

**Submission by the Australian Road Transport Industrial Organisation (ARTIO) to the House of Representatives Standing Committee on Infrastructure and Communications' Inquiry into the:**

- a. *Road Safety Remuneration Bill 2011 and*
- b. *Road Safety (Consequential Amendments and Related Provisions) Bill 2011*

***Executive Summary***

1. This proposed legislation is about improving road safety generally and safety outcomes for road transport drivers. The Tribunal established under it must have safety as its paramount focus and safety is critical to its powers and must guide its operations in all respects.
2. Safety is not a competitive advantage nor is it intellectual property – in the road transport industry, it is about ensuring road transport drivers can operate as safely as practicable in all circumstances, and be properly and fairly remunerated for their contribution to the economy of the Nation.
3. Safety is also affected by many other factors and these must continue to be addressed. These include a safer system such as:
  - a. Safer roads
  - b. Safer drivers
  - c. Safer operators
  - d. Safer vehicles
  - e. Safer customers
4. The freight and logistics industry contributes around 15% of Australia's gross domestic product and we must ensure that road transport operators, whether employers or hirers, are not strangled by additional regulation and the associated costs of compliance with those regulations.

5. This Bill must fit squarely within and support the other national heavy vehicle reforms currently underway across all states and territories.
6. Over time, the scope of the tribunal's work should focus on where it can deliver benefits, especially in terms of improving truck driver safety. The Review of the Act to be conducted in 2015 must contain a specific term of reference to address this matter.

## **Background**

1. The Australian Road Transport Industrial Organisation (ARTIO) is the national Industrial Organisation of Employers registered under the Fair Work (Registered Organisations) Act 2009 (FWRO Act 2009). It represents employers and prime contractors in the transport and logistics industry, particularly those engaged in road transport. As at 31 December 2011, it had around 440 members. These include, but are not limited to the large multi-national transport companies such as Linfox and Scott's Group of Companies, down to the family owned businesses that perform the largest percentage of Australia's freight task.
2. ARTIO operates as a federation with Branches in all States except South Australia. ARTIO and its Branches operate independently and in accordance with the particular Constitution applying in that Branch.
3. ARTIO Council, which has a representative from each of its State Branches, meets on a bi-monthly basis to consider and discuss Industrial Relations issues impacting on the organisation (industry) and its members. Much of its day-to-day activities are carried out by the Branches, especially when dealing with operational issues and providing advice to members on issues surrounding industrial obligations and other regulatory matters.
4. On a national level, ARTIO was the main employer representative covering road transport in the Awards Modernisation process conducted by the AIRC (now Fair Work Australia) over 2008 – 2010. More recently, ARTIO in conjunction with the

Fair Work Ombudsman, produced modern Award handbooks to assist road transport operators and users in the proper application of the Road Transport & Distribution Award 2010 (RTD) and the Road Transport (Long Distance Operations) Award 2010 (LDO).

5. ARTIO has been very closely involved in all matters leading to the development of these Bills. In particular, it made detailed submissions to the National Transport Commission (NTC) Inquiry into '*Safe Payments in the Heavy Vehicle Industry*'. Following that report and subsequent brief policy discussion, a joint media release was issued advising that the Government would be looking to implement some of the recommendations made in the NTC Report.
  
7. In December 2009, the then Deputy Prime Minister established a Safe Rates Advisory Group to provide advice to the Department of Employment Education and Workplace Relations (DEEWR). ARTIO had several representatives invited to participate in that Group. The product of the advice and discussions was the '*Safe Rates, Safe Roads*' Directions Paper, which was released in November 2010. The purpose of the 2010 Directions Paper was to obtain further industry feedback on potential models developed by DEEWR to deal with the Government view that there is some causal link between payment schemes and methodologies and road safety outcomes in the heavy vehicle industry.
  
8. ARTIO put in a submission and, while it did not necessarily agree with all the findings made in earlier papers, nor did it accept all of the conclusions reached in the 2010 Directions Paper, it conceded that it was time to move ahead in this debate and work towards the development of a safer and, one would believe, a more productive and efficient road transport industry.

