9.1 This Award shall apply to:

(i) all transport operators operating wholly or partly in New South Wales and to all employees engaged by such transport operators and to all labour hire employees utilised by such transport operators in their businesses; and

(ii) all consignors party to transport contracts which require the cartage of freight partly or wholly within New South Wales.

9.2 This Award shall commence on and from 2 November 2006, except in relation to clause 3, Safe Driving Plans, which shall operate from 1 December 2006, and shall remain in force thereafter for a period of 3 years.

ANNEXURE A - SAFE DRIVING PLAN (EXAMPLE)

Operator/Consignor Identification		Delivery Period and PUD Details	Remuneration
			How Work is Remunerated having regard to health and safety Kilometre rates for driving and hourly rate for loading/unloading/queuing time
Consignor:	XYZ <Address>	Pick Up Location: Toll Minchinbury Distribution Centre	Remuneration Method and Rate: Transport Industry (State) Award - Grade 7 Long Distance Rates (29.54 cents per km) plus Hourly rate of ($17.25 base) for all time loading/unloading/queuing.
Transport Operator:	Toll <Address>	Delivery Location: Wagga Wagga XYZ's Store	Remuneration Monitoring/Measuring Systems: GPS, On Board Computer, Auditing cross checks of pay, log book, timesheet, consignment note, GPS & Engine Records, SDP
		Period : 12.30 pm Delivery Window	Means to Limit Work Hours and Work Contact with manager (<insert phone number>) for reporting unexpected delays and rescheduling journey if necessary

Planned Application of Hours	
Planned Total Trip Time: 11.75 hours 7am - 15 minute pre-trip inspection 7.15 am to 12.00pm (Minchinbury - Wagga Wagga) 4.45 hrs driving 30 minutes break prior to unloading 12.30-1.30 pm loading unloading 1.30pm to 4.15pm (Wagga Wagga/Marulan) 30 minutes Marulan (4.45pm) 4.45 - 6.45 Marulan - Minchinbury 2 hours	
Confirmation that driver has been inducted and trained in OHS policy	
Confirmation that driver has been inducted and trained in company D&A policy	

F. L. WRIGHT *J, President.*
M. J. WALTON *J, Vice-President.*
P. J. SAMS *D.P.*
I. TABBAA, Commissioner.

Printed by the authority of the Industrial Registrar.

(1857) SERIAL C5264

TRANSPORT INDUSTRY - MUTUAL RESPONSIBILITY FOR ROAD SAFETY (STATE) CONTRACT DETERMINATION

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

FULL BENCH

Application by Transport Workers' Union of New South Wales, Industrial Organisation of Employees.

(No. IRC 4219 of 2005)

Before The Honourable Justice Wright, President 2 and 21 November 2006
The Honourable Justice Walton, Vice-President
Mr Deputy President Sams
Commissioner Tabbaa

DETERMINATION

1. Purposes of This Industrial Instrument

The purposes of this industrial instrument are to ensure that:

1.1 all parties connected with the road transport of goods, including consignors, transport operators, contract carriers and the Union take responsibility for health and safety issues;

1.2 long distance road transport work is carried out safely and in accordance with applicable laws and industrial instruments;

1.3 the performance of long distance road transport work is properly planned in order to prevent driver fatigue;

1.4 contract carriers are properly trained in matters relating to health and safety;

1.5 safety is not compromised as a result of underpayment of contract carriers; and

1.6 professional drug taking is eliminated from the transport industry, and contract carriers do not otherwise perform work whilst affected by drugs and alcohol.

2. Definitions

2.1 "Accredited official of the Union" means an officer or employee of the Union with a current instrument of authority issued under section 299 of the Act.

2.2 "Act" shall mean the *Industrial Relations Act* 1996.

2.3 "Bluecard Program" means the safety awareness program aligned to the Transport Industry National Competency Standard TDT F1 197B "Follow Occupational Health and Safety Procedures".

2.4 "Bluecard" means the standard-form card issued by a Bluecard Program training provider to certify that a person has completed a Blue Card Program training course.

2.5 "Consignor" shall mean any person, being a transport operator, who enters into a transport contract with another transport operator under which that other transport operator carries freight for the consignor. Note: the consignor may itself be subject to a contractual obligation to arrange for the carriage of the same freight.

2.6. "Contract carrier" shall be as defined in section 309 of the Act, and includes, where the context requires, a reference to the person driving the contract carrier's truck where the contract carrier is a corporation or a partnership.

