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SUPPLEMENTARY SUBMISSION ON THE ROAD SAFETY REMUNERATION BILL 2011

3 February 2012

***NOTE*: Supplementary to submission lodged 30 January 2012**

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1.0 Introduction

This document is supplementary to the 30 January 2012 submission lodged with the House of Representatives Infrastructure and Communications Committee Inquiry into the *Road Safety Remuneration Bill 2011* and the *Road Safety (Consequential Amendments and Related Provisions) Bill 2011*.

2.0 Context

As detailed in the primary submission, NatRoad does not support the *Road Safety Remuneration Bill 2011* in its current form. No part of this supplementary submission should be interpreted as either a general or specific endorsement of the proposal.

This supplementary submission recommends several amendments to the current bill on the assumption that the Federal Government will nonetheless convene a parliamentary debate on the *Road Safety Remuneration Bill 2011* in early 2012 with a view to commencement by 1 July 2012.

3.0 Summary of Recommendations

Recommendation 1: ***The definition at 9(4) should be modified to include the term "has carried, is carrying or will carry goods" (also see Recommendation 25).***

Recommendation 2: ***The definition of a participant in the supply chain at Section 9(6) should be expanded to include owners or operators of loading/unloading premises (also see Recommendation 25).***

Recommendation 3: ***The Objects should be amended to:***

- ***Ensure that responsibility and cost of implementing and maintaining standards is carried by the supply chain participant best placed to address the issue; and***
- ***Empower the Tribunal to make orders with respect to any party, including drivers.***

Recommendation 4: ***The Tribunal should be required to inform applicants of the reasons for a refusal to consider an application as part of the requirement for notification at s19(6).***

Recommendation 5: ***It is recommended that:***

- ***The Tribunal should only hear applications outside its annual work program if exceptional circumstances exist;***
- ***Before the Tribunal decides to hear a matter outside its annual work program it should be required to consult with the industry; and***
- ***The same tests and procedures which apply to making an order should apply to non-technical variations to an existing Order.***

Recommendation 6: ***It is recommended that the Bill include a new section specifically addressing evidentiary thresholds and the use of underlying assumptions.***

Recommendation 7: ***The matters at Section 20 should be expanded to specifically include:***

- ***Enforceability listed as a separate matter, not grouped in with fair and reasonable as it is as present in section 20(1)(a);***
- ***The need to ensure that the responsibilities each participant bears are commensurate with its capacity to pay and its place in the supply chain and its ability to influence safety outcomes;***

- ***Whether competitors with differing business structures, infrastructure or equipment are able to undertake the transport task in question safely and at a lower cost;***
- ***Considerations relating to safety including:***
  - ***Prevailing trends in safety improvement;***
  - ***The reliability of available safety data;***
  - ***The quantum of any proposed safety improvements and whether or not actual improvements are likely to be measureable;***
  - ***Current safety measures, in place or under development that may address the problem;***
  - ***Compliance levels with existing safety measures and whether these can be improved through improved enforcement or other measures; and***
  - ***Alternative non-regulatory measures that could be pursued.***

Recommendation 8: ***The Tribunal should be required to notify interested stakeholders about any proposal to conduct research before it has been undertaken.***

Recommendation 9: ***Statutory bodies with interests in road safety or driver remuneration should be specifically included either by general reference in s24(1)(a) or by listing each entity as part of the regulations referred to at s24(1)(b).***

Recommendation 10: ***The Bill should clearly provide that, to the extent of any inconsistency, Safe Remuneration Orders, Safe Remuneration Approvals and Arbitration Rulings prevail over:***

- ***All Fair Work Instruments;***
- ***All collective agreements;***
- ***All driver contracts including those applicable to owner-drivers and small fleet operators; and***
- ***All other relevant contracts in the supply chain.***

Recommendation 11: ***The Bill should provide that Safe Remuneration Orders, Approvals and Arbitration Rulings prevail over any such guidelines or Codes of Practice to the extent of any inconsistency.***

Recommendation 12: ***The Bill should stipulate that an agreement should not be a stand- alone agreement. It should instead be an amendment to the way a Safe Remuneration Order applies to the determined parties and should only be able to deal with those matters covered in the Safe Remuneration Order.***

Recommendation 13: ***Hirers should be able to apply for approval of a collective agreement without evidence of approval of 50% of drivers.***

Recommendation 14: ***The Bill should expressly exclude the operation of the Consumer and Competition Act in relation to negotiations for a Safe Remuneration Approval.***

Recommendation 15: ***Section 43(b) of the bill should be amended so that it reads "driver or employer or hirer".***

