

ANNEXURE II

A Comparative Analysis of Chain of Commonwealth and NSW Long Distance Trucking Driver Fatigue Laws¹ and the proposed National Transport Commission (Model Legislation – Heavy Vehicle Driver Fatigue) Regulations 2006

This short paper critically compares Part 11 of the *Occupational Health and Safety (Safety Standards) Regulation 1994* (Cth) (“the Commonwealth Regulation”) and Part 4.5 of the *Occupational Health and Safety Regulation 2001* (“the NSW Regulation”) and the Transport Industry - Mutual Responsibility for Road Safety (State) Award and the Transport Industry - Mutual Responsibility for Road Safety (State) Contract Determination (“the NSW Instruments”). It concludes that Part 11 of the *Occupational Health and Safety (Safety Standards) Regulation* nor the proposed National Transport Commission (Model Legislation – Heavy Vehicle Driver Fatigue) Regulations 2006 are adequate alternatives to the NSW Regulation or the NSW Instruments for protecting transport workers and the others who share the roads with heavy vehicle drivers from the risk of harm, injury or death as a consequence of driver fatigue in long distance road transport.

Class of Vehicle

The Commonwealth Regulation only applies to heavy vehicles over 12 ton whereas the NSW instruments apply to heavy vehicles over 4.5 ton. By limiting the application of the Regulation to heavy vehicles over 12 ton, work performed by drivers in smaller rigid vehicles (ie less than 12 ton) is not regulated even though such work may involve long distance driving.

Risk Assessments

Both the NSW Regulation and the Commonwealth Regulation require employers to assess the risk of driver fatigue. The prescription in the Commonwealth Regulation however is somewhat different to its NSW counterpart. For a start the Commonwealth Regulation only

¹ An earlier version formed part of TWUA submission to the Comcare Scheme Review: <http://www.workplace.gov.au/workplace/Publications/PolicyReviews/ComcareReview/Comcarereview-submissionsreceived.htm>.

requires an employer to assess the risk of driver fatigue if the risk has been identified as a 'significant risk of serious injury or any risk of death'². This means that if the risk is not a risk which would not lead to a significant risk of serious injury or death, then no further action is required. It is only when a risk has been identified as meeting the threshold of 'significant risk of serious injury or any risk of death' that action is required to eliminate or control that risk.

This is a serious departure from the standard approach to OH&S regulation in Australia that requires either, as part of the statutory general duty or through prescribed processes contained in regulations, or both, for employers to assess the risk of ALL harm and injury to persons arising from the conduct of an employer's undertaking. It would seem that the only explanation for the different approach adopted in the Commonwealth Regulation is that harm and injury caused by driver fatigue is acceptable, presumably for business exigency purposes, so long as it does not amount to serious injury or death. The Commonwealth Regulation does not provide any guidance how an employer is, on the one hand, to determine how the risk of harm or injury arising from driver fatigue, which is related to the conduct of the employer's undertaking, might be characterised as 'significant risk of serious injury or any risk of death' or, on the other hand, something less than this. The approach is flawed because the risk of serious harm or death from driver fatigue is likely to arise as a result of the culmination of risks, which if viewed in isolation might not appear significant.

The Duty to develop and implement driver fatigue management plan

The NSW Regulation and NSW Instruments require employers to prepare Driver Fatigue Management Plan ("DFMP") in the case of the NSW Regulation and a Safe Driving Plan ("SDP") in the case of the NSW Instrument for each driver who engages in long distance transport before work is undertaken. The NSW Regulation requires employers to account for schedules and driver rosters, certain management practices, work environment and amenities, training and information about fatigue to drivers, loading and unloading schedules, practices and systems including queuing practices and systems³ when preparing a DMFP for a driver. There is some overlap between the NSW Regulation and the NSW Instrument but on the

² Division 11.2 of the Commonwealth Regulation

³ Clause 81D(4) of the NSW Regulation

whole the NSW Instruments supplements the NSW Regulation because it deals with additional risk criteria such as systems of remuneration⁴.

