

Submission 023  
Received 1/02/12



**CIVIL CONTRACTORS  
FEDERATION**

# POLICY DOCUMENT

Submission to the House of Representatives Standing Committee on  
Infrastructure and Communications into the Road Safety  
Remuneration Bill 2011 and Road Safety (Consequential amendments  
and related provisions) Bill 2011

February 1 2012

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*Constructing Australia's Infrastructure*

**Submission to the House of Representatives Standing Committee on Infrastructure and Communications into the Road Safety Remuneration Bill 2011 and Road Safety (Consequential amendments and related provisions) Bill 2011**

**1 About the Civil Contractors Federation**

Thank you for the opportunity to make a submission to this important Inquiry.

The CCF is the member based representative body of civil engineering contractors in Australia providing assistance and expertise in contractor development and industry issues.

Through our Federation we represent over 2000 small, medium and large sized contractors who in turn work in an industry of more than 350,000 people.

Our members are involved in a variety of projects and activities including the development and maintenance of civil infrastructure such as roads, bridges, dams, wharves, commercial and housing land development.

Our members also employ road transport industry operators and drivers either directly or through contract arrangements. By way of example civil construction often requires that heavy equipment such as graders and excavators be floated to site as well as the carting or haulage of road base and other materials by heavy on road vehicles from quarries to the construction site.

CCF has previously commented on issues in relation to road transport where there has been a direct link with the everyday activities of our members.

It is not however our intention in this submission to transverse the complex issues of Road Safety that have been the subject of a number of inquiries, recommendations and actions by the industry participants over the years.

Rather we would like the committee to be aware of some of the practical problems that might arise for civil contractors employing heavy vehicle drivers directly or through contract arrangements.

These reforms will have a ripple effect impacting on businesses whose main activity is not in road transportation. We are also concerned about the implications for workplace relations generally flowing from these Bills.

## **2 The present inquiry and the Road Safety Bills**

We note that the present Road Safety Bills are an outcome of a process which included in 2008, the [National Transport Commission](#)'s review into remuneration and safety in the Australian heavy vehicle industry, and the Directions Paper "Safe Rates, Safe Roads Directions Paper" released in December 2010.

Subsequently the Bills were introduced into the House of Representatives and have now been referred to this Committee.

The legislation seeks to make the following key reforms:

- The establishment of a Road Safety Remuneration Tribunal (the Tribunal )
- The bill empowers the Tribunal to inquire into sectors, issues and practices within the road transport industry and, where appropriate, determine mandatory minimum rates of pay and related conditions for employed and self-employed drivers.
- The determinations, to be known as Road Safety Remuneration Orders, will be in addition to any existing rights employed drivers have under industrial instruments and owner drivers have under their contracts for services.
- The Tribunal will be empowered to resolve disputes between drivers, their hirers or employers and participants in the road transport industry supply chain about remuneration and related conditions in so far as they provide incentives to work in an unsafe manner.
- The bill also establishes a compliance regime for the enforcement of orders made by the Tribunal, safe remuneration approvals and any orders arising out of a dispute.

Importantly we note that the RST will be setting wage rates separately and apart from Fair Work Australia notwithstanding that members of Fair Work Australia will be assisting the Tribunal.

We note this is a significant departure from the model of wages and conditions currently the province of Fair Work Australia. We have commented on this at paragraph 4.2 below.