## **The Bills**

9. Following the further consultation and debate that ensued over the 2010 Directions Paper, the Government introduced the two Bills which are the subject of the Inquiry. These Bills are the:
  - a. *Road Safety Remuneration Bill 2011* (the RSR Bill) and the
  - b. *Road Safety (Consequential Amendments and Related Provisions) Bill 2011*
  
10. ARTIO makes no particular comments on the Road Safety (Consequential Amendments and Related Provisions) Bill other than to note that should any changes be made to the RSR Bill, then further amendments to that Bill may be warranted.

## **Safety**

11. ARTIO considers that the following statement made by Minister Albanese in his second reading speech is an accurate reflection of Government Policy supporting the introduction of these Bills and thereby improving road safety. He stated:

*“The Government is committed to doing all that is necessary to ensure that truck drivers, whether employees or contractors have a safe and fair workplace, whilst maintaining the long term viability of the road transport industry.”*
  
12. The focus of the Minister’s statement is about safety and fairness and in ARTIO’s view this must be properly reflected in the proposed legislation.
  
13. Although the RSR Bill mentions safety in its Objects, ARTIO submits that there needs to be a much stronger emphasis on ‘safety’ in all aspects of the proposed Tribunal’s operations. ARTIO’s view is that ‘safety’ must be the critical factor in determining the Tribunal’s jurisdiction and its ability to act and make Road Safety Remuneration Orders (RSRO).

14. Safety is not just about rates of pay, costs of doing business or charges to a client – it involves assessing risks and then developing systems and procedures to protect individual employees or contractors working in the road transport industry and also members of the public who use our nation’s roads.
15. Therefore, ARTIO proposes that the Bill should be amended to mandate safety as the over-riding factor that must be considered by the Tribunal in exercising any of its functions. Before making an RSRO, the Tribunal must be satisfied that making such an order will lead to safer driving practices and it must be able to follow-up to ensure those changes are embedded into systems and procedures within the supply chain. This would require amendments to sections 3, 20, 27 and 31 of the Bill or the introduction of a new section specifying the overarching jurisdictional requirement of safety.
16. In addition, it is not clear in section 31 whether or not the Tribunal has the power to review an RSRO within the first few months or years of its operation to ensure that it achieved its objectives and continues to do so, on an on-going basis. The Tribunal should have the power to review/audit industry to determine whether orders made have modified work habits, and that this power be available during the life of the RSRO. Section 31 should clarify that that the tribunal can undertake its own research to determine whether an order has accomplished its objectives.
17. Safety is the responsibility of all who work in the road transport industry and ARTIO considers that there must be an obligation imposed on ‘road transport drivers’ to comply with safety policies and procedures implemented by their hirers, employers or imposed by other participants in the supply chain. ARTIO submits that the Bill should be amended to implement such an obligation.

## **Organisations**

18. As set out earlier in this submission, ARTIO is an organisation of employers registered under the FWRO Act 2009. That legislation is directed towards ensuring that such organisations operate in a democratic and transparent fashion and that members can have a direct say in the development of policies and protocols. ARTIO must comply with its obligations concerning financial accounts, registered rules, elections for office-holders and its management administration generally.
  
19. Indeed, ARTIO pays particular regard to ensure that its corporate governance operations and standards are fully maintained and up-dated in line with current legislation governing the internal management of registered organisations. Non-registered organisations or associations do not have to meet such legislated standards.
  
20. ARTIO submits that as a registered organisation it should have enhanced recognition over a non-registered body or association or an individual person under this legislation in terms of:
  - a. initiating matters
  - b. appearing before the Tribunal
  - c. disputes
  - d. applying for orders under Division 5, Parts 4 & 5
  - e. intervention in proceedings
  
21. This could be achieved by differentiating between a registered organisation and a non-registered one in section 4 (Definitions) and clearly delineating the rights and roles of identified parties accordingly. Furthermore, at s. 47(2) it appears the right of employee organisations to apply for orders is greater than the ability for employer organisations at s. 47(3). It seems an ‘affected person’ need not give consent to an employee association to apply for orders as is required for

employer associations. The sections appear to be inequitable as to the Tribunals ability to recognise the applicant's standing to apply for orders.