The Commonwealth Regulation also requires employers to prepare fatigue management plans⁵. However, the requirements are narrower in their application and scope compared to the provisions contained in the NSW Regulation and NSW Instruments which together, and severally, address a wider range of known risk factors which are in practice critically determinative of the risk of fatigue. For a start, the Commonwealth Regulation only requires an employer to prepare a fatigue management plan for trips where goods are being carried. This presumably does not apply to trips or parts of trips where a driver is not carrying goods. This omission in the Commonwealth Regulation is difficult to understand because it is very common for heavy vehicle drivers who in engage in long distance transport to drive without freight. Often it occurs because a driver has made a delivery and is returning to base empty because a return load was not obtained by the employer (or by an owner driver if he was contracted by the principal on the basis of a one way load). In the alternative, the driver might be between a delivery and subsequent pick up or might be instructed to travel empty to a location for a pick up by his or her employer/principal. In each case, the task involves driving, albeit without goods on board, and this driving is likely to contribute to the risk of fatigue if it is not managed in the same way as driving with goods on board.

It is much overlooked by some employers in the transport industry who are required to prepare a DFMP pursuant to the NSW Regulation and/or SDP pursuant to the NSW Instruments that each nominated criteria must be addressed in relation to each freight task in circumstances where the requirements of each freight task differ. In practice few transport operators require their drivers to perform strictly line haul work⁶. The reality is most long distance drivers in the transport industry in Australia are required to do multiple pick ups and deliveries of bulk loads in combination with part loads from client premises and freight

⁴ An employer who must comply with both the NSW Regulation and NSW Instrument can prepare a single fatigue management plan which incorporated the requirements of the NSW Regulation and the supplementary matters required by the NSW Instrument.

⁵ 11.06 of the Fed Regulation

⁶ In its purest form line haul work involves driving between depot A and depot B where upon at journey's end the driver might be provided with a noise insulated air-conditioned cabin to sleep for eight hours whilst her/his vehicle is unloaded and reloaded ready for her/his return trip upon awaking. For example, Toll and Linfox engage their employee drivers to do strictly line haul work (although the employees of Toll and Linfox fleet operator contractors and subcontracted owner drivers are not so well catered for).

forwarding facilities. This can involve hours of urban driving, waiting in queues, unloading and reloading which must be added to the many hours spent on interurban and country highways travelling to the intended destination. When long distance driving is combined with so called 'local work' it is impossible to impose a uniform fatigue management plan on every freight task because the conditions can be so variable. If employers try to do this they risk having a fatigue management plan that may not reflect the performance of the actual freight task. In which case the plan may be rendered meaningless or worse still a sham document which serves to deflect attention from unsafe work practices. Furthermore, there is a relationship between the complexity of the freight task and the number of contingencies that must be planned in the performance of the freight task. As the complexity of the freight task increases, that is where the driver is required to do more tasks ancillary to line haul driving, such as extensive urban driving and numerous pick ups and deliveries, so does the exposure to unpredictable events, such as queuing and urban traffic congestion, which increase the time taken to perform the freight task. Since unpredictable events are of themselves not foreseeable the task of planning contingency arrangements which align the needs of a transport business with the employer's obligation to provide a safe system of work could be a daunting if not impossible. Although unpredictability is not foreseeable clearly the risk of it occurring is when the long distance freight transport is made burdensome on the long distance driver.

The NSW Regulation attempts to deal with the risks arising from poorly planned freight tasks by requiring an employer, in preparing a DMFP, to take into account the times actually taken to perform tasks as well as the times required to perform tasks safely⁷. Although the Commonwealth Regulation contains a similar provision it also provides that a fatigue management plan can provide for longer hours of driving and working and shorter periods of minimum rest than that which is prescribed under state road transport legislation. Clause 11.07(5) of the Commonwealth Regulation provides that:

- (5) The management plan must also include arrangements for the management of work time and rest times, including arrangements to ensure that:
 - (a) as far as reasonably practicable, the driver's driving time, work time and rest time are consistent with the regulated hours specified in Part 2 of Schedule 1 to the *National Transport Commission (Road Transport Legislation — Driving Hours Regulations) Regulations 2006*; and

⁷ Clause 81D(4)(ii) of the NSW Regulation.

