



# Toward A Safe & Sustainable Transport Industry

## Submission To 'Safe Payments Inquiry', National Transport Commission

Transport Workers Union of Australia

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## EXECUTIVE SUMMARY

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1. The Transport Workers' Union of Australia ("TWUA") represents 85,000 men and women in Australia's aviation, oil, waste management, gas, road transport (including cash-in-transit) milk, passenger vehicles and freight logistics industries. With over one hundred years experience in conducting Australia's freight task, the TWU has been proactive in establishing efficient industry standards that improve the lives and safety of transport workers, their families and the road using public.
2. The TWU welcomes the opportunity to contribute to the National Transport Commission's inquiry into 'Safe Payments.' This submission complements previous TWU papers presented to other inquiries; including the 'Beyond the Midnight Oil' Parliamentary inquiry and the 2001 landmark NSW Government 'Inquiry into Safety in the Long Haul Trucking Industry.' It is submitted on behalf of the Transport Workers Union of Australia and is supported by all TWUA state Branches and their leaderships.
3. The TWUA notes that this inquiry is occurring in the context of an industry in the midst of a severe crisis in safety. In 2007, 235 people needlessly perished in articulated heavy vehicle and rigid heavy vehicle incidents. In the same period, the number of deaths in articulated heavy vehicle incidents increased by 5.4% when compared to the previous year.<sup>1</sup> In 2004-2005, 5 350 people suffered serious injuries at work in the transport industry, at the rate of 31 per day. In 2005-2006, 2.8% of the workforce in the industry suffered a serious injury at work.<sup>2</sup> Each road death costs \$1.7 million. Each injury in an incident costs \$408 000<sup>3</sup>. When the non monetised social impact of road deaths, injuries and illness, family breakdown, pain and suffering is included in the measurement of what road deaths and injuries cost the community, the need for regulatory intervention is obvious.
4. The foundation of this regulatory intervention must be full and proper recognition of the relationship between methods for the remuneration of drivers and, the poor safety practices that plague the transport industry and cause high levels of deaths and injuries. Judicial and coronial determinations, academic studies and government-commissioned inquiries have explained how these systems of remuneration result in low rates of pay that encourage inappropriate industry

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

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

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



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

5. This evidence has been empirically scrutinised and subjected to extensive judicial and peer review. Persons and organisations offering an alternate opinion bear the onus of providing irrefutable evidence of a contrary position. It is not sufficient to merely assert that evidence of the strong relationship between systems of remuneration and poor safety practices do not exist. As this submission will demonstrate, that relationship has been independently verified in numerous forums and is supported by the actual experiences of many drivers across Australia.
6. The experiences of these drivers, and a body of academic, judicial and coronial evidence, demonstrates that a root cause of unsafe remuneration systems is the commercial dominance of the transport industry's powerful clients— especially the big retailers. Australia's three largest food-sellers have a 71% market share, worth approximately \$140 billion in sales per annum.<sup>5</sup> Coles has "2 700 truck movements a day from existing distribution centres to stores."<sup>6</sup> Thousands of additional movements occur between Coles suppliers and their distribution centres. 10 000 subcontracted transport companies participate in the Coles logistical system.<sup>7</sup> A similar operation in the Woolworths' supply chain network requires over 1 million truck movements per year.<sup>8</sup>

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

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

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

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

8. *Ibid.*



7. The same body of evidence that confirms the power major transport clients have to determine industry standards also identifies the policies needed to correct this market failure. These can be summarised as four related policy objectives:
- I. Enforceable rates of remuneration and related conditions for transport workers, including self-employed truck owner-drivers, which are “safe” - that is, which, by reason of quantum or structure of payment, do not compel or encourage unsafe driving practices;
  - II. Enforceable requirements relating to planning for the safe and legal performance of road transport journeys (instead of employees and owner-drivers being compelled to perform the work within client parameters established without regard to legal requirements and safety);
  - III. The establishment of a “chain of responsibility” in which all participants in the contractual chain, up to and including the ultimate client, are accountable for the safe and legal performance of road transport work and the payment of safe and reasonable rates of remuneration; and
  - IV. An appropriate and adequate enforcement regime.
8. In addressing the information sought for the purposes of the review (including the examination of existing legislation), this paper identifies legislative options that would give rise to a framework that would permit these policy objectives to be met. It is structured to address both the questions asked on the “Safe Payments Submissions” page of the NTC website and also the Terms of Reference for The Hon Lance Wright QC and Professor Michael Quinlan. It commences by presenting evidence of the link between pay/conditions, safety and client pressure; followed by an examination of the existing legislative frameworks in Australian jurisdictions. It concludes by outlining options for reform that will assist the community in ending the carnage currently occurring on our Community’s roads.



