

**SAFE PAYMENTS
ADDRESSING THE UNDERLYING
CAUSES OF UNSAFE PRACTICES
IN THE ROAD TRANSPORT
INDUSTRY**

October 2008



Prepared by

**National Transport Commission with
The Hon Lance Wright QC and Professor Michael Quinlan**

National Transport Commission

Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry

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FOREWORD

The National Transport Commission (NTC) is an independent body established under Commonwealth legislation and an Inter-governmental Agreement and funded jointly by the Commonwealth, states and territories. The NTC has an on-going responsibility to develop, monitor and maintain uniform or nationally consistent regulatory and operational reforms relating to road, rail and intermodal transport.

The Australian Transport Council (ATC) is a ministerial forum for Commonwealth, state and territory consultations and provides advice to governments on the coordination and integration of all transport and road policy issues at a national level. The ATC has outlined a vision for Australia's transport network by endorsing the National Transport Policy Framework. This is an ambitious agenda for reform to ensure a safe, secure, efficient, productive, reliable and integrated national transport system.

As part of these reforms, the ATC requested the NTC to prepare a report addressing the underlying causes of unsafe practices in the road transport industry. ATC specified that an evaluation, with recommendations, for the improvement of truck driver payment methods, working conditions and career structures to address safety issues should be undertaken.

The NTC's report, and the report from the Hon Lance Wright QC and Professor Michael Quinlan, will form a significant component for future reforms in this sector. It will provide ATC with a conclusive statement as to the existence of the payments/safety link. This conclusion will mean that for the first time, the incentives behind safety issues will be addressed when targeting on-road behaviour.

The consultants, and the NTC, have provided a series of options for implementing a system of safe payments for both employees and owner-drivers. In developing these options, consideration was given to the unique nature of the transport industry, including the intense competition in the industry, the economic pressures faced by drivers and the mix of having both employees and independent contractors working side-by-side in the same market.

This report makes recommendations for the ATC's consideration that address the issue of safe payments and may require a policy response from a number of portfolios including transport, independent contractors and workplace relations, following ATC's decision. Safe payment is an issue which requires a whole of government response.

Australia must maintain an internationally competitive transport network to service the growing freight task, to reduce road trauma, and to ensure Australian businesses can compete cost-effectively in the global marketplace. The trucking industry has a long history of adapting to necessary change and evolving in its position as a vital component of Australia's freight industry. Safe payments is an important next step for the transport industry.

The NTC acknowledges the work of the Hon Lance Wright QC and Professor Michael Quinlan in providing their report, and Tim Eaton and Kathryn Hodges in developing this project and contributing to this report. The NTC also acknowledges Paul Sullivan, Neil Wong, Damian Callachor and other colleagues for their contributions and advice.



Greg Martin

Chairman

EXECUTIVE SUMMARY

Over the past 50 years there have been significant improvements in safety outcomes on Australian roads. However, despite continuing efforts and reforms undertaken by state, territory and commonwealth governments, safety outcomes in the road freight transport industry are still not at an acceptable level. Indeed, while freight transport safety has improved, the rate of improvement has been less than that achieved for non-freight vehicles.

There has been a considerable amount of evidence produced that seeks to identify the root cause of unsafe on-road behaviour. Some assert that payment systems such as payment per kilometre or per load provide an incentive to speed or work excessive hours in breach of current laws.

The ATC requested the NTC to engage two experts to review the evidence demonstrating the existence of this payments/safety link and to assist with the preparation of legislative implementation options to address its on-road impacts. The Hon Lance Wright QC and Professor Michael Quinlan concluded that the *“overwhelming weight of evidence indicates that commercial/industrial practices affecting road transport play a direct and significant role in causing hazardous practices.”*

In short, off-road actions can encourage or create an incentive for on-road behaviour. The NTC has done a considerable amount of work addressing how the transport supply chain contributes to on-road safety through the chain of responsibility principle in road transport law. Two recent reforms, heavy vehicle driver fatigue and speeding legislation, address some of the underlying causes of on-road behaviour. Both sets of laws create obligations on parties which limit the demands and requests that can be made on drivers that would lead to a breach of speeding or fatigue laws.

However, further reforms are needed to address the underlying economic factors which create an incentive for, or encourage, unsafe on-road practices. A system of ‘safe payments’ would be an important step in further driving those parties up the chain of responsibility to address those incentive factors.

In their report Professor Michael Quinlan and the Hon Lance Wright QC defined a ‘safe payment’ as *“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.”*

Some jurisdictions have sought to address some of these root causes through regulation aimed at dealing with the unequal bargaining power and information asymmetry faced by owner-drivers. However, these reforms do not apply nationally and do not tackle issues faced by employee drivers who are an integral and interconnected part of the same market.

Despite a comprehensive enforcement system to require positive steps from chain of responsibility parties in regards to some of the underlying issues, allowing the market to impose unsustainable payment levels on employees and owner-drivers at the same time as permitting payment systems which reward drivers who drive fast, or work long hours, are fundamentally at odds with other nationally agreed safety reforms.

The NTC, on recommendations from Professor Michael Quinlan and the Hon Lance Wright QC, recommends that ATC endorse the establishment of a national scheme for setting minimum safe rates covering both employee and owner-drivers in the heavy vehicle industry.

A minimum safety net for employee and owner-drivers will enable those operators to cover costs and secure a sufficient return so that they are not forced or encouraged to cut corners in regards to safety. A safe payment system will not stop operators being able to make other productivity and efficiency gains in their businesses. It will not stop operators being able to compete on price. A safe payment system will just ensure there is a minimum enforceable safe rate which will ensure that those price efficiencies do not come at the expense of driver and broader community safety.

The NTC has left the policy options recommended in this report sufficiently broad to enable a full policy development process. The NTC recommends that ATC request the federal Minister for Infrastructure, Transport, Regional Development and Local Government to progress the issue in consultation with his Commonwealth Ministerial colleagues and report back to the ATC in May 2009.

A safe payment system would reinforce and lock in the benefits of previous chain of responsibility reforms by taking another important step in removing economic incentives for unsafe behaviour.

The report proposes a solution which seeks to further address those root causes of unsafe on-road behaviours through a framework to implement a system of safe payments - a payment system which allows the trucking industry to compete fairly on service and efficiency without being compelled to cut corners on the levels and methods of driver payments.

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1. INTRODUCTION

The National Transport Policy Framework as approved by Australian Transport Council calls for a review of truck driver pay methods, working conditions and career structures to develop recommendations to address safety issues.

The NTC was requested to undertake this review, and to provide advice on a system that will assist in addressing safety issues related to driver remuneration and payment methods. The NTC was requested to consider the application of the chain of responsibility principles to any legislative framework.

On 25 July 2008, federal, state and territory transport ministers further requested that the NTC provide a report to ATC on safe payments. In a joint press release Ministers Albanese, Gillard and Emerson requested the NTC to:

“... identify and assess 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.”¹

In response to these requests, the NTC has undertaken the Safe Payments Project. This project will report to ATC in November 2008 on:

- whether there is a payments/safety link;
- whether there is a safety case for regulatory intervention into ‘safe payments’; and
- options for regulatory reform.

1.1 National transport policy framework

In February 2008, ATC agreed that there is a need for a national approach to transport policy and endorsed the National Transport Policy Framework (ATC 2008). The ATC consists of transport ministers from federal, state and territory governments. It is the ministerial forum for the coordination and integration of transport policy issues at a national level.

Following the meeting in February, the ATC agreed to a vision, policy objectives and policy principles in May 2008. Importantly, the ATC’s vision for Australia’s transport future states:

“Australia requires a safe, secure, efficient, reliable and integrated national transport system that supports and enhances our nation’s economic development and social and environmental well-being.”

To achieve this vision, ATC commits to the following policy objectives:

- **Economic:** To promote the efficient movement of people and goods in order to support sustainable economic development and prosperity.

¹ Media Release, Ministers Albanese, Gillard and Emerson, 25 July 2008, http://www.minister.infrastructure.gov.au/aa/releases/2008/July/AA092_2008.htm

- **Safety:** To provide a safe transport system that meets Australia's mobility, social and economic objectives with maximum safety for its users.
- **Social:** To promote social inclusion by connecting remote and disadvantaged communities and increasing accessibility to the transport network for all Australians.
- **Environmental:** Protect our environment and improve health by building and investing in transport systems that minimise emissions and consumption of resources and energy.
- **Integration:** Promote effective and efficient integration and linkage of Australia's transport system with urban and regional planning at every level of government and with international transport systems.
- **Transparency:** Transparency in funding and charging to provide equitable access to the transport system, through clearly identified means where full cost recovery is not applied.

The Safe Payments Project and recommendations made by the NTC align closely with the commitment of ATC with respect to the economic, safety and environmental policy objectives. Safety improvements in the road transport industry were the key consideration in undertaking this report, by looking to address safety outcomes through a consideration of the economic factors which drive such behaviour. A safe payments system is also likely to encourage efficiency and productivity gains in the market, through sending real pricing signals to clients.

1.2 The National Transport Commission

The NTC was established to assist Australian governments in achieving their jointly agreed objective set out in the Inter-governmental Agreement of:

“...improving transport productivity, efficiency, safety and environmental performance and regulatory efficiency in a uniform or nationally consistent manner.”

The role of the NTC is to lead transport regulatory reform nationally to meet the needs of transport users and the broader community for safe, efficient and sustainable land transport.

The NTC contributes to a vision of the best national transport outcomes for Australia. To achieve this, the NTC consults widely and works with industry and all levels of government to establish priority areas for transport regulatory reform.

The NTC is an independent body that works in close partnership with the road and rail transport sectors, governments, transport agencies, the Australian Local Government Association, regulators and police to develop practical land transport reforms.

In recent years, the focus of road transport reform has shifted toward regulatory innovations, addressing safety risks and transport efficiency improvements.

Some of the key reforms over recent years have included:

- Australian Road Rules;
- Australian Vehicle Standards Rules;

- Heavy Vehicle Driver Fatigue Model Legislation;
- Compliance and Enforcement Model Legislation;
- National Heavy Vehicle Accreditation Scheme (NHVAS); and
- National Heavy Vehicle Dimensions, Mass Limits and Registration Charges.

1.3 Safe payments project

The objectives of the Safe Payments Project are:

- to examine how current payment rates and methods for truck drivers affect road safety outcomes; and
- to identify and assess options for implementing a system of safe payments for both employees and owner-drivers, which recognise the special vulnerabilities of independent contractors in the transport industry.

This project will report on the effects of remuneration levels and payment methods on safety outcomes. It will not focus on identifying specific monetary values or amounts for driver remuneration. Rather, it will focus on legislative options for a framework for the establishment and maintenance of such monetary values or amounts.

This project will not address matters unrelated to safety considerations regarding remuneration or payment methods.