- (b) if an employer decides to require or allow driving time, work time or rest time that is not consistent with those regulated hours:
 - (i) the employer records the reason for requiring or allowing the different time; and
 - (ii) the employer records the hours that are required or allowed; and
 - (iii) the employer records the measures to be taken to control the risk of serious injury or death arising from fatigue.

This clause permits licensees to drive in excess of maximum driving hours and have less than the minimum rest periods in breach of state road transport driving hours regulations where it is not reasonably practicable to comply. Driving hours' regulations are the lowest form of regulation of driver fatigue in the regulatory armoury and unquestionably the least effective regulatory control of driver fatigue in long distance heavy vehicle transport having had little impact on the rate of death and injury on Australian roads caused by heavy vehicle crashes involving driver fatigue. This provision completely discredits the Commonwealth Regulation as a creditable alternative to the NSW Regulation and NSW Instruments and proves that the Commonwealth Regulation it is not just an inadequate alternative but it is a dangerous law.

In order to understand how this can occur it is first necessary to provide some background of road transport regulation of driving hours in Australia and the relationship between road transport regulatory approach to driver fatigue and OH&S law.

In each Australian jurisdiction except the ACT and WA⁸ road transport law prescribes maximum hours of driving and work and minimum hours of rest for long distance truck drivers based on the *National Transport Commission (Road Transport Legislation — Driving Hours Regulations) Regulations 2006*. In New South Wales relevant prescriptions are to be found in the *Road Transport (Safety and Traffic Management) (Driver Fatigue) Regulation 1999* (“the NSW road transport regulation”). Pursuant to clause 28(1) of the NSW road transport regulation the combined number of hours a driver can drive and work and drive in a 7 day period is 84 hours if that driver has been registered with the Road and Traffic Authority of New South Wales under TFMS⁹ or 14 hours a day. The standard weekly driving limit for non-TFMS registered drivers is 72 or 12 hours per day¹⁰. Drivers must have at least one six

⁸ Prescriptive hours for driving and rest are dealt with under OH&S law in that state

⁹ Transitional Fatigue Management Scheme.

¹⁰ Clause 19(1) of the NSW road transport regulation. Non-TFMS drivers are allowed to work a maximum of two hours daily in addition to the daily prescribed driving hours pursuant to clause 20.

hour continuous rest break in each 24 hour period and at least one continuous 24 hour rest period each 7 days. There are currently no restrictions on night driving or working which means all driving and work can be performed at night and all rest can be taken during the day notwithstanding the conditions a driver may be required to endure such as extreme heat, cold, noise or work related interruptions. There is also no requirement that rest be taken in a place other than the cabin of a truck if the truck is fitted with a berth/cabin in conformance with the relevant Australian standard¹¹. No regard must be had to the cumulative effects of fatigue including interference to the circadian rhythm caused by extended periods of unbroken night driving/work and fragmented periods of insufficient rest.

In 2001 the National Transport Commission assembled the Fatigue Expert Group (“the FEG”) for the purpose of coming up with a safer prescription of driving/work and rest hours for long distance truck drivers. In their published report the FEG were critical of the existing driving/work and rest hours’ standards¹² however, they stopped well short of saying that the recommendations they made to redress the safety concerns with the existing regulated hours regimes were in fact a safe limit¹³.

¹¹ Clause 21(1)(b)(i) of the NSW road transport regulation prescribes the relevant standard as ADR 42.

¹² In its report, Fatigue Expert Group, *Options for Regulatory Approach to Fatigue in Drivers of Heavy Vehicles in Australia and New Zealand*, February 2001, National Road Transport Commission, the FEG Reported (at p.4):

“Current driving hours regulations do not meet evidence based critical factors
The expert group’s evidence-based critical factors are similar to those identified by expert panels in the United States and Canada and when applied to assess the current prescriptive driving hours regime highlight deficiencies including:

- The maximum working (including driving) period in a day does not accommodate circadian patterns (time of day factors);
- The minimum rest periods do not account for cumulative fatigue issues and the variable length of break required for adequate sleep opportunity at different times of the day;
- The minimum rest periods do not accommodate the opportunity for night sleep;
- The short rest breaks are arbitrary and do not allow breaks to be taken when they may be of most benefit.”