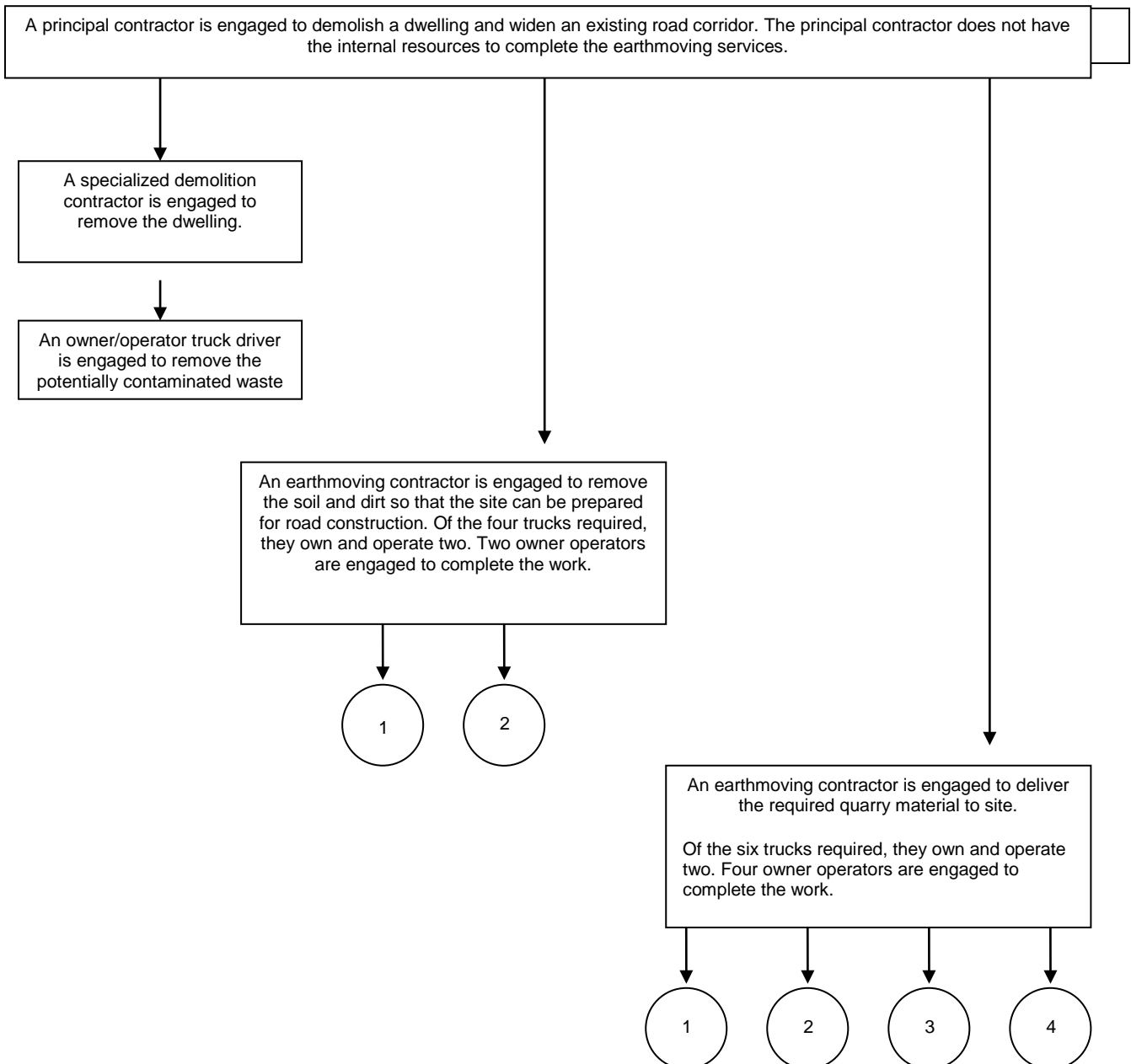
We also note that the Tribunal will be setting wages and conditions for owner/drivers. We note that these reforms are coming at the same time as a number of other policy initiatives which impact on independent contractors such as the specific obligations on contractors in the building and construction industry to report annually to the ATO on payments to contractors<sup>1</sup> and the recent inquiry by the ABCC into Sham contracting. We comment further on this at paragraph 4.4 below.

<sup>1</sup> See the Draft Regulations Taxation Administration Amendment Regulations – Reporting of taxable payments.

**3 Use of employee drivers and owner/drivers in civil construction projects.**

To set the context for our submission it is useful to illustrate how on a particular project employee drivers of owner drivers might be used. Civil Construction is by its nature project based and no two projects are likely to be identical.

However the example set out below in relation to a road project provides a good illustration



In this very broad example:

- 11 trucks are required to undertake the work of which 7 are operated by owner drivers.
- Those 11 trucks are engaged by 3 different contractors, none of which are the principal contractor and;
- Each of the activities outlined requires different skill sets amongst the owner/drivers

We also note that under other common models of engagement a civil contractor may source drivers from a “pool operator” who in turn engages the owner/drivers under either an hourly or trip rate. These arrangements may be particularly impacted by Section 27 of the Bill as noted below in paragraph 5.2 below.

