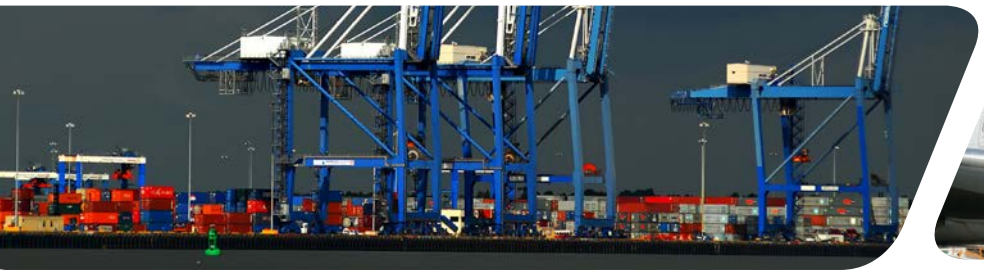
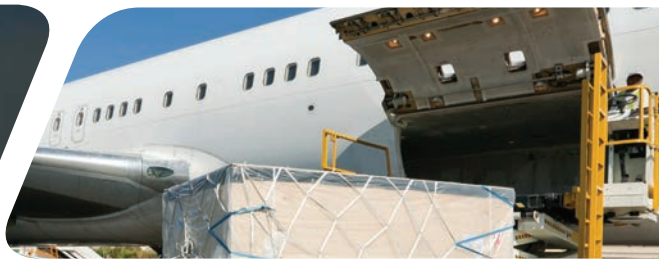
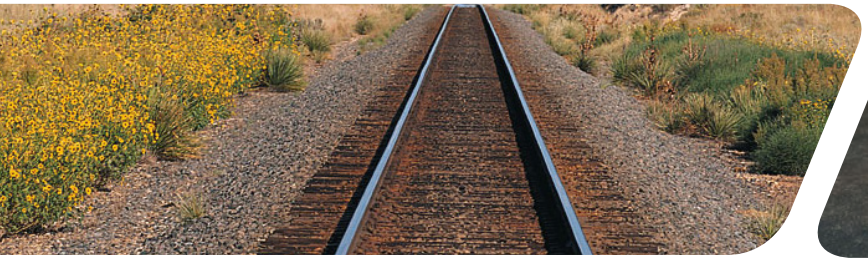
AUSTRALIAN LOGISTICS COUNCIL

JANUARY 2014

ALC SUBMISSION ON THE ROAD SAFETY REMUNERATION SYSTEM







THIS SUBMISSION HAS BEEN PREPARED WITH THE ASSISTANCE OF KM CORKE AND ASSOCIATES, CANBERRA.

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Introduction

The Australian Logistics Council is pleased to make a submission on the operation of the Road Safety Remuneration System **(the remuneration system).**

On 17 December 2013 the Full Bench of the Road Safety Remuneration Tribunal **(RSRT)** handed down a decision entitled the *Road Transport and Distribution and Long Distance Operations Road Safety Remunerations Order 2014*[1] **(the decision)**, through which the first Road Safety Remuneration Order **(the RSRO)** was made.

The RSRO will commence operation on 1 May 2014.

That means this Review of the remuneration system is of an *ex ante* nature.

It will therefore be difficult, if not impossible, to assess the economic burden of the remuneration system on (for example) the Australian economy.

However, ALC does not see this as a reason to allow the system to operate for a few years to see what happens.

The ALC Position

The view of the majority of ALC members remains as expressed in:

- the ALC submission to the House of Representatives Infrastructure and Communications Committee on the Road Safety Remuneration Tribunal Bill 2011 **(Attachment 1)**; and
- the initial Written Comments on *Proposed Road Safety Remuneration (Retail Sector) and Road Safety Remuneration (Inter and Intra State Long Distance Sector)* Order **(Attachment 2)**

which is:

1. the Road Safety Remuneration Tribunal should be abolished and the *Road Safety Remuneration Act 2012* **(the Act)** repealed;
2. the National Heavy Vehicle Regulator, which will commence operation on 10 February 2014[2], should, through its experience gained in regulating the heavy vehicle sector and its own research, continue to identify ways to increase road safety; and
3. to the extent there is any need for remedial legislation to assist any perceived information asymmetry affecting the capacity of independent contractors to make informed business decisions, consideration could be given to inserting into law provisions requiring the publication of an information booklet contained in Part 2 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic)[3]

The Reviewer is invited to carefully read the contents of Attachments 1 and 2, as they set out the reasons, and supporting evidence, as to why the majority of ALC members hold the position they do with respect to the remuneration system.

This is a brief overview of the attachments.

1 [2013] RSRTFB 7
2 The Regulator has had a delayed commencement
3 If this is seen as desirable at federal level, it could be best achieved through an amendment to the *Independent Contractors Act 2006* by imposing on the Minister responsible for the administration of that law a duty to prepare such a duty.

The RSRT

The majority ALC position is held because:

1. there are specific provisions contained in Chapters 5 and 6 of the *Heavy Vehicle National Law* relating to the management of speeding and fatigue - the major elements that affect the safety of workers in the industry, that require all members of the freight chain to take all reasonably practicable steps to prevent speed and fatigue offences.

   To that extent, the reviewer should note the National Transport Commission, at the request of the Standing Council of Transport and Infrastructure of the Council of Australian Governments, is conducting a review of the 'chain of responsibility laws' contained in these Chapters of the Law (amongst others) to determine whether they can be further developed with a view to ensuring better safety outcomes. The further prescription of duties contained in current RSRO could therefore be characterised as unnecessary duplication;

2. Australian workforce health and safety law already impose on a person conducting a business or undertaking a primary responsibility to follow the 'As Low As Reasonably Practicable' **(ALARP)** concept of encouraging appropriate safety outcomes. This means that again, the current RSRO appears to be unnecessary duplication;

3. there are in existence industry safety codes such as the National Logistics Safety Code of Practice which has been registered in Victoria under the Road Safety Act 1986 (VIC) that relate to health and safety (relevantly to the first RSRO issued) the Retail Logistics Supply Chain Code of Practice that is managed by ALC is one of several industry codes that are underpinned by the NLSC setting out clearly all participant's responsibilities when they control or influence the movement of freight in the supply chain, particularly road transport laws and OH&S legislation. The NLSC has been developed by ALC through the harmonisation of the Retail Logistics Supply Chain Code of Practice with the Steel Code of Practice and is the platform from which specific industry sectors can develop specialist solutions that best suit the needs of the business whilst improving safety outcomes. Examples of modern codes that have been developed include the CSG Logistics Safety Code, Australian Steel Industry Code and the Electrical Cable code;

4. there are other laws in force in Australia regulating heavy vehicle safety and the treatment of independent contractors, which, when taken cumulatively, deal with the same matters contained in the proposed orders; and

5. whilst the current RSRO is not as prescriptive as it could have been, the requirement for written contracts in all circumstances, the development of safe driving plans and drug and alcohol policies could create a culture of merely 'following the award' rather than creating a culture of continuous improvement in the management of speed and fatigue thus chilling innovation and therefore productivity.

As ALC said in its November 2013 submission to the National Commission of Audit:

Parliament has passed the *Road Safety Remuneration Act 2012.*

Despite the title of the legislation, ALC notes that a road safety remuneration order made under the Act can govern not only remuneration matters, but also **related conditions.**

It would therefore be open for the Road Safety Remuneration Tribunal (effectively a division of Fair Work Australia) to make a decision relating to, for instance how trucks should be loaded and unloaded as well as managing fatigue, without necessarily referring to remuneration.

At the same time, the Heavy Vehicle National Law **(HVNL)** has also commenced operation in all jurisdictions except Western Australia.[4]

It specifically manages speeding and fatigue management - the areas of greatest safety concern in the sector.

Finally, generally applicable workplace health and safety law requires a PCBU to take all reasonably practicable steps to *protect the safety of workers.*

ALC has strongly argued that safety issues are best dealt with by specialist laws - in the case of heavy vehicles the HVNL, administered by specialist regulators - in the case of heavy vehicles the newly established National Heavy Vehicle Regulator.

However, the *Road Safety Remuneration Act* will prevail over all other laws.[5]

That would mean that a road operator would have to follow any road safety remuneration order made by the Road Safety Remuneration Tribunal specifically for dealing with (for instance) truck loading or fatigue, notwithstanding the obligations of operators under nationally consistent heavy vehicle and WHS/OHS laws.

This is a recipe for inefficiency, derived from duplication of statutory obligations that will impact on productivity without commensurate safety outcomes.

It is understood the Government proposes reviewing the Road Safety Remuneration Act.

However, efficiency would be assisted if there was only one set of laws to regulate a particular subject matter.

This area is a case study of this proposition.

Recommendation:

The National Commission of Audit should recommend the establishment of a rule requiring government to conduct a 'direct collision' analysis before proposing regulatory change so as to determine whether the subject matter is already the subject of regulation, and then be required to make a case why the additional layer of regulation is needed in any regulatory impact statement that is required to be made.

In that way:

a) government will be obliged to determine the best suite of laws, and most suitable regulator, to regulate a particular subject matter

b) industry will only have one set of laws to manage compliance mechanisms; so therefore

c) efficiency should rise and compliance costs fall; and

d) the overall size of the government and level of red tape will fall.

4 Since the publication of this submission the Northern Territory has indicated it does not propose to commence the operation of the National Law in its jurisdiction.

5 Subdivision A of Division 3 of Part 1 of the *Road Safety Remuneration Act 2012*

The National Heavy Vehicle Regulator

As referred to above, ALC has strongly argued that safety issues are best dealt with through the operation of industry specific legislation enforced by a special regulator, which in this case is the National Heavy Vehicle Regulator **(the NHVR)**.

One of the objects of the Heavy Vehicle National Law is to promote public safety[6] , while the functions of the NHVR include the identification and promotion of best practice methods for managing the risks to public safety arising from the use of heavy vehicles on roads, as well as encouraging and promoting safe and productive business practices of people involved in the road transport of goods or passengers.[7]

Safety research - a desirable thing - could safely sit within the responsibilities of the NHVR.

Independent contractors

The Bill clearly intends to create a safety net scheme of regulation for these road transport drivers, and effectively creates a 'third class' of worker who will be entitled to a similar safety net system as an employee under the *Fair Work Act 2009,* yet for all other purposes (i.e. taxation, superannuation or workers' compensation) may continue to be treated as an independent contractor.

This is an outcome that could confuse both operators and owner/drivers.