¹³ Key recommendations of the FEG Report included:

- Most people require between 7-8 hours sleep per night. If this minimum sleep is not achieved then alertness and performance are affected adversely
- A person averaging six to seven hours of sleep were at twice the risk of a sleep related crash. Persons with five to six hours were at three times higher risk
- Analysis of data showed that drivers who had less than six hours sleep in the previous 24 hours had a three fold increase of risk of a dangerous incident including crashing
- Longer block of time need to have opportunity for minimum sleep period
- Schedule should provide two consecutive nights of rest each week to provide drivers with the opportunity to recuperate from the effects of accumulating a sleep debt
- A single night of sleep is not adequate to compensate fatigue built up over a longer period and research to compensate fatigue suggests that extended recovery time must be made available once every seven days
- The FEG recommended that drivers should not accumulate more than 18 hours night work (between 00.00 and 06.00) before having two consecutive nights rest. This recommendation was derived from taking Canadian and US

No comfort should be taken by the fact that state road transport laws are to be overhauled later this year as jurisdictions start enacting into law the NTC Heavy Vehicle Driver Fatigue – National Model Legislation. The NTC did not adopt the recommendations of the FEG in its model because of concerns about the impact it might have on productivity¹⁴. The NTC instead opted for a three tiered model with the following outer limits:

*Standard Hours*¹⁵:

- 12 work hours per day
- The maximum number of hours that can be worked or driven in a 7 day period is 72 hours or 144 hours in 14 days.
 - 7 hours continuous rest break each 24 hours, two of which in each fortnight must occur between the hours of 22.00 and 08.00 hours.
 - One 24 hour continuous rest breach each 7 days
 - Must have at least 4 night rests in a 14 day period, two of which must be consecutive.
 - 7 hours continuously daily rest break

*Basic Fatigue Management (BFM)*¹⁶:

- Driver not to work more than 6 hours without taking a break of at least 15 minutes
- After 8.5 hours work driver required to have at least a 30 minute break

research and was seen as a compromise which would balance safety with productivity

- The upper band of daily working time should be set at no more than 12-14 hours
- Anyone off long trips over 12 hours should not extend into the 0000-0600 period
- To further provide a safety net, in a seven day period there should be no more than 70 hours of working time

¹⁴ The NTC sought the opinions of members of the FEG of its Driver Fatigue Policy Proposal released in January 2004. Further changes occurred following consultation with industry in 2006 which further watered down the proposal including allowing for the continuous 7 hour rest break to be split.

¹⁵ Clause 43 of the National Transport Commission (Model Legislation – Heavy Vehicle Driver Fatigue) Regulations 2006. The standard hours prescription is the default arrangement because it applies to operators who are not accredited to operate under BFM or AFM and it does not have a requisite requirement to implement fatigue management systems.

¹⁶ Clause 49 of the National Transport Commission (Model Legislation – Heavy Vehicle Driver Fatigue) Regulations 2006. BFM requires participants to demonstrate they have basic fatigue management systems in place. Industry favour this model because they see the prescriptions applicable to BFM as something which can be paid for 'off the shelf'.

- After 11 hours work driver required to have at least 60 minutes break
- Must not work any more than 14 hours in each 24 hour period
- Must not work more than 84 hours in any 7 days
- Must not work more than 144 hours in any 14 days
- Must not work more than 36 *long/night hours* in combination in 7 days. A “long/night hours” means any working time in excess of 12 hours in each 24 hour block which is worked between the hours of 00.00 and 06.00.
- Must rest for 10 hours in each 24 hour period including a 7 hour continuous rest break or in the alternate 8 hours continuous rest break which can be split in one of part of two hours and one part of 6 hours.
- Two 7 hour continuous rest breaks must occur between the hours of 22.00 and 08.00 each week and two of these must occur on consecutive nights in each 14 day period.
- Must have one 24 hour continuous rest break after 84 hours work

Advanced Fatigue Management:

- An outer daily limit of 16 hours driving
- Must have 6 hours continuous rest break in each 24 hour period or in the alternate 8 hours continuous rest break which can be split in two (non-prescribed) blocks.
- Must have at least two 7 hour continuous rest breaks between the time of 10pm and 6am each 14 days and at least four 7 hour continuous rest breaks between the time of 10pm and 6am every 28 days.