2.7 "Drugs" means any drugs, whether lawfully or unlawfully taken, which affect the safe performance of work performed pursuant to a transport contract.

2.8 "Freight" means goods, materials and substances of all descriptions, and includes waste products, cash, livestock, and shipping and other containers (whether packed or empty).

2.9 "Head consignor" shall mean any person, not being a transport operator, who enters into a contract with a transport operator under which the transport operator carries freight for the head consignor. Note: the head consignor will usually be at the head of the contracting chain.

2.10 "Heavy vehicle" means a motor vehicle with a GVM of over 4.5 tonnes.

2.11 "Long distance work" means any single journey or series of journeys in any one shift of more than 500km (including the distances travelled in delivering freight and travelling after the delivery of freight) carried out in a heavy vehicle.

2.12 "Long haul transport contract" shall mean any transport contract pursuant to which a transport operator regularly requires any contract carrier engaged by it to perform long distance work.

2.13 "Principal contractor" shall be as defined in section 310 of the Act.

2.14 "Professional drug use" means the use of drugs by truck drivers to combat fatigue and to stay awake and alert whilst working.

2.15 "Regulation" means the Road Transport (Safety and Traffic Management) (Driver Fatigue) Regulation 1999.

2.16 "Transport contract" shall mean any contract, arrangement or understanding between a transport operator and a consignor or head consignor under which the transport operator carries freight for the consignor or head consignor.

2.17 "Transport operator" shall mean any principal contractor engaged in the business of the transport of freight by road, or who engages contract carriers to transport freight by road.

2.18 "Union" shall mean the Transport Workers Union of New South Wales, registered under the Act as an association of contract carriers.

2.19 "Work" shall mean all work performed by the driver of a heavy vehicle in or in connection with long distance work, including driving work, loading and unloading work, and queueing work.

3. Safe Driving Plans

3.1 A transport operator must prepare a safe driving plan in relation to any work performed by its contract carriers pursuant to a long haul transport contract to which the transport operator is a party.

3.2 A safe driving plan must:

(i) identify the name and address of the relevant transport operator, and of the consignor or head consignor party to the relevant long haul transport contract;

(ii) identify the period in which work is required to be performed under the long haul transport contract to which the safe driving plan applies;

(iii) identify the relevant pick up and delivery locations;

(iv) demonstrate how the work to be performed is to be remunerated in accordance with any applicable industrial instrument;

(v) identify the remuneration method chosen (having regard to the health and safety of relevant contract carriers, and the rate;

(vi) identify the system(s) by which the effect of the chosen method of remuneration on driver fatigue may be monitored and measured;

(vii) identify the means by which the amount of hours and work to be performed by contract carriers is to be limited in order to prevent driver fatigue occurring and excessive hours being worked, and the means by which such limitations are to be enforced;

(viii) set out how the work is be performed and rest breaks taken in a manner consistent with the Regulation and any provisions of any applicable industrial instrument concerning hours of work, limitations upon hours of work, meal breaks, rest breaks, crib breaks and like matters;

(ix) identify the means by which the transport operator will ensure that any persons performing the work will be doing so free of drugs and alcohol (which shall include but not be limited to the transport operator's drug and alcohol policy implemented in accordance with clause 7 of this Contract Determination);

3.3 A safe driving plan must, as far as practicable, be prepared in consultation with the contract carriers who are to perform the work the subject of the safe driving plan, and each such contract carrier performing work the subject of the safe driving plan is to be supplied with a copy of it.

3.4 A safe driving plan must be reviewed regularly and updated when there is any change to the circumstances applicable to the work.

3.5 A copy of the safe driving plan must be provided to the consignor or head consignor party to the long-haul transport contract.

3.6 A consignor which is provided with a copy of a safe driving plan pursuant to subclause 3.5 hereof shall send a copy of such safe driving plan to any head consignor who has sub-contracted the cartage of the freight the subject of the safe driving plan.

3.7 Where the cartage of freight is to be sub-contracted by any consignor, it must be a condition of the sub-contracting arrangement that a safe driving plan applying to the cartage of such freight which conforms with the requirements of subclause 3.2 above has been provided to such consignor prior to the performance of any cartage work.

3.8 Nothing in this clause is intended to affect or detract from any obligation or responsibility upon an employer under the Occupational Health and Safety Act 2000 or the Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005.

3.9 The transport operator may use a form consistent with that appearing in Annexure A provided that the use of the form complies with the terms of this Contract Determination.

