

Remuneration and Safety in the
Australian Heavy Vehicle
Industry: A Review undertaken
for the National Transport
Commission

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Melbourne

SAFE PAYMENTS REVIEW

ABBREVIATIONS

AIRC	- Australian Industrial Relations Commission
ARTF	- Australian Road Transport Federation
ARTIO	- Australian Road Transport Industrial Organisation
ATA	- Australian Trucking Association
ATC	- Australian Transport Council
CCI WA	- Chamber of Commerce, Western Australia
COR	- Chain of Responsibility
DHFM	- Driving Hours and Fatigue Management
GHQ	- General Health Questionnaire (a measure of health/wellbeing)
IRC	- Industrial Relations Commission
KPI	- key performance indicator
NTC	- National Transport Commission
OHS	- occupational health and safety
OHSMS	- occupational health and safety management systems
QTA	- Queensland Trucking Association
RTA	- Roads and Traffic Authority (NSW)
RTBU	- Rail, Tram and Bus Union
SCOT	- Standing Committee on Transport
TFCA	- Tasmanian Forestry Contractors Association
TWU	- Transport Workers Union
VTA	- Victorian Transport Association
WST	- Workplace Standards Tasmania

BACKGROUND TO REVIEW

On Friday 25 July 2008 a Joint Media Statement was issued by the Honourable Julia Gillard, Deputy Prime Minister and Minister for Employment and Workplace Relations, the Honourable Anthony Albanese, Minister for Infrastructure, Transport, Regional Development and Local Government and the Honourable Craig Emerson, Minister for Small Business, Independent Contractors and the Service Economy. The Joint Media Statement was entitled “Safer Payment Systems for Heavy Vehicle Drivers”.

The Joint Media Statement commenced as follows:

“The National Transport Commission (NTC) will investigate and report on driver remuneration and payment methods in the Australian trucking industry and make recommendations for reform.

The NTC will be assisted by Professor Michael Quinlan of UNSW and the Hon Lance Wright QC, the former president of the NSW Industrial Relations Commission.”

The Joint Media Statement is included in its entirety at Appendix 1.

In our subsequent meetings with officers of the National Transport Commission (NTC) we were advised that the assistance required of us would be in the form of a report as to the terms of reference of the Inquiry. This report thus provides the assistance sought from us.

ACKNOWLEDGEMENT

The authors would like to express their gratitude to all those drivers, union and company officials, employer and industry representatives, government agencies and individuals, such as Professor Ann Williamson, who made themselves available or who submitted material to this Review. Their time and assistance was invaluable. We would also like to thank Ms Kathryn Hodges of the NTC for the able and efficient logistical and other support that made completing this Review expeditiously possible.

TERMS OF REFERENCE – SAFE PAYMENTS

The Terms of Reference for this Inquiry, as subsequently provided to us, were in the following terms:

To identify the means by which commonwealth legislative systems applying (or to apply) to employees and independent contractors could/should accommodate a system of ‘safe payments’ for employees and owner-drivers.

In considering the above, have regard to the following:

1. the link between driver remuneration and payment methods (and related matters such as waiting times and unpaid work) and safety outcomes;
2. the scope of existing regulatory models for employees and owner-drivers in the transport industry including existing definitions of independent contractor/owner-driver;
3. current capacity and mechanisms to recover costs, such as fuel costs and other variable costs;
4. the role and impact of all parties in the transport supply chain on driver payment methods and remuneration;
5. the concurrent use of employees and owner-drivers in the transport industry including consideration of existing regulatory models in other jurisdictions with the capacity to deal concurrently with both employee and owner-driver payment methods and remuneration; and
6. any gaps in the current regulatory approach.

STAKEHOLDER CONSULTATIONS

In undertaking this review the National Transport Commission undertook the following activities to hear the views and opinions of stakeholders:

- put out a request for submissions via the NTC website; and
- engaged in a round of one on one consultations in Brisbane (Friday 19 September 2008), Sydney (Friday 26 September 2008) and Melbourne (Tuesday 30 September 2008).

Written submissions

On 5 August 2008 the NTC put out a request for submissions into the 'safe payments' review. The request for submissions asked parties to address the following questions:

1. What systems are currently in place to recover genuine increases in heavy vehicle operating costs (eg: fuel levies) and are they effective? Is the industry able to negotiate fair cost recovery?
2. Is there evidence of a link between driver payment methods (eg: kilometre rates), remuneration, and safety outcomes in the road freight industry?
3. Is there a role for government to intervene in payment systems for transport operators?
4. If regulatory intervention is required, what form should this take? Should that role approach different for employed or contracted drivers? Could there be any unintended effects from implementing safe rates?
5. Do you have any other comments on 'safe payments' for heavy vehicle drivers?

The NTC's mailing list goes out to around 5700 email addresses which include industry, drivers, industry associations and government addresses. In addition to that, the NTC directly contacted parties including large and medium operators, groups purporting to represent independent contractors, and others associations. Many of those parties either declined, or failed to provide submissions.

The NTC received the following written submissions:

1. Mr H Morris Australian Logistics Council
2. Mr T Squires Tothag Transport Group
3. Mr J Redfern Coles
4. Mr T Sheldon TWU
5. [Ms J Lewis ATA NSW](#)
6. [Mr D Coonan ATA](#)
7. [Mr T Lovelle CCI](#)
8. [Mr P Garske QTA](#)
9. [Mr P Lovel VTA](#)
10. [Mr P Lovel ARTIO](#)
11. Mr A Thomas RTBU)
12. [Professor Ann Williamson](#)
13. [Mr P Schuback](#)

14. Mr F Kroon Tasmanian Forest Contractors Association
15. Mr Frank Black
16. Mr J Brown Sarre
17. Mr Freestone
18. Betts Transport
19. Ms Petrovic
20. Mr Lucas
21. Mr E Willemse Woolworths (confidential)
22. Mr P Hennekam WorkSafe Victoria (confidential)
23. SafeWork South Australia
24. NSW Government

All submissions which were not requested to be confidential were uploaded onto the NTC website.

Stakeholder consultations

The NTC, in conjunction with the two expert consultants undertook a round of meetings with stakeholders. The following parties appeared:

1. Zoe Wilson, Australian Logistics Council
2. Ian Ross, Australian Logistics Council
3. Wally Eaglesham, Rocky's Own Transport
4. Ren Van Duren, Rocky's Own Transport
5. Tony Sheldon, NSW and National Secretary Transport Workers Union
6. Michael Kaine, National Assistant Secretary Transport Workers Union
7. Hughie Williams, State Secretary QLD Transport Workers Union
8. Karen Bow, Industrial Officer QLD Transport Worker Union
9. Scott Connolly, Executive Officer QLD Transport Workers Union
10. John Berger, Senior Organiser Vic / Tas Transport Workers Union
11. Naomi Rowe, National Campaign Co-ordinator Transport Workers Union
12. Chris Fennell, National Organiser Transport Workers Union
13. Paul Walsh, Owner Driver
14. Paul Dewberry, Owner Driver
15. Ian Vaughan, Employee Driver
16. Norm Hill, Employee Driver
17. Ian Buckingham, Employee Driver
18. Brad Webster, Employee Driver
19. Cliff Curran, Ex- Owner Driver
20. Kevin Hoey, Employee Driver
21. Luke Jeffries, Employee Driver
22. Frank Black, Owner-Driver representative Australian Trucking Association
23. Ray and Dale Jordan
24. Rob Fittler
25. Keith Beanie
26. Mark Bowland
27. Diane Nicholls
28. Robin Casey
29. Eric Willemse, Secondary Freight Manager Woolworths
30. Nathalie Samia, Group Manager Government Relations, Woolworths

31. Professor Ann Williamson, University of New South Wales
32. Peter Davis
33. Jim Redfern, General Manager Supply Chain, Coles
34. Chris Mara, Adviser Government Affairs, Coles
35. Paul Ryan, Victorian Trucking Association & Australian Road Transport Industrial Organisation
36. Phil Lovel, Victorian Trucking Association & Australian Road Transport Industrial Organisation
37. Peter Garske, Queensland Trucking Association & Australian Road Transport Industrial Organisation
38. David Coonan, National Manager Policy, Australian Trucking Association
39. Steve Shearer, Chair, Safety KRA, Australian Trucking Association (Chief Executive South Australian Road Transport Association)
40. Kathy Williams, Member, ATA Council, Deputy Chair, ATA Transport Policy & Economics Committee, Bunker Freight Lines
41. Bernie Belacic, CEO, NatRoad
42. Brian Hicks, Brian Hicks Transport
43. Michael Kennedy
44. WorkSafe Victoria – Paul Hennekam
45. Paul Toogood
46. Daniel Madden
47. Ray Brackt
48. Bill Schuit

THE IMPORTANCE OF SAFETY IN THE HEAVY VEHICLE INDUSTRY

1) While the purpose of this Review is not report on the hazards associated with heavy vehicle road transport some brief observations do establish a necessary context for evidence being reviewed in relation to remuneration and safety. Measured in terms of the overall number of injuries and fatalities as well as the incidence per 1000 employees, road transport ranks as a very dangerous occupation. In Australasia, North America and the European Union the road transport industry accounts for the highest number of work-related fatalities in any given year and the occupation of truck driver usually ranks in the top six most dangerous occupations. In Australia there has been no significant shift in the annual number of fatalities resulting from crashes involving articulated trucks between the early 1990s and 2007 despite an overall decline in the annual road toll (Department of Infrastructure, Transport and Regional Development, 2007, 2008). While it is difficult to make comparisons across countries available data for the late 1990s on heavy truck crash-related fatalities per 100 million kilometers traveled indicate that Australia's record was significant worse than that of both the USA and UK (Quinlan et al, 2006). Fatalities and serious injuries represent only the tip of the ice-berg of OHS problems in the industry (Quinlan and Mayhew, 2006; oral submission of WorkSafe Victoria)

Table 1: Fatalities involving articulated trucks in NSW and Australia, 1990-1999

Year	Artic drivers killed		Other road users killed ¹		Total killed	
	NSW	Aust ²	NSW	Aust ²	NSW	Aust ²
1990	18	46	76	216	94	263
1991	13	30	65	153	78	183
1992	18	40	66	141	84	181
1993	21	42	48	143	69	204
1994	9	27	58	140	67	179
1995	10	31	53	168	63	199
1996	13	33	43	160	56	194
1997	15	36	56	135	71	171
1998	23	N/A	48	N/A	71	179
1999	13	N/A	51	N/A	64	189

1. In crashes involving at least one articulated truck
2. Source for Australian data: Australian Transport Safety Bureau, Transport Safety Statistics Unit. Supplied by RTA.

- 2) The risks associated with trucking extend well beyond truck drivers to other road users. As Table 1 indicates a substantial number of persons killed in crashes involving articulated trucks are other road users. In New South Wales the Roads and Traffic Authority (RTA) estimated that in the years 1993 to 1998 fatigued heavy truck drivers accounted for 80.8 casualty crashes (or 7.6% of total casualty crashes) and fatigued articulated truck drivers accounted for 58.7 (or 5.6%) casualty crashes. Figures for 1999 indicate that of 1595 persons killed or injured on NSW roads in heavy truck crashes, truck driver speeding contributed to 170 casualties, driver fatigue to 98 casualties and insecure loads to 25 casualties. Of the 830 persons killed or injured in crashes involving articulated trucks, truck driver speeding contributed to 130 casualties, driver fatigue to 70 and insecure loads to 15 deaths or injuries. Ignoring single-vehicle incidents, truck drivers were deemed at fault in roughly one quarter of crashes, Australia-wide for the years 1990-1996. Truck driver fault exceeded 90% in single-vehicle incidents (a significant number were fatigue-related).
- 3) In 1999, 189 Australians died in crashes involving articulated trucks (or about one tenth of all road fatalities that year) and more recent data indicates that this situation has not changed. In the latest year for which data is available (2007), 1616 Australians died in road crashes (18 more than 2006), with articulated trucks accounting for about 10% of fatal crashes. For the year 2007 a total of 235 persons died in incidents involving articulated and heavy rigid trucks. A far larger number suffered serious injury. According to the Transport Workers Union submission (at page 1) drawing on Bureau of Transport Economics data each road death costs \$1.7 million and each injury incident \$408,000 expressed in terms of 1996 dollars (meaning the current figure would be higher). Beyond the immediate economic costs road deaths and serious injury associated with heavy vehicles there are critical social and human costs. These include loss of or incapacity to a breadwinner or parent, financial strain and disruption to families (including education of children and social activities) as well as the emotional cost and grieving experienced by family members, friends and work colleagues. These costs extend to drivers, other road users, and the community more generally (including those in the emergency services that must deal with these incidents).
- 4) In sum, the safety of heavy vehicle road transport remains both a serious concern in relation to both drivers and the community more generally. Although some material relevant to other sectors of the industry was made available to the Review, the bulk of the material related to heavy vehicles, especially those engaged in the long haul sector; and this is reflected in our report. At the same time, it should be noted that this is the sector of the industry where there is most concern about safety.

REMUNERATION, PAYMENT SYSTEMS AND SAFETY

The link between driver remuneration and payment methods (and related matters such as waiting times and unpaid work) and safety outcomes; current capacity and mechanisms to recover costs, such as fuel costs and other variable costs; the role and impact of all parties in the transport supply chain on driver payments and methods; the concurrent use of employees and owner-drivers in the transport industry; and gaps in current regulatory approaches

- 5) A key term of reference for this inquiry was to investigate the link, if any, between driver remuneration and payment methods (and related matters such as waiting times and unpaid work) and safety outcomes. In practice, this cannot be neatly disentangled from other terms of reference, including capacity/mechanisms to recover costs; the concurrent use of employees and owner/drivers; the role and impact of all parties in the transport supply chain on driver payments and methods; and gaps in current regulatory approaches. As this report will show, the factors just identified all intersect to impact on the relationship between remuneration and safety. For example, the capacity to recover costs for genuine increases in operating costs can be seen as one aspect of the capacity of owner/operators or small firms to secure rates that will sustain the business and this, in turn, can be influenced by both the power exercised by clients and the operator's place in an often multi-tiered supply chain. In a number of areas these issues have been dealt with extensively in earlier reports into the industry and for that reason this evidence will be summarized, with the focus being on information that is most salient with regard to the current review as well as new information submitted to this Review.

- 6) The term remuneration is important because drivers of heavy vehicles consist of both self-employed workers (owner/drivers) and employees. Essentially, owner/drivers and employed drivers undertake the same tasks and often compete for the same jobs. For owner/drivers the rate they charge a client (whether that is a customer, forwarding agent or another truck operator) represents both a freight rate to undertake/sustain their business and the basis for their remuneration. A range of other commercial practices, including the extensive use of multi-tiered subcontracting and waiting time to load/unload and unpaid work also impact the remuneration of both owner/drivers and employed drivers. For example, large transport operators frequently subcontract their work to smaller firms who in turn may subcontract the freight to an even smaller firm or owner/drive. At each subcontracting point, the price for the task is reduced in order to provide a return to those higher in the chain. The imbalance in two-way freight movements between major destinations (such as Melbourne/Brisbane and Melbourne/Perth) can also result in differential rates and the practice of backloading (where a return trip is undertaken at a highly discounted price). Finally, it needs to be noted that the vast majority of heavy vehicle drivers used in the commercial freight industry – whether they be owner/drivers or employees – are paid under an piecework/incentive or trip-based payment system (calculated as either a total price (or per tonne) for a particular task or in terms of a rate per kilometer travelled. In short, the payment of drivers intersects with a range of other commercial practices in the industry. For this reason, the link between payment and safety must be considered in the context of these other practices.

- 7) In the course of the Review 24 written submissions were received from a range of parties including transport customers, transport associations, trucking operators, government OHS agencies, owner/drivers, employed drivers and unions. The Review also spoke to 48 individuals from the same spectrum of interest groups in meetings held in Brisbane, Melbourne and Sydney. With regard to the question of the link between payment and safety a range of views were expressed. Employee and owner drivers, the Transport Workers Union, the Rail, Tram and Bus Industrial Union, some transport operators, a leading academic researcher, and government agencies (such as SafeWork South Australia) all indicated that they believed that there was a significant link between driver remuneration and safety. The Australian Logistics Council, though recognizing divergent views within its membership, did not question the need for 'safe rates'. One transport association (NatRoads) accepted that pay and safety could be linked but argued that it was more effective for intervention to focus on fatigue management. Two major users of road freight questioned whether there was a link between pay and safety as did the Australian Trucking Association. Overall, the vast majority of those making submissions to this Review believed remuneration/pay rates had a significant effect on safety in the industry.

Prior evidence linking commercial practices, rewards and safety outcomes in trucking

- 8) Before examining specific arguments/evidence to raised support these divergent contentions it is worth considering the available evidence pertaining to this question. Much of this research was addressed in an earlier report into safety in the long haul trucking industry (Quinlan, 2001) but is worth summarizing along with updated evidence.
- 9) Findings that commercial practices and remuneration schemes are linked to safety are not new. During the 1980s and 1990s a number of inquiries, coronial inquests and commissioned/non-commissioned research into the road freight industry in Australia identified a strong association between commercial practices and safety. This included detailed research by Hensher and colleagues during the 1990s (Hensher and Battellino, 1990; and Golob, T. and Hensher, 1994) that found a clear and significant link between scheduling pressures, unpaid waiting time, insecure rewards and access to work, and hazardous practices such as speeding, excessive hours and drug use by drivers.
- 10) Hensher and Battellino (1990:545-546) noted a decline in freight rates over the previous decade and the intense level of competition on the large Sydney/Melbourne corridor (with its 10-12 hour trip times and emphasis on overnight delivery). They also referred to problems of low 'backloading' rates on longer routes to destinations (Perth, Adelaide and Brisbane) with a pronounced imbalance in terms of two-way freight movement. Whereas Linklater's late 1970s studies had reported drivers earned high income-levels relative to their education, Hensher and Battellino (1990:546) found this had not been sustained into the late 1980s, especially given the exceptionally long hours worked, with owner/drivers earning much lower incomes than employee drivers. They found that drivers were paid according to a diverse array of systems, ranging from fixed wages (22.6%)

through to a percentage of the earnings of the truck (19.4%) or a set trip rate (25.8%). Examining the issue of average trip speed, Hensher and Battellino (1990:551-552) identified five significant variables. For employee drivers, higher average speed was associated with drug-use (drug-using drivers drove faster), payment system (drivers paid on a trip rate basis drove an average 15 kmh faster than those on fixed rates) and vehicle registration (vehicles registered in NSW travelled an average 15kmh slower than federal-registered trucks). For owner/drivers, increased average trip speed was positively associated with drug use, trip time/scheduling (those arriving before 10am had higher speeds), time spent waiting for a load prior to departure (those waiting had higher speeds) and length of trip (longer trips were associated with higher speeds). In concluding, Hensher and Battellino stated they had “...confirmed our initial hypothesis that the underlying economic conditions in the industry are a significant contributor to the on-road behaviour of drivers. These conditions, which manifest themselves in declining freight rates, tightening schedules and increasing competition confront drivers daily as they try to forge a living on the road. If the problem of safety on our roads is to be addressed, and solved satisfactorily, it is important to look beyond the symptoms of speeding, infringement of driving time regulations, and driver fatigue and consider the underlying causes which result in this behaviour” (Hensher and Battellino, 1990:553).

