Road Safety Remuneration Bill 2011

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**Road Safety Remuneration Bill 2011**

**Date introduced:** 23 November 2011  
**House:** House of Representatives  
**Portfolio:** Education, Employment and Workplace Relations  
**Commencement:** 1 July 2012

**Links:** The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through [http://www.aph.gov.au/bills/](http://www.aph.gov.au/bills/). When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at [http://www.comlaw.gov.au/](http://www.comlaw.gov.au/).

**Purpose**

The Road Safety Remuneration Bill 2011 (the Bill) establishes the Road Safety Remuneration Tribunal (the Tribunal) which may set pay and contract rates in the road transport industry by issuing Road Safety Remuneration Orders (RSROs). RSROs will operate in addition to industrial instruments/contracts of employment applicable to employed drivers, or contracts for services applicable to independent contractor drivers.

The Tribunal may also grant Safe Remuneration Approvals (a form of collective agreement determination) in relation to road transport collective agreements between hirers and self-employed (independent contractor) drivers. It will be empowered to resolve disputes between drivers, hirers and employers and participants in the road transport industry supply chain, with any orders being enforced by the Fair Work Ombudsman.

This Bills Digest should be read in conjunction with the companion to the Bill—the Road Safety Remuneration (Consequential Amendments and Related Provisions) Bill 2011.¹

**Background**

Road transport accounts for over 1.7 per cent of Australia’s total GDP and employs over 246 000 Australians.² It has the highest incidence of fatal injuries of any industry with 25 deaths per 100 000 workers in 2008-09, making fatalities in the road transport sector ten times higher than the average

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for all industries. The Bureau of Infrastructure, Transport and Regional Economics has calculated the cost to the Australian economy of these losses at $2.7 billion a year.3

Managing fatigue in transport

Previous Parliamentary reports have raised concerns with aspects of the road transport sector. The then House of Representatives Standing Committee on Communications, Transport and the Arts (the Committee) conducted an inquiry into fatigue in transport in 2000.4 The Committee’s report entitled *Beyond the midnight oil: managing fatigue in transport* found that the Australian road transport industry had reduced its freight rates (charges to consumers for delivery) as a result of competition, but that this had come at a price:

... the combination of low freight rates and the increasing cost of overheads (such as fuel and tyres) means that many operators are being forced to drive longer, faster and further in order to make even a small profit. As one long distance truck driver told (the Committee), he has 'never ever worked harder to try and make nothing'.5

The Committee also found that there was an increased need to raise utilisation levels of equipment, which, when tied to low freight rates, created pressure to drive long hours to make ends meet. Pressure on transport companies to remain competitive is one of the most prominent causes of driver fatigue.6 Nevertheless, the Committee concluded that there was little governments can do to intervene in commercial matters in respect of setting freight rates:

They are decisions made by businesses operating in a free market for transport services ... In the first instance, prime responsibility for ensuring that the market for transport services operates in a fair manner lies with the industry itself. Not just with the individual operators who are pressed into making unsustainable decisions, but also with the customers and freight forwarders who have, over the years, imposed unrealistic delivery expectations at the same time as benefiting from the reduced rates they have extracted.

It is simply not feasible for governments to make and impose decisions about optimal staffing levels within individual transport companies; or about the rates of payment in haulage contracts; or about payment methodologies. These are matters which the industry itself needs to resolve.7

This Bill reflects a different conclusion.

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3. Ibid.
4. Details of the terms of reference, submissions to the inquiry and the final report can be viewed at: http://www.aph.gov.au/house/committee/cita/manfatigue/mfcontents.htm
6. Ibid., p. 96.
7. Ibid.
National Transport Commission research

The Bill is also informed, in large part, by research by the National Transport Commission\(^8\) (NTC).\(^9\) In 2008, the Australian Transport Council which comprises Commonwealth, state, territory and New Zealand Ministers responsible for transport, roads and marine and ports issues requested that the NTC report on safe payments. The NTC was tasked with:

... identifying and assessing options for implementing a system of safe rates for both employees and owner-drivers, recognising the special vulnerabilities of independent contractors in the transport industry.\(^10\)

The NTC report entitled *Safe Payments—addressing the underlying causes of unsafe practices in the road transport industry* concluded that there was ‘sufficient evidence which points to a link between rates and methods of payments and a variety of on-road behaviours’ including speeding, working long hours and using illicit substances, ‘which are acknowledged contributors to truck crashes’.\(^11\)

As part of its report, the NTC considered four separate options for regulatory reform:

- **Option 1**—maintain the status quo
- **Option 2**—a state based regulatory system
- **Option 3**—a national framework for employee and owner-drivers, and
- **Option 4**—a national industrial relations scheme for all drivers.\(^12\)

The NTC recommended that the Australian Transport Council acknowledge that the link between payment rates and methods and unsafe on-road behaviours should be addressed through regulatory intervention.\(^13\) It further recommended that the Australian Transport Council should:

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


12. Ibid., pp. 29–45.

13. Ibid., p. 46.

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• recognise that a safe payments regime for truck drivers requires a whole of government approach due to linkages with transport law, workplace relations law and independent contractors/small business law
• endorse the policy proposal in Option 3\(^\text{14}\), and
• request the federal Minister for Infrastructure, Transport, Regional Development and Local Government progress the issue in consultation with his Commonwealth Ministerial colleagues and report back in May 2009.\(^\text{15}\)

Nature of Option 3

Option 3 recommended the establishment of a **specialised body** under federal transport legislation to:

• establish and maintain enforceable safe payments for employees
• establish and maintain enforceable safe payments for owner-drivers
• settle disputes in a low-cost, accessible manner
• consider and, if necessary, bestow rights and impose obligations regarding safe payments on other parties in the transport supply chain, and
• consider and, if necessary, bestow rights and impose obligations with respect to enforcement of safe payments.\(^\text{16}\)

The Ministers represented on the Australian Transport Council ‘agreed that there was a case for investigating a whole of government regulatory approach’.\(^\text{17}\)

Safe Rates Advisory Group

Following the NTC report, at the Government’s request, the Department of Education, Employment and Workplace Relations (DEEWR) established a body of experts, the Safe Rates Advisory Group (SRAG), to develop detailed options for implementing the approach advocated in the report of the NTC on a national basis.\(^\text{18}\). For the proposed specialised body, SRAG recommended a tribunal approach. In November 2010, workplace relations Parliamentary Secretary, Senator Jacinta Collins, released a ‘directions paper’, entitled *Safe Rates, Safe Roads*, and invited submissions from the

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14. Ibid., pp. 34–35 contain a discussion about why the NTC preferred Option 3.
15. Ibid.
16. Ibid., p. 40.

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public on the matters raised in that paper by 28 January 2011. In canvassing possible ways of implementing the approach advocated by the NTC, the directions paper canvassed three tribunal models:

- creating a safe rates panel within Fair Work Australia with power to make orders for safe rates and related terms in the road transport industry
- extending the *Fair Work Act 2009* (FWA) to cover owner-drivers and conferring additional powers on FWA, or
- establishing a new independent specialist tribunal with responsibility for establishing safe rates in the industry and related matters.  

This Bill and the companion Bill represent the Government’s response to the NTC report and the subsequent directions paper.

**Position of major interest groups**

Forty-five submissions were received in response to the *Safe Rates Safe Roads* directions paper. Of these, 21 supported the mandatory (regulatory) option while 14 did not support any of the options, preferring a ‘status quo’ approach. The remaining ten submissions supported a voluntary model.

**Unions**

There was strong support for the mandatory approach from unions, individual drivers, and driver groups.

For example, the Australian Council of Trade Unions (ACTU) stated that, ‘in light of the overwhelming evidence, the development of an effective national system of safe rates for employee and owner drivers is not only desirable but essential’. It considered that ‘the cornerstone of the

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20. Ibid., pp. 11–12.
22. The text of each of the submission can be viewed at: [http://www.deewr.gov.au/WorkplaceRelations/Policies/SafeRatesSafeRoads/Pages/FeedbackReceived.aspx](http://www.deewr.gov.au/WorkplaceRelations/Policies/SafeRatesSafeRoads/Pages/FeedbackReceived.aspx)
23. PricewaterhouseCoopers Australia, op. cit., p. 53.

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new safe rates system should be an independent tribunal, responsible for determining safe rates and related conditions for both employees and owner drivers’.  

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Similarly, the Transport Workers Union advocated:  

that a Safe Rates System should utilise an Independent Tribunal, accessible to all supply chain participants, to determine enforceable rates of remuneration and related conditions for employed truck drivers and self-employed truck owner-drivers which are “safe.”  

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This submission was supported by Unions NSW.  

Large employers  

Submissions from large employers/fleet operators disagreed, arguing that any measures introduced should be voluntary.  

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For example, TOLL Group expressed concern about a number of aspects of the directions paper, including that it ‘only proposes options that contemplate the strict regulation of rates of pay of independent contractors without explaining how this can be made to work’, and that it ‘does not provide a strong argument that the additional regulation proposed will lead to additional safety’.  

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In addition, TOLL submitted that it is already difficult for businesses to successfully navigate and adhere to overly complex regulatory environments—and that the proposals in the directions paper would unnecessarily add to existing regulation.  

Woolworths Ltd did not support the introduction of a Safe Rates Tribunal model as proposed in the discussion paper stating that:  

the more appropriate mechanism to improve driver safety outcomes is the implementation of an enforceable code of practice for the road transport industry based on, or similar to, the existing Australian Logistics Council’s Retail Logistics Supply Chain Code of Conduct.  

