

██████████ Director, Cartels  
Australian Competition and Consumer Commission

By email: ██████████

June 15, 2020

Dear ██████████

We write in response to a letter received by one of our members Frank Black (Arcidiaco) from your organisation dated June 1.

To say the union was taken aback by this letter to one of our truck driver members is an understatement. We are utterly astounded that the ACCC is threatening criminal charges carrying jail terms to a truck driver, who is the elected owner driver representative on the general council of the Australian Trucking Association, over an opinion article which merely states the blinding obvious: that truck drivers are under pressure because of the squeeze on rates.

This pressure on drivers does not exist in isolation, it has real life consequences which can be catastrophic.

Truck driving is Australia's deadliest industry with around one in three workplace deaths involving a transport worker. We urge you to check the Safe Work Australia website on any given day to see the extent to which transport workers lives are at risk just by doing their job: as we write it shows that there have been 78 worker deaths since the start of the year with transport workers at the top with 25 fatalities, the next highest is construction at 14 deaths and agriculture at 12 deaths.

The impact is also huge for other road users. A 2016 report by the Bureau of Infrastructure, Transport and Regional Economics states that "heavy vehicles are disproportionately involved in casualty crashes", accounting for 16% of road crash deaths, despite making up just 2.4% of vehicle registrations and 7% of vehicle-kilometres travelled. In the five years to March 2020, 901 people lost their lives in truck crashes, according to BITRE data.

There are too many academic studies to provide here an exhaustive list linking the financial pressure drivers are under to deaths on the roads.<sup>1</sup> As far back as 1991 the Federal Department of Transport and

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<sup>1</sup> Some of the evidence is as follows: *Safe Payments Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, the National Transport Commission with the Honourable Lance Wright QC and Professor Michael Quinlan, October 2008. See also: *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,

Communications acknowledge the link in a report stating: “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.”

It is astounding and distressing that the ACCC has written this threatening letter to a hard-working truck driver when it should be fully aware that longstanding laws in Australia provide owner drivers with certainty over their rates entirely within the scope of the law. This includes arrangements under Chapter Six of the *Industrial Relations Act NSW 1996* which has been operational since 1979. In addition, for nearly 30 years a competition exempt arrangement for owner drivers has existed on an industry level between the union and employer associations in respect of long-distance work.

There is also statutory acknowledgment of the critical nature of rates certainty in owner driver legislation in both Victoria and Western Australia, and of course until recently, there was acceptance by the Parliament of Australia that rates for owner drivers should be set and enforceable within the purview of the Road Safety Remuneration Tribunal. The tribunal during its 4-year existence made Orders on rates and conditions for owner drivers which ensured, amongst other things, that they were paid for all their work and were paid within 30 days of invoice.

For the owner drivers and transport operators who do not have a fixed salary or defined rate the truth is that they are left to savage instincts of the market which is neither free nor fair. The road transport market is actually marked by destructive competition; it is an industry which is cannibalising itself. Owner drivers are often forced to tout their services to clients such as major retailers, manufacturers and oil companies on an entirely unequal footing and a take-it-or-leave-it basis. Frank was simply pointing this unfair and deadly state of affairs out in his opinion article.

Truck drivers don't hear too much from the ACCC. They never hear the Commission talking about the imbalance in the transport supply chain, the financial pressure they are under or the bankruptcies hundreds of them each year fall into. The Commission's tinkering here and there on unfair contracts does not amount to very much in terms of addressing this imbalance for the average truckie.

What is so disappointing about your letter is its timing. Truck drivers have been hailed as heroes of the pandemic as they risked their health and lives to continue delivering goods during the pandemic. This includes crossing closed state borders, finding truck stops shut or unable to provide them with hot meals or showers.

As Frank points out it has also meant pressure on drivers to take on extra work, knowing that with a crisis hitting the economy work could dry up altogether. As he said in the column this has meant sacrifices like missing his grandson's first birthday.

It has also meant drivers forced to take on work in which they will make a loss, as he states. What interests me is that instead of the ACCC taking an interest in drivers forced into this situation, the Commission has threatened legal action over the notion that drivers should maintain their rates.

In light of the disturbing elements that your letter raises we would request the following from you immediately:

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*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.

- Information on how you obtained Frank Black's personal contact details;
- A full withdrawal of the letter and accusations levelled at Frank Black and an apology;
- Urgent confirmation that the ACCC will commence a detailed inquiry into destructive competition in the road transport industry that sees those at the top of the supply chain squeezing transport operators, their employees and owner drivers like Frank into deadly circumstances;
- A meeting with ACCC chairman Rod Sims so that we can provide him with a briefing on the real competition concerns we hold for the industry and assist in the formulation of Terms of Reference for the above inquiry.

We look forward to hearing from you shortly,

Yours sincerely,



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Michael Kaine  
TWU National Secretary



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1 June 2020

Frank Arcidiaco



By email:



Dear Mr Arcidiaco

**Re: Pricing comments in relation to truck owner-drivers**

I am writing to advise you of concerns the Australian Competition and Consumer Commission (**ACCC**) has in relation to the pricing of truck services from owner-drivers. In particular we refer to an article you authored in the Owner Driver publication, titled 'Opinion: Maintain your rates', dated 16 April 2020 (the **Article**).

In the Article you made statements that could give rise to allegations that you attempted to fix prices with other owner-drivers. Potentially problematic paragraphs from the Article include:

- *What does concern me is the cheap freight being offered by people taking advantage of the situation. This is no time for bottom feeders to seek to profit at the expense of others. We can't afford for rates to be lowered anywhere in the industry.*
- *In harder times, it's more important than ever for us to stick together and stand strong. We all feel the calling of our personal financial needs but undercutting each other to win work will only do harm to us all.*

The ACCC has not formed any concluded views about this issue, but has concerns about the Article and whether the conduct is more wide reaching. The Article raises concerns that you may have attempted to form arrangements or reach understandings with the purpose of fixing, controlling or maintaining prices. If such conduct has occurred, or is occurring, it may constitute a breach of the *Competition and Consumer Act 2010* (Cth) (**CCA**), including the cartel provisions.

The ACCC is highly conscious of the impact COVID-19 is having on Australian consumers and businesses. Maintaining competition in the long term will be critical to benefit both consumers and the economy. A competitive economy will be vital to Australia's future.

Contravention of the cartel provisions of the CCA is a criminal offence and carries serious criminal and civil penalties, including up to **10 years in jail for individuals**, and heavy pecuniary penalties for corporations.

The ACCC will continue to monitor attempts to form arrangements or reach understandings with the purpose of fixing, controlling or maintaining prices.

Please feel free to contact me on [REDACTED] if you wish to discuss this letter.

Yours sincerely

[REDACTED]

Director  
Cartels