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**Submission**

*Safe Rates Submission*

*DEEWR*

**11 February 2011**

The Transport Workers Union Of Australia

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## **ABOUT THE TRANSPORT WORKERS UNION**

The Transport Workers' Union of Australia ("TWUA") represents 90,000 men and women in Australia's aviation, oil, waste management, gas, road transport, passenger vehicles and freight logistics industries. With over 100 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.

The TWU welcomes the opportunity to provide feedback on the Department of Education Employment and Workplace Relations '*Safe Rates Safe Roads' Direction's Paper.*' This submission complements previous TWU papers presented to other inquiries; including the '*Wright/Quinlan - National Transport Commission's Safe Payments Inquiry*', the '*Beyond the Midnight Oil*' Parliamentary Inquiry and the 2001 landmark NSW Government '*Inquiry into Safety in the Long Haul Trucking Industry.*'

This Submission is made on behalf of the Transport Workers Union of Australia. It is supported by all TWUA State Branches.

## EXECUTIVE SUMMARY

### *The Safety Crisis In Road Transport Industry*

- For too long the Australian Road transport industry has been Australia's most dangerous industry. No other industry is responsible for 330 deaths in a year. No other industry injures 5,350 people per year at the rate of 31 per day.
- Sadly, the crisis threatens to get worse. In the three years to March 2010 fatal crashes involving heavy rigid trucks has increased by average of 0.3% per year. In the year before the Wright/Quinlan Inquiry, the number of deaths in articulated heavy vehicle incidents increased by 5.4% when compared to the previous year.
- Each road death costs approximately \$1.7 million. Each injury in an incident costs \$408,000. When the non-monetised social cost of road deaths, injuries and illness, family breakdown, pain and suffering is included in the measurement of what road deaths and injuries costs the community, the damages bill is immeasurable.

### *Crisis Causes*

- The report prepared by the Honorable Lance Wright QC and Professor Michael Quinlan for the National Transport Commission attributes the cause of the road transport safety crisis to economic factors; namely the low level of driver remuneration and their methods of payment.
- The same body of academic, judicial and coronial evidence that confirms the relationship between remuneration and safety outcomes also confirms that the root cause of unsafe remuneration systems is the power imbalance between transport purchasers ("clients") and transport suppliers.
- As made clear in the NTC Report, the high level of control exercised by clients over price, timing, destination and route causes operators to bear the costs that, ordinarily, are borne by customers. Denied a proper return,

let alone a margin that exceeds the cost of capital, operators undercut each other, bid the price of transport down, and attempt to recoup the losses caused by clients from drivers by not paying them for all work performed; and by paying them through incentive rates.

- Because employment is too often conditional on strict compliance with an operators direction and client deadlines, drivers are prone to drive while fatigued, speed, take drugs, and skimp on maintenance.

#### *The Policy Framework Required To Improve Industry Conditions & Safety Practices - Key Principles of A Safe Rates System*

- Once the need for external intervention in the transport market 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.
- Academic advice, the Wright/Quinlan Inquiry, the NTC report and 'real world' driver experiences strongly indicates that four key principles must be incorporated into the design of a Safe Rates system for it to effectively reduce the numbers of persons killed or injured by the road transport industry.
- They are: the universal application of a Safe Rates system to all supply chain participants including client accountability for safe performance/ planning and Safe Rates; and Safe Rates and related conditions for long & short haul employees and owner-drivers determined by an independent tribunal; and the capacity to make binding determinations and resolve disputes amongst supply chain participants; and an appropriate and adequate enforcement regime.

#### *A Comparative Examination Of The Proposed Models For The Creation Of A Safe Rates System*

- The Department of Employment, Education & Workplace Relations has circulated for comment three models that purport to establish a Safe Rates system. The first two, a Specialist Tribunal (Option One) and a Safe

Rates Panel (Option Two) originated in the Wright/Quinlan inquiry. The third, an Outworker Model, is proposed for the first time.

- If all models include all the DEEWR key features the option will create a policy framework to establish and maintain safe rates and related conditions for owner-drivers and employees across all sectors of the transport industry.
- Option One is attractive because it best allows for the unique nature of the transport industry to be reflected in the new system. If implemented, care will need to be taken defining the legislative and/or operational interaction of the *Safe Rates* system and existing systems that apply to owner-drivers and employees; including the Fair Work Act and related instruments.
- Option Two benefits from drawing on an established institutional machinery experienced in the determination of labour standards and conditions.
- Option Three requires detail to be provided on how this model allows for the unique considerations of owner drivers to be accounted for.

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'. Only then will substantial progress be made towards ending the destruction and carnage currently occurring on Australian roads.