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

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### Pay and Related Conditions

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#### Research, Reports and Judicial Findings

1. A large body of national and international evidence has confirmed the link between rates of pay and safety in the transport industry. Judicial and coronial determinations, academic studies, and government-commissioned inquiries have explained how systems of remuneration that result in low rates of pay cause inappropriate industry practices. These practices include drivers being subject to the pressure to work excessive hours; the pressure to exceed legal speed limits; the pressure to drive through break and sleep times; and, in some circumstances, the professional use of illegal stimulants to combat fatigue.<sup>9</sup>
2. This dangerous relationship has been known for some time. The 1991 Federal Department of Transport and Communications (Commonwealth) study into on-road performance and economic reward found:

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

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

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

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



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

4. This pressure to maximise hours to compensate for low levels of remuneration can result in dangerous levels of fatigue. The research of Williamson *et al* (2000) determined that drivers compensated through a 'payment-by-results' method were twice as likely to report being fatigued on at least half of their trips than drivers who are paid an hourly rate. The landmark 2001 'Report Of Inquiry into Safety in the Long Haul Trucking Industry' by Professor Michael Quinlan of the University of New South Wales found that these contingent payment systems applied to 82.3% of drivers in the Australian road transport industry. The Professor's report also highlighted studies confirming the association between 'payment by results' remuneration systems and the increased use of stimulant drugs.
5. The existence of the link between payment methods and safety has widespread acceptance in the transport industry. In cross-examination in the NSW Industrial Relations Commission *Mutual Responsibility For Road Safety* case, officers of the NSW Road Transport Association gave this evidence:

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

A. *That's right, I agree with that.<sup>12</sup>*

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

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

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

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

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

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



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

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

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

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

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

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

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

15. See Appendix 1

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

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



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

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

and:

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

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

### ***Driver Accounts and Evidence of Death, Injury and Dangerous Practices***

10. There is much evidence of drivers being forced into daily decisions that betray their lack of control over their safety and conditions. The current spike in the price of fuel is the latest reminder of the life threatening burdens placed upon employees and owner-drivers by a market so totally dominated by the commercial imperatives of powerful industry clients. Drivers have to work additional hours, take extra loads and drive faster to feed their families and meet their next rent or mortgage repayment.
11. Below are seven accounts from drivers across Australia, a small sample of the statements made to the Transport Workers Union, attesting to the extraordinary pressures they currently face from the lack of a system of remuneration that provides them with adequate compensation:

### **Driver Accounts**

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

*In the past I have been offered - and accepted out of necessity, working conditions that I know were unsafe. I accepted them because I needed to feed my children.*

*In some cases drivers are paid safe rates, in many cases however employers and principal contractors try to make as much profit as they can by reducing their labour costs.*

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18. See Appendix 1



*I personally know of many drivers who's extremely high running costs make it difficult to stay afloat.*

*They cut a lot of corners to reduce their costs to keep their trucks on the road.<sup>19</sup>*

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

*In my experience kilometer rates mean drivers work harder and faster which induces fatigue and increases the chance of accidents.*

*I have personally experienced fatigue because I was being paid per kilometer. My only response however was to keep driving to make more money*

*Safe enforceable systems that require planning of trips mean that drivers would be less likely to breach the law because it would be more easily identifiable.*

*In the past I have worked well past a 'safe' point because I simply needed the money.<sup>20</sup>*

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

*I am paid by the hour, but know that there is no way you can survive on 7.6 hours pay a day so you work as much overtime as you can to survive. As a result, I have driven whilst I've felt fatigued in order to finish the job and earn more money.*

...

*I have experienced being pressured to accept lower rates in order to keep work, and was been told indirectly that I must do the job or face consequences such as termination <sup>21</sup>*

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

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

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

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

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

20 Ibid.

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

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

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



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

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

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

*On occasion I have had to work more hours than I felt were safe because of low rates of remuneration when I drove only under cents per kilometre rates for previous employers. In order to earn a decent level of income I had to do numerous long runs and on most trips I felt unable to take a rest break because I felt pressured to continue driving in order to meet the strict deadlines to get back.*

*There is always pressure to accept lower rates in order to obtain and keep work when you are on a cents per kilometre rate because of the threat that if you don't do it cheap they'll find someone else.<sup>25</sup>*

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

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

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

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

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

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

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

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



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

### Fatigue

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

### Drug Usage

- 22 Two national surveys in 1991 and 1998 recorded that the use of 'stay awake' or stimulant drugs was cited by drivers as one of the two most helpful strategies for managing fatigue. Professor Quinlan's inquiry found that while the precise level of drug use in the long-distance trucking industry was unknown, the evidence led to a firm conclusion that it was widespread. He noted that prolonged sleep deprivation/fatigue and drug use may not only increase the risk of truck crashes but also will have long-term health effects on the drivers affected.
- 23 Of the 13 driver witnesses, a number openly admitted using stimulants to help them work; others gave evidence of having conversations with other drivers about the use of illicit drugs while working; three drivers spoke of management knowing or encouraging the use of drugs during the course of performing their work.

### Excessive hours of work

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

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

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28. See Appendix 1



- 25 Some drivers gave examples of extreme breaches of driving hours: 85 hours in a 120 hour period, 20.5 hours in 24 hours, 30 hours in a 32 hour period and 53 hours without a break.
- 26 When taking breaks, the drivers' evidence was that it was often too short or taken in situations where the driver was deprived of a proper opportunity to rest. Other factors referred to as inhibiting proper rest were lack of heat and space in sleeper cabins and interruptions during rest time where rest was taken in the depot while waiting for more work.
- 27 Other drivers reported on the pressure they were under directions from management to work extreme hours including threats and financial penalties. Drivers reported that they became abusive and aggressive when placed under this pressure.