- 11) Following this pilot study the Federal Office of Road safety funded a more extensive survey of 820 drivers (Hensher et al 1991). As with the earlier pilot survey, Hensher et al (1991:101) found that drivers spent considerable time (an average of 3.5 hours) on off-road activities (loading/unloading, maintenance etc) before commencing a trip. When they sampled particular trips Hensher et al found that 35% of drivers were travelling to a set schedule but 60% of drivers reported that even where freight forwarders hadn't set a schedule a self-imposed arrival time was set, primarily due to concerns about queuing and getting the next load. Of those drivers on a set schedule, a small proportion was offered incentives (2.7%) but a quarter indicated they would be penalised for late arrival (Hensher et al, 1991:48). Around half of all drivers felt freight companies demanded unreasonably tight schedules (the figure was slightly lower for large fleet drivers Hensher et al, 1991:51). Average trip speed was highest amongst small fleet drivers (82.01 kph) and younger drivers aged 17-24 years (84.72 kph) compared to an overall average of 81.06 kph. Econometric analysis indicated that for both owner/drivers and employers of drivers, economic rewards were a major influence on the propensity to speed. Hensher et al (1991:96) concluded: “There is very strong evidence to support the primary hypothesis that the trip rate received by the owner driver (ie gross earnings) and the freight rate obtained by the company using an employee driver have a significant influence on the propensity to speed. The negative relationship is stronger for owner drivers as might be expected... The main impetus of this study has been confirmed: on-road performance is strongly linked to economic reward.” The study drew particular attention to trip-based payment: ““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” (Hensher et al, 1991:102).

- 12) As part of their study, Hensher et al (1991:28-29) had also considered the insecurity of owner/drivers without contracts or regular load arrangements and the problem of backloading (involving heavily discounted freight rates) where two-way freight movement imbalances made return loads scarce. Over 40% of drivers had rejected a load in the past 12 months the most common reason was that the rate was too low, with other reasons being the unreliability of payment by the customer (7.4%). Only a small number of loads were rejected on the basis of being overweight (4.5%) or that it would require exceeding legal driving limits (2.7% Hensher et al, 1991:30). The combination of competition, low freight rates and uncertainty of loads and consequent uncertainty of earnings had other safety-related effects, most notably that it encouraged "...*the practice of the self-imposed schedules and the taking of stimulants to enable extension of the productive working week. While the extended working week does increase the earnings, the incidence of productive (ie driving) time decreases as total working hours increases. Any strategy which can reduce the uncertainty of earnings must reduce the hours of total work, increase the amount of sleep time and consequently reduce the incidence of self-imposed schedules and hence the use of stimulants*" (Hensher et al, 1991:102).
- 13) In a later paper based on survey results for 402 drivers, Golob and Hensher queried the drawing of a simple dichotomy between owner/drivers and employee drivers. (1994:29). They argued that small company drivers had some of the worst practices in terms of speeding, drug-use and traffic fines and that a more useful explanatory classification was in terms of the nature of contracts, work practices and the ability to secure loads. For example, drivers on regular contracts were less likely to use drugs or speed (though they attract a higher number of speeding fines) which Golob and Hensher saw as having important policy implications, along with the earnings issue more generally. Once again it was found that earnings exercised a significant influence on on-road behaviour. Thirty seven percent of drivers had a schedule imposed by an employer or freight forwarder and, these drivers on such trips were more likely to be fined for speeding. For the remainder, propensity to self-impose a schedule, and speed/attract fines, was associated with the time spent securing a load and final delivery (carrying perishable goods and, to a lesser extent, heavier gross truck weight also influenced scheduling and other behaviour). Self-imposed schedules were, in turn, the most important influence on the propensity to take stimulant drugs. Golob and Hensher (1994:25) found the greatest influence on average trip speed was the earning rates of both owner/drivers and employee drivers. Drivers with higher earnings rates exhibit lower speeds, and this is particularly true for owner/drivers. The last finding in particular is important because the clear implication is that improving earning rates for owner/drivers would alter the on-road behaviour of owner/drivers contrary to the a priori reasoning of a number of other reports (such as *Driving Forward*) which argue drivers would simply continue doing the same practices at the higher rate in order to enhance their earnings.
- 14) In 1995 Arblaster and colleagues completed a report funded by a research grant from the National Occupational Health and Safety Commission (NOHSC) based on interviews with 57 long distance truck drivers based in South Australia, 52 partners and a small group of managers and ex-drivers. Drivers also filled out a time-use diary over a two-week period. Though quite a small survey population,

the pattern of results was generally consistent with earlier studies already discussed. For example, the study found evidence of unrealistic trip schedules, such as a trip time of 24 hours between Adelaide and Perth that translated into an average speed of 112 kilometers per hour without breaks (Arblaster et al, 1995:84).

- 15) Two large surveys of long haul drivers at the beginning and end of the 1990s provided clear evidence on the use of contingent payment systems (especially trip based pay) and the connection of this to occupational health and safety. The national fatigue survey (n=1007) by Williamson et al (2000) found that most drivers (68.3% were paid per trip according to the kilometres travelled or the weight or volume of freight delivered while 14% were paid a flat load rate). Around 17% of drivers negotiated pay rates for each load while 43% of the remainder had ongoing contracts for some or all of their loads. In terms of payment level, 63.2% of drivers were paid the award rate or better but 17.1% were receiving less than the award. A further 19.1% were unaware of how their pay compared to the award (previous research would suggest many of these drivers would be receiving rates below the award). The survey found there had been increase in the work required of long distance drivers, entailing longer trips and with a reported earlier onset of fatigue. Most drivers did some midnight to dawn driving (when there are far higher risks of crashing), over 20% had exceeded the 72 hour working hour limit in the last week and around a quarter admitted breaking driving hours regulations on every trip. In short, many drivers worked excessive and dangerous hours and the situation was, if anything, getting worse. Long hours also made it very difficult for drivers to juggle work and family commitments.

- 16) Williamson, Feyer, Friswell and Sadural (2000:35) found drivers under a payment by results system were almost twice as likely to report having experienced fatigue on at least half of their trips than drivers paid on a time/hourly basis (32.5% as compared to 18.7%. The 1991 survey yielded a similar ratio although the overall level of reported fatigue was higher). In the context of other evidence, the impact of payment systems on fatigue management assumes critical importance in the overall conclusions of the Williamson et al study. After dealing with other sources of scheduling pressure such as freight forwarder and customer pressure Williamson et al (2000:111) state: *“The remuneration system is another pressure on drivers that appears from the survey, to influence drivers’ work schedules. Both surveys reveal that payment by results was the predominant method of remuneration for all drivers, even company employees, and this form of payment increased markedly across the period of the two surveys... Analysis of the relationship between payment type and experience of fatigue demonstrated that drivers who were paid in a payment-by-results mode were more likely to report fatigue as a substantial or major personal problem and to experience fatigue more often than drivers paid under other payment regimes. In addition, a significant percentage of drivers volunteered the strategy of standardising or regulating minimum payment rates as a way of managing fatigue... The pressures exerted by the payment by results system can also be seen in the influences on drivers to break the working hours regulations. The factors that distinguish drivers who frequently break the working hours regulations from those who do not are related to organisation of work such as the need to do enough trips to earn a living and to*

get in early to get the next load rather than personal reasons. This is further evidence that the way drivers are remunerated clearly has an adverse effect on the ability to manage fatigue well. This is another factor that should be examined further if fatigue management is to be truly achieved in this industry.”

- 17) Subsequent analysis of the two surveys referred to by Williamson found an association between payment by results and increasing use of stimulant drugs to cope with work demands, with these findings being subsequently published in the *American Journal of Epidemiology* (Williamson, et al, 2004 and Williamson, 2007). In Table 1 of the latter which summarised drug use Williamson noted that in the 1991 survey 12.9% of drivers reported using drugs often, 19.2% stated they used drugs sometimes, 12.2% stated they used drugs rarely and 56% stated they never used drugs. The corresponding figures on drug use from the 1998 survey were 9.1%, 12.3%, 9% and 68.9% (Williamson, 2007: 1322). In discussing her results, Williamson (2007: 1323) stated that *“the strongest predictors of drug use were payment based on the amount of work completed and fatigue reported as a major problem...The strong association of payment by results and low pay with drug use among Australian long-distance truck drivers is consistent with other research suggesting that economic factors are an important influence on health and safety in the workplace...When asked the reasons for their non-compliance with rules and regulations, stimulant users were more likely than never users to cite external pressures such as tight schedules and economic pressures. This finding lends support to the external-demands explanation.”* Williamson went on to note that drug use was more common amongst less experienced drivers, something that suggested that like long term shift workers more experienced long haul drivers were a survivor population.
- 18) It should also be noted that Dr Williamson, an expert on both fatigue and transport safety with an international reputation was an expert witness in a notable (and successful) prosecution following a fatigue-related truck driver death in NSW where drugs were also involved. Dr Williamson’s evidence was cited extensively in the decision (*WorkCover Authority of New South Wales v Hitchcock* (2004) 135 IR 377 and *WorkCover Authority of New South Wales v Hitchcock* (2005) 139 IR 439). Like a number of other cases discussed in this Review reference was made to the payment structure in the industry (per kilometer) which encouraged excessive hours of work. In his judgement, Walton J found that fatigue had significantly impaired the ability of the long haul truck driver Mr Derri Haynes to drive safely or to respond safely to that fatigue by electing to take appropriate rest breaks. It should also be noted that prolonged sleep deprivation/fatigue and drug use may not only increase the risk of truck crashes but also have long term health effects (these connections were discussed in the NSW Trucking Safety Report, Quinlan, 2001. For international research making the same points see Saltzman and Belzer, 2003, 2007). Hence, the impact of payment systems is not confined to the on-road safety of truck drivers and other road users but also the long term health and wellbeing of truck drivers irrespective of any involvement in crashes.
- 19) Similar observations to those found in the research just described can be found in a series of government reports. The final report of the National Road Freight Industry Inquiry (May et al 1984) was very clear about the bargaining power that consigners and shippers exerted over freight forwarders and transport operators in

relation to freight rates. Just a few quotes illustrate this point: “*Large consignors, through their ability to obtain competitive quotes, are able to lower the rates they pay by exercising their considerable bargaining power over forwarders* (May et al, 1984:30). *Large shippers may negotiate discounted (or contract) rates well below the schedule rate, especially when the individual forwarder is faced with actual or potential competition for the business in question*” (May et al 1984:32). Looking specifically at the relationship between commercial practices and safety the Inquiry Report noted that not only was flouting of speed, weight limits and other regulations widespread but this was hardly surprising given the commercial advantages to do so. It noted that an instance of overloading of one tonne per trip might yield \$1500 in additional revenue at the risk of only expecting to pay a fine or around \$250 if the offence was detected (May et al 1984:184). In terms of commercial pressures the Report noted a survey of long distance owner/drivers by the NSW Freight Transport Industry Council which concluded they were “...*overloading and speeding in order to get and keep regular work with companies. They are working excessively long hours and attempting to cut costs on comprehensive and personal insurance and sometimes on vehicle maintenance*” (WD Scott, 1984 cited in May et al, 1984:184).

20) In its 1989 report, *Concerning Alert Drivers and Safe Speeds for Heavy Vehicles*, the STAYSAFE committee of the NSW parliament pointed to reward and other pressures on drivers and argued that operator accountability could only be improved if the incitement to misbehave was addressed: “*14.1.1 STAYSAFE received substantial anecdotal evidence of drivers being rewarded for achieving delivery times which necessitated speeding and inadequate rest, and of drivers being penalised for failing to achieve such deadline. In some cases, contracts threaten penalties if deliveries are late without adequate excuse. 14.1.2...Some drivers claimed that they were told by owners or freight forwarders “get it there by 7.00 am, or don’t bother to come back for more work.” The “just-in-time” (JIT) manufacturing strategy was suggested as possibly contributing to this problem. STAYSAFE accepts that such practices probably do occur and sees them as very difficult to stop... 14.1.3 STAYSAFE understands that an exploration is in hand within the Roads and Traffic Authority of means of prosecuting unscrupulous freight forwarders. STAYSAFE considers that rewards or penalties inciting illegal operations should themselves be clearly illegal, and those offering such inducements, regardless of driver explanation, should be subject to substantial penalties*” (emphasis in original, STAYSAFE, 1989).

21) The question of commercial practices, competition and safety was re-visited by a federal parliamentary inquiry into fatigue in the transport industry which reported in 2000. In its report, the inquiry (House of Representatives Standing Committee on Communications, Transport and Arts, 2000:93) noted the significant drive towards increasing economic efficiency in transport over the past 20 years wrought by a number of factors. This included changes to government involvement in providing and regulating transport, technical improvements, company attempts to contain costs and pressure from customers. The report went on to note that there was now a growing body of evidence that best practice in efficiency is jeopardizing best practice in safety (House of Representatives Standing Committee on Communications, Transport and Arts, 2000:93). The Report noted it had received many submissions that competitive pressures were

the most important factor contributing to fatigue. In relation to road transport in particular, the report noted evidence on the impact of competition on freight rates and the effects of this, in turn, on safety as well as the dangers posed by paying drivers on the basis of kilometers driven. Without disputing this evidence the Report then argued that there was little the government could do to intervene in economic matters; that some companies would make poor or good commercial decisions; and government responsibility should be to protect third parties such as other road users. The Report recommended state, territory and federal government cooperation to develop programs to enhance business skills and the federal Minister for Transport and Regional Services conduct a series of industry round table meetings to examine the extent that economic pressures pose a threat to public safety and measures in relation to improve staffing levels and freight rates. As noted elsewhere (Quinlan, 2001) the logic of the report is, at times, perplexing – seeing freight rates as a potential stimulus for regulatory action to protect public safety but not, apparently those who drive trucks.

22) Research and reports undertaken in other countries indicated that the linkages between payment/reward systems and road transport safety were not confined to Australia. A US study by Braver et al. (1999) found shippers contributed to the tight schedules on drivers but other factors like delays also exerted an influence. In the USA Belzer and colleagues (for a summary see Belzer et al, 2003 and Rodriguez et al, 2003, 2006) undertook a carrier-based (the second largest by truckload-sector in the USA) study on the association between payment levels and safety. Following up on the consequences of a substantial pay increase in this firm in the 1990s their study identified a significant link between overall payment levels and safety (ie higher pay was strongly associated with reduced crashes). They found that the pay increase influenced safety by modifying the behaviour of drivers, with data indicating drivers had better crash records after the increase (controlling for demographic, occupational and personal characteristics). Like Hensher et al, Belzer et al (2003) found that the more wasted (ie unpaid) time drivers have the more likely they are to squeeze too many hours into a day, forcing schedule irregularity and excessive hours. Belzer argued that the consequent safety risk could be reduced by charging shippers and consignors for delay time and paying drivers for this time so they log it on as duty (measures to reduce driver turnover were also advocated).

23) In sum, Belzer et al found a clear association between safety outcomes and payment levels and systems, especially trip-based pay. In a paper summarising this research published in a leading journal (Rodriguez et al 2006: 222) they concluded that the results “*suggest that the pay increase influenced safety by modifying the behaviour 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. It is unclear whether the improvement in the drivers’ safety records was the result of more careful driving, perhaps due to increased costs of leaving the firm, a desire for less effort (a labour leisure trade off), or other related behaviour adjustments.*” After indicating the need for further research with regard to the precise causal chain the authors note that they found mixed evidence on the human capital contribution to crash outcomes (notably that a reduction in drive turnover of itself did not improve crash outcomes but rather the retention of older and more

experienced drivers). Notwithstanding the acknowledged limits of a single company study the authors conclude that the findings inform policy interventions, notably the connection between payments and regulatory controls relating to fatigue/hours and speeding. It is also worth noting that Professor Belzer submitted expert evidence to the Mutual Responsibility Test Case before the NSW Industrial Relations Test Case (Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No. 2), Re [2006] NSWIRComm 328). Professor Belzer’s evidence was not challenged by employer representatives and was also accepted by the full bench in handing down its decision.

- 24) The Review understands that Professor Belzer is currently working on a Large Truck Crash Causation Study data for the US Federal Motor Carrier Safety Administration (FMCSA) merging a series of data sets to examine the same question, namely the link between pay and safety. This study will provide more aggregate data (ie not company specific), with predicted completion towards the end of this year. The undertaking of such a study by the FMCSA – the key federal government agency responsible for heavy vehicle safety - is indicative of the growing importance with which the pay/safety connection is viewed in terms of improving road safety.
- 25) Other overseas studies point to the complex interaction between scheduling pressure and payment systems. For example, Arboleda, Morrow, Crum and Shelley (2003) found that driver scheduling autonomy was not a predictor of safety, something they attributed to the poor regulation of driving hours, lack of compensation for non-driving work, and linking pay to mileage, which provided a powerful incentive for drivers to exercise autonomy by driving longer. In a later article on the antecedents of fatigue, near misses and crashes amongst drivers US researchers Morrow and Crum (2005: 67) argued that different driver payment schemes (by the mile, hour or load) should be incorporated into future studies.
- 26) Similar findings can be found in government reports undertaken outside Australia. For example, an inquiry into truck safety in New Zealand (Storey, 1996) emphasised the significant role of economic incentives in regulatory evasion. Tendering practices common in the industry contained a number of elements clearly not conducive to safe operation. For example, tenders often took little explicit account of how a task was to be completed or other safety related issues and often quoted ‘all in’ prices that placed cost burdens on the transport company even for events beyond its control or due to customer inefficiency. Contracts often did not impose/enforce waiting time charges meaning that the customer had no incentive, other than their own convenience, for unloading trucks promptly. Given that local delivery drivers were paid on an hourly basis there was often an incentive to leave long distance trucks waiting. Delays exacerbated pressure to arrive early to beat the queue or race to get to the next job, especially amongst owner/drivers but also fleet drivers.
- 27) In 2000 the NSW Motor Accidents Authority commissioned an inquiry for the NSW government that specifically focused on the relationship between commercial or industrial practices and safety in the transport industry, including evidence on the relationship between pay levels or systems of remuneration and safety outcomes (Quinlan, 2001). The Inquiry’s terms of reference covered the

effects of commercial power exercised by clients, the use of elaborate subcontracting networks, delays/waiting time, operator margins, delays/non-payment to owner/drivers, enforcement of awards/agreements covering employee drivers and assessing the effectiveness of various types of regulation as well as other measures to improve safety. It should be noted that the Inquiry drew on evidence from all Australian jurisdictions (not just NSW) from a wide range of sources, including interviews with over 100 stakeholders and over 40 detailed submissions as well as examining the evidence presented to earlier inquiries into the road transport industry, commissioned research (including a survey of 300 long haul truck drivers) and relevant evidence from overseas, most notably the USA. Putting this evidence together, the Inquiry reached the conclusion that commercial arrangements between an array of parties to the transport of freight, including load owners/clients and receivers, consignors and brokers, freight forwarders, large and small fleets as well as owner/drivers have a significant influence on safety. 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.

