

In general the TWU endorses and supports the submissions of Unions NSW and the Australian Council of Trade Unions. The TWU, however, makes the following further specific comments in respect to matters that affect the transport industry.

CHAPTER 2 – SCOPE APPLICATION AND DEFINITION

Industry Sectors

[Responses to Questions 7 and 8 of the *Issues Paper*]

1. Subject to the exception of mine safety regulation, the TWU supports the principle of having a single OH&S law for all industries. However, any national OHS model law **must recognise** both implicitly, within its scope and application of general duty provisions, and explicitly through prescriptive regulation or processes the unique risks which arise from how work is organised and organised in the road transport industry.

The harmful effects of long driving and working hours

2. In Australia there were more than 220 deaths from heavy vehicle crashes in the 12 months to June 2007¹. Whilst this represents a slight decrease in the deaths from the previous 12 months there has been an overall increase in the carnage on Australian roads in the last 5 years. A 2002 study commissioned by the National Transport Commission found that Australia's heavy vehicle fatality rate per kilometre travelled is 47% higher than the USA and 39% higher than the UK². Of course the number of non-fatal injuries far exceeds the number of person killed each year in heavy vehicle road crashes. In New South Wales, on whose roads 80% of all road freight in Australia is transported³, there were 1224 persons injured in heavy vehicle accidents

¹ Australian Transport Safety Bureau; "Fatal Heavy Vehicle Crashes Australia", Quarterly Bulletin, July – September 2007 (includes articulated and single heavy vehicles)

² N. Haworth, P. Vulcan & P. Sweatman, Truck Safety Benchmarking Study, National Transport Commission, 2002

³ Note there are only 15,824 registered heavy articulated vehicles in New South Wales yet in 2006 there were 1220 crashes involving heavy articulated vehicles. This serves to highlight the fact the majority of heavy vehicles using New South Wales roads are not actually registered in New South Wales. This raises issues about Commonwealth funding arrangements for New South Wales roads and the critical role New South Wales must play in heavy vehicle safety regulation (Roads and Traffic Authority of New South Wales, Road Traffic Crashes in New South Wales, Statistical Statement for the year ended 31 December 2006, Table 34)

for the calendar year 2006⁴ (more than half of which involved heavy articulated vehicles) arising out of a total of 2436 crashes. The proportion of persons involved in heavy rigid and heavy articulated vehicle accidents who were killed was four times higher than those persons killed in car crashes.

3. The majority of truck occupant fatalities in Australia are single vehicle crashes and the majority of these occur at night⁵. This suggests fatigue is a significant cause⁶. According to the RTA, between 1996 and 2001, on average, about 8% of fatal heavy vehicle crashes involved a fatigue heavy vehicle driver⁷ and 12% of fatal heavy vehicle crashes involved a speeding heavy vehicle driver⁸. A survey of 1000 long distance drivers in the early 1990's reported that the hours long distance drivers were required to work were increasing and that most drivers were required to drive between midnight to dawn⁹. In addition, the survey also found that about 20% of drivers worked more than the 72 hour weekly limit imposed by road transport law in most Australian jurisdictions and about one quarter admitted to working more than maximum legal hours on every trip¹⁰.
4. Drivers are at risk of fatigue because of unsafe practices in the supply chain which result in long periods of continuous work and long hours of driving without sufficient rest and/ or incentives for rest. Low rates of pay, poor scheduling, unrealistic and tight pick up and delivery deadlines, poorly managed loading and unloading facilities, intense competition within the industry and low freight rates all contribute to the risk of harm and injury caused by fatigue¹¹. Owner-drivers in particular are exposed financially because they have mortgages on their businesses and are forced to work long hours, often at low rates to keep their business afloat. Professor Quinlan in his

⁴ Roads and Traffic Authority of New South Wales, Road Traffic Crashes in New South Wales, Statistical Statement for the year ended 31 December 2006, Table 10.

⁵ Howarth et al, *opcit*, at p.26

⁶ *Ibid* at pp. 26-27

⁷ Roads & Traffic Authority of New South Wales, *Issue and Countermeasures*, RTA/Pub. 03.073, June 2003, at p.20

⁸ *Ibid*, p. 16.