4. Records and Inspection of Safe Driving Plans

4.1 A transport operator who is required to prepare a safe driving plan, and any consignor who is required to be provided with a copy of a safe driving plan pursuant to subclause 3.5 above shall keep a copy of the safe driving plan during the period in which the cartage of the freight the subject of the safe driving plan is being carried out, and for 6 years thereafter.

4.2 An accredited official of the Union is entitled to inspect a safe driving plan at the premises of any transport operator or consignor, which is required to maintain a copy of such safe driving plan under subclause 4.1 above upon the provision of 24 hours written notice.

5. Compliance With Safe Driving Plans and Applicable Laws

5.1 Consignors shall enter into long haul transport contracts with transport operators on the basis that strict compliance with applicable safe driving plans, the Regulation and relevant industrial instruments is a condition of the contract.

5.2 Consignors and transport operators must ensure that all work undertaken pursuant to a long haul transport contract to which they are party is carried out in conformity with the applicable safe driving plan, the Regulation, and any applicable industrial instrument.

5.3 Contract carriers must comply with any safe driving plan applicable to the work they are required to perform. If any circumstances arise which make compliance with a safe driving plan impracticable, they shall notify their principal contractor as soon as possible.

5.4 Where a consignor becomes aware that a transport operator it has contracted with under a long haul transport contract has breached any applicable safe driving plan, the Regulation, or any applicable industrial instrument, the consignor must take such action as is necessary to ensure that such a breach is rectified and is not repeated. Such action may include termination of the long haul transport contract.

5.5 Consignors must take pro-active steps to monitor compliance by transport operators carrying freight put out to consignment by the consignor with the relevant safe driving plan, the Regulation and any applicable industrial instruments.

5.6 Where the Union becomes aware of any breach by a transport operator party to a long haul transport contract of any applicable safe driving plan, the Regulation, or any applicable industrial instrument, it shall notify the transport operator, the consignor, and the head consignor, of such breach, with such notification to include the necessary particulars, and shall advise of what action it thinks is necessary to ensure such breach is rectified and not repeated.

5.7 Where any dispute arises between the Union and a transport operator or a consignor about whether a breach of any applicable safe driving plan, the Regulation, or any applicable industrial instrument has occurred, or about what action is necessary to ensure that any such breach is rectified and not repeated, the disputes procedure set out in clause 8 of this Contract Determination shall be followed.

6. Bluecard

6.1 All new and existing contract carriers engaged by transport operators, unless currently in possession of a valid Bluecard, shall undertake a Bluecard Program paid for by the transport operator, and conducted by a licensed Bluecard Program training provider in conjunction with the transport operator. Existing contract carriers will be so trained within 3 months of the date of operation of this Contract Determination.

6.2 All, contract carriers shall be paid no less than their usual rate of pay whilst attending a Bluecard Program training course, and shall also be reimbursed for any expenses reasonably incurred in attending such a course.

6.3 From 3 months after the date of operation of this Contract Determination, no contract carrier shall be permitted by a transport operator to perform work under a long haul transport contract unless in possession of a valid Bluecard.

7. Drug and Alcohol Policy

7.1 All transport operators shall, within six months of the date of operation of this Contract Determination, develop and implement a written drug and alcohol policy which is designed to ensure that:

(i) professional drug-taking amongst its contract carriers is entirely eliminated; and

(ii) no contract carrier performs work whilst impaired by the effects of drugs or alcohol;

and which otherwise conforms with the requirements of this clause.

7.2 The drug and alcohol policy to be developed and introduced by a transport operator shall:

(i) be tailored to correlate with the transport operator's size, resources, and the nature of its operations;

(ii) make provision for the implementation of a fair and transparent system for testing for the presence of drugs and alcohol in contract carriers;

(iii) specify what procedure shall apply if a positive test result is recorded and verified;

(iv) provide for paid training of contract carriers in relation to the requirements of the policy and safety issues associated with drug and alcohol use generally, with such training being carried out in conjunction with a Union representative; and

(v) be integrated with any safe driving plans developed pursuant to clause 3 of this Contract Determination.

7.3 The drug and alcohol policy to be developed and introduced by a transport operator shall be consistent with the following principles:

(i) Professional drug use (as defined in clause 2.14 of this Contract Determination) is the major cause of impairment to the driving and general work performance of employees, contract carriers and labour hire employees in the transport industry, and its elimination must therefore be the primary focus of the policy to be developed.

(ii) Professional drug use occurs because of driver fatigue, so that to eliminate professional drug use it is necessary to ensure that employees, contract carriers and labour hire employees are not required to, and do not, perform work in such a way or to such an extent that driver fatigue occurs.