Recommendation 16: ***Section 4 of the bill should be amended so that the definition of compellable person includes simply a participant in the supply chain. The requirement that the driver also be involved in a matter before the Tribunal should be removed.***

Recommendation 17: ***The requirement for employer associations to obtain the Tribunal's consent for applications should be removed at s19(3)(e)(ii) and ss32(2)(d)(ii).***

Recommendation 18: ***The Bill should require the relevant Minister to table the Annual Report in Parliament as soon as reasonably practicable and immediately after this time the report must be made available on the Tribunal's website.***

Recommendation 19: ***The Bill should stipulate that the annual report must at a minimum include:***

- ***A section on progress against the annual work plan;***
- ***A summary of the orders and approvals made;***
- ***A summary of refusals and the reasons given for the refusals;***
- ***A section on compliance activities, including a summary of compliance notices issued and the reasons for their issue;***
- ***A summary of the operation of the dispute resolution mechanism;***
- ***A summary of matters referred to the Fair Work Ombudsman;***
- ***A summary of matters that are known to have been referred to the courts;***
- ***An estimate of the additional costs imposed on industry as a result of orders or approvals made;***
- ***A statement concerning safety improvements expected to occur over and above underlying trends;***
- ***A statement concerning whether or not safety improvements are actually occurring as a result of the Tribunal's actions;***
- ***A statement concerning any issues arising through the concurrent operation of overlapping legislation; and***

- ***Recommendations to improve the operation of the Tribunal.***

Recommendation 20: ***The Bill should be amended to provide employers and hirers with protection against adverse action by supply chain participants for reasons relating to their exercising or refusing to exercise rights they have under the Bill or a Safe Remuneration Order.***

Recommendation 21: ***The Tribunal's primary focus should be on matters that are not addressed in awards and orders should not impose pay or conditions that are more generous than that contained in the awards.***

Recommendation 22: ***The Tribunal should not seek to establish minimum remuneration rates for sub-contract drivers.***

Recommendation 23: ***Orders issued by the Tribunal must be specific for either employees or sub-contract drivers and must reflect the unique considerations required for each.***

Recommendation 24: ***The Tribunal should not have powers to remove or otherwise change the cents per kilometre rate as contained in the long distance award and used by sub-contractors in the long distance sector.***

Recommendation 25: ***The bill should apply to all parties in the supply chain with an ability to influence rates or safety outcomes, as closely as possible reflecting the chain of responsibility provisions of the Heavy Vehicle National Law and the Workplace Health and Safety Act.***

Recommendation 26: ***Orders should include a mechanism for road transport operators to recover increased costs from the other parties in the contracting chain.***

Recommendation 27: ***Orders should take into account the variations in supply and demand for road transport services by either geographical or other measure, as is consistent with current pricing procedures.***

Recommendation 28: ***The Tribunal should refer all matters relating to conditions and standards to established authorities with relevant responsibilities where they exist.***

Recommendation 29: ***The inaugural annual work program should identify payment timeframes and recoverable demurrage as priority reforms.***

Recommendation 30: ***The Tribunal should initially focus on measures that would address regulatory gaps and while delaying actions that would impact on competition, productivity industry structure (i.e. measures that would impact on freight rates).***

4.0 Proposed Amendments

4.1 General Observations

Current chain of responsibility laws recognise that all parties in the transport and logistics supply chain have obligations and responsibilities for ensuring driver safety.

In contrast, the current draft of the *Road Safety Remuneration Bill 2011* focuses too heavily on dealing with issues specific to drivers without adequately balancing the interests of the other parties in the chain. This intrinsic bias effectively limits the potential of the bill to influence outcomes in the road transport industry and denies other parties a remedy for substantially similar issues. In fact, a likely perverse outcome of the current bill would be to increase the cost pressures on road transport operators who themselves have primary responsibility for many important safety matters.

The recommendations contained in the sections to follow are generally aimed at enhancing the potential of the bill to improve fairness for other parties in the supply chain with an ability to influence remuneration or safety outcomes.

4.2 Definition of Supply Chain

4.2.1 Intermediaries

A participant in the supply chain includes Intermediaries. At present, section 9(4) defines Intermediary as a party to a contract that concerns anything in respect of which a driver "is carrying" goods.

Such a definition would mean, for example, that a person is unlikely to ever be an intermediary for the purposes of a dispute until such time as a driver is actually carrying goods.

Recommendation 1: ***The definition at 9(4) should be modified to include the term "has carried, is carrying or will carry goods" (also see Recommendation 25).***

4.2.2 Operators of Loading Facilities

It is conceivable that some obligations in a Safe Remuneration Order would be best imposed on those who own or develop loading/unloading facilities, not just the operator.