30 31

25. Ibid., p. 6.  
30. Information about the Retails Logistics Supply Chain Code of Conduct can be viewed at: http://www.ozlogistics.org/rsic.html  

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Industry groups

The Australian Chamber of Commerce and Industry did not support any of the proposals in the directions paper stating that its preferred position was to, amongst other things:

a. Await the commencement of the national heavy vehicle regulator;

b. In conjunction with all states/territories (ideally through COAG) consider the creation of independent authority/body outside of the Fair Work Act 2009 which would have jurisdiction for the heavy vehicle transport industry only and limited to owner-drivers;

c. Not disturb existing industrial relations arrangements for employee drivers... 32

Nor, did the Australian Trucking Association support the proposed Tribunal, instead recommending that:

Governments should establish the National Heavy Vehicle Regulator with the resources, expertise and authority to take direct carriage of major Chain of Responsibility investigations and prosecutions and to work in partnership with industry to provide guidance on safety management methods and issues. 33

The South Australian Road Transport Association supported none of the proposals in the directions paper on the grounds that:

they are effectively unenforceable and they are based on a premise that is at best unsubstantiated and improbable and at worst false; namely that the proposals have the capacity to deliver behavioural change amongst those who flaunt the existing far tougher Speed and Fatigue Management laws, merely by increasing rates of pay. 34


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State governments

The submission by the NSW Government did not ‘endorse any of the particular tribunal models discussed in the directions paper’. However, it considered that ‘an independent tribunal is best placed to set and maintain safe rates in the industry’, adding that:

if the establishment of a safe rates tribunal proceeds, thorough and timely consultation with [Safe Work Australia] and [work health and safety] regulators about the model WHS legislation will be required to ensure there is no duplication or inconsistency between safe payment and general work health and safety requirements, noting that the model WHS laws will take effect on 1 January 2012.

The South Australian Government, represented by SafeWork SA (which consulted the Department of Transport, Energy and Infrastructure) supported the mandatory option, but considered that the relevant tribunal should be Fair Work Australia. In addition, SafeWork SA considered that Fair Work Australia should be empowered to make binding determinations in relation to the remuneration of independent contractor owner drivers.

The Western Australian Government took the view that a national regulatory framework such as that proposed by in the directions paper would not be as responsive to industry needs and local conditions as existing state laws; and would create unnecessary complexity and uncertainty.

The Queensland Government advised that it withheld support for any changes until a thorough economic analysis had been performed.

Basis of policy commitment

The subject matter of the Bill was not incorporated in the Australian Labor Party’s 2010 federal election commitments on industrial relations. However, the Government claims that the Bill complements existing federal legislation such as the FWA and the Independent Contractors Act 2006,

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36. Ibid., p. 25.
38. Ibid.
41. ‘IR policies compared – where the parties stand’, Workplace express.com, 20 August 2010.

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as well as current state-based legislative schemes dealing with owner-driver contracts and proposed state-based heavy vehicle laws.\textsuperscript{42}

**Committee consideration**

**Senate**

At its meeting of 25 November 2011, the Senate Selection of Bills Committee resolved that the Bill not be referred for inquiry and report.\textsuperscript{43}

**House of Representatives**

On 24 November 2011, the Bill (and the companion Bill) were referred to the House of Representatives Standing Committee on Infrastructure and Communications for inquiry and report. No reporting date has been set.\textsuperscript{44} At the date of writing this Bills Digest no submissions had been published on the inquiry website.

**Regulation Impact Statement**

DEEWR prepared a preliminary Regulation Impact Statement (RIS) for finalisation by Pricewaterhouse Coopers. The final RIS responds to the economic question of whether:

> the societal benefits from improved road safety offset the expected increase in the resource cost and productivity of freight and cost to government from establishing and implementing a road safety remuneration system for owner and employee drivers.\textsuperscript{45}

The RIS considers regulation of the road transport industry’s remuneration arrangements under three options. Option 1 is the base case that assumes no change to current arrangements. Option 2 is the voluntary option. It would involve implementing a suite of voluntary measures, using the current regulatory framework. Alternatively it would involve establishing new legislation which should result in remuneration being brought up to a minimum wage ‘guideline rate’ for which industry compliance would be barely 10 per cent.\textsuperscript{46} Option 3 is the mandatory scheme in effect legislated via the Bill, and is expected to result in remuneration increases for a greater proportion of owner drivers by bringing remuneration up to award rates of pay. The RIS expects the legislated scheme under Option 3 to apply to 60 per cent of all owner drivers, and that compliance would increase to 90 per cent.\textsuperscript{47}

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\textsuperscript{42} A Albanese, ‘Second reading speech: Road Safety Remuneration Bill 2011’, op. cit.
\textsuperscript{44} Details of the inquiry are at: \url{http://www.aph.gov.au/house/committee/ic/24Nov/index.htm}
\textsuperscript{45} PricewaterhouseCoopers Australia, op. cit., p. 4.
\textsuperscript{46} Regulation Impact Statement, p. xxxviii.
\textsuperscript{47} Ibid., p. xl.