⁹ M. Quinlan, "Report of the Inquiry into Safety in the Long Haul Trucking Industry", Motor Accidents Authority of New South Wales, 2001, p.19

¹⁰ *Ibid*

¹¹ C. Jones, J. Dorrian and D. Dawson, 'Legal Implications of Fatigue in the Australian Transportation Industries', 45 *JIR* 344 at 351; 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, p.92

inquiry into the Long Distance Trucking industry noted that “many drivers work excessive and dangerous hours and the situation is, if anything, getting worse”¹². This was a view he reaffirmed in evidence before the New South Wales Industrial Relations Commission in the Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination major case in March 2006.

Organisation and the Performance of Work in the Transport Industry and its impact on safety outcomes

5. The transport industry provides road freight transport services to clients (usually consignors and consignees) which are integrated into various supply chains that service a particular market or customer. The transport needs of these supply chains are serviced by logistics networks which require the contractual engagement of transport operators or owner drivers to perform various transport freight tasks. A typical contracting chain might see a supply chain head engage one or more head contractors (who are usually major transport operators) to perform certain logistics functions. These head contractors may in turn subcontract portions of their work to middle tier fleet operators who in turn may engage employees to do the work or in the alternate owner-drivers or in the further alternate these middle tier operators may simply subcontract overflow, excess or unprofitable work to smaller fleet operators. A good, but by no means only, example of the type of client controlled supply chains are those organised by Coles and Woolworths for their commercial benefit. .
6. Clients can and do exercise enormous power and control over the providers of transport services in the supply chains of which they are the principal commercial beneficiaries. The commercial power exercised by major retail and manufacturing consignors operate in a supply chain context that permits them to control at least two separate aspects of freight transportation: firstly, the maximum payment available for any transportation of consignor freight; and secondly, the time frame available to transport this freight from its' origin to its' destination. These two forms of leverage can be exercised with adverse consequences for the safety outcome. Clients have been found to exercise downward pressure on the price payable for the supply of transport

¹² Ibid

services and also impose demands on suppliers for the movement of freight in time frames which cause the providers of transport services to demand of their direct hire and contractor drivers that work be performed in unsafe time frames without regard to adequate rest breaks or legal driving or working hours.

7. Through the control over the parameters of freight contracts, major retailer consignors are able to exercise control over the specific interrelated matters which together shape practical outcomes for truck drivers, including maximum price paid, payment structure (by kilometre or flat journey rate, no or nominal monies paid for waiting, loading or unloading) and maximum travel time available for delivery of the freight.
8. Historically, these consignors have successfully sought to impose contractual conditions in relation to matters which directly benefit their own commercial interests including minimising the cost to the consignor of transport freight services and delivery times and schedules which place a higher priority on the client or customer's business needs over safety. This situation is a cause of, and perpetuates, remuneration structures that create incentives for drivers to not rest or sleep and driving and working long hours both of which are antecedent risk factors giving rise to harm or injury caused by driver fatigue.
9. When sentencing a truck driver to four years and nine months imprisonment in respect to an accident in which two persons were killed and a third was seriously injured when his semi trailer collided with a car, Justice Graham of the District Court of New South Wales remarked:

In the present matter, the statement of facts refers to safety cams and log books. Restrictions on the maximum speed of heavy vehicles have also been implemented. Despite those measures, heavy truck drivers are still placed under, what is, clearly intolerable pressure in order to get produce to the markets or goods to their destination within a time fixed, not by any rational consideration of the risks involved in too tight a timetable, but by the dictates of the marketplace. Or, to put it bluntly, sheer greed on the part of end users of these transport services.

The time has come when those who are beneficiaries of the interstate transport industry must take some blame for what happens at the sharp end of the interstate transport industry. The drivers are put under intolerable pressure. When a collision occurs, such as happened here, who ends up in the dock? Who ends up behind bars? Not the operators. Not the transport companies. Not the big corporations who are the people who use transport services. But the driver. It's the driver who goes to gaol. The companies still

make profits. The drivers become another casualty in the transport industry. Their lives are ruined by the imperative of greed which lies at the heart of the transport industry.”¹³

10. 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.

¹³ *R v Randall John Harm*, District Court of New South Wales, per Graham J, 26th August 2005.