In undertaking this review, the NTC considered that the expression ‘safe payments’ best reflected the scope of the project. Many submissions and stakeholders referred to ‘safe rates’. The NTC believes that this does not accurately reflect the more holistic issue that the NTC should consider as they relate to the safety performance of drivers. Safe payments includes a consideration of :

- the quantum amount received by drivers (e.g. 36 cents per kilometre);
- the method by which that quantum is calculated (e.g. a per kilometre or per trip rate);
- other factors which affect the take-home figure received by drivers, including unpaid working time, late and non-payment of invoices and back loading; and
- conditions of engagement or employment necessary to implement a system of safe payments.

It is also important to note that, as requested, this project considers safe payments in respect of both employee drivers and owner-drivers. Employee drivers work in the same market as owner-drivers, often side-by-side for the same employer and client. As noted by Professor Michael Quinlan and the Hon Lance Wright QC “*essentially owner/drivers and employed drivers undertake the same task and often compete for the same jobs*”. Also, due to the structure of some transport awards, employee drivers can still be remunerated on a per kilometre or per trip rate, making them equally as vulnerable to a number of the economic pressures faced by owner-drivers. As such, it is important that they be jointly considered in this review.

The NTC also recognised in undertaking this review that owner-drivers have chosen to be independent contractors and operate as small businesses, as such, the NTC carefully

considered options presented to ensure that owner-drivers maintained their status as independent contractors. The NTC notes that no parties who provided written or oral submissions to this inquiry sought to have owner-drivers 'deemed' as employees.

1.3.1 NTC review process

On 25 July 2008 Ministers Albanese, Gillard and Emerson announced that the NTC would be assisted in the Safe Payments Project by two industry leading experts; the Hon Lance Wright QC, former president of the NSW Industrial Relations Commission, and Professor Michael Quinlan, an occupational health and safety (OHS) expert from the University of New South Wales.

The Hon Lance Wright QC and Professor Michael Quinlan have produced an independent report which was submitted to ATC in November 2008. The terms of reference are in Appendix 2.

In undertaking this review the NTC and the consultants sought input from industry, industry associations, unions, academics and government bodies. The NTC put out a request for written submissions on 5 August 2008. The NTC received around 20 written submissions in response to that request.²

The NTC, in conjunction with the Professor Michael Quinlan and the Hon Lance Wright QC, conducted a round of stakeholder meetings to gain further input into this project. Meetings were held in Brisbane, Sydney and Melbourne.³

² All submissions that were not requested to be kept confidential can be found at <http://www.ntc.gov.au/ViewPage.aspx?page=A02217507300280020>

³ Further details regarding the submissions received, and parties met with in consultations are available in Appendix 1.

2. SAFETY IN THE TRANSPORT INDUSTRY

The NTC was asked to review the link between payment rates and methods for truck drivers and safety outcomes in the road transport industry.

This section will consider:

- safety in the transport industry generally as compared with other industries;
- the history of improvements to road safety outcomes;
- the on-road factors which lead to poor safety outcomes; and
- whether payment methods and rates contribute to those on-road outcomes.

This section includes a review of previous literature on this issue, as well as conclusions from the new report undertaken by the Hon Lance Wright QC and Professor Michael Quinlan.

2.1 Safety outcomes in the transport industry

Truck drivers have a unique working environment. Their workplace is mobile and inevitably interacts with public spaces shared by other motorists, the general public, pedestrians and other commercial users. Because of this, safety in the road transport industry can have a broader impact on society than safety issues in other workplaces. When a truck is involved in a safety incident the general public is affected, either through direct involvement in the accident, in which case the other party statistically is likely to suffer worse consequences than the truck driver, and also through the impact on shared infrastructure and monetised and non-monetised community costs. Sharing this workspace with the public and other users can result in serious consequences. In this sense, the transport industry has a unique and higher burden than many other industries in relation to safety outcomes.

Around 330 people are killed each year in crashes involving a heavy vehicle. Around 16 per cent or 52 of those killed are the drivers of the heavy vehicle⁴.

The road transport sector is amongst the most dangerous industries to work in. The Australian Safety and Compensation Council reports the transport and storage industry has the largest number of compensated fatalities of any industry at 41 fatalities⁵. This is followed by the construction industry with 33 fatalities, manufacturing with 28 fatalities and property and business services industries with 27 fatalities⁶.

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

4 National Road Transport Commission (2003). National Heavy Vehicle Safety Strategy 2003 – 2010.

5 Australian Safety and Compensation Council (2008). Compendium of Workers' Compensation Statistics Australia 2005–06, June. Note: This data only covers employed road transport workers and not self-employed owner-drivers.

6 Ibid

2.2 History of transport safety improvements

Road crash deaths record keeping commenced in Australia in 1925. Over the period to now, road deaths increased rapidly until 1970, when they peaked, and then remained relatively stable throughout the 1970s⁷. Road deaths have decreased substantially since the 1970s⁸.

As Professor Michael Quinlan and the Hon Lance Wright QC noted:

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 kilometres travelled 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 occupational health and safety problems in the industry (Quinlan and Mayhew, 2006; oral submission of WorkSafe Victoria)

The 1 634 road crash deaths in 2003 are comparable with those in 1950, when there were 1 643 deaths; however, road crash current death *rates* are substantially lower⁹. In 1950, the death rate per 100 000 people was 20.1 and the death rate per 10 000 registered vehicles was 11.8¹⁰. In 2003, the death rate per 100 000 people was 8.2 and the death rate per 10 000 registered vehicles was 1.2¹¹. These gains are for all registered vehicles. When different vehicle types are examined it emerges that the safety gains for heavy freight vehicles are less than for all vehicles.

Following the introduction in 1969 of Australian Design Rules requiring seat belts in new vehicles and the law requiring compulsory seat belt wearing in 1970, the climb in road deaths leveled out and the number of deaths remained fairly stable for the remainder of the 1970s. By 1979 – a few years into the progressive implementation of random breath testing – road deaths began to fall, and the decline has, by and large, continued up to the current period.

Crashes involving heavy vehicles (trucks and buses) are estimated to cost around \$2 billion a year out of the total \$15 billion costs of road crashes¹². Around 330 people are killed each year in crashes involving a heavy vehicle¹³. The numbers of crashes resulting in a hospitalisation involving a heavy truck are about three times those involving a fatality and for buses about ten times those involving a fatality¹⁴.

While there were improvements in the early to mid 1990s where fatalities resulting from heavy vehicle crashes fell substantially, the numbers of fatalities have remained relatively

7 Australian Transport Safety Bureau

8 Ibid

9 Ibid

10 Ibid

11 Ibid

12 Ibid

13 Ibid

14 Ibid

static since 1996. Since then the freight task has increased substantially, as have the registrations of articulated vehicles.

From 2000-2004, one in five road deaths involved heavy vehicles, with speed and fatigue widely acknowledged as significant factors.

2.3 Contributing factors to on-road safety outcomes

There are a number of on-road factors that can contribute to the poor safety outcomes in the road transport industry. These factors include:

- fatigue;
- speeding;
- drug use;
- poor vehicle maintenance;
- inattention; and
- road or environmental conditions.

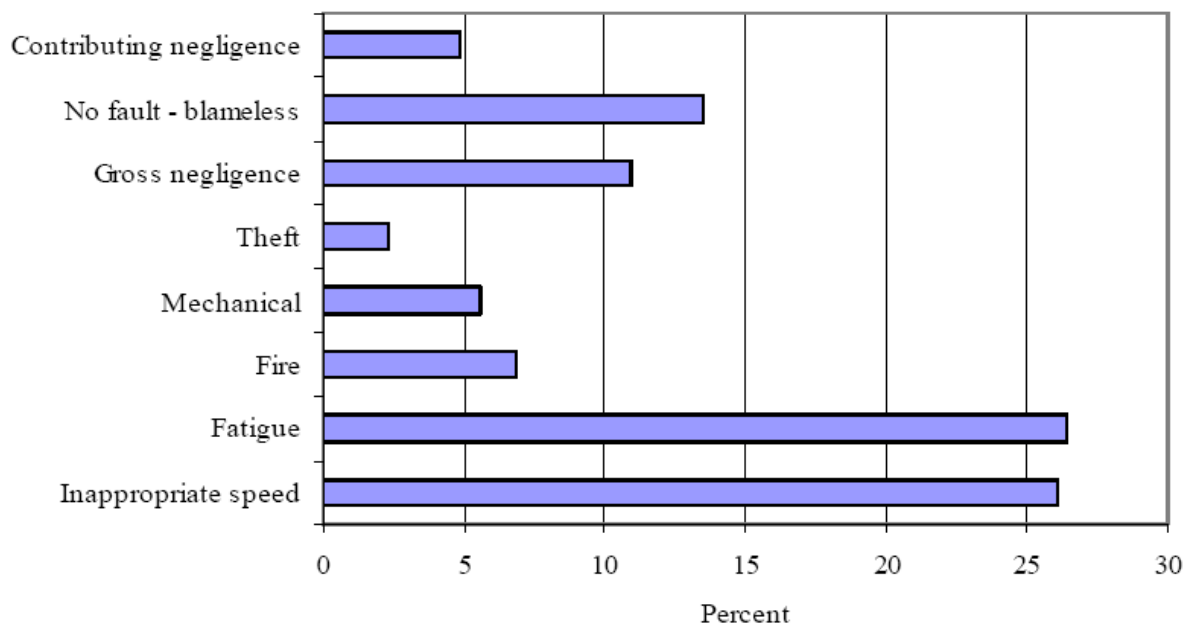


Figure 1. Accident cause from NTI claims between 2002-2003 and where the cost of the accident was greater than \$50,000¹⁵

2.3.1 Fatigue

Fatigue is an important health and safety issue for truck drivers and other road users alike. Fatigue is not unique to the transport industry. It occurs across all sectors of industry characterised by long or irregular working arrangements. Fatigue has been identified as

¹⁵ NTI (2005). The Truck Report, Volume 2, Number 1, Autumn 2005, National Transport Insurance.

presenting particular risks with regard to workers in the transport, forestry and logging, health and manufacturing industries¹⁶.

Surveys undertaken indicate that the experience of fatigue while driving is a regular part of the work experience of many heavy vehicle drivers. Over a 15-year period, around 76 to 78 per cent of truck drivers rate fatigue a major or substantial problem. Heavy vehicle driver fatigue is an important factor in crashes involving driver deaths and injuries and results in costs of around \$250 million a year for fatigue crashes where the heavy vehicle driver is deemed to be at fault¹⁷.

In the recent report 'Health Survey of the NSW Transport Industry', it was found that:

“On average NSW truck drivers work 62-hour per week which is much greater than the Australian full-time employee average of 43 hours per week. Alarming 65% state they work more than 60-hours per week and 6.5% more than 100-hours.”¹⁸

Fatigue as a problem in industry	1991	1998	2006 (Mainly-long haul group)
	%	%	%
Problem in industry			
A major problem	38	40	45
Substantial problem	40	36	31
A minor problem	20	21	20
Not at all a problem	2	3	3
Don't know	0	0	1

Figure 2. Fatigue as a problem in the industry

Fatigue is one of the most significant risk factors in terms of heavy vehicle safety. Contributing factors identified are driving long distances, overnight shifts, industry payment practices and historical work practices¹⁹.