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The RIS estimates that 29 per cent of owner drivers are underpaid using current remuneration estimates of average owner-driver income being about $29 000. The RIS also estimates that current award-based remuneration under the relevant federal transport awards for employee drivers working similar hours to owner-drivers would place owner-drivers on an income of about $65 000. One benefit that both Option 2 and Option 3 are assumed to deliver is a more efficient use of truck and driver time as under current arrangements owner drivers are not paid for truck waiting time at the beginning of journeys. The mandatory scheme will press freight forwarders to reassess this practice. Other benefits such as less speeding, less over-loading and substance abuse are also modelled. However, the conclusions the RIS derive show that the economic costs imposed under an operational remuneration system and tribunal do not generate economic returns sufficient to outweigh losses in economic efficiency:

Based on conventional economic measures and the assumptions used in this RIS, both options (options 2 and 3) generate a BCR (benefit cost ratio) below one and a negative NPV (net present value). That is, the additional costs associated with increased remuneration exceed the additional road safety benefits expected (refer table below).

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<tr>
<th>Table 5: CBA model results - Central estimates</th>
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<tr>
<td>Option 2 – voluntary 10% compliance rate</td>
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<tr>
<td>Option 3 – 60% coverage and 90% compliance rates</td>
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<tr>
<td>BCR</td>
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<tr>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>Overall sector</td>
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<td>0.49</td>
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<tr>
<td>Specific sector</td>
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<tr>
<td>Long Haul</td>
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<tr>
<td>0.30</td>
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<tr>
<td>Agriculture</td>
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<tr>
<td>0.89</td>
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<tr>
<td>Quarry</td>
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<td>0.29</td>
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48. Ibid., p. xxiv.
49. Ibid.
50. BCR: the difference between the present value (PV) of total incremental benefits and the PV of the total incremental costs.
51. NPV: ratio of the PV total incremental benefits net of PV of total incremental PV of capital costs.
52. Ibid., p. xlvii.

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On the other hand, the RIS also observes that there are strong grounds to at least establish a remuneration body to investigate pay/condition issues in the road freight sector:

For example, the incremental regulatory costs of Option 3 are $5.0 million per year to fund the establishment and operation of a remuneration body. This translates into a total cost over the ten year evaluation period of PV$32.6m (Appendix D). Comparing this to the safety benefits of approximately PV$56.6m for the voluntary option alone (Appendix D) indicates that there are strong grounds for establishing a remuneration body to investigate and develop the evidence base required to address the data issues identified in this RIS. Further economic analysis would be needed to assess whether any recommended changes in rates are desirable.53

**Financial implications**

According to the Explanatory Memorandum, the cost of establishing the Road Safety Remuneration System is $11.77 million over four years commencing in 2011–12. These costs will be fully offset by DEEWR.54

**Main issues**

**Effect of a safe payment rate**

Doubts have been expressed that the proposed Tribunal, in isolation, will significantly improve safety outcomes. Rather, there is a range of factors which together influence industry safety including:

- road and traffic laws and enforcement, particularly the national fatigue management and chain of responsibility regulations
- improvement of highway and road conditions
- improvement and frequency of rest stop facilities, and
- health and safety legislation.

What remains unclear, are the potential outcomes of a decision by the Tribunal to set a safe payment rate. According to the Australian Road Transport Industrial Organisation, one outcome is that an increase in ‘contractual rates in the interests of delivering better safety outcomes will see those costs recovered along the supply chain and ultimately by consumers’.55

In addition:

53. Ibid.
54. Explanatory Memorandum, Road Safety Remuneration Bill 2011, p. c.

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... for many drivers, increasing payment rates will act to increase, rather than decrease, the incentive to work longer hours. Higher remuneration also decreases the relative attractiveness of leisure time because the opportunity cost associated with not working becomes greater.  

Scope of a safe payment rate

The Tribunal will be empowered to make road safety remuneration orders and safe remuneration approvals about remuneration and related conditions for road transport drivers.

It is possible then, that the Tribunal could take into account a number of costs which are borne by drivers and owner-drivers, such as reduced payment for backloads, non-payment during waiting times and the costs of ‘wash-out’ by livestock transporters in making its decisions. It has been suggested that:

The application of a demurrage charge has productivity benefits for the economy because it would also represent an incentive for distribution centres to reduce waiting times, allowing trucks (and their drivers) to more quickly get back on the road and engaged in productive activities.  

The RIS recognises the diversity of the road transport industry in Australia and accordingly contains analysis of the long haul freight, short haul quarried and short haul agricultural sectors of the industry. The challenge for the Tribunal will be to ensure that its decisions about safe payment rates are framed in flexible terms—rather than merely ‘in terms of certain vehicle classes or the distance travelled by the affected transport carriers’.  

Chain of responsibility legislation

It has been suggested that, rather than adopting the proposals in this Bill, chain of responsibility legislation would be better suited to addressing the problem of road safety in the transport industry. Chain of responsibility legislation was an initiative of the NTC in the early 1990s as a component of its approach to ensuring compliance with road transport laws.