The Link between Remuneration and Safety

11. There is now an 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.¹⁴ 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. As a consequence of these characteristics, drivers, who are obviously the very last link in the transport supply chain, in that they perform the work, have the weakest concentration of market power and must often take the price given to them or fail to receive work. This makes them prone to engaging in unsafe practices, such as driving for too long, in order to obtain for themselves and their families a decent living.
12. The Full Bench of the Industrial Relations Commission of NSW in the *Mutual Responsibility for Road Safety Case*¹⁵ made an express finding that there is a direct link between methods of payment and/or rates of pay and safety outcomes:

¹⁴*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.

¹⁵ *Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* Re: [2006] NSWIRComm 328

- 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 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 regard:

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.”

13. *Inspector Campbell v. James Gordon Hitchcock*¹⁶ (“*The Hitchcock Case*”) involved the prosecution of a company director for breaches of the *Occupational Health and Safety Act* 1983 (NSW)¹⁷ by the company because it failed to ensure the health and safety of an

¹⁶ [2004] NSW IR Comm 87 at [42]

¹⁷ Now repealed and replaced by the *Occupational Health and Safety Act* 2000 (NSW)

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 found that "...driving whilst fatigued is a risk to health and safety"¹⁸.

14. The Court in *Hitchcock* accepted prosecution submissions that the serious specific truck journey risk posed by "driving whilst fatigued" was clearly exacerbated by requirements of "directed delivery and pick up times" for truck journeys "in the context of a clear monetary incentive to drive for excessive hours (drivers were paid by the kilometre)" in combination with "excessive workloads" and failures to audit truck journey compliance with OHS (and road transport) legal obligations.

15. More specifically, the Court explicitly reviewed the employee driver's payment structure whereby he was paid by the kilometre and no mechanism existed to effectively audit the opportunity for driver rest recovery. In doing so the Court held that:

The system provided a clear incentive for drivers to maximise kilometres (this was the only way to increase income) thereby extending driving hours; but little scope for reducing the time taken to perform other necessary work for which they were not paid. Loading, unloading, refuelling and washing the truck necessarily took a certain, substantial, amount of time. Indeed, the only real scope for drivers to reduce this "unpaid" time was to arrive at depots as early as possible to minimise the time spent queuing behind other trucks, thus reinforcing the pattern of driving at night. There was an obvious temptation for drivers to increase their driving hours by reducing their rest hours¹⁹.

¹⁸ In particular his Honour found that at [42]

- (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.

¹⁹ *Hitchcock* at [196]

16. The Court further held that this payment structure along with the failure to effectively ensure and/or audit opportunity for truck driver rest recovery "... had the effect of *increasing the risk*" posed by truck driving whilst fatigued²⁰.
17. Whilst this paper has so far discussed how client pressure can lead to excessive hours and unsafe rates of pay, which are antecedents for risks such as driver fatigue, it is important to acknowledge that risk of harm or injury can arise from other causes which may also involve client culpability. Over-loading of trailers and over-weight containers are a good example where the loading is actually performed by the client or encouraged by the client.

How the National Laws Should deal with the particular risks to Health and Safety in the Transport Industry

[Responses to Questions 10, 12, 13 and 15 of the *Issues Paper*]

There would seem to be good grounds for suggesting that supply chains can be used to promote higher levels of legal compliance among the parties within them and hence combat the adverse health and safety effects of externalisation and poor enforcement already mentioned. In many cases those at the head of supply chains are likely to be larger than the organisations undertaking work for them and hence, as the evidence presented earlier suggests, possess more sophisticated health and safety knowledge and expertise and therefore the capacity to support improved health and safety management in them. In addition, in the context of the asymmetrical power relationships that often exist between those engaged in supply chains, larger organisations at the top of them will often possess the ability to influence the 'compliance-non compliance' decision-making of those lower down by raising the possibility of their incurring financial losses, or opportunity costs, through the ability they have to terminate or withhold contracts. A differentiation of power which reminds us that market relationships are marked by the presence, rather than absence, of hierarchies of control and thereby can encompass relationships akin to those of 'principle and agent'²¹.

18. Endorsing the general principles discussed in the Unions NSW submission in respect to these matters, in particular in section 2.3 of that submission, the TWU submits that it is imperative that national OHS model laws regulate all parties in the chain of responsibility in supply chains which utilise transport services. This can be done in three ways.

²⁰ *Ibid.*, at [290]

²¹ P. James, R. Johnstone, M. Quinlan and D. Walters, "Regulating Supply Chains to Improve Health and Safety", *Industrial Law Journal*, Vol. 36, No. 2, June 2007 at p.175.