## THE SAFETY CRISIS IN ROAD TRANSPORT

1. For too long the Australian Road transport industry has been Australia's most dangerous industry. No one else causes as many deaths, injuries and maiming as the road transport industry. No other industry is responsible for 245 deaths in a year.<sup>1</sup> No other industry injures 5,350 people per year at the rate of 31 per day. This appalling safety record has led the Australian Safety and Compensation Council to dub road transport as amongst 'the most dangerous industries to work in.'<sup>2</sup>

**Excerpt From National Transport Commission Report - "SafePayments. Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry"**

Around 330 people are killed each year in crashes involving a heavy vehicle. Around 16 per cent or 52 of those killed are the drivers of the heavy vehicle.

The road transport sector is amongst the most dangerous industries to work in. The Australian Safety and Compensation Council reports the transport and storage industry has the largest number of compensated fatalities of any industry at 41 fatalities. This is followed by the construction industry with 33 fatalities, manufacturing with 28 fatalities and property and business services industries with 27 fatalities.

In summary, the road transport industry is amongst the industry sectors with the worst safety record of industry sectors in Australia and safety outcomes in the industry remain at unacceptable levels, to both drivers and the broader community.

2. Sadly, the crisis threatens to get worse. In the three years to March 2010 fatal crashes involving heavy rigid trucks has increased by average of 0.3% per year.<sup>3</sup> In the year before the Wright/Quinlan Inquiry, the number of deaths in articulated heavy vehicle incidents increased by 5.4% when compared to the previous year. Each road death costs approximately \$1.7 million.<sup>4</sup> Each injury in an incident costs \$408,000. When the non-monetised social cost of road deaths, injuries and illness, family

<sup>1</sup> "Fatal Heavy Vehicle Crashes Australia Quarterly Bulletin," (Department of Infrastructure and Transport, 2011).

<sup>2</sup> "Compendium of Workers' Compensation Statistics Australia," (Australian Safety and Compensation Council, 2005-2006).

<sup>3</sup> "Fatal Heavy Vehicle Crashes Australia Quarterly Bulletin."

<sup>4</sup> "Road Crash Costs in Australia," (Bureau of Transport Economics, 2006).

breakdown, pain and suffering is included in the measurement of what road deaths and injuries costs the community, the damages bill is immeasurable.

### *Crisis Causes*

3. The report prepared by the Honorable Lance Wright QC and Professor Michael Quinlan for the National Transport Commission attributes the cause of the road transport safety crisis to economic factors; namely the low level of driver remuneration and their methods of payment.

#### **Excerpt From Wright/Quinlan Report<sup>5</sup>**

This Review finds that the overwhelming weight of evidence indicates that commercial/industrial practices affecting road transport play a direct and significant role in causing hazardous practices. There is solid survey evidence linking payment levels and systems to crashes, speeding, driving while fatigued and drug use. This evidence has been accepted and indeed confirmed by government inquiries, coronial inquests, courts and industrial tribunal hearings in Australia over a number of years. The association between remuneration and safety applies to both employed and owner/drivers.

4. The report of Wright and Quinlan succeeds numerous 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. As early as 1991, the 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.<sup>6</sup>*

5. NSW Deputy Coroner Dorelle Pinch expressed the consequence of this heightened 'exposure to risk' in her 2005 findings regarding the tragic

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<sup>5</sup> Wright Quinlan, "Remuneration & Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission," (The National Transport Commission, 2008). p 49.

<sup>6</sup> "Long Distance Truck Drivers: On Road Performance & Economic Reward," (The Department of Transport & Communications, 1991). p 102

deaths of employee drivers Anthony Forsythe, Barry Supple and Timothy John Walsh. The Coroner highlighted the impact of inadequate rates:

*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.<sup>7</sup>*

6. 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.<sup>8</sup>*

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

*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.<sup>9</sup>*

#### *The Cause of Poor Payment Practices - Client Power*

8. The same body of academic, judicial and coronial evidence that confirms the relationship between remuneration and safety outcomes also confirms that the root cause of unsafe remuneration systems is the power imbalance between transport purchasers ("clients") and transport suppliers. Pictorially, overleaf, the Bureau of Transport, Infrastructure and Regional Economics ("BITRE") portray their relationship as<sup>10</sup>:

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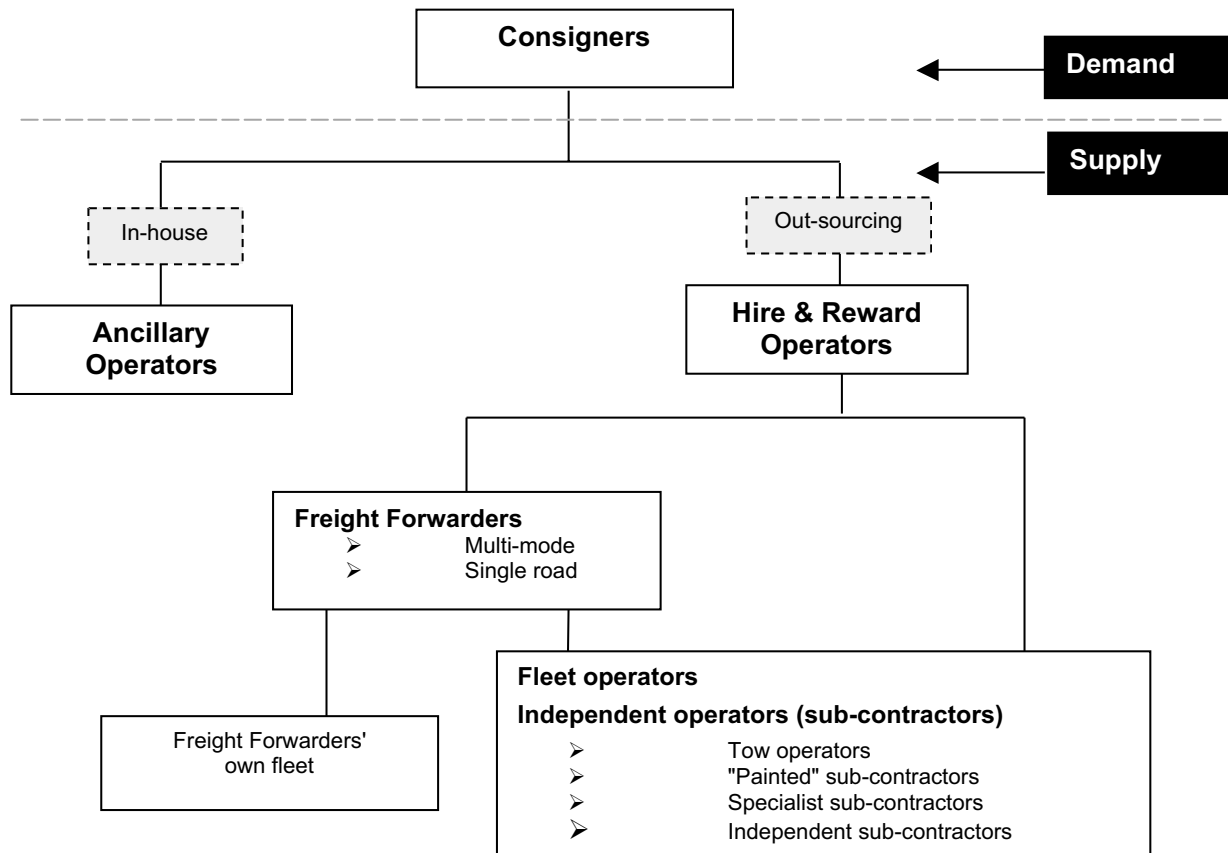
<sup>7</sup> *State Coroner's Summation & Finding in Relation to Anthony Forsythe, Barry Supple & Timority John Walsh, (2003).*

<sup>8</sup> *Mutual Responsibility for Road Safety Case, (2006). Transcript [458]*

<sup>9</sup> *Ibid.*

<sup>10</sup> "Working Paper 60, an Overview of the Australian Road Freight Industry," (Bureau of Infrastructure, Transport & Regional Economics, 2003), p3

Excerpt From BITRE Working Paper 60, An Overview of the Australian Road Freight Industry



9. In reality there is no power equality between those who demand transport services and those who provide it. Decisions over price, timing, destination and route is almost exclusively a prerogative that belongs to the client. The true nature of modern supply chains was accurately described by the Full Bench of the Industrial Relations Commission of New South Wales:

**Excerpts From Mutual Responsibility for Road Safety Case, Full Bench of the Industrial Relations Commission of New South Wales<sup>11</sup>**

the transport industry is characterised by chains of successive contracting out of work with commercial power decreasing with each successive step; and  
...  
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 pressures exercised by major retailers are in the form of directed delivery schedules placing stress, and at times, unrealistic expectations on the driver actually performing the work;  
...  
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;  
...  
labour costs are the most significant component of transport 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;  
...  
those higher up the chain often contract out work for the express reason of transferring responsibility for the safe performance of work to others.”

10. The power of clients over price has been attested to by the Australian Trucking Association:

*“Economically powerful industry clients 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 to small fleet operators and owner-drivers can exacerbate this phenomenon, particularly in the long distance sector.”<sup>12</sup>*

<sup>11</sup> *Mutual Responsibility for Road Safety Case.*

<sup>12</sup> D Coonan, "Australian Trucking Association Submission to Ntc Safe Payments Inquiry," (Australian Trucking Association, 2008).