Moreover, limiting the capacity for operators to efficiently manage the peaks and troughs of freight volumes by impending their ability to engage independent contractors could impinge the efficient management of the freight effort as well as increasing costs throughout the supply chain.

ALC finally notes that bona fide independent contractors are capable of having unfair contracts reviewed by the Federal Circuit Court under the *Independent Contractors Act 2006* and that the *Competition and Consumer Act 2010* permits ACCC to authorise collective bargaining with larger operators.

It follows there are federal mechanisms that are reasonably convenient that an independent contractor may access to deal with remuneration related issues.

That said, ALC notes the Act was introduced on the assumption there is a link between poor remuneration and accidents and that the national minimum wage is an 'economically efficient remuneration level' when striking a price, with one reason being a failure by small operators to factor into the costs of operating a business.

A possibly more efficient model for this area than the remuneration system is the adoption of some of the elements of existing Victorian legislation requiring the provision of information to independent contractors so they can make an informed business decision without the undue interference from an arbitral body.

6 Clause 3 (a) of the HVNL
7 Paragraphs 600 (2) (j) and (k) of the HVNL

The RSRT and the first RSRO

The RSRT

Section 3 of the Act includes as objectives of the RSRT:

- *the development and application of reasonable and enforceable standards throughout the road transport industry supply chain; and*
- *ensuring hirers of road transport drivers and participants in the supply chain take responsibility for implementing and maintaining the standards.*[8]

The net effect of this is that a full bench of the RSRT (constituting the Tribunal President, a Fair Work Australia member and an industry member) are contingently capable of making decisions about loading trucks and managing fatigue.

However, an examination of the membership of the Tribunal contained in the annual report of the RSRT reveals that a majority of members are effectively industrial relation practitioners, with limited specialist knowledge in safety issues relating to the sector.[9]

The annual report goes on to say:

> *While the Tribunal is a separate entity to the Fair Work Commission, it is funded through an appropriation to the Fair Work Commission. It was decided at the outset that an integrated model of support for both the Fair Work Commission and the Tribunal would be the most efficient way to support the new tribunal. The integrated model enables the Tribunal to draw on the experience and knowledge of Fair Work Commission staff and avoids unnecessary duplication of staff functions and other resources. The Tribunal shares administrative support with the Fair Work Commission across functions such as information technology, communications, website design and support, human resources and research.*[10]

This cultural and functional integration meant the RSRO followed the usual model for considering industrial instruments in Australia.

A draft RSRO was produced. Negotiations followed. An arbitral model was used to manage the process with each side presenting evidence, cross examining witnesses etc.

Whilst this reflects the model of operation created by the powers of the RSRT set out in section 25 and Division 2 of Part 6 of the Act, this led to over 12 days of either hearings or 'facilitative discussions', together with the need, in many cases for legal assistance to prepare evidence, so it was in a form capable of use.[11]

Moreover, to ensure procedural fairness (an inherent part of the arbitral model) there was a focus on process, with:

- *some evidence not being considered due to witness unavailability for cross examination; and*
- *much time spent on whether the parties had enough time to consider evidence presented.*[12]

There is some doubt as to whether this is the best method to develop legally binding safety standards.

8 Paragraphs 3(c) and 3(d) of the Act
9 Road Safety Remuneration Tribunal Annual Report 2012-2013 (2013): 5-6
10 Op cit: 4
11 See http://www.rst.gov.au/index.cfm/haerings-conferences/nol/previous/ accessed 21 December 2013
12 See paras [30] - [60] of the decision

The RSRO

There also appears to be no consideration given by the Tribunal as to the cost involved in duplication.

For instance, parties to proceedings indicated that the adverse conduct provision of the RSRO largely replicated general protection provisions contained in the *Fair Work Act 2009.*

Yet the clause was inserted.[13]

Paragraph 271 of the decision recorded:

> *Mr Vaughan's evidence was that Coles undertakes annual audits of its contract partners to ensure compliance with the Australian Logistics Council Retail Logistics Supply Chain Code of Practice Responsibility Matrix (ALC RLSC Code) covering matters such as the contract partner's safe driving plans, training for those they employ of engage, and drug and alcohol policy.*[14]

Moreover, the *Toll Group and Transport Workers Union Fair Work Agreement 2011-2013* and the L*infox Road Transport and Distribution Centres National Enterprise Agreement* have safe journey plans incorporated.

Yet clauses 10 and 12 of the RSRO require the development of safe driving plans and drug and alcohol policies.

Whilst the RSRT said at paragraph 411 of its decision:

> *The safe driving plans, training and drug and alcohol policy clauses apply nationally and are consistent with clauses awarded in the NSW Mutual Responsibility case by the Industrial Relations Commission of New South Wales. They are also consistent with provisions in the ALC RLSC Code, albeit the clauses are enforceable. (emphasis added)*

ALC has yet to conduct its analysis as to whether the clauses are 'consistent' with the code let alone what changes are required to be made to the code's auditing matrices so that they measure compliance with safety laws that are in force in Australia.

For instance, one question is whether section 12 of the Act, which provides that the terms an RSRO effectively override a modern award or enterprise agreement where the terms are 'more beneficial', means that the safe journey plans determined in enterprise agreements are ousted and the RSRO becomes the requirement to be followed?

An ALC member has also reported:

- *The plan can on one level be regarded as being overly restrictive by setting out when rest breaks are to be taken, rather than taken when they are necessary*[15]*;*
- *Other standard features of safety plans, such as being able to determine the available hours a driver has before being required to take a rest break before commencing a new trip, are absent;*
- *The witnessing regime proposed to be established by clauses 10.7 and 10.8 of the RSRO will be difficult to properly implement in practice;*

13 See paras [143] - [147] of the decision
14 Mr Vaughan is National Compliance Manager with Coles
15 Paragraph 10(1) (g) of the RSRO. Note this paragraph is argulably in tension with paragraph 10(1) (j), which adequately covers the standard safety practice.

- *Subparagraph 10.6(f)(iv) of the RSRO, which requires a driver to declare pre-departure whether the driver has inspected the vehicle(s) and rectified or had rectified any defects likely to affect the safe operation of the vehicle is poorly drafted inasmuch as only qualified mechanics would have the capacity to properly inspect, identify and rectify any defects;*
- *There are many repetitive journeys that would allow the creation of a generic safe driving plan, with variations reported on an exception basis rather than a new plan for each journey;*
- *Much of the information is contained in the already mandated national work diary, and so these provisions impose a duplication burden;*
- *recording the make and model number of a vehicle does not advance any particular safety outcome;*[16]
- *the RSRO uses terminology unknown to the industry such as 'gross train vehicle mass'*[17] *and 'fatigue risk management system';*[18] *and*
- *whilst many companies use a 'safe driving plan' model to ensure compliance with the laws, other companies may use other methods that are just as effective.*

The RSRT appears to have failed to consider:

- the compliance costs imposed on businesses in giving effect to the RSRO;
- the costs involved to groups such as ALC in changing its auditing matrices

and most importantly

- whether the terms of the RSRO will lead to better safety outcomes.

As indicated in the statistics contained in **Attachment 3,** safety in the sector is generally improving.

ALC believes that the RSRT model in which the prescription of safety practices are:

- determined by people who are (largely) industrial relation practitioners; on the basis of
- evidence limited in nature to that which can be provided without breaching procedural fairness – a function of the arbitral model inherent in the design of the RSRT runs the risk of regulatory failure.

The better view is the 'continuous improvement' requirements implicit in operators having to take all reasonable steps to ensure safety inherent in the Chain of Responsibility provisions of the *Heavy Vehicle National Law* and general workplace health and safety legislation is more likely to lead to improved safety outcomes.

Moreover, as observed by the RSRT in paragraph 422 of its decision, there are two modern awards that are relevant to the industries covered by the RSRO, together with other enterprise agreements.

These would appear to be the mechanisms to deal with any remuneration related matters, or to other terms and conditions that may require an arbitrated settlement.

16 Required by paragraph 10.6 (d)
17 Defininition of'gross vehicle mass', clause 3
18 Paragraph 10.6 (e)

As previously discussed, the RSRT effectively acts as an arm of Fair Work Australia. That may as well be formalised through:

- the abandonment of the remuneration system;
- the administration of safety issues through the National Heavy Vehicle Law; and
- remuneration and related issues dealt with through the ordinary operation of the modern award system.

Australian Logistics Council

January 2014

ATTACHMENT 1

AUSTRALIAN LOGISTICS COUNCIL

SUBMISSION

ON THE ROAD SAFETY REMUNERATION BILL 2011
TO THE HOUSE OF REPRESENTATIVES INFRASTRUCTURE
AND COMMUNICATIONS COMMITTEE

JANUARY 2012

SUBMISSION

ON THE ROAD SAFETY REMUNERATION BILL 2011
TO THE HOUSE OF REPRESENTATIVES INFRASTRUCTURE
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THIS SUBMISSION HAS BEEN PREPARED WITH THE
ASSISTANCE OF KM CORKE AND ASSOCIATES, CANBERRA.

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SUMMARY OF RECOMMENDATIONS

1. ALC opposes the Road Safety Remuneration Bill 2011 and holds the view that there is insufficient evidence to support a definitive link between remuneration levels and safety outcomes in the heavy vehicle industry. It therefore believes the establishment of a Road Safety Remuneration Tribunal is premature.
2. In this absence of such a link, ALC requests that the Committee recommends that the Bill is not introduced into the House of Representatives until a link between remuneration and road safety is proved
3. Instead of introducing a new body in the form of the Road Safety Remuneration Tribunal to regulate operations of the heavy vehicle sector, the Government should encourage the National Heavy Vehicle Regulator, due to come into effect on 1 January 2013, to continue to identify ways to increase road safety.
4. If the Bill is to proceed, it should be amended to satisfy a number of industry concerns:
    - » The Tribunal's work is restricted to matters relating only to remuneration and that the research it commissions is subject to stakeholder review
    - » The only matters the Tribunal is able to make Road Safety Remuneration Orders on are matters on the Tribunal's work plan
    - » The Tribunal should be under a mandatory duty to provide reasons as to why an existing instrument (including a modern award under Fair Work Australia) does not adequately cover the subject matter of a proposed Road Safety Remuneration Order
    - » The Tribunal should be required to estimate the costs involved in implementing an order, including the compliance costs involved in having to adhere with different statutory schemes
    - » If the ambit of the Tribunal is not amended, the Bill should be renamed the 'Road Transport Regulation Bill' and orders described as 'Road Transport Regulation Orders'.
    - » The Bill only covers remuneration issues relating to long distance operations
    - » The Bill is the only legislation that deals with remuneration issues relating to heavy vehicle drivers to the exclusion of state laws currently in place
    - » The Bill adopts provisions from Victorian legislation whereby independent contractors are provided with information to enable them to make informed business decisions.