Recommendation 2: ***The definition of a participant in the supply chain at Section 9(6) should be expanded to include owners or operators of loading/unloading premises (also see Recommendation 25).***

4.3 Safe Remuneration Orders

4.3.1 Limitations on Tribunal Powers

The objects of the Bill are crucial. The Tribunal must make Safe Remuneration Orders consistent with the objects of the bill. Thus, the Objects of the Bill provide the only real limitation on the Tribunals powers.

At present the Objects are skewed in favour of drivers and gives insufficient weight or recognition to the interests of road transport operators. The Bill also underplays the role of drivers in influencing safety outcomes. For instance, the Bill does not include powers for the Tribunal to impose any obligations on drivers that might improve their safety or the safety of the general public. This is reflected in two aspects:

- While the Objects of the Bill include requiring hirers and supply chain participants to maintain standards, there is no equivalent Object in relation to drivers;
- Section 27(3) clearly prohibits the Tribunal from imposing obligations on drivers.

In respect of other participants in the supply chain there is nothing in the Objects that would clearly allow road transport operators to argue that those higher up the supply chain should change their business practices.

Recommendation 3: ***The Objects should be amended to:***

- ***Ensure that responsibility and cost of implementing and maintaining standards is carried by the supply chain participant best placed to address the issue; and***
- ***Empower the Tribunal to make orders with respect to any party, including drivers.***

4.3.2 Reasons for Refusal

It is a reasonable expectation that modern legislation will enshrine a sensible level of transparency so that regulated persons or entities are able to ascertain the reasons for decisions that affect their interests.

Given that s19(5)(b) allows the Tribunal to refuse to consider an application 'for any other reason', it is imperative the Bill requires the Tribunal to inform the applicant of any such reasons as part of the requirement for notification at s19(6).

Recommendation 4: ***The Tribunal should be required to inform applicants of the reasons for a refusal to consider an application as part of the requirement for notification at s19(6).***

4.4 Integrity of the Annual Work Program

It is likely that the matters before the Tribunal will be significant and momentous for the road transport industry. It is essential that industry is forewarned so as to be well prepared to meaningfully contribute to the debate on the matters under consideration.

Recommendation 5: ***It is recommended that:***

- ***The Tribunal should only hear applications outside its annual work program if exceptional circumstances exist;***
- ***Before the Tribunal decides to hear a matter outside its annual work program it should be required to consult with the industry; and***
- ***The same tests and procedures which apply to making an order should apply to non-technical variations to an existing Order.***

4.5 Evidence

It would appear that the Tribunal is being established under circumstances in which the extent of any link between remuneration and safety has not been conclusively proven (as acknowledged in the 2008 NTC Report, the 'Safe Rates Directions Paper and the Regulatory Impact Statement). If the link cannot be conclusively proven on an industry wide-basis then any supposed link is likely to be even more tenuous for specific sectors of the industry.

NatRoad is gravely concerned that this underlying assumption and lack of conclusive evidence will create a situation in which applications can be made without substantiating claims beyond a general statement that '*safety is generally a problem in the road transport industry and increased payments will necessarily lead to safer outcomes'*. This also has consequential impacts for measuring the success of the tribunal – to do so on such an assumption would necessarily lead to the conclusion that every order or agreement had been 100% successful.

The Bill does not specifically address the issue of an evidentiary threshold. NatRoad asserts that a new section must be included in the bill that specifically deals with this issue. This will have multiple benefits:

- The number of frivolous or opportunistic applications may be reduced;
- The collection and accumulation of new evidence and data concerning any extant link between safety and remuneration will be promoted;
- The Tribunal will have clear criteria for relying on evidence for decision making purposes.

Recommendation 6: ***It is recommended that the Bill include a new section specifically addressing evidentiary thresholds and the use of underlying assumptions.***

4.6 Matters for Consideration

It is essential that the Tribunal has clear guidance concerning the matters that must be taken into consideration when making, or refusing to make, a Safe Remuneration Order.

The matters set out at Section 20 of the bill are however incomplete and should be expanded to include a number of other considerations that are fundamental to the objects of the act and matters that are of practical importance to the industry.