The laws target speeding, illegal driving and working hours, overloading, exceeding vehicle dimensions and poorly restrained loads. Improved compliance with these and other laws will provide a safer industry for workers in the road transport industry and other road users.

57. Ibid., p. 6.

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Chain of responsibility is a key initiative targeting those who, by their actions, inactions or demands, put drivers’ lives and other lives at risk, and gain an unfair competitive advantage by breaking the law.\(^{59}\)

According to TOLL, chain of responsibility regulations ‘have been quickly adopted, accepted and embedded within the industry’ and ‘are currently applied on the basis of state jurisdictions’.\(^{60}\) The Australian Logistics Council agrees.\(^{61}\)

However, existing chain of responsibility legislation is not uniform and it does not provide the breadth of coverage Australia-wide as that which is proposed by the Bill.

**Key provisions**

**How this Bill operates with other laws**

The Bill covers all employed and self-employed drivers in the road transport industry—to the fullest extent possible under the Constitution. In order to accomplish this, clause 4 defines the term ‘road transport industry’ by reference to four existing transport awards and provides for the prescription of future awards in regulations. In addition clauses 5–7 and 9 define a ‘road transport driver’ and a ‘participant in the supply chain’ respectively to ensure the broadest application of the *Road Safety Remuneration Act 2012* (when enacted).

The proposed Road Safety Remuneration Tribunal (the Tribunal) which is established under clause 79 of the Bill will be empowered to issue ‘road safety remuneration orders’ (under Part 2), ‘safe remuneration approvals’ (under Part 3) and ‘arbitration orders’ (under subclause 44(2)). For the purposes of the Bill, these are ‘enforceable instruments’. The Bill is intended to operate concurrently with existing Commonwealth, state and territory legislation.\(^{62}\) However where an award, enterprise agreement\(^{63}\), FWA order\(^{64}\) or transitional instrument\(^{65}\) sets out terms and conditions for road transport drivers which are less favourable than those set out in an enforceable instrument, then the enforceable instrument will prevail.\(^{66}\) In addition, clause 13 provides that where an enforceable instrument applies to a road transport driver who is an independent

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60. TOLL Group, op. cit.
63. The term ‘enterprise agreement’ in the Bill means and enterprise agreements made under the FWA.
64. The term ‘FWA order’ means an order of Fair Work Australia under the FWA.
65. The term ‘transitional instrument’ means a transitional instrument within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

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contractor, the remuneration and related conditions in the enforceable instrument prevail over the terms of any road transport contract to which the driver is a party.

Road safety remuneration orders

Clause 19 empowers the Tribunal to make road safety remuneration orders. These orders may cover any provisions relating to remuneration and related conditions for road transport drivers that the Tribunal considers appropriate. 67

Subclause 27(4) of the Bill requires a road safety remuneration order to specify all of the following:

- the road transport drivers to whom the order applies
- the persons on whom any requirements in the order are imposed68
- a commencement date for the order or a series of commencement dates69, and
- an expiry date for the order (which must not be later than four years after the commencement date).

There are two circumstances in which the Tribunal may make a road safety remuneration order.

Clause 18 requires the Tribunal to prepare, in consultation with industry, and publish a work program each year. Under the work program, the Tribunal may identify a sector of the road transport industry, specific issues within the industry, or practices affecting the industry (or a sector of the industry), which it intends to inquire into—with a view to making a road safety remuneration order about those matters. The first circumstance in which the Tribunal may make an order, then, is where the order is related to its work program: subclause 19(2).

The second circumstance in which the Tribunal may make an order is where an application is made by any of the persons or associations listed in subclause 19(3)—that is, an individual road transport driver, a hirer of a road transport driver, and a registered employee association or industrial association which is entitled to represent the interests of road transport drivers. Where the application relates to a matter which has not been identified in the work program, it must relate to a matter that is capable of being included in the work program. 70 Subclause 19(5) allows the Tribunal to refuse to hear an application.

Before the Tribunal makes a road safety remuneration order it must follow the process set out in clauses 22–26, that is:

- publish a draft form of the order on the Tribunal’s website and by any other means it considers appropriate

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67. Subclause 27(1) in Part 2 of the Bill.
68. Subclause 27(3) in Part 2 of the Bill sets out the classes of person upon who an order may impose requirements.
69. Subclause 27(5) in Part 2 of the Bill allows for an order to take effect in stages (as provided in the order) if the Tribunal considers that it is not feasible for it to take effect on a single date.
70. Subclause 19(4) in Part 2 of the Bill.
• provide those persons and bodies likely to be affected by the order (if made) with a reasonable opportunity to make written submissions about the likely affect of the order
• publish those submissions—unless the Tribunal is satisfied that they are confidential or commercially sensitive
• allow persons and bodies who are likely to be affected by the order (if made) to provide comments about the material in the published submissions
• have the option to hold hearings in public, or in private, if the Tribunal considers it is desirable to do so\textsuperscript{71}, and
• finalise the terms of the road safety remuneration order, based on the draft.