### **Falsifying log books**

- 28 As a consequence of working excessive hours there was widespread evidence of drivers falsifying log books in order to keep legal records required by the *Road Transport (Safety and Traffic Management) (Driver Fatigue) Regulation 1999* ("1999 Regulation").
- 29 Some of these measures included:
- (a) not recording the beginning or end of trips;
  - (b) recording time spent performing pick ups or deliveries as breaks;
  - (c) falsifying start or finish times;
  - (d) using another driver's details to claim that there was a second driver in the truck;
  - (e) not recording local work in the logbook;
  - (f) possession of a second logbook; and
  - (g) falsifying the place of depot so as to avoid having to carry a logbook at all.
- 30 Other drivers found it preferable to carry no log book at all. There was evidence of managers encouraging drivers to falsify log books or management's disinterest in whether log books were correctly entered.



## Speeding

- 31 The evidence disclosed that speeding is a regular part of the job for long distance truck drivers and drivers found ways of avoiding detection such as the use of radar detectors, distorting number plates, turning off lights, or "tailgating" other trucks to avoid detection by cameras.
- 32 The effects of these driving practices on the health, safety and well-being of drivers was described both in expert evidence and directly in the evidence of the drivers. Drivers reported the effects of long hours as akin to hallucinating or being drunk. The effects of the widespread use of illicit drugs are self-evident. Drivers reported traumatic health problems and pressure on families and personal relationships.

### **Death and injury in the road transport industry**

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

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

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

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

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

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



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



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

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

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



## Client Pressure

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### **Supreme Economic Power of Clients & Pressure on Transport Operators**

15. The body of academic, judicial and coronial evidence demonstrates that a root cause of unsafe remuneration systems is the commercial dominance of the transport industry's powerful clients– especially the big retailers. Australia's three largest food-sellers have a 71% market share, worth approximately \$140 billion in sales per annum.<sup>36</sup> The number of truck movements required to keep these retailers' shelves stocked is staggering. Coles has "2 700 truck movements a day from existing distribution centres to stores."<sup>37</sup> Thousands of additional movements occur between Coles suppliers and their distribution centres. 10 000 subcontracted transport companies participate in the Coles logistical system.<sup>38</sup> A similar operation in the Woolworths' supply chain network requires over 1 million truck movements per year.<sup>39</sup>
16. A core feature of the Coles and Woolworths business plans is to reduce supply chain costs. To this end, the power accrued by the mass amount of transport movements purchased creates a hyper-competitive market for transport services. Major transport users no longer maintain their own fleets. They contract out the transport function on a cost-competitive basis. The *intention* of this model is to achieve cost savings by taking advantage of the competitive market. The *effect* has been the development of extreme competition in the industry; where low prices are the primary determinant of securing enough work to continue to operate.
17. Transport operators all face the same bundle of costs, costs such as vehicle maintenance, real estate, fuel and wages. To be successful, companies competing for the work of the big retailers cut their profit margins and then, when those margins become too thin, find other ways to reduce their costs.

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

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

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

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

39. *Ibid.*



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

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

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

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

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

41 See Appendix 1.

42 See Appendix 6.

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

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



clients' premises, further exacerbate the harm caused by their excessive control of the transport market.<sup>45</sup>

20. As a consequence of power, drivers, who are obviously the very last link in the transport supply chain, in that they perform the work, have the weakest concentration of market power and must often take the wage/rate given to them or fail to receive work. This makes them prone to engaging in unsafe practices, such as driving for too long, in order to obtain for themselves and their families a decent living.
21. Owner drivers and employee drivers suffer from client control of the transport industry in equal measure. They operate in the same market doing the same work. While their remuneration systems differ in most circumstances, addressing the need for safe rates for one group and not the other would be counter-productive. It would simply shift the burden of work on to the group for which safe rates were not in place. To effectively correct the market failures caused by excessive client control, any regulatory intervention must equally protect owner drivers and employee drivers.

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

- (a) there is widespread non-compliance with award and contract determination provisions and, in particular, underpayment of wages (a view supported by the Executive Director of the NSW Road Transport Association, Martin Iffland);
- (b) it is not uncommon for transport companies, which themselves would not engage in conduct in breach of industrial instruments, to subcontract work of marginal viability to other transport companies, which are prepared to breach industrial instruments in order to make a profit;
- (c) labour costs are the most significant component of transportation costs and there is an inherent incentive to achieve savings through non-compliance with industrial instruments or through the engagement of owner drivers or small fleet owners who are prepared to do what it takes to make the work profitable;
- (d) the competitive pressures in the long distance sector have resulted in a situation where the major transport operators perform only a fraction of the work in the industry with the rest being contracted out;
- (e) most companies performing long distance work resist enterprise bargaining because of the likelihood that an enterprise bargaining arrangement will price them out of the market by requiring the payment of labour costs measured against yardsticks other than that of financial viability;
- (f) there is a link between remuneration and safety issues such as excessive hours of work;
- (g) *commercial pressures, most notably from major retailers, have intensified, resulting in the major transport companies tendering for contracts at very low rates and leading to the result that they subcontract out any work that they cannot perform profitably. Commercial pressure is also exercised by major retailers in the form of directed delivery schedules placing stress and, at times, unrealistic expectations on the driver actually performing the work;*
- (h) major retailers refuse to take responsibility for the consequences of the time restrictions that their delivery systems impose on subcontractors and major transport operators themselves contract out responsibility for the work and yet resist being called to account when things go wrong further down the chain;
- (i) *the transport industry is characterised by chains of successive contracting out of work with commercial power decreasing with each successive step;* and
- (j) those higher up the chain often contract out work for the express reason of transferring responsibility for the safe performance of the work to others.