19. Firstly, the national model law should include a general duty broad enough to ensure that the principals or supply chain heads whose conduct or undertaking can give rise to risks adverse to the safety outcome are liable for those outcomes.
20. Secondly, the national law must not limit employer liability to the principal premises of the employer's undertaking or place of work and the employer's obligation to ensure the health and safety of its employees should be expressed to include providing safes systems of remuneration.
21. Thirdly, the national law must regulate specific **prescriptions** or **processes** for directly managing prevalent industry specific risks such as driver fatigue. In respect to driver fatigue, the national model should adopt Part 4.5 of the *Occupational Health and Safety Regulation 2001* (NSW) and NSW Transport Industry - Mutual Responsibility for Road Safety (State) Award and the NSW Transport Industry - Mutual Responsibility for Road Safety (State) Contract Determination.
22. For the sake of regularity, these matters will be dealt with, where possible, in relation to the order they arise in respect to the *Issues Paper*.

Definitions

[Response to question 15 of the *Issues Paper*]

Place of work and Premises

23. Employers must have an absolute and non-delegable duty to ensure the health, safety and welfare of employees and persons not in their employment. The workplace of a truck driver is not fixed in any one day. It may include one or more of the employer's premises and it is likely also to include the premises of numerous clients. Predominately, however, the place of work for a truck driver will be the truck that a driver is driving or working at any particular time.

Again, the underlying importance of the performance of work (and the effect such performance may have on others) is clear. In the

light of these decisions, which pose a clear test capable of straightforward application, and which contain obvious parallels to the present case (in that public roads or footpaths are included in the definition of "employer's place of work" when they may be affected by work being done) I reject the defendant's submission that it is too difficult to determine, in the case of a moving lorry, where the place of work begins and ends. In any event, this mistakes the issue. The issue is not, in a conceptual sense, where the place of work begins or ends but whether the place in question was in fact the employer's place of work at the time of the accident²².

24. Therefore, definitions including "place of work" and "premises" must be broadly defined²³.
25. The scope for protection of non-employees should not be more limited or qualified to the employer's place of work (see for example section 8(2) of the *Occupational Health and Safety Act 2000 (NSW)*). The scope of the duty needs to be wide and clear so that it protects:
- (a) Owner drivers or truck drivers, employed by persons or entities other than the primary duty holder, who in the performance of that owner driver's or truck driver's work, are exposed to risks arising from the conduct or undertaking of the duty holder, including in circumstances where the risk arises in locations other than places where the duty holder's undertaking is principally conducted.
 - (b) The public from risks arising from the conduct of the duty holder's undertaking when those risks are manifested in locations other than places where the duty holder's undertaking is principally conducted.
26. It is also necessary that any duty imposed on non-employers (eg principal contractors or head of supply chain) is equally not limited to the location where the principal's undertaking is conducted.
27. These matters are discussed more comprehensively in a paper by Professor Richard Johnstone²⁴ which is annexed to this submission (**Annexure D**).

²² *Hitchcock* at [307] per Walton J

²³ See for example, section 4 of the Occupational Health and Safety Act 2000 (NSW)

CHAPTER 3 – DUTIES OF CARE – WHO OWES THEM AND TO WHOM

28. Generally, the TWU endorses the ACTU and Unions' NSW submissions in respect to this topic but would make the following additional points specific to the transport industry in response to the questions raised in this chapter.
29. The national model law should include a general duty broad enough to ensure so that the principal or supply chain heads and those who act as their agents, and whose conduct or undertaking gives rise to risks adverse to the safety of non-employees, are liable. It is not necessary, and may even be self defeating, for the duty to be founded on the existence of an employment relationship.
30. Subject to a causal nexus being established this duty must be couched in terms wide enough that:
- 30.1 Clients are accountable for scheduling arrangements, waiting time, loading and unloading practices and any risk these factors pose to the safety outcome of transport workers and other persons arising out of the performance of the transport task for the client.
- 30.2 Client's pricing and tendering processes of any transport freight task takes into account safe turn-around times, realistic waiting times and safe scheduling and delivery times for those performing the work, sustainable rates of pay and cost recovery factors such as fuel costs (especially for owner drivers).
- 30.3 The commercial practices of the principal do not create incentives for unsafe work practices amongst operators and drivers in the performance of principal's work.