\textbf{Clause 30} requires that a Full Bench of the Tribunal\textsuperscript{72} make road safety remuneration orders. Under \textbf{clause 20}, a Full Bench of the Tribunal must have regard to a range of matters when deciding whether or not to make an order. These include, but are not limited to:

• the likely impact of any order on the viability of businesses in the road transport industry
• the special circumstances of areas that are particularly reliant on the road transport industry, such as rural, regional and other isolated areas
• orders and determinations made by the Minimum Wage Panel of Fair Work Australia in annual wage reviews and the reasons for those orders and determinations
• the need to reduce complexity and for any order to be simple and easy to understand, and
• the need to minimise the compliance burden on the road transport industry.

\textbf{Clause 21} requires the Tribunal to publish on its website any research conducted when deciding whether or not to make a road safety remuneration order.

Once a road safety remuneration order is made, a person on whom it imposes a requirement must not contravene that requirement: \textbf{clause 28}.\textsuperscript{73}

Every road safety remuneration order must be reviewed by the Tribunal during the 12 month period before the order expires.\textsuperscript{74} After the review, the Tribunal must revoke the road safety remuneration order and do one of the following:

• replace it with a road safety remuneration order in the same terms except for a new expiry date (which must be no more than four years after the date the replacement order is made)
• replace it with a road safety remuneration order in different terms, or
• not replace it.\textsuperscript{75}

\begin{itemize}
  \item \textsuperscript{71} Clause 88 in Part 6 of the Bill refers.
  \item \textsuperscript{72} Clause 96 in Part 6 of the Bill sets out the constitution of the Full Bench.
  \item \textsuperscript{73} This is a civil remedy provision. \textbf{Subclause 46(2)} provides that the maximum penalty for a breach of the provision is 60 penalty units—being $6600.
  \item \textsuperscript{74} \textbf{Subclause 31(1)} in Part 2 of the Bill.
  \item \textsuperscript{75} \textbf{Subclause 31(2)} in Part 2 of the Bill.
\end{itemize}

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As part of its review process, the Tribunal must ensure that any affected persons are given a reasonable opportunity to file submissions in the same way as for draft road safety remuneration orders.\(^\text{76}\)

The Tribunal has the power to vary a road safety remuneration order that has been made, either on its own initiative, or on application by one of the parties listed in subclause 32(2). In deciding whether to vary an order, the Tribunal must consider those matters which are set out in clause 20.

**Safe remuneration approvals**

Under clause 33 a Full Bench of the Tribunal (or a dual Fair Work Act Member)\(^\text{77}\) may grant a safe remuneration approval for certain "road transport collective agreements". Subclause 33(2) defines a "road transport collective agreement" as an agreement between road transport drivers (who are independent contractors) who propose to contract for the provision of road transport services (referred to in Part 3 as "applicable services"), and a hirer, or potential hirer (referred to in Part 3 as the "participating hirer"). The purpose of the road transport collective agreement is to set out remuneration or related conditions the participating hirer is required to provide to those drivers providing the applicable services.

If the Tribunal decides to grant a safe remuneration approval in respect of a road transport collective agreement it must be satisfied of, and do all of the things required of it by clauses 34 and 35 respectively.

**First**, the Tribunal must be satisfied of all of the following:

- a "road safety remuneration order" that applies to the participating drivers is in effect\(^\text{78}\)
- a majority of the participating drivers would be better off under the safe remuneration approval
- a majority of the participating drivers have approved the road transport collective agreement, and
- any road transport collective agreement that is to last for more than one year contains a method for adjusting remuneration during the period of the agreement.\(^\text{79}\)

**Second**, the Tribunal must:

- state in writing that it is satisfied that the remuneration and any related conditions in the road transport collective agreement are adequate to ensure that road transport drivers do not have remuneration related incentives to work in an unsafe manner

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76. Subclause 31(3) in Part 2 of the Bill.
77. Clause 39 in Part 3 of the Bill. Note that where a person is aggrieved by a decision of the dual FWA Member under this Part, subclause 92(1) provides a right of appeal to the Full Bench of the Tribunal.
78. Clause 37 in Part 3 of the Bill sets out how the approval operates in respect of any road safety remuneration orders that are in effect.
79. Clause 34 in Part 3 of the Bill.
• ensure the approval contains all the matters specified in subclause 35(2) including an expiry date which must not exceed four years from the date of the approval
• give a copy of the approval to the participating drivers and participating hirer, and
• publish the approval on the Tribunal’s website by any other appropriate means.