Since the 1970s, state and territory road agencies have attempted to address the incidence of fatigue by limiting the amount of hours that drivers can drive on the road. More recently, the NTC developed the *National Heavy Vehicle Driver Fatigue Model Legislation* that came into force on 29 September 2008 in four jurisdictions (NSW, Victoria, Queensland and South Australia).

16 National Road Transport Commission (2003). National Heavy Vehicle Safety Strategy 2003 – 2010.

17 Ibid

18 Australian Rotary Health Research Fund, 'Health Survey of the NSW Transport Industry' 2008.

19 National Road Transport Commission (2003). National Heavy Vehicle Safety Strategy 2003 – 2010.

This new legislation creates an offence for a driver to drive while fatigued, sets a national maximum legal limit for driving hours, and imposes additional rest and continuous rest obligations on drivers.

The legislation also prohibits parties in the transport supply chain from making demands that they know or ought to know would cause a breach; enter into contracts that they know or ought to know would cause, encourage or give an incentive for a breach; coerce, induce or encourage breaches; or pass on false or misleading information that could cause a breach.

The fatigue reforms are likely to have an impact upon queuing times, with the new laws creating an obligation that after 30 minutes in a queue, a driver must be able to rest. This provision is likely to create some cultural change in relation to the behaviour of distribution centres, and will provide an important incentive to reduce queuing time.

2.3.2 Drug use

The use of stimulant drugs is a consequence of drivers trying to manage the impact of fatigue. It is primarily an issue with long haul drivers. There is evidence that a significant minority of heavy vehicle drivers use stimulants, and research indicates that stimulant users are more likely to be involved in crashes²⁰.

A recent survey indicated that one in six (18%) drivers considered that 'stay awake drugs' were helpful way to manage fatigue²¹.

2.3.3 Speeding

The NTC recently reported the prevalence of speeding of heavy vehicles. For highways with posted speed limits of 100 kilometres per hour or more this showed:

- for rigid trucks or buses: 15 to 20 per cent speeding, 5 to 8 per cent having an excess speed of 5 km/h or greater, and 2 per cent having an excess speed of 10 km/h or greater;
- for articulated trucks: approximately 40 per cent speeding, 10 to 15 per cent having an excess speed of 5 km/h or greater, and 2 per cent having an excess speed of 10 km/h or greater; and
- for B-doubles: 25 to 50 per cent speeding, 10 to 15 per cent having an excess speed of 5 km/h or greater, and 1 per cent having an excess speed of 10 km/h or greater²².

Even small changes in travel speed have a substantial impact on the risk of involvement in a serious crash. There are grounds to believe that the link between speed and safety outcomes may be even more critical for heavy vehicles than for light vehicles. Concern and action on heavy vehicle speeds has tended to focus on the small proportion of heavy vehicles that exceed posted speed limits by a substantial margin. These vehicles represent a significant safety hazard, but even speeding by a few kilometres per hour involves

20 National Road Transport Commission (2003). National Heavy Vehicle Safety Strategy 2003 – 2010.

21 National Transport Commission (2007). Reform Evaluation Survey on Driver Fatigue: A National Study of Heavy Vehicle Drivers. Report prepared by AMR Interactive.

22 National Transport Commission (2007). Speed Compliance of Heavy Vehicles: Final Proposal and Regulatory Impact Statement.

substantial additional risk. 'Low level' speeding is important to overall safety outcomes because it is far more common than extreme speeds.

Brooks found that a tiny proportion of articulated vehicles travelling more than 30 per cent over the limit represents a significant safety problem, quite out of proportion to their numbers (i.e. 29% of the total excess casualty risk is attributable to speeding by this vehicle class)²³. However, the much larger number of vehicles speeding within 10% of the limit represents – in aggregate – a larger safety problem (i.e. 41% of the total excess risk).

Since 1991, there has been a requirement for heavy vehicles over 12 tonnes to be fitted with a speed limiter. Speed limiters are designed to limit peak highway speeds to 100 km/h, and do not control speeding in urban areas or on rural roads with lower speed limits. There is evidence of tampering with speed limiters to deactivate them or set the limiting speed to a higher speed. The NTC estimates that tampering of speed-limited heavy vehicles is in the range of 10 to 30 per cent, and for some heavy vehicle classes it may be even higher²⁴.

The NTC has developed model legislation for heavy vehicle speeding compliance. This legislation creates a chain of responsibility for speed compliance, including a provision for parties to take all reasonable steps to ensure that their conduct does not cause the driver to exceed speed limits. The legislation also prohibits requests, agreements and contracts that may result in a driver exceeding the speed limit.

As such, this legislation should have an impact on the ability of hirers/consignors and other off-road parties to make unreasonable demands on drivers to meet deadlines.

2.3.4 Other factors

There are other factors that influence safety outcomes in the transport industry. These include wearing of seat belts by truck drivers, truck design and safer road design.

A serious contributor to truck driver deaths is the low rate of seat belt wearing in Australia. Studies have shown wearing rates as low as 10 per cent among heavy vehicle drivers that have died in a crash²⁵. The reason given by drivers for non-use relate to comfort, inconvenience and an incorrect belief that seat belts increase the risk of being killed or seriously injured in a crash.

The safety features incorporated within light vehicles have improved substantially over the last decade. The advent of technology such as air bags, anti-lock brakes and design features such as crumple zones have made a significant contribution to crash survival rates and have significantly reduced harm to the occupants. Design features of heavy vehicles can improve the safety of heavy vehicle drivers or other road users. These include integrated seat belts in driver seats, improved cabin strength and better under run protection which reduces the harm to other road users in the case of a crash involving a heavy vehicle. There are also advanced features currently available such as lane-departure warning devices and fatigue-monitoring devices.

23 Brooks, C. (2002). Speed and Heavy Vehicle Safety. Papers for the NRTC/ATSB National Heavy Vehicle Safety Seminar, Melbourne, October.

24 National Transport Commission (2007). Speed Compliance of Heavy Vehicles: Final Proposal and Regulatory Impact Statement.

25 National Road Transport Commission (2003). National Heavy Vehicle Safety Strategy 2003 – 2010.

Improving the safety of roads is the single most significant achievable factor in reducing road trauma. Further investment in safer roads is highly justified on both social and economic grounds. Road investment improves road safety through general road improvements, typically, 'new' (including rehabilitated) roads are safer than 'old' roads, as well as through treatment of black spots.

Well-directed investment in roads provides substantial savings in lives and serious injuries for all road users, and excellent cost benefits. General road improvements reduce fatalities by around two lives per annum per \$100 million invested with benefit cost ratios averaging 3.3. Black spot programs have been found to significantly reduce fatalities by over 20 lives per annum per \$100 million invested with very high benefit cost ratios of around 14. These benefits are cumulative over the life of the projects: for example, a black spot program of \$100m a year over five years will reduce the total fatality count by close to 100 lives. The recent assessment of the *Roads to Recovery* program has also demonstrated that substantial safety benefits have accrued from the investments made in that program.

These factors can improve overall road safety, but they are not directly related to payment systems.

2.4 How do payments contribute to unsafe behaviours?

There has been a considerable amount of research conducted over the past 30 years examining whether there is a link between methods and rates of driver remuneration and safety outcomes. The NTC commissioned two industry leading experts to confirm the existence of this link.

This section will:

- outline current data and research on payment systems and remuneration for drivers;
- present findings and conclusions reached prior to this review, including findings of academics, coronial inquiries and NTC research; and
- present the conclusion reached by the experts.

2.4.1 Remuneration and payment systems

While small businesses make up 60 per cent of the road transport industry, they only account for 11 per cent of the income earned in the industry²⁶. Furthermore, the profitability of the non-employing owner operator segment of the industry is very low. In 1999-2000 these businesses earned an average profit before tax of only \$20 637 per business. That was lower than the average earnings paid to employees in the lowest paid segment of the employed business group²⁷.

Note that this average profit is for the business that is not an employing business: the owner of the company (or the sole trader) has not paid themselves a wage for their own labour, but has just drawn profits. The sum of \$20 637 therefore represents all income for both labour and return on capital and profit²⁸.

26 National Road Transport Commission (1998). *Who Carries What Where*.

27 ACIL Tasman (2003). *Freight rates and Safety Performance in the Road Freight Industry*, A report prepared for the SCOT Working Group, April.

28 Report of Inquiry Owner Drivers and Forestry Contractors, Victoria, 2005

Not only is remuneration for owner-drivers low, drivers work long hours. For example, in the week prior to the November 2002 ABS Labour Force Survey employers working full time in their business worked an average of 58 hours per week²⁹. Therefore, owner-drivers work long hours for low remuneration.

Low remuneration is consistent with the road transport industry being a highly competitive industry. In this highly competitive market it is argued that owner-drivers are forced to accept work at the going market rate or no work at all.

There are a variety of payment methods for truck drivers:

- weekly wage;
- per trip;
- daily wage;
- per tonne;
- per hour;
- per kilometre; and
- per delivery.

A survey of over six hundred 600 truck drivers undertaken in 2006 showed:

- 17 per cent of those surveyed on hourly rates;
- 17 per cent on salaries; and
- 64 per cent on performance-based payment systems³⁰.

The survey also showed that 85 per cent of owner-drivers were on performance-based payment systems³¹, and 77 per cent of truck drivers working mainly long haul were on performance-based payment systems³².

The payment system also varied with the usual vehicle driven. Sixty nine per cent of drivers of articulated trucks and 70 per cent of drivers of B-doubles were on performance-based payment systems³³.

29 ACIL Tasman (2003). Freight rates and Safety Performance in the Road Freight Industry, A report prepared for the SCOT Working Group, April.

30 National Transport Commission (2007). A Survey of Attitudes to Compliance with Road Safety Requirements: A National Study. Report prepared by AMR Interactive, May.

31 Ibid.

32 Ibid

33 Ibid

Payment	Total (n=613) %	DRIVER TYPE			LONG HAUL TRIPS			COMPANY TRUCKS (EMPLOYEES)				USUAL VEHICLE			
		Employee (n=432) Owner driver (n=171) %	0-29% (n=130) 30-89% (n=103) 90-100% (n=379) %	1-4 (n=113) 5-10 (n=97) 11-50 (n=136) >50 (n=83) %	Rigid (n=70) Articulated (n=320) B-double (n=177) Road Train (n=46) %										
Payment method															
Hourly	17	21	7	46	22	5	19	25	14	28	40	15	7	29	
Daily/Weekly/ Salary	17	20	8	16	21	16	23	22	17	20	20	14	18	22	
Per trip/load/km	64	56	85	37	50	77	55	49	67	47	40	69	70	44	
Mixed	3	3	1	2	6	2	4	4	2	5	0	2	5	4	
Award rate															
At the award rate	35	37	29	28	28	39	38	32	39	36	31	33	40	28	
Less than the award rate	9	5	19	15	7	8	3	7	6	5	9	10	8	9	
More than the award rate	42	49	26	42	50	40	50	55	45	51	50	41	38	52	
Don't know	14	9	26	15	16	13	10	6	10	8	10	15	14	11	
Contract															
Negotiate	14	6	34	11	19	14	8	4	7	5	16	15	9	22	
Contract - <u>all</u> loads	24	25	24	23	24	25	31	19	26	19	19	24	29	11	
Contract - <u>some</u> loads	8	9	6	3	9	10	10	7	13	6	3	8	11	11	
Contract - <u>no</u> loads	53	59	35	63	47	51	50	69	54	69	61	52	50	57	
Payment for non- driving work															
Yes - at same rate	40	44	28	55	50	32	48	48	37	46	67	34	32	63	
Yes - not same rate	10	12	5	5	8	12	6	11	14	16	3	8	15	9	
Yes - don't know if at same rate	1	1	1	1	2	1	2	2	1	0	0	2	1	0	
No	45	38	62	37	37	50	39	35	43	34	27	50	47	28	
Don't know	5	5	4	3	3	6	5	3	5	5	3	5	5	0	

Bolded: Higher result, with a statistically significant difference between groups (p<.05).