²⁴ R. Johnstone, "The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement", Australian National University, National Research Centre for OHS Regulation, March 2002; Note an earlier version this paper appeared in M. Quinlan, "Report of the Inquiry into Safety in the Long Haul Trucking Industry", Motor Accidents Authority of New South Wales, 2001, at Appendix II. See also P. James, R. Johnstone, M. Quinlan and D. Walters, "Regulating Supply Chains to Improve Health and Safety", *Industrial Law Journal*, Vol. 36, No. 2, June 2007

31. In the context of a discussion in respect to the duty of an employer to non-employees under the *Health and Safety at Work Act 1974* (UK), Professor Richard Johnstone has observed²⁵:

It would consequently seem that an organisation's duty under section 3(1) can oblige it to have regard to issues of health and safety arising from the activities of those undertaking supply chain activities on its behalf. However, the type of activities so covered remains uncertain. In addition, similar uncertainty surrounds whether the duty extends to

- (a) afford protection against the adverse occupational health and safety effects which can stem from an organisation squeezing the prices paid to small companies with whom it is contracting to the point where their ability to invest in health and safety measures is significantly restricted and
- (b) encompass situations where, for example, a major retailer contracts production out to a manufacturer in the knowledge that it will in turn make use of homeworkers working in inadequate health and safety environments.

32. The test for the attracting liability should not be narrow or limited so as to be artificial or such that the objective of the duty is readily defeated (for example, it should not be defeated simply because no privity of contract exists, and the duty should be non-delegable without qualification). Furthermore, the relationship should not be limited by tests such as 'proximity' or 'remoteness' because this could act to defeat the objective of Occupational Health and Safety legislation which is to promote proactive management of risk.

33. The test for attracting liability of clients under a general duty (and any available defence) must be capable of examining the substantive relationship between the conduct or undertaking (eg acts or omissions) of the principal or supply chain head and the possibility of risk of harm or injury arising to affected persons from the undertaking or conduct of the client (for example, truck drivers who may be fatigued because of unsafe scheduling or commercial practices including tendering practices which cost the performance of work based on unfair or unrealistic delivery/ pick up or turn around times and other persons who come into contact with fatigued drivers).

Chapter 4: 'Reasonably Practicable' & Risk Management

²⁵ P. James, R. Johnstone, M. Quinlan and D. Walters, "Regulating Supply Chains to Improve Health and Safety", *Industrial Law Journal*, Vol. 36, No. 2, June 2007 at p.172.

Managing specific Risks in the transport freight task

34. The provisions under the *Occupational Health and Safety Act 2000* (NSW), *Occupational Health and Safety Regulation 2001* (NSW)²⁶, including Part 4.5 of that Regulation which deals specifically with risk management of driver fatigue by employers and consignors and consignees, together with the Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination provide the best package of protections for transport workers available nationally.
35. We submit that the national law must regulate specific **prescriptions** or **processes** for directly managing prevalent industry specific risks such as driver fatigue. In respect to driver fatigue, the national model should adopt Part 4.5 of the *Occupational Health and Safety Regulation 2001* (NSW) (“the NSW Regulation”) and NSW Transport Industry - Mutual Responsibility for Road Safety (State) Award and the NSW Transport Mutual Responsibility for Road Safety (State) Contract Determination (“the NSW Industrial Instruments”).
36. These prescriptions collectively require employers of drivers and those who engage owner drivers to proactively conduct risk assessments in respect to the risk of fatigue for each driver and prepare safe driving plans which must take into account systems of remuneration. The NSW Industrial Instruments require employers and principals that engage owner drivers to prepare drug responses to drug and alcohol use and provide for industry specific training qualification known as *Blue Card*. They also provide certain obligations with respect to consignors and consignees.
37. Part 11 of the *Occupational Health and Safety (Safety Standards) Regulation 1994* (Cth) (the Commonwealth Regulation) is not a model that the Review Committee should recommend as suitable for national application.
38. The Commonwealth Regulation fails to set a bare minimum standard necessary to regulate the risk of harm caused by driver fatigue in the transport industry and as a

²⁶ Note the Occupational Health and Safety Regulation 2001 (NSW) was amended by the *Occupational Health And Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005*

consequence, the Commonwealth Regulation is inadequate. In particular the Commonwealth Regulations

- i. Only applies to heavy vehicles over 12 ton where as the NSW Regulation applies 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) are not regulated even though such work may involve long distance driving.
- ii. Only 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'²⁷. 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. The Federal 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.
- iii. The Commonwealth Regulations only require an employer to prepare a Driver Fatigue Management Plan (DFMP) for trips where goods are being carried. This excludes trips or parts of the trips where a driver is not carrying goods. The NSW Instruments require employers to prepare fatigue management plans for drivers for each driver who engages in long distance transport²⁸ before work is undertaken.