## **4 Our general policy position**

### **4.1 The importance of road safety**

CCF and its members support initiatives to improve road safety. Indeed a safe place to work and a safe way of doing work are the fundamental principles which underpin the CCF approach to Occupational Health and Safety.

As a matter of general principle in our view this approach is best implemented through:

- a focus on OHS at the business or enterprise level based on continuous improvement;
- leadership from business owners and managers and a shared sense of responsibility by all those in the workplace;
- systems and processes to support a safe way of doing things; and
- Development and support at all levels of an organisation for a “workplace safety culture”.

However, road safety is a broader issue and improving road safety requires a holistic approach rather than being based on a narrow focus upon the method and quantum of remuneration.

In this regard we strongly support the comments of the Ai Group that a holistic approach to road safety includes the following key elements:

- Risk Identification and control
- Improved Roads
- Fatigue Management
- Education and Training
- Drug and Alcohol policies; and
- Use of technology.

We also note that the issue requires participation and co-operation by all levels of government and that the industry has undertaken a number of very positive initiatives over the years.<sup>2</sup>

The Bill however focuses on one aspect that is remuneration practices as Minister Albanese stated in introducing the Bills:

“The bill being introduced today reflects the government's commitment to taking the necessary next steps in addressing the underlying economic factors which create an incentive for, or encourage, unsafe on-road practices.

The measures being introduced will ensure pay and pay related conditions encourage drivers to drive safely, manage their hours and maintain their vehicles.”<sup>3</sup>

#### **4.2 CCF does not support the creation of a new Tribunal to set wages and conditions in the Transport Industry**

Fundamentally, CCF does not support the creation of a new Tribunal to set wages and conditions for employees in the road transport industry.

This approach is also at odds with the stated policy rationale of the Government with the establishment of Fair Work Australia (FWA) as a “one stop shop”.

In the creation of FWA the Government ceased the operation of a number of bodies such as the Australian Industrial Relations Commission (AIRC), the Australian Industrial Registry (AIR), the Australian Fair Pay Commission (AFPC), the Workplace Authority and the Workplace Ombudsman bringing all the activities under Fair Work Australia.

It is also at odds with the approach taken to the Australian Building and Construction Commission (ABCC).

We note in the second reading speech to the introduction of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 Minister Crean stated:

“The government believes that the ABCC needs to be replaced with a new body that is part of the mainstream Fair Work Australia system...”<sup>4</sup>

<sup>2</sup> See Australian Industry Group Submission in Response to the Safe Rates, Safe Roads directions paper 11 February 2011

<sup>3</sup> See Second Reading Speech Hansard 23 November 2011 at 15333

<sup>4</sup> Hansard at 12686

### **4.3 Road Safety Remuneration Orders and the current powers of FWA**

As have been noted by other stakeholders, employees in the road transport industry:

“enjoy fair, relevant and modern wage and employment conditions through:

- The National Employment Standards (NES), the enterprise agreement provisions, the General Protections and other aspects of the Fair Work Act;
- Modern Awards; and
- Federal and State Laws dealing with superannuation, training, long service leave and other matters”

Thus if the argument is that the road transport industry participants are not receiving fair wages and conditions then it is an argument that the Fair Work Act system is not delivering the outcomes the Government has constantly claimed for it.<sup>5</sup>

Indeed we note in particular that the National Employment Standards (NES) includes maximum weekly hours and also prohibits an employee to work more than reasonable additional standards. We note with approval the comments of Ai group:

“this protection is relevant in the context of fatigue management as it prohibits employees being pressured to work hours which are unreasonable. In determining whether additional hours are reasonable, the Act requires that ‘any risk to employee health and safety from working additional hours’ be taken into account.”<sup>6</sup>

This seems an odd and curious policy outcome. If the FWA system is not achieving the objectives it is supposed too, then requiring another Tribunal to deliver what are perceived as the “right outcomes” seems a very difficult policy position to adopt and undermines the arguments made for the FWA.

