NEW SOUTH WALES GOVERNMENT SUBMISSION TO THE NATIONAL TRANSPORT COMMISSION

INQUIRY INTO

SAFE PAY IN THE TRANSPORT INDUSTRY

18 SEPTEMBER 2008

CONTENTS

Executive Summary 3

Section 1: Introduction and Overview 5

Section 2: The Road Freight Transport Industry 6

Section 3: Chapter 6 of the *Industrial Relations Act 1996* (NSW) - History and Origins 8

Section 4: What Does Chapter 6 Do? 11

Section 5: New South Wales Award Regulation of the Transport Industry 18

Section 6: New South Wales Occupational Health and Safety Regulation of the Long Distance Trucking Industry 21

Section 7: Road Transport Law Regulation of the Trucking Industry and Interaction with Other Regimes 22

Section 8: Conclusions 24

Appendix A: *Transport Industry - Mutual Responsibility for Road Safety (State) Award and Contract Determination (No. 2), Re* [2006] NSWIRComm 328 (2 November 2006)

Appendix B: *National Competition Policy Review of Chapter 6 of the NSW Industrial Relations Act,* Bray, Macdonald and Waring, Employment Studies Centre, University of Newcastle, July 2002

Appendix C: *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005*

Appendix D: *Inter-agency Guidelines for the Prevention and Investigation of Long Haul Heavy Trucking Incidents*, and three operational protocols made thereunder

Executive Summary

The NSW Government welcomes the opportunity to make a submission to the National Transport Commission (NTC) into safe payments in the transport industry.

The NTC has been requested by federal state and territory transport ministers '(t)o identify the means by which Commonwealth legislative systems applying (or to apply) to employees and independent contractors could/should accommodate a system of 'safe payments' (and related matters such as waiting times and unpaid work) for employees and owner-drivers'.

In considering the above, some of the matters the NTC must have regard to, include the following:

1. the link between driver remuneration and payment methods (and related matters such as waiting times and unpaid work) and safety outcomes;
2. the scope of existing regulatory models for employees and owner-drivers in the transport industry including existing definitions of independent contractor/owner-driver;
3. the concurrent use of employees and owner-drivers in the transport industry including consideration of existing regulatory models in other jurisdictions with the capacity to deal concurrently with both employee and owner-driver payment methods and remuneration; and
4. any gaps in the current regulatory approach.[1]

The NSW Government makes no submission regarding the desirability or otherwise of 'safe payments', or what the quantum of such payments could or should be.

However, it is the NSW Government's submission that questions of this nature are best dealt with by an independent statutory tribunal with broad powers. The best available model for such a regulatory arrangement is the NSW Industrial Relations Commission (the IRC), including the powers available to it under Chapter 6 of the NSW *Industrial Relations Act 1996* (IR Act).

The powers available to the IRC under Chapter 6 include the power to make contract determinations (analogous to awards), and to approve contract agreements (analogous to enterprise agreements) between parties in the transport industry. Chapter 6 also empowers the IRC to resolve disputes in the industry, provides for the registration of associations of contract drivers and

[1] Terms of Reference at http://www.ntc.gov.au/ViewPage.aspx?page=A02317401400240020

associations of contract carriers, and for the registration of associations of 'employing contractors' (that is, those who engage contract drivers and contract carriers). Further, Chapter 6 applies many of the general provisions of the IR Act to contracts covered by Chapter 6 (for example the enforcement provisions).

Recent case law demonstrates that occupational health and safety issues may be considered in Chapter 6 proceedings.

The current Chapter 6 provisions and their statutory forerunners have been a feature of the NSW system for over half a century and have enjoyed the support of all major political parties throughout their existence.

The provisions are well-used and supported by the relevant industry parties.

It is therefore the NSW Government's submission that the provisions of the IR Act are the best means of regulating pay and conditions in the transport industry, and dealing with questions of safe pay in that industry.

These provisions should be retained in the NSW jurisdiction and the NSW Government urges the National Transport Commission to recommend the adoption of national legislative provisions based on the IR Act. These provisions would need to be put in place by means of cooperation with State Governments.