Background on the Australian Logistics Council

The Australian Logistics Council is the peak national body representing the major and national companies participating in the Australian freight transport and logistics supply chain.

Vision

To be the lead advocacy organisation to all levels of Government and industry on freight transport and logistics supply chain regulation and infrastructure issues.

Mission

To influence national transport and infrastructure regulation and policy to ensure Australia has safe, secure, reliable, sustainable and internationally competitive supply chains.

2011 – 2013 Strategic Intent

To establish the Australian Logistics Council as the 'go to' organisation representing the major and national companies participating in the Australian freight transport and logistics supply chain.

Objectives:

1. Be the nationally recognised voice of Australia's freight transport and logistics supply chain.
2. Be the leading advocate of appropriate national regulation and infrastructure to ensure Australia enjoys the full benefits of freight transport and logistics policy development and reform.
3. Promote and encourage greater recognition by Government and the community of the importance of the freight transport and logistics industry's contribution to Australia's economy.

ALC Members are major and national companies participating in the Australian freight transport and logistics supply chain. ALC also has a number of Associate Members, which include associations, organisations, government agencies and companies participating in the Australian freight transport and logistics supply chain.

Australia's freight task is estimated to triple by 2050 – from 503 billion tonne kilometres to 1,540 billion tonne kilometres, with local demand for total freight movements increasing by as much as 60% by 2020.

The Transport and Logistics Industry is a critical part of the Australian economy, generating 14.5% of Australia's GDP and providing more than 1 million jobs across 165,000 companies. ALC estimates that every 1% increase in efficiency will save Australia around $1.5 billion a year.

SUMMARY

ALC opposes the Road Safety Remuneration Bill 2011. It believes the introduction of another layer of regulation and the establishment of a pay setting entity will generate duplication, confusion, cost and result in reduced viability of smaller operators and increased costs to consumers without achieving a commensurate improvement in safety outcomes.

ALC notes the Regulatory Impact Statement (RIS) accompanying the Bill **does not** support a definitive link between remuneration levels and safety outcomes and so it is premature for the Road Safety Remuneration Tribunal to be established in the absence of such a link.

ALC therefore requests that the Committee recommend that the Bill is not introduced into the House of Representatives until a link between remuneration and road safety is proved, and that the Government encourage the proposed National Heavy Vehicle Regulator to commence operation on 1 January 2013 to draw on its experience gained in regulating the heavy vehicle sector and its own research, to continue to identify ways to increase road safety.

ALC is concerned the proposed Road Safety Remuneration Tribunal can make orders that may conflict with requirements imposed by workplace health and safety and heavy vehicle laws.

If the Tribunal is to exist, its work program should be formulated with industry participation, with the work program being strictly limited to remuneration matters relating to long distance operations.

It should also be placed under a mandatory duty to provide reasons as to why any other existing instrument (including a Modern Award made under the FWA) or law (such as the Heavy Vehicle National law or model workplace health and safety legislation) does not adequately cover the subject matter of a proposed Road Safety Remuneration Order.

It should also be required to estimate the costs involved in implementing an order, including the compliance costs involved in having to adhere with different statutory schemes.

However, if the ambit of the Tribunal is not amended, the Committee should recommend the Bill be renamed the Road Transport Regulation Bill and orders described as 'Road Transport Regulation Orders'.

To the extent that the Bill deals with independent contractors, ALC requests the Committee to consider the insertion of provisions requiring the publication of an information booklet contained in Part 2 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic), which requires the provision of information to independent contractors so they can make an informed business decision.

Finally, the Bill preserves by and large the effect of legislation in force in NSW, Victoria and WA, with the Bill only prevailing where there is inconsistency.

Given the NSW and Commonwealth legislation can regulate the hirer/independent contractor relationship, there is a possibility of 'forum shopping', with relevant parties 'gaming' the system and utilising the legislative scheme that may provide (from their perspective) the most favourable outcome.

It follows that given the ambit of the unamended Bill (complete with the involvement of Fair Work Australia in the development of orders and subsequent enforcement), it is equally appropriate for this industry sector to have its industrial relationship regulated the same throughout Australia.

If the Bill is to proceed, it should be amended so that it is the legislation that deals, as far as constitutionally possible, with remuneration issues relating to heavy vehicle drivers to the exclusion of state laws currently in place.

SUBMISSION ON THE ROAD SAFETY REMUNERATION BILL 2011 TO THE HOUSE OF REPRESENTATIVES INFRASTRUCTURE AND COMMUNICATIONS COMMITTEE

The Australian Logistics Council (ALC) welcomes the opportunity to make a submission on the Road Safety Remuneration Bill 2011 (the Bill) and makes the following observations.

Introduction

The concept of the Australian Government legislating for 'safe rates' for the long haul industry has been a subject for consideration for a number of years.

The ALC position on the Bill is that the introduction of a new layer of regulation and the establishment of a pay setting entity will generate duplication, confusion, cost and will result in reduced viability of smaller operators and increased costs to consumers without a commensurate improvement in safety outcomes.

These views are consistent with the comments ALC provided on the *Safe Rates Safe Roads* discussion paper in February 2011.

As the executive summary of the ALC submission said:

> The Australian road transport sector is as diverse as it is large. It employs approximately 250,000 people in entities that range from an individual owner driver operating a single rigid vehicle within a local or regional area to major multinational corporations, employing thousands of people and subcontractors and moving freight – from parcels to containers to bulk minerals and construction materials – between all points of the country.
>
> The differing business models, priorities and purposes employed by transport operators have been a key feature and driver of the success and growth of the sector. Australia's future economic growth will depend heavily on the sector's ability to achieve further improvements in efficiency, productivity and safety.

Participants in the Australian road transport sector have long recognised the importance of safety and been willing to work with Governments and other road transport users to improve safety outcomes. As acknowledged by the Directions Paper, a number of safety risks are beyond the scope of industry, such as road conditions and the behaviour of other road users. However, for those risks that do fall within the scope of industry control, numerous initiatives have been identified and introduced to ensure safety is a key consideration in decision making, in addition to commercial and industrial objectives.

Today, industry driven Codes of Conduct provide a framework for organisations to operate both safely and commercially. Numerous regulations and legislation exist at national and state levels to ensure and enforce behaviours aimed at increasing safety outcomes, including Chain of Responsibility legislation, Independent Contractor legislation, Workplace Health and Safety legislation and the ALC National Safety Codes.

Results to date of these initiatives, as well as significant investment in roads and new vehicles and technology, have been significant and should not be underestimated. Equally as important is that they have been broadly adopted and accepted as 'part of doing business'.

Increasing industry concern about the complex regulatory environment that presently exists has been partially allayed by the Council of Australian Government's decision to establish the National Heavy Vehicle Regulator (NHVR) from 2013. Consolidating legislation under one national banner represents a powerful and effective model for the delivery of further safety improvements.

For these reasons ALC believes that the establishment of a tribunal, as proposed in the Directions Paper, is a step against the positive momentum currently being experienced. Rather than improve safety outcomes, ALC believes the introduction of a new layer of regulation and another entity will generate duplication, confusion and cost, resulting in reduced viability of smaller operators and increased costs to consumers without achieving a commensurate improvement in safety outcomes.

ALC vehemently opposes the imposition of statutory provisions duplicating other obligations imposed by law that do not tangibly add to industry participant safety.

As stated earlier, Industry has already proactively introduced self regulating mechanisms to increase safety.

ALC has worked closely with its members to develop the ALC Safe Payments Systems Statement and the National Logistics Safety Code. ALC is committed to further developing the Code with industry and the appropriate regulating bodies to increase its scope, as well as broaden its application.

Codes that focus on measurement and outcomes enable individual organisations to operate under their own business model while achieving "accepted" safety outcomes.

In an industry of this level of diversity and disparity, it is a much more sustainable, efficient and effective model than attempting to have one central entity, staffed by a small numbers of regulators and government representatives, develop and enforce rates of pay that will suit each and every one of the tens of thousands of organisations delivering road transport services.

It should also be noted that the freight transport and logistics industry has devoted considerable time and resources developing the National Transport Commission *Guidelines for Managing Heavy Vehicle Driver Fatigue*[1] which assists fatigue management within industry that will be used as a source for the Heavy Vehicle National Law (HVNL) and model work health and safety laws.

It follows that ALC is disappointed that the Government has elected to proceed with the Bill, which effectively introduces an 'industrial arbitration' model of dealing with remuneration and safety reforms rather than allowing the mechanisms that are available to operate.

This is particularly the case where the link between remuneration levels and safety outcomes has not been proved.

The 'missing link' between remuneration levels and safety outcomes

The regulatory impact statement (**RIS**) accompanying the Bill does not support a definitive link between remuneration levels and safety outcomes and so it is premature for a tribunal such as the Road Safety Remuneration Tribunal to be established in the absence of such a link.

The RIS says that:

> The Australian road transport industry generally has a strong safety performance and key safety initiatives, such as CoR and fatigue management laws which are being bedded down, so further improvements in road safety can be expected to continue. Important initiatives including the NHVR and the National Road Safety Strategy should have a positive effect on road safety. Governments are also continuing to invest in road infrastructure, including quality rest stops, divided roads and improved freight corridors, which the NTC put forward as major catalysts for a safer road transport industry.
>
> However, as the current system does not address the link between remuneration and safety, no action may mean that the financial incentive to engage in practices which are often a factor in heavy vehicle crashes - speeding, working long hours and using illicit substances - would remain and potentially undermine these other Government investments. Improvements in road transport laws are underway but the current system is reported in stakeholder submissions to lack consistency and uniformity and is complex at the state level, especially for owner drivers.