### **4.4 Interaction with current arrangements**

In a number of states there are already detailed legislative requirements in relation to the pay and terms and conditions of engagement for owner operators. We note that the explanatory memorandum to the Bill says that:

<sup>5</sup> See Ai group “Submission to the Safe Rates, Safe Roads Directions Paper” 11 February 2011 at [www.aigroup.com.au](http://www.aigroup.com.au)

<sup>6</sup> Ibid page 20

“the Bill complements existing Federal legislation such as the FW Act and the *Independent Contractors Act 2006*; current State-based schemes dealing with owner-driver contracts; and proposed State-based heavy vehicle laws.”<sup>7</sup>

In practice we question how this can be delivered.

We have noted carefully the provisions in the Bill which deal with these issues. They are by necessity in themselves complex dealing as they do with the constitutional powers of the Commonwealth. At the very least the new arrangements will cause confusion.

For example in NSW there are already Excavated Materials Contract Determinations of relevance to our members. It is difficult to see how contractors particularly small contractors will be able to meet their obligations without expert assistance and support.

In our view the committee should inquire further into how these different determinations and regulations and laws will operate together from a practical stand point.

For example:

- how will rates be set at a National level, will they be state specific although nationally made, what would this mean for projects such as roads and bridges which may well extend over state boundaries?
- What would happen to current infrastructure projects which might have been costed on a particular set of assumptions when a Federal Tribunal may quite fundamentally change the terms and conditions upon which drivers have been engaged.
- In what circumstances will regulatory action be taken for errors and underpayments occurring due to the confusing state of both federal and state regulations.

#### **4.4 Regulation of Owner Drivers**

##### **(a) The importance of supporting independent contractors**

However, one of the most concerning aspects of the legislation is the extension of both the jurisdiction and powers of this Tribunal to regulate Owner/Drivers. This is yet another example of what we regard as a highly undesirable policy development. CCF has recently made a number of

<sup>7</sup> See Explanatory Memorandum at Outline (b)



submissions on this point to the ABCC Inquiry into Sham contracting in the building and construction industry.<sup>8</sup>

**(b) Competition issues and owner/drivers in civil construction**

The role of owner/drivers can be a particularly important part of a civil construction project. It is often the case that each particular project or job has its own specific characteristics – contractors are required to carry out varied and specialised tasks dependent on the nature of the project. For example specialised tasks might require tip trucks of a certain size, or of a certain cartage capacity or in some cases operators skilled in the removal and disposal of contaminated waste.

A consequence of the setting of Road Safety Remuneration Orders to owner/drivers would be the setting of a floor price, or benchmark which may not take into account the individual specifications of a particular job. An operator who has 10 years' experience in a particular type of cartage would be rewarded the same as an operator who has little or no experience.

The diversity of the particular projects which earthmoving contractors undertake means that contractors compete with each other on a range of price points. To win particular contracts from head contractors they rely on particular individual skills (both theirs and their subcontractors) experience and equipment.

The standardisation of rates may very well remove an incentive to be innovative or for owner drivers to invest in the very latest equipment. All of which are to the public detriment and may ultimately lead to a rise in the price of construction of infrastructure projects which in a number of cases will be borne by the taxpayer.

We also question given the extensive state regulation in this area how with divergent views amongst the states the federal regulation could work in practice.

**5 Specific Issues**

Finally we would like to raise the following specific issues in respect of the legislation.

<sup>8</sup> See our submission to the ABCC Inquiry into Sham contracting available at [www.civilcontractors.com](http://www.civilcontractors.com)

## **5.1 Administrative and compliance burden**

We are particularly concerned as to the additional compliance and administrative burden this legislation will impose.

In this regard the Regulatory Impact Statement (RIS)<sup>9</sup> prepared for this legislation should provide a proper analysis of these additional costs. However we believe that there are a number of issues raised in relation to the RIS into which the Committee should make further inquiries. These matters are set out below.