## ***Disputes***

22. This Part appears to be based around the notion of a road transport driver, whether employee or contractor, being 'forced' to work in an 'unsafe manner' on account of remuneration or related conditions or being terminated for refusing to perform 'unsafe work'.
23. Whilst ARTIO generally supports the necessity to protect individual road transport drivers, it appears that a simple 'contention' by a driver is enough to enliven the Tribunal's jurisdiction under sections 41 and 42. ARTIO's view is that there must be some objective element against which a contention can be measured. An allegation is not sufficient. 'Unsafe manner' must go to breaching a road law, such as a fatigued related one, or an occupational health and safety law or an RSRO, if in place. There needs to be some objective test in place against which 'unsafe manner' can be reviewed. This will necessitate an amendment to the Bill.
24. As sections 41 and 42 currently read, there is no time limit imposed on a road transport driver to file an application claiming dismissal for refusing to work in an 'unsafe manner'. ARTIO submits that any such time period must be consistent with that currently applying in the Fair Work Act 2009 (FW Act 2009), which is 14 days.
25. Consistent with its submission on the Safe Rates, Safe Roads Directions Paper released by DEEWR in 2010, ARTIO continues to support the concept of compulsory arbitration, with binding orders to resolve disputes. Further, it believes those other participants in the supply chain should have access to the Tribunal and all decisions must be open to review, with leave, in accordance with normal principles of appeal.

## ***Fair Work Ombudsman - Compliance***

26. Section 73 prescribes that the Fair Work Ombudsman (FWO) is responsible for compliance with this Act and enforceable instruments.
27. An inspector can issue a 'compliance notice' if he/she 'reasonably believes' that a person has contravened a term of an 'enforceable instrument'. A simple inquiry or complaint from a road transport driver does not, in ARTIO's view, sustain the reasonable belief criteria set out in section 76 (1).
28. ARTIO notes that section 77 requires that the review of such a compliance notice must occur in the Federal court, the Federal Magistrates Court or an eligible State or Territory court.
29. Given that the premise of this legislation is predicated upon the Road Safety Remuneration Tribunal being the body responsible for safety and preventing work occurring in an 'unsafe manner', ARTIO contends that the Tribunal itself should have some direct involvement, especially at the first instance, in the review of any compliance notice issued by an FWO Inspector. Further, it would be a more cost effective and efficient option. Additionally, ARTIO contends that the receiver of a compliance notice by the FWO should have the ability to have the matter internally reviewed within FWO consistent with current practice under the Fair Work Act 2009.

## ***Resourcing***

30. In performing its tasks under the proposed legislation the FWO must provide education, assistance and advice to road transport drivers, their employers or hirers and participants in the supply chain in relation to road transport drivers.
31. This proposed law is novel and creates legal obligations on third parties to the employment relationship as well as those not directly party to a contract to perform a road transport task. This will require an extensive campaign of

‘education, assistance and advice’. As Government is creating these legal obligations, it must ensure that the FWO is adequately resourced to meet its mandated functions.

32. ARTIO notes that this Tribunal is to fit within Fair Work Australia, which will perform many of the back office functions associated with the operation of a National Tribunal. It is mandatory that the Tribunal be properly resourced to ensure that its functions can be effectively performed. Given that it must prepare a work program each year and conduct and publish research, then there must be adequate funds available to support the full performance of those tasks.
33. Just as important from the resourcing perspective is the requirement that the Tribunal be not only accessible, but also operational, in all states and territories within a reasonable time frame. If a matter is lodged but cannot be dealt with for an inordinate amount of time, then clearly safety could be compromised. The Tribunal cannot be seen to be, nor become, a Sydney or Melbourne centric body.
34. Further, Government needs to resource the registered organisations, as defined – refer back to paragraphs 19 and 20 of this submission – to ensure their members and more importantly their members’ clients and industry generally have a thorough understanding of this proposed legislation and its potential implications on their operations. Ignorance of the law is no excuse but when a new piece of legislation introduces fundamental changes to the accepted system of doing business then Government is duty bound to assist in and resource the education process.