11. The consequence of client power on transport pricing over forty years has been documented by the BITRE:

**Excerpt From BITRE Information Sheet 28: Freight Rates in Australia 1964-2007-2008**



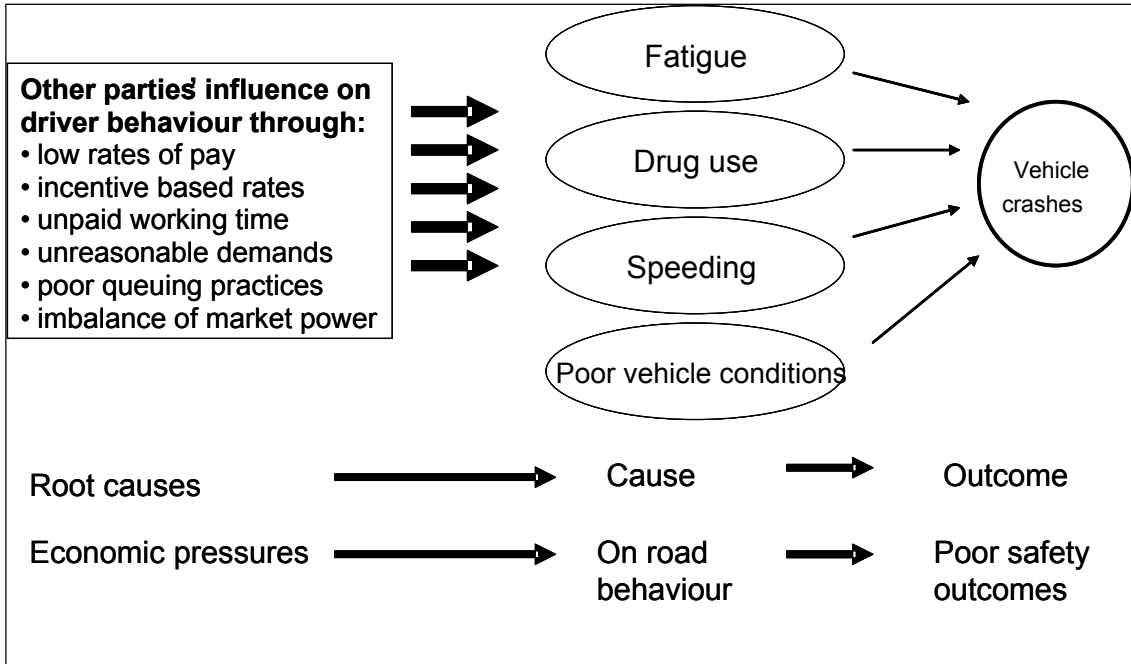
12. Most remarkably, the 41% fall in price between 1964 and 2007 occurred in the midst of an explosion in demand for transport. Over the same period growth in the supply of transport did not keep pace with demand. In an ordinary functioning market, the price for transport would rise, not fall by 41%. That the opposite occurred confirms the NTC's determination that the road transport industry is a "price taker" not a "price maker."<sup>13</sup>

*The Relationship Between Client Power, Low Remuneration and Poor Safety Practices*

13. The causal link that explains how client pressure causes poor remuneration practices, which in turn lead to the systemic flourishing of illegal and immoral practices, has been pictorially displayed in the NTC report. It is reproduced overleaf:

<sup>13</sup> "Safe Payments. Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry," ed. National Transport Commission (2008). p 32.

Excerpt From National Transport Commission Report - "SafePayments. Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry"<sup>14</sup>



14. As made clear in the NTC Report, the high level of control exercised by clients over price, timing, destination and route causes operators to bear the costs that ordinarily are borne by customers. Denied a proper return, let alone a margin that exceeds the cost of capital, operators undercut each other, bid the price of transport down, and attempt to recoup the losses caused by clients from drivers by not paying them for all work performed; and by paying them through incentive rates. Because employment is too often conditional on strict compliance with an operators direction and client deadlines, drivers are prone to drive, while fatigued, speed, take drugs, and skimp on maintenance.<sup>15</sup>

<sup>14</sup> Ibid. p 19

<sup>15</sup> Ibid. p 23-25

15. The full bench of the Industrial Relations Commission of New South Wales cited this casual chain to record key findings regarding fatigue, drug usage, excessive hours of work, log book offenses and speeding. They are reproduced below:

**Excerpts From Mutual Responsibility for Road Safety Case, Full Bench of the Industrial Relations Commission of New South Wales**

**Fatigue**

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**

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.

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**

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.

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.

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.

**Speeding**

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.

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.

16. Critically, the Commission made its findings regarding the relationship between poor remuneration methods and fatigue, drug usage, excessive hours of work and speeding for both owner-drivers and employees. It found that no matter a person's legal status, they were equally likely to be afflicted by the outcome of client pressure and poor remuneration methods.

17. The fact that people can be left to labour under these conditions so powerful clients can minimise their costs is outrageous. Without the urgent implementation of a *Safe Rates* system that comprehensively addresses the relationship between remuneration and safety, drivers and other road users will continue to be the victims of a safety crisis which is entirely preventable.