1 National Transport Commission Guidelines For Managing Heavy Vehicle Driver Fatigue www.ntc.gov.au/filemedia/bulletins/Guidelines_Fatigue_August07.pdf

> Despite the developments outlined earlier, it would appear that the investigation of further reforms may be warranted in relation to low remuneration and inappropriate payment systems for owner drivers, which are antecedent factors to fatigue and speeding.[2]

It also says:

> The road safety benefits assessed in this RIS are also considered very conservative based on the assumptions used. The road safety elasticities used in this RIS are sourced from a limited number of international studies. Further empirical work is required to validate these results for the Australian case. It may be the case that the elasticities would differ by road freight segment, resulting in a higher weighted elasticity across the industry. Moreover, the incremental safety benefits are net of the savings expected from non-remuneration related safety programs currently in place……. The possible uplift in road safety associated with adding remuneration related safety programs to the current suite of approaches has not been investigated. While the RIS assumes that there will be different levels of risk in each segment (proxied by the number of crashes), it assumes that drivers' risk profiles do not vary across segment. This is a simplifying assumption given incomplete and uncertain data.[3]

And also states:

> Speed and fatigue are often identified as the primary cause for a crash but it is a much harder task to prove that drivers were speeding because of the manner or quantum of their remuneration. There is some research to suggest that the remuneration for drivers is a factor in safety outcomes, however data at this point in time is limited and being definitive around the causal link between rates and safety is difficult.[4]

whilst page 19 of the 2008 National Transport Commission report *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry* – the publication that formed the basis for these changes, said:

> 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.

It is finally noted the Parliamentary Library Bills Digest records that the RIS which forms part of the Explanatory Memorandum does not provide unqualified support for instituting the Tribunal.[5]

It would therefore appear premature to establish a tribunal such as the Road Safety Remuneration Tribunal as if the link has been proved.

ALC therefore requests that the Committee recommend that the Bill is not introduced into the House of Representatives until a link between remuneration and road safety is proved.

ALC has strongly argued that safety issues are best dealt with through the operation of industry specific legislation enforced by a specialist regulator.

The COAG process has led to the development of the HVNL currently before the Queensland Parliament, that will bring a high degree of uniformity of laws relating to the safe operation of heavy vehicles.

It is also proposed that the HVNL will be regulated by a specialist administrative body - the NHVR.

The national scheme is due to commence on 1 January 2013.

One of the objectives of the HVNL is to promote public safety[6], whilst the functions of the NHVR include the identification and promotion of best practice methods for managing the risks to public safety arising from the use of heavy vehicles on roads, as well as encouraging and promoting safe and productive business practices of people involved in the road transport of goods or passengers.[7]

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2 RIS p.xxvi
3 RIS p.xlviii
4 RIS p.iv
5 *Bills Digest* No.88 2011-12 Road Safety Remuneration Bill p.23
6 Clause 3(a) of the HVNL
7 Paragraphs 600(2)(j) and (k) of the HVNL

Rather than add an additional body with the capacity to regulate the operations of the heavy vehicle sector, the Committee should recommend the Australian Government encourage the new NHVR to draw on its experience gained in regulating the heavy vehicle sector as well as its own research, to continue to identify ways to increase road safety.

However, if the Bill is to proceed, ALC requests the Committee to make amendments to the Bill, as discussed below:

What should the Road Safety Remuneration Tribunal do?

The Bill is described as being a 'road safety remuneration Bill'.

However, it is far more than that.

This is made clear by clause 90 of the explanatory memorandum, which says:

> 90. The Tribunal can make orders in relation to any of the following:
>
> » conditions about minimum remuneration and other entitlements for road transport drivers who are employees, additional to those set out in any modern award relevant to the road transport industry. The relevant modern awards are those referred to in the definition of 'road transport industry';
>
> » conditions about minimum rates of remuneration and conditions of engagement for road transport drivers who are independent contractors;
>
> » conditions about industry practices for loading and unloading vehicles, waiting times, working hours, load limits, payment methods and payment periods;
>
> » ways of reducing or removing remuneration-related incentives, pressures, and practices (including practices of participants in the supply chain) that contribute unsafe work practices (for example, speeding or excessive working hours).

This describes the ambit of clause 27, which reads:

> 1. If the Tribunal decides to make a road safety remuneration order, the Tribunal may make any provision in the order that the Tribunal considers appropriate in relation to remuneration and related conditions for road transport drivers to whom the order applies.
>
> 2. Without limiting subsection (1), the Tribunal may make provision in the order in relation to any of the following:
>
> a. conditions about minimum remuneration and other entitlements for road transport drivers who are employees, additional to those set out in any modern award relevant to the road transport industry (see subsection 20(2));
>
> b. conditions about minimum rates of remuneration and conditions of engagement for road transport drivers who are independent contractors;
>
> c. conditions for loading and unloading vehicles, waiting times, working hours, load limits, payment methods and payment periods;
>
> d. ways of reducing or removing remuneration-related incentives, pressures and practices that contribute to unsafe work practices.

It is therefore appropriate for paragraphs 87 and 88 of the explanatory memorandum to note:

> 87. Subclause 27(1) provides that the Tribunal may make any provision in the order it considers appropriate in relation to remuneration and related conditions for road transport drivers.
>
> 88. Subclause 27(2) provides that the Tribunal can make orders in relation to matters listed in this subclause. It should be noted that this list is also referred to in the definition of 'related conditions' as including 'matters of a kind referred to in subclause 27(2)'. The definition is intended to identify the broad scope of 'related conditions', without unduly limiting what the Tribunal may find necessary to make orders about. Also, the beginning of subclause 27(2) specifically notes that the list is not intended

The net effect is that a full bench of the Road Safety Remuneration Tribunal (constituting the Tribunal President, a Fair Work Australia member and an industry member) are contingently capable of making decisions about loading trucks and managing fatigue.

This is highly undesirable.

ALC members are committed to the general duty imposed by the workplace health and safety model law that commenced operation in some Australian jurisdictions on 1 January 2012 which requires a person undertaking a business undertaking to ensure that workplace risks are as low as reasonably practicable (**ALARP**).

This necessarily includes responsibility towards independent contractors engaged by operators.

There is a direct collision between the philosophy of this Bill, which raises the spectre of inserting command/control regulation in an areas where other laws require the application of ALARP principles - which in one way places greater burdens on operators as ALARP implicitly requires implementation of 'best practice' and continuous improvement.

It should also be noted the HVNL will specifically manage speeding and fatigue management in the Australian road long haul sector to ensure there is a more national approach to achieving positive safety outcomes.

Operators face prosecution if they fail to take all reasonable steps to ensure the HVNL is not been breached – see in particular chapters 5 and 6 of the HVNL, as introduced into the Queensland Parliament in December 2011.

Paragraph 20(1) (g) of the Bill states that the Tribunal must have regard to the need to avoid 'unnecessary' overlap with the *Fair Work Act 2009* or any other law prescribed.

However, the need to *avoid* unnecessary overlap must mean that *some* overlap is anticipated.

It is particularly noted that Subdivision A of Division 3 of Part 1 of the Bill provides that the Bill prevails over (amongst other things) state laws.

That would mean that a road operator would have to follow any road safety remuneration order made by the Road Safety Remuneration Tribunal that specifically deals with (for instance) truck loading or fatigue, notwithstanding the obligations of operators under proposed nationally consistent heavy vehicle and WHS/OHS laws.[8]

If an order is made with respect to (for example) the loading of goods, one possible outcome could be that operators will be obliged to adopt the practices in vogue at the time the instrument is made..

This means that it will be unlawful for operators to adopt more efficient and safer practices that can and do develop dynamically with improvements in technology etc - something that a reasonable observer would have thought that an operator in an ALARP safety environment would have been obliged to do.

This 'direct collision' between different statutory schemes is highly undesirable as it leads to uncertainty in the law, as well as reducing safety outcomes.

As mentioned previously, ALC has strongly argued that safety issues are best dealt with by a specialist regulator – in the case of heavy vehicles the HVNL, regulated by a specialist law – in the case of heavy vehicles the NHVR.

This is so regulators with specific expertise in a subject area will be making decisions in areas where they possess a greater background in the relevant area of regulation, lessening the possibility of regulatory failure.

This regulatory regime should be the primary method used to ensure driver safety.

If the Tribunal is to exist, it should be restricted to matters directly pertaining to remuneration.

It should also be placed under a mandatory duty to provide reasons as to why any other existing instrument (including a Modern Award made under the FWA) or law (such as the HVNL or workplace health and safety legislation) does not adequately cover the subject matter of a proposed road safety remuneration order.

It should finally be required to estimate the costs involved in implementing an order, including the compliance costs involved in having to adhere with different statutory schemes.

8 The proposed Heavy Vehicle National Law and the Workplace Health and Safety Law are applied national schemes or models. That means whilst generally nationally consistent, they remain state laws. This means to the extent the terms of these laws are inconsistent with a *determination by the Tribunal* the determination prevails by force of clause 10 of the Bill

Emphasising the importance of evidence based decision making

The Bill states that the Tribunal may make a road safety remuneration order with respect to 'remuneration and related conditions':

a. on its own initiative if it is in relation to a matter identified in its work program; or

b. at its discretion, on application from (effectively) an industry participant or an industrial association with respect to something that is, **or is capable of** being included, in the Tribunal's work plan.

One of the positive features of the Bill is to require the Tribunal to prepare a work program with industry participation.

It is therefore disappointing that a contingent capacity exists to allow an industry participant to make an application for a road safety remuneration order if it relates to a matter that is 'capable of' being included in the work program.

If the Tribunal is to make remuneration decisions that will override other instruments (such as contracts with independent contractors or Fair Work Australia Modern Awards), decisions must be evidence based and made in a careful manner.

That means decisions should only be made on the basis of research programs agreed with industry.

It will also mean the capacity for 'forum shopping' will be reduced.

The only matters that the Road Safety Remuneration Tribunal should be able to make a Road Safety Remuneration Order on are those matters on the Tribunal work plan.

Honesty in legislation

Finally, it is important there is transparency in the law.

Paying drivers sufficient remuneration to ensure that safety risks are avoided is of course important.

However, if the Road Safety Remuneration Tribunal is to make decisions on matters other than the remuneration paid by drivers dealt with by other laws (thus raising the spectre of forum shopping), statutory tags contained in legislation should properly describe the true ambit of the legislation.

To do otherwise would be dishonest.

ALC requests the Committee to recommend that if the Bill is to proceed, its ambit should be restricted to remuneration matters.

Therefore:

» clause 3 (the objects clause) should be amended to make clear that the Tribunal should deal with remuneration matters;

» clause 27 should be amended so that the concept of 'related conditions' should be removed from the Bill

» subclauses 19(3) – (6) should be removed so that the Tribunal can only make orders with respect to matters on the Tribunal work plan; and

» if the ambit of the Tribunal is not amended, the Committee should recommend the Bill be renamed the Road Transport Regulation Bill and orders described as road transport regulation orders.