28) Amongst the more important specific findings of the NSW Trucking Safety report were:

- That there were serious questions in relation to the ongoing economic viability of many operators, if not the industry more generally. This evidence included the level of turnover of trucking operators in the past decade, submissions from small and larger operators as well as insurers. Detailed statistical analysis by Dean Croke (1998 and further evidence presented to the Inquiry) found that for most of the 1990s returns to not only small to medium operators but also large operators did not provide an adequate rate of return for long term sustainability and this, in turn, was incompatible with safe operation. Other evidence as well as submissions from owner/drivers, small fleet operators and more unexpected sources like insurers supported this interpretation. Low freight rates were widely seen as a direct threat to safe operations because they encouraged pushing the margins (cuts to maintenance, more trips in given period, speeding etc). Low freight rates were seen to originate from:
 - The pressure of customers in a strong bargaining position (and without – in practice - the restraint of any accompanying OHS responsibilities) exacerbated by expectations of freight-rate cuts fostered in conjunction with the GST.
 - Intense competition amongst transport operators and the use of pyramid subcontracting by larger firms to capture work at reduced rates. The Inquiry Report devoted considerable attention to describing and presenting evidence on the increased use of subcontracting chains to drive down freight rates. It was noteworthy that representatives of large transport operator readily conceded that they engaged in this practice to meet the stringent cost demands of clients (note: this is directly relevant to the terms of the current Review).
 - Poor business practices on the part of many (especially small) operators who focus on cash flows rather long term sustainable returns although the limited

bargaining power of such operators also makes it difficult for them to charge more 'realistic' rates.

- A regulatory environment where failure to abide by safety and other standards is not only possible but may actually deliver an economic advantage.
- Externalities (such as the full cost of the resulting injuries, deaths and illness) and the absence of competitive neutrality (for example, in terms of road/rail infrastructure investment/cost recovery and regulatory requirements) act as a hidden subsidy to freight rates.
- The use of performance base payment systems (including industrial agreements) and widespread evasion of minimum award entitlements for drivers that effectively encouraged illegal driving practices and enabled cost savings to be made. The link between pay rates and safety was clearly recognized by some trucking operator representatives with the president of the NSW Road Transport Association Paul Campbell subsequently urging all operators to pay award rates, arguing "*If we sit on our hands and do nothing, and we continue to have 'at fault' accidents at this rate, the insurance industry will come in and clean us up*" (*Australasian Transport News*, 28 March 2002:17).
- Job insecurity fears of both employee and owner drivers make it more likely that they will accommodate to dangerous work practices rather than registering complaints to transport companies or customers.
- Research by Williamson et al (2000), and the Inquiry's own survey, provided evidence of an association between tight schedules, delivery time bonus/penalties and performance-based payment systems (eg kilometer-based rates) and both chronic injury and the propensity of drivers to engage in dangerous practices (such as speeding and excessive hours). Yet bonus/penalty systems remain common. The report also considered the research of Professor Michael Belzer on the link between pay and safety in the US trucking industry (discussed above).

29) The NSW Trucking Safety Report's findings on the relationship between commercial pressures/practices (such as elaborate subcontracting chains, intense competition, operator turnover, low freight rates and performance-based payment systems) and safety in the long haul trucking industry were widely accepted and brought about a number of regulatory changes in New South Wales (notably a new OHS fatigue regulation covering long haul drivers *New South Wales Occupational Health and Safety Amendment (Long Distance Truck Fatigue) Regulation 2005*) as well as being taken up by subsequent industrial tribunal hearings, government inquiries and coronial inquests). The evidence on commercial pressures and the links to pay and safety were accepted in a test case before the NSW Industrial Relations Commission (Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No. 2), Re [2006] NSWIRComm 328), along with evidence from Professors Belzer and Williamson.

30) The NSW Trucking Safety Report's findings were also accepted in coronial inquests and in court proceedings. In January 2003 the NSW Deputy State Coroner Dorelle Pinch issued a supplement to her findings in relation to the death of three truck drivers (Barry Supple, Timothy Walsh and Anthony Forsyth). It is worth noting that these drivers died in a variety of circumstances including truck

crash and a drug induced cardiac arrest at a truck stop. In her supplementary report the Coroner identified a number of common factors in the deaths including fatigue, drugs, falsified logbooks, pressure for deliveries, operator viability and the absence of any medical testing of driver health – with the exception of the latter all of these factors had been dealt with in some depth by the NSW Trucking Safety Report (and makes direct reference to the report as identifying the underlying causes of poor safety outcomes as well as ways of remedying this). In her observations the Coroner emphasized the need to deal with the underlying problem rather than symptoms and stated (at page 4: emphasis in original) “*As long as driver payments are based on a (low) rate per kilometer there will always been an incentive for drivers to maximise the hours they drive, not because they are greedy but simply to earn a decent wage. I anticipate that this incentive will remain an overriding concern for drivers irrespective of legal and safety considerations.*”. In May 2008 a judgement was handed down in the County Court of Victoria in relation to another long haul truck driver who died of a drug induced cardiac arrest (*Albert, Ruth v M. and V. Brown Pty Ltd*, County Court of Victoria, Case No. 1179 of 2006, Reasons for Judgement 13 May 2008). The presiding judge (Coish J) accepted evidence relating to the use of drugs within the industry (including the expert testimony of Professor Drummer of Monash University) and its connection to aspects of work in the industry including long hours/fatigue and delays/waiting time to load/unload.

- 31) In 2002 the Australian Transport Council (ATC) established a Standing Committee On Transport (SCOT) working group to investigate the issue of safe sustainable rates for owner drivers (consistent with one of the major recommendations of the NSW Trucking Safety Inquiry). The working group issued a discussion paper in May 2003 (Standing Committee On Transport working group, 2003). A consultant report commissioned by the working group confirmed the very low rates of earnings amongst owner operators. Unfortunately, as far as I am aware the working group did not commission independent research to specifically investigate the link between low returns and safety (and the ATC’s consideration of this matter appears to have lapsed in 2004). The May 2003 discussion paper summarized existing research, the overwhelming bulk of which was dealt with in the 2001 NSW Trucking Safety Inquiry. The Discussion Paper (at page 6) argued that the evidence linking financial pressure and road safety as ‘mixed and inconclusive’.
- 32) The last contention is problematic on a number of grounds. There is a body of evidence finding an association between payment/reward systems and related commercial pressures on safety (not all of which is considered by the discussion paper) where there is little if any evidence specifically refuting such a link. Most of the research cited by the SCOT report is at best inconclusive rather than mixed. To have genuinely mixed results a number of contrary findings are required (ie studies that find pay and rewards are not linked to safety). Further, evidence based on research is commonly mixed. The real question is whether there is a weight of evidence favouring one interpretation over another. In this case there is. Most of the studies cited did find a relationship between financial pressures/reward systems and safety in relation to some aspects of driver behaviour and OHS.

- 33) The contrary evidence raised by the Discussion Paper is confined to examples of findings failing to link (rather than positively refuting) a relationship between particular categories of drivers (owner drivers and small/medium or large firm employee drivers) and crash experience. There are four significant problems with this counterpoint.
- a) First, the point relies on an over-simplification of the actual evidence from the survey of 300 drivers undertaken as part of the NSW Trucking Safety Report. While the overall crash rate was similar between the three groups more owner/drivers reported involvement in serious crashes in the past 12 months than large fleet drivers (and slightly less than small fleet drivers). With regard to the previous five years a higher proportion of owner/drivers reported involvement in serious crashes than either small or large fleet drivers. As has been argued elsewhere (Mayhew and Quinlan, 2006) the narrower gap between owner/drivers and small fleet drivers in terms of crashes (and other OHS outcomes) when compared to large fleet employees is not surprising given the place of small firms in the transport supply chain (see also earlier findings of Hensher).
 - b) Second, the point is restricted to crash-related incidents rather than a broader array of OHS outcomes (including chronic injury and health effects). While it may be understandable that transport authorities are most interested in truck crashes this is too narrow (and was not the approach taken in the 2001 NSW Trucking Safety Inquiry). The survey associated with this Report found both a substantial level of reported chronic injury (around 50% of respondents) as well as significant differences in reported injury amongst different categories of drivers with, for example, owner drivers and small fleet drivers being more likely to report a chronic back injury (over 33%) than large fleet employees (23.5%). Owner/drivers were also more likely to experience occupational violence. The survey also assessed driver health using the 12 point General Health Questionnaire – an internationally accepted tool for measuring worker stress and wellbeing. The mean GHQ score for owner/drivers (11.5) was higher than that of small and large fleet drivers (9.8 and 10 respectively). The survey results also indicated that the predominant independent variable was economic stress. The lowest GHQ-12 scores were found amongst those truck drivers paid on the award rate while the highest scores were recorded amongst owner/drivers with insecure and highly variable incomes. An examination of routes and qualitative responses reinforced the economic pressure connection. The Hume Highway – the busiest and most competitive route in Australia connecting Sydney to Melbourne – accounted for 40.4% of over 14 scores (but only 26.3% of driver interviews). Qualitative responses from drivers when asked to nominate their most serious safety concerns reinforced the conclusion that freight rates and economic pressures were a significant safety issue.
 - c) Third, there are a number of reasons why comparisons of different categories of drivers may not show the differences in crashes presumed by the Discussion Paper and these were dealt with in the NSW Report and in subsequent reports/publications on road transport OHS. One reason is that the competitive pressure of underpaid owner-drivers appears to have led to an increased use of trip-based payment systems for employee drivers. At the very least, the

differences in payment regime between owner/drivers and employee drivers are less than might be expected. Trip-based payment encourages hazardous driving practices, irrespective of whether those drivers are owner-operators or employees. A related point that is ignored by the Discussion Paper but receives some considerable attention in the NSW Trucking Safety Report is the problem of underpayment of employee drivers (ie payment below award rates). Evidence to the inquiry suggested under-payment was a widespread problem. Again, underpayment of employee drivers narrows the reward gap with owner-drivers and therefore could help explain the absence of significant differences in crash rates (though note too the differences in responses as to what constitutes a serious incident identified in the driver survey undertaken in conjunction with that inquiry). In sum, comparisons between different categories of drivers are likely to understate the effect of economic pressures on OHS outcomes or overlook flow-on effects on non-contingent workers (this limitation is being increasingly recognised in research into contingent work arrangements. See for example, George, Chattopadhyay, Lawrence & Shulman, 2003).

d) Fourth, the SCOT report fails to consider the Hensher et al research in depth nor the more recent research by Williamson which showed a clear link between payment systems unsafe work practices including working while fatigued and drug use.

34) The *Report of Inquiry into Owner Drivers and Forestry Contractors* (a far more substantial and researched document than the SCOT Working Group Discussion Paper just referred to) undertaken by Industrial Relations Victoria (2005: 14-17) reproduced the NSW Trucking Safety Report's (Quinlan, 2001) major findings in relation to commercial practices and low freight rates, arguing that it had dealt with these issues in '*a very comprehensive fashion*'. The later sections of the Report discussing health and safety and driver well-being and family life drew extensively on the Report (Industrial Relations Victoria (2005: 106-110,113). Unlike the SCOT Working Group Discussion Paper this Report makes reference to other evidence from this Report relating to the OHS consequences of economic pressures (including chronic injuries and GHQ scores).

Evidence tendered to this Review, including contrary arguments and alternate remedies

- 35) In the course of evaluating the evidence presented to this Review pertaining to a relationship between remuneration and safety emphasis was placed on the capacity to provide supporting evidence or to substantiate claims made. Thus, for example, during interviews with owner/drivers and employees drivers or operators who indicated they believed remuneration rates or systems were compromising safety the Review sought examples or illustrations (where such material was not already provided in statements).
- 36) The Review received a number of submissions from owner/drivers or small operators and interviews were conducted with owner/drivers in Brisbane, Sydney and Melbourne. A considerable number of those interviewed (indeed the vast majority) did not appear at the behest of the Transport Workers' Union and from what could be ascertained in interviews had no connection to the union. At the same time the views they expressed were consistent and did not differ in substance from those of both employee and owner/drivers who gave evidence to the Review as part of the TWU submission (see below). The vast majority of owner/drivers interviewed were very experienced operators, most with over 20 years in the industry, including a considerable period as an owner/operator.
- 37) There was virtual unanimity amongst owner/drivers and small operators (such as those five or six trucks) interviewed that remuneration was linked to safety and that inadequate remuneration led to compromises or poor practices in relation to the safety and health of truck drivers and the safety of other road users. Consistent with evidence presented to earlier reviews, owner/drivers indicated that rates paid by clients had been stagnant for some time (except for fuel levy increases and even here the timing of adjustments was often critical); provided at best a marginal rate of return (and not even operational cost-recovery in the case of backloading as clients and brokers took advantage of the imbalance of freight movements between major destinations like Melbourne and Brisbane); and that operators also had to deal with delays and non-payment (where time and cost considerations discouraged resort to the courts). A more general complaint was made about the activities of some freight forwarders or loading agents, who negotiated a rate with a client or transport operator and then subcontracted the task to the owner/operator (to accommodate their commission) at rate that was not viable but that, in the circumstances, the latter felt obliged to accept in order to secure a load. A submission from the Transport Workers Union (TWU) essentially supported this point, arguing that the role of freight forwarders/loading agents had detrimental effects where they essentially subcontracted urgent or contingent work from other transport operators (and thereby took part of an already negotiated transport price) and because competition amongst freight forwarders/brokers themselves placed downward pressure on rates. These problems can be seen as specific part of the problem of progressive rate cutting in multi-tiered subcontracting that has already been referred to.
- 38) Owner operators also complained about penalties or risk of contract loss for late delivery as well as frequent prolonged and unpaid (ie no demurrage) delays in loading/unloading – arguing they had not experienced significant improvements in

the latter over the past five years (contradictory to the evidence of several trucking clients referred to later). The times cited with regard to waiting times were consistent with those identified in earlier inquiries.

- 39) In addition, owner drivers and small operators made reference to two practices not referred to in earlier reviews. One was a requirement by clients that drivers phone their destination about three hours prior to arrival which could result in a re-scheduling of the time (for example, telling the driver not to arrive until some time later, thus avoiding a queue at the warehouse, store or distribution centre). As noted below, a number of major clients denied using this practice although owner/operators were emphatic that the practice occurred. A second practice was recipient-generated invoicing. Owner/drivers and small operators complained that clients (or other trucking operators in the case of a subcontracting arrangement) would offer a verbal contract but, rather than accepting an invoice from the operator, then generate their own invoice with different terms and conditions to those agreed to (or impose deductions that reduced the effective rate paid). Recipient-invoicing was seen as an entirely acceptable and indeed efficient practice by some interviewed by the Review but owner/drivers and small operators largely saw it as a means of exploiting their already vulnerable position.
- 40) Following on from the last point owner/drivers and small operators repeatedly emphasized that their capacity to determine rates sufficient to sustain their business was limited if not entirely negated by their inferior bargaining capacity when dealing with large clients or larger transport operators as part of a multi-tiered subcontracting chain. A number stated they had refused to work for a particular clients or operators following experiences they found unacceptable. At the same time, intense competition for the pool of available work distributed through subcontracting chains meant they were at the bottom of the freight task 'food chain' with little choice about key contract conditions. In addition to rates this might specify whether an owner/operator could use their own trailer (prohibition of the latter could result in the parking and non-return financially on an expensive piece of equipment).
- 41) The submission of a small Queensland-based operator (Tim Squires of Tothag Transport Group) illustrated how imbalances in bargaining power and the attitude of some powerful parties effectively subverted attempts to establish viable rates. After noting the importance of small/medium operators and owner/drivers as part of multi-tiered subcontracting network for delivering freight Mr Squires stated (at page 2) *"I was in the position earlier this year where I was given the opportunity to offer a quote to a large national company for the provision of local distribution shuttle services on a 24/5 basis to a national supplier of a food product...The prime contractor asked for full cost disclosure. As is normal practice, I submitted my quotation on a cost plus margin basis, only to be informed by the contract manager of this large multi national that, given the fact that I would own the assets (vehicles) at the end of the contract period, I should not be looking to attract a margin but quote for cost recovery and a small overhead recovery component. He would not discuss a formula for fuel recovery in the event of volatile increases, only to say that we would discuss it at the time. Needless to say I walked away at this point."*

- 42) The mirror image of capacity to obtain viable rates for owner/drivers and small operators was their capacity genuine cost increases. With regard to this, the first of term of reference for the Review, owner/drivers expressed general dissatisfaction with current arrangements for recovering genuine cost increases. While mechanisms sometimes existed with regard to particular clients or large operators they were no means standard practice, key conditions varied (like the period of adjustment for changes in fuel charges) and no were these conditions always adhered to. One Queensland operator observed (Frank Black) *“At the moment there is no real system by which operators can recover their costs, such as increased fuel costs through fuel spikes, increased maintenance costs, spares, tyres, and the increased cost of living on the road (meals etc) are all being absorbed by the operator. Very few companies are passing on the correct fuel levy with some not passing on any at all. Usually any request made for greater payment is met by a response of ‘take or leave it we can get someone else to do the job.’”*
- 43) These views were echoed by the submission of Victorian Paul Freestone who stated (at page 1) that there *“was no system in place to cover genuine increases for the transport operator. It is up to the operator to negotiate with the freight forwarder. This person is usually in middle management (on some sort of bonus system). His job is to keep profits high, costs low. The owner/driver is at the mercy of this person, and depending on market forces may or may not gain any increases. Only when the source dries up, does the operator have a change (sic) of genuine increases.”* Mr Freestone went onto indicate that the situation was exacerbated by delays to payment – effectively a credit system that favoured freight forwarders without any commensurate debt security for the operator. He urged government intervention to establish a no-credit/payment on completion system with minimum rates and adjustment mechanisms. Jerry Brown-Sarre (written submission of Australian Long Distance Owners and Drivers Association at page 3) also referred to lengthening periods of payment delay/interest-free credit since the 1970s.
- 44) Asked by the Review to indicate how rates and related commercial arrangements affected safety and health, owner/operators made the following points. First, it was contended that without some action on rates it would be impossible for them to abide by the new national fatigue regulations. Operators believed the new regulations would not enable them to negotiate higher rates, with some indicating they would have to have to break the law to survive. Second, another fatigue related issue raised was that the imposition of higher rates on long haul drivers would discourage the use of these drivers for local deliveries. Third, a number of small operators argued that they had responded to poor remuneration by cutting costs in relation to truck maintenance and repair. Examples given included lengthening periods between major services, operators undertaking some specialist repairs (like brakes) themselves, increased use of re-tread tires and even re-grooving tires (one operator indicated he had purchased a re-groover). It was acknowledged that such measures could entail additional operational costs in the longer term as well as safety risks. Fourth, the imposition of late delivery penalties (of say \$100) or risk losing a contract was seen to encourage speeding or failure to take breaks. Fifth, poor rates and trip-based pay were seen to lead to attempts to squeeze in more trips in a week to cover costs, with flow on effects to

scheduling as well as the OHS effects of the additional workload. Sixth, another issue raised was the stress factor in worrying about meeting financial commitments – something consistent with earlier research on higher general health questionnaire (GHQ) scores (a measure of distress) amongst owner/drivers (Mayhew and Quinlan, 2006). In evaluating these contentions the Review sought detailed examples from operators where-ever possible. While such anecdotal evidence needs to be treated with caution it is broadly consistent with evidence given to earlier inquiries (Quinlan, 2001), with research undertaken by Professor Williamson and with much, though not all, other evidence tendered to this Review.