**THE POLICY FRAMEWORK REQUIRED TO IMPROVE INDUSTRY CONDITIONS AND SAFETY PRACTICES.**

18. Once the need for external intervention in the transport market 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. What follows is a description of the four key principles that should inform the design of a *Safe Rates* system; an examination of current regulatory gaps; and an assessment of other policy approaches promulgated as an alternative to a *Safe Rates* system.

*Key Principles of A Safe Rates System*

19. In providing its report to the Australian Transport Council of Ministers, the NTC considered what the objectives of a *Safe Rates* system should be:

Excerpt From National Transport Commission Report - "Safe Payments. Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry"<sup>16</sup>

In developing these options for a regulatory response for safe payments, the NTC considered submissions received from industry, drivers and unions. It is also considered the need to ensure a safe, efficient and productive transport industry for Australia's future economic growth. More specific policy objectives include:

- the need to provide an adequate safety net of safe payments for both employees and owner-drivers;
- the provision of appropriate safeguards through chain of responsibility and enforcement of safe payments;
- addressing the imbalance of market power faced by drivers at the bottom of the supply chain;
- protecting the choice and genuine independence of parties who have chosen to become independent contractors; and
- continuing to encourage productivity and efficiency gains in the road transport industry.

20. To achieve these objectives Coronial inquests, academic advice, the Wright/Quinlan Inquiry, the NTC report and 'real world' driver experiences strongly indicates that four key principles must be incorporated into the design of a *Safe Rates* system for it to effectively reduce the numbers of persons killed or injured by the road transport industry. They are:

- (i) The Universal Application Of A Safe Rates System To All Supply Chain Participants, Including Client Accountability For Safe Performance/ Planning and Safe Rates: A *Safe Rates* System should draw on the successful of a 'Chain of Responsibility' approach ("the COR") implemented in some existing occupational health and safety instruments, and some existing road safety laws. In this approach 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. The degree of responsibility is determined by reference to the participant's power over the supply chain as a whole.

Since the 2001 landmark Quinlan Report, this COR approach has been the theoretical underpinning for all strategies to combat safety hazards in the road transport industry. By vertically mapping the organisation of supply chain movements, the COR approach lets the

<sup>16</sup> Ibid. p33.

power of any one participant to be measured relative to the power of any other. The absolute duty to transport freight safely using proper and legal remuneration methods can then be apportioned amongst parties according to their power over the chain as a whole. A Party with more power has more legal responsibilities than a party with less power.

This principle should be utilised as the key design feature to determine the scope of a *Safe Rates* system. It would see a Safe Rates System apply to Clients, Transport Operators, sub-contracted Fleets and/or Companies; and Drivers. The system's effectiveness would then flow from its universality. No party could exempt themselves from the law by passing the buck to another.

- (ii) Safe Rates and Related Conditions for Long & Short Haul Employees and Owner-Drivers Determined by An Independent Tribunal: A Safe Rates System should utilise an Independent Tribunal, accessible to all supply chain participants, to determine 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 to counter unsafe competition in the industry.

To determine and apply rates and conditions that are safe, the Tribunal requires a broad array of powers that enable it to attach requirements on a supply chain participant that match their role and function in organising a freight movement. These powers should include power regarding rates, conditions, trip planning & information capture, occupational & public health and safety, training & education and cost recovery. The Tribunal should also be able to rapidly respond to changes in external variables (e.g oil prices) that affect safety outcomes and standards in the road transport industry.

In exercising its power, the Tribunal needs to be able to exercise discretion to account for differing sectoral and geographic requirements. It should be able to make determinations for both the long and short haul sectors as the safety crisis does not distinguish between the two. It should also be armed with the ability to ratify

single company agreements if it is satisfied that the agreement leaves affected drivers 'safer off overall.'

Armed with these powers, the Tribunal would be to account for the complexity and diversity of the Australian freight task. It could 'scale' its determinations and adjust its decisions as the volume of freight moved fluctuates. With the number of Australian freight movements expected to double by 2020, these heads of power would guarantee the System's future relevance.

- (iii) The Capacity To Make Binding Determinations and Resolve Disputes Amongst Supply Chain Participants -Noting the differences between judicial and arbitral power, a *Safe Rates* System should be able to mediate and conciliate disputes that arise from time to time amongst supply chain participants.

To the extent that-agreement cannot be reached, the Tribunal should have the capacity to test competing views with the power to make binding decisions resulting in the establishment and ongoing maintenance of those rates and conditions.

The dispute settlement function should be a cost free jurisdiction. Parties should have access to protections against vexatious claims.

- (iv) Appropriate and Adequate Enforcement Regime -A *Safe Rates* system should be supported by a strong enforcement regime that is a catalyst for industrywide change. The system should properly adapt the existing enforcement powers and rights currently available to registered industrial organisations so they are suitable to a supply chain context.