Jurisdiction of Tribunal

Application to long distance operations only

The Bill is capable of regulating the broadly defined 'road transport industry', which includes the road transport and distribution, long distance operations, cash in transit and waste management industries (as they are described in the relevant modern industry awards), as well as all road transport drivers, including independent contractors.

It is noted that the research relating to driver safety revolves around long distance operations.

It is respectfully submitted that extending the coverage of the Bill to couriers and cash in transit industries is an exercise in jurisdictional creep.

The Modern Award system and the standard occupational health and safety laws adequately deal with these market sectors.

ALC requests the Committee to ask the Government to explain why these sectors should be regulated under the terms of the Bill.

The Bill should be amended so it only covers remuneration issues relating to long distance operations.

Independent contractors

The Bill clearly intends to create a safety net scheme of regulation for these road transport drivers, and effectively creates a 'third class' of worker who will be entitled to a similar safety net system as an employee under the *Fair Work Act* yet for all other purposes (i.e. taxation, superannuation or workers' compensation) may continue to be treated as an independent contractor.

This is an outcome that could confuse both operators and owner/drivers.

Moreover, limiting the capacity for operators to efficiently manage the peaks and troughs of freight volumes by impending their ability to engage independent contractors could impinge the efficient management of the freight effort as well as increasing costs throughout the freight chain.

ALC finally notes that *bona fide* independent contractors are capable of having unfair contracts reviewed by the Federal Magistrates' Court under the *Independent Contractors Act 2006* and that the *Competition and Consumer Act 2010* permits ACCC can authorise collective bargaining with larger operators.

It follows there are federal mechanisms that are reasonably convenient that an independent contractor may access to deal with remuneration related issues.

That said, ALC notes the RIS operates on the assumption there is a link between poor remuneration and accidents and that the national minimum wage is an 'economically efficient remuneration level', carrying a clear implication that many operators are yielding less than the minimum wage.

The RIS also suggests that one reason for this is a failure by small operators to factor into the costs of operating a business. Another reason suggested is the fact that many contracts specify payment on the basis of distance without factoring in waiting and loading time.

A possible alternative model (discussed in the RIS) is to adopt some of the elements of existing Victorian legislation requiring the provision of information to independent contractors so they can make an informed business decision without the undue interference from an arbitral body.

To the extent that the Bill deals with independent contractors, ALC requests the Committee to consider the insertion of provisions requiring the publication of an information booklet contained in Part 2 of the *Owner Drivers and Forestry Contractors Act 2005* (Vic), which requires the provision of information to independent contractors so they can make an informed business decision.

Adoption of this recommendation would help to ensure information consistency between independent contractor and operator, allowing both parties to negotiate arrangements that mutually support the business model freely adopted by each party.

Repeal of state based regulation dealing with the same issue

Finally, the Bill preserves by and large the effect of legislation in force in NSW, Victoria and WA, with the Bill only prevailing where there is inconsistency.

Given the NSW and Commonwealth legislation can regulate the hirer/independent contractor relationship, there is a possibility of 'forum shopping', with relevant parties gaming the system and utilising the legislative scheme that may provide (from their perspective) the most favourable outcome.

This on its face is inefficient and imposes unreasonable administrative costs on companies who may be required to comply with up to four different legislative schemes dealing with the hirer/independent contractor relationship.

Put another way, ALC previously described this Bill as creating an 'industrial arbitration' model of regulating the driver/operator relationship.

The Commonwealth has exercised its constitutional capacity to effectively 'cover the field' with respect to workplace relations.

It follows that given the ambit of the unamended Bill (complete with the involvement of Fair Work Australia in the development of orders and subsequent enforcement) it is equally appropriate for this industry sector to have its industrial relationship regulated the same way throughout Australia.

If the Bill is to proceed, it should be amended so that it is the legislation that deals, as far as constitutionally possible, with remuneration issues relating to heavy vehicle drivers to the exclusion of state laws currently in place.

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- Westgate Ports

HONORARY FELLOWS

Paul Little AO – February 2011
Peter Gunn – February 2011
Ivan Backman – May 2010
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ATTACHMENT 2

AUSTRALIAN LOGISTICS COUNCIL

22 April 2013

The Honourable Jennifer Acton
President
Road Safety Remuneration Tribunal
GPO Box 1994
Melbourne VIC 3001
inquiries@rsrt.gov.au

Draft Road Safety Remuneration Orders

Dear Ms Acton

The Australian Logistics Council is pleased to make a submission on the Road Safety Remuneration (Retail Sector) and Road Safety Remuneration (Inter and Intra State Long Distance Sector) proposed orders.

Yours sincerely

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ALC COMMENTS ON PROPOSED ROAD SAFETY REMUMERATION (RETAIL SECTOR) AND ROAD SAFETY REMUNERATION (INTER AND INTRA STATE LONG DISTANCE SECTOR) ORDER

Introduction

1.1 The Australian Logistics Council (**ALC**) is pleased to make a submission on the Road Safety Remuneration (Retail Sector) and Road Safety Remuneration (Inter and Intra State Long Distance Sector) proposed orders (**the proposed orders**).

1.2 ALC submits the proposed orders, as proposed to the Tribunal by the Transport Workers Union (**the applicant union**), should not be adopted on the following grounds:

(a) because:

(i) the specific provisions contained in the Heavy Vehicle National Law relating to the management of speeding and fatigue;

(ii) the As Low As Reasonably Practicable (**ALARP)** principles contained in the primary duty imposed on a person conducting a business or undertaking imposed in national workplace health and safety legislation;

(iii) the existence of industry safety codes that relate to health and safety, such as by ALC, which have been registered in Victoria under the *Road Safety Act 1986*; and

(iv) other legislation in force in Australia regulating heavy vehicle safety

when, taken cumulatively, deal with the same matters contained in the proposed orders; and

(v) the prescriptive nature of the proposed orders is likely to act as a disincentive and discourage continuous improvement in the management of speed and fatigue, as some freight chain participants opt to merely 'follow the award' rather than proactively improve safety

the proposed order:

(vi) fails to avoid unnecessary overlap with the workplace health and safety laws prescribed for the purposes of the *Road Safety Remuneration Act 2012* (**the Act**);

(vii) fails the test of meeting the need to reduce complexity; and

(viii) fails the test of meeting the need to minimise the compliance burden

matters that the Tribunal is under a mandatory duty to consider under section 20 of the Act when making a road safety remuneration order **(RSRO)**;

(b) the contents of the proposed order, in particular:

(i) the pay rates proposed to be established by Schedule B of the proposed orders; and

(ii) the implied right of entry proposed to be conferred on officers of the applicant union

constitute an attempt to re-litigate issues dealt with under the modern award process and thus constitutes an unnecessary overlap with the *Fair Work Act 2009*, a matter the Tribunal is under a mandatory duty to consider when making an RSRO.

(c) the proposed orders impose irrational and unworkable obligations on freight chain participants, meaning that the proposed orders:

(i) fail the test of the need to reduce complexity and to have orders that are easy to understand; and

(ii) fails the test of meeting the need to minimise the compliance burden

matters that the Tribunal is under a mandatory duty to consider under section 20 of the Act when making an RSRO;

(d) the applicant union, in any of its submissions, has neither:

(i) provided any assessment on the financial impact on industry; nor

(ii) evidence that the proposed orders, through their imposition, will lead to further improvement to safety in the transport industry

meaning that the proposed orders:

(iii) fails the test of the need to reduce complexity;

(iv) fails the test of meeting the need to minimise the compliance burden;

(v) fails the test of considering the viability of businesses in the road transport industry; and

(vii) fails the test of considering the effect the proposed award will have on the national economy and on the movement of freight across the nation

matters that the Tribunal is under a mandatory duty to consider under section 20 of the Act when making an RSRO.

1.3 ALC concurs with the proposed order of the Australian Road Transport Industrial Association (**ARTIO**), dated 4 March 2013, generally for the reasons contained in the covering letter to its proposed order.

Duplication of laws serving common purposes

2.1 Model workplace legislation that will be adopted in all states and territories (except Victoria and Western Australia) imposes a primary duty of care on a person conducting a business or undertaking to ensure all reasonably practicable steps are taken to ensure the health and safety of workers at work in the business or undertaking.[1]

2.2 The duty also extends to other people put at risk from work carried out as part of the conduct of the business or undertaking.

2.3 ALC members are committed to compliance with this primary duty.

2.4 The Queensland Parliament has passed the *Heavy Vehicle National Law Act 2012*, which contains the Heavy Vehicle National Law (**HVNL**) scheduled to be applied in all states and territories (except WA) by 1 July 2013.

2.5 Chapter 5 of the HVNL imposes obligations on all elements of the freight chain to prevent drivers speeding.

2.6 Chapter 6 of the HVNL imposes obligations on all elements of the freight chain to prevent drivers from driving whilst fatigued.

2.7 Chapter 9 of the HVNL confers significant compliance powers to ensure compliance with speed and fatigue laws.

2.8 In addition, sections 174 and 200 of the HVNL require employers, prime contractors and operators to adopt business practices that will not cause drivers to exceed the speed limit or drive fatigued (respectively).

2.9 Moreover, section 17 of the HVNL deals with the relationship between the HVNL and WHS laws. The effect of the section ensures that the two sets of law operate together, with the duties imposed by both sets of laws preserved.

2.10 Finally industry has promulgated codes such as the ALC *National Logistics Safety Code*, that is currently registered in Victoria and which is intended to be registered as a code of practice under the HVNL. Once registered, for the purposes of the National Law, compliance with the Code will be evidence that all reasonably practicable steps were taken to ensure that a particular event involving speed or fatigue did not occur.

2.11 There is thus direct collision between the philosophy of the proposed orders, that are effectively command/control in nature and the philosophy of laws influenced by the ALARP concept that implicitly encompass a requirement to implement 'best practice' and continuous improvement.

[1] Employers in Victoria nevertheless have a similar obligation s – see Part 3 of the *Occupational Health and Safety Act 2004* (Vic)

2.12 It is particularly noted that Subdivision A of Division 3 of Part 1 of the Act provides that the Bill prevails over (among other things) state laws.

2.13 That would mean relative parties would have to follow the proposed orders, if made, notwithstanding the obligations of operators under proposed nationally consistent heavy vehicle and WHS/OHS laws.