²⁷ Division 11.2 of the Fed Reg

²⁸ These are referred to as safe driving plans in the Transport Industry - Mutual Responsibility for Road Safety (State) Award and the Transport Industry - Mutual Responsibility for Road Safety (State) Contract Determination.

- iv. The prescriptive requirements of Driver Fatigue Management Plans under the Commonwealth Regulation are less than those matters required in the NSW Instruments. Part 4.5 of the Occupational Health and Safety Regulation 2001 for example requires that a DFMP must address a range of itemised known risk factors which are in practice critically determinative of the risk of fatigue. These include, for example, trip 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 systems²⁹.
- v. A Safe Driving Plan prepared pursuant to NSW Instruments and a DFMP prepared pursuant to the NSW Regulation must address the nominated criteria in relation to each freight task in circumstances where the requirements of each freight task differ. The Commonwealth Regulation fails to take account of key risk factors such as the unsafe rates of pay which have been extensively linked to safety concerns such as pressure to work excessive hours; pressure to exceed legal speed limits; and pressure to drive through break and sleep times³⁰;
- vi. Reduces the level of safety on our roads by allowing fatigue management plans to be in breach of the National Transport Commission (Road Transport Legislation — Driving Hours Regulations) Regulations 2006 providing that subclause 5 of clause 11.07 of the Commonwealth Regulations is satisfied. This clause permits licensees to drive in excess of maximum driving hours and have

²⁹ Clause 81D(4) of the NSW Reg

³⁰ *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; 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; 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).

less than the minimum rest periods in breach of state road transport driving hours regulations where it is not reasonably practicable to comply with the said state laws. Driving hours' regulations are the lowest form of regulation of driver fatigue in the safety regulatory armoury and unquestionably the least effective regulatory control of driver fatigue in long distance heavy vehicle transport. They have had little impact on the rate of death and injury on Australian roads in heavy vehicle crashes involving driver fatigue. This provision completely discredits the Commonwealth Regulation as a creditable alternative to the Occupational Health and Safety Act 2000 (NSW); the NSW Regulation and the NSW Industrial Instruments and proves that the Federal Regulation it is not just an inadequate alternative but it is a dangerous law.

39. A fuller critique of the Commonwealth Regulation in comparison to the *Occupational Health and Safety Act 2000 (NSW)*; Part 4.5 of the *Occupational Health and Safety Regulation 2001* and the *Transport Industry - Mutual Responsibility for Road Safety (State) Award* and the *Transport Industry - Mutual Responsibility for Road Safety (State) Contract Determination* is provided in the attached Annexure II.

Reasonable Practicability

[Response to Question 37]

40. The TWU supports the Unions NSW submission in respect to retaining “reasonable practicability’ as part of the defence rather than included as part of an element to be proven by the prosecution in the general duties.

41. We would add however, that it is the defendant who is the best position, rather than the prosecutor, to know what steps were reasonable in the context of the ability of its business to discharge its obligation or duty because it is the defendant that understands the nature of the cost and practical consequences to its business of acting or not acting to manage a hazard. In other words, it is best left to the commercial judgment of the defendant to resolve how the risk is to be attended³¹.

³¹ *Genkem Pty Ltd v Environmental Protection Authority* (1994) 35 NSWLR 33 at 41 per Gleeson CJ

It is the existence of the reasonable excuse which prevents the failure from becoming an offence, and that excuse must necessarily be comprised of facts which are additional to those which constitute the failure to comply. Added to that particular indicium is the undoubted circumstance that those additional facts will in almost every case (if not indeed in every case) be solely within the knowledge of the director or the officer of the company who is charged³².