The system should also be able to recognise any industry scheme, such as a code or accreditation scheme, that meets *Safe Rates* standards for remuneration and accompanying conditions; and is endorsed by registered industrial organisations and supported widely across industry.

### *Regulatory Gaps*

21. In determining if any Australian jurisdiction currently includes the features of a *Safe Rates* system it is apt to recall the findings of the Wright/Quinlan Inquiry:

Consideration of the current legislative frameworks indicates that they do not successfully or adequately address the present issue. There is no issue that the safety problems identified in the inquiry apply equally to employees and owner/drivers in the industry who relevantly perform the same work. Indeed there are many references in the material provided to us to both categories operating in " a single market" (a proposition with which we agree).

However, the current frameworks deal separately with employee/drivers and owner/drivers. Employee/drivers are dealt with by a variety of federal and state industrial awards, in the case of state instruments apparently covering both long haul and short haul drivers

As to owner/drivers, there is a marked difference between the various regimes. There are no specific regulatory systems that deal with owner/drivers in Queensland, South Australia, the Australian Capital Territory, the Northern Territory and Tasmania. New South Wales has had a long history of regulation of owner/drivers since the 1960s but under the legislation there is (significantly) no scope for liability for breaches of contract determinations to be imposed on anyone other than principal contractors and owner/drivers.

....

Notwithstanding the important step taken in Victoria, and as earlier noted, it does not address the often fundamental bargaining power imbalance between owner/drivers and those engaging them. As such, it fails to address the problem at the centre of this Review; nor was any evidence presented to the Review that indicated it had resulted in substantial changes in rates paid to owner/drivers.

22.No current Australian jurisdiction includes all the features proposed for inclusion in a *Safe Rates* system. Federally, the system to determine minimum standards of remuneration and conditions for employees is provided in the *Fair Work Act 2008*. By definition it does not cover owner-drivers (no law in the Federal jurisdiction provides *Safe Rates* like standards for owner-drivers). Nor does it provide for conditions to be attached to entities not directly party to the employer-employee relationship, like clients.

23.In so far as the *Fair Work Act* does create minimum standards for employees, they are general in nature. The establishment and maintenance of safe rates and conditions, and planning for the legal performance of the work and client responsibility are not matters that

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<sup>17</sup> Quinlan, "Remuneration & Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission." pp 52-60.

may be dealt with by modern awards. 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. 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.

24. At a State level, New South Wales, Victoria and Western Australia are the only jurisdictions to have systems of regulation for owner-drivers. None of these systems can attach obligations to clients. Only New South Wales allows for the creation of proactive enforceable standards that allows cost recovery. WA and Victoria's systems almost exclusively focus on unfair business practices in contract setting. Even then, both can only be used *after* a breach has occurred. Unlike, New South Wales neither has a mechanism to resolve disputes when the parties fail to agree.

## **A COMPARATIVE EXAMINATION OF THE PROPOSED MODELS FOR THE CREATION OF A SAFE RATES SYSTEM**

25. The Department of Employment has circulated for comment three models that purport to establish a *Safe Rates* system.<sup>18</sup> The first two, a Specialist Tribunal (Option One) and a Safe Rates Panel (Option Two) originated in the Wright/Quinlan inquiry. The third, an Outworker Model, is proposed for the first time. The Department maintains that all three options contain the following key features:

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<sup>18</sup> "Safe Rates, Safe Roads Directions Paper," ed. Employment & Workplace Relations Department of Education (2010).

**Jurisdiction**

a) Decisions have a binding effect on employers, employees, owner drivers, clients and other industry participants across the Australian road transport industry.

Safe rates for employees

b) Powers to set and maintain safe payments and payment methodologies for employees, taking into account health and safety implications.

c) Decisions binding on employers, employees and clients across the road transport industry.

**Safe rates for owner drivers**

d) Powers to set and maintain safe payments and payment methodologies for owner drivers, taking into account health and safety implications.

e) Capacity to set different rates for different industry sectors and different rates for different truck types and configurations within the same industry sector.

f) Decisions bind industry participants in the supply chain, as well as owner drivers across the road transport industry.

**Supply chain practices**

g) Subject to constitutional limitations, decisions about matters, including the payment of mandated safe rates of pay, setting accreditation requirements for industry participants, chain-of-responsibility measures (for example, record keeping and safe driving plans), apply to others in the transport supply chain, as necessary.

Dispute settlement

h) Parties seek assistance to resolve disputes about safe payments and payment methodologies.

**Activation**

i) Parties, such as the tribunal itself, registered organisations, other organisations by leave with suitable interest, commence proceedings.