2.14 Moreover, the prescriptive nature of the draft orders is likely to act as a disincentive and discourage continuous improvement as (particularly) smaller operators will default to the terms of the proposed orders because compliance 'with the award' (as undoubtedly an order made under this Act will be called in practice in the workplace) for the sake of peace, notwithstanding the fact that the HVNL and WHS laws create what is in effect a duty of 'continuous improvement'.

2.15 A tick-a-box compliance mentality will more likely than not develop, to the detriment of overall safety outcomes.

2.16 ALC strongly argues that safety issues are best dealt with by a specialist regulator – in the case of heavy vehicles the HVNL, regulated by a specialist law – in the case of heavy vehicles the National Heavy Vehicle Regulator.

2.17 This is so regulators with specific expertise in a subject area will be making decisions in areas where they possess a greater background in the relevant area of regulation, lessening the possibility of regulatory failure.

2.18 This regulatory regime should be the primary method used to ensure driver safety.

2.19 It is finally noted that there are other laws that are aimed to ensure heavy vehicle driver safety in Australia, including:

(a) Chain of Responsibility legislation, such as under the NSW *Road Transport (General) Act 2005* and associated regulations;

(b) State and Territory road transport legislation, including safety and traffic management, driver licensing, and heavy vehicle registration laws;

(c) minimum conditions of employment under the National Employment Standards in the *Fair Work Act 2009*;

(d) industrial awards and enterprise agreements made under the *Fair Work Act* setting terms and conditions for employees in the road transport industry;

(e) contract determinations made under State and Territory legislation establishing minimum terms and conditions for the engagement of contractor drivers, such as the *Transport Industry - General Carriers Contract Determination*, the *Transport Industry - Mutual Responsibility for Road Safety Contract Determination* and the *Transport Industry - Interstate Carriers Contract Determination* made under the *NSW industrial Relations Act 1996*;

(f) additional protections under Chapter 6 of the NSW *Industrial Relations Act 1996*, the Western Australian *Owner Drivers (Contracts and Disputes) Act 2007*, and the Victorian *Owner Drivers and Forestry Contractors Act 2005*;

(g) rights and protections for independent contractors under the Commonwealth *Independent Contractors Act 2006*; and

(h) rights and protections against unconscionable or oppressive conduct under the Commonwealth *Competition and Consumer Act 2010*

the effects of which have gone towards Safework Australia being able to report a 23% reduction in serious compensation claims for the transport and storage industry between 2000-01 and 2009-10.[2]

2.20 ALC therefore submits the proposed order:

(a) fails to avoid unnecessary overlap with the workplace health and safety laws prescribed for the purposes of the Act;

(b) fails the test of meeting the need to reduce complexity; and

(c) fails the test of meeting the need to minimise the compliance burden

matters that the Tribunal is under a mandatory duty to consider under section 20 of the Act when making an order.

[2] See Schedule 2

Reventilation of matters previously dealt with in the context of relevant awards

3.1 ALC members report that Fair Work Australia has, through the *Road Transport and Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010*, effectively already established the awards and pay rates to be established by Schedule B of the proposed orders.

3.2 This was determined after an exhaustive hearing. Nothing in the outline of the submission provided by the applicant union establishes any reason as to why those rates should vary and how increasing the amount prescribed by the Modern Award would add to worker safety.

3.3 The draft orders can therefore be characterised as a colourable attempt to re-litigate issues dealt with through the *Fair Work Act* process and must therefore be:

(a) construed as an 'unnecessary overlap' of that Act; or alternatively

(b) display a failure to have full regards to modern awards relevant to the road transport industry, and the reasons for those awards

matters the Tribunal is under a mandatory duty to consider when making an RSRO.

Observations on the contents of the proposed orders

4.1 Clause 4.1 – the imposition of a positive duty on a consignor, consignee or intermediary to ensure' an amount paid under a contract is sufficient to enable to be paid is unreasonable as it anticipates knowledge of the operations and finances of the other parties that a reasonable person could not expect a consignor, consignee or intermediary to obtain, particularly because, as a matter of commercial reality, the other party would be unlikely to provide relevant commercial information to someone outside of that party's commercial organisation.

4.2 Clause 4.2 – the imposition of a positive duty on a consignor, consignee or intermediary to ensure that an amount paid under a contract includes an amount sufficient to cover 'the reasonable business expenses' of the other party is unreasonable because in the context in which it is used the term 'reasonable business expenses' is so vague as to be uncertain.

4.3 Clause 5 is unreasonable in its entirety as:

(a) the capacity to use a debt recovery mechanism contained in an order to recover outstanding amounts payable under 'any other applicable modern award, enterprise agreement, FWC order or transitional order' would appear to be outside of the scope of matters the Tribunal may deal with established by section 27 of the Act*;* and

(b) unreasonable inasmuch as a clause requiring a 'relevant' consignor, consignee or intermediary (a concept that is of itself uncertain in context) to pay all of an outstanding amount is unreasonable where the amount payable is attributable to (for example) multiple consignment loads, shared loads or home and business deliveries.

4.4 Clause 6.3 – the requirement of a consignor, consignee or intermediary to ensure that the amount paid includes an amount sufficient to cover reasonable business expenses associated with the preparation of a safe driving plan is unreasonable because:

(a) it anticipates knowledge of the operations and finances of the other parties that a reasonable person could not expect a consignor, consignee or intermediary to obtain, particularly because, as a matter of commercial reality, the other party would be unlikely to provide relevant commercial information to someone outside of that party's commercial organisation;

(b) creates an unnecessarily complex burden on businesses required to prepare preparing driving plans as they must apportion the cost of producing a safe driving plan across different classes of customers; or, in the alternative

(c) if a flat fee is charged to cover safe driving plans because of the complexity referred to in the previous paragraph, an incentive may be created to overcollect from, in particular, consignors, consignees and intermediaries for goods carried by (for example) multiple consignment loads, shared loads or home and business deliveries.

4.5 Clause 8 – the provision requiring consignors, consignees and intermediaries to ensure contractor drivers achieve 'full recovery of reasonable costs' and a 'reasonable profit margin' is unreasonable as:

(a) it anticipates knowledge of the operations and finances of other parties that a reasonable person could not expect a consignor, consignee or intermediary to obtain, particularly because, as a matter of commercial reality, the other party would be unlikely to provide relevant commercial information to someone outside of that party's commercial organisation; and

(b) in context, the phrases 'full recovery of reasonable costs' and 'reasonable profit margin' is so vague as to be uncertain.

4.6 Clause 9.3 and 14 – the level of direction imposed by these clauses, when taken cumulatively, may give rise construction that a contractor driver is being engaged under a contract of employment rather than a contract of services.

4.7 Clause 10.1 - a reference to a registered training provider should be amended to mean a training provider accredited under the Australian Qualifications Network.

4.8 Clause 10.6 – the reference to clause 7.2 is presumably a reference to clause 8.2.

4.9 Clause 11 is unreasonable as training costs form part of the costs taken into account when setting a price for the provision of services. Imposing a training levy on consignors, consignees and intermediaries would constitute double payment by the end-user for the same cost.

4.10 Clause 12 – the clause is wholly unreasonable as:

(a) it imposes an unreasonable record keeping requirement on consignors, consignees and intermediaries;

(b) it creates, as admitted by clause 12.3, a duty to 'make' records, which imposes an unreasonable burden on business;

(c) by conferring a requirement to 'make available for inspection by an inspector or authorised officer of the TWU' documents no later than 24 hours of the request imposes:

(i) an unreasonable impact on business;

(ii) a right of access to the commercial documentation of consignors, consignees and intermediaries that is disproportionate to what is reasonably required to ensure compliance with the proposed order; and

(iii) in the case of the applicant union, an implied right of access to business premises, including to the premises of consignors, consignees and intermediaries where the union does not have coverage; and

(iv) can be exercised at will by either an inspector or an authorised officer of the applicant union without any controlling condition precedent such as reasonable grounds to believe that the terms of the proposed order are being breached.

4.11 Clause 13 is unreasonable in its entirety as:

(a) compliance with legal instruments such as the proposed order (if granted) and 'any applicable modern awards, enterprise agreements, FWC orders and transitional instruments' is already required by law. Requiring parties to enter contracts requiring 'strict compliance' with laws is nugatory;

(b) requiring consignors, consignees, intermediaries and hirers to ensure that work is carried out 'in conformity' with applicable rules is unreasonable as it anticipates knowledge of the operations of other parties that a reasonable person could not expect a consignor, consignee or intermediary to obtain, particularly because, as a matter of commercial reality, the other party would be unlikely to provide relevant commercial information to someone outside of that party's commercial organisation; and

(c) clause 13.6 does not create a complementary obligation on the applicant union to report breaches of the various rules set out in the clause.

4.12 paragraph 14.3(f) - the concept of 'artificial stimulants' is uncertain.

4.13 paragraph 14.3(i) – the prohibition on disciplinary action where road transport drivers voluntarily disclose 'professional use of artificial stimulants' (a phrase of uncertain meaning) or a personal drug or alcohol problem is wholly unreasonable as actions of this nature may, in a particular case, be the most appropriate manner in discharging an employer's duty of care both to the employee and others.

4.14 When taken as a whole the proposed orders impose irrational and unworkable obligations on freight chain participants, the proposed orders:

(a) fail the test of the need to reduce complexity and to have orders that are easy to understand; and

(b) fail the test of meeting the need to minimise the compliance burden

matters that the Tribunal is under a mandatory duty to consider under section 20 of the Act when making an RSRO;

Financial impact of proposals on the road transport industry

5.1 In a submission to the Productivity Commission on benchmarking regulatory impact analysis, ALC recommended regulatory impact statements contain a business impact statement estimating the cost the proposed regulatory change will impose on industry in all circumstances where a legislative instrument is made.

5.2 ALC has had the validity of its view confirmed with respect to the development of a recently proposed WHS code of practice. A relevant newspaper article discussing the issue is contained in **Attachment 1**.

5.3 Even though an order may be characterised as an industrial instrument, the Act requires the Tribunal to consider the likely impact on the viability of businesses, on the impact on the national economy of movement of freight, and the need to reduce complexity and compliance burdens on the road transport industry when making an order.

5.4 ALC therefore believes that:

(a) it is incumbent on those presenting orders with significant impacts on industry to provide evidence as to the likely cost of the impositions contained in draft orders; and

(b) the overall effect of section 20 of the Act imposes an implicit requirement that an order should meet the standard typically required for any legislative instrument, being that the burdens proposed in something like a draft order provide a net public benefit.