Section 1: Introduction and Overview

The structure of this submission is as follows:

Section 2 briefly sets out the structure of the transport industry, with particular attention to industrial and occupational health and safety issues;

Section 3 sets out the history and origins of Chapter 6 of the *Industrial Relations Act 1996* (NSW), which amongst other matters regulates pay and conditions in the transport industry;

Section 4 describes the features of Chapter 6, the review of its provisions by Professor Mark Bray and recent case law;

Section 5 describes award regulation of the transport industry in NSW;

Section 6 describes relevant occupational health and safety regulation; and

Section 7 concludes the submission and sets out the NSW Government's position in detail.

Appendices A, B, C and D contain copies of various documents referred to in the submission.

Section 2: The Road Freight Transport Industry

2.1 In 2003 the Bureau of Transport and Regional Economics (BTRE) published *An Overview of the Australian Road Freight Transport Industry*. It is estimated the road freight industry employs approximately 153,000 employees nationally.

2.2 There are approximately 47,000 businesses operating in the hire and reward part of the road freight transport business.[2] However over 90 per cent of these are small establishments with one or two trucks. While owner drivers/small freight operators account for less than twelve per cent of the industry's operating income, they represent nearly two thirds of the total number of operating businesses.[3] This industry profile suggests that the majority of small businesses in the industry face intense competition on price.

2.3 The road freight industry's incidence of occupational injury compares poorly against other industry sectors, including those sectors involving manual and semi-skilled occupations. From a road safety perspective, heavy vehicles are involved in a disproportionate number of crashes and these crashes often have more severe consequences.

2.4 In 2002 the NSW Government convened a workplace safety Summit attended by industry leaders. The Summit recognised that the long haul transport industry faced particular safety issues such as driver fatigue. Arising from the Summit the NSW Government made a long term commitment to improving safety and reducing the number of serious and fatal incidents in the transport industry through strengthened regulation and cooperation of all players.

2.5 The nature and provenance of the road transport industry was reviewed extensively by the Industrial Relations Commission of NSW (the IRC) in its decision in the *Transport Industry - Mutual Responsibility for Road Safety (State) Award and Contract Determination (No. 2), Re* [2006] NSWIRComm 328 (2 November 2006). A copy of this decision is attached to this submission (Appendix A).

2.6 While the road freight transport industry plays a critical role in the NSW and Australian economies, its regulation is attended by complex issues.

[2] Submission by Transport Workers' Union of Australia to House of Representatives Inquiry into Independent Contracting and Labour Hire Arrangements, (March 2005) p.5

[3] Bureau of Transport and Regional Economics, *An Overview of the Australian Road Freight Transport Industry, Working Paper 60* p.vii

Many of these issues go to the occupational health and safety of the drivers concerned. The result of failing to deal with these issues can be injury or even death for drivers within the industry or amongst the general public. It follows therefore, that any system of regulation of the long distance transport industry must be capable of comprehending and effectively responding to the broad range of issues evident in the industry.

Section 3: Chapter 6 of the *Industrial Relations Act 1996* (NSW) - History and Origins

3.1 Under Australian common law, most taxi drivers and owner drivers of motor lorries and other vehicles are not employees but independent contractors. As such, traditionally they would not have access to the industrial relations system and its attendant employee-based rights and obligations, such as collective bargaining, protection from unfair dismissal and so on.

3.2 From the mid 1940s, there were various legislative efforts to create employee-like industrial rights to 'overcome the anomalies created by the judicial appreciation of work relationships in the transport industry'. The result was substantial litigation, culminating in an extended legal campaign by business groups in the 1960s. Between November 1963 and May 1969, the employers' legal campaign involved

> ….four separate cases before the New South Wales Supreme Court, two trips to the Privy Council in Britain, one case in the Commonwealth Industrial Court and innumerable appeals to the New South Wales Industrial Commission.[4]

In response, the Industrial Commission of NSW conducted an inquiry into the operation of relevant provisions, at that time contained in s88E of the *Industrial Arbitration Act 1940*. In particular, the inquiry considered the question of whether s88E should be continued in force or amended.