Recommendation 7: ***The matters at Section 20 should be expanded to specifically include:***

- ***Enforceability listed as a separate matter, not grouped in with fair and reasonable as it is as present in section 20(1)(a);***
- ***The need to ensure that the responsibilities each participant bears are commensurate with its capacity to pay and its place in the supply chain and its ability to influence safety outcomes;***
- ***Whether competitors with differing business structures, infrastructure or equipment are able to undertake the transport task in question safely and at a lower cost;***
- ***Considerations relating to safety including:***
  - ***Prevailing trends in safety improvement;***
  - ***The reliability of available safety data;***
  - ***The quantum of any proposed safety improvements and whether or not actual improvements are likely to be measureable;***
  - ***Current safety measures, in place or under development that may address the problem;***
  - ***Compliance levels with existing safety measures and whether these can be improved through improved enforcement or other measures; and***
  - ***Alternative non-regulatory measures that could be pursued.***

4.7 Publication of Research

Section 21 requires publication of research undertaken or commissioned by the Tribunal. However, research can often be contentious and take a lengthy amount of time to complete. Interested parties cannot be expected to be able to undertake alternative research challenging the findings of published research within the timeframes required once an application for an order has been made.

Some stakeholders may also be in a position to make a meaningful contribution to the research proposed to be undertaken by the Tribunal but will be unable to do so if only becoming aware of the initiative post publication.

Recommendation 8: ***The Tribunal should be required to notify interested stakeholders about any proposal to conduct research before it has been undertaken.***

4.8 Affected Persons and Bodies to Have a Reasonable Opportunity

Section 24 sensibly requires that requires that affected persons and bodies are to have a reasonable opportunity to make and comment on submissions for draft order.

Statutory bodies including enforcement agencies with responsibilities for regulations currently applicable to road safety or driver remuneration may be uniquely affected by road safety remuneration orders. While such bodies will not be a party to an order, the thresholds of particular regulations under their administration may effectively cease to apply to certain sectors (or may apply differently) in favour of new standard specified as part of an order.

For the purposes of clarification, NatRoad suggests that statutory bodies with interests in road safety or driver remuneration should be specifically included either by general reference in s24(1)(a) or by listing each entity as part of the regulations referred to at s24(1)(b).

Recommendation 9: ***Statutory bodies with interests in road safety or driver remuneration should be specifically included either by general reference in s24(1)(a) or by listing each entity as part of the regulations referred to at s24(1)(b).***

4.9 Application and Overlap Issues

There are some potentially significant issues with the way the Bill and its instruments interact with other Acts and their instruments. At present the Bill provides for a reasonably complicated set of rules about whether and what extent the orders of the Tribunal override existing Acts and their instruments. For example:

- the Bill states that Fair Work instruments are of no effect if they provide for conditions less beneficial than a Safe Remuneration Order, but is silent about what happens if a Safe Remuneration Order is simply inconsistent with any of those instruments;
- The Bill limits the definition of enterprise agreement to agreements made under the Fair Work Act but there are quite possibly many agreements under the Workplace Relations Act still extant;
- The Bill provides that owner-drivers must get at least the remuneration specified in a Safe Remuneration Order or Approval, but is silent about how those instruments relate to a contract in all other circumstances, such as if they are simply inconsistent.
- The Bill is silent about how a Safe Remuneration Order relates to other contracts within the contract chain even though an Order may need to override or augment existing contracts to, for example, ensure hirers are free of obligations that would make it impossible for them to comply with an Order in respect of their drivers.

This is likely to lead to cost, uncertainty, and complexity for road transport operators because litigation and test cases will be required to sort out how any instruments work in practice. The decision about whether and to what extent instruments are overridden or augmented should be in the hands of the Tribunal so it can tailor its decision as required.

Recommendation 10: ***The Bill should clearly provide that, to the extent of any inconsistency, Safe Remuneration Orders, Safe Remuneration Approvals and Arbitration Rulings prevail over:***

- ***All Fair Work Instruments;***
- ***All collective agreements;***
- ***All driver contracts including those applicable to owner-drivers and small fleet operators; and***
- ***All other relevant contracts in the supply chain.***

4.10 Safe Work Australia

The Bill is silent about how the Safe Remuneration Orders dovetail with the Safe Work Act, and in particular any guidelines and Codes of Practice made under that Act.

Recommendation 11: ***The Bill should provide that Safe Remuneration Orders, Approvals and Arbitration Rulings prevail over any such guidelines or Codes of Practice to the extent of any inconsistency.***

4.11 Safe Remuneration Approvals

The Bill envisages hirers and their owner-drivers being able to ask the Tribunal to exempt them from a Safe Remuneration Order by approving a collectively agreed arrangement that provides for conditions more beneficial to the Drivers than the Safe Remuneration Order.

While this is a useful concept, NatRoad is concerned that the current provisions may be open to abuse.

4.11.1 Content of Agreements/Approvals

At present there is nothing that limits the content of a Collective Agreement. It is therefore simply a tool for by-passing the collective bargaining provisions of the (former Trade Practices) Consumer and Competition Act.