The NTC will not guarantee that these limits (including an outer limit of 84 driving hours a week allowable under BFM) and the pressing need for safety reform in road law because to maintain the status quo was no longer a policy option. It is widely accepted that proposed hours rules are a compromise between productivity and the safety outcome to satisfy industry concerns about the capacity of a many operators to adapt to the changes.

Inspector Campbell *Inspector Campbell v. James Gordon Hitchcock*¹⁷ (“*The Hitchcock Case*”) involved the prosecution of a company director for breaches of the *Occupational Health and Safety Act 1983 (NSW)*¹⁸ by the company because it failed to ensure the health and safety of an employee truck driver and a non employee truck driver in circumstances where the employee driver was killed after he collided with an on-coming heavy vehicle because he was affected by fatigue. His Honour Vice President Walton of the Industrial Court of New South Wales made the following finding¹⁹:

It is clear from Associate Professor Williamson's expert evidence, and I have no hesitation in finding beyond reasonable doubt, that driving whilst fatigued is a risk to health and safety. In particular, I find that:

- (a) Long hours of working, especially at night, lead to fatigue;
- (b) Six hours of sleep during the core period of midnight to 6am (or an equivalent restorative sleep during day time, which may take longer due to the deficiencies of day time sleep) is the bare minimum to manage fatigue appropriately;
- (c) The high levels of attention required for driving will also contribute to fatigue;
- (d) Chronic fatigue can develop over a series of long work days in the absence of adequate rest;
- (e) Sleep is the only way to effectively alleviate fatigue;
- (f) The most beneficial, restorative sleep is taken between midnight and 6am. Longer periods of day-time sleep are necessary to reduce a build-up of fatigue;
- (g) Driving when fatigued is extremely dangerous because the skills necessary for driving - paying attention moment by moment - are significantly impaired by fatigue;
- (h) The nature of fatigue makes this situation even more dangerous: the more tired a driver becomes, the less able they are to respond safely to that fatigue by electing to take appropriate rest-breaks, or to stop; and
- (i) Fatigued drivers have a higher risk of crashing.

The prescriptive regulation of driving hours is how road transport law has traditionally approached the regulation of fatigue. In contrast state OH&S legislation requires a different approach to the regulation of fatigue because duties holders are required to ensure employees and others under their control or at the workplace are not at risk of harm or injury. This will usually require that safe systems of work are in place and often regulation will prescribe steps to be taken to identify and assess the risk of harm and then to take steps to eliminate or control the risk. This result is that the OH&S law is likely to result in a higher standard of safety than is permitted under existing road transport hours regulations and indeed the forthcoming NTC – national model legislation. This point was conceded by the NTC director of policy, Mr Barry Moore, who was quoted in an industry journal as saying²⁰:

¹⁷ [2004] NSW IR Comm 87 at [42]

¹⁸ Now repealed and replaced by the *Occupational Health and Safety Act 2000 (NSW)*

¹⁹ *Hitchcock Case* at [42].

²⁰ A. Stewart, “Like Sands Through the Hour Glass, Australasian Transport News, September 2006, p.44

If nothing is done [meaning no reform to the existing unsafe road transport long distance driving hours' regimes], OH&S will govern driving hours and that could lead to much lower hours [of driving] such as the 48 a week in Europe and 60 in the USA. So we need an hours system which shows safety as a serious concern.

Although the proposed NTC changes to existing state road transport Regulation of driving hours for long distance heavy vehicle drivers might be a case of putting 'lipstick on the pig' it should not be overlooked that the NTC model laws also contain new proposed general duties which purportedly take precedence over the driving/work hours regimes²¹. The model national law provides that compliance with a particular driving hours regime contained in the model law is not necessarily exculpatory of the obligations of a party in the chain of responsibility to prevent a person driving whilst fatigued²². Having said that the general duties contained in the model NTC national legislation do not mirror the duties found in state OH&S legislation law and the result is that where the protections overlap with OH&S the NTC model is generally weaker.