3.3 The former s88E provided that certain groups of workers who were not normally regarded at common law as 'employees' could be 'deemed' to be employees for the purposes of the *Industrial Arbitration, Annual Holidays* and *Long Service Leave* Acts. In addition, s88F empowered the Commission to declare void certain contracts (including those for the sale of trucks 'in-work') if those contracts were found to be 'unfair, harsh or unconscionable'.

3.4 The Commission's 1970 Report to the NSW Government on s88E found that the deeming provisions were not satisfactory and that it would be better to deal with the workers concerned in 'their true colours'.

3.5 In examining the position of owner drivers, the report concluded: 'We have no doubt that the public interest requires that there should be regulation in

[4] Professor Mark Bray et al *NCP Review of Chapter 6 of the Industrial Relations Act 1996* Employment Studies Centre, University of Newcastle, July 2002 p8

some form of some classes of owner drivers' (p 686). The reasons given for this conclusion included the following:

- the distinction between owner drivers who are truly employees and those who are independent contractors is a fine one with the line difficult to draw;
- many owner drivers come under the direction and control of their principal in a way which in a practical sense is little different from the case of true employees;
- a situation exists in which, 'particularly in a less buoyant economic climate, the industrial arbitration system could be endangered by the principal contractors moving away from the employment field into the unregulated field of independent contract';
- owner drivers have generally fared best in the sections where there has been a form of industrial regulation;
- the public interest requires that disputes between owner drivers and their principal contractors should be speedily settled as there is no difference in the public dislocation caused by these disputes compared with employer-employee disputes;
- industrial regulation will assist in reducing overloading and speeding; and
- industrial regulation would also benefit principal contractors by bringing stability, lower turnover of drivers, less likelihood of industrial disputes, and preventing 'unfair competition' from principal contractors who might be disposed to cut prices at the expense of their drivers.

3.6 The report went on to recommend the creation of specific provisions to deal with contracts of bailment for taxi drivers and contracts of carriage involving motor lorries.

3.7 The recommendations were given effect in the 1979 legislation which introduced the regulated contracts provisions[5].

3.8 These provisions were carried forward as Chapter 6 of the *Industrial Relations Act 1991* and then as Chapter 6 of the *Industrial Relations Act 1996*. In introducing the current provisions, the Second Reading Speech noted that:

> Chapter 6 of the bill carries forward, with some variations and streamlining, the provisions of the 1991 Act that apply a modified

[5] The *Industrial Arbitration (Amendment) Act 1979* introduced the regulated contracts provisions into the *Industrial Arbitration Act 1940.*

industrial relations system for drivers of public vehicles and carriers of goods by vehicle who are engaged under contracts of bailment and contracts of carriage, rather than employment contracts…

The bill extends coverage of the chapter to bicycles to address a lacuna in the existing regulatory framework concerning courier work undertaken with that mode of transport. Although a number of the provisions in the revised chapter 6 of the bill incorporate words or phrases used in other parts of the bill in relation to employees, it is, nonetheless, the legislative intention to retain the chapter as a discrete system of regulation. The nature of contractual relations governed by this chapter, although analogous in some respects, is not the same - and is not intended to be treated in the same way - as employment relationships…

Part 7 continues the provisions enacted by the New South Wales Industrial Relations Contracts of Carriage) Amendment Act 1994 for the determination of claims by a specially constituted tribunal - namely, the Contract of Carriage Tribunal - about compensation to carriers if their contracts are terminated after they paid money as "goodwill".

Section 4: What Does Chapter 6 Do?

4.1 Chapter 6 provides a discrete regulatory regime which applies to contracts of bailment (taxi drivers) and contracts of carriage (drivers involved in the transportation of goods who own their own vehicle).

4.2 These provisions provide the IRC with the power to make contract determinations (analogous to awards) and to approve contract agreements (analogous to enterprise agreements) between parties in relation to such contracts. The IRC is also empowered to resolve disputes in the industry.

4.3 The Chapter 6 scheme is based on the premise that the drivers involved are, in terms of bargaining power, in an analogous position to employees. In other words, although the contractual agreements entered into by these drivers are not employment contracts at law, nevertheless they may be in a vastly inferior bargaining position as against the transport operators for whom they perform services.