(iii) Alcohol and/or drug problems arising from recreational use should be dealt with as health problems, with an emphasis on education and rehabilitation.

(iv) Transport operators should provide training and guidance to their managers and supervisors to ensure that they:

(a) do not impose work pressure on contract carriers which may lead to professional drug use;

(b) recognise when contract carriers are becoming fatigued to the extent that professional drug use may become necessary; and

(c) know how to satisfactorily and fairly deal with contract carriers whose work performance or conduct is affected by alcohol or drugs.

(v) Transport operators, managers, supervisors, and contract carriers must all comply with the policy once it is in place and must cooperate with each other to prevent incidents arising from the consumption or use of alcohol and other drivers.

(vi) Transport operators have an obligation to respond to and investigate any information provided to them which suggests that either its contract carriers are engaging in professional drug use, or that work pressures on contract carriers are such as to make it likely that professional drug use will occur.

(vii) Personal information received from or about contract carriers as a result of self disclosure, testing, counselling, treatment and/or rehabilitation shall be treated with the strictest confidence.

(viii) Drug and alcohol testing shall be carried out in a way which:

(a) is either responsive to signs of impairment on the part of the contract carrier, and/or is genuinely random;

(b) permits consensual and non-consensual testing;

(c) respects the privacy of the person being tested;

(d) is as least personally invasive as possible (e.g. by use of saliva testing, but may also involve urine testing);

(e) conforms with accepted scientific standards;

(f) involves a secure chain of custody procedure with respect to any samples taken;

(g) allows a second sample to be provided to the contract carrier to allow independent testing to be carried out if necessary.

(ix) Contract carriers who voluntarily disclose professional drug use or a personal drug or alcohol use problem shall not be subject to disciplinary action but shall be provided with counselling, training, and if necessary, treatment and rehabilitation.

7.4 Transport operators shall develop their drug and alcohol policies in consultation with contract carriers and the Union. Where there is a dispute about any aspect of the drug and alcohol policy being developed, the policy shall not be implemented until the dispute has been resolved in accordance with the disputes procedure of this industrial instrument.

8. Disputes Procedure

8.1 In the event of any dispute arising in relation to the obligations imposed by this Contract Determination (including the matters referred to in clause 5.7 and 7.4 above), senior representatives of the Union and of the transport operator or consignor (as relevant) shall meet to discuss the dispute.

8.2 If such discussions do not resolve the dispute, it shall be referred to the Industrial Relations Commission of New South Wales for conciliation and, if necessary, arbitration.

9. Area, Incidence and Duration

9.1 This Contract Determination shall apply to:

(i) all transport operators operating wholly or partly in New South Wales and to all contract carriers engaged by such transport operators in their businesses; and

(ii) all consignors party to transport contracts which require the cartage of freight partly or wholly within New South Wales.

9.2 This Contract Determination shall commence on and from 2 November 2006, except in relation to clause 3, Safe Driving Plans, which shall operate from 1 December 2006, and shall remain in force thereafter for a period of 3 years.

ANNEXURE A - SAFE DRIVING PLAN (EXAMPLE)

Operator/Consignor Identification		Delivery Period and PUD Details	Remuneration
			How Work is Remunerated having regard to health and safety Kilometre rates for driving and hourly rate for loading/unloading/queuing time
Consignor:	XYZ <Address>	Pick Up Location: Toll Minchinbury Distribution Centre	Remuneration Method and Rate: Transport Industry (State) Award - Grade 7 Long Distance Rates (29.54 cents per km) plus Hourly rate of ($17.25 base) for all time loading/unloading/queuing.
Transport Operator:	Toll <Address>	Delivery Location: Wagga Wagga XYZ's Store	Remuneration Monitoring/Measuring Systems: GPS, On Board Computer, Auditing cross checks of pay, log book, timesheet, consignment note, GPS & Engine Records, SDP
		Period: 12.30 pm Delivery Window	Means to Limit Work Hours and Work Contact with manager (<insert phone number>) for reporting unexpected delays and rescheduling journey if necessary

Planned Application of Hours	
Planned Total Trip Time: 11.75 hours 7am - 15 minute pre-trip inspection 7.15 am to 12.00pm (Minchinbury - Wagga Wagga) 4.45 hrs driving 30 minutes break prior to unloading 12.30-1.30 pm loading unloading 1.30pm to 4.15pm (Wagga Wagga/Marulan) 30 minutes Marulan (4.45pm) 4.45 - 6.45 Marulan - Minchinbury 2 hours	
Confirmation that driver has been inducted and trained in OHS policy	
Confirmation that driver has been inducted and trained in company D&A policy	

F. L. WRIGHT *J, President.*
M. J. WALTON *J, Vice-President.*
P. J. SAMS *D.P.*
I. TABBAA, Commissioner.

Printed by the authority of the Industrial Registrar.