**Education, compliance and enforcement**

j) The legislation is enforced by the Fair Work Ombudsman.

k) Information and advice provided to employers, employees and owner drivers, as well as others within the supply chain, about compliance with the arrangements.

l) Resources developed for use within the industry, such as model contracts for owner drivers, as well as researching and evaluating initiatives.

In developing these options for a regulatory response for safe payments, the NTC considered submissions received from industry, drivers and unions. It is also considered the need to ensure a safe, efficient and productive transport industry for Australia's future economic growth. More specific policy objectives include:

- the need to provide an adequate safety net of safe payments for both employees and owner-drivers;
- the provision of appropriate safeguards through chain of responsibility and enforcement of safe payments;

<sup>19</sup> Ibid. pp 12-13

- addressing the imbalance of market power faced by drivers at the bottom of the supply chain;
- protecting the choice and genuine independence of parties who have chosen to become independent contractors; and
- continuing to encourage productivity and efficiency gains in the road transport industry.
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26. The TWU supports the inclusion of all of these features in every option. What follows is specific commentary on how each model gives effect to these essential features.

*Option One - The Specialist Tribunal*

27. This option is attractive because it best allows for the unique nature of the transport industry to be reflected in the new system. Regarding its design the TWU takes note of the following:

- This model is the original Wright/Quinlan proposed model. If adopted, careful attention should be paid to their recommendations in the build phase.
- If this model includes all the DEEWR key features, the option will create a policy framework to establish and maintain safe rates and related conditions for owner-drivers and employees across all sectors of the transport industry.
- Care will need to be taken defining the legislative and/or operational interaction of the *Safe Rates* system and existing systems that apply to owner-drivers and employees; including the Fair Work Act and related instruments.
- Mechanisms would need to be adopted that provide for best practice regulation and minimise unnecessary duplication and overlap with other laws.

*Option Two - The Safe Rates Panel*

28. This option was contemplated by Wright & Quinlan. They indicated that it could be acceptable if it included all the features of Option One. Regarding its design the TWU takes note of the following:

- If this model includes all the DEEWR key features the option will create a policy framework to establish and maintain safe rates and related conditions for owner-drivers and employees across all sectors of the transport industry.
- Establishing these features in the Fair Work Act would require amending its scope so it applied to clients and owner drivers; and broadening the power of Fair Work Australia so it could make decisions that give effect to Safe Rates and related conditions for owner-drivers and employees.
- This options benefits from drawing on an established institutional machinery experienced in the determination of labour standards and conditions.
- Mechanisms would need to be adopted that provide for best practice regulation and minimise unnecessary duplication and overlap with other laws.

*Option Three - The Outworker Model*

29. This option is new. It draws from the 'outworker model' currently applied in the Textile, Footwear and Clothing Industry. The TWU has extensive experience working in that model through our TCFUA NSW Sub Branch. We observe:

- If this model includes all the DEEWR key features the option will create a policy framework to establish and maintain safe rates and related conditions for owner-drivers and employees across all sectors of the transport industry.
- Establishing these features in the Fair Work Act appears to be more complex than the first two options as the Outworker model main

purpose is to extend employee-like terms, including the National Employment Standards, to owner-drivers.

- Detail needs to be provided on how the outworker model is different from 'deeming' owner-drivers as employees. Detail is also required on how the Outworker model allows for the unique considerations of owner drivers to be accounted for.
- Mechanisms would need to be adopted that provide for best practice regulation and minimise unnecessary duplication and overlap with other laws.

### **AN EXAMINATION OF OBJECTIONS TO A SAFE RATES SYSTEM**

30. While interacting with a few industry participants and operators some objections and concerns have been flagged with the *Safe Rates* principles discussed earlier. What follows is an examination of the merits of these arguments and a determination of what, if any, affect they have on the design of a *Safe Rates* system.

#### *Objection One - The (Proposed) National Heavy Vehicle Regulator Is Sufficient*

31. Some organisations posit that the proposed National Heavy Vehicle Regulator ("the NHVR") can single handedly address the entire safety crisis in the road transport industry. This argument is erroneous. It fails to properly explain the role and function of the NHVR or account for the NHVR's inability to address the relationship between pay and safety. It should be considered back door argument for Government to do nothing.

32. The purported role and function of the NHVR is to provide nationally consistent regulation of the heavy vehicle industry. In so far as 'safety' is an objective, it is subordinate to the dominate consideration of creating a single model for road regulation. Accordingly designers are focussed on removing inter-jurisdictional differences from 16 separate heavy vehicle laws; often leading to safety standards dropping, not increasing.

33. No part of the NHVR's work programme relates to the relationship between remuneration and safety. No proposed head of power would allow the Regulator to address the relationship between remuneration and safety. Those who argue that the NHVR can single handedly address the safety crisis in road safety are arguing that the safety crisis in the road transport industry can be addressed *without* addressing the relationship between remuneration and safety.