Figure 3. Payment profiles, by driver groupings

Submissions received from owner-drivers, the Transport Workers' Union and industry associations also highlighted a number of other issues that affect the payment systems for owner-drivers.

Unpaid queuing time, or demurrage, was highlighted as a major issue in the transport industry during the fatigue reforms. Major clients such as Coles and Woolworths acknowledge that queuing is an issue at distribution centres, and indicated that they are taking steps to manage queuing time in line with new obligations under the *Heavy Vehicle (Driver Fatigue) Model Legislation*.

It was also highlighted that many drivers are not paid for time spent loading and unloading their vehicles when making or picking up deliveries.

Over a week, the time spent in the truck, while not earning any money, can have a significant effect on the drivers' earnings encouraging the drivers to 'make up for' the lost time by trying to fit in that extra trip.

The issue of 'back loading' was also highlighted as a significant problem for owner-drivers. Where drivers are paid significantly less on the 'back leg' of a trip e.g. Melbourne to Brisbane at one rate, Brisbane to Melbourne at a considerably lower rate.

2.4.2 Previous literature on payments/safety link

There has been a considerable amount of work previously undertaken to identify whether there is a link between payment methods and rates and safety outcomes in the transport industry. Some of the previous literature, coronial findings and other data are summarised below.

Professor Ann Williamson found that drivers compensated through a 'payment-by-results' method were twice as likely to report being fatigued on at least half of their trips than drivers who are paid an hourly rate³⁴.

Professor Williamson argues that long distance truck drivers use stimulant drugs to overcome the fatigue caused by working long hours. In her submission, and in meeting with the NTC and Professor Michael Quinlan and the Hon Lance Wright QC, she confirmed her view that drivers work these long hours due to payment methods and remuneration.

The evidence Professor Williamson cites to support her argument is two national surveys of long distance truck drivers in Australia. These surveys were conducted in 1991 and 1998. These surveys show that drivers who were paid on a payment by results or piece-rate form of payment, e.g. by trip or load, were two to three times more likely to report taking stimulants while driving as drivers paid on a time basis. A third survey undertaken in NSW in 2005 found that stimulant drug use is a continuing characteristic of long distance truck drivers³⁵.

Williamson et al in their 2001 study of a sample of Australian drivers found that 46.6 per cent of independent owner-drivers were more likely to report the need to do more trips to earn a living as the reason for breaking road rules, while only 25.6 per cent of large company drivers were likely to do the same. These differences are statistically significant at the 95 per cent confidence level³⁶.

34 Williamson, A., Feyer, A., Friswell, R. and Sadural, S. (2001). Driver Fatigue: A Survey of Professional Long Distance Heavy Vehicle Drivers in Australia, report prepared for the National Road Transport Commission.

35 Ibid

36 Ibid

There are a number of international studies that identify a link between size of firm, freight rates and safety performance. For example:

- Belzer (2002) concluded that there is a strong correlation between driver pay and safety outcomes in the United States and that higher pay rates are associated with greater driver safety³⁷;
- A US study by Corsi, Keane and Zacharia (2002) that firms exhibit characteristics that implied better driver safety performance tend to have higher gross revenues³⁸; and
- Moses and Savage (1994), using sample data from 75 500 trucking firms in the US, also found that accident rates decline with firm size and that very large firms have a crash rate about a third of the smallest firms³⁹.

Hensher, using regression analysis on data from a 1990 survey of Australian long distance drivers, found strong evidence suggesting that owner-driver compensation and company freight rates have a significant influence on the propensity to speed⁴⁰. However, the proportions in Hensher's survey data did not demonstrate a clear relationship between remuneration and crash involvement.

A quarter of drivers reported that they frequently experience pressure to drive over the speed limit to meet deadlines on at least some trips. The breakdown showed:

- owner-drivers – pressure to speed to meet deadlines – 21 per cent of trips;
- owner – for company – 17 per cent of trips; and
- company driver – 28 per cent of trips⁴¹.

'Pressure to make deadlines' was by far the most common reason raised in the survey as to why truck drivers speed, by two-thirds of drivers⁴². Twenty four per cent of drivers in the survey reported that they were speeding on at least half of their trips even though the vehicle was supposed to be speed limited⁴³.

Several submissions received by the NTC presented three significant coroners' investigations into road deaths in Australia to support the existence of the payments/safety link. In their finding, the coroners concluded that payment systems provide an incentive to break the law.

In 1989, the NSW Coroner made the following statement in an investigation into a fatal crash near Cowper:

"The driver of the semi trailer... worked under a system which was obviously designed to reward him for extended periods of driving. He was paid a fee per trip plus a fee per kilometre travelled. The more trips he fitted in, and the

37 Belzer, M, Rodriguez, D, Sedo.S.A (2002), 'Paying for Safety: An Economic Analysis of the Effect of Compensation on Truck Driver Safety.

38 Corsi, T, Barnard, R, & Gibney, J (2002), Motor Carrier Industry Profile: Linkages Between Financial and Safety Performance Among Carriers in

Major Industry Segments, Paper prepared for the Federal Motor Carrier Safety Administration, Analysis Division, U.S Department of Transportation.

39 Moses, L. N. and I. Savage (1994). The Effect of Firm Characteristics on Truck Accidents. *Accident, Analysis and Prevention* 26(2): 173-179.

40 Hensher, D; Battellino, H; Gee, J; and Daniels, R; (1991) 'Long Distance Truck Drivers On-Road Performance and Economic Reward'

41 National Transport Commission (2006a). Speed Behaviours of Heavy Vehicle Drivers – A National Study, report prepared by AMR Interactive, June.

42 Ibid

43 Ibid

*further he drove each day, the more he was paid. Such a method of remuneration is decidedly unhealthy.*⁴⁴

In 1999 the South Australian Coroner, reporting on a fatal crash on the Blanchetown Road recommended the following be investigated:

*“The extent to which the current system, whereby drivers are paid by the trip, or by the kilometre, represents an incentive to break the law (the evidence from this inquest certainly proves it does), and whether it is possible to design a different system which provides drivers with more incentive to comply with the law, and with safe work practices.”*⁴⁵

The NSW Industrial Commission made a similar conclusion. In dealing with an application for the making of an award by the NSW Industrial Commission for ‘mutual responsibility’ in the road freight transport industry in that state, a Full Bench concluded:

*“As long as driver payments are based on a rate per kilometre there will always be an incentive to maximize the hours they drive, not because they are greedy but simply to earn a decent wage.”*⁴⁶

and:

*“We consider that the evidence in the proceedings established that there is a direct link between methods of payment and/or rates of pay and safety outcomes.”*⁴⁷

The Quinlan Report of Inquiry into the Longhaul Trucking Industry concluded:

*“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.”*⁴⁸

44 NSW State Coroner, Glebe Coroners Court, 20 April 1990, p. 27, quoted in House of Representatives Standing Committee on Communications, Transport and the Arts, BEYOND THE MIDNIGHT OIL: Managing Fatigue in Transport, Parliament of Australia, Canberra, 2000, p.96

45 BEYOND THE MIDNIGHT Oil p. 96

46 Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No.2), [2006] NSWIRComm 328, paragraph 33.

47 Ibid

48 Quinlan M., REPORT OF INQUIRY INTO SAFETY IN THE LONG HAUL TRUCKING INDUSTRY, Motor Accidents Authority of NSW, Sydney, 2001

In *Campbell v Hitchcock*, His Honour Justice Walton stated:

“Finally the evidence as to the drivers’ payments structure was not disputed. They were not paid for washing the truck, queuing to load or to unload, nor for other necessary work activities such as filling up with fuel, inspecting the truck, making telephone calls or completing paperwork. They were paid a fixed rate for each kilometre driven and a predetermined sum for loading and unloading each load, regardless of how long it actually took. The system provided a clear incentive for drivers to maximize kilometres (this was the only way to increase income) thereby extending driving hours; but little scope for reducing the time taken to perform other necessary work for which they were not paid.”⁴⁹

The Transport Workers’ Union submission contained statements from 53 truck drivers about their views. Some of these statements discussed payments systems and safety:

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

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

In the past I have worked well past a ‘safe’ point because I simply needed the money.”

Bruce Butler, Transport Workers’ Union 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 rates for previous employers. In order to earn a decent level of income I had to do numerous long runs and on most trips I felt unable to take a rest break because I felt pressured to continue driving in order to meet the strict deadlines to get back.

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

Ian Buckingham, Transport Workers’ Union submission⁵⁰

The NTC received several submissions that argued that there is a link between rates and safety outcomes in the heavy vehicle industry is a weak link. One of those submissions argued that:

“The ATA considers that the base premise of the “Safe Rates” proposal, that there is a strong and inextricable link between rates of pay and Heavy Vehicle road safety outcomes, whilst understandable, is far from being a substantiated fact. We accept that the Full Bench of the NSW Industrial Relations Commission came to a view in 2006 that there is such a link. We do not agree, however, that there is or has been, a clear, demonstrable

49 Inspector Campbell v James Gordon Hitchcock, [2004] NSWIRComm87, para. 1.

50 Submission to Safe Payments inquiry, Transport Workers’ Union

and significant link between rates of pay and road safety outcomes that would warrant the establishment of a “Safe Rates” scheme such as that under consideration by the Review.”⁵¹

None of the submissions that argued against a link, or that the link was weak, presented evidence to refute the findings and decisions made in any of the coronial inquiries or other reports quoted above.

Although considerable work has been undertaken to this point to demonstrate the link between safety outcomes and truck driver pay rates or methods, the new report by Professor Michael Quinlan and the Hon Lance Wright QC draws all this information together, and, with the addition of new evidence from stakeholders, conclusively determines the existence of this link.

2.5 Quinlan and Wright conclusion

The Hon Lance Wright QC and Professor Michael Quinlan in their report concluded:

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 Occupational Health and Safety 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 Transport Workers Union).

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).

⁵¹ Submission to Safe Payments inquiry, ATA pg 2

2.6 NTC conclusion on the existence of the link

The conclusion of the Hon Lance Wright QC and Professor Michael Quinlan, together with the previous work undertaken in this area confirms that there is a link between how and how much truck drivers are paid and poor safety outcomes. The NTC believes that there is sufficient evidence which points to a link between rates and methods of payments, and a variety of on-road behaviours which are acknowledged contributors to truck crashes.