- 45) Owner/drivers were not simply concerned for their own safety and the wellbeing of their families that might flow from a serious incident or a premature disabling health condition due to stress, cumulative sleep deprivation and the like (not to mention instances of family members, such as children, riding in trucks – the tragic consequences of which have demonstrated on a number of occasions). Owner/drivers also expressed concern for the safety of other road users and the community more generally. Typical was the statement of a Queensland-based operator (written submission Frank Black): *“At the end of the day it is obvious that for drivers or operators to be able to perform their duties safety and professionally they need to be viable. In my opinion, and the opinion of many other road transport operators that I come into contact with, the broader community could also see benefits in the manner of properly maintained vehicles and improved operating practices, helping to provide safer conditions on our roads that our industry and broader community share.”* The issue of and benefit to public safety on the roads was raised by a number of other parties making submissions to this Review and is a matter warranting serious consideration.
- 46) The submission (at page 1) of the Tasmanian Forest Contractors’ Association expressed similar views to those just made. Referring to a limited capacity to recover costs the TFCA stated that *“...not every business is able to readily increase their rates. This is certainly the position of the forest industry where haulers and harvesters are very much ‘price takers’ rather than ‘price setters’ and the entire industry is to a greater extent, reliant on the interaction of international markets. It is certainly the experience of TFCA and its members that links exist between rates and safety outcomes. Reports of vehicles not being effectively maintained due to rising costs and inadequate revenues are increasing. Unfortunately the ability to invest and innovate in an effort to combat production cost increases is often not within the realms of many operators due to low rates and limited contract longevity.”* The Review is aware that the forestry industry approached Workplace Standards Tasmania (WST) several years ago with a view to it assisting them to address the nexus between rates and safety. The Review is also aware that an experienced WST forestry inspector viewed the piecework payment of forestry harvester and haulers as amongst the most (if not the most significant) serious source of OHS risks in the industry.
- 47) In terms of addressing the remuneration/safety nexus, the vast majority of owner/drivers or small operators interviewed or making written submissions (such as the submission from Be Betts of Betts Transport Pty Ltd) urged that the government to intervene to establish safe rates. A number like that of Jerry

Brown-Sarre (submission of Australian Long Distance Owners and Drivers Association which called for a mandatory code) specifically referred to the failure of repeated attempts over many years to set rates on a consensual or voluntary basis. Most believed this should be done directly though a small number favoured more indirect mechanisms (such as a government watchdog to oversee industry association and unions setting 'indicative minimum rates'). Some submissions suggested that there would be some flexibility in payment methods regarding different types of freight (written submission of Noreen Petrovic, a Western Australian operator). For its part, the TFCA urged the introduction of legislation, requiring the use of agreed cost models, with mechanisms for rate increases, dispute resolution processes and plain English contracts.

48) Given that owner/drivers and employee drivers perform essentially the same work the setting of minimum rates for owner/drivers needed to be matched to providing better protection to employee drivers. Like a number of other parties (medium sized operators, the TWU and some industry bodies – see below), some small operators were critical of the shift to a more fragmented bargaining/award structure in recent years and urged the re-establishment of industry-wide award structure that also recognised driver grades and different equipments. For example, Tim Squires, director of Tothag Transport Group (at page 4) called for the “*re-introduction of a **fair and equitable award system** (rather than the current awards that can not even be used as a reasonable guideline) that recognises payments for differing skill levels of the various driver grades and the differing equipment types within these grades. A meaningful award system, re-introducing the discipline of regular driver payment reviews, will ensure that the playing field is leveled to the degree that at least one major component of the vehicle running cost is not open to exploitation. It will also ensure that our drivers, as the backbone of the industry, are fairly rewarded and are able to make a reasonable living from the tasks that they perform. Again, reward for effort*” (emphasis in original).

49) The Review also interviewed a number of medium-sized operators. Here there was some divergence of opinion. Those who appeared with the Australian Trucking Association tended to support the ATA's views (discussed below) while those appearing independently expressed views more consistent with that of owner/drivers and small operators just described. One Queensland based operator with 110 trucks and 150-160 employee drivers indicated that it paid an hourly rate for local work and a kilometer rate for other work (with an hourly rate kicking in when delays were experienced). This company operated a fatigue management program in conjunction with the use of global positioning technology, on-board truck monitoring (to manage driver behaviour) and independent random drug testing. It noted smaller companies lacked the resources to avail themselves of GPS and truck monitoring technologies (recording speed, braking behaviour and the like). The company praised enforcement measures by Queensland Transport though the view was expressed that a number of serious incidents involving subcontractors and long hours and drugs had not been fully investigated. At the same time, managers noted that changes to rules allowing large trucks (and bigger loads) as well as improvements in road infrastructure (including bridges etc) did not benefit operators because any gains were passed directly to clients in the form of reduced freight charges. The company's managers also stressed that

implementing its fatigue management regime required an increase in freight charges that resulted in the loss of its hitherto biggest customer and the pursuit of niche markets where cost-undercutting was less of an issue. In short, the company drew a direct connection between freight rates (and associated labour costs) and fatigue management. Consistent with other submissions, the company indicated that larger operators were able to deal with competitive pressures by subcontracting out tasks.

50) The Transport Workers Union (TWU), including its Queensland and Victorian/Tasmanian branches as well as the federal office, made a series of written and verbal submissions to the Review, including the evidence of a number owner/driver and employee drivers affiliated to the union. The verbal evidence of owner/drivers was in agreement with that of non-union owner/drivers and small operators already discussed, arguing that poor remuneration/rates impacted on safety (with examples similar to those already mentioned such as a Queensland based driver stating he had been paid as little as half the rate for backloading and had consequently cut costs with regard to tyres and other essential maintenance). Like other owner/drivers, a number indicated there had been occasions when they were intimidated or threatened with losing their jobs if they asked for an increased rate or refused additional work on the grounds of fatigue or being 'out of hours'. Like the majority of non-union owner/drivers spoken to by the Review, they urged that a mandatory regime for setting minimum safe rates be introduced. In New South Wales, a number of heavy vehicle owner/drivers in the short haul sector presented evidence on their experience with the contract determination system that operates under that state's industrial relations legislation. In essence, they confirmed that this system operated effectively to protect their interests in terms of safety: setting minimum rates that were sustainable, could accommodate the needs of particular subsectors of activity (examples cited included concrete delivery), contained appropriate cost-adjustment mechanisms and a regular review process (that entailed collective negotiation), and where there was general employer compliance with terms and conditions. This evidence is consistent with the submission of the NSW government which provides a detailed history of the development and operations of contract determinations in the road transport sector.

51) For their part, employee drivers giving verbal evidence to the Review also indicated that payment systems and levels had compromised safety in the industry. A Queensland based employee driver who had worked for a number of major operators stated he had recently experienced a roll-over after falling asleep behind the wheel. He admitted doing illegal hours, stating that like other drivers he was afraid of losing his job. The driver also contended that the low remuneration and standards in the industry meant it ended recruiting persons who couldn't get work elsewhere.

52) In addition to verbal statements to the Review at meetings held in Sydney, Brisbane and Melbourne, the written submission included statements from 20 drivers from Victoria, Queensland, South Australia and Western Australia as well as an additional 31 driver statements submitted to the Senate Inquiry into the *Independent Contractors Bill 2005*. These statements cover drivers engaged in a wide range of different road freight transport activities. Again, these statements

essentially reinforce oral statements made to the Review, and as such, they will not be reproduced except to provide some additional insights or illustrative examples. With regard to the latter, a Victorian-based owner/driver drew a stark connection between rates, sustainability and safety (statement at page 74 of the TWU submission): *“The inability to pay your bills on time has a big impact on safety. I’ve just paid \$2600 mechanics bill, a lot of blokes can’t afford it. If they can’t afford to repair their trucks, they will plumb it up and just make do until they can afford it. Blokes don’t want to drive around in a broken down truck, they just have no other option, they just can’t afford to fix it. You can’t save on registration, insurance and fuel and we’re working on the same rates we were getting 20 years ago – how can anyone be expected to have a viable business.*

53) Echoing this, a Queensland-based owner/driver admitted he was behind in his maintenance because business was a little slow and he was obliged to drive unsafe until income allowed him to pay for these repairs (statement at page 85 of TWU submission). Another owner/driver stated (statement at page 78 of the TWU submission): *“In my experience larger companies dictate the prices of transport and force smaller companies to cut corners to make up the money which creates a situation that isn’t safe or sustainable.”* An owner driver in the milk industry from South Australia with 26 years experience also referred (statement at page 102 of the TWU submission) to the erosion of rates and his need work hours *“I felt were unsafe due to the time constraints of customers, who can be quite demanding.”*

54) A number of employee drivers made also reference to how multi-tiered subcontracting of freight tasks and trip/kilometre based payment affected them in ways similar to owner drivers, and their awareness of pressures on the latter (experience of working under both regimes was not uncommon and is indicative of inter-changeability of employment status in the industry). For example, a Queensland-based driver who now worked for a large operator spoke of his prior experience (statement at page 91 of TWU submission): *“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 rate 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.”*

55) Another employee driver from Western Australia stated (at pages 7-8 of the TWU submission): *“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. I personally know of many drivers whose extremely high running costs make it difficult to stay afloat. They cut a lot of corners to keep their trucks on the road...In my experience kilometre rates mean drivers work harder and faster which induces fatigue and increases the chances of accidents. I have personally experienced fatigue because I was being paid per kilometre.”* Another employer driver from Victoria stated (at page 8 of the TWU submission) *“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 told indirectly that I must do the job or face consequences such as termination."

- 56) While this evidence (and the earlier evidence of non-union affiliated owner drivers) may be viewed as only anecdotal it is entirely consistent with evidence tendered to previous inquires over the previous decade or more and also with evidence given under oath to court and tribunal proceedings. It also consistent with systematic research studies undertaken by Hensher, Williamson and Mayhew, amongst others over a more than 15 year period in Australia. The vast majority of the statements were made by drivers with considerable experience of the industry and in the view of this Review their views warrant serious consideration.
- 57) In its written submission (at pages 4-7) the TWU also provided a detailed overview of documentary evidence linking payment levels and systems to safety outcomes in the road freight industry, including government reports, coronial inquests, tribunal hearings/court proceedings and academic research. Some of this evidence has already been discussed elsewhere in this Review (such as the research of Ann Williamson and Michael Belzer). However, other evidence introduced by the TWU included court decisions (*R v Randall John Harm*, District Court of New South Wales, per Graham J, 26th August 2005) and evidence given by officers of an industrial association (the NSW Road Transport Association) to the mutual responsibility test case referred to elsewhere in this Review (Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No. 2), Re [2006] NSWIRComm 328) that agreed that low levels of pay and trip based payment schemes were connected to poor safety outcomes.
- 58) With regard to remedies the TWU urged the introduction of minimum safe rates regime covering both employers and owner drivers – the mechanics of this are discussed elsewhere in the Review. The union argued that alternative options including recent initiatives with regard to unconscionable contracts were not a substitute for this. Thus, in a separate submission the Victorian/Tasmanian branch of the TWU stated that the Victorian *Owner Drivers and Forestry Contractors Act 2005* had brought some improvements (in terms of a cost model and unconscionable contracts dispute mechanism) it did not establish a minimum rates structure – and this was what was required at national level.
- 59) The Review received submissions from a number of other parties, including several state government agencies responsible for OHS and Professor Ann Williamson, whose earlier work on fatigue and OHS in the heavy vehicle road transport that linked remuneration to safety was discussed above.
- 60) One state OHS authority provided the Review with a confidential copy of research on safety in the road transport industry prepared for it using a mixture of qualitative research (eight focus groups composed of long and short haul drivers in different sized operations, their spouse partners, owner/operators, OHS practitioners, employers/managers, government agency and industry representatives) and quantitative research (a telephone survey of 90

employer/managers and 250 road transport workers). The research identified three main safety issues of concern, namely the use of drugs, driver fatigue and loading/unloading issues. Examining where the culture of the industry needed to change the report identified a continuum where poor margins flowed onto the need for greater productivity and scheduling pressures, excessive hours and poor pay leading on to short cuts, less breaks, fatigue, drug use and safety not as a priority. The report also noted that factors challenging both employers and regulators included the mobile nature of workplaces and challenges in upholding industry wide standards in OHS. The Research also found that partners/spouses believed compliance with OHS standards in the transport industry was lower than other industries they were familiar with. More broadly, the study found that compliance was seen to be a problem but especially amongst smaller operators and owner/drivers who felt pressured to take as many jobs as possible in order to cover their costs. Suggested means of improvement from focus groups included consideration of a 'pay by the hour' regulation. In a verbal submission to the Review a representative of the authority indicated that the research had been undertaken following concerns at the high risk nature of the industry (rated worst in 2008) and the fact there had been no significant improvement in injury rates over the past five years (with between 1500 and 1600 serious injuries each year). The project was an attempt to look at the industry with 'fresh eyes' and also entailed discussions with inspectors. In terms of what needed to be addressed arising from this research, the representative emphasized the need to address the connection between pay/incentive (piece rate) payment systems and OHS (an association that had been found across very different sectors of the road transport industry, including for example couriers).

- 61) The submission of another state OHS agency, Safework South Australia, argued that there was a significant body of academic and government research that confirmed a nexus between remuneration levels/performance-based payment methods of long distance road freight operators and poor OHS outcomes, including speeding, excessive hours/insufficient breaks/fatigue and drug use (some of the research referred to has already been cited in this Review but not all, see for example, Davey and Richards, 2004 study of drug use by long haul drivers and *Inspector Campbell v James Gordon Hitchcock* [2004] NSWIRComm 87 (21 October 2004) at para 288 on incentive pay and excessive hours). While endorsing the new National Heavy Vehicle Driver Fatigue (HVDF) legislation the Safework submission argued (at page 1) that reduction of fatigue *"for long distance truck drivers will only be achieved if the current performance based payment systems in the industry are reformed. Fatigue laws are a critical pre-condition to achieving improved safety outcomes in the industry. However, without measures to address the current remuneration structure, there will still be major economic incentives for truck drivers to engage in unsafe work practices. Such economic incentives towards unsafe work practices operate throughout the entire road freight industry."*
- 62) In pointing to a regulatory solution the submission identified the South Australian mandatory Outworker Code – dealing with the implementation of minimum labour standards in complex supply chains – that was both modeled on earlier NSW legislation (but with provision to be more generic in application ie not confined to clothing workers) and was seen as ultimately forming part of a

consistent national code. The Safework South Australia submission (at page 4) also made reference to unconscionable contract provisions applying to owner/drivers under industrial relations laws in New South Wales and Queensland, identifying them as superior to provisions in the federal *Independent Contractors Act 2006* (where a recent case *Keldote and Riteway* did not permit the conduct of the principal party to be taken into account and where the issue of whether drivers are entitled to damages remains undetermined). Safework South Australia expressed the view that the *Independent Contractors Act* would not operate as a de facto method of setting minimum rates for owner/drivers. While acknowledging the efforts of industry bodies to improve OHS it argued (at page 4) that legislative and policy developments must address the performance based remuneration system as a critical structural feature affecting safety in the industry.

63) The Review obtained other documents that addressed the issue of remuneration and safety in road transport. For example, the Regulation Impact Statement: Owner Driver Regulation in Western Australia (no date) states (at pages 3-4) that anecdotal “*evidence links low rates of pay with long hours of work and increased levels of fatigue. Safety concerns are not a key issue for owner drivers as such, as a range of regulatory processes are in place, such as occupational health and safety (OHS) legislation and recent ATC initiatives on driver fatigue. However, financial pressures can lead owner drivers to compromise on safety. Compromises typically include an increased propensity to speed, overload vehicles and/or minimise vehicle maintenance. Thus owner drivers’ inability to obtain a safe and sustainable freight rate may impact on their health and family relationships. Drivers that feel financially compelled to compromise safety are caught between bending the rules or going broke...Increases in fuel prices have exerted some financial pressure on owner drivers with marginal businesses, and have particularly affected long distance drivers. Moreover, some hirers have been charging higher rates to cover increasing fuel costs, but have not always passed on these higher rates to owner drivers.*” Later (at page 9) it is noted that the Western Australian Long Distance Owner and Drivers Association had informed them that low rates had forced some WA owner drivers to increase their labour input to a level “*they considered both unsafe and unsustainable.*” Again, the above observations are consistent with the bulk of evidence obtained by this Review.

64) In her written submission (elaborated on in a verbal presentation to the Review) Professor Ann Williamson stated that link between driver remuneration, payment methods and safety has been a serious but largely overlooked problem for heavy vehicle long distance road transport for many years. In her submission Professor Williamson made reference to a third survey of long distance truck drivers in NSW that updated and essentially confirmed earlier large surveys undertaken in the 1990s (and summarized above). This is a most significant conclusion because Professor Williamson’s work covers a time span of over 14 years and as such provides the most authoritative scientific evidence on what influences truck driver behaviour in the area of safety in Australia.

65) With regard to the term of reference relating to the recovery of genuine increases in heavy vehicle operating costs (eg fuel levies) Professor Williamson stated that the current trip-based or incentive payment system – the predominant method

used in relation to both employee and owner/drivers – limits the ability to negotiate fair cost recovery. She argued (at page 2) that this type of payment system “*increases the likelihood that driver payment will be negotiated individually with drivers and the likelihood that drivers will be competing for work. Both of these offshoots of the per trip payment system increase the downward pressure on the amount that drivers are paid for each trip and decreases the likelihood that a fair cost recovery is achieved by drivers.*” The Review notes other evidence that mechanisms, even when they exist, for passing fuel levies operate although the frequency of adjustments varied (from anywhere between weekly and six monthly) and a number of owner/drivers and small operators stated they had not always received these payments. At a more general level, Professor Williamson’s evidence is consistent with the weight of other evidence available to the Review. At the same time, the Review would note other evidence that suggests it is a combination of the power exercised by some clients, intense competition for work, the use of multi-tiered subcontracting (as associated cost pressures and subcontractor dependency associated with this), imbalances in freight movements as well as the individualized and trip/incentive-based payment level that inhibit the capacity to recover increases in operating costs (or operating costs more generally on occasion).

66) As noted below, Professor Williamson concluded that her evidence established a persuasive case for government intervention on payment systems in the transport industry. With regard to the form intervention should take Professor Williamson argued, consistent with her findings, that ideally the link between payment and output needed to be broken (some operators giving evidence to the Review indicated they had moved to hourly pay) and this should be done in conjunction with action on the current overall hours limit (which she viewed as excessive). If it was not possible to eliminate contingent payment systems altogether Professor Williamson argued the most effective regulatory approach would be to set minimum freight rates that included additional cost imposts (such as fuel price increases). Consistent with other evidence presented to this Review, Professor Williamson’s expert opinion was that employee and owner/drivers should be paid equivalent rates [that is, net rates] when undertaking the same work.

67) With regard to remuneration and safety Professor Williamson stated (at page 2) that there was “*very good evidence of a link between driver payment, remuneration and safety.*” To support this Professor Williamson referred to the findings of surveys she conducted in the 1990s (discussed earlier in this Review) linking trip-based payment to fatigue and drug use (ie drivers on trip-based payment were two to three times more likely to report stimulant use as drivers paid on an hourly/time basis). In addition, Professor Williamson indicated that the more recent survey undertaken in 2005 confirmed both stimulant use as an ongoing problem and that the factors that promoting it had remained largely unchanged. In summing up her findings she observed (at page 3) that while “*drivers continue to be encouraged to do more trips on the basis that they can earn more money, fatigue will continue to be a natural consequence. Stimulant drugs will continue to be used in lieu of sleep as they are one of the few...strategies available for drivers to stave off fatigue that are effective in the longer term.*” Professor Williamson also referred to the research of Hensher et al

(again discussed earlier in this report) linking payment systems to speeding behaviour by truck drivers.