While subclause 33(3) provides that all road transport collective agreements must specify the road transport drivers with whom the participating hirer proposes to contract, this does not limit the effect of any approval given by the Tribunal to only those drivers.80

A participating hirer specified in a safe remuneration approval must not provide remuneration or related conditions to road transport drivers which are less beneficial than those specified in the approval: clause 36.81

Disputes about remuneration and related conditions

Part 4 of the Bill sets out the Tribunal’s powers for dealing with disputes. Either a party to a dispute, or an industrial association that is entitled to represent the interests of a party to a dispute (provided that the party consents to the making of the application by the association) can make an application to the Tribunal to deal with the dispute in the following circumstances:

• between an employee and employer—a dispute about remuneration or related conditions: subclause 41(1)
• between an employee and a former employer—a dispute about the dismissal of the employee where the employee contends that the dismissal was mainly because the employee refused to work in an unsafe manner: subclause 41(2)
• between an independent contractor and a hirer—a dispute about remuneration or related conditions: subclause 42(1)
• between an independent contractor and a former hirer— a dispute about the termination of a road transport contract where the independent contractor contends that the termination was mainly because of a refusal to work in an unsafe manner: subclause 42(2), or
• between participants in the supply chain—a dispute about practices that affect an employer’s or hirer’s ability to provide remuneration or related conditions to a driver that do not provide incentives to work in an unsafe manner: clause 43.

Clause 44 provides the Tribunal with a range of options for settling a dispute including, but not limited to, mediation, conciliation or arbitration.

In circumstances where the parties have agreed that the Tribunal will arbitrate a dispute, the Tribunal may make an ‘arbitration order’ which ensures that the driver does not have remuneration

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80. The hirer is bound by the terms granted by the Tribunal in respect of all drivers it hires or has currently hired: subclause 36(2) in Part 3 of the Bill.
81. This is a civil remedy provision. Subclause 46(2) provides that the maximum penalty for a breach of the provision is 60 penalty units—being $6600.

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incentives to work in an unsafe manner: **subclause 44(2)**. A person on whom an arbitration order imposes a requirement must not contravene the requirement: **subclause 44(4)**.  

Disputes about safe remuneration are to be dealt with by a dual FWA Member: **clause 45**.

**Compliance**

Set out in the Bill are a number of ‘**civil remedy provisions**’, which must be complied with by those in the road transport industry. **Clause 47** sets out those persons who may apply to the Federal Court, Federal Magistrates Court or an eligible state or territory court for orders in relation to a breach of any of the civil remedy provisions.

Where there is a breach of a civil penalty provision, two consequences arise. **First, clause 49** describes the orders each of those courts can make. Time limits do apply. Generally a person may apply for an order in relation to the contravention of a civil remedy provision within six years after the day of the contravention: **clause 48**. However, in the case of an underpayment, a court must not make an order requiring a person to pay an amount in relation to a period that is more than six years before the proceedings commenced: **subclause 49(4)**. **Second, clause 50** provides that the courts may order a person to pay to the Commonwealth a pecuniary penalty up to the maximum amount specified in **subclause 46(2)**. In that case, the debt arising from the order is taken to be a judgement debt.

**Division 2 of Part 5** sets out the jurisdiction and powers of the courts under the **Road Safety Remuneration Act 2012** (when enacted) as follows:

- Federal Court—jurisdiction in relation to any civil matter: **clause 62**. However, the jurisdiction is to be exercised in the Fair Work Division of the Court in the circumstances listed in **clause 63**. The Federal Court also has jurisdiction to hear appeals against decisions of state or territory courts under the **Road Safety Remuneration Act 2012** (when enacted): **clause 64**, and

- Federal Magistrates Court—jurisdiction in relation to any civil matter: **clause 66**. However, the jurisdiction is to be exercised in the Fair Work Division of the Court in the circumstances listed in **clause 67**.

**Division 3 of Part 5** outlines the role of the Fair Work Ombudsman in ensuring parties comply with the provisions of the **Road Safety Remuneration Act 2012** (when enacted). The role of the Ombudsman is both preventative, in providing education, assistance and advice to relevant parties, and investigative, with power to investigate any situations that may be contrary to the Bill.  

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82. This is a civil remedy provision. **Subclause 46(2)** provides that the maximum penalty for a breach of the provision is 60 penalty units—being $6600.

83. Note that where a person is aggrieved by a decision of the dual FWA Member under this Part, **subclause 92(1)** provides a right of appeal to the Full Bench of the Tribunal.

84. **Clause 73** of Part 5 of the Bill.

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clause 73, the Fair Work Ombudsman also has the power to commence court proceedings or refer matters to relevant authorities.

For the purpose of determining whether the Road Safety Remuneration Act 2012 (when enacted) or an enforceable instrument has been complied with, a Fair Work inspector (referred to merely as ‘inspector’ in this Part) may exercise the compliance powers of the FWA: clause 74.85

In the event an inspector reasonably believes that a person has contravened any of the provisions of the Road Safety Remuneration Act 2012 (when enacted), an inspector may give the person a ‘compliance notice’ ordering the person to take action to remedy the contravention and to produce evidence of compliance with the notice: subclause 76(2).

Road Safety Remuneration Tribunal

Part 6 of the Bill establishes the Road Safety Remuneration Tribunal, its functions, mode of operation and appointment of members. Clause 80 sets out the functions of the Tribunal. In addition to making road safety remuneration orders, granting safe remuneration approvals and dealing with disputes, the Tribunal is to conduct research into remuneration-related matters that may affect safety in the road transport industry and any other function which may be prescribed by the regulations or another law of the Commonwealth.