The NTC considers that this is a tripartite link:

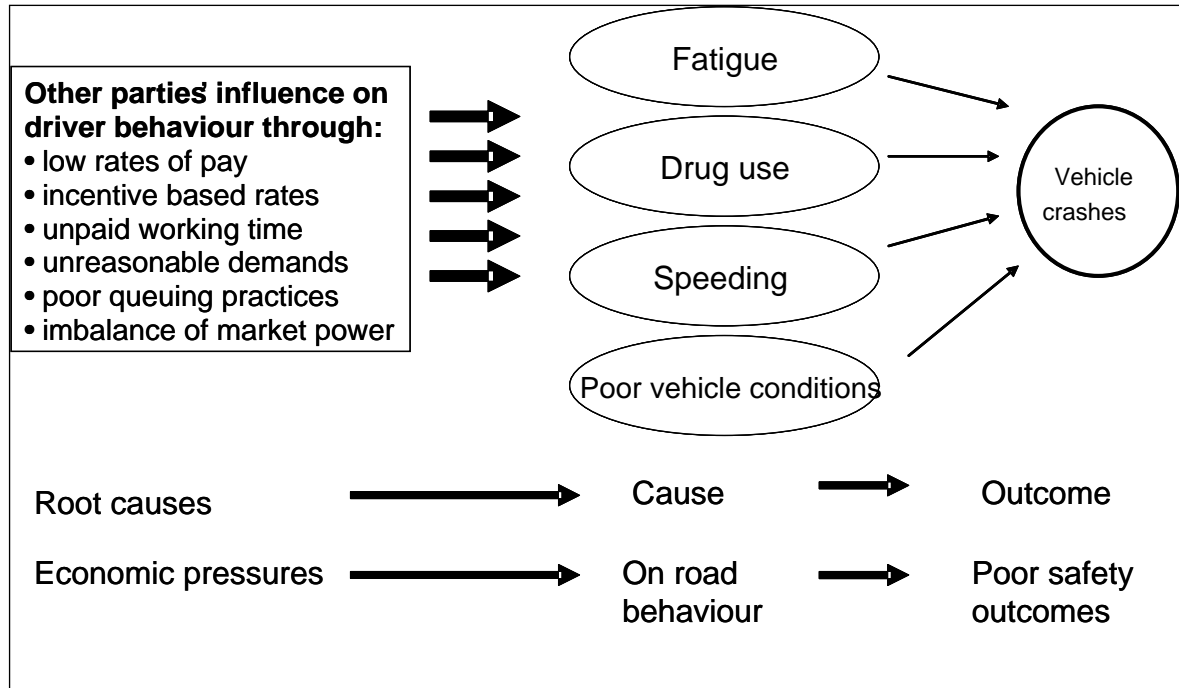


Figure 4. Link between safety outcomes and economic pressures

The clear evidential links shown recognise that those on-road behaviours, in particular driving while fatigued, under the influence of stimulants or driving in excess of speed limits are factors that cause vehicle crashes. The NTC acknowledges that vehicle crashes are usually a result of multiple factors.

As noted by Professor Michael Quinlan and the Hon Lance Wright QC in their report, 'safety outcomes' in this discussion should not be limited to a simple analysis of crash data, but rather, consider the broader occupational health and safety outcomes and implications that economic pressures on drivers may create or encourage.

The evidence presented by Professor Michael Quinlan, the Hon Lance Wright QC, Professor Ann Williamson, Professor Michael Belzer and others demonstrates that many drivers engage in those on-road behaviours because of the economic pressures.

While it cannot be shown that low rates of pay and methods of payments *directly* cause truck crashes, a point argued by several submissions, it can be shown that low rates of pay and performance based payment systems do create an incentive for, or encourage, other on-road behaviours which lead to poor safety outcomes.

In the 2000 House of Representatives inquiry *Beyond the Midnight Oil* it was stated that:

“not only are the three causes of fatigue (long hours of work, night work and the lack of restorative sleep) ever present in the transport industry, they are exacerbated by other factors common in the industry, such as:

- *insufficient staff numbers;*
- *poor rostering practices;*
- *poor work scheduling, particularly poor scheduling of pick-up and delivery times for truck drivers and poor estimating of ship times of arrival for maritime pilots;*
- *inefficient organisation at loading and unloading points resulting in lengthy queuing, particularly for truck drivers;*
- *methods and rates of pay that induce employees to work longer hours;*
- *commercial pressures on companies that are passed on to employees;”*⁵²

This report helped establish the case for the new national *Heavy Vehicle (Driver Fatigue) Regulations* that came into force in four jurisdictions on 29 September 2008. This reform will go a long way to helping improve safety outcomes in the industry, and the NTC notes the strong support expressed for these new regulations in a number of submissions received.

The new fatigue laws, and the existing speeding compliance model legislation address some of the underlying causes for the on-road behaviour. Both sets of laws create obligations on parties which limit the demands and requests that can be made on drivers that would lead to a breach of speeding or fatigue laws.

These obligations may address two of the economic pressures which drivers face that encourage or create an incentive for drivers to break the law. This creates an important chain of responsibility obligation on the chain parties interacting with those drivers. These NTC reforms, and previous NRTC reforms and others that create chain of responsibility obligations have been important in changing the culture of the industry, so that other parties in the chain began to recognise, and have to comply with, obligations relating to how their actions affected the on-road safety of drivers.

ATA describes the fatigue reforms as the “*most far-reaching and comprehensive heavy vehicle road reform for decades...*” and “*the principal and most appropriate and effective response to the past road safety issues within the trucking industry.*”

In relation to these comments Professor Quinlan and the Hon Lance Wright QC noted:

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 issues.

...

This approach risks a focus on treating the symptoms rather than the underlying causes.

...

While it may be argued that the new fatigue management regime will lead to changes in freight rates to accommodate new work practices this is seen as a brave assumption in the context of the past history of the industry.

However, further reforms are needed in relation to low remuneration and inappropriate payment systems which, as the above graph illustrates, are antecedent factors to fatigue and speeding. For example in relation to issues surrounding unpaid queuing time, although the new fatigue laws will provide a significant incentive to improve queuing systems, until there is a pricing signal which negatively impacts on those parties allowing the systemic queues to exist, the system is unlikely to be effectively addressed. A system of 'safe payments' to address the safety link would be an important step in further requiring those up the chain of responsibility to address those incentive factors.

The NTC believes that until the root causes of unsafe driving practices are addressed, addressing the on-road behaviours will never sufficiently resolve the safety problem.

The NTC endorses the conclusion reached by Professor Michael Quinlan and the Hon Lance Wright QC as to the confirmation of the existence of a link between economic pressures faced by drivers and the unsafe on-road behaviours that lead to poor safety outcomes.

3. THE TRANSPORT MARKET

Chapter 2 discussed the safety link between rates and methods of payment and safety outcomes, concluding that there was a link which needs to be addressed through regulation. However, it is important in developing a regulatory response to safe payments to consider why drivers are accepting rates and payment methods which do not allow them to perform their work safely and legally.

3.1 Australia's freight task

The trucking industry is a vital component of Australia's economy. This industry moves goods from our factories, farm gates and mines across the country, and provides a link via our ports to an international market place.

Road transport performs approximately 75 per cent of the non-bulk freight task⁵³ and employed 232 400 people in 2007⁵⁴. There was a total of 517 000 trucks registered in Australia as at 31 March 2006⁵⁵.

Australia's freight task is estimated to double by the year 2020⁵⁶, which means that the road transport industry needs to grow to manage that task.

3.2 Transport market

The road transport market is a highly competitive market, in that a limited number of operators compete for a defined amount of work. However, in direct contrast to other markets where that situation would lead to drivers being able to command higher rates due to the lack of availability of other services, the transport market operates in the opposite way, in which competition leads rates to fall rather than rise.

There are several factors that contribute to drivers being 'price takers' rather than 'price setters':

- length of the sub-contracting chain;
- prevalence of 'undercutting' to win work;
- high capital costs of entering the industry;
- tendering processes that have little or no regard for the safety of the transport task;
- limited negotiating ability of drivers;
- small number of large clients; and
- presence of a few large dominant transport companies with the ability to make efficiency and price gains through purchasing power.

During the stakeholder consultations many owner-drivers talked about trying to set a rate with a client that would cover costs and allow the work to be performed legally and safely,

53 <http://www.bitre.gov.au/publications/76/Files/R112.pdf>

54 http://www.bitre.gov.au/publications/39/Files/ATS_2008.pdf

55 http://www.bitre.gov.au/publications/39/Files/ATS_2008.pdf

56 http://www.austlogistics.com.au/index.php?option=com_content&task=view&id=115&Itemid=234

but that the ‘guy around the corner’ would often come in and undercut that price in order to get that job. They pointed out that that guy might be out of business in a year, but that is a year where drivers either forgo the work, or compete at his level thus forcing prices in the market down.

The highly competitive nature of the transport industry, and the commercial pressures placed on drivers, are widely acknowledged. A selection of sources are extracted below.

As noted in the ATA submission:

“Economically powerful industry clients have the commercial influence to determine the price of transport services and, in many circumstances, key conditions relating to the performance of transport work. Successive instances of contracting out to small fleet operators and owner-drivers can exacerbate this phenomenon, particularly in the long distance sector.”⁵⁷

In the Mutual Responsibility for Road Safety Case, the Full Bench of the Industrial Relations Commission of New South Wales noted:

“(b) it is not uncommon for transport companies, which themselves would not engage in conduct in breach of industrial instruments, to subcontract work of marginal viability to other transport companies, which are prepared to breach industrial instruments in order to make a profit;

(c) labour costs are the most significant component of transport costs and there is an inherent incentive to achieve savings through non-compliance with industrial instruments or through the engagement of owner drivers or small fleet owners who are prepared to do what it takes to make the work profitable;

...

(g) commercial pressures, most notably from major retailers, have intensified, resulting in the major transport companies tendering for contracts at very low rates and leading to the result that they subcontract out any work that they cannot perform profitably. Commercial pressures exercised by major retailers are in the form of directed delivery schedules placing stress, and at times, unrealistic expectations on the driver actually performing the work;

...