68) One important matter dealt with in Professor Williamson's verbal submission was in relation to the enforcement of awards for employee drivers. Professor Williamson's research in the 1990s as well as that of other researchers (such as Arblaster et al) and the NSW Trucking Safety Report (Quinlan, 2001) had identified a serious level of non-compliance with award rates amongst long haul truck drivers. Contrary to best-practice in enforcement (see Johnstone, 2004) there was an over-reliance on complaint-based enforcement rather than proactive and strategic enforcement by inspectorates. No evidence presented to this Review indicated that this problem has improved in recent years. Indeed, the submissions of several industry groups referred to elsewhere in the Review were specifically critical of recent changes away from generic industry-based awards, both in terms of setting standards and enforceability. The submission of the NSW government was also critical of recent developments in federal award structures. Asked about award compliance Professor Williamson reinforced these concerns. She indicated that the widespread use of trip/kilometer based payment meant that many drivers were unaware of their award entitlements and were therefore in no position to assert their rights in this regard (problematic in any case due to fear of job loss). An effective minimum rates regime for employee drivers (and for owner/drivers for that matter) will clearly require adequately resourced and strategic enforcement.

69) Concluding her written submission, Professor Williamson observed (at page 4) that implementing *“safe rates will almost certainly have the effect of increasing freight charges. On the other hand, safer payment rates are also likely to improve driver retention, improve the attractiveness of the industry to drivers so enhancing efforts in recruitment and improve the quality and efficiency of the drivers' work. Drivers who are no longer chronically fatigued and as a consequence focus only on getting enough trips done to pay their bills will be much more likely to participate actively in their role in the company. Making these changes to payment systems will have significant benefits to both safety and efficiency of the long distance road transport industry.”*

70) The Review was not asked to examine the likely impact of implementing safe rates on freight charges more generally. It can be observed that, as Professor Williamson, implies the relationship between the setting of safe rates and the efficiency and cost of transport services is more complex than a simple translation of additional costs to the consumer. Further, there is another side to this coin. As researchers in countries like the USA have recognised (see for example, Belzer and Christopherson, 2008) transportation costs that are too low can have adverse effects on the industry itself, leading to less than optimal business practices as well as sub-optimal use of road transport (including over-use that results in congestion, accelerated infrastructure costs, pollution and other forms of environmental degradation, health hazards and other externalities paid for by the community). Consistent with this, the *Regulation Impact Statement: Owner Driver Regulation in Western Australia* (no date) stated (at page 7) that adequate levels of remuneration for owner drivers was essential for the long term sustainability of operators and the efficient use of road transport more generally. It

is only stating the obvious to observe that environmental considerations are increasingly impacting on government policy. There is also a 'level' playing field argument in relation to the regulatory standards and effectiveness of enforcement with regard to different industries or sub-sectors that may, to some degree, compete for the same business (and to enhance complementarities or inter-modal connections). In this regard it is worth noting that the submission of the Rail, Tram and Bus Industrial Union argued that in other modes of land transport such as rail regulation governing working hours and the enforcement of these and other safety laws appeared to be far more stringent (and with higher levels of compliance) than appeared to be the case with regard to road transport. Finally, any assessment of cost/benefit or regulatory impact has to be seen in the context of the significant economic, social and human costs of road related deaths and disabling injuries (including flow on costs to families and the community more generally).

- 71) In contrast to the evidence referred to above a number of parties disputed that there was a link between remuneration and safety in heavy vehicle transport. The same test with regard to supporting evidence was provided in relation to those parties who argued there was no relationship between remuneration and OHS outcomes. Several large trucking clients indicated they believed there was no connection between remuneration and safety but when asked indicated they had not specifically investigated this issue. They opposed government intervention, one indicating that driver shortages would remedy any discrepancy in rates and arguing the issue was best approached in terms of the responsibilities of all individuals involved. In terms of their own response, these clients drew attention to their efforts to enhance OHS more generally as well as particular measures to reduce trucking waiting times (and related fatigue issues) in warehouses/distribution centers, to monitor the OHS performance of transport operators or to limit the extent of subcontracting. At a general level reference was made to OHS and turnaround times as an important key performance indicator (KPI) for distribution center managers (who it was stated did walk-round spot checks of compliance). With regard to loading/unloading the large clients emphasized that trucking operators were given on-day delivery windows (with leeway before and after) at distribution centers and that measures had been taken to avoid queues and reduce turn-around times (including the number, location and layout of centers as well as the provision of rest/facilities, the use of alert vibrators and mobile phones to call up drivers when required).
- 72) Two large clients of road freight services who made submissions that average turn around times had been reduced to about 80 minutes although it was also noted that on-time arrival remained a significant problem (one client indicated that less than 50% of trucks met to arrival windows). Those clients interviewed all denied that they used the practice of requiring drivers to phone in to confirm delivery windows (thus enabling a change of time) – a practice that drivers that were interviewed alleged to be common. Clients interviewed argued that queuing of trucks at distribution centres was inefficient and that turnaround times had been reduced although a problem for them was trucks arriving well-outside the delivery windows (including early). It was also stated that drivers' service hours were checked when they arrived so that suitable arrangements could be made if unloading/loading could not occur within the drivers' allowable hours. Truck

drivers who were interviewed were emphatic that delays of several hours or more were common (although some of this could have been the result of missing their 'slot'). Within the constraints of this Review it impossible to fully reconcile these divergent opinions.

- 73) The two major clients just referred to also indicated that they sought to oversight the OHS of trucking operators they engaged, working with medium to large firms whose performance could be monitored (and affect future contracts). Both included fuel levy adjustment mechanisms in their contracts and indicated they preferred longer term contracts with reliable providers rather than the lowest possible price. The last point could not be investigated in detail but is not consistent with evidence given by transport operators to earlier reviews or with the evidence about customer attitudes of most drivers and operators (including owner/drivers) given to the current Review (a number of whom referred to refusing work or losing contracts from a client to other operators who they believed had under-bid/accepted less than sustainable rates). Neither of the major clients interviewed by this Review sought information on the rates actually paid to subcontractors (or sub-subcontractors and so on) working for the transport operators they engaged. One client stated that they sought to limit the number of steps or tiers in the subcontracting process but conceded they would only become aware of non-compliance with this if an incident occurred involving a subcontractor in breach of this. Neither made reference to demurrage confirming other evidence that arrangements for demurrage were both rare and seldom enforced even where they did exist.
- 74) A number of other submissions and verbal evidence presented to this Review either disputed that there was a demonstrated connection between remuneration and safety in trucking (most notably the submissions/evidence of the Australian Trucking Association or ATA and Queensland Trucking Association or QTA) or while accepting there might be connection argued that it was insignificant or did not warrant action to establish safe rates because this was either not feasible (points also made the ATA and ARTIO) or that there were superior remedies available (notably NatRoads).
- 75) For example, in its submission (at page 2) the QTA stated that, apart from taxation law, the Independent Contractors Act 2006, Owner Driver Contract and Dispute Legislation in Victoria and Western Australia and ACCC powers, it rejected *"intervention into Commercial transactions in the free market, specifically to influence payment systems for operators...QTA Ltd suggests no one influence has been successful in significantly changing behaviour and road safety outcomes...QTA Ltd however supports the right of every operator to secure a return on investment and accordingly have access and redress to law which prevents exploitation."* The QTA also makes reference to partnered developments to enhance safety including intelligence access program, chain of responsibility, fatigue/driving-hours reform, national heavy vehicle accreditation programs and random roadside drug testing. In a similar vein, the submission of the Chamber of Commerce of Western Australia (at page 1) indicated that it didn't believe pay rates for heavy trucks were leading to a decrease in road safety and stated it understood most drivers were able to seek full cost recovery in order to meet the rising costs of maintaining vehicles. At the same time, the CCI WA stated it

understood efficiency targets “*are also contributing to unsafe work practices.*” Unlike submissions from a number of other parties (such as Safework South Australia), neither the QTA submission nor that of the CCI WA makes reference to the extensive evidence of previous inquiries, coronial inquests and court decisions into the effect of commercial practices, including payment regimes, on safety in the industry. Nor do these submissions cite any independent or commissioned research to support their stance.

76) In its written submission the ATA spends page 9 addressing the question as to whether payment methods affect safety? Only in the final paragraphs is the actual issue of evidence addressed. In this the ATA states “*Whilst there have been several reports over the past decade that have pointed to an apparent link, these have largely been based on unsworn evidence/statements and anecdotal evidence. The ATA has not been able to identify any reports that establish any such link through empirical evidence that has been rigorously tested. On the surface its (sic) may well seem that there is a link or that there may be a link between driver payment and safety outcomes and the ATA does not rule this out entirely. On balance, however, the ATA is firmly of the view, based upon wide consultation within the industry, including within peak state and sector industry associations that collectively represent a substantial and representative proportion of the industry of all fleet sizes and operational types, that any such link that may exist is not significant. Moreover, the ATA considers that any such link would be more of a correlation than a causal link because it would be more about the mindset and attitude of individuals concerned than it is about real economic impacts.*” This Review cannot accept this characterization of the situation as accurate on a number of grounds. First, a number of the reports raising this link drew on a variety of evidence beyond personal statements and written submissions of numerous parties, including in the case of the NSW Trucking Safety Report, a structured survey of 300 long haul drivers (Quinlan, 2001). Further, court and coronial inquests attesting to this link do contain sworn testimony. Second, adopting the ATA’s stance it own ‘extensive consultations’ could be viewed as just as anecdotal as numerous statements by owner/drivers, employee drivers, government agencies, police, insurers, individual employers and some industry association representatives presented to this and previous inquiries. It is worth noting that in the course of this Review, persons associated with industry bodies such as Paul Freestone and Frank Black put a very different perspective. Third, and perhaps most importantly there is rigorous research attesting that reward systems in trucking are not only associated with safety outcomes but that this association is significant. Much of this research pertains to the Australian trucking industry and has been available (and growing) since the early 1990s, including the work of Hensher et al and Ann Williamson and her colleagues (a number of other studies are referred to in this Review). A number of these studies (including Hensher and Williamson) were carried out for road transport agencies and were peer reviewed as part of this. Several were subsequently published in peer-review international scientific journals, presented to international conference proceedings or other scientific publications. Further, there is international research also making this link, most notably but not exclusively the work of Professor Belzer in the USA. In its oral presentation ATA representatives referred to Professor Belzer’s research and this is discussed below.

77) One argument raised by the ATA and a number of other parties (see also written submission of NatRoads) was that a leading reason for a rates squeeze/unsustainability amongst owner/drivers and small operators was poor business practices. It was contended that a mandated safety rate should not be used to 'reward' inefficient business practices and rather these practices needed to be addressed. The problem of poor business practices by owner/operators has been identified by earlier reviews, which noted the relative ease with which a new operator could enter the industry (without the necessary skills to run a business) and money could be borrowed to purchase a truck (for a summary see Quinlan, 2001). In its written submission (at pages 7-8), discussing the industry's capacity to negotiate fair cost recovery, the ATA indicated that there were varying views and different bargaining positions affected by industry sector and size. The ATA pointed to the development of readily available business models as well as Chain of Responsibility (COR) and Driving Hours and Fatigue Management (DHFM) laws as leading to an improvement in the situation even for owner/drivers.

- a) Without denying poor business practices are an issue (and one where successive recommendations that may have addressed this have not been effective or implemented [in the case of operator licensing]) this problem needs to be seen in context. Evidence presented to this Review and earlier reviews (see extensive evidence on freight rates in Quinlan, 2001) suggests that client pressure on freight rates, poor margins (even amongst larger operators) and the use of subcontracting chains to reduce costs affects the business practices of even highly experienced owner/operators and not simply new entrants lacking skills. Asked about the number of experienced small operators complaining about their current circumstances ATA representatives contended that even poor business operators could survive 10-15 years. The Review finds this hard to accept and in any case a number of the operators complaining about the pressure from the current level of remuneration had successfully run their business for over 20 years. Only one of those interviewed fitted the scenario of an operator who had made a poor business decision (and this, it was alleged, was based on assurances about the amount and price of subcontracted work from a large transport operator). Further, a number of those interviewed had no major encumbrances in terms of new truck repayments.
- b) The Review also found that, contrary to the poor business explanation, owner/operators were able to provide a detailed breakdown of their cost structure and both the operational and capital cost recovery-based level of remuneration needed to service this. Finally, a number of owner/operators were emphatic that when they sought to request an increase in rates they were told if they didn't like the rates they could go elsewhere. Others stated that promises made about return trips evaporated on arrival at the first destination or made reference to under-bidding on contracts. In such a competitive industry (the submission of NatRoads indicated there estimated to be 49,000 businesses directly in the freight hire and reward sector – the vast majority very small - not counting competition from in-house and other modes of transport) the power imbalance of small operators gives them little bargaining power. It is worth noting that submission of the NSW government indicates (at page 24) that recognition of the imbalance of bargaining power of

owner/drivers was the impetus for setting a framework of minimum rates even though these drivers were not employees.

- c) The submission of NatRoads acknowledged (at page 3) that competitive pressures were a key driver in the industry and that other factors hampering cost recovery (in addition to poor business practices) had to be acknowledged including administrative difficulties in keeping up with cost fluctuations; some reluctance to pass on full costs for fear of losing work; and concerns about maintaining commercial viability that were “*often validated with clients moving to different transport operators or in the case of certain export markets goods being unviable due to increased transport costs.*”
- d) The poor business model does not really explain why major transport operators choose to subcontract so much work unless the industry explicitly recognizes and relies on uneconomic subcontractors to subsidise unsustainable rates. In sum, while poor business practices may be a problem, for many operators it appears that the pressure from low rates is conducive to poor business practices not vice versa.

78) Another argument raised by the ATA queried the connection between poor rates and cost cutting in relation to vehicle repair and maintenance, by noting that investigation by police revealed that a lack of roadworthiness accounted for only a small proportion of crashes (around 3% was the figure cited). Whether this figure is really low (accepting the figure cited) or an acceptable level of non-compliance for commercial road transport are both moot points. While the Review was unable to explore this issue in detail it would make the following observations. Vehicle failure has been responsible for some extremely serious incidents. For example, the failure of brakes on a semi-trailer on the Mooney Mooney Bridge (on the main freeway north of Sydney) in October 2004 resulted in a pile up involving 34 other vehicles and the death of a woman driving one of the cars involved (*Sydney Morning Herald* 23 October 2004). Heavy vehicle crashes commonly result from multiple causes (for example the combination of speed, fatigue, road/traffic conditions as well as maintenance issues) and these causes are not always fully investigated (for detailed evidence on this see Perrone, 2000) so it is entirely possible if not probable that maintenance/repair problems have contributed to crashes beyond the figure just cited. Further, crashes investigated and reported to police are likely to represent only the tip of an ice-berg of incidents or OHS related effects of poor vehicle maintenance. Finally, leaving this all to one side it needs to be noted that the research of Hensher et al and Williamson et al discussed above demonstrates that economic and reward pressures can result in variety of unsafe driver behaviour (not simply cost cutting on maintenance) including speeding and excessive hours/inadequate breaks/driving whilst fatigued. To this list might be added overloading. Other evidence discussed above (such as that of WorkSafe Victoria) reinforces this point. In sum, more detailed investigation into the causes of heavy crashes is required but available evidence indicates economic and reward pressures are associated with a spectrum of unsafe work practices and adverse OHS outcomes that warrant concern and action.

79) Representatives of the ATA also made the point that since Belzer’s study of pay and safety in the US trucking industry was confined to single company it was not

clear whether the safety gains of improving pay could be extended to the entire industry since it may simply be based on retention of a limited pool of more experienced and competent drivers. The limitations with company-specific studies are acknowledged (and indeed identified by Belzer) although this was a very large company. It should also be noted that the company study was only one of three data sets and studies within the overall report submitted to the Transportation Research Board by Belzer and his colleagues (Rodriguez et al 2003). Another data set involved a cross-section of more than 100 nonunion TL carriers. This data set showed the same relationship, including the effect of unpaid labor, and was highly significant across all compensation variables. The third and final data set involved analysis of a truck driver survey also yielded consistent results including the same significance with respect to the variables. A number of additional points can be made. First, the studies of Hensher and Williamson et al and a number of others (eg Mayhew and Quinlan, 2006) were not company specific and so this limitation does not apply to the Australian research linking remuneration systems and safety. Second, the ATA's point indirectly raises another important question, namely the shortage of drivers in the trucking industry. Selection effects cannot be considered in isolation of the capacity to obtain workers in an industry more generally. Indeed, one of the major issues confronting the trucking industry in both Australia and other countries such as the USA is a shortage of drivers – a point made by many submissions and verbal presentations to this Review. The truck-driver workforce in Australia is ageing - something well reflected in interviews conducted for this Review where only one driver was under thirty years of age and the vast majority of drivers were aged in their fifties or sixties.

80) Irrespective of company specific effects, labour shortages and an ageing workforce are unlikely to be conducive to higher levels of health and safety in the industry because they limit the capacity of many employers (not just some) to be selective in recruitment and retention policies; makes it more difficult to manage labour turnover (there is a well-recognised connection between short job tenure and OHS problems, see Breslin and Smith, 2006); and leads to workloads that discourage changes in work arrangements to suit health/wellbeing and long-term workforce participation of older drivers. While labour shortages in an industry where minimum rates of remuneration (to both owner/drivers and employee drivers) are an issue may seem paradoxical to the laws of supply and demand the situation is not unique to Australia (for study of the USA see Belzer, 2000), reflecting structural features of the industry and, arguably, the unattractiveness of working conditions.

a) Many employee and owner/drivers who spoke to the Review referred to the long hours, low remuneration/financial strain and poor work/life balance (especially time spent with family – notwithstanding the efforts of some companies to address this with staged driving and the like. These are conditions hardly likely to attract new and younger workers to the industry – something that may become more critical given population decline in country towns (a traditional source of recruitment due to limited alternative employment opportunities). Indeed, these very points were articulated by older drivers to explain why their children would not opt for the same occupation as well as the only driver under 30 years of age that was interviewed (who indicated that those of his age group were discouraged by the long hours). As

noted elsewhere in the Review, a number of submissions from owner/drivers indicated that the combination of poor returns, escalating costs and more stringent laws and penalties was causing long term operators to decide to leave the industry.

- b) While long hours (up to 72 hours per week) are taken for granted in the long haul trucking industry (and long hours are also a feature of short haul trucking, see Williamson et al, forthcoming) these are exceptional when compared to most other industries. Unlike mining, remuneration does not appear commensurate to these hours. Although detailed exploration of this issue could not be undertaken by this Review, it is at least arguable that making the heavy vehicle industry more attractive (in terms of pay and hours) would address both labour shortages and enhance OHS outcomes in the longer term. It is an important issue that warrants consideration. With regard to this Review it is sufficient to note that reference to 'selection' effects in terms of safety outcomes does not itself address a range of broader considerations about workforce changes confronting the industry.
- c) Consistent with a number of the points just made, Professor Williamson also expressed the view that safe rates could enhance the capacity of operators to secure and retain better and more actively involved drivers with long term safety and efficiency benefits to the industry. This is consistent with the views of a number of US researchers who have argued that a number of safety benefits flow from increased retention rates (including better training regimes, enhanced organisational safety culture) and these would effect multiple companies if not the industry more generally (See Short et al, 2007:14).

81) In its written submission (at pages 8-9) the ATA acknowledged contentions about the safety enhancement that could flow from safe rates enabling better recruitment and selection. The ATA indicated it didn't accept this view, stating that the award system set legal minimum rates for which the compliance rate was high, and that there was nothing stopping employers from paying higher rates to attract and retain good drivers. The Review has already identified submissions from other industry associations pointing to problems with the current award arrangements. It also received evidence in relation to problems with compliance (such as Professor Williamson and the TWU) which is consistent with findings of earlier inquiries (Quinlan, 2001). The third argument does not address the issue of competitive pressures on transport operators, extensive references to which can be found elsewhere in this report.