4.4 In the absence of regulatory provisions such as those contained in Chapter 6, these drivers are left outside of traditional industrial tribunals. Not being employees, they cannot seek the basic protections enjoyed by employees, such as minimum working conditions, base remuneration, access to tribunal for dispute resolution and effective representation.

4.5 In this context, Chapter 6 establishes a framework which provides an appropriate balance between the need to address the likely inferior bargaining position of owner drivers and the desirability of fostering optimal productivity and efficiency benefits. A summary of the measures used to achieve this are as follows:

Contract Determinations - The IRC can determine minimum conditions for certain contracts of carriage/bailment – these instruments usually deal with very few issues and are designed to ensure that some basic aspects central to the viability of the contractual relationship cannot be bargained away;

Contract Agreements - Groups of owner drivers, whether or not represented by a union, can enter enterprise specific arrangements with their principal contractor – these arrangements provide commercial certainty to drivers and principal contractors alike through provisions designed for the enterprise, and also provide administrative ease and therefore further cost benefits to principal contractors;

Reinstatement of Contracts of Carriage - The IRC power is parallel to that with respect to unfair dismissal, and recognises the significant risk in terms of investment made by owner drivers;

Dispute Resolution - A predetermined, cheap, quick and effective conciliation procedure before members of the IRC with relevant expertise and either personal or institutional access to relevant industrial processes and history;

Recovery of Outstanding Moneys - Owner drivers are able to pursue underpayment for the work they perform through the same streamlined processes as employees.

4.6 Finally, Chapter 6 establishes a Contracts of Carriage Tribunal which is empowered to order the payment of compensation for termination of 'head contracts of carriage'. These are the overarching arrangements under which truck drivers agree to provide services exclusively and on an agreed regular basis for a particular principal contractor.

Contract Determinations in the NSW Industrial Relations System

4.7 As noted above at para 4.5 the NSW IRC has the power to set minimum rates of pay for owner-drivers in the transport industry through the contract determination system.

4.8 Part 2 of Chapter 6 of the IR Act gives the IRC the power to inquire into matters arising under contracts of bailment or carriage and to make contract determinations in respect of each type of contract. Contract determinations are able to set wages and conditions of engagement for the bailees and contract carriers who fall within the scope of Chapter 6. Contract determinations are made following an application from an interested party and in effect, are the equivalent of awards for bailees and contract carriers.

4.9 Contract determinations in NSW currently cover owner-drivers within the following areas:

- waste collection and recycling;
- concrete haulage;
- car carrying services;
- courier services;
- furniture removal;
- goods requiring refrigeration transported in refrigerated vehicles; and

- general freight.

For particular examples of contract determinations, see *Transport Industry - General Carriers Contract Determination* [2008] NSWIRComm 1020 (28 February 2008); *Transport Workers' Union of New South Wales (on behalf of TWS NSW Pty Ltd and Ready Transport) and Smartskip (NSW) Pty Ltd* [2008] NSWIRComm 55 (26 March 2008); *Transport Workers' Union of New South Wales (on behalf of S & L Bozinovski Pty Ltd and MJW Transport Pty Ltd) and Glen Cameron Nominees Pty Ltd* [2008] NSWIRComm 38 (3 March 2008); *TNT Logistics (Australia) Pty Ltd (NSW Local Fleet) Contract Determination* [2008] NSWIRComm 1036 (6 May 2008); *Transport Industry - Car Carriers (NSW) Contract Determination* [2008] NSWIRComm 1050 (23 May 2008); *Transport Workers Union of New South Wales v Sydney Civil Excavation Pty Ltd* [2008] NSWIRComm 1049 (27 June 2008).

Reviewing the Operation of Chapter 6 – The Bray Report

4.10 As a result of concerns about possible conflicts between Chapter 6 and relevant provisions of the *Trade Practices Act* 1976 (Cth) (the TPA)[6], Chapter 6 was temporarily exempted from the operation of the latter Act by virtue of then s310A of the *Industrial Relations Act 1996*. The then Minister for Industrial Relations initiated a review of this exemption in early 2002, so that consideration could be given to making the exemption permanent. The review was undertaken by Professor Mark Bray and his colleagues from the Employment Studies Centre of the University of Newcastle, who were asked to subject the exemption to a rigorous process of public benefit assessment. Professor Bray and his colleagues reported in late 2002. A copy of Professor Bray's Report is attached (Appendix B).