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

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

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

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

24. And in Professor Quinlan's 2001 study:

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

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

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

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

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

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



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

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

### **Clients Contract Out of Responsibility For Safety**

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

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

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49. Full extract in note above.

50. Transcript 27 March 2006 p625ff.



- Q. Does Woolworths have any mechanism to check whether the prices against which the work may be further sub-contracted permit the appointment of employees in accordance with the necessity relevant awards?
- A. No, we don't.
- Q. That is a matter you regard beyond your area of responsibility?
- A. It is the commercial responsibility of the parties so that we tender to our requirements.
- Q. You will be aware the TWU has complained to Woolworths for some time that the delivery window and operation of other circumstances has led to situations where people speed and do not take regulation breaks in order to meet required times of delivery?
- A. I am aware of the TWU's complaints, yes.
- Q. Has that been directed to Woolworths to see whether that is so?
- A. There has been an on going investigation for sometime.
- Q. Has it been investigated, whether that complaint is true, that drivers have been breaching the law in order to meet slots?
- A. To my knowledge no investigation has taken place.
- Q. It is serious allegation?
- A. Yes, it is.
- Q. On one view it is a serious attack on Woolworth's reputation?
- A. Yes, it is.
- Q. Your evidence is Woolworths had made no attempt to investigate whether that allegation has been made out in fact or not?
- A. That's correct?

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

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

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



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

"If I missed a delivery time for Safeway, Coles or K-mart, I would then need to stay overnight in Melbourne and have to deliver in the same time the next day. I recall situations where if I missed my delivery time by 10 – 15 minutes, I would be rejected by the load allocator and asked to come back the next day. This is despite the fact that I could wait up to 3 hours at each depot before they can unload me."

"I was rarely unloaded within the half hour unloading window set. In my experience Coles and Woolworths would book in around 10 trucks for each half hour window even though it take around an hour to unload each truck and there was only ever 2 trucks being unloaded at one time. As a result, there was often up to 20 or 30 trucks waiting to be unloaded, with more on the street waiting to get in."

"I usually had to wait for three (3) or four (4) hours and sometimes up to nine (9) hours before staff or docks were available for loading. On one occasion prior to Christmas 2004 I had to wait nine and a half hours to be unloaded at the Woolworths warehouse in Arndell Park. I was not paid for any time I spent waiting to be loaded or unloaded on this or any other occasion."

"In addition to the long hours, I often had to speed in order to meet the time in which we were required to make the deliveries. I was told by Smith what time I had to get into Woolworths in Arndell Park. I was usually booked for 5am. That normally gave me around 11 hours to do what is roughly a 12 hour trip without breaks however I understood that this requirement stood even when I did not get out of Melbourne at 7 o'clock at night. Alex Smith told me, "If you are late twice in a month Woolworths will ban us from delivering. So I will be out of contract and you will be out of job."

"If I did not get there by my allocated time, I was relegated to the back of the queue. As the Woolworths dock staff logged off at 1pm irrespective of whether there were trucks waiting or not, if I had not made it to the front of the queue by then I wasn't unloaded at all."

"A 7am booking at Woolworths meant I had to be at Sydney by 5am because there were other customers freight on vehicle that I had to unload before Woolworths.

I said

" I had been loading and unloading all day in Melbourne. I needed to have some sleep."

Smith:

"This is how you work your logbook."

He proceeded to show me what the RTA requirements were. He got on the Internet and pulled up the RTA rules and tried to show me how to rort it."

"Also, Woolworths would not let me in before my allocated time if I was early and would often leave me waiting for a long time past the time allocated to me (even when I got there early) before I got unloaded or even got onto a dock. I was not paid for any of this work."<sup>52</sup>

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



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

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

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

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

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

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

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

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

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

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

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

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

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



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

*When I called Peter Gooding to say I was leaving, he said words to the effect of*

*“You've got to get there. We can't fuck this up.”*

*I left Brisbane at 5pm and drove 12 hours straight until daylight when I pulled up in the middle of nowhere and had 5 hours sleep. I then drove into a town (I think it was Hay) where I had a shower and food. I was stopped for there for about 3 hours so as to avoid a SafeTCam I knew to be in the area and then drove straight to Adelaide with maybe only two or three more quick breaks on the way (just long enough to get a drink and something to eat). I arrived at my destination at around midnight, approximately 31 hours after I had started my trip.<sup>57</sup>*

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

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

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

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

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

58. [http://www.twuqld.asn.au/index.php?option=com\\_content&task=view&id=23&Itemid=28](http://www.twuqld.asn.au/index.php?option=com_content&task=view&id=23&Itemid=28) accessed 20/8/08

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



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

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



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

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33. The evidence above shows that without external intervention the transport market is incapable of providing safe and reasonable rates and conditions. There is an urgent need long term need to finally restore integrity to payments in the transport industry.
34. Once this is accepted, the only conclusion, other than allowing the continuation of horrendous practices, is to establish a comprehensive framework for maintaining safe rates and conditions. That framework should have both the capacity to endorse any industry-wide agreement as to appropriate rates and conditions for employees and owner-drivers and, to the extent that industry-wide agreement cannot be reached, the capacity to test competing views before an independent body with the power to make binding decisions resulting in the establishment and on-going maintenance of those rates and conditions.
35. The evidence strongly indicates that at least four key elements are required in such a framework to effectively address this problem:

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

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

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

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

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

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



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

(iv) *Appropriate and Adequate Enforcement Regime:*

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

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

36. What follows is:

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



## Existing Regulation

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### Employees

37. Across the country various awards, Federal and State (NAPSAs), apply to employees in the transport industry. Almost without exception, Federal transport awards provide not only for a lower rate of pay but also for a more restricted set of conditions of employment than state awards. The capacity to apply for variations to Federal Awards since 1996, and all awards since WorkChoices, has been limited to the point of being in practice non-existent by preventing the amendment of matters which were rendered prohibited after the introduction of WorkChoices.
38. The rates in the Federal Long Distance Award reward distance travelled rather than time spent driving, and consequently have effects on employee driver and employer behaviour similar to those observed with respect to owner-drivers and those who engage them. Such rates have been deemed "incentive" rates and, as a result, have not been increased since 2005. It follows from the restrictions on variation applications that there is no present capacity to apply for changes to the payment structures, or to include vital planning requirements to ensure the integrity of the payment structures in the award system.
39. No transport award presently extends any obligations or duties to parties other than employers in the industry. This inability to extend important safety obligations to parties outside the award framework results in an inability for the minimum rates notionally applicable to effectively protect drivers and road users from price pressure in the industry.

### Employees - Modern Awards

40. The *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* was passed by the Federal Parliament on 18 March 2008. The transitional legislation, inter alia, creates a new Part 10A of the Workplace Relations Act 1996. The object of the Part is to empower the Australian Industrial Relations Commission to make "modern awards."<sup>60</sup> This is to be achieved through an award modernisation process. That process commenced with an award modernisation request from the Minister for Workplace Relations to the President of the Commission who is presently convening Full Benches to deal with the request.
41. The establishment and maintenance of safe rates and conditions, planning for the legal performance of the work (such as the safety measures endorsed

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



by the Full Bench of the Industrial Relations Commission of NSW in the *Mutual Responsibility* case) and client responsibility are not matters that may be dealt with by modern awards.<sup>61</sup> 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.<sup>62</sup> That mandatory obligation is referable solely to the requirements of the Act and does not operate to expand the category of matters to which the obligation applies.

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

### **The “One Market” Approach – Employees and Owner-Drivers in NSW**

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

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

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

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61. See section 576J of the *Workplace Relations Act 1996*

62. Award Modernisation Request: 3(g).

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



44. It is worth devoting space to an explanation of the system so as to convey an understanding of the reasons that it has been such a stable system so widely supported.
45. Chapter 6 of the Industrial Relations Act 1996 (NSW) is characterised by the following:
- Enforceable standards providing the certainty of at least cost recovery;
  - The prevention of unfair or destructive competition by preventing undercutting (below the cost recovery minima) across a site or industry sector;
  - The capacity for incentive systems to flourish above the minima, either on an individual or enterprise (union or non-union) level;
  - Protection against arbitrary termination of the contract;
  - Quick, no cost access to the Industrial Relations Commission for the resolution of disputes about goodwill (amongst other matters), including the frequent successful oversight of contract transfer upon changeover of head contract to which the work relates;
  - The capacity to recover goodwill where termination of the contract has resulted in that goodwill being unfairly extinguished (a provision enacted under a state Liberal government).
46. The New South Wales model flowed out of a Commission of inquiry set up by the state Liberal government in the late 1960s.<sup>64</sup> The inquiry concluded that there was “an overwhelming case” for the regulation of owner-drivers. It recognised that owner-drivers were contractors but their dependent nature nevertheless justified a minimal form of industrial regulation. It was overwhelming because,

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

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



47. Chapter 6 does not apply to genuinely independent transport companies that trade with a variety of clients and that have the power to set the price of the services they provide. Rather it applies to single vehicle owner-drivers who are tied to and dependent upon one company.
48. Chapter 6 is a model of proven sustainable balance between freedom to contract and encouragement of “entrepreneurship” on the one hand, and, on the other, proper protection for those choosing to contribute to Australian working life through independent contracting arrangements. Accordingly, it has, for nearly 30 years, had the support of workers, transport operators, industry bodies and both Labor and Liberal governments.
49. Through the NSW system owner-drivers and transport operators currently enjoy (and for much of the last 30 years have enjoyed) settled arrangements that have led to productive, efficient and harmonious execution of the transportation function. These arrangements are contained in a variety of industrial instruments at both the industry sector (contract determinations) and enterprise level (contract agreements).
50. Contract Determinations: Part 2 of Chapter 6 allows for the creation and protection of cost recovery standards through contract determinations. Contract determinations create a set of contracting standards established most often in consultation with industry groups and most commonly with the NSWRTA.
51. Contract determinations regulate only the basic conditions of engagement. They do **not**, for example, contain employee-like entitlements such as overtime, penalty rates or minimum hours of work, and there is no entitlement to leave (maximising the availability of the truck) compensation for which is contained in the rate structure. Rather determinations are incentive and mode-based and aim to provide basic minima upon which parties can negotiate *viable* contracting arrangements.
52. This minimalist approach ensures that the measures are not of such a nature as to unduly hinder the efficiency and productivity of the independent contract arrangements while providing the framework necessary to sustain the owner-driver small business model. In addition to covering off all foreseeable costs, the contract determination system also has the capacity to deal with unexpected events such as the recent dramatic fuel price increases. These can be dealt with