2004

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Minister for Industrial Relations)

Fair Work Contracts Bill 2004

Contents

Page

Part 1 Preliminary

1 Name of Act 2

2 Commencement 2

3 Object of Act 2

4 Application outside ACT 2

5 Dictionary 2

6 Notes

3

7 Offences against Act—application of Criminal Code etc

3

Part 2 Key concepts

8 *Work contract*

4

9 *Contract worker*

4

10 *Principal*

4

Part 3 Review of work contracts

11 Applications for review

5

12 Remuneration cap—individual contract workers

5

13 Revenue cap—corporate contract workers

6

14 Time limit for applications—terminated contracts

6

15 Representative parties

7

16 Review of work contract

8

17 Unfairness under work contracts

8

18 Orders to amend or set aside unfair work contract

9
19 Orders for compensation
10
20 Orders prohibiting further unfair work contracts
10

Part 4 Tribunal proceedings

21 Additional powers
12
22 Costs
12

Part 5 Enforcing tribunal orders

23 Court may enforce order filed in court
14
24 Enforcement in Magistrates Court
14
25 Contravention of court enforcement order
15

Part 6 Miscellaneous

26 No contracting out
16
27 Approved forms
16
28 Determination of fees
16
29 Regulation-making power
16

Part 7 Transitional and consequential provisions

30 Application to work contracts 18
31 Legislation amended—sch 1 18

Schedule 1 Consumer and Trader Tribunal Act 2003—consequential amendments 19

Dictionary 22

2004

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Minister for Industrial Relations)

Fair Work Contracts Bill 2004

A Bill for

An Act about certain work contracts, and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

Part 1 Preliminary

1 Name of Act

This Act is the *Fair Work Contracts Act 2004*.

2 Commencement

This Act commences on 1 July 2006.

Note The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

3 Object of Act

The object of this Act is to ensure fair conditions for workers under work contracts.

4 Application outside ACT

This Act extends to—

(a) a work contract made, or amended, in the ACT for work outside the ACT; and

(b) a work contract made, or amended, outside the ACT for work in the ACT.

5 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1 The dictionary at the end of this Act defines certain terms used in this Act, and includes references (***signpost definitions***) to other terms defined elsewhere in this Act.

For example, the signpost definition '***contract worker***—see section 9.' means that the term 'contract worker is defined in that section.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

6 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

7 Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 *Criminal Code*

The Criminal Code, ch 2 applies to all offences against this Act (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg ***conduct***, ***intention***, ***recklessness*** and ***strict liability***).

Note 2 *Penalty units*

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

Part 2 Key concepts

8 *Work contract*

(1) A ***work contract*** is a contract for services for the doing of work in an industry.

Example of *work contract*

A contract under which a person is to transport goods, or install electrical fittings, and—

- is paid to achieve a particular result or outcome; and
- must supply plant and equipment, or tools of trade, for the work needed to achieve the result or outcome; and
- is, or would be, liable for the cost of rectifying any defect in the work done.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(2) To remove any doubt, a work contract does not include a contract of employment.

9 *Contract worker*

A ***contract worker*** under a work contract is a person engaged to do work under the contract.

10 *Principal*

The ***principal*** under a work contract is a party to the contract other than a contract worker.

Part 3 Review of work contracts

11 Applications for review

(1) Application may be made to the consumer and trader tribunal for review of a work contract.

(2) An application may be made only—

(a) by an interested person; and

(b) on the ground that the work contract is unfair.

(3) For this part, each of the following is an ***interested person***:

(a) a party to the work contract;

(b) an industrial organisation whose rules entitle it to represent the industrial interests of a contract worker under the work contract, if the organisation acts with the written consent of the worker;

(c) an industrial organisation whose rules entitle it to represent the industrial interests of a principal under the work contract, if the organisation acts with the written consent of the principal.

Note 1 If a form is approved under s 27 for this provision, the form must be used.

Note 2 A fee may be determined under s 28 for this provision.

12 Remuneration cap—individual contract workers

(1) The tribunal may review a work contract under which the contract worker is an individual only if the total value of the remuneration for the worker under the contract is, during the relevant period, less than the remuneration cap.