34. This argument was considered by the NTC. It found the current regulatory framework, which the NHVR is consolidating, does not sufficiently address the safety crisis in road transport. 'Further reforms are needed to address the underlying economic factors which create an incentive for, or encourage, unsafe on-road practices.' Accordingly, the NHVR, at best, is a complementary measure to the creation of a *Safe Rates* system, not a substitute.

*Objection Two -A Safe Rates System Would Increase the Consumer's Cost Of Living.*

35. Some organisations say that to address the relationship between pay and safety is to cause the consumer's cost of living to increase. This view does not account for the fact that under the status quo, consumers are currently paying for poor practices within the supply chain. Nor does this view acknowledge that concerns about price gouging can be addressed by including strong anti-gouging powers either within the *Safe Rates* framework or the Trade Practices Act.

36. As mentioned earlier, each road death costs approximately \$1.7 million.<sup>20</sup> Each injury in an incident costs \$408,000.<sup>21</sup> Assuming 330 people needlessly die each year, the cost from death alone totals \$561 million. Enforcement costs are also high. Each year road regulators incur approximately \$110.2 million in heavy vehicle enforcement costs; of which only a small portion are recovered from heavy vehicle owners

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<sup>20</sup> "Road Crash Costs in Australia."

<sup>21</sup> Ibid.

through registration fees.<sup>22</sup> No enforcement related costs are recovered from clients. No estimate exists on how much money is expended by other regulators and Police on the heavy vehicle industry.

37. All of these externalities are currently borne by persons and consumers who do not cause, or are otherwise involved in, the heavy vehicle industry. Such persons and consumers are already paying the price for an appalling heavy vehicle industry through higher insurance premiums, higher registration charges, higher taxes and higher consumer prices. Insofar as a *Safe Rates* system reduces deaths, injuries and accidents, the 'safety dividend' should be shared with consumers. No consumer should be the victim of price-gouging because of a *Safe Rates* system.

38. Furthermore if any unscrupulous client or operator does use the introduction of a *Safe Rates* system as an excuse to unnecessarily hike prices, they should be subject to tough penalties and fines under either the *Safe Rates* legislation or an amended Trade Practices Act. In addition, Fair Work Australia and/or the Australian Competition and Consumer Commission should be mandated to proactively investigate and prosecute price gougers. Collectively, these measures should deter clients and operators from gouging, while reassuring consumers that they won't be the victims of unscrupulous clients and operators.

#### *Objection Three - Voluntary Schemes and Codes Are Sufficient*

39. Some organisations argue that the voluntary codes and schemes can be relied upon exclusively to end the crisis in heavy vehicle safety. This view was considered by Wright & Quinlan. They found:

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<sup>22</sup> "2007 Heavy Vehicle Charges Determination Regulatory Impact Statement Volume 1," ed. National Transport Commission (2007). p 27

Fourth, reference was made to various other schemes affecting heavy vehicle safety such as the ATA's Trucksafe Scheme and the Heavy Vehicle Accreditation scheme. These schemes have existed for some time. They were examined in detail by the NSW Tracking Safety Report (Quinlan, 2001) where it was found that, while not with effect, voluntary schemes lacked the coverage and influence to bring about an overall change in safety-related work practices in the trucking industry. At the time of the NSW Report, Trucksafe had around 350 members out of around 30,000 for-hire freight operators in long haul transport. The ATA indicated that the scheme now has around 400 members, and while this includes many large operators, it is still by no means setting a pervasive benchmark for the industry.

40.No industry association or operator has led data or evidence that suggests that a voluntary scheme would ever achieve the size or scope to have any widespread impact on the industry Even if such schemes were to be mandated, no scheme in existence has the capacity to address the relationship between remuneration and safety. At best these schemes are complementary measures to the implementation of a *Safe Rates* system, not substitutes.

*Objection Four - Higher Remuneration and Conditions Does Not Lead To Higher Safety*

41.Some organisations argue that no evidence exists that demonstrates how higher remuneration and conditions lead to higher safety. This is factually incorrect. As the NTC noted:

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<sup>23</sup> ———, "Remuneration & Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission." p 48

Professor Michael Belzer from the University of Michigan has stated that:

*"The point estimates indicate that if mileage rate were to increase to \$0.37 per mile, drivers would reduce their weekly hours to be in compliance with 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 mandated law."*

and:

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

42. Other places where evidence of higher pay leading to higher safety has been adduced include 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,

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<sup>24</sup> "Safe Payments. Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry."

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.

### **CONCLUSION– The Need To Act**

43. The TWU has provided evidence that attests to the severe crisis in safety that is currently plaguing the transport industry. In 2010 this crisis claimed 245 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. 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.

44. The TWU 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.

45. The TWU 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:

- 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 and dispute resolution system.
46. 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.