### ***Interaction with Modern Awards***

35. The definition of ‘road transport industry’ in the Bill is based around the definition of industry as contained in the following modern awards as at 1 July 2012:

- a. Road Transport & Distribution Award 2010 (RTD Award)
- b. Road Transport (Long Distance Operations) Award 2010 (LDO Award)
- c. Transport (Cash in Transit) Award 2010 (Cash Award)
- d. Waste Management Award 2010 (Waste Award)

36. As mentioned earlier, ARTIO was closely involved with the development of these modern awards. While the notion of deferring to the Award coverage definitions is a novel approach, ARTIO considers that it will work, but does note that should Fair Work Australia alter the definition of industry in one of those listed awards there may well be a significant consequential affect upon the jurisdiction conferred by this Bill. In this respect it is suggested that the Fair Work Act 2009 be amended to ensure that the RSR Bill be taken account of in any matter coming before FWA that could affect the jurisdiction and operation of this Bill.

37. Although these modern awards have only been in place for two years, they were based on the pre-existing Federal Awards which had applied in the various sectors of the industry for many years. In particular, the LDO Award is based around previous long distance awards going back to the 1960s.

38. It has been well-established over 50 years that long distance drivers can be paid on a trip rate for those trips defined in the Award – this rate is expressed in those awards by way of two options - as an hourly rate or on a cents per kilometre (cpk) basis. The conversion of the hourly rate to a cpk rate is simply done by using a divisor equating to the notional speed per hour. This has increased by around 32% over that 50 year period from 57kph to the current figure of 75kph. Clearly, this is not a piece-rate or incentive based remuneration system.

39. Further, there have been many enterprise agreements approved over the last twenty years, many of which are based around a trip based payment system.

40. ARTIO also notes that the current LDO Award defines ‘loading/unloading’ as being physically engaged in the loading/unloading task of the vehicle. A driver resting in a client’s lunch room whilst his truck is being loaded/unloaded by an employee of the client is resting and not working.
41. It is imperative that there must be consistency of definition between this new legislation and any ‘enforceable instrument’ made there-under and current award conditions which reflect well-established and understood practices across a specific sector of the industry.
42. Should current practices lead to safety issues or the performance of work in an ‘unsafe manner’ then, as a matter of course, such practices must be reviewed by the Road Safety Remuneration Tribunal.
43. Although there are only four modern awards specifically directed at transport, it is important to understand that within the structure of the road transport industry there are many sectors or sub-sectors. For example, some are listed below:
- a. Import/export container work
  - b. Port work, including grain & animal export
  - c. Express freight pick-up and delivery (PUD) work
  - d. Taxi trucks
  - e. Waste removal and recycling work
  - f. Road work and tip trucks
  - g. Livestock
  - h. Concrete agitators
  - i. Grain and agricultural work
  - h. Over-Dimensional
  - i. Refrigerated
  - j. Ancillary(own freight fleets are two thirds of the industry)
  - k. Non freight carrying Trucks

- l. Farmers' trucks
- m. Long distance
- n. Bulk tankers
- o. Car carrying

44. This list is not exhaustive but included to show how this legislation needs to be able to allow the Tribunal to focus on specific issues within a particular sector. Safety problems in livestock transport bear no relationship to those in the taxi truck industry.

## ***Interaction with other Laws***

### **Chain of Responsibility**

45. The Compliance & Enforcement Model Bill developed by the National Transport Commission introduced the Chain of Responsibility concept – that is, that all those with responsibility for activities that affect compliance with the road transport laws should be held legally accountable if they don't meet their responsibility. The majority of State jurisdictions have introduced Chain of Responsibility provisions into Road Law.

46. Chain of Responsibility provisions impose obligations on all parties in the transport chain and all individuals in the corporate chain of command. Those parties are required to either take reasonable steps to prevent a contravention of the road transport laws, or to not encourage or coerce others to contravene those laws.

47. The Chain of Responsibility provides that consignors, packers, loaders and receivers may be held legally liable for breaches of heavy vehicle mass, dimension, load restraint, fatigue and speed obligations, in addition to drivers and vehicle operators. In this way, off-road parties are as legally liable as their on-road counterparts if a breach of those requirements occurs. This enables

authorities to better target the party or parties actually at fault in each case. It also reduces pressures on on-road parties and ultimately leads to improved compliance, and safer roads.