(2) In this section:

relevant period means—

(a) the 12-month period before the day the application to review the contract is made to the tribunal; or

(b) if the contract has been terminated in the 12-month period

mentioned in paragraph (a)—the 12-month period before the day the contract is terminated.

remuneration cap means $200 000, WCI indexed.

13 Revenue cap—corporate contract workers

(1) The tribunal may review a work contract under which the contract worker is a corporation only if satisfied the gross revenue of the corporation from all sources is, during the relevant period, less than the revenue cap.

(2) In this section:

relevant period means—

(a) the 12-month period before the day the application to review the contract is made to the tribunal; or

(b) if the contract has been terminated in the 12-month period mentioned in paragraph (a)—the 12-month period before the day the contract is terminated.

revenue cap means $200 000, WCI indexed.

14 Time limit for applications—terminated contracts

The tribunal may review a work contract that has been terminated only if the application for review is made no later than 12 months after the day the contract is terminated.

15 Representative parties

(1) This section applies if 2 or more people have the same or a similar work contract, whether or not it is with the same principal.

(2) An application may be made to the tribunal under this part in relation to the contract by any of those people on behalf of some or all of them.

(3) Unless the tribunal orders otherwise, a proceeding under this part may also be continued against any of those people on behalf of some or all of them.

(4) At any stage of a proceeding to which this section applies, the tribunal

may appoint a party to the proceeding, or someone else, to represent some or all of the people having the same or a similar work contract.

(5) If the tribunal appoints someone under subsection (4) who is not already a party to the proceeding, the tribunal must join the person as a party to the proceeding.

Note The *Consumer and Trader Tribunal Act 2003*, s 28 (2) provides for the tribunal to join a person as party to a proceeding.

(6) An order made in a proceeding to which this section applies binds everyone represented by a person appointed under subsection (4) but must not be enforced against anyone not a party to the proceeding without the tribunal's leave.

(7) An application for leave under subsection (6) must be made in writing.

Note 1 If a form is approved under s 27 for this provision, the form must be used.

Note 2 A fee may be determined under s 28 for this provision.

(8) The applicant must give a copy of the application to each person against whom the order is sought to be enforced.

(9) The tribunal may, by written order, exempt a represented person from an order mentioned in subsection (6) if satisfied that facts or matters peculiar to the person would make it unfair for the person to be bound by the order.

(10) The tribunal may also act under subsection (9) on its own initiative.

16 Review of work contract

(1) The tribunal must, on application under section 11, review a work contract and decide whether it is unfair.

(2) In reviewing the work contract, the tribunal must consider the following:

(a) the relative strength of the bargaining positions of the parties to the contract and, if applicable, anyone acting for a party;

(b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract;

(c) whether the contract provides for any payment by the contract worker and the provisions about the payment if the contract is terminated;

Example of payment by contract worker

payment for goodwill, plant or equipment

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(d) any action taken by a party to mitigate any claimed unfairness under the contract.

(3) The tribunal may also consider anything else the tribunal considers relevant.

17 Unfairness under work contracts

(1) This section does not limit the cases in which the tribunal may find that a work contract is unfair.

(2) However, the tribunal may decide that a work contract is unfair if satisfied about any of the following:

(a) the contract provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee doing similar work;

(b) the contract avoids, or is designed to avoid, the provisions of an industrial award or agreement;

(c) the contract, if terminated, does not result in the contract worker being treated fairly in relation to any amount paid by the worker under the contract;

(d) the contract is, or appears to be, against the public interest.

Example for par (c)

the contract does not provide for repayment of the amount paid or compensation for the contract worker

Example for par (d)

the effect of the contract, or a series of similar contracts, would adversely affect the safety of workers or a section of the public

Note An example is part of the Act, is not exhaustive and may extend,

but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(3) Also, the tribunal may decide that a work contract is unfair—

(a) as originally made; or

(b) as subsequently amended; or

(c) because of the conduct of a party.

18 Orders to amend or set aside unfair work contract

(1) This section applies if the tribunal decides that a work contract is unfair.

(2) The tribunal may, by written order—

(a) amend the contract; or

(b) set aside all or any part of the contract; or

(c) if the contract has been terminated—reinstate the contract with any amendment the tribunal considers fair and reasonable.

(3) The amendment of a work contract, including a reinstated work contract, may include—

(a) the omission of any provision of the contract; and

(b) the insertion of new and substituted provisions into the contract.

(4) An order under this section may only be made for the purpose of putting the parties to the work contract as nearly as practicable on a footing that avoids the contract being unfair.