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

53. Contract Agreements: Transport operators and groups of owner-drivers (**whether or not represented by the Union**) may enter into arrangements as to the terms and conditions best suited to their particular enterprise ('contract agreements'). These agreements set the desired agreed provisions for a given term, thereby allowing both operator and owner-drivers greater commercial certainty and operational efficiency.
54. At present there are over 170 contract agreements between groups of owner-drivers and specific enterprises and over 25 contract determinations, covering industry sectors including:
- General transport;
  - Freight forwarding;
  - Couriers;
  - Concrete;
  - Quarries;
  - Waterfront;
  - Excavated Materials;
  - Waste Collection;
  - Breweries;
  - Taxis; and
  - Car Carriers
55. One notable feature of Chapter 6 in NSW is that until the commencement of the *WorkChoices* legislation, the Industrial Relations Commission of NSW was able to seamlessly deal with issues relating to the establishment and maintenance of safe standards of remuneration and related conditions of *both* employees and owner-drivers performing intra state work.
56. The logic behind this approach is that drivers in the transport industry operate in one market and that owner-drivers, although independent contractors at law, are in fact highly dependent on those with whom they contract and are thus as vulnerable to exploitation (if not more so) than an employee driver.<sup>65</sup> In many cases employees and owner-drivers work for the same company and/or start at the same location each day and do the same work. The 1970 Willis Report put it this way:

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

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

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



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

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

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

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

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



## NSW – Summary of Existing Provisions

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

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

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



## Victoria

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60. The Kennett referral of industrial relations powers to the Commonwealth meant that, even before *WorkChoices*, employees in Victoria were subject to the Federal industrial relations system. Accordingly, the above comments about the incapacity of the present framework to facilitate the achievement of the identified policy objectives apply in respect of Victoria.
61. There is no framework that facilitates client accountability with respect to rates, related conditions and planning for the legal performance of the work.
62. In 2003 the Victorian State Government established an owner-driver and forestry contractor inquiry. As mentioned above, the inquiry now forms part of the significant body of evidence regarding the rates and safety link and client pressure on contracts and the way in which work is performed. In 2005 the Labor Victorian Government acted on the inquiry report and established the *Owner Drivers and Forestry Contractors Act 2005 (VIC)*.
63. The approach and effect of the legislation is different from that taken in NSW. In the context having already referred industrial relations power, the Act was established in the Fair Trading jurisdiction. It is based, amongst other things, on the premise that provision of information to market participants will provide for rational decision-making. The main elements of the Victorian Act are as follows:
- (i) The Victorian Act seeks to redress the information imbalance existing between owner-drivers and hirers by:
    - a. the provision of an information booklet to the owner driver prior to the entering of a contract;
    - b. the provision of a published guidance rates and costs schedules to the owner-driver prior to the entering of a contract;
    - c. a requirement that contracts must be recorded in writing and state the rates to be paid and the minimum period of notice applicable.
  - (ii) A capacity for owner-drivers to appoint a negotiating agent to negotiate on behalf of an owner-driver or group of owner-drivers for the purposes of making, varying or terminating a contract.



- (iii) The establishment of Codes of Practice in relation to owner-drivers and hirers.
- (iv) A consequence of adopting a Fair Trading model is that the integrity of the system is based on the prevention of unfair business practices. The Act adopts many of the well-understood tests enunciated in the *Trade Practices Act 1974 (Cth)* and the *Fair Trading Act 1999 (Vic)* in relation to unconscionable conduct. It also introduces several new tests relating directly to owner-drivers' contracts, namely a comparison of the amount for which the owner driver could have supplied the services as an employee, and whether or not the contract allows for increases in fixed and variable overhead costs on a regular and systematic basis. These additional tests provide a framework in which both hires and owner-drivers can understand whether or not their conduct in relation to a contract represents unfair business practices. A good example would be a contract that provides for no review of fixed and variable costs, such as fuel, on a regular and systematic basis.
- (v) One of the key foundations of the Victorian Act is the establishment of a low-cost, easily accessible dispute resolution procedure under the auspices of the Victorian Small Business Commissioner (VSBC). The Act provides for parties with a dispute to make an application to the VSBC for mediation over the dispute, and, although the legislation is young, to date the VSBC has experienced a settlement rate of around 85 to 90% of disputes through this process. In the event a dispute is not resolved in the VSBC, either party may obtain a certificate to proceed to the Victorian Civil and Administrative Tribunal in order to have the dispute arbitrated.