42. In *WorkCover Authority of New South Wales (Inspector Penfold) v Fernz Construction Materials Ltd [No 1]*³³, the Court said:

The particular measures which may or may not have been taken by the defendant to prevent a detriment to safety are matters which, in part, concern a commercial judgement for the defendant.

43. The Industry Commission said in its 1995 Inquiry into OH&S³⁴:

The reason for reversing the onus in NSW is a practical one. It is more efficient for the holder of the duty of care rather than the prosecution to have to establish what was reasonably practicable. A duty holder could be expected to know more about the costs and benefits of the various attitudes open to his or her at any time, than anyone else.”

44. To show that a defendant has not taken reasonable steps may require the prosecutor to call expert witnesses to show what steps could have been reasonably taken by the defendant to manage an attendant risk. This will increase costs and increase court time.

45. We do not support a definition or qualification of the words ‘reasonably practicable’ except in its current form as a defence available pursuant to section 28 of the *Occupational Health and Safety Act 2000* (NSW).

46. We do not favour any qualification of terms including ‘reasonably practicable’ or ‘management of risk’ by words of limitation such as ‘likely’.

47. As Hamilton J said in *Schnabel v Lui*³⁵, ‘likely’ is a slippery word and can mean different things depending on the context. For instance:

“in some contexts it means ‘probable’ as opposed to ‘possible’:
Australian Telecommunications Commission v Krieg Enterprises Pty Ltd
(1976) 14 SASR 303 at 311-312 per Bray CJ. In other contexts it means only ‘having substantial, real, and not remote chance of causing the

³² *Ganke v Corporate Affairs Commission* (1990) 19 NSWLR 449 at 457 per Hunt J (whom who Enderby and Sharpe JJ agreed)

³³ (1999) 91 IR 119 at 132

³⁴ Report No 47, September 1995 at p 55

³⁵ (2002) 56 NSWLR 119; [2002] NSWSC 1184

result': *R v Teremoana* (1990) 54 SASR 30 at 40 per Cox J. Where it is to be found in the spectrum between these extremes varies according to the statutory context"

48. NSW, Queensland and the UK all reverse the onus of proof. To seek to suggest that NSW should do anything else because other jurisdictions might adopt a different formula is simply a race to the bottom.

CHAPTER 5: CONSULTATION, PARTICIPATION AND REPRESENTATION

49. The TWU supports the submissions of Unions NSW in respect to the matters in this chapter including in relation to union right of entry and prosecutory powers. We add the following comments on specific questions.

Question 59

50. Yes

Question 60

51. Union authorised officers exercising powers of entry and inspection under OHS law should be appropriately trained.

52. Question 61

53. It is necessary that any power or right of entry be exercised without notice so that an authorised officer can gain immediate access to respond to an immediate danger or imminent threat to health and safety. It is no answer to this proposition to say that an authorised officer could apply for a certificate or some form of waiver from the Industrial Registrar. This process would take time and the delay could be sufficient to defeat the purpose of the entry being exercised.

54. Question 62

55. Union authorised officers should have power to require the production of documents and otherwise exercise the powers currently available to them upon entry under section 81 of the *Occupational Health and Safety Act 2000* (NSW). This is essentially an investigatory power and it gives the authorised officer a real capacity to establish whether any acts or omissions of a duty holder have led to a risk to health and safety. There are two reasons why this power should form part of the national model laws.
56. Firstly, use properly, these powers provide an effective means for union officers with (appropriate training) to protect their members by enforcement of safety law and also maintain a level playing field (eg where rogue operators commercially undercut good employers by non-compliance with safety laws). Secondly, investigatory powers are a necessary pre-function or corollary to the power to prosecute.
57. It is noted that the existing powers in section 81 *Occupational Health and Safety Act 2000* (NSW) are not as extensive as powers of Workcover inspectors. For instance, union authorised officers cannot compel persons to answer questions.

Prosecutions

Question 82 and 110

58. Union secretaries should have standing to commence proceedings as they currently do under the *Occupational Health and Safety Act 2000* (NSW). Union's are motivated stakeholders with a direct interest in the matter. They are usually well resourced and have the capacity to fund prosecutions. There is no evidence that any prosecutions that have been brought by unions have been improper. As far as I am aware, all of them have been successful and the convictions obtained and improvements to safety outcomes have been to the benefit of the relevant workers and in the public interest. It is in the public interest that unions are able to prosecute and enforce OHS law. It is likely that the defendants in the union prosecutions would not have been prosecuted had it not been for the fact the unions had the power to investigate the matters and institute proceedings.