(i) the transport industry is characterised by chains of successive contracting out of work with commercial power decreasing with each successive step; and

(j) those higher up the chain often contract out work for the express reason of transferring responsibility for the safe performance of work to others.”⁵⁸

⁵⁷ ATA submission, pg 8

⁵⁸ Mutual Responsibility Case

The *Beyond the Midnight Oil* inquiry also found that:

“There is little doubt that increased competition in the Australian transport industry has resulted in lower transport costs for consumers. But there is a growing body of evidence indicating that we are fast approaching the point where best practice efficiency is jeopardising best practice is safety.”

and:

*“risks are compounded by the commercial imperative on transport operators to maximise the return on their investment, the demands of customers and by the pressure this places on transport workers to undertake longer hours with fewer rest breaks”.*⁵⁹

The submission from the Transport Workers’ Union noted that:

*“To this end, the power accrued by the mass amount of transport movements creates a hyper-competitive market for transport services. Major transport users no longer maintain their own fleets. They contract out the transport function on a cost-competitive basis. The intention of this model is to achieve cost savings by taking advantage of the competitive market. The effect has been the development of extreme competition in the industry; where low prices are the primary determinant of securing enough work to continue to operate.”*⁶⁰

and

*“As a consequence of power, drivers, who are obviously the very last link in the transport supply chain, in that they perform the work, have the weakest concentration of market power and must often take the wage/rate given to them or fail to receive work.”*⁶¹

The ATA submission argued that:

*“At the end of the day the only realistic answer to a client attempting to impose a rate below the driver’s cost in providing the service on any journey must be to decline that job.”*⁶²

However, as pointed out in the personal submission by Mr Frank Black:

*“Usually any request made for greater payment is met by a response of “take it or leave it we can get someone else to do the job.” There is an unspoken pressure operators/drivers have put on them. (the thought that they must meet their commitments i.e. house or truck payments etc.)”*⁶³ [sic]

During stakeholder consultations several owner-drivers acknowledged that the pressure was to ‘keep the wheels moving’ because accepting a low rate was still getting some money, even though it was not necessarily enough to cover costs.

One further factor which contributes to the low market power faced by owner-drivers is the high capital costs of entry into this industry. Owner-drivers take on significant amounts of

59 *Beyond the Midnight Oil*, pg 1

60 TWU submission pg 14

61 TWU submission pg 16

62 ATA submission pg 7

63 Submission to Safe Payments Inquiry, Mr Frank Black

debt, often mortgaging their homes or other assets to purchase a vehicle, or enter into leasing arrangements. These costs create enormous pressure for drivers to keep the wheels moving to just cover these costs, even if jobs do not allow them to earn a profit or cover all costs.

As was noted in a hearing of the Senate Standing Committee on Employment, Workplace Relations and Education report 'Workforce challenges in the transport industry' by Queensland Trucking Association representative, Mr Tony Squires:

*"They go in up to here, purchase trucks and trailers that they really can't afford, and the only way they can keep those things running is to keep them working."*⁶⁴

In their report Professor Michael Quinlan and the Hon Lance Wright QC stated:

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.

These commercial and market pressures that drivers face link with closely with the issue of 'safe payments'. Drivers are at the very bottom of the contracting chain, and have little commercial ability to demand rates which would enable them to perform their work safely and legally.

The operation of the transport market affects drivers abilities to set wage rates and payment methods that would allow them to perform their work legally and safely. Addressing drivers' lack of bargaining power is critical to establishing a system of safe payments.

64 Senate Standing Committee on Employment, Workplace Relations and Education, 'Workforce challenges in the transport industry', para 5.4

4. GAPS IN CURRENT REGULATORY SYSTEMS

In relation to the objectives of this review, being to make recommendations for the establishment of a system of safe payments for owner-drivers and employees, Professor Michael Quinlan and the Hon Lance Wright QC identified the following gaps in the current regulatory system:

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.

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

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

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

...

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

...

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.

A summary of the current legislative frameworks can be found in Appendix 3.

4.1 Textile, clothing and footwear outworkers

In their submission SafeWork SA noted recent reforms into the textile clothing and footwear outworkers.

The textile clothing and footwear industry is in many ways analogous to the transport industry. Like transport, the textile, clothing and footwear industry can be characterised as:

- utilising a casual/contract workforce;
- using incentive or performance based payment systems (piece rate);
- involving long working hours;
- having work undertaken not in a ‘workplace’ but often from a remote location such as a person’s home; and
- having poor safety outcomes and a ‘sweatshop’ image.

In particular, it is the length of sub-contracting chains which links the industries closely. Like transport, outworkers are often at the bottom of a contracting chain which can include three to four other parties. The length of this chain means that the parties at the top of the chain, usually retailers or large clothing manufacturers, are able to distance themselves from the other parties in the chain, and the manner in which those parties at the bottom of the chain are engaged.

The problems associated with the prevalence of outworkers in the clothing, textile and footwear industry have been extensively addressed in federal, state and international reports.

In a submission titled ‘Rationalisation of Award Wage & Classification Structures Discussion Paper’ (February 2006) the Textile, Clothing and Footwear Union of Australia noted:

“In clothing, the industry is structured on a vertical integration model of production with very long subcontracting chains ranging from retailer/fashion house to main contractor to sub contractor (s), possibly to another contractor and then finally to the outworker performing the bulk of the work at their home premises. This is not an aberrant structure but the dominant framework of clothing manufacture and production. At the top of the chain it is common for fashion houses to produce little work in house but still employ any of the following of designers, production assistants, sample machinists/repairers and pattern makers. That is, whilst the modern fashion houses still manufacture and is still covered by the Award, it often contracts out some or most or all of that manufacturing, and performs other work in-house, in a manner which may not be considered ‘traditional’, due to the nature of these roles and the relationship of the fashion house to contractors and/or outworkers in their

garments. As previously discussed, Part 9 of the Clothing Trades Award 1999 was specifically crafted to address the modern clothing production model to ensure Award compliance at each level in the contracting chain.”

Textile, clothing and footwear outworkers are largely covered by the *Clothing Trades Award 1999*. Section 576K of the *Workplace Relations Act 1996*, provides the power for modern awards relating to these outworkers to include terms which bind employers, but also which bind ‘eligible entities’ as defined in section 564 of the Act. The capacity to bind ‘eligible entities’ was created in recognition of the contracting chains which exist in this industry, and that the Award obligations in this industry should not be limited to those entities which directly employ workers.

The concept of ‘eligible entities’ used to regulate textile, clothing and footwear outworkers could potentially be used in addressing the similar dynamics in the transport supply chain.

5. OPTIONS FOR REGULATORY REFORM

The NTC was requested to ‘*recommend and assess options for implementing a system of safe payments for both employees and owner-drivers*’. This section will:

- establish the need for regulatory intervention;
- outline four possible options for regulatory intervention; and
- evaluate and recommend a preferred option to implement a system of safe payments.

5.1 Should government intervene?

The need for government intervention should be decided on two issues:

- the establishment of a relationship between payment rates and methods and safety outcomes; and
- whether regulatory intervention would have the effect of improving safety outcomes.

The NTC, as previously stated in Chapter 2, considers there is a relationship between the on-road performance of truck drivers, and the method and quantum of driver remuneration has been established.

In particular Professor Michael Quinlan and the Hon Lance Wright QC stated:

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.

...

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).

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.

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.

The second issue is whether it can be established that a system of safe payments would have the effect of improving safety outcomes. Some submissions received by the NTC argued that it cannot be shown that paying drivers more money, or altering the structure of those payments would in fact alter the on-road performance.

It is important to again establish that the NTC considers safe payments to address issues more broadly than simply the quantum rate drivers received, but also how driver pay is calculated, for example, per trip, per kilometre or by the hour, and other factors that contribute to the economic pressures faced by drivers, including unpaid loading and unloading time, or unpaid queuing time.

There is Australian and international research that suggests that increases in rates and methods of pay do have the effect of improving safety outcomes.

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

*“The point estimates indicate that if mileage rate were to increase to \$0.37 per mile, drivers would reduce their weekly hours to be in compliance with current regulations. At this rate, drivers are being compensated at a rate sufficient for them to be able to satisfy their income requirements without being induced to work in excess of mandated law.”*⁶⁵

and:

“Every 10% more that drivers earn in pay rate is associated with an 18.7% lower probability of crash, and for every 10% paid days off the probability of driver crashes declines 6.3%”⁶⁶

The submission from the Transport Workers’ Union quoted another recent study that *“demonstrated that higher rates of pay for truck drivers lead to lower frequency of accidents”⁶⁷*. That report states that:

“the pay increase influences safety by modifying the behaviour of current drivers. The data indicate that drivers had better crash records after the pay increase...”⁶⁸

Some stakeholders argued that the concept of ‘target earnings’, being a point at which people decide they are earning enough and do not need to work any more is false. They argued that even if a system of safe payments was put in place, there was no reason to assume that drivers would not take any changed rate or method of payment and continue to engage in the unsafe on-road behaviours simply to earn more.

The NTC acknowledges that this is a valid concern, and acknowledges that some drivers may choose to do that. However, during the stakeholder consultations a number of drivers pointed out the serious health and other consequences that working long hours and use of illegal stimulants has taken on them. They stated that if they had a choice, no one would choose to work those hours, and subject their bodies to the potentially devastating effects of long term stimulant use if they did not have to.

The NTC does not believe that the potential for a minority to continue to engage in unsafe on-road behaviours, despite having a system of safe payments, is a sufficient reason to not attempt to improve the safety outcomes in the industry through such a framework.

Some stakeholders also raised the issue of a safe payments system having the effect of increasing freight rates and discouraging productivity in the industry. In her submission Professor Ann Williamson stated:

“Implementing safe rates will almost certainly have the effect of increasing freight charges. On the other hand, safe payments 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 only focus 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 the safety and efficiency of the long distance road transport industry.”⁶⁹

66 Appendix 1 TWU report

67 TWU submission – pg 6

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

69 Professor Ann Williamson submission, pg 4

In their report Professor Michael Quinlan and the Hon Lance Wright QC noted:

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. ... 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).

The transport industry also has a widely acknowledged skills and labour shortage. In an inquiry in 2007, the Senate Standing Committee on Employment, Workplace Relations and Education in particular noted the many challenges faced by transport operators in finding, training and retaining qualified staff. Among the many factors noted as a cause for this was the low levels of remuneration, long working hours and poor working conditions faced by drivers in the industry.

One of the recommendations of that report was:

“The committee recommends that employers in all sectors of the transport and logistics industry give priority to improving working conditions, including minimum safe rates of pay and paid waiting time, as well as offering shorter or more flexible shifts and any other options as appropriate, as a means of retaining workers and encouraging current licence holders to return to the industry.”⁷⁰

The implementation of safe payments could have an important flow-on effect to the skills and labour shortage in the transport industry. Any improvement in attracting drivers, and being able to retain drivers would inevitably have an important flow-on effect to improved levels of productivity.

In their report Professor Michael Quinlan and the Hon Lance Wright QC noted:

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 occupational health and safety outcomes in the longer term. It is an important issue that warrants consideration.

⁷⁰ Senate Standing Committee on Employment, Workplace Relations and Education, pg 73

...

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 affect multiple companies if not the industry more generally (See Short et al, 2007:14)

The NTC believes that the evidence from Professor Michael Belzer, and the evidence of the contribution of methods and rates of pay to safety, does indicate that a system of safe payments would likely have the effect of improving safety outcomes within the heavy vehicle industry.

The NTC also believes that any changes to current industry practices such as unpaid queuing time, will provide an important pricing signal to increase efficiency in the transport market. Currently, costs for unpaid working time such as time spent queuing is a cost which is internalised by drivers, creating no incentive for other parties to address the efficiency issues which lead to that practice. Requiring that the real cost of this time be passed on in the cost of moving those goods, there is likely to be significant efficiency gains.