Recommendation 12: ***The Bill should stipulate that an agreement should not be a stand- alone agreement. It should instead be an amendment to the way a Safe Remuneration Order applies to the determined parties and should only be able to deal with those matters covered in the Safe Remuneration Order.***

4.11.2 Driver Approval of Agreements

At present, a Safe Remuneration Approval needs the consent of more than 50% of Drivers to whom it will apply.

Given the nature of the industry and its engagement patterns it is entirely possible that there is no identifiable driver or set of drivers at the time the hirers wish to make the order.

The fact that the approval must make people better off compared to the Order should be sufficient protection and hirers should be able to apply for approval without evidence of approval of drivers.

Recommendation 13: ***Hirers should be able to apply for approval of a collective agreement without evidence of approval of 50% of drivers.***

4.11.3 Approvals and Consumer and Competition Act

At present, nothing in the Bill explains how Safe Remuneration Approvals will work vis-a-vis the collective bargaining regime within the Consumer and Competition Act. At first blush, any attempt to negotiate such an agreement could well constitute price fixing or anti-competitive conduct in breach of the Consumer and Competition Act.

Recommendation 14: ***The Bill should expressly exclude the operation of the Consumer and Competition Act in relation to negotiations for a Safe Remuneration Approval.***

4.12 Dispute Resolution – Driver Must be a Party

The NatRoad Survey referred to in section 4.0 of our primary submission found that the majority of small, medium and large operators would generally support the establishment of a dispute resolution mechanism that allows for both conciliation and arbitration with the consent of all parties.

However, the dispute resolution mechanism currently hinges on drivers being a party to the dispute. The consequence of this requirement is an effective restriction on road transport operators using the mechanism to resolve disputes with parties further up the supply chain. In many cases, the root cause of a transport operator not being able to pay drivers a higher amount will be the rates or conditions stipulated by a customer or prime contractor.

Recommendation 15: ***Section 43(b) of the bill should be amended so that it reads "driver or employer or hirer".***

Recommendation 16: ***Section 4 of the bill should be amended so that the definition of compellable person includes simply a participant in the supply chain. The requirement that the driver also be involved in a matter before the Tribunal should be removed.***

4.13 Applications and Representations by Employer Bodies

NatRoad notes that the bill prevents all employer bodies from making an application without the approval of relevant members and the approval of the tribunal. This restriction stands in stark contrast to the rules applicable to unions which may apply simply on the basis that they are entitled to represent the interests of a road transport driver to whom an order will apply (i.e. specific permission is not required from either the individual driver or from the Tribunal).

In practical terms the restriction on industrial associations is arguably pointless given that a member can make an application and nominate the employer association as their agent.

Recommendation 17: ***The requirement for employer associations to obtain the Tribunal's consent for applications should be removed at s19(3)(e)(ii) and ss32(2)(d)(ii).***

4.14 Annual Report

Section 116 requires the production of an annual report which must be provided to the Minister. The content of the annual report is not specified however and there is no requirement for publication.

Given the sensitivities concerning whether or not the Tribunal will be effective in improving safety and the potential for significant costs to the imposed on the road transport industry, it is vitally important that the contents of the report include measures of effectiveness and that the report is publicly available.

Recommendation 18: ***The Bill should require the relevant Minister to table the Annual Report in Parliament as soon as reasonably practicable and immediately after this time the report must be made available on the Tribunal's website.***

Recommendation 19: ***The Bill should stipulate that the annual report must at a minimum include:***

- ***A section on progress against the annual work plan;***
- ***A summary of the orders and approvals made;***
- ***A summary of refusals and the reasons given for the refusals;***
- ***A section on compliance activities, including a summary of compliance notices issued and the reasons for their issue;***
- ***A summary of the operation of the dispute resolution mechanism;***
- ***A summary of matters referred to the Fair Work Ombudsman;***
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- ***An estimate of the additional costs imposed on industry as a result of orders or approvals made;***
- ***A statement concerning safety improvements expected to occur over and above underlying trends;***
- ***A statement concerning whether or not safety improvements are actually occurring as a result of the Tribunal's actions;***
- ***A statement concerning any issues arising through the concurrent operation of overlapping legislation; and***
- ***Recommendations to improve the operation of the Tribunal.***

4.15 Protections for Exercising Rights

Section 118 provides that this Bill is a workplace law for the purposes of the Fair Work Act. The main impact of this deeming provision is that employees and owner-drivers are protected by the adverse provisions of the Fair Work Act in relation to asserting their rights under the Bill.

The Bill is unbalanced in that there is no corresponding protection for road transport operators against adverse action by other supply chain participants simply because they have sought to assert their rights under the Bill.