82) As already noted, the submissions of several parties to the Review argued that, irrespective of any purported connection between remuneration and safety, the most effective means of addressing OHS problems in the industry was through means other than setting 'safe rates'. There were a number of points made in support of these contentions, each of which will be addressed in turn.

83) First, it was argued that the setting of safe rates was not feasible or practical. Several different points were raised in connection with this.

- a) Several parties queried what the term ‘safe rates’ meant (see for example the submissions of the VTA and NatRoads). This was not seen to be problematic by the vast majority of those making a submission to the Review. The tenor of these submissions was that safe rates represented a level that enabled operators and those they employed to secure a return sufficient as not to encourage hazardous driving practices or other compromises with regard to safety. For example, responding to the query as to what rates had to do with fatigue and breached, Jerry Brown-Sarre (CEO of the Australian Long Distance Owners & Drivers Association) stated (at page 3) *“simply, it is the amount of money left over after all costs per trip that either forces an owner driver or driver, to have rest, do maintenance on the vehicle or make him compelled to work harder and longer putting himself or others at risk.”* An independently audited safety performance benchmarking tool could be used to assist in the formulation of safe rates (such a tool has been developed in the USA – see <http://www.ilir.umich.edu/TIBP/> under the “Safety Performance”).
- b) A number of difficulties were raised about the setting of safe rates in relation to owner/drivers by the VTA/ARTIO. The VTA/ARTIO submissions did not see a problem in relation to employee drivers, stating it supported a strong industry-based award system (though noting problems in relation to incentives and paid rates awards created by the federal WorkChoices legislation). It preferred a return to this model. However, in relation to owner-drivers the both the VTA and ARTIO identified a number of problems including how to address differences in the nature of freight tasks, differences in rates due to the imbalance in freight movements between some centres, differences tax concessions available to different firm structures (eg corporate status), how to account for differences in the model, age and cost of equipment (notably trucks and trailers), and how to effectively enforce any rates regime. The ATA submission (at page 4) also pointed to the highly variable nature of freight tasks, providing the example of 100 tonnes of dry goods, 100 tonnes of dangerous goods and a 100 tonne indivisible load. Owner/drivers were also asked about their views about the difficulties in setting minimum safe rates. Interviews indicated that many worked under a relatively restricted range of kilometer/tonnage based payment regimes or single trip prices for standard trips that were in many circumstances well-known. A number of owner/drivers interviewed by the Review were dismissive about some of the alleged complexities arguing that the costs of undertaking trips on most major routes were already well-known and others could be readily calculated. Further, it was noted that while newer trucks posed greater costs in terms of repayments and insurance older trucks cost more to maintain and operate and access to tax concessions for depreciation also needed to be acknowledged. The Review accepts that heavy vehicle freight covers a range of tasks but does not believe the complexity is such as to make the setting of an effective safety rate regime impossible. Clearly, a range of rates would be needed (along with agreed costing formulas to deal with special or contingent cases). Rates could also be determined for more specialized areas of activity as is already the case in the short haul sector. Owner/drivers in the short haul sector described to the Review in some detail how the contract determination system worked and how adjustments were made both to deal with particular subsectors as well as a regular review process. If such a process can work in the short haul sector

there seems no logical reason why a system of safety-based rates could not be determined federally (particularly if those involved in making these decisions had suitable expertise in the industry, rate fixing processes and safety). A number of issues regarding the mechanics of establishing and enforcing a system of minimum rate setting are dealt with in later sections of this report.

- c) As an alternative to mandating minimum rates for owner drivers the VTA pointed to a tribunal structure that established rates as a standard or guidance rather than as a binding requirement (the ARTF/TWU Interstate Owner/Driver Tribunal). The rates established by this body (latest rates to apply from September 2008) include agreed costing models and adjustment mechanisms in relation to fuel prices. If such a workable structure is possible on an advisory basis the question needs to be asked as to why such a rates structure is not viewed as possible on a mandatory basis.
- d) Reference was also made during the course of the Review to the Victorian *Owner Drivers and Forestry Contractors Act, 2005* that sought to address the exploitation of owner/drivers. The VTA saw this as a model that could be adopted nationally. The Victorian Act requires that contracts must be in writing and specify rates and minimum hours of work, prohibited the deduction of costs without permission, specified a minimum period of notice for contract termination and included a right to mediation in the case of disputes (see complaints about verbal contracts by owner/drivers earlier in this report). The Act was also incorporates a model contract for owner/drivers and the Department and Victorian Transport Industry Council also produced code of conduct and information booklets as well as rates/costs schedules to assist owner/drivers. The Review was informed that cases referred to mediation had an 83% success rate in terms of resolution. Cases that could not be resolved at this level could be referred to the Victorian Civil and Administrative Tribunal (it was indicated one case had been concluded and two other cases had been certified to proceed to this level). It should be noted that several other jurisdictions (such as New South Wales) have had unconscionable contract provisions applying to truck drivers for many years in their industrial relations legislation (this option is not available in Victoria which ceded its industrial relations powers to the Commonwealth). There is also provision for action under the federal *Independent Contractors Act, 2006* (but note criticisms of the limitations of this in the submission of Safework South Australia referred to above). With regard to the Victorian legislation and contract provisions in other jurisdictions the Review would make a number of points. First, to the extent they are enforced elements of the Victorian legislation (such as those relating to written contacts) have value. Second, mechanisms for resolving disputes or dealing with unconscionable contracts in Victorian and other state legislation have value (it is arguable that the NSW approach is superior). Nonetheless, mechanisms for disputing contracts place the onus on individual owner/drivers – an unknown number of which may decide not pursue a complaint due to time and resource constraints (even where these are relatively small) or due to fears of blacklisting and loss of future work. Interviews with owner/drivers indicated these were real concerns. Further, individual or even small group complaints are unlikely to affect broader issues of rates amongst owner/drivers. Third, following from the last point the

Victorian legislation addresses the issue of what are acceptable minimum rates in an individual and voluntary/non-mandatory fashion (ie it is up to the aggrieved owner/driver to take action). Providing better information to owner/drivers does not address the often fundamental bargaining power imbalance between owner/drivers and those engaging them. As such, it fails to address the problem at the centre of this Review and nor was any evidence presented to this Review that indicated it had resulted in substantial changes in rates paid to owner/drivers.

- e) Taking the above arguments into consideration, this Review would make the following observations. As previous inquiries have indicated (Quinlan, 2001) attempts to set minimum rates for owner/drivers on a voluntary or consensual basis, while they may exert some influence, have repeatedly failed since the late 1970s because they lacked the capacity to ensure meaningful coverage and compliance (inevitably breaking down under competitive pressure). In several jurisdictions (most notably New South Wales) longstanding awards and contract determinations covering employee and owner/drivers respectively in the short haul sector (covering a diverse array of transport activities from refrigerated transport to courier services) demonstrate that such a mechanism is both feasible and enforceable.
- f) It might also be suggested that trip or kilometer-based payment, even if does compromise safety, will be difficult to change because it is attractive to drivers to enhance their earnings and to operators (including owner/drivers) because it boosts productivity and spreads the risk (for example the negative impact on productivity was a concern raised in the submission of the Australian Logistics Council at page 4). Setting of safe rates doesn't preclude maintenance of the trip or kilometer-based payment system and the moral hazard argument is addressed elsewhere. At the same time, trip-based payment (without demurrage) fails to penalize inefficient use of transport by clients. Incentives could be revised to utilize in-truck technology to secure better efficiency and safety outcomes (with regard to speed, fuel economy, braking behaviour etc). Some operators (generally medium to large firms) have already moved in this direction (and examples of this were presented to the Review). However, far from precluding a safety-rate these observations simply indicate that even with such rates, more than sufficient basis for competitive efficiencies will exist in the industry and be exploited by some operators. However, the pursuit of these will not compromise safety and clients will still be able to select more efficient operators.
- g) Yet another argument (see submission of NatRoads at page 4) was that a safe rates regime could have the unintended consequence of resulting in a shift away from the use of owner/drivers. The mix in use of owner/drivers and employee drivers may indeed change although the precise effect can only be suggested and are unlikely to be as immediate or profound as implied. Further, it is difficult to reconcile this concern with repeated statements from owner/drivers themselves that existing rates were unsustainable and that many were contemplating leaving the industry (see evidence above) or the widespread acknowledgement of a driver recruitment/retention problem. It seems unlikely owner/drivers would urge a measure that would lead to their

extinction. Consistent with this sentiment, the *Regulation Impact Statement: Owner Driver Regulation in Western Australia* (no date) stated (at page 7) that increasing the earnings of owner/drivers was necessary to ensure the long term sustainability of the industry because low rates discouraged new entrants and the capacity of existing operators to invest in more productive equipment. The Review acknowledges there is a need to ensure there are matching levels of rate protection and enforcement with regard to both owner and employee drivers. Evidence of various parties, including medium-sized operators, to the Review indicated that there would always be an ongoing need for owner/drivers to meet fluctuations in task-load, niche services, combining several smaller tasks from different clients and the like. For small transport firms, the use of owner/drivers provides a means of cutting their capital costs and spreading business risks. While the mix of owner/drivers and employee drivers may change over time (this will be influenced by a variety of factors not least of which will be the desire for and relative attractiveness of owner/operator and employee driver status) it seems very unlikely that the former will not continue to be an important part of the industry as they have been for many years. Again, the experience of contract determinations for short haul drivers in NSW clearly indicates that this did not lead to the disappearance of owner/drivers.

h) In sum, while the implementation of a safety rate regime covering owner drivers and employee drivers will involve some challenges and complexities this Review finds no evidence such difficulties, either individually or in combination, are sufficient to indicate that a workable solution cannot be reached. Indeed, there are already successful models that demonstrate a workable outcome is eminently achievable.

84) The submission of the Australian Logistics Council (at page 4) identified a number of potential benefits of safe rates including certainty of income for employee and owner/drivers; preventing undercutting of rates to unsafe and unsustainable levels in a competitive market; increased compliance with fatigue and speed regulations; customers unable to use bargaining power to drive rates to unsafe levels; and demurrage payments would encourage more efficient distribution systems. The Council also identified potential disadvantages including lack of flexibility; adverse productivity effects; doesn't directly address unsafe practices; may be difficult to enforce. The flexibility and productivity arguments were addressed above. In relation to the other potential disadvantages the evidence available to this Review indicates that far from being an indirect intervention addressing rates represents a more direct approach to the source of unsafe practices that many if not most other regulatory interventions. Economic or commercial pressure is not tangential to safety in road transport, it occupies a key position. With regard to enforcement it also arguable that addressing causal issues is more likely to succeed than enforcement directed at symptoms. Again, the operation of contract determinations covering short haul drivers for many years in at least one jurisdiction indicates that enforcement can be secured. This Review recognises the need for more strategic and active enforcement in relation to employee drivers, and recommendations are made in this regard.

85) Second, it could be argued that the setting of minimum safe rates would simply result in drivers working the same hours in order to enhance their income – the moral hazard argument developed by economists. The Review does not find this argument persuasive on a number of grounds. This interpretation is not consistent with the evidence – as distinct from a priori reasoning – of research undertaken by Hensher, Belzer and others that has already been referred to in this report. Nor is it consistent with the submissions of drivers (both employee and owner/operator) to this Review (or previous reviews such as Quinlan, 2001 for that matter) about the poor work/life balance they experience and their desire to spend more time with their families. Further, to the extent that some drivers did follow such a path this minority could be targeted by enforcement agencies in the knowledge that there was no economic necessity under-pinning such behaviour. Finally, the moral hazard argument doesn't address a number of areas of safety concern that were raised in connection to poor remuneration, including cost-cutting on truck maintenance, servicing and repair.

86) Third, it was argued that attention should focus on fatigue management especially in the context of the recent national initiative in this regard. It was suggested that the effectiveness of this measure should be given time before further interventions were considered (a rather similar argument about recent fatigue management initiatives was made in submissions to the NSW Trucking Safety Inquiry in 2000). While accepting the importance of recent national initiatives on heavy vehicle fatigue management this Review has concerns about viewing this regime as an alternative to addressing remuneration and safety issue.

a) This approach risks a focus on treating symptoms rather than underlying causes (see the research of Hensher et al and Williamson et al already referred to). In her submission Professor Ann Williamson addressed the issue of whether government should intervene on payment systems. She stated (at page 4) that the first survey undertaken of fatigue amongst truck drivers in the early 1990s *“we pointed out that driver payment systems were incompatible with good fatigue management and consequently needed to be reviewed. Over the intervening 15 years there has been no change to the way drivers are paid. Clearly leaving the industry to address this issue has not been successful. As a consequence, therefore, it is essential that the government takes a role to intervene to make payment systems for long distance truck drivers more compatible with safety.”* Professor Williamson believed that despite, the view of the industry that it was achieving success through new fatigue laws and fatigue management regimes, these still permitted hours of work that she regarded as excessive.

b) Further, consistent with the previous point a number of operators making submissions to this Review (including those systematically implementing enhanced fatigue management regimes such as Rocky's Own Transport) indicated that they were only able to do this in the context of securing better freight rate outcomes (and foregoing some existing clients who refused to pay higher rates). While it might be argued that the new fatigue management regime will lead to changes in freight rates to accommodate new work practices this seems a brave assumption in the context of the past history of the industry. Those operators who achieved the change appeared to have been able

to carve out a niche market (such as the movement of explosives) that insulated them to some degree under-bidding by less scrupulous operators. As indicated above small operators and owner/drivers interviewed by the Review overwhelmingly indicated that attempts to secure better rates were generally rebuffed and they lacked the bargaining power to influence outcomes (ie they were price takers) or the financial resources to keep refusing work until a better contract was located. Operators in this position face a difficult choice well summarised by the submission of one owner/driver (Frank Black at page 1). After noting that while most owner and employee drivers he talked to tried “hard to operate within the law” but at times felt obliged to break it in order to survive, Mr Black stated that many operators with more than 25 years experience were considering leaving the industry due to new laws/heavier penalties and the inability to financially survive.

- c) Despite substantial evidence attesting to its ineffectiveness (summarised in Quinlan, 2001) the logbook system remains a pivotal element in tracking hours of work in the industry. Evidence presented to this Review from a range of parties, including drivers themselves, reinforced these earlier observations about inadequacies in the logbook regime in terms of widespread/systemic breaches and the like. Drivers openly admitted that they falsified logbooks and did so under pressure to complete tasks within schedules or to reach a necessary level of earnings under trip or kilometer-based pay to meet their financial commitments. Professor Williamson stated there was a need for a more trackable system of recording working hours and one that didn't place responsibility entirely with the driver to create the record. She believed freight forwarders and others were clearly aware that driving hours were being breached and that a new mechanism which would tie in their responsibility needed to be created if more than lip service was to be paid to chain of responsibility. With regard to this it is worth noting that prosecutions extending beyond drivers and operators to freight forwarders and clients remain almost if not entirely unknown with regard to all aspects of chain of responsibility laws.
- d) Overall, the weight of evidence from this Review and previous research and inquiries casts severe doubt that a new national fatigue regime – the effective enforcement of which remains to be proved – will of itself rectify this situation. It should not be viewed as an alternative to intervention on remuneration/pay but rather the two should be seen as complementary.

87) Fourth, reference was made to various other schemes affecting heavy vehicle safety such as the ATA's Trucksafe Scheme and the Heavy Vehicle Accreditation scheme. These schemes have existed for some time. They were examined in detail by the NSW Tracking Safety Report (Quinlan, 2001) where it was found that, while not with effect, voluntary schemes lacked the coverage and influence to bring about an overall change in safety-related work practices in the trucking industry. At the time of the NSW Report, Trucksafe had around 350 members out of around 30,000 for-hire freight operators in long haul transport. The ATA indicated that the scheme now has around 400 members, and while this includes many large operators, it is still by no means setting a pervasive benchmark for the industry. As in the NSW 2000 Report this Review heard some conflicting

evidence about the effectiveness of the Trucksafe logo in terms of safe work practices. The Review was in no position to evaluate this evidence. Nonetheless, in the absence of compelling evidence that Trucksafe and other schemes have secured a change a safety culture within the industry as whole this Review remains unconvinced by the argument these schemes are an alternative. While beneficial voluntary schemes by their very nature lack the coverage and mandatory force to secure change amongst all operators. In a highly competitive industry like commercial trucking there will always be pressures for operators to dip below acceptable or legal levels of safe behaviour and once even a small number of operators have done this the pressure will flow on to other operators via freight rates and remunerations systems that discourage safe work practices.

88) Fifth, another point raised by ATA representatives was the safety performance of the industry (as measured by the incidence of fatal crashes and crash fatalities involving heavy vehicles) had improved over time when considered in the context of the growth of the overall freight task. This could be viewed as an argument against the need for any additional intervention measures. Essentially the same argument was presented to the NSW Trucking Safety Review which, however noted, that the major improvement had occurred in the early 1990s following regulatory responses to a serious of disastrous incidents; the improvement did not match that secured in relation to other vehicles; and that, while important, crashes are not the only important indicator of OHS performance (Quinlan, 2001). It is not clear that these counterpoints have changed significantly in the past seven years (apart from an improvement in the indexed number of fatal crashes involving articulated trucks between 2002 and 2007, Department of Infrastructure, Transport, Regional Development and Local Government, 2008). Further, as is the case with measuring productivity changes, crash statistics trends need to take account changes in the number and size/configuration of trucks, including the growing use of larger vehicles such as B-Doubles (Boyer and Burks, 2007). Most importantly perhaps, such aggregated data cannot be viewed as an endorsement of existing practices, the contribution of which to this outcome is unclear.

Overall findings on the relationship between pay and safety in heavy vehicles

89) This Review finds that the overwhelming weight of evidence indicates that commercial/industrial practices affecting road transport play a direct and significant role in causing hazardous practices. There is solid survey evidence linking payment levels and systems to crashes, speeding, driving while fatigued and drug use. This evidence has been accepted and indeed confirmed by government inquiries, coronial inquests, courts and industrial tribunal hearings in Australia over a number of years. The association between remuneration and safety applies to both employed and owner/drivers. The Review was also told by owner/drivers and small operators that inadequate remuneration had obliged them to cut back on costs relating to the maintenance and repair of their vehicles. The extent and safety implications of this are unknown but the practice is disturbing. A number of government OHS agencies (Safework Victoria and Safework South Australia) also indicated that they believed remuneration was an important safety factor in the trucking industry, with Safework Victoria providing the Review with recent focus group research undertaken in the industry that attested to this link. Unfortunately, while there is evidence linking remuneration and safety in the

Australian heavy vehicle industry for over 15 years this connection has been largely ignored by policy-makers and regulators (and not, for example factored into multi-causal investigation of serious truck crashes by road transport authorities, despite evidence from court proceedings and coronial inquests). Major stakeholders in the industry continue to deny there is a connection, while essentially proffering little if any research or credible evidence to discount or provide alternative explanations to research indicating that such a connection exists. Thus, for example, the findings of Professors Hensher and Williamson have been largely ignored, even though they are also consistent with what owner/drivers and employee drivers told this Review and previous inquiries (not to mention the submissions of the TWU).