48. Chain of responsibility is similar to the legal concept of ‘duty of care’ that underpins occupational health and safety law. This approach has long been used by the courts to impose liability in negligence and damages claims. Penalties and sanctions under the road law will range from formal warnings to court-imposed fines and penalties.
49. Businesses trying to gain an unfair commercial advantage over competitors by compromising road safety standards can be held liable and fined up to three times the amount of profit gained.
50. The law requires all parties to take all **reasonable steps** to prevent actions or conduct from causing or contributing to a breach. In addition, the law also prohibits:
  - a. making demands that knowingly or “ought to know” would cause a breach
  - b. coercing, inducing or encouraging breaches
  - c. passing on false or misleading information that could cause a breach.
51. All parties should ensure that they can demonstrate they did not know and could not have been reasonably expected to know that a breach in the road law occurred and that if one occurred then either:
  - a. they had taken all reasonable steps to prevent the breach
  - b. there was nothing they could reasonably have done to prevent the breach.
52. ARTIO submits that this RSR Bill must operate in conjunction with the Chain of Responsibility provisions enacted by the States.

## **The introduction of the National Heavy Vehicle Regulator**

53. An independent National Heavy Vehicle Regulator responsible for regulating all vehicles in Australia over 4.5 tonnes is scheduled to become operational in 2013.
54. Integral to establishing an independent National Heavy Vehicle Regulator is the release of the Draft Regulatory Impact Statement (RIS) and the draft Heavy Vehicle National Law. The National Transport Commission (NTC) and the National Heavy Vehicle Regulator (NHVR) Project Office are working together in this critical consultation phase to ensure stakeholders have the opportunity to comment.
55. This consultation phase provides an opportunity for everyone in the heavy vehicle transport chain to have their say in shaping the laws and how a national regulator should operate. A series of forums were held around Australia during the ten-week public consultation period from 28 February 2011.
56. Submissions are currently being considered ahead of the draft Heavy Vehicle National Law being resubmitted to Australian transport ministers.
57. In addition, Australia's heavy vehicle owners, operators and drivers are potentially only 12 months away from being able to drive across eight Australian states and territories under one rule book, following the recent vote by the inaugural Standing Council of Transport and Infrastructure (SCOTI) on 4 November to support the first bill of the new National Heavy Vehicle Law.
58. SCOTI replaced the former Australian Transport Council, as part of the Council of Australian Government's (COAG) reforms to the federal system of Standing Councils, Select Councils, and Legislative and Governance Fora.

59. The SCOTI vote on 4 November was closely followed by the introduction of the proposed legislation into the Queensland Parliament on 15 November. Once passed, the Queensland legislation to set up the National Heavy Vehicle Regulator (NHVR) will be adopted by all other states and territories to roll out the framework nationally.

60. ARTIO submits that this proposed national legislation concerning:

- a. registration,
- b. road access,
- c. mass and loading,
- d. fatigue management
- e. compliance and enforcement of these laws

is the primary legislative framework for delivering operational safety Australia wide and accordingly the RSR Bill ensuring a more safe and efficient road freight industry must be consistent with the provisions of the NHVR legislation and operate in a complementary fashion.

### **Fair Work Act 2009**

61. ARTIO notes that section 78 of the Bill enables the same right of entry provisions as contained in the FW Act 2009 but only for sections 482 and 483 of that Act. The bill does not appear to adopt any of the protections for employers or hirers contained in sections 484 to 504 of the FW Act 2009.

62. Further, it is not clear which body – Fair Work Australia or the Road Safety Remuneration Tribunal – has the power to issue permits for officials of organisations or deal with disputes arising out of right of entry matters.

63. ARTIO submits that this issue must be clarified to ensure that any right of entry matters be dealt with in a consistent and transparent fashion as between the two Acts and the two Tribunals.

64. A jurisdictional matter is also raised in that section 494 of the FW Act 2009 authorises a permit holder to exercise a ‘State Territory OHS Right’ if such a right is conferred in a state or territory law. Australia is moving to harmonised Work Health and Safety Laws in each State. An RSRO must be consistent with National or State Work Health and Safety law to provide absolute certainty to road transport drivers, employers, hirers, inspectors and supply chain participants. It is ARTIO’s view that this will require an amendment to the RSR Bill.