Recommendation 20: ***The Bill should be amended to provide employers and hirers with protection against adverse action by supply chain participants for reasons relating to their exercising or refusing to exercise rights they have under the Bill or a Safe Remuneration Order.***

5.0 Other Matters for Consideration

5.1 Remuneration for Employee Drivers

The NatRoad Survey referred to in section 4.0 of our primary submission found that the overwhelming majority (84%) of road transport operators consider that the minimum remuneration and conditions contained in the Fair Work Act and the Road Transport Awards do not encourage unsafe behaviours (Table 1).

	%	%
# Trucks	Yes	No
0 to 2	83	17
3 to 19	82	18
20+	86	14
All	84	16

Table 1: *Q: Do you consider that the minimum conditions contained in the Fair Work Act and road transport awards are 'safe'?*

Importantly, this result was consistent across small, medium and large operators indicating that the currently applicable pay and conditions standards are well accepted and generally supported.

On this basis, NatRoad is of the strong opinion that the Tribunal's primary focus should be on matters not addressed in the awards and orders should not impose pay or conditions that are more generous than that contained in the awards. If the Tribunal considers that awards need to be modified, this should occur via the current system of annual review undertaken by Fair Work Australia.

Recommendation 21: ***The Tribunal's primary focus should be on matters that are not addressed in awards and orders should not impose pay or conditions that are more generous than that contained in the awards.***

5.2 Remuneration for Drivers who are Sub-contractors

The NatRoad Survey referred to in section 4.0 of our primary submission found that the majority of small and medium operators consider that, *in principle*, minimum rates for sub-contractors should be determined on an equivalent basis as compared with employees (Table 2). Larger operators however disagreed and considered that rates should be left to the market to determine.

	%	%
# Trucks	Market	Award
0 to 2	31	69
3 to 19	33	67
20+	66	34
All	43	57

Table 2: *Q: In principle, should sub-contractor rates be determined by market competition or an equivalent basis compared with employees?*

This difference of opinion is no doubt in line with the relative bargaining positions of large and small operators. It is also important to note that small and medium operators support this position on the basis of 'fairness' and generally do not believe that safety would also be improved (see section 5.6 of NatRoad's primary submission).

For the reasons outlined in section 6.3 of our primary submission, NatRoad supports the primacy of independent contacting arrangements and does not believe that minimum rates should be set by the Tribunal for sub-contract drivers. NatRoad advises all members not to accept work that is offered at unsustainable rates.

Sub-contract drivers are commercial entities operating in a competitive market. Other than facilitating an unfettered operating environment, it is not appropriate for the Government to intervene in commercial arrangements between parties in the supply chain.

However, given the public comments made by certain representatives of the Federal Government, NatRoad expects that one of the primary objectives of the Tribunal will be to attempt to lift the wage component of lower-paid sub-contractor rates to a level that is at least on par with the minimum currently applicable to employees.

This is a very difficult proposition fraught with complexities that fundamentally undermine the very basis of comparing employees and sub-contractors, as outlined below.

5.2.1 The Basis of Comparison

It is not reasonable to make direct comparisons of wages across employee and sub-contract drivers. Simply arguing that 'they both drive trucks' belies the complexity of the situation.

Employees are paid a regular wage with tax deducted by their employee and enjoy significant other benefits such as superannuation, sick leave and recreational leave.

Employees also do not carry a risk of business failure and are free from regulatory overheads associated with business management.

Sub-contractors on the other hand have many opportunities to reduce their taxable income through the use of business structures, financial arrangements and their relationships with others in the supply chain. If a sub-contractor was in fact earning the equivalent wage component compared with an employee it is unlikely to be readily apparent simply by comparing the taxable income of each party.

NatRoad is not particularly surprised with the assertion in the regulatory impact statement that 29% of owner-drivers are 'underpaid' on the basis of pre-tax profit. This finding does not appear to consider the ability of owner-drivers to write off income against what might otherwise be personal expenditure (such as a phone, home office, fuel or a motor vehicle owned by the business) and it is generally known in the industry that many drivers are more concerned with the accumulation of assets than maximising take-home pay.

As an example, a driver who makes high payments on a truck in the early years of a leasing arrangement is likely to report a very low pre-tax profit. However, if the value of the truck significantly exceeds the value of the residual lease payment, the driver has effectively made a reasonable profit that can be realised through the sale of the vehicle and subsequent entry into a new leasing arrangement.

This principle also applies to the accumulation of other saleable assets such as real estate and the good-will associated with building a successful road transport business.