Our references in the main in this section are to Option 3 as identified in the RIS as

“establishing the tribunal, with discretion to set and maintain remuneration rates and/or remuneration related conditions for employees, owner drivers and the supply chain, if safety outcomes would improve as a result of the decision.”<sup>10</sup>

### **(a) Incomplete and uncertain data**

The RIS authors explicitly state the problem in preparing their analysis as follows:

“This RIS adopts a wide range of assumptions in the face of incomplete and uncertain data. While the CBA results indicate that the costs outweigh the benefits with both Options 2 and 3, the results are sensitive to the assumptions used. Changing the central assumption that existing remuneration is economically ‘efficient’ would have a significant impact on results for both Options 2 and 3.”<sup>11</sup>

### **(b) Impact on stakeholders –which stakeholders?**

In considering the stakeholders for the purposes of the RIS the RIS authors refer to:

“• supply chain intermediaries (other than truck drivers) – including the manufacturer, wholesaler, retailer, freight forwarder, freight business owner, warehouse operator, etc

• Government – largely responsible for establishing (or extending), operating, monitoring and enforcing new or existing heavy vehicle regulatory frameworks relating driver pay levels and/or conditions.”<sup>12</sup>

<sup>9</sup> <http://ris.finance.gov.au>

<sup>10</sup> Ibid page v

<sup>11</sup> Ibid page vii

<sup>12</sup> Ibid xxxiv

This in our view is incomplete as no reference is made in the intermediaries to the use of drivers in project based infrastructure - even though the use of drivers in quarrying is specifically acknowledged in the RIS.<sup>13</sup>

Additionally, no reference is made to Government as a procurer of infrastructure projects but only on the regulatory impact on government through the new framework.

It may be that this what the RIS authors refer to as “potential second round market responses” to which their analysis did not extend.<sup>14</sup> Further elaboration would be helpful.

### **(c) Assumptions about pass through costs**

We also note that the RIS in examining the cost of Option 3 states that:

“For the purpose of this RIS, it is assumed that businesses contracting owner drivers will pass all costs onto supply chain participants and increases in costs will be passed onto subsequent supply chain participants, such that the increase in the cost of owner driver services will ultimately be met by consumers. As the increases in costs are expected to be spread widely, the increases are likely to be insignificant for individual consumers<sup>15</sup>.”

Whilst this might be a valid assumption for freight generally, we would question how applicable this would be to civil construction projects where margins are tight and competition strong especially in difficult economic conditions. In any event the costs in this sector would not fall on consumers per se but rather tax payers through increased costs of infrastructure delivery.

In our view the Committee would be well placed to make further inquiries in relation to a number of the statements in the RIS.

## **5.2 Extension of the obligations through the supply chain**

In Section 3 of our submission we outlined the circumstances in which a civil contractor may engage with the transport industry. Our understanding of this Bill is that it specifically operates so that it imposes responsibility on all parties in the supply chain. It does this through a number of provisions

<sup>13</sup> Ibid vi

<sup>14</sup> Ibid

<sup>15</sup> Ibid xii

and it would seem on our reading of the Bill the definition in Section 9 of an intermediary could apply to the scenario we outlined previously.

We also note Sections 27 (3) (a) and (b) in the making of the order by the Tribunal

“(3) The order may impose requirements, in relation to a matter for which provision is made, on any or all of the following:

- (a) an employer or hirer of a road transport driver to whom the order applies;
- (b) a participant in the supply chain in relation to a road transport driver to whom the order applies.”

These obligations are extensive and wide ranging. It could on our reading of the Bill mean that civil contractors could incur responsibilities to third parties they do not directly hire (for example drivers acquired through a pool operator) or over whom they have no direct control.

At the very least this will lead to extensive paperwork requirements as Head Contractors seek to satisfy themselves that sub-contractors have met their legal obligations and sub-contractors in turn seek assurances that others have also met their obligations.

Such requirements are being imposed at a time when small to medium sized contractors are facing increased regulatory burden from other reporting obligations such as the recent budget initiatives to report payments to contractors in the building and construction industry referred to previously.

We regard this situation as highly unsatisfactory and seek further clarification of just how far these obligations are intended to apply.

## **6 Conclusion**

CCF does not support this legislation. We do not see the need to set up a separate Tribunal when FWA and the Modern Award system were stated by the government to deliver fair wages and conditions for transport workers.

We also believe that the further regulation of owner/drivers is particularly unwarranted and has the capacity to undermine the ability of owner/drivers to compete on the basis of particular skills and innovative work methods.

The Bill will also add compliance and administrative costs on intermediaries such as our members at a time when they are facing increasing regulatory burdens which are impacting on their ability to deliver the infrastructure services Australia needs.