## **Western Australia**

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- 64. Employees – see paragraphs above dealing with the incapacity of the current Commonwealth employee framework to achieve the required policy objectives.
- 65. There is no framework that facilitates client accountability with respect to rates, related conditions and planning for the legal performance of the work.
- 66. In 2004 the WA government recognised the dire circumstances facing the owner-drivers and established a working group to address the formulation of safe sustainable rates the result being a Bill passed by the WA legislature, which the



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

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

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

## Queensland

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

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



## Australian Capital Territory

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70. Employees – see paragraphs above dealing with the incapacity of the current Commonwealth employee framework to achieve the required policy objectives.
71. There is no framework that facilitates client accountability with respect to rates, related conditions and planning for the legal performance of the work.
72. Tabled in the ACT parliament is the *Fair Work Contracts Bill*. This bill, like the Victorian legislation and the WA bill is set in the commercial context.<sup>69</sup>

## South Australia and Northern Territory

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73. In 2002 in South Australia and the Northern Territory a review was conducted into industrial laws which noted the growth of independent contractor arrangements, the increased competition in the industry and the need for owner drivers and employees to work longer hours to maintain their incomes. The review also noted the potential adverse consequences of these characteristics for industrial relations and occupational health and safety outcomes and the particular problems created for transport workers.
74. Although the aspect of the Bill which would have facilitated, amongst other things, the making of awards governing conditions of contract workers (such as truck drivers) did not pass, the underlying rationale for such capacity remains.
75. There is no framework that facilitates client accountability with respect to rates, related conditions and planning for the legal performance of the work.

## Tasmania

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

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69. Copy of Bill attached at Appendix 12.



## Regulatory Gaps

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77. Paragraph 37, above, explain the significant regulatory gap with respect to employees. For employee drivers this means: no capacity to establish and maintain safe rates and conditions; no capacity to establish (whether from scratch or by transferring existing safety provisions) and maintain requirements relating to planning for the legal performance of the work; no capacity to hear and determine as necessary, by way of appropriately tested evidence, any competing views regarding the establishment and maintenance of safe rates and conditions and planning requirements; no capacity (with respect to the transport industry) to incorporate into awards terms relating to clients.
78. NSW, Victoria and WA have owner-driver provisions which, to varying degrees, provide a framework consistent with the objective of establishing and maintaining safe rates and conditions for owner-drivers performing intra state work. There is no such operative framework in any other jurisdiction. There is no such framework applicable to interstate work.
79. The *Independent Contractors Act* does not currently provide the framework within which any of the policy objectives in respect of owner-drivers can be achieved. In addition, the Act suffers from deficiencies that render its use practically difficult even in pursuit of the limited remedies it contains.<sup>70</sup>
80. The NSW owner-driver framework facilitates the establishment of requirements relating to planning for the safe and legal performance of the work. No other jurisdiction has this capacity.
81. With the exception of the provisions regarding fatigue and schedules within the NSW Occupational Health and Safety regulation (noted above), no jurisdiction has contains a framework with the capacity to deal with client accountability.
82. Appropriate obligations in road transport law with respect to safe rates and conditions. The absence of reference to rates and conditions in transport law demonstrates a lack of recognition of the link between unsafe rates and road law compliance. Appendix 7 sets out the changes that could be made to road laws to complement the employee and owner-driver 'safe rates' and conditions framework proposals that follow.

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



## Conclusion – Legislative Proposals

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### Core of Terms of Reference

“To identify the means by which legislative systems applying (or to apply) to employees and independent contractors could/should accommodate a system of ‘safe payments’ (and related matters such as waiting times and unpaid work) for employees and owner-drivers.”<sup>71</sup> (NTC Website)

83. The purpose of this section is to identify the means by which the Commonwealth could legislate to achieve the following policy objectives:
- (i) Rates of remuneration and related conditions for transport workers that are “safe” - that is, which, by reason of quantum or structure of payment, do not compel or encourage unsafe driving practices. (In the case of owner-drivers, this will require rates of remuneration which enable the proper recovery of standing and running truck costs and the return to the driver of remuneration not less than the safe award rate for an employed truck driver).
  - (ii) Requirements relating to planning for the safe and legal performance of road transport journeys (instead of operators compelling employees and owner drivers to perform the work within client parameters established without regard to legal requirements and safety).
  - (iii) The establishment of a “chain of responsibility” in which all participants in the contractual chain, up to and including the ultimate client are accountable for the safe and legal performance of road transport work and the payment of safe and reasonable rates of remuneration.
  - (iv) Appropriate and adequate framework for enforcement of (i) – (iii) above.
84. Two options are identified by which these objectives may be achieved. The first option involves the amendment of existing legislative regimes applying to employee truck drivers and truck owners drivers, namely the *Workplace Relations Act 1996* (Cth) and the *Independent Contractors Act 1996* (Cth) respectively. The first option involves the utilisation of existing structures and institutions (in particular, the Australian Industrial Relations Commission) to achieve the policy objectives.

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



85. The second option would involve the enactment of a discrete piece of legislation, and the creation of new structures and institutions (in particular, the creation of a new tribunal specific to the road transport industry) in order to achieve the policy objectives. Some consequential amendments to the *Workplace Relations Act* would be necessary.
86. In each case, because of the current lack of publicly available information as to the detail of how the Commonwealth Government intends to legislatively implement its *Forward with Fairness* industrial relations policy, and because of the urgency of this matter, these proposals have been prepared by reference to the *Workplace Relations Act* and the *Independent Contractors Act* in their current form. In each case it is envisaged that the proposals will operate seamlessly with road transport laws.<sup>72</sup>

## Option One

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### Employees

87. The amendments required to be made to the *Workplace Relations Act* to effect the legislative objectives with respect to employed truck drivers are relatively straightforward. In summary, it is proposed that the Australian Industrial Relations Commission would be empowered, in the case of “modern awards” which have application to employed truck drivers, to make and, at regular intervals, review award provisions concerning the matters identified in paragraphs 83(i)-(iv) above.
88. The specific changes to the *Workplace Relations Act* would be as follows:
- (i) A new provision would be inserted into Part 10A Division 3 Subdivision A which, in respect of employed truck drivers, would prescribe the following matters additional to those in s 576J:
    - (a) such terms relating to the conditions under which an employer may employ transport workers to ensure their health and safety (including terms relating to the pay and conditions of employed truck drivers and the planning of the performance of their work in a safe and legal fashion); and
    - (b) such terms relating to the conditions under which an “eligible entity” (as defined in s 564) may arrange for road transport work to be carried

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72. See Appendix 7.