Some insight into the contribution the proposed model law (which includes both driving and rest hours regimes and general duties on parties in the chain of responsibility) will actually make to the improving safety in the transport freight task and to saving the lives of hundreds of Australians who die each year in heavy vehicle crashes can be gleaned from its relative position in respect to existing state and territory OH&S law. Neither the proposed hours regimes or the proposed duties on parties in the chain of responsibility contained in the NTC model laws are intended to override, abrogate or replace State based occupational health and safety legislation. In fact the proposed new model road transport law gives primacy to state and territory occupational health and safety legislation²³. The reason for this is that the NTC have recognised that the road transport national model law may not provide the same standard of community or worker protection that is currently provided by existing state and territory occupational health and safety legislation and that the model law should therefore operate concurrently wherever possible with state and territory OH&S law and should a conflict arise then OH&S law must prevail.

²¹ For a more detailed critique of the proposed NTC laws see the TWU submission to the NTC at <http://www.ntc.gov.au/FileView.aspx?page=A02313400400830020>

²² Clause 27(3) NTC Heavy Vehicle Driver Fatigue National Model Legislation (Cth)

²³ Ibid, clause 9

So if state and territory OH&S law will continue to do the heavy lifting in preventing harm and injury to transport workers and the general public arising from driver fatigue in the performance of the freight task after the road transport national model law is enacted by the jurisdictions, then it begs the following question: How can Part 11 of the Commonwealth Regulation seriously be considered an adequate legislative response to preventing death and injury on Australian roads when it sets as its standard a standard even lower than the unsafe existing driving/work and rest hours regimes (that are about to be scrapped by state and territory jurisdictions)? Clearly, Part 11 is not an adequate response and its credibility will not be improved even when the NTC model laws are adopted because of the fact the national model laws are no substitute for Occupational Health and Safety legislation in NSW (including the NSW Regulation) which the NTC model laws acknowledges are superior legislation in respect to the safety regulatory framework concerning driver fatigue in long distance road transport.

The final point that needs to be made in respect to clause 11.07(5) of the Commonwealth Regulation is that the reference to *work time* does not include waiting or queuing time.

Safe Rates

In contrast to the comprehensive range of risk factors which must be addressed by employers in SDP/ DMFP under the NSW Regulation and NSW Instruments, the Commonwealth Regulation fails to take account of key risk factors such as the unsafe rates of pay²⁴.

²⁴ There is now a large body of national and international evidence in the form of judicial and coronial determinations, academic studies, and government-commissioned inquiries identifying in the transport industry a link between, on the one hand, low rates of pay and other inappropriate industrial practices (such as penalty/reward and other performance/time related systems), and on the other hand, safety concerns such as pressure to work excessive hours; pressure to exceed legal speed limits; and pressure to drive through break and sleep times (*R v Randall John Harm*, District Court of New South Wales, per Graham J, 26th August 2005; Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2) Re: [2006] NSWIRComm 328; *National Road Freight Industry Inquiry, Report of Inquiry* to the Minister for Transport, Commonwealth of Australia, (1984), Canberra; *Beyond the Midnight Oil, An Inquiry into the Managing Fatigue in Transport*, House of Representatives Standing Committee on Communication, Transport and the Arts, October 2000, Canberra; C. Jones, J. Dorrian and D. Dawson, 'Legal Implications of Fatigue in the Australian Transportation Industries', 45 *JIR* 344 at 351; Professor Michael Quinlan, *Report into Safety in the Long Haul Trucking Industry*, A report Commissioned by the Motor Accidents Authority of New South Wales, 2001, Sydney; R Johnstone, 'The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement', March 2002, National Research Centre for OHS Regulation, the ANU; *WorkCover Authority of NSW v Hitchcock* (2005) 139 IR 439). It is in the area of remuneration and related conditions that the power relationships within the transport and logistics supply chain are most clearly seen. Economically powerful industry clients have the commercial influence to determine the price of transport services and, in many circumstances, key conditions relating to the performance of transport work. Successive instances of contracting out, combined with unpaid waiting time at clients' premises, exacerbate the problem, especially in the long distance sector.