5.2.2 Other Complicating Factors

The business structures and commercial arrangements used by sub-contractors can also complicate the determination of an equivalent wage. For instance:

- businesses operating as a husband and wife partnership can effectively split a single income across two persons to minimise tax liabilities;
- In the event that a business is able to purchase and own a truck outright, there is the potential to factor in significant capital depreciation to offset taxable income;
- While it is known that choice and independence are highly valued aspects of being an owner-operator it is very difficult to place a monetary value on such intangible commodities; and
- As is the case with many small businesses across the economy, it is a usual occurrence for entities to undertake a service 'in kind' in exchange for different services that may be received from the other party either immediately or 'down the track' as required.

Capital efficiency is also of major importance to road transport operators and the Australian economy. Under utilisation of a vehicle or using a vehicle combination that is not ideal for purpose increases relative running costs and can significantly decreases profit margins. In effect, some operators will be able to undertake a task at a much lower rate because they are using their capital more efficiently.

Currently, the market rewards these operators with a competitive advantage. There would be an obvious detrimental impact on better operators and on the broader economy if orders are imposed requiring minimum remuneration at a rate which allows inefficient operators to undertake any freight task.

It is also open to debate whether or not an order applicable to sub-contractors should allow for a reasonable rate of return on capital or simply cost recuperation.

5.2.3 Conclusion on Sub-Contract Drivers

While the factors and examples listed in the sections above are by no means exhaustive, they serve to illustrate the complexities involved in attempting to set a minimum rate of remuneration for sub-contract drivers who are operating in a competitive environment as a commercial entity. NatRoad asserts that there is no reasonable basis for establishing a minimum remuneration level for commercial entities and this should remain a business decision.

Recommendation 22: ***The Tribunal should not seek to establish minimum remuneration rates for sub-contract drivers.***

Recommendation 23: ***Orders issued by the Tribunal must be specific for either employees or sub-contract drivers and must reflect the unique considerations required for each.***

5.3 Incentive-based Payments

NatRoad notes the comment in the NTC's 2008 Report that incentive based payment systems are one of the factors that motivate drivers to engage in unsafe on-road behaviours. There has since been some speculation concerning the potential role of the Tribunal in the abolition of such payment methodologies.

It is perhaps useful to examine the current use of incentive based payment systems in conjunction with crash statistics.

There are two road transport awards that cover the majority of employee truck drivers:

- *Road Transport (Long Distance Operations) Award 2010*; and
- *Road Transport and Distribution Award 2010*.

The Road Transport (Long Distance Operations) Award 2010 allows for either a 'cents per kilometre' rate (CPK) or an hourly driving rate. The Road Transport and Distribution Award 2010 provides for an hourly rate only.

NatRoad understands that, in general, it is fair to say that:

- Most long distance employee drivers operate articulated vehicles and are paid a CPK rate under the Road Transport (Long Distance Operations) Award 2010;
- Most short distance employee drivers operate rigid vehicles and are paid an hourly rate under the Road Transport and Distribution Award 2010; and
- Owner-drivers are paid by a variety of mechanisms (including per load, weight, volume or distance) but are most commonly paid a CPK or load rate.

If the use of performance-based payment systems such as a CPK rate reduced on-road safety, it would be expected that crash rates would be higher for owner-drivers and for employee drivers on CPK rates.

However, as outlined in sections 5.3 and 5.4 of NatRoad's primary submission, there is no difference in crash rates for employee drivers and owner-drivers and the rate of fatal crashes involving articulated vehicles (generally using CPK rates) is falling faster than for either rigid vehicles or all other vehicles combined.

NatRoad considers that while performance based payment systems are by their very nature designed to promote transport efficiency and productivity, safety statistics do not support the claim that performance based payment systems are currently resulting in an elevated crash risk or acting as an impediment to reducing crash rates.

The NatRoad Survey referred to in section 4.0 of our primary submission found that operators of all sizes are, on average, either opposed or strongly opposed to the removal of long accepted incentive based payment systems such as the CPK rate currently included as part of the *Road Transport (Long Distance Operations) Award 2010*.

Most operators consider that CPK rates are entirely appropriate for the long distance sector. The CPK rate initially determined with reference to the hourly rate and remains intrinsically linked. Most drivers are better off financially under such an arrangement because of the more generous allowances included and operators are better able to quote jobs on small margins when the cost of the transport task is able to be accurately predicted.

Long distance operators on small margins of between 3-10% can ill-afford unforeseen costs such as fines or breakdowns and actively discourage drivers from breaking the law. Regulatory enforcement through safety cams, weigh stations, highway patrol and log books etc effectively makes breaking the law uneconomic.

While NatRoad acknowledges that there is an issue with the application of CPK rates for drop offs and pick ups at either end of a long trip, this matter would be more appropriately addressed as part of a review of the long distance award.