- 90)** With regard to the term of reference relating to the recovery of genuine increases in heavy vehicle operating costs the Review found that a combination of the power exercised by some clients, intense competition for work, the use of multi-tiered subcontracting (as associated cost pressures and subcontractor dependency associated with this), imbalances in freight movements as well as the individualized and trip/incentive-based payment level inhibits the capacity to recover increases in operating costs (or operating costs more generally on occasion).
- 91)** Since employee and owner/drivers perform the same tasks (and are interchangeable) both need to be covered by a minimum safe rates regime. In the past, in the long haul sector minimum award protection applied to employed drivers but no protection was afforded to owner/drivers. In the context of fierce competition amongst operators and cost containment pressures from often large and powerful clients the result has been extensive use of subcontracting and owner/drivers at reduced and arguably often unsustainable rates that has in turn placed pressure on the payment system of employed drivers (leading to extensive use of trip/kilometer-based rates and widespread problems of compliance with awards/agreements, especially amongst smaller operators. Again, the findings of this Review confirmed earlier research and inquiries (see Williamson et al 2000 and Quinlan, 2001).
- 92)** Until such time as these issues are addressed there was unlikely to be any significant improvement in safety performance across the industry. At the very least, addressing these issues are an integral element in achieving an effective package of policy intervention. Setting minimum rates for both employee and owner/drivers (albeit using different mechanisms) would be, in the view of this Review, an important and necessary step in this direction. The regime covering owner/drivers needs to be mandated. As previous inquiries have indicated (Quinlan, 2001) attempts to set minimum rates for owner/drivers on a voluntary basis have repeatedly failed since the late 1970s because they lacked the capacity to ensure meaningful coverage and compliance (inevitably breaking down under competitive pressure). Even with the best business practices, owner/drivers are often in no position to bargain effectively with more powerful parties and evidence suggests community and driver safety is the loser from such an imbalance. In several jurisdictions (most notably New South Wales) longstanding awards and contract determinations covering employee and owner/drivers respectively in the short haul sector (covering a diverse array of transport

activities from refrigerated transport to courier services) demonstrate that such a mechanism is feasible.

93) In the view of this Review the evidence indicates that the transport industry will remain intensely competitive even following the setting of minimum rates for owner/drivers and more vigorous implementation of employee driver entitlements. Transport operators will still have a strong incentive to provide a cost effective service by making astute use of market niches, technology (such as GPS) and other operational efficiencies (a number of which were identified in this report as illustrative of other evidence made available in this regard). However, the setting of minimum rates will mean that the incentive to cut labour costs and engage in work practices that compromise safety will be removed as a basis for competitive advantage. As several submissions to this Review argued, this type of competition imposes heavy and unacceptable costs on the industry and the Australian community at large. A final consideration is that the industry is already experiencing labour shortages, something that will be compounded by a rapidly ageing workforce. The Review endorses Professor Williamson's view that the setting of safe rates will make the industry more attractive to potential workers and will aid the building of a more sustainable, effective and safer workforce in the future.

TERMS OF REFERENCE 2, 5 AND 6

94) In this part of our report we deal with the Terms of Reference numbered 2, 5 and 6. Those Terms of Reference, in summary, deal with, in the context of the issue of “safe payments”, the scope of existing regulatory models for employees and owner/drivers in the transport industry; the concurrent use of employees and owner/drivers in the industry, including consideration of existing regulatory models in other jurisdictions (other than the Commonwealth jurisdiction) with the capacity to deal concurrently with both employees and owner/drivers; payment methods and remuneration; identification of means by which Commonwealth schemes could deal with a system of “safe rates” for employees and owner/drivers, should that be appropriate, and any gaps in the current regulatory approach

Current Legislative Frameworks

95) The Terms of Reference require us to consider the scope of existing regulatory models in the transport industry. The NTC has usefully provided a document entitled “Current Legislative Frameworks”, the content of which has been checked by the NTC with relevant state, territory and federal authorities. A copy of that document is included as Appendix 2.

96) The first part of this Review concluded that there is a clear relationship between remuneration and safety in the heavy vehicle road transport industry and that the recent enactment of the fatigue regulations will not be sufficient to result in the situation where it can be said that there are safe payment and/or remuneration systems for drivers in the industry.

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

98) However, the current frameworks deal separately with employee/drivers and owner/drivers. Employee/drivers are dealt with by a variety of federal and state industrial awards, in the case of state instruments apparently covering both long haul and short haul drivers (importantly the NSW Government has indicated it has concerns about the current federal award modernisation process and the awards resulting from the process particularly as to how effectively in the context of this Inquiry the resulting award(s) will assist or maintain safety in the transport industry).

99) As to owner/drivers, there is a marked difference between the various regimes. There are no specific regulatory systems that deal with owner/drivers in Queensland, South Australia, the Australian Capital Territory, the Northern Territory and Tasmania. New South Wales has had a long history of regulation of owner/drivers since the 1960s but under the legislation there is (significantly) no

scope for liability for breaches of contract determinations to be imposed on anyone other than principal contractors and owner/drivers.

- 100) In 2005 the State of Victoria enacted the *Owners Drivers and Forestry Contractors Act* to regulate the contractual dealings between owner/drivers and hirers and freight brokers. This legislation resulted from recommendations made by an Inquiry into Independent Contractors which found that owner/drivers were vulnerable due to their lack of negotiating power and this led to lower rates of pay creating a tendency among owner/drivers to speed, drive while fatigued, drive overloaded vehicles and generally to breach the road laws in order to revenue efficiencies in pay and conditions. As the document provided to us by the NTC shows:

“The Act applies to three defined parties; hirers, owner-drivers and freight brokers. The threshold requirements for the Act to apply to an owner-driver are that the owner must not own more than three vehicles and must also be the driver of one of the vehicles. Owner-drivers can operate under a range of business models such as sole-traders, non-public corporations and partnerships.

The legislation creates a framework that has three components. First, it introduces a range of requirements on those hiring owner-drivers. These obligations require hirers and freight brokers to provide owner-drivers with information booklets (these contain an overview of the legal framework regulating owner drivers, rates and cost schedules, dispute resolution processes, practical business information and safety laws and regulations) within strict timelines, negotiate with agents acting on behalf of owner-drivers and not to act unconscionably when contracting. The legislation also imposes contracting and termination requirements.

Second, the Act creates a range of administrative structures and processes. These deal with a range of areas from the production and status of certain documents (i.e. information booklets and codes of practice) to the creation of a Transport Industry Council to advise and make recommendations to the Minister for Industrial Relations and a dedicated dispute resolution process involving the Small Business Commissioner and the Victorian Civil and Administrative Tribunal (VCAT).

Third, the Act provides owner drivers with certain rights, such as the ability to appoint and negotiate through an agent and protections, such as the prohibition of unconscionable conduct. Note however, that freight brokers and hirers are also provided with certain rights, such as the ability to appoint agents...”

- 101) As earlier noted The Victorian Act requires that contracts must be in writing and specify rates and minimum hours of work, prohibits the deduction of costs without permission and specifies a minimum period of notice for contract termination.

- 102) Both the VTA and the ARTIO made detailed submissions generally in support of the systems operating in Victoria. Specifically they contended that there should be:
- (a) a strong award based system to determine terms and conditions for employees drivers.
 - (b) acknowledgement of the well recognised mechanism for developing rates for interstate owner drivers through the ARTF/TWU tribunal which could form the basis for a more formal model with the Australian Industrial Relations Commission (AIRC) as the appropriate body to administer this.
 - (c) continuation of state systems of owner driver regulation that reflect the culture and traditions applying and well accepted across the industry.
- 103) Notwithstanding the important step taken in Victoria, and as earlier noted, it does not address the often fundamental bargaining power imbalance between owner/drivers and those engaging them. As such, it fails to address the problem at the centre of this Review; nor was any evidence presented to the Review that indicated it had resulted in substantial changes in rates paid to owner/drivers. The VTA and the ARTIO approach does not sufficiently recognize these shortcomings or the changing nature of the award systems referred to by the NSW Government.
- 104) Safework South Australia's submission is that there are still significant obstacles to addressing the nexus between unsafe remuneration levels and poor safety practices in the road freight industry. Reduction in fatigue for long distance road truck drivers will only be achieved if the current performance based payment systems in the industry are reformed. Fatigue laws are a crucial precondition to achieving safety outcomes; however, without measures to address the current remuneration structure, there will still be major economic incentives for truck drivers to engage in unsafe work practices. Such economic incentives towards unsafe work practices operate throughout the entire road freight industry.
- 105) In canvassing a range of options Safework South Australia suggests a tribunal structure, perhaps based on current federal legislation (the *Workplace Relations Act* and the *Independent Contractors Act*) with power to make determinations applying to conditions and contracts under transport workers (including owner-drivers) work, providing for "safe" rates and methods of remuneration.
- 106) The NSW Government's contention is that questions of the present nature are best dealt with by an independent statutory tribunal with broad powers and that the best available model for such a regulatory arrangement is the NSW Industrial Relations Commission including the powers available to it under Chapter 6 of the NSW Industrial Relations Act 1996 such as the power to make contract determinations (analogous to awards), and to approve contract agreements (analogous to enterprise agreements) between parties in the transport industry and the power to resolve disputes in the Industry. The NSW Government urges the National Transport Commission to recommend the adoption of national legislative provisions based on the NSW legislation that would need to be put in place by means of cooperation with State Governments.

- 107) Parenthetically, we should emphasise that there was no submission before us which sought that owner/drivers be treated as if they were employees or that there should be some mechanism to deem owner/drivers to be employees as is currently found in Queensland legislation.
- 108) The submissions of many representatives of head contractors, employers, and industry clients of such companies, counseled or warned against the introduction of forms of regulation in the industry. Many of those were coupled with the view that there was no, or no necessary, relationship between rates and safety (an approach we have rejected) while others seem to reject such a proposal irrespective of the conclusions reached on the safety issue (see, for example, the submissions of Tothag Transport Group, ATA NSW, CCI of WA, ATA, QTA, Woolworths and Coles). A number of the submissions rely heavily on the existence of different sectors in the transport industry to submit that it would not be possible to deal with such differing sectors in the same instrument or the same framework.
- 109) Once it is accepted there is a clear relationship between remuneration and safety in the road traffic industry that has existed for many years, and which is not being adequately addressed, it would not only be unacceptable but perverse to fail to recommend appropriate rectification. Different parts of the industry would inevitably be dealt with differently by the mechanism we recommend. Many other of the concerns raised would be met by the specialist nature of the proposed mechanism, which would not be part of any generalist system and would be staffed by personnel with relevant industry expertise (with the expertise undoubtedly speedily growing).
- 110) Of the various submissions before us concerning these Terms of Reference the most detailed and specific is that of the TWU. For example, paragraphs 37 to 76 of the TWU submission deal with the issue of existing schemes of regulation; paragraphs 77 to 82 deal with what the TWU sees as the relevant “regulatory gaps”; and paragraphs 83 to 97 set out the TWU’s proposals and options concerning the legislative provisions that should be adopted to cure the “regulatory gaps” in the industry.
- 111) The TWU submission, before setting out the detail of the two options it proposes indicates in paragraph 83 that the purpose of the relevant part of its submissions is to identify the means by which the Commonwealth could legislate to achieve the policy objectives set out in that paragraph. Paragraphs 84 to 86 then set out in summary form the nature of the two options proposed (in the following terms):

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.

83. *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. [paragraphs 84 to 86.]*

- 112) The first option put forward by the TWU, in summary, proposes that amendments be made, in the case of employees, to the *Workplace Relations Act* and to the *Independent Contractors Act*, in the case of owner/drivers. Paragraphs 87 to 89 set out option one and because of their importance, we set them out in full:

Option One

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 80(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 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 86(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 86(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

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 80(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 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 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. [paragraphs 87 to 89, together with appropriate headings.]

- 113) The second option put forward by the TWU involves the creation of a new legislative regime, separate from the *Workplace Relations Act* and the *Independent Contractors Act*, with the new legislative regime applying specifically to transport workers and owner/drivers, although the new Act would need to interact to a degree with, certainly, the *Workplace Relations Act* and, perhaps, the *Independent Contractors Act*. Again, because of its relevant detail, we set out the relevant paragraphs of the TWU's submissions in full:

Option Two

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 87(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 87(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 90(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

92. 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 . 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.

93. 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.
[paragraphs 90 to 93 of the TWU submissions.]

RECOMMENDATIONS

- 114) The Review recommends that a national scheme for setting mandatory safe rates covering both employee and owner/drivers be established in the heavy vehicle industry. This is the only viable and direct mechanism for addressing the imbalance in bargaining power confronting owner/drivers that affects safety in the road freight industry.
- 115) In principle, there then are three possible options open for consideration as appropriate reforms in the light of that recommendation. First, legislative deeming of owner/drivers as employees and subsequent regulation of their conditions by an industrial tribunal. Second, amendments to the *Workplace Relations Act* and the *Independent Contractors Act* and the conferral of power on the Australian Industrial Relations Commission to determine conditions for both employee drivers and owner/drivers (broadly TWU option 1). Third, creation of a specialized body under federal transport legislation with wide powers to fix rates of remuneration and related matters which ensure industry safety.
- 116) The first option has received no support in the Review. No party has argued for it. Many owner/drivers would oppose this option and we consider that their choice should be respected. The second option faces many practical difficulties which are discussed below. We consider that the third option, having regard to all the evidence and submissions before us, represents a solution that balances the respective interests of the industry stakeholders and pays due regard to the public interest considerations involved in achieving a safer road transport industry.
- 117) We conclude that a clear case has been demonstrated for a form of regulation to be established in the context of the chain of responsibility to ensure that rates of pay and other elements of remuneration in the long haul transport industry may be determined to provide for safe rates, conditions and remuneration. We also conclude that whatever form of regulation is decided upon, it must be a *dynamic* form of regulation. *Dynamic* in two senses: *dynamic* in the sense that it is capable of dealing speedily to changes in the industry which could be considered as detrimental to the existence of rates of pay which maintain safety in the industry; and *dynamic* also in the sense that the system is capable, to the extent necessary, of fixing different rates of pay and remuneration for different sectors of the industry.
- 118) We have also concluded that there is considerable public interest in such a form of regulation being in place. The major, but certainly not the only, public interest element of this issue is the important effect it has on road safety which, of course, has an actual or potential effect on every member of the community.
- 119) In general terms, we favour certain aspects of the second option proposed by the TWU. We do not consider that the first option is appropriate for a number of reasons which include the uncertainty of the future of the AIRC in terms of the government's proposals which have been promulgated under the rubric of "Forward with Fairness" under which, inter alia, the AIRC is likely to be replaced by a body to be known as Fair Work Australia and the consideration that the Australian Industrial Relations Commission (AIRC) does not have significant

experience in respect of independent contractors generally or owner/drivers specifically. If the concerns of the NSW Government earlier are valid the relevant federal body would eventually have less expertise than at present. These considerations have also lead us not to accept certain of the aspects of the proposals made by Safework South Australia and the NSW Government.

120) We also conclude that the new body should be established under specific transport legislation because the prime basis and rationale for its existence will be the important issue of road safety and because such a specialist body will be more likely to allay or lessen industry concerns as to the undesirability of regulation. Necessary consequential amendments to other federal legislation (such as the *Workplace Relations Act* and the *Independent Contractors Act*) should be made.

121) It is considered that a specific and specialised tribunal should be established and although certain elements of the structure of the new tribunal may well be appropriate for government policy decision (issues such as whether it be a single member tribunal or a multi member tribunal, although we favour the latter), it is essential that the personnel of the tribunal have extensive experience in the transport industry; industrial relations (certainly in the fixation of rates of payment); and/or occupational health and safety. These qualifications by way of experience would be in addition to any other kind of qualification or the holding of office which government policy might determine; for example, legal qualifications; membership of an existing federal or state tribunal or court; accounting experience or experience in small business.

122) The terms of reference include identification of means by which Commonwealth schemes could deal with a system of “safe rates” for employees and owner/drivers, should that be appropriate. Power for federal laws to be made to deal with principals, intermediaries, agents or employers in the chain of responsibility in the transport industry, to the extent that that they are constitutional corporations (for example, trading or financial corporations) is now clear. The High Court of Australia in its 2006 judgment in the *Workchoices* case (*New South Wales v Commonwealth* (2006) 229 CLR 1; [2006] HCA 52); held, inter alia, at [267] that

“The essential operation of the provisions under immediate consideration is that the employment relationship between certain constitutional corporations and their employees shall be regulated according to certain terms and conditions whose content is to be found in identified forms of instrument and whose content may be adjusted in the ways prescribed by the new Act. That is a law with respect to constitutional corporations.”

123) Indeed, it is arguable that the judgment of the High Court provides power to the Commonwealth to enact legislation for all entities or persons in the chain of responsibility if the “highest” entity in the chain is a constitutional corporation. Plainly, however, for reasons of certainty in operation, it would be preferable for there to be also counterpart state legislation.

- 124) Finally we make a make a number of more minor recommendations. Reference has been earlier made to the Victorian requirement for written contracts. The Tasmanian Forest Contractors Association (TFCA) also submits that ‘plain English style contracts’ should be mandated, even to the point of developing proformas. “The more complex document, the more difficult it is for operators to understand and problems arise when rates are discussed. Within some transport contracts in Tasmania that TFCA is familiar with, the fuel adjustment mechanisms alone are some three pages long and difficult to interpret without legal advice”.
- 125) We recommend finally that legislative provision should be made to require all contracts pertaining to employees and owner/drivers in the industry be in writing and in ‘plain English style’. No doubt proformas would be developed, probably from documentation already in use in the industry.
- 126) As noted earlier in the Review, compliance with minimum rates for both owner/drivers (where voluntary agreements have hitherto prevailed apart from contract determinations pertaining to short haul drivers in NSW) and employee drivers (covered by awards/agreements) has proved problematic especially in the long haul sector of the industry. Failure to pay even legally mandated entitlements has been shown by previous inquiries to be a direct consequence of the same commercial pressures that compromise safety. To facilitate effective implementation of a safe rate regime this Review would make the following recommendations.
- a) That it be made mandatory for every heavy vehicle to carry information pertaining to the payment level and rate for that trip/s currently being undertaken at its compliance with the relevant safe rates pertaining to either the employee or owner/driver involved. Copies of these records are to be kept by the operator (where this is not the owner/driver of the vehicle), principal contractor and client.
 - b) This information is to be provided to any accredited government authority (police, road transport or OHS) or their representative upon demand. A duly-accredited official of an industrial organisation should also be empowered to request this information.
 - c) If payment is not made by the party that immediately engaged the driver (within a specified time period of not more than two weeks) in the case of an owner/driver) there should be a rebuttable presumption that responsibility for making restitution rests with the principal contractor in any multi-tiered subcontracting arrangement.
 - d) Matching penalties shall apply for the failure to pay safe rates to employee or owner/drivers with escalating penalties for repeated offences or systemic evasion of legal requirements.
 - e) Enforcement measures to ensure compliance with safe rates for both employee and owner drivers needs to be adequately resourced, proactive (not simply complaint driven) and strategic (see for example, Johnstone 2004). The success of enforcement regimes in relation to OHS provides a model of how to secure this.

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Appendix 1: Media release

MEDIA RELEASE

The Hon Anthony Albanese MP

Minister for Infrastructure, Transport,
Regional Development and Local Government



25 July 2008
AA092/2008 Joint

Joint Media Statement

The Hon Anthony Albanese MP
Minister for
Infrastructure, Transport,
Regional Development
and Local Government

Julia Gillard
Deputy Prime Minister
Minister for Employment
and Workplace Relations

Craig Emerson
Minister for Small
Business,
Independent Contractors
and the Service Economy

SAFER PAYMENT SYSTEMS FOR HEAVY VEHICLE DRIVERS

The National Transport Commission (NTC) will investigate and report on driver remuneration and payment methods in the Australian trucking industry and make recommendations for reform.