59. Union's have historically had the power to investigate and prosecute industrial breaches for the best part of a century. The power to prosecute for safety offences also existed under the now repealed, *Factory Shops and Industries Act 1962 (NSW)*³⁶. This statute was the principle instrument of industrial safety regulation prior to the introduction of Robens legislation in NSW in 1983³⁷. The right to prosecute for industrial and safety breaches has been broadly accepted by the community as being appropriate.
60. The power of union secretaries to prosecute for breaches of industrial breaches has by and large had bi partisan political support throughout its existence in NSW and elsewhere in Australia. The extension of the right of unions to investigate suspected OHS breaches and prosecuting to all Australian jurisdictions is not a radical step but a logical extension of a privilege which, when properly used, is of great benefit to the workers directly affected and also the community at large.
61. There are existing remedies for employers and other stakeholders to seek redress should the power be improperly used. Under existing law an application can be made to the Industrial Register for the permit of the permit holder to be revoked or for there to be conditions attached to the use of that permit. The TWU supports the issuing of permits and fair and reasonable processes for their regulation.
62. It is noted that in NSW counsel appearing for the union and their instructing solicitors are subject to the bar or solicitor's rules including the respective parts of those rules dealing with prosecutor's duties.

8.8 Workplace Injury and Serious Death

63. The TWU strongly supports the inclusion of industrial manslaughter provisions in the national model based on Part 2A of the *Crimes Act 1900 (ACT)*.

³⁶ Repealed by section 24 of the [Shop Trading Act 2008 No 49](#) with effect from 1.7.2008.

³⁷ The Act was repealed by the [Occupational Health and Safety Act 2000 No 40](#), Sch 1 with effect from 1.9.2001.

64. The following compelling findings from an appeal on sentencing to the Supreme Court of South Australia Court of Criminal Appeal³⁸ is good example of why such laws are necessary to regulate unsafe practices in the transport industry [*emphasis ours*]:

On Saturday, 3 August 1996 at about 1.00 pm the appellant was driving a semi-trailer at about 90 to 100 kph west along the Sturt Highway towards Adelaide in fine weather conditions, on a dry bitumen road which was in good condition with a centre line marking. The vehicle comprised a prime mover with a tandem trailer, the rig travelling on a total of twenty-two wheels including the two on the front steering axle. The rig was in good condition.

The appellant, on a straight section of road, slowly veered towards his right-hand side of the highway for some seconds until the appellant's vehicle was entirely on its incorrect side of the road. It collided successively with two motor cars travelling the opposite direction; namely, a white Toyota Corolla sedan, and a brown Mitsubishi Magna sedan. The appellant's vehicle apparently passed completely over the Magna. The two motor cars were entirely on their correct side of the carriageway.

Two persons in the Toyota died as a result of the accident and four from the Magna. The manner of the appellant's driving as he approached the accident scene was appalling. For some kilometres before he reached the point of impact, his driving was noteworthy by reason of the number of people whose attention was attracted to the way in which the vehicle slowly veered on to its wrong side of the road and then back again. It is only a matter of chance that the same sort of accident did not happen earlier.

It is apparent that the appellant was barely awake for some time before the collision. As one victim impact statement observed 'It is difficult to accept that this accident could occur on this straight stretch of road at 1.00 pm.' However, the toxicology report on blood samples taken from the appellant after the accident shows that the appellant had taken Phentermine and Ephedrine, which can be used to combat fatigue. Cannabis residue was also detected. It would be difficult to assess the combined effects of these drugs in the circumstances.

In sentencing the appellant the Sentencing Judge noted the impossible driving schedules which the appellant's employer expected of him; in particular, during the week leading up to the accident.

The employer supported its unreal expectations of the appellant by providing him with drugs by way of stimulants. The appellant accepted the risks which were imposed upon him by his employer because the rates of remuneration on offer were so small as to require that the appellant worked long hours without proper rest in order to support his wife and young family).

³⁸ *R v BRIAN DOUGLAS SNEWIN* - BC9701676, unreported judgment of the Supreme Court of South Australia Court of Criminal Appeal, 18th April 1997, per Olsson, Williams and Bleby JJ at 4