Recommendation 24: ***The Tribunal should not have powers to remove or otherwise change the cents per kilometre rate as contained in the long distance award and used by sub-contractors in the long distance sector.***

5.4 One in, all in

The NatRoad Survey referred to in section 4.0 of our primary submission found that road transport operators are of the strong opinion that, if the bill is to proceed, that it must apply in a similar fashion to the chain of responsibility provisions of the Heavy Vehicle National Law (currently under review in the Queensland Parliament) and the Workplace Health and Safety Act. In this fashion, the bill would capture (for various purposes and subject to the limitations outlined elsewhere in this submission):

- Employees and Employers;
- Sub-contractors and hirers;
- Local drivers and long-distance drivers; and
- All other parties in the supply chain with an ability to influence rates or safety outcomes.

Recommendation 25: ***The bill should apply to all parties in the supply chain with an ability to influence rates or safety outcomes, as closely as possible reflecting the chain of responsibility provisions of the Heavy Vehicle National Law and the Workplace Health and Safety Act.***

5.5 Operating in the Middle of the Supply Chain

Transport companies operate in a highly competitive environment that requires moving large volumes of freight at very low profit margins. Small to medium operators are generally unable to influence the market freight rate and any increase in costs must be internalised as a lower profit margin. This has been the experience with recent increases in registration and fuel excise charges.

Orders which simply increase driver remuneration will effectively impose a cost increase on the next party in the contracting chain, which will often be a road transport business.

A reduction in the profitability (or indeed viability) of transport companies is a disturbing outcome. Transport companies are ultimately responsible for fundamental safety issues including truck maintenance, scheduling, loading and route selection.

Any shift in the remuneration ratio between operators and employee drivers will also represent a shift in the supposed incentives for unsafe behaviours. Adding financial pressure to transport operators will increase the incentive for these companies to cut costs in other areas in order to maintain a reasonable profit margin that ensures the ongoing viability of the business.

It is imperative that orders should include a mechanism for road transport operators to recover increased costs from the other parties in the contracting chain.

Recommendation 26: ***Orders should include a mechanism for road transport operators to recover increased costs from the other parties in the contracting chain.***

5.6 Freight Inequities

As outlined in the regulatory impact statement there are well known inequities in freight volumes on major transport routes in Australia. As a result, the practice of 'back loading' has become a major feature of the transport industry. There has been significant investment in locating transport infrastructure regional areas which now have a significant reliance on the practice.

While it is preferable that all freight could be carried for a profit in its own right, NatRoad is concerned that generally applicable orders may effectively prevent operators from accepting loads at below market rates in circumstances when no other freight is available on one leg of a round trip. In this event, marginal freight may become uneconomic further exacerbating freight inequities and leading to inefficient use of capital as trucks are forced to travel home empty. This will also impact on incomes for owner-drivers who are not entitled to payment for the return journey.

Recommendation 27: ***Orders should take into account the variations in supply and demand for road transport services by either geographical or other measure, as is consistent with current pricing procedures.***

5.7 Conditions and Standards

The NatRoad Survey referred to in section 4.0 of our primary submission found that road transport operators have significant concerns about the possibility of the Tribunal making orders about matters unrelated to remuneration. Key amongst these concerns is whether or not the Tribunal will have sufficient knowledge and expertise to make binding decisions upon such matters.

NatRoad considers that, as a general rule, the Tribunal should refer any such matters to established authorities with relevant responsibilities.

Recommendation 28: ***The Tribunal should refer all matters relating to conditions and standards to established authorities with relevant responsibilities where they exist.***

5.8 Priorities for Reform

The NatRoad Survey referred to in section 4.0 of our primary submission found that there is general support among road transport operators of all sizes for regulatory intervention that would:

- Require payments to sub-contract drivers to be made within a maximum timeframe; and
- Require demurrage payments to drivers after a specified period (providing that the payment was recoverable from the entity that is responsible for the delay).

While NatRoad would prefer an alternative and specific regulatory approach to implementation, these reforms should nonetheless be a high priority for inclusion in the Tribunal's annual work program.

Recommendation 29: ***The inaugural annual work program should identify payment timeframes and recoverable demurrage as priority reforms.***

5.9 Softly, Softly: Price Last

In the context of the other recommendations contained in this submission, NatRoad asserts that the Tribunal should take a cautious approach towards reform. The Tribunal should initially focus on measures that would address regulatory gaps while delaying actions that would impact on competition, productivity and industry structure (i.e. measures that would impact on freight rates).

Recommendation 30: ***The Tribunal should initially focus on measures that would address regulatory gaps and while delaying actions that would impact on competition, productivity industry structure (i.e. measures that would impact on freight rates).***