The NTC will be assisted by Professor Michael Quinlan of UNSW and the Hon Lance Wright QC, the former president of the NSW Industrial Relations Commission.

The NTC will report by November 2008, and the report will be considered by the Australian Transport Council (ATC - Commonwealth, State and territory transport ministers). Working with the ATC, the Government's objective is to implement these reforms in the context of changes to national road transport regulation and the introduction of the new workplace relations system.

The trucking industry prides itself on being highly competitive and efficient. However, the industry's strength can also be its weakness, with truck drivers often finding themselves in a weak bargaining position and unable to maintain safe work practices.

This is especially so at a time when hard-working trucking companies and owner-drivers, who deliver essential food and supplies to supermarket shelves every day, have been hit hard by rising global fuel prices.

The report will examine how current methods and rates of pay for heavy vehicle drivers contribute to poor road safety outcomes, and will identify options for implementing a system of safe rates for both employees and owner-drivers, recognising the special vulnerabilities of independent contractors in the transport industry.

From 2000-2004, one in five road deaths involved heavy vehicles, with speed and fatigue widely acknowledged to be significant factors. During recent years several reports have also linked unsafe work practices in the trucking industry to road accidents.

The investigation follows on from an agreement between Commonwealth, state and territory transport ministers on February 29 concerning the need for a coordinated national transport plan. The NTC was requested to review and make recommendations relating to truck driver pay and remunerations methods.

The Government notes that addressing this matter touches on developments in Commonwealth and State regulations relating to transport and road safety, workplace relations, occupational health and safety and the legislative frameworks for employees and independent contractors.

The Government is committed to working with the transport industry, unions and other stakeholders to improve road safety for Australian families, ensure a fair go for both employees and owner-drivers, and sustain the long-term viability of the trucking industry.

Today's announcement continues the Government's heavy vehicle reform process and complements other safety initiatives, including:

- Implementing new laws to limit heavy vehicle driver fatigue and excessive speed; and
- A \$70 million safety and productivity package which will fund the trial of black box technologies that monitor driving hours and speed as well as the construction of more rest areas along the nation's highways.

Media Contacts

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http://www.minister.infrastructure.gov.au/aa/releases/2008/July/AA092_2008.htm

Appendix 2: Current legislative frameworks

National reforms

Over the past 15 years the NTC together with commonwealth, state and territory governments has undertaken the development of a suite of road transport laws reforms aimed at addressing un safe on-road behaviours and introducing the concept of 'chain of responsibility'. These reforms have included:

- Heavy Vehicle Driver Fatigue;
- Mass and Overloading;
- Speeding;
- Compliance and Enforcement;
- Dangerous Goods;
- Restricted Access Vehicles; and
- Intelligent Access Program.

The NTC, in conjunction with the commonwealth, state and territory governments, has undertaken the development and drafting of national model legislation. Each

jurisdiction is then expected to implement that legislation to achieve the goal of nationally consistent road transport legislation in relation to heavy vehicles.

Chain of responsibility

The NTC has developed and applied the Chain of Responsibility principle to many areas of road transport reform. This concept extends liability for breaches of road transport law to all parties who influence the road transport task. A primary concern of road regulators and governments has been that breaches of road transport laws occur due to the interactions of a number of parties in the supply chain, rather than just the behaviour of the driver of the vehicle or its operator.

Chain of responsibility legislation dealing with four areas of road transport activity (specifically dangerous goods, mass, dimension and load restraint, fatigue and speeding) requires that each party in the chain takes reasonable steps to ensure that breaches of the road law do not occur. One of the advantages of chain of responsibility is that it overcomes traditional issues with apportioning criminal liability to supply chain parties who have either been outside the scope of prosecution or have contracted out of their obligations. It achieves this by extending the scope of liability to those parties who, through action or inaction, contributed to the breach and therefore bear a level of responsibility for it.

In recent chain of responsibility legislation (fatigue and speeding), new restrictions have been introduced to deal with requests and contracts or agreements dealing with service or loading. These restrictions deal with requests and contracts or agreements that may encourage or, due to the way in which they operate, require the breaching of driving hours or speed limits. The legislation prohibits such requests and contracts or agreements.

The effect of the chain of responsibility prohibitions on requests, contracts or agreements has ramifications on those parties who engage drivers for transport purposes. In those situations, contracts or agreements that require, or in effect result in, an owner-driver or employee breaching speeding or fatigue laws, are considered prohibited and liability extends to the party or parties who contracted with the driver.

In addition, other chain of responsibility legislation such as dangerous goods and mass, dimension and load restraint, also have an impact on employees and owner-drivers. Although they don't expressly deal with or regulate contractual relationships, they implicitly do so because of the operation of chain of responsibility and the requirement for all chain parties to take reasonable steps.

Dangerous goods

In the *National Transport Commission (Model Legislation — Transport of Dangerous Goods by Road or Rail) Regulations 2007* and the *National Transport Commission (Road Transport Legislation – Dangerous Goods Regulations) Regulations 2006*, the responsibilities of each of the parties in the dangerous goods transport chain are defined by drawing a distinction between the primary liability of the person responsible for ensuring that a particular requirement is met, and the secondary liability of a person who is responsible only to the extent that he or she knew, or reasonably ought to have known, that the obligation was not fulfilled.

Under the Dangerous Goods chain of responsibility, packers, loaders, manufacturers, consignors, prime contractors and drivers have defined legal responsibilities that correspond to their respective duties in the loading and transport of dangerous goods. The extent of their liability (primary or secondary) reflects the extent of their control over these duties.

Compliance and enforcement legislation

The *National Transport Commission (Road Transport Legislation — Compliance and Enforcement Bill) Regulations 2006* targets compliance rather than simple enforcement issues. Its objectives are to rectify identified inadequacies in the areas of enforcement powers and evidentiary requirements and introduce new sanctions and responsibilities for those involved in road transport.

In order to achieve these objectives, the Bill creates a general framework for compliance and enforcement activities, outlines the chain of responsibility concept, introduces stronger enforcement powers and provides a range of innovative sanctions, penalties and evidentiary provisions.

Furthermore, a three-part classification of breaches, defined according to the degree of risk involved (comprising of minor, substantial and severe risk breaches) is created and thresholds are imposed for each category of risk.

The Bill deals specifically with the duties and liability of consignors, packers, loaders, vehicle operators and receivers as well as drivers. In addition, directors and senior managers of corporations involved in the use and operation of heavy vehicles are also subject to liability for breaches of the road law. Parties in the supply chain are given a reasonable steps defence.

There are specific enforcement powers available in respect of each category of offence (i.e., minor risk, substantial risk and severe risk offences) and the powers become stronger in proportion to escalating risk.

The legislation also imposes requirements for the provision of accurate container weight declarations and the liability of the various parties in respect of these declarations.

Mass, dimension and load restraint

The *National Transport Commission (Road Transport Legislation — Compliance and Enforcement Bill) Regulations 2006* contains specific offence provisions relating to mass, dimension and load restraint issues which have a detrimental impact on-road safety and infrastructure. Parties identified in the mass dimension and load restraint chain of responsibility include consignors, loaders, carriers, drivers, packers, receivers and directors and senior managers of bodies corporate.

Breaches of mass, dimension and load restraint are characterised according to the risk involved and thresholds are specified in terms of a combination of absolute values, percentage values and where the breach involves load restraint, more subjective criteria.

Consignors of goods, loaders, operators and drivers are all guilty of an absolute liability offence where a breach of a mass, dimension or load restraint requirement occurs, but each of these groups has available to it a 'reasonable steps' defence.

However, the defence in its application to operators and drivers is limited to minor risk mass, dimension and load restraint breaches.

Consignees of goods may also be liable for mass, dimension and load restraint breaches if they intentionally, recklessly or negligently induce or reward the commission of such breaches.

Heavy vehicle driver fatigue

The *National Transport Commission (Model Legislation — Heavy Vehicle Driver Fatigue) Regulations 2007* requires all parties in the supply chain, not just the driver, to take reasonable steps to ensure drivers are able to comply with the legal work/rest hours.

Parties in the fatigue chain of responsibility include the driver, the employer of a driver, the prime contractor of a driver, the operator of a vehicle, the scheduler of goods or passengers for transport by the vehicle and also the scheduler of its driver, both the consignor and consignee of the goods transported by the vehicle, the loading manager, and the loader and unloader of the goods carried by the vehicle.

As discussed in previous chapters the new fatigue laws do create some obligations on chain parties not to enter into contracts which would encourage drivers to drive while fatigued.

Speeding

The *National Transport Commission (Model Act on Heavy Vehicle Speeding Compliance) Regulations 2008* creates a chain of responsibility for speed compliance.

Chain of responsibility provisions for speed compliance deal with those parties who are in a position to influence a decision to breach speed limits. Parties in this chain are required to actively consider whether what they are doing, for example scheduling, loading etc, will require a driver to speed.

Specific duties and offences apply to employers, prime contractors, operators, schedulers, loading managers, consignors and consignees. These parties are required to take reasonable steps to ensure that their conduct does not cause the driver to exceed speed limits.

Additionally, the model legislation forbids requests, agreements and contracts that may result in a heavy vehicle driver exceeding the speed limit.

State regulatory systems

Only states that have specific regulatory systems which impact on owner-drivers have been addressed in this section. Those other jurisdictions: Queensland, South Australia, Northern Territory and Tasmania do not have any currently operating system to support owner-drivers.

Australian Capital Territory

The Australian Capital Territory (ACT) has at present no regulatory framework for owner-drivers. However, in 2004, Katy Gallagher MLA, Minister for Industrial Affairs, tabled the *Fair Work Contract Bill 2004* in the ACT. The Bill has not since progressed. The Bill is based on the Victorian and Western Australian legislation, and is grounded in a combination of commercial and industrial relations law.

New South Wales

The regulation of owner-drivers has been long established in New South Wales (NSW) for over 30 years. The regulatory framework is based on the recommendations of a Commission of Inquiry undertaken in the 1960s. The Commission of Inquiry found that owner-drivers were vulnerable due to their working arrangements and were therefore likely to be exploited by others within the transport industry. Subsequently, the regulation of contracts of bailment and contracts of carriage came to be covered under Chapter 6 *Industrial Relations Act 1996*.

The *Industrial Relations Act 1996* under Chapter 6 regulates contracts between owner-drivers and principal contractors. Importantly, the Act doesn't apply to those transport companies that are independent and in the commercial position to enter into commercial arrangements with a number of parties. Rather, it applies to single vehicle owner-drivers who lack the ability to independently contract with several parties. It provides for cost recovery rates of pay across a variety of transport sectors, vehicle classes and vehicle ages (contract determinations), while at the same time permitting arrangements to provide enterprise specific incentives. Under the Act, the undercutting of prices is prevented but incentives for owner-drivers above the minimum standards set by the Act are allowed. There are a number of protections for owner-drivers. These include protections against the arbitrary termination of a contract, and the capacity to recover goodwill in cases involving termination of the contract that result in the goodwill being extinguished unfairly. The Industrial Relations Commission resolves disputes between owner-drivers and principal contractors, and gives enforceable effect to industry or sector arrangements in contract determinations.

The legislation also allows for contract agreements, which are arrangements dealing with terms and conditions specific to a particular enterprise. These agreements can be entered into by transport operators and groups of owner-drivers, owner-drivers can request their union representative to represent them, and there are currently a range of such agreements dealing with specific enterprises across a full range of transport sectors such as waste collection, car carriers, breweries etc. Note however, that under the legislation there is no ability to impose liability on anyone for breaches of contract determinations other than principal contractors and owner-drivers.

Victoria

The *Owner Drivers and Forestry Contractors Act 2005* (the Act) regulates the contractual dealings between contractors (owner drivers) and hirers and freight brokers. The legislation was a result of recommendations made by the Victorian Report of Inquiry: Owner Drivers and Forestry Contractors February 2005 which found that owner drivers were vulnerable due to their lack of negotiating power and this led to lower rates of pay creating a tendency among owner drivers to speed, drive while fatigued, drive overloaded vehicles and generally to breach the road laws in order to remedy deficiencies in pay and conditions.

The legal areas underpinning the Act involve a mixture of industrial relations, trade practices and consumer/small business law. This approach is based on a view of owner-drivers as small business operators but sharing many of the characteristics of employee drivers.

The Act applies to three defined parties: hirers, owner-drivers and freight brokers. The threshold requirements for the Act to apply to an owner-driver are that the owner must not own more than three vehicles and must also be the driver of one of the vehicles. Owner-drivers can operate under a range of business models such as sole traders, non-public corporations and partnerships.

The legislation creates a framework that has three components. First, it introduces a range of requirements on those hiring owner-drivers. These obligations require hirers and freight brokers to provide owner-drivers with information booklets (these contain an overview of the legal framework regulating owner drivers, rates and cost schedules, dispute resolution processes, practical business information and safety laws and regulations) within strict timelines, negotiate with agents acting on behalf of owner-drivers and not to act unconscionably when contracting. The legislation also imposes contracting and termination requirements.

Second, the Act creates a range of administrative structures and processes. These deal with a range of areas from the production and status of certain documents (i.e. information booklets and codes of practice) to the creation of a Transport Industry Council to advise and make recommendations to the Minister for Industrial Relations and a dedicated dispute resolution process involving the Small Business Commissioner and the Victorian Civil and Administrative Tribunal (VCAT).

Third, the Act provides owner drivers with certain rights, such as the ability to appoint and negotiate through an agent, and protections, such as the prohibition of unconscionable conduct. Note however, that freight brokers and hirers are also provided with certain rights, such as the ability to appoint agents. Further, all the parties to whom the Act applies are restricted from subjecting any person to detriment because that person has or wishes to exercise a right available under the Act.

Western Australia

In Western Australia (WA), the *Owner Driver (Contracts and Disputes) Act 2007* (the Act) regulates a number of supply chain parties. The Act is based on the Victorian *Owner Drivers and Forestry Contractors Act 2005*. It is intended to deal with the same issues that led to the development of the Victorian legislation, specifically road safety concerns due to excessive competition within the trucking industry. The objective of the legislation is to provide owner-drivers with sustainable guideline rates and a practical framework through which they can negotiate with hirers on a collective basis. The legislative framework covers owner-drivers contracts and applies to owner-drivers and prime contractors who are engaged in the transportation of freight within Western Australia, even if the contract has been entered into outside of the state. However, the legislation does not apply to owner-drivers who are covered by similar legislation in NSW or Victoria.

The legislation specifically provides owner-drivers with security of payment, establishes a Road Freight Transport Industry Council with one of its tasks to develop the Code of Conduct that includes guideline rates and other provisions regulating the relationship between the parties. The Act also includes a conciliation and arbitration mechanism, under the Road Freight Transport Industry Tribunal, which can hear disputes between the parties regarding breaches of contracts, the Code of Conduct and breaches of the security of payment provisions. Owner-drivers are allowed to appoint

bargaining agents (union or other) so as to negotiate collectively, and the legislation prohibits unconscionable conduct. Due to the operation of the *Independent Contractors Act 2006* the *Owner Driver (Contracts and Disputes) Act 2007*, was not operational. This Act received exemption from the Independent Contractors Act as of 1 August 2008.

Federal regulatory systems

Workplace Relations Act

The *Workplace Relations Act 1996* (the Act) has wide application on matters of employment in Australia including for employees employed in the freight transport industry. The election of a Labor government will have implications for the operation and scope of the Act as the government has indicated it will be either amending or replacing the Act in line with its pre-election promises. These changes are expected over the next 12 – 18 months.

The present Act provides for a number of institutions, mechanisms and principles that collectively form the federal institutional framework for industrial affairs. The coverage of the Act increased significantly following amendments made by the WorkChoices legislation in 2005. Essentially, these amendments to the Act increased its scope so that all employees employed by a trading corporation would now be covered. These changes affected employees employed in the transport industry. The legislation operates to cover the field, so that employers and employees, who were formerly covered by State industrial relations legislation or a state award, but not a federal award, are now covered by commonwealth legislation. This does not mean all state industrial instruments are inoperative, but that the status of those instruments has changed and the extent to which such provisions will continue to apply is presently the subject of the award modernisation process. The exclusion of state and territory industrial laws is done under section 16 of the Act. However, state industrial relations schemes continue to operate in situations where employees are employed by non-trading corporate entities, for example, those employed by sole traders, unincorporated partnerships and non-constitutional corporations.

The legislation currently requires certain minimum standards for employees (such as leave and holiday conditions, and minimum wage as set by the Fair Pay Commission). Rates of pay which may be set out in transport awards or workplace agreements. Workplace agreements are a central component of the legislation. Generally, workplace agreements outline the conditions and pay rates that apply between a specific employer and its employees. It should be noted in the transport industry the majority of employees are not covered by workplace agreements and therefore most transport employees rely on the Award conditions.

Transport workers awards

Across the country various awards, Federal and State (NAPSAs), apply to employees in the transport industry. Federal transport awards provide for lower rates of pay and a more restricted set of conditions of employment than state awards.

The Transport Workers (Long Distance Drivers) Award 2000 (the Award) is one award which regulates some transport employees. The Award covers employees

employed as drivers in long-distance operations (defined as involving distances of more than 500 km).

The Award was originally made by the Australian Industrial Relations Commission under the auspices of the Workplace Relations Act 1996 made the Award, and was preserved subject to notional amendments under the WorkChoices amendments (which took effect on 27 March 2006). It has been amended several times and covers employers who are a party to the award (listed in a schedule to the Award), employee drivers and the Transport Workers Union. The award applies to interstate operations within the Commonwealth of Australia and to long distance operations within the states of Queensland, South Australia, Tasmania and Victoria.

A number of terms and conditions of employment that were originally set by the Award are now covered by the minimum standards set under the Workplace Relations Act 1996, including leave and public holidays. Base rates of pay are separately guaranteed under an Australian Pay and Classification Scale derived from the Award, and adjusted by the Australian Fair Pay Commission.

The Award retains (among other things) provisions for incentive-based payments and allowances, and contains a dedicated dispute resolution mechanism. Relevantly, the Award retains two incentive-based pay models (i.e. kilometre and time based rates of pay). The general approach underlying the Award is to link the incentive-based pay of an employee to the distance travelled. 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.

No transport award presently extends any obligations or duties to parties other than employers in the industry.

Like other awards, the Award is currently subject to the award modernisation process which is being undertaken by the Australian Industrial Relations Commission.

Independent Contractors Act

The *Independent Contractors Act (2006)* (ICA) came into operation in July 2007. The intention of this Act is to protect from the interference in the genuine independent contractual relationships of those parties who have chosen to become independent contractors.

The ICA covers 'service contracts' which are defined to be a contract that:

- has independent contractor as a party; and
- relates to the performance of work by an independent contractor; and
- has required constitutional connection of one party to the contract being either the Commonwealth or a corporation incorporated in Australia.

The ICA overrides existing state legislation; unless where specific exemption has been granted. Both the NSW and Victorian owner-driver systems received an

exemption from the operation of this Act when it was created, WA applied for and received a similar exemption in July 2008.

The ICA gives the Federal Court jurisdiction to review a 'service contract' if that contract is alleged to be unfair or harsh. In determining whether a contract is unfair or harsh, the court may have regard to:

- the terms of the contract when it was made;
- the relative bargaining strengths of the parties to the contract;
- any undue influence or pressure was exerted upon a party to the contract;
- whether the contract provides total remuneration; and
- any other matters the court considers relevant.

The ICA gives the Federal Court power to set aside whole or part of a contract, or make orders varying that contract. The Federal Court may only have regards to the terms of the contract and the conduct of the parties at the time of entering into the contract.