The NTC, federal and state governments have undertaken significant work over the past 20 years to improve safety outcomes in the road transport industry. There is little doubt there has been considerable and very important improvement. However, the rates of improvement will taper off unless those factors that cause, create or encourage poor on-road safety practices are addressed in the industry. The NTC supports the conclusion reached by Professor Michael Quinlan and the Hon Lance Wright QC that a system of safe payments would be an important step in further improving levels of safety in the industry.

5.2 Options for regulation

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

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

Professor Michael Quinlan and the Hon Lance Wright QC presented the following recommendations for creating a system of safe payments:

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.

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 specialised body under federal transport legislation with wide powers to fix rates of remuneration and related matters which ensure industry safety.

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.

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.

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.

In general terms, we favour certain aspects of the second option proposed by the Transport Workers Union. 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 Australian Industrial Relations Commission (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 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.

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.

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.

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.”

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.

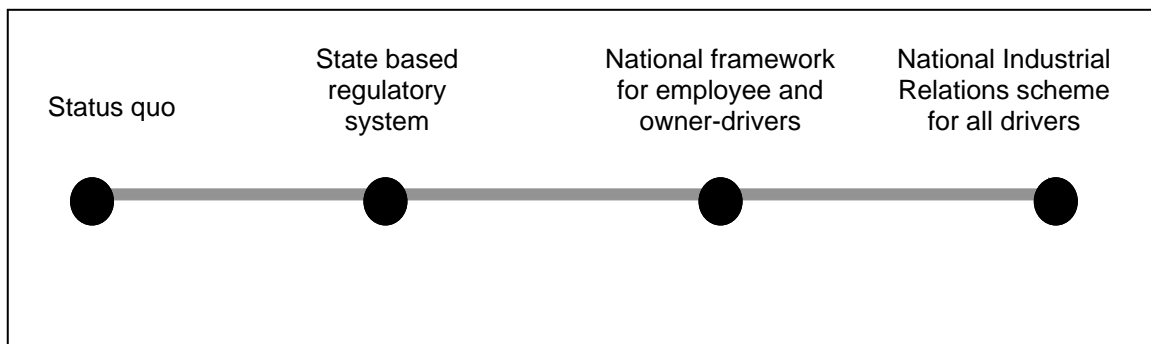
Finally we make a number of more minor recommendations. Reference has been earlier made to the Victorian requirement for written contracts. The Tasmanian Forest Contractors Association (TFCA) also submits that ‘plain English style contracts’ should be mandated, even to the point of developing proformas. “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”.

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.

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 occupational health and safety) 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.

From those recommendations, and consultations with stakeholders the NTC has developed four options for addressing the safety/payments link along the spectrum as follows:



5.2.1 Complementary measures

In addition to the four legislative options outlined below there is a range of complementary measures that could also be considered when implementing any of the options. These measures alone would not address safety outcomes, but would provide important support to whichever system is adopted.

Education and training

Several submissions, including that of the Australian Trucking Association (ATA), highlighted improved education and training of owner-drivers to help them better operate their businesses, and negotiate fairer contracts would improve safety outcomes. The ATA stated:

“We therefore see merit in providing guidance and support, such as knowledge, skills and tools to both clients and operators to assist them in dealing with these issues...”⁷¹

The *Report of Inquiry Owner Drivers and Forestry Contractors* undertaken by Industrial Relations Victoria in 2005 highlighted that “*t[T]he most significant element of market failure that exists for owner drivers and forestry contractors is the problem of information imbalance*”⁷².

An education or training system which:

- provides owner-drivers with information on running a business;
- provides employees with information on awards and employer obligations;
- provides drivers with cost models to enable them to better estimate and understand the cost structures within their business; and
- provide information on entering into contracts, and model contracts;

would likely make improvements in the current information asymmetry faced by drivers.

The NTC believes that improved access to information would benefit truck drivers, both owner-drivers and employees, and suggests that this should be a necessary element of the policy response to this issue.

Enforcement

Several submissions highlighted the need for increased enforcement of existing road laws, such as fatigue laws and speeding laws, as an alternative for implementing a system of safe rates. The NTC believes that increased enforcement of existing laws is vital to continuing to address unsafe on-road behaviours.

Enforcement options such as:

- greater use of technology, including digital tachographs;
- greater focus on ‘intelligence’ led enforcement;
- strong compliance and enforcement legislation that reflects ‘chain of responsibility’ principles;
- consistent, effective and well-targeted enforcement;

The NTC highlights that increased enforcement of the unsafe on-road behaviours targeted at drivers could have the effect of exacerbating the economic pressures. Increased enforcement of all chain of responsibility parties is an important step.

Standards for taking a risk-based approach to running operations

Standards that mean that operators change their way of running their businesses can lead to improved road safety. There are two types of these standards in Australia:

71 Submission to Safe Payments inquiry, ATA Submission

72 Report of Inquiry Owner Drivers and Forestry Contractors pg 119

Voluntary industry standards. These standards are developed by industry to meet specific needs of industry. Examples of these types of standards include the Australian Trucking Association's TruckSafe and the Australian Livestock Transporters' Association's TruckCare.

Government standards that provide a productivity benefit. There are three national standards for vehicle maintenance, mass management and fatigue management. Operators meeting these standards by a third-party audit can access productivity benefits.

NTC is current finalising a proposal to ATC about the national scheme run by governments.

Both industry and government standards can provide level of assurance to freight customers that these operators have management systems in place. These standards are a complementary way to improve road safety.

5.2.2 Option 1 – Status quo

Option 1 leaves current state and federal legislative systems in place, and does not seek the introduction of any new legislative reforms. Option 1 recommends implementation of all existing NTC reforms that address the unsafe on-road behaviours.

The NTC has over the past 15 years has undertaken the development of an important suite of road transport reforms to address a variety of on-road behaviours that lead to poor safety outcomes. Most recently, the new Heavy Vehicle Driver Fatigue laws have commenced operation in four jurisdictions.

Currently, several jurisdictions have either failed to implement the suite of road transport reforms, or have implemented the reforms with some level of inconsistency. Figure 5 in accurately reflects the current status of implementation of existing reforms.

NTC Reform	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	CTH
Mass & Loading (M&L)/ Oversize Overmass (OSOM)	✓	✓	✓	✓	✓	✓	✓	✓	✓
Restricted Access Vehicles (RAV)		✓					✓	✓	✓
Compliance & Enforcement Bill (ATC 11/03)		✓		✓	✓	In progress	✓	In progress	
Intelligent Access Program (IAP) (ATC 12/05)		✓		✓	In progress		✓		
Fatigue (ATC 02/07)		✓	In progress	✓	✓	In progress	✓		
Speeding (ATC 01/08)		✓							
Dangerous Goods	In progress	In progress	In progress	In progress	In progress	In progress	In progress		✓

Figure 5. Summary of implementation status for national heavy vehicle reforms

Further and uniform implementation of existing legislation nation-wide remains an important step for the heavy vehicle industry. Further safety improvements can be made by the implementation of existing reforms in all jurisdictions.

Option 1: encourage all jurisdictions to implement the existing suite of road transport reforms, and to do so in a manner consistent with the model law.

5.2.3 Option 2 – State based regulatory system

Option 2 would leave the current regulatory systems in place for employee and owner-drivers, at both a state and federal level. Option 2 also does not propose any new Commonwealth regulation.

Leaving the current regulatory systems in place would mean that the coverage of employee and owner-drivers at a federal level would remain unchanged.

Three jurisdictions currently have legislative regimes which address some of the issues faced by owner-drivers. Option 2 also recognises that two of those schemes are recent regulatory creations.

This option would recommend that the jurisdictions that currently do not have owner-driver regulation undertake to implement a state based system. Those jurisdictions without existing owner-driver schemes are South Australia, Tasmania, ACT, Queensland, Northern Territory and Tasmania.

In developing an owner-driver regulatory systems states should have regard to those matters identified as necessary in such a system including:

- addressing the information imbalance faced by owner-drivers;

- providing a low cost and accessible dispute resolution process; and
- development of guideline rates or costing models.

Option 2: all jurisdictions to implement state based regulatory models to address the issues faced by owner-drivers.

5.2.4 Option 3 – National framework for employee and owner-drivers

This option is based on the recommendation from Professor Michael Quinlan and the Hon Lance Wright QC as to the optimal model for addressing the link between payments and safety outcomes.

Option 3 recommends the establishment of a specialised body under federal transport legislation:

- to establish and maintain enforceable safe payments for employees;
- to establish and maintain enforceable safe payments for owner-drivers;
- to settle disputes in a low-cost, accessible manner;
- to consider and, if necessary, bestow rights and impose obligations regarding safe payments on other parties in the transport supply chain; and
- to consider and, if necessary, bestow rights and impose obligations with respect to enforcement of safe payments.

The body would exercise these functions of its own volition or on application by a relevant employer/employee association. The body would have regard to industry views in undertaking the above.

Professor Michael Quinlan and the Hon Lance Wright QC note in particular the need to ensure that the system put in place is:

dynamic in the sense that it is capable of dealing speedily with changes in the industry which could be considered as detrimental to the existence of rates of pay which maintain safety in the industry; and also dynamic 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.

When implementing Option 3 regard may need be given to:

- any required interaction with the framework of laws and institutions being implemented through the Fair Work Bill 2008 (to be introduced into Parliament in late 2008) and existing laws including the *Independent Contractors Act 2006*; and
- the desirability of achieving clear and certain coverage of the proposed new federally established system of enforceable safe payments and the extent of the continued operation of State laws.

In addition to the establishment of a national framework to support safe payments for owner drivers and employee drivers, this option recommends an amendment to model road

transport law to include chain of responsibility obligations on parties in the supply chain with respect to safe payments.

This option envisages the creation of some practical mechanism to allow some flexibility for operators to undertake separate safe arrangements.

Option 3: implementation of a framework for the establishment and maintenance of safe payments for employees and owner drivers and amendments to model transport laws with respect to chain of responsibility obligations for safe payments.

5.2.5 Option 4 – National industrial relations scheme for all drivers

Option 4 is the creation of a new chapter in the *Workplace Relations Act* in which the Australian Industrial Relations Commission (or successor institution) would be empowered to establish and maintain safe payments for owner-drivers and employees. This would override existing regulatory regimes and would have the capacity to deal concurrently with employees and owner-drivers in the road transport industry.

This is the approach taken under the *Industrial Relations Act NSW 1996* and this option could be achieved by replicating the relevant provisions of that Act in a new chapter of the *Workplace Relations Act*.

The Commission would be given the power to consider and make provisions with respect to other parties in the transport supply chain and would involve the same amendments to model transport law with respect to chain of responsibility obligations set out in Option 3.

Option 4: A new chapter inserted into the Workplace Relations Act 1996 based on the Industrial Relations Act NSW 1996 Chapter 6 providing the Australian Industrial Relations Commission with the power to establish safe payments for owner-drivers and employees concurrently.