65. The FW Act 2009 contains a ‘better off overall test’ in section 195 and ARTIO notes that the term ‘better off overall’ is used in this Bill – section 34(b), but not defined. Firstly, it is not clear whether or not the intention is to have such concepts as being interchangeable and secondly, if not, then can non-financial matters be included for the purposes of the RSRT granting a Safe Remuneration Approval? This must be clarified to ensure certainty around the approval process of Safe Remuneration Approvals.

### ***General Comments***

66. ARTIO’s strong view is that most of the public information surrounding the relationship between prime contractors and sub-contractors in the road transport industry is anecdotal. There is very little well-researched information available, across most industry sectors.

67. ARTIO submits that the Tribunal will need to conduct evidence based research into some of these sectors to obtain detailed information surrounding the use and earnings of contractors. Some of this work may need to be contracted out and the comments made in paragraph 31 will be relevant.

68. One of the driving factors behind this legislation has been the need to make those participants who operate distribution centres (DCs) to become more

efficient and to factor safety into their treatment of the road transport drivers and their employers and hirers.

69. ARTIO submits that it would be prudent to include in section 4 (Definitions) a clear definition of what a DC is. This becomes critically important to ensure supply chain participants can clearly be identified and informed of their obligations under any RSRO.
70. ARTIO considers that such a definition should be consistent with that currently applying in Chain of Responsibility Road Law where a distribution centre is defined as a place where five or more regulated heavy vehicles are loaded/unloaded in a day. ARTIO submits the RSR Bill should be amended accordingly.
71. The road transport industry is heavily regulated by State and Federal Government law. Such regulation adds substantial compliance costs to the business. The road transport industry cannot absorb any additional such costs and Government must ensure that the cost burden can be passed on to supply chain participants.
72. One issue that always generates plenty of debate is that colloquially known as 'backloading'. One such example is freight moving in and out of a Capital city e.g. Melbourne. As Melbourne is the manufacturing and import processing centre of Australia, more freight leaves Melbourne than arrives there. Simply put, there will always be more empty trucks heading towards Melbourne.
73. ARTIO contends that a road transport driver is not necessarily being treated unsafely or unfairly if he/she is paid less when travelling empty towards Melbourne, or any other city, compared to a full load ex that same city.

74. Supply chain participants generally will only pay for the transport of their goods and not for the return of an empty truck.
75. This Bill, if passed, must ensure that there is national consistency on safety across the road transport industry and it must also fit within the other laws currently being developed to improve heavy vehicle safety – see comments on Chain of Responsibility and the National Heavy Vehicle Laws in Section dealing with Interaction with Other Laws.
76. ARTIO notes that there must be a review of the Act completed by December 2015. ARTIO contends that this Review must be independently conducted to ensure it is open and transparent and it must examine the Tribunal’s decisions to determine whether or not there have been better safety outcomes for truck drivers and the broader community. It is imperative that the Bill (or orders made by the tribunal) do not inadvertently encourage the same unsafe work practices but for higher rewards.

## **Conclusion**

77. This proposed legislation is about improving road safety generally and safety outcomes for road transport drivers. The Tribunal established under it must have safety as its paramount focus and safety is critical to its powers and must guide its operations in all respects.
78. Safety is not a competitive advantage nor is it intellectual property – in the road transport industry it is about ensuring road transport drivers can operate as safely as practicable in all circumstances and be properly and fairly remunerated for their contribution to the economy of the Nation.
79. Safety is also affected by many other factors and these must continue to be addressed. These include a safer system such as:
- a. Safer roads

- b. Safer drivers
- c. Safer operators
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80. The freight and logistics industry contributes around 15% of Australia's gross domestic product and we must ensure that road transport operators, whether employers or hirers, are not strangled by additional regulation and the associated costs of compliance with those regulations.

81. This Bill must fit squarely within and support the other national heavy vehicle reforms currently underway across all states and territories.

82. Over time, the scope of the tribunal's work should focus on where it can deliver benefits, especially in terms of improving truck driver safety. The Review of the Act to be conducted in 2015 must contain a specific term of reference to address this matter.