The Tribunal may regulate the conduct of its proceedings as it sees fit and is not bound by the rules of evidence and procedure: clause 85. In addition, the Tribunal has very broad powers to inform itself in relation to matters it is dealing with. These include requiring a compellable person to attend before the Tribunal, to provide copies of documents or records, or any other information to the Tribunal and by taking evidence under oath or affirmation in accordance with the regulations (if any): clause 86.86

The Tribunal is not required to hold a hearing in performing its functions: clause 88. However, when a hearing is conducted, clause 89 makes it an offence for a person to:

- fail to attend a hearing before the Tribunal when required to attend
- fail to take an oath or make an affirmation when the Tribunal requires the person to do so, and
- refuse or fail to answer a question or produce a document when the Tribunal requires the person to do so.

Each offence carries a criminal penalty of six months imprisonment. However, subclause 89(4) does allow for the defence of reasonable excuse to apply to these offences. Whilst there are some appeal

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85. Note that the powers contained in sections 715 (about enforceable undertakings relating to contraventions of civil remedy provisions) and 716 (about compliance notices) of the FWA cannot be exercised for the purposes of the Road Safety Remuneration Act 2012 (when enacted).

86. This clause does not override the privilege against self-incrimination. Where the privilege against self-incrimination would apply, there would be a defence of reasonable excuse for the related offence provisions and the person would not have to provide the documents or information. Explanatory Memorandum, p. 38.

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rights flowing from decisions of the dual FWA Member to the Full Bench of the Tribunal—they are not automatic. The person may appeal a decision by applying to the Tribunal. The Bill is silent on the circumstances in which the Tribunal may refuse such permission. However, subclause 92(4) provides that the Full Bench must grant permission to hear an appeal where it is in the public interest to do so. Where permission is granted, clause 94 sets out the process which is to be followed by the Full Bench of the Tribunal.

Clause 95 allows the President of the Tribunal to refer a question of law to the Federal Court that has arisen in a matter appealed to the Full Bench of the Tribunal.

As stated above, the original NTC directions paper canvassed three tribunal models:

- creating a safe rates panel within Fair Work Australia with power to make orders for safe rates and related terms in the road transport industry
- extending the Fair Work Act 2009 (FWA) to cover owner-drivers and conferring additional powers on FWA, or
- establishing a new independent specialist tribunal with responsibility for establishing safe rates in the industry and related matters.

Whilst the Bill establishes an independent specialist tribunal, it also strikes a balance in terms of the need for some expert involvement by FWA by carefully weighting the membership of the Tribunal. It is to consist of the following:

- the President—who must also be a Deputy President of Fair Work Australia
- at least two and no more than four persons who are experienced in workplace relations matters—who must also be Deputy Presidents or Commissioners of Fair Work Australia, and
- at least two and no more than four persons who have knowledge of, or experience in the road transport industry.

This means that the maximum number of members of the Tribunal is nine—with five of those already holding positions at Fair Work Australia.

Members of the Tribunal are appointed by the Governor-General by written instrument for a period not exceeding five years. Clauses 99–110 set out the terms and conditions of appointment of the Members of the Tribunal.

Clause 120 states that the Minister must ensure a review of the operation of the Act is to commence by 1 July 2015 and is to be completed by 31 December 2015.

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87. This may be where the application for appeal is frivolous or vexatious. Explanatory Memorandum, p. 40, paragraph 265.
88. The referred matter is to be determined by the Full Court of the Federal Court: subclause 95(2).
89. See footnotes 19 and 20.
90. Clauses 79 and 97 in Part 6 of the Bill refer.

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Concluding comments

The RIS which forms part of the Explanatory Memorandum does not provide unqualified support for instituting the Tribunal. It might have been useful for the RIS also to have indicated somewhat more precisely how the proposed Tribunal might implement any orders in relation to underpayment. Most of the RIS makes useful estimates of below minimum wage earnings. However, contract rates in the road transport sector are usually set in terms of the freight task on a rate per tonne kilometre or net tonne per kilometre basis ($$.cc/ntk), and much less so in relation to the minimum wage or award wages. These appear more as a residue of the other factors taking place. Also the matter of return journey loads is often critical as to whether an initial transport task might be undertaken on a profitable basis; indeed there are some freight forwarders which specialise in return load organisation. These then are some of the issues with which the newly formed Tribunal is likely to have to deal.

The low freight rates which currently exist in the market place have come about in large part as a result of the massive Federal funding of the road network over the past 30 years. This has allowed larger trucks to operate at lower costs due to grade improvements and wider roads, as well as by carrying heavier loads leading to reduced delivery times. A similar phenomenon is starting to emerge on rail networks.

It may be then, that the impact of the Bill is to create a tension between the desire to improve the safety of transport drivers and the desire to deliver national economic benefits.
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