(5) An order under subsection (3) may be expressed to commence on—

(a) the day the order is made; or

(b) if a later date of commencement is stated in the order—that later date.

19 Orders for compensation

(1) This section applies if the tribunal is satisfied that an order under section 18 would be inadequate for putting the parties to the work

contract as nearly as practicable on a footing that avoids the contract being unfair.

(2) The tribunal may, in writing, order a party to the work contract to pay a stated amount of compensation to another party to the contract.

(3) An order for compensation may be made instead of, or in addition to, an order under section 18.

20 Orders prohibiting further unfair work contracts

(1) This section applies if the tribunal is satisfied that—

(a) a principal under a work contract found to be unfair is likely to enter into another unfair work contract as principal; or

(b) if the principal mentioned in paragraph (a) is a corporation—an executive officer of the corporation is likely to—

(i) enter into an unfair work contract as principal; or

(ii) be an executive officer of a corporation likely to enter into an unfair work contract.

(2) The tribunal may, in writing, order the person not to enter into a work contract of a stated kind.

(3) In this section:

executive officer, of a corporation, means a person, by whatever name called and whether or not the person is a director of the corporation, who is concerned with, or takes part in, the corporation's management.

Part 4 Tribunal proceedings

21 Additional powers

The powers of the tribunal under this Act are additional to those under the *Consumer and Trader Tribunal Act 2003*.

22 Costs

(1) The tribunal may require a party to a proceeding arising from an application under this Act to pay all or any part of the costs of another party reasonably incurred in relation to the proceeding if satisfied about any of the following:

(a) an application by the party is frivolous or vexatious;

(b) the party acted unreasonably in pursuing, or failing to settle, a matter before the tribunal;

(c) the party contravenes a tribunal direction.

(2) However, the tribunal may award costs under subsection (1) only if satisfied that it is in the interests of justice to do so.

(3) In deciding whether it is in the interests of justice to award costs, the tribunal must consider the following:

(a) whether the party's actions were deliberate or could easily have been avoided;

(b) whether (and if so, the extent to which) the party's actions affected the tribunal's ability to conduct the proceeding in accordance with the *Consumer and Trader Tribunal Act 2003*, section 21 (Principles about tribunal procedures);

(c) the importance to the community of people being able to afford to bring applications to the tribunal under this Act;

(d) the relative financial capacities of the parties to meet the costs of the proceeding.

(4) The tribunal may also consider anything else the tribunal considers relevant.

(5) Costs under this section are payable at $^{2}/_{3}$ of the scale of costs prescribed by the rules applying to a civil proceeding in the Supreme Court.

Part 5 Enforcing tribunal orders

23 Court may enforce order filed in court

(1) This section applies if a party to a proceeding under part 3 (Review of work contracts)—

(a) applies to a court of competent jurisdiction to enforce a tribunal order made in the proceeding; and

(b) files a copy of the order, certified in writing by the tribunal registrar, in the court.

(2) If the court is satisfied that a person (the ***respondent***) against whom the order is made has contravened, is contravening or is likely to contravene the order, it may—

(a) make an order restraining the respondent from contravening the tribunal order (including an order requiring the respondent to do something); or

(b) make any other order the court considers appropriate to enforce the tribunal order; or

(c) enforce the tribunal order as if it were a final judgment of the court.

24 Enforcement in Magistrates Court

(1) To remove any doubt, the Magistrates Court has jurisdiction to act under this part to enforce a tribunal order.

(2) However, this section does not affect any limit on the Magistrates Court's jurisdiction under the *Magistrates Court Act 1930*, part 4.2 (Civil jurisdiction).

25 Contravention of court enforcement order

A person must not contravene an order of a court under section 23.

Maximum penalty: 50 penalty units.

Part 6 Miscellaneous

26 No contracting out

A provision of a contract or agreement is void if it limits or modifies, or purports to limit or modify, the operation of this Act (including this section), or an order under this Act, in relation to a work contract.

27 Approved forms

(1) The Minister may, in writing, approve forms for this Act.

(2) If the Minister approves a form for a particular purpose, the approved form must be used for that purpose.

Note For other provisions about forms, see the Legislation Act, s 255.

(3) An approved form is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

28 Determination of fees

(1) The Minister may, in writing, determine fees for this Act.

Note The Legislation Act contains provisions about the making of determinations and regulations relating to fees (see pt 6.3).

(2) A determination is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

29 Regulation-making power

(1) The Executive may make regulations for this Act.