5.3 Evaluation of options

The NTC was requested by transport ministers to “*identify options for implementing a system of safe rates for both employees and owner-drivers*”⁷³ as such, in evaluating the options presented above the NTC will consider the following factors:

- does this option address both employees and owner drivers;
- does this option implement a system of safe payments; and
- does this option create chain of responsibility obligations for parties in the supply chain with respect to safe payments?

Any option that would not result in the implementation of a framework to achieve a system of safe payments for owner-drivers and employees is not an option within the scope of the task assigned to the NTC. Accordingly, it is arguable that options 1 and 2 relating to the status quo and implementation of state based regulatory systems would not fall within the scope of this review. However, the NTC has decided to include options 1 and 2 because

some stakeholders have indicated these as preferred options with respect to improving safety outcomes in the road transport industry.

Option 1

Option 1 reflects the views of several stakeholders, in that measures to address the current unsafe on-road behaviours have not been:

- implemented by all jurisdictions;
- implemented consistently; and
- given time to penetrate the safety culture of the industry.

The ATA in particular argued that time should be allowed in order to assess the impact the new Heavy Vehicle Driver Fatigue Model Legislations, which came into force on 29 September 2008, will have on driver behaviour and issues such as queuing time, which have been highlighted in this report as a concern of many drivers.

Further and uniform implementation of existing legislation nation-wide remains an important step for the road transport industry. However, although two of the existing reforms, speeding and fatigue, do acknowledge the pressure from other parties in the transport supply chain on drivers to breach those laws, they do not discuss the economic factors which have been found to encourage speeding, long hours and the artificial use of stimulants to combat the effects of fatigue.

Option 1 would be better recommended as a complementary measure to any option that is selected. As a stand alone option:

- would not address the economic pressures faced by drivers as outlined in Chapter 2;
- does not take into account measures identified as necessary by the experts; and
- does not implement a system of safe payments for owner-drivers and employees.

Option 2

Likewise with Option 1, Option 2 is an option that reflects the views of some stakeholders as to a preferred next step to improve safety outcomes in the road transport industry. However, the NTC does not believe it sufficiently addresses the provision of a system of safe payments for owner-drivers and employees that the NTC was tasked to recommend.

Option 2 fails to address any of the issues relating to the provision of safe payments for employee drivers. Option 2 also does not address the limitation of the current federal provisions in the *Independent Contractors Act* as outlined by the Professor Michael Quinlan and the Hon Lance Wright QC.

The NTC recognises the important role that the state regulatory systems can fulfil, however, even if all states had systems along the lines of the Victorian model in place to address the needs of owner-drivers those models would:

- not address the needs of employee drivers;
- only address limited segments of the market (i.e. in the Victorian model it only captures drivers who are performing the majority of their work within Victoria, thus ignoring the long distance drivers); and

- not provide an enforceable minimum rate (a safe payment).

Despite publishing ‘guideline rates’ to assist owner-drivers in accurately assessing their costs, the Victorian model stops short of putting in place enforceable minimum rates for owner-drivers. As was noted by Professor Michael Quinlan and the Hon Lance Wright QC:

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 addition to that, the model relies on an owner-driver coming forward as a complainant through the dispute resolution system, and otherwise provides for no enforcement mechanisms from other bodies of any of the obligations in the Act.

Again, using the Victorian model as an example, it does not put in place any obligations on parties other than the contracting parties. There is no provision for any chain of responsibility type mechanism, which would drive obligations up the chain to the ultimate client. Instead, the Victorian model only covers the hirer and driver, who are at the bottom of this chain, and often the ‘price takers.’ The Victorian legislation also fails to interact with any other obligations on drivers in road transport or occupational health and safety law.

Although state models do provide useful initiatives to address some of the issues faced by owner-drivers, they do not put in place a system of safe payments, and as such, the NTC does not recommend that Option 2 as a stand-alone model would address the points above.

However, the NTC also considers that the existing state regimes should be left in place to the extent that they do not conflict with a national system, and that states without local owner-drivers models could consider the implementation of such to address intrastate owner-driver issues.

Option 2 would not provide a system which would substantially address the underlying economic pressures faced by owner-drivers, and would not impact on employee drivers.

Option 3

Option 3 would implement a system of safe payments for employees and owner-drivers. Option 3 also adequately addresses the need to have any system of safe payments reinforced by appropriate chain of responsibility provisions in model road transport law.

Although it will not deal with employees and owner-drivers in isolation of each other, recognising that it is one transport market, it does not result in owner-drivers being treated under law as employees, thereby minimising the perception that their choice to be independent contractors is undermined by regulatory protection. The NTC notes the importance of protecting the genuine independence of owner-drivers.

Option 3 would create a framework for safe payments system. It provides a forum for groups; industry, unions and employer associations to negotiate outcomes for drivers and a body to determine any outstanding issues.

Option 3 would also create a low cost and accessible forum for the resolution of disputes.

Several submissions argued that it is impossible to set a rate for an industry as diverse as the transport industry, arguing that it is impossible to establish costing models that would reasonably fit all variables in the industry. Under Option 3, the body that is established

would provide the framework under which issues such as that would be resolved. The NTC does not believe that setting a rate is an unachievable task, as there are currently several costing models available which are able to do so, including the longstanding published ARTF/TWU guideline rates, as noted in the Australian Road Transport Industrial Organisation submission.

As was noted by Professor Michael Quinlan and the Hon Lance Wright QC:

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 kilometre/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 specialised 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).

Option 3 represents an appropriate balance of the requirements needed to address the safety case made in Chapter 2 and the market issues outlined in Chapter 3. Option 3 is not as highly interventionist as Option 4, but is strong enough to provide for an adequate safety net for drivers.

In relation to the argument that setting a minimum safety net rate for owner-drivers and employees would have the effect of lessening competition in the market, it was noted that the NSW Chapter 6 system currently in place has that capacity, and there remains a healthily competitive market system for short haul drivers.

Professor Michael Quinlan and the Hon Lance Wright QC also pointed out that:

Incentives could be revised to utilise 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.

The NTC supports provision within the safe payments system framework for the flexibility for owner-drivers and operators to pursue efficiency and productivity gains without cutting corners on safety.

The NTC recommends Option 3 presents the best option to establish a system of safe payments for employee and owner-drivers.

Professor Michael Quinlan and the Hon Lance Wright QC noted:

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.

Option 4

Option 4 would implement a system of safe payments for employees and owner-drivers. Option 4 also adequately addresses the need to have any system of safe payments reinforced by appropriate chain of responsibility provisions inserted into model transport law.

However, the NSW Chapter 6 laws have lead to the incorrect perception that owner-drivers are 'deemed' employees because their regulatory protections are contained within industrial law. Owner-drivers have chosen to become small business people and as such, this perception is one which is likely to cause owner-drivers concern. As was previously noted, no parties who appeared before this inquiry recommended or sought 'deeming' provisions in relation to owner-drivers.

As was noted in the report from Professor Michael Quinlan and the Hon Lance Wright QC, the existing uncertainty as to the future role of the Australian Industrial Relations Commission makes this option difficult to progress. In addition to that, there is the added complexity that the Australian Industrial Relations Commission does not have specific skills or knowledge in relation to the transport industry, to effectively enable them to undertake the roles required in relation to the setting of rates for employees and owner-drivers in different segments of the market.

The NTC believes Option 3 represents a balance between providing an appropriate safety net for employee and owner-drivers in respect of safe payments, whilst still maintaining and protecting both the substance and perception of the genuine choice made by owner-drivers to be independent contractors.

6. RECOMMENDATIONS

The NTC recommends that ATC:

1. recognise that payment rates and methods create an incentive for, or encourage unsafe on-road behaviours such as speeding, fatigue and use of illicit substances which contribute to poor safety outcomes in the trucking industry;
2. acknowledge that this link should be addressed through regulatory intervention;
3. recognise that safe payments for truck drivers requires a whole of government approach due to linkages with transport law, workplace relations law and independent contractors/small business law;
4. endorse the policy proposal in Option 3; and
5. request the federal Minister for Infrastructure, Transport, Regional Development and Local Government to progress the issue in consultation with his Commonwealth Ministerial colleagues and report back to the ATC in May 2009.

7. CONCLUSION

The road transport industry is vital to the ongoing growth of Australia's economy. Further improvements in efficiency, productivity and safety outcomes in the road transport industry are imperative to transport being able to meet the growing freight task.

The NTC, Commonwealth, state and territory governments have undertaken significant reforms over recent decades to improve the safety outcomes in the industry. To date these reforms have focussed on changing the on-road behaviour of drivers, and other chain of responsibility parties, through laws addressing speeding compliance, driving hours limits, log book offences and use of alcohol or drugs.

Although these reforms have been important in addressing some of the on-road behaviours, the fact remains that until what causes or encourages those behaviours is also tackled, real cultural safety change in the transport industry will not happen and safety improvements will taper off.

The issue of whether rates and methods of remuneration lead to poor safety outcomes had been debated and discussed for many years, the report from Professor Michael Quinlan and the Hon Lance Wright QC determines the existence of this link.

Economic factors create an incentive for truck drivers to drive fast, work long hours and use illicit substances to stay awake. These economic factors include, low rates of pay, incentive based payment methods (such as per kilometre or per trip), unpaid working time and demurrage. Other factors include the hyper-competitive nature of the industry and the low bargaining power faced by drivers.

Two industry leading experts have recommended that government has a role in fixing this link, and have provided a series of options to do that.

The NTC supports the recommendations made by the Professor Michael Quinlan and the Hon Lance Wright QC. The NTC supports the recommendation for an option to implement a system of safe payments which includes the establishment of a national body to establish safe payments for employees and owner-drivers.

The establishment of a framework to allow for the setting of a minimum safe payment for employees and for owner-drivers would be an important step for the transport industry. A safe payments system will allow for drivers to be remunerated at rates which will allow them sufficient cost recovery without having to cut corners.

A safe payments system will not discourage transport operators from making productivity and efficiency gains in their businesses and will not prevent them competing on price, it will just set in place a system which will allow the drivers to perform their work legally and safely.

The NTC believes safe payments would be an important step for the future of the road transport industry.

APPENDIX 1: STAKEHOLDER CONSULTATIONS

In undertaking this review the National Transport Commission (NTC) 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, Sydney and Melbourne.

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 (e.g. 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 (e.g. 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 be 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 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 Transport Workers' Union
5. Ms J Lewis Australian Trucking Association NSW
6. Mr D Coonan Australian Trucking Association
7. Mr T Lovelle Chamber Commerce and Industry
8. Mr P Garske Queensland Transport Association
9. Mr P Lovel Victorian Transport Association
10. Mr P Lovel Australian Road Transport Industrial Organisation
11. Mr A Thomas Rail Tram and Bus Union
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

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 and Australian Road Transport Industrial Organisation

36. Phil Lovel, Victorian Trucking Association and 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, Australian Trucking Association Council, Deputy Chair, Australian Trucking Association Transport Policy and 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

APPENDIX 2: TERMS OF REFERENCE CONSULTANTS

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' (and related matters such as waiting times and unpaid work) 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.

APPENDIX 3: 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 under-cutting 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.