The Full Bench of the Industrial Relations Commission of NSW in the *Mutual Responsibility for Road Safety Case* made an express finding that there is a direct link between methods of payment and/or rates of pay and safety outcomes:

Link between remuneration and safety

33 In the 2003 Deputy State Coroner's inquest referred to earlier, the following observation was made (emphasis added):

My main areas of concern arising in the Inquests, namely, working hours, fatigue and drug use are to the forefront of current policy discussions and proposals. However, as a general observation, it seems to me as if the focus is on finding solutions to the symptoms of the basic problem rather than dealing with what I perceive to be the underlying problem. *As long as driver payments are based on a (low) rate per kilometre there will always be an incentive for drivers to maximise the hours they drive, not because they are greedy but simply to earn a decent wage.* I anticipate that this incentive will remain an overriding concern for drivers irrespective of legal and safety considerations. This is obviously a structural matter for the road

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

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

transport industry that has already been placed on the agenda by Professor Quinlan. However, structural changes do not feature prominently in current initiatives as far as I can ascertain.

- 34 We consider that the evidence in the proceedings establishes that there is a direct link between methods of payment and/or rates of pay and safety outcomes. We shall refer to the submissions of the Union in this Regulationard:

The evidence has shown a direct link between the rate of pay and/or the method of payment on the one hand and safety outcomes on the other. The uncontested evidence of Associate Professor Michael Belzer [Ex 45] in the context of long distance trucking in the United States is that driver pay has a strong effect on safety outcomes [Ex 45, p 15]: *“Higher pay produces superior safety performance for firms and drivers. The precise driver-level study of Hunt suggests this relationship may be as high as 1:4.”* He also concluded, on the basis of a survey based on self-reported driver crashes in the sector, that *“...every 10% more that drivers earn in pay rate is associated with an 18.7% lower probability of crash, and for every 10% more paid days off the probability of driver crashes declines 6.3%.”* [Ex 45, p 105].

Belzer also examined, using an extensive driver survey, the relationship between the rate of remuneration and hours worked [Ex 45, p 11]. Referring to the results of this survey, he stated [at p 104]:

“Our measurement supports the hypothesis that drivers have target earnings and drivers paid lower than average seek to achieve earnings of about \$750 per week by increasing their hours, in confirmation of the “sweatshop” hypothesis.”

Jurisdictional problem with extending application of obligations to Contractors

It should be pointed out that the extension of clauses 11.04 and 11.05 of the Commonwealth Regulation to cover contractors is probably meaningless. The contractors of a non-Commonwealth licensee are defined in section 9A(4) of the OHS Act (Cth) to only include natural person who work on the premises of the Comcare employer. In addition there must be a direct contractual nexus between the Comcare employer and contractor or the person the contractor works for. Whilst the definition of ‘premises’ in section 5(1) includes a vehicle, it will be rare indeed for a circumstance to arise in the transport industry for a contractor to be working from the principal’s heavy vehicle. Contractors usually supply their own plant.

Employees of contractors use their employer's plant. In addition, it is also the case that work is often performed by persons who have no contractual relationship with the principal employer who controls and organises the freight task. In this case the Commonwealth Regulation would have no application to the engagement of these contractors. For these reasons the application of both clauses 11.04 and 11.05 to contractors must be read down in accordance with section 9A of the principal legislation.

Consignors and Consignees

There are also jurisdictional problems with the provisions in the Commonwealth Regulation relating to consignors and consignees. Clause 11.09 of the Commonwealth Regulation which imposes certain duties on consignors and consignees is limited to circumstances where the non-Commonwealth licensee is also the consignor or consignee. The Commonwealth Regulation cannot impose a duty on a party which is not bound by the principal legislation (because they are not an employer as defined in section 5(1) of the principal Act. This approach is confirmed by the definition of 'consignor' and 'consignee' in clause 11.03 of the Commonwealth Regulation.

In contrast, the NSW Regulation is so limited because it extends to other clients and not just clients who are also the employer of the drivers.

Conclusion

In conclusion Part 11 of the *Occupational Health and (Safety Standards) Regulation* is an not adequate alternative to the NSW Regulation or the NSW Instruments for protecting transport workers and the others who share the roads with heavy vehicle drivers from the risk of harm, injury of death from the risk of driver fatigue in long distance road transport.