5.5 In this context, the proposed orders appear to impose costs on freight chain respondents contained in at least the following costs:

(a) costs on consignors, consignees and intermediaries 'ensuring' that an amount paid under a contract is sufficient to pay the road transport driver;

(b) costs on consignors, consignees and intermediaries 'ensuring' that the price paid is sufficient to cover the 'reasonable business costs' of the other party to the contract;

(c) the cost of preparing and maintaining safe driving plans[3] (by whomever ultimately covers the preparation costs);

[3] To the extent that an enterprise level agreement or the law of a State or Territory does not require the preparation of such a plan

(d) costs on consignors, consignees and intermediaries 'ensuring' employees are paid for all time worked including time spent loading and unloading vehicles, waiting for someone else to load or unload vehicles, waiting for someone else to load or unload vehicles, taking crib breaks, washing vehicles, performing maintenance tasks and checks, training and effecting metropolitan pick-up and deliveries, as well as complying with any other industrial instrument;

(e) costs on employers employing drivers on a per kilometre basis for all work including time spent loading and unloading vehicles, waiting for someone else to load or unload vehicles, waiting for someone else to load or unload vehicles, taking crib breaks, washing vehicles, performing maintenance tasks and checks, training and effecting metropolitan pick-up and deliveries, to the extent that any agreement or industrial instrument does not remunerate the performance of these functions;

(f) costs on all parties 'ensuring' that contractor drivers receive the 'full recovery of reasonable costs' and a reasonable profit margin for the operation of the contractor driver's business;

(g) costs on employers and hirers in sourcing and engaging a Registered Training Provider as to provide training on workforce health and safety roles (to the extent that such training is not already provided) together with the cost of drivers attending such courses as well as any compulsory retail distribution facility training inductions;

(h) costs on consignors, consignees and intermediaries as a result of the imposition of a safety levy made by the Tribunal under a head of power contained in the proposed award that does not confine the matters to be had regard to when determining the level of the levy (and thus its level);

(i) costs on consignors, consignees and intermediaries inherent in the retention or making of the documents required to be kept or made by the proposed order, as well as the costs inherent in facilitating inspections of documents;

(i) costs on all parties in 'ensuring' that all work conducted is carried out in conformity with any applicable safe driving plan or industrial instrument; and

(j) the compliance costs involved in settling any disputes arising from the operation of the proposed award.

5.6 It is also appropriate to recognise the costs incurred by all parties where there is either direct collision or 'overlap' with the provisions of any of the laws referred to in Part 2 of these comments, as well as any other relevant industrial instrument made by Fair Work Australia.

5.7 Because the applicant union's outline of submission neither estimates:

(a) how much safety outcomes will be improved as a result of the making of the proposed award; nor

(b) the costs imposed on freight chain

as a result of impositions listed in paragraph 5.5 and 5.6 it is impossible to determine whether the orders provide a net public benefit.

5.8 The cumulative failure to provide:

(a) any assessment on the financial impact on industry; or

(b) evidence that the proposed orders, through their imposition, will lead to further improvement to safety in the transport industry

mean the proposed orders:

(c) fails the test of the need to reduce complexity;

(d) fails the test of meeting the need to minimise the compliance burden;

(e) fails the test of considering the viability of businesses in the road transport industry; and

(f) fails the test of considering the effect the proposed award will have on the national economy and on the movement of freight across the nation

matters that the Tribunal is under a mandatory duty to consider under section 20 of the Act when making an RSRO.

Conclusion

6.1 ALC believes the applicant unions go way beyond the underlying rates of pay necessary to ensure safety but rather intrudes on the efficient functioning of the Australian freight supply chain, with additional costs involved delivering no tangible improvements in safety.

6.2 Major transport and logistics service providers carry an amount of commercial risk. They are responsible for operating their businesses in the most efficient manner, while still ensuring compliance with all applicable laws and regulations.

6.3 An approach which protects such major transport and logistics providers against commercial risk, and inappropriately transfers such risk to consignors, is unnecessary to safeguard small contractors most at risk of exploitation or unfair treatment.

6.4 To the extent that the Tribunal considers it appropriate to make any road safety remuneration order for the retail sector, or for the interstate and intrastate long distance sector, any such order should clearly set out minimum obligations which are measurable and identifiable and expressed to apply only to contracts involving small independent contractors.

6.5 As illustrated by the graphs contained in **Attachment 2**, there is improvement in safety standards.

6.6 In this context, and with the recent passage of national WHS and heavy vehicle laws, those specialist laws should be given time to take effect.

6.7 ALC therefore believes that the Order proposed by ARTIO effectively captures the immediate safety needs of drivers in a manner that is neither commercially intrusive nor costly to the Australian economy.

Australian Logistics Council

April 2012

ATTACHMENT 1

Australian Financial Review
Matthew Stevens
Safety go-slow pleas a paradox
PUBLISHED: 26 Mar 2013

The confrontation between Australia's stevedores and Safe Work Australia over a draft industry code of practice continues to foment, with DP World and the Australian Logistics Council separately inviting Workplace Relations Minister Bill Shorten to intervene.

There is a delightful paradox in the industry's entreaties – first because the industry believes the minister and his department have actually been overengaged in the preparation of the contentious safety code and, second, because the appeal might well have bought a relatively instant result.

Outside the content of a code that the stevedores think has developed into a prescriptive, unwieldy and potential unsafe beast, one of the key points of consistent complaint has been purely procedural.

The stevedores and their agents of agitation, ALC and Shipping Australia, are extremely concerned that there was no plan to put the code through the regulatory impact analysis that they imagined its outcomes would require.

In the letter sent to Bill Shorten earlier this month, the ALC noted that the failure to formally review the impact of the proposed safety code was its most significant concern about the process.

"ALC does not agree with the assessment of the Office of Best Practice Regulation that the costs associated with the Stevedoring Code of Practice will be "minor" and asks on what basis was this assessment made," ALC managing director Michael Kilgariff wrote.

"ALC believes the Code in its current form has the potential to impose significant new costs to industry, without commensurate safety outcomes.

"ALC has long argued for Regulatory Impact Statements to be prepared for all legislative instruments that may impact business. This is a clear case where an RIS is required to assess the potential costs and benefits of the reform."

Following reports in The Australian Financial Review that just one key element of the code under preparation – the requirement to have an extra safety official on every crane serving every ship – could add at least $15 million to our national stevedores' labour costs, there seems to have been a change of heart by the government.

Shorten's office has confirmed that the OBPR will review the code and that the decision will be announced with this week's release of a final draft of the code into its community consultation phase

This is a good start. Whether Shorten will be as open to addressing the industry's core criticisms of the code under construction, well, time will tell. Certainly, though, the minister was left in no doubt about the nature of the concerns.

"ALC shares the position of DP World, as communicated to you in their letter of 1 March 2013, that a number of outstanding issues need to be urgently addressed before the Code can be released for public comment.

"These issues relate to the Code's scope, which needs to be amended to ensure it does not conflict with current workplace health and safety legislation and international maritime safety legislation.

"Another significant issue is the proposed requirement to have in place a mandatory 'Safety Observer'. Industry believes this could potentially have a perverse safety outcome whereby safety outcomes are actually reduced as a result of this requirement rather than enhancing them through reliance on the observer, rather than taking 'all reasonably practicable steps' to ensure safety."

Shorten received this correspondence from ALC a day ahead of Safe Work Australia's decision to send the draft code to public consultation. The decision to force an RIS on the code is not expected to delay this timetable.

In the wake of the March 14 decision by Safe Work, the ALC wrote requesting a meeting with the agency's new chairwoman, Ann Sherry.

Sherry is chief executive of Australia's largest cruise ship operator, Carnival Australia, and so one might imagine she is well enough aware of the issues being raised by her stevedoring cousins. But, so far at least, the industry's seeds of ill-content have fallen on stony ground.

The ALC introduced Friday's request for a meeting with Sherry with a reminder that its members included Asciano, DP World, Qube and Toll.

The letter went on to state: "ALC is . . . concerned that Safe Work Australia has agreed to release the Code of Practice . . . without due consideration being given to the significant concerns expressed by industry.

"It is disappointing that industry's comments on the draft Code have not been reflected in the final draft, despite repeated attempts to raise these with Safe Work Australia. These concerns heighten the need for a Regulatory Impact Statement to be prepared for the Code to assess the costs and potential safety outcomes were this Code to be implemented.

"This lack of genuine consultation undermines industry's confidence in the Code of Practice and is unfortunate given the stevedores' commitment to implementing a Code which is performance and risk-based and is in line with the Work Health and Safety legislative framework."

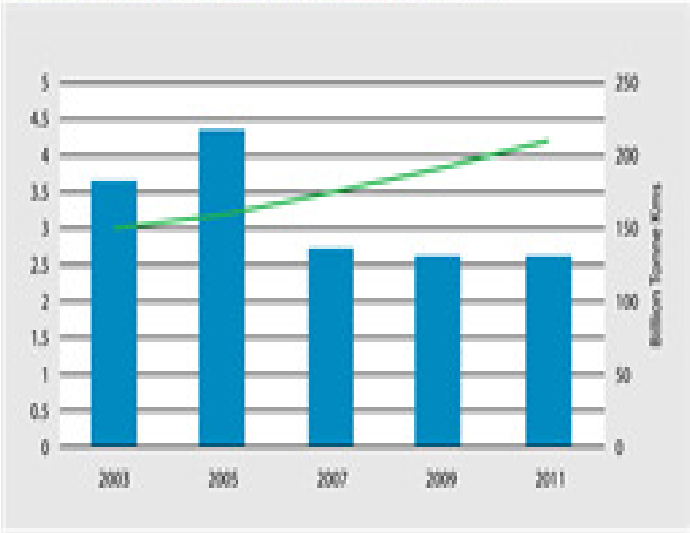
ATTACHMENT 2

AUSTRALIAN LOGISTICS COUNCIL FORUM 2013

MAJOR CRASH INCIDENTS V GROWTH IN FREIGHT

- the major crash rate per '000 units has improved by 42.7% since 2003
- Significant growth from 150 to 209 billion tonne kilometres carried since 2003.
- Average cost per major crash has decreased 13% from the last report.