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

- (ii) A new provision similar to s 576V(5) permitting a modern award to apply, in addition to relevant employers, employees and organisations, an “eligible entity” or an employer that operates in the road transport industry or in respect of which a term made in accordance with the new provisions identified in paragraph 88(i) above are expressed to apply.
- (iii) A variation to s 576H to permit the AIRC to vary modern awards in order that any new provisions of the type identified in paragraph 88(i) above remain relevant in the light of any changed circumstances. Such power could be exercised by the AIRC acting on its own initiative or upon the application of an organisation bound by the relevant modern awards.

### **Owner Drivers<sup>73</sup>**

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

- (i) apply to any “services contract”, as defined in s 5 and of a type to which Part 3 of the Act applies in accordance with s 11, where the relevant services supplied are road transport services involving the use of a motor vehicle operated by the independent contractor;
- (ii) confer power upon the AIRC to make a determination with respect to the remuneration of the independent contractor, and any condition, under such a services contract or class of such services contracts, and with respect to the termination of any such services contract;
- (iii) additionally, confer power upon the AIRC to make a determination with respect to the conditions under which an eligible entity (defined in the same

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



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

- (iv) provide that such a determination may be made by the AIRC acting on its own initiative or upon the application of any organisation registered under the *Workplace Relations Act* which has as members independent contractors bound by any such services contracts;
- (v) apply the provisions of the *Workplace Relations Act* concerning the AIRC’s procedures, including but not limited to its procedures with respect to the conduct of hearings, appeals, representation and costs, to the AIRC’s exercise of its powers under the new part of the *Independent Contractors Act*;
- (vi) provide for enforcement procedures for determinations made by the AIRC that are relevantly the same as for awards under the *Workplace Relations Act*.

## **Option Two**

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



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

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

- (i) to make award provisions applying to employed truck drivers, employers and eligible entities relating to:
  - (a) the conditions under which an employer may employ transport workers which are necessary to ensure their health and safety (including terms relating to the pay and conditions of employed truck drivers and the planning of the performance of their work in a safe and legal fashion); and
  - (b) the conditions under which an eligible entity may arrange for road transport work to be carried out for the entity (either directly or indirectly) by transport workers which are necessary to ensure their health and safety (including terms relating to the pay and conditions of employed truck drivers and the planning of the performance of their work in a safe and legal fashion); and
- (ii) to make determinations applying to independent contractors, entities engaging independent contractors, and eligible entities (with the modified definition referred to in paragraph 89(iii) above) with respect to:
  - (a) the remuneration of an independent contractor, and any condition,



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

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

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

## **Conclusion – The Need To Act**

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94. The TWUA has provided evidence that attests to the severe crisis in safety that is currently plaguing the transport industry. In 2007, this crisis claimed 235 people's lives in articulated heavy vehicle and rigid heavy vehicle incidents. Each road death costs \$1.7 million. Each injury in an incident costs \$408 000<sup>74</sup>. When the non monetised social impact of road deaths, injuries and illness, family breakdown, pain and suffering is included in the measurement of what road deaths and injuries cost the community, the need for regulatory intervention is obvious.
95. The TWUA has demonstrated how Judicial and coronial determinations, academic studies, and government-commissioned have recognised that the foundation of this regulatory intervention must be full and proper recognition of the relationship between methods for the remuneration of drivers and the poor safety practices that imperil the transport industry. These practices include drivers being subject to the pressure to work excessive hours; the pressure to exceed legal speed limits; the pressure to drive through break and sleep times; and, in some circumstances, the professional use of illegal stimulants to combat fatigue.
96. The TWUA has also demonstrated that the root cause of unsafe remuneration systems is the commercial dominance of the transport industry's powerful clients– especially the big retailers. Their power to determine industry standards mandates their involvement in a 'safe rates' framework that has four related policy objectives:


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



- I. Enforceable rates of remuneration and related conditions for employed truck drivers and self-employed truck owner-drivers which are “safe” - that is, which, by reason of quantum or structure of payment, do not compel or encourage unsafe driving practices;
- II. Enforceable requirements relating to planning for the safe and legal performance of road transport journeys (instead of employees and owner drivers being compelled to perform the work within client parameters established without regard to legal requirements and safety);
- III. The establishment of a “chain of responsibility” in which all participants in the contractual chain, up to and including the ultimate client, are accountable for the safe and legal performance of road transport work and the payment of safe and reasonable rates of remuneration; and
- IV. An appropriate and adequate enforcement regime.

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



Tony Sheldon  
NSW Secretary  
National Secretary  
Transport Workers Union