Note A regulation must be notified, and presented to the Legislative Assembly, under the Legislation Act.

(2) A regulation may make provision in relation to the making, keeping or transfer of records relating to work contracts.

(3) A regulation may create offences and prescribe maximum penalties of not more than 10 penalty units for the offences.

Part 7 Transitional and consequential provisions

30 Application to work contracts

(1) This Act applies in relation to conditions under a work contract only if the contract was made on or after the commencement of this Act.

(2) This section expires on 1 July 2008.

31 Legislation amended—sch 1

This Act amends the *Consumer and Trader Tribunal Act 2003* in schedule 1.

Schedule 1 Consumer and Trader Tribunal Act 2003—consequential amendments

(see s 31)

[1.1] New section 6 (a) (iii)

insert

(iii) exercise other functions given to the tribunal under other Acts; and

[1.2] Section 7 (2)

substitute

(2) The tribunal has—

(a) a general division; and

(b) a fair work contracts division.

[1.3] New section 10A

insert

10A Deputy president—fair work contracts division

A person may be appointed under section 10 as the deputy president for the fair work contracts division only if—

(a) the person—

(i) is a lawyer, and has been a lawyer for not less than 5 years; or

(ii) has had experience at a high level in industry, commerce, government or industrial relations; or

(iii) has, at least 5 years previously, obtained qualifications from a university or other tertiary educational institution in the field of law, economics, industrial relations or some other field of study considered by the Executive to be

substantially relevant to the functions of the deputy president; and

(b) the Executive is satisfied the person is suitable for appointment because of the person's expertise and experience in the field of industrial relations.

[1.4] Section 15 (b) and note

substitute

(b) for disciplinary action to be taken against a person under the Act; or

(c) for the exercise of a function given to the tribunal under another Act.

Note The following Acts provide for applications to be made to the tribunal:

- *Agents Act 2003*
- *Security Industry Act 2003*
- *Fair Work Contracts Act 2004*.

[1.5] New section 25A

in division 4.2, insert

25A Conduct of proceedings—tribunal divisions

(1) A proceeding arising under the *Fair Work Contracts Act 2004* must be conducted in the fair work contracts division of the tribunal.

(2) Any other proceeding must be conducted in—

(a) the general division of the tribunal; or

(b) if directed by the president, a division created by regulation under section 7 (Establishment of tribunal).

[1.6] Section 28 (1) (b)

substitute

(b) for an application in relation to a disciplinary action—the commissioner and the person to whom the application relates; or

(c) for a proceeding arising from an application to review a work contract under the *Fair Work Contracts Act 2004*——each party to the contract.

[1.7] Section 29

substitute

29 Representation

(1) A person may be represented in a proceeding by a lawyer or someone else.

(2) However, in a proceeding before the tribunal arising under the *Fair Work Contracts Act 2004*, an interested person may be represented by a lawyer only with leave of the tribunal.

(3) In this section:

interested person—see the *Fair Work Contracts Act 2004*, section 11 (3).

[1.8] Section 44 (2)

substitute

(2) The tribunal may take any other action it considers appropriate that is consistent with this Act and the Act under which the application to which the proceeding before the tribunal applies was made.

Note A reference to an Act includes a reference to the statutory instruments made or in force under the Act, including any regulation (see Legislation Act, s 104).

Dictionary

(see s 5)

Note 1 The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2 For example, the Legislation Act, dict, pt 1, defines the following terms:

- chief executive (see s 163)
- consumer and trader tribunal
- contravene
- lawyer.

contract worker—see section 9.

industrial organisation means an organisation registered under the *Workplace Relations Act 1996* (Cwlth), schedule 1B (Registration and Accountability of Organisations).

industry includes—

(a) any profession, trade, manufacture, business, project or occupation in which people work; and

(b) a part of an industry or of a number of industries.

interested person, for part 3 (Review of work contracts)—see section 11 (3).

order means an order by the tribunal under this Act.

principal—see section 10.

remuneration includes non-financial remuneration.

termination, of a work contract, means the termination or other ending of the contract.

tribunal means the consumer and trader tribunal.

unfair includes harsh and unconscionable.

WCI means the Wage Cost Index (Canberra) issued by the Australian Statistician.

Note In June 2004, this was series 6345.0.

WCI indexed, for an amount, means the amount as adjusted in line with any adjustment in the WCI since the commencement of the provision in which the amount appears.

work contract—see section 8.

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 2004.

2 Notification

Notified under the Legislation Act on 2004.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

© Australian Capital Territory 2004