MAJOR CRASH INCIDENTS (PER '000) V GROWTH IN FREIGHT TASK



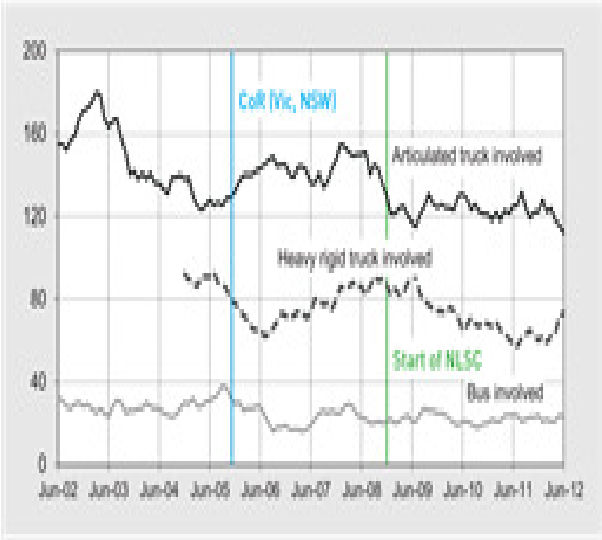
Source, 2013 Major Accident Investigation Report, National Truck Accident Research Centre, National Transport Insurance

When investigating only multi vehicle fatal incidents, it was established that in every 2011 NTI insured vehicle fatal incident, the driver of the lighter vehicle or the third party, was at fault. This was a highly significant outcome from the 2011 data. In 2009, the truck was at fault in 18% of NTI insured incidents involving a fatality.

FATAL HEAVY VEHICLE CRASHES

- In the 12 months to the end of June 2012, 225 people died from 200 fatal crashes involving heavy vehicles or buses.
- Fatal crashes involving articulated trucks decreased by an average of 1.8 percent per year over the three years to June 2012.
- Fatal crashes involving heavy rigid trucks decreased by an average of 8.1 percent per year over the three years to June 2012.
- 45% of truck crashes are not the fault of the truck driver (RMS).

FATAL CRASHES INVOLVING HEAVY VEHICLES, AUSTRALIA — MOVING ANNUAL TOTAL
(Each point shows the number of fatal crashes during the preceding 12 months)

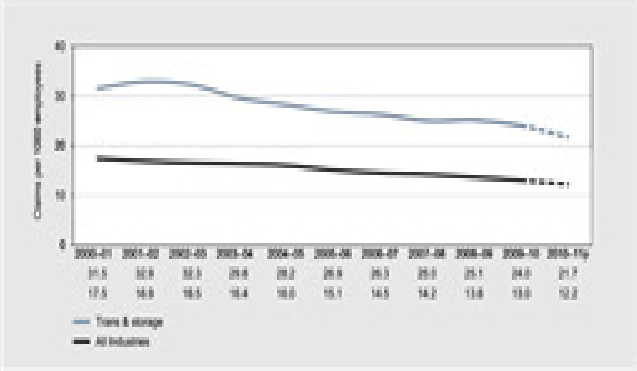


Source, Fatal heavy vehicle crashes Australia quarterly bulletin, April - June 2012, Bureau of Infrastructure, Transport and Regional Economics, January 2013

TRANSPORT & STORAGE SERIOUS CLAIMS

- Safe Work Australia estimates the transport and storage industry employed 549,000 workers in 2010-2011, or 5 percent of the workforce.
- There were 9535 claims for serious injury or illness in the transport and storage sector in 2010-2011.
- The incidence rate of serious claims in the transport and storage industry has fallen by 23 percent, from 31.5 claims per 1000 employees in 2000-01 to 24 claims per 1000 employees in 2009-2010. Note, the transport and storage industry still has the highest incidence rate of all industries.

SERIOUS CLAIMS: INCIDENCE RATES BY YEAR



Source, Safework Australia, 24 September 2012

ATTACHMENT 3

AUSTRALIAN LOGISTICS COUNCIL

MEDIA BACKGROUNDER – RETAIL LOGISTICS SUPPLY CHAIN CODE OF PRACTICE

(December 2013)

What is the Retail Logistics Supply Chain Code of Practice (RLSC)?
The RLSC is an industry driven response to the need to continually improve safety across the supply chain in the heavy vehicle industry. It was developed by the Australian Logistics Council (ALC) in 2006 to ensure participants in the freight logistics supply chain industry are aware of their responsibilities when they control or influence the movement of freight.

How does it work?
The RLSC adopts a risk management approach consisting of a 10 point code of conduct that supports a clear chain of responsibility in freight logistics. Under the RLSC, signatories to the Code are required to actively demonstrate they are implementing positive actions to adhere to the required elements of the Code, including, for example, speed management, fatigue, loading etc. A critical element of the Code is an audit regime to assess whether signatories to the Code are complying with relevant safety rules and regulations.

Why is it important?
All participants in the supply chain who control or influence the movement of freight have a responsibility for safety, and as such, need to be responsible for their actions. This is fundamental to the concept of 'Chain of Responsibility' where supply chain participants have a duty to implement positive actions that prevent breaches of the law.

Who is involved?
More than 60 companies are signatories to the RLSC. This includes transport giants Toll and Linfox, and retail majors Woolworths, Coles and Metcash – all of whom were original signatories to the Code.

Is the Code working?
Evidence suggests industry safety codes such as the RLSC are having a positive influence on safety in the heavy vehicle industry. Since the RLSC was launched, a number of key safety indicators have shown a positive improvement. For example, according to Safe Work Australia's Report 'Work Health and Safety in the Road Freight Transport Industry' there has been 48 percent decrease in the annual number of work related fatalities resulting from injury in the road freight transport industry, from 58 in 2006-2007 to 30 in 2010-2011 (see Graph 1).

It is significant that that this positive downward trend has been achieved against the backdrop of an increasing freight task in each state and territory (see Graph 2) as well as an inconsistent national framework for workplace health and safety laws.

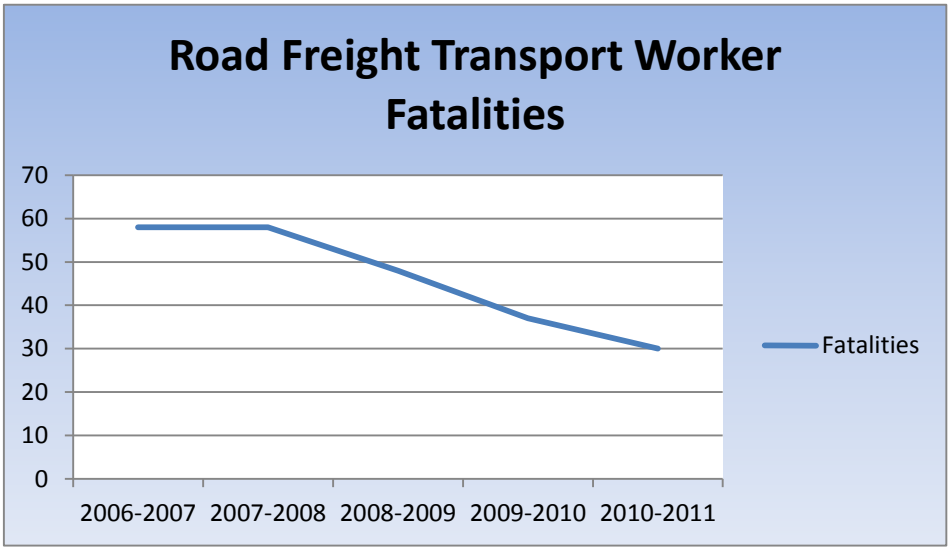
What are the next steps for the RLSC?
ALC is expanding the RLSC so that it covers a greater range of participants in the supply chain. ALC is also working to have RLSC registered under the Heavy Vehicle National Law (HVNL) due to commence in 2013. The HVNL will for the first time deliver a national approach to CoR obligations and registration of the RLSC will provide its members with greater assurance they are meeting their CoR requirements

For further information:

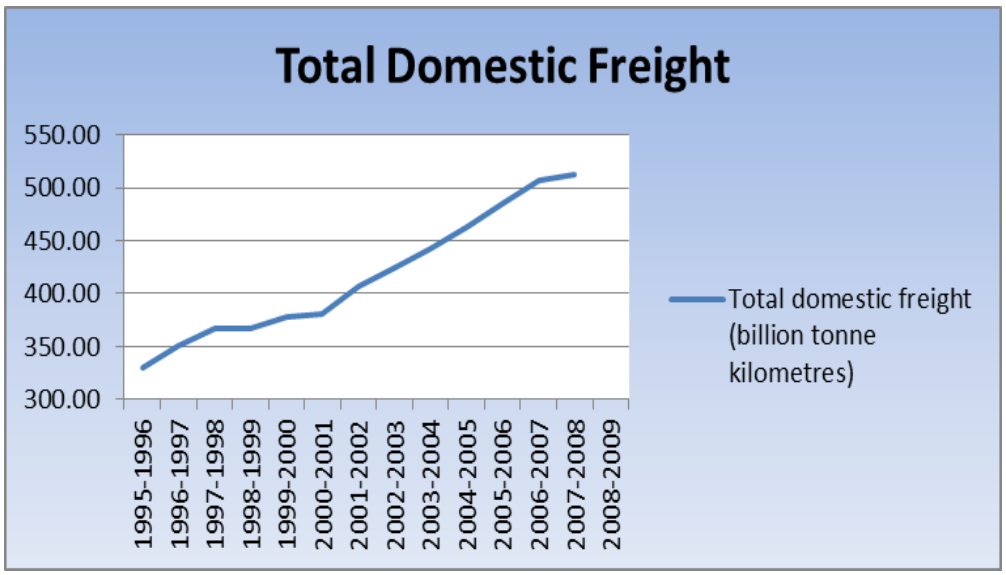
ALC Safety Codes – click here

ALC media releases (http://austlogistics.com.au/media-centre/alc-media-releases-2011/)
See: Registration of ALC Safety Code a Step Forward for Freight Logistics, 23 September 2012

RLSC brochure (http://austlogistics.com.au/wp-content/uploads/2001/03/RLSC_Flyer_final.pdf)
(This brochure includes testimonials from RLSC signatories – Coles, Woolworths, Toll, Metcash, Linfox, and Coca Cola Amatil).



Graph 1 – Road Freight Transport Worker Fatalities: (Source: Work Health and Safety in the Road Freight Transport Industry, October 2013, Safe Work Australia, Page 7.)



Graph 2 – Australia's Rising Freight Task (Source: Bureau of Infrastructure, Transport and Regional Economics, Australian Statistics Yearbook 2011, Page 33)

Note: A billion tonne kilometre is the weight in tonnes of the material transported multiplied by the number of kilometres driven.

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