4.11 Professor Bray and his colleagues undertook a detailed examination of the operation and effects in the context of its historical background and objectives and the characteristics of the relevant product and labour markets. Professor Bray and his colleagues were informed by the evidence and opinion of a wide range of industry participants and stakeholders, and analysis of secondary literature, case law and descriptive statistics. Other potential alternatives operating elsewhere in Australia and internationally were also examined.

4.12 Professor Bray found that that Chapter 6 provisions originated as a response to industry problems identified in the operation of the free market for the services of owner-drivers and bailee-drivers in the NSW road

[6] These provisions were ss45 and 45A of the TPA.

transport industry following many previous legislative attempts to rectify the problem.

4.13 Professor Bray also found that in the absence of such a regulatory regime as Chapter 6 of the IR Act, over-supply and untenably low prices would produce high demand for owner drivers. This in turn, would encourage owner drivers to engage in road behaviour that challenges both health and safety standards and road safety for the wider community. Accordingly, there exists a clear need for legislative intervention, such as that provided by Chapter 6, to protect industrial relations, occupational health and safety and quality of service issues.

4.14 Professor Bray's analysis of the operation of the legislation suggested a robust jurisdiction, with significant numbers of determinations and agreements having been made under the legislation.

4.15 The principal conclusion of Professor Bray's report was that Chapter 6 had not had a substantial impact on the degree of competition in the road transport industry and that the public benefits of the legislation outweighed the public costs. In particular, it was concluded that there was market failure in road transport when contract carrier rates were unregulated because the price mechanism did not effectively regulate the supply and demand of contract carriers. Furthermore, this market failure had significant and adverse consequences for industrial relations, occupational health and safety, road safety and quality of service.

4.16 Consequent to this conclusion, the report's principal recommendation was that Chapter 6 should receive permanent protection against the anti-competitive provisions of the TPA and the *Competition Code of New South Wales* which would require amendment to the IR Act. This recommendation was put into effect by means of the *Industrial Relations Amendment (Public Vehicles and Carriers) Act 2003*.

Chapter 6 and Commonwealth Legislation

4.17 The passage of the *Workplace Relations Amendment (Work Choices) Act* in 2005, meant that all employers who are constitutional corporations were moved into the federal industrial relations jurisdiction from 26 March 2006. While this legislation did not apply to non-employee owner drivers, further Commonwealth legislation, in the form of the *Independent Contractors Act 2006*, has the potential to override Chapter 6 and any other State legislation that applies to owner driver. While a specific exemption of State owner driver provisions at s7(2)(b) of the latter Act prevents this from occurring, the former Commonwealth Government made it clear that this exemption would be reviewed.

4.18 It is not clear whether the current Commonwealth Government also intends to review the exemption, or whether it intends that Chapter 6 should remain in place in the long term.

4.19 It is the NSW Government's view that the exemption should remain.

Transport Industry - Mutual Responsibility for Road Safety (State) Award and Contract Determination

4.20 In August 2005, the NSW Branch of the Transport Workers' Union initiated a major industrial case in the NSW IRC. The key elements of the claimed award were:

1.1 all parties connected with the road transport of goods, including consignors, transport operators, employees, contract carriers and the Union take responsibility for health and safety issues;

1.2 long distance road transport work is carried out safely and in accordance with applicable laws and industrial instruments;

1.3 the performance of long distance road transport work is properly planned in order to prevent driver fatigue;

1.4 employees and contract carriers are properly trained in matters relating to health and safety;

1.5 safety is not compromised as a result of the underpayment of employees and contract carriers; and

1.6 professional drug taking is eliminated from the transport industry, and employees and contract carriers do not otherwise perform work whilst affected by drugs and alcohol.

4.21 After hearing submissions and evidence from various parties, including a significant jurisdictional challenge to the scope of the claim, the Full Bench of the NSW IRC determined to make the *Transport Industry - Mutual Responsibility for Road Safety (State) Award* and the *Transport Industry - Mutual Responsibility for Road Safety Contract Determination* in November 2006. A copy of the decision is attached to this submission (Appendix A).

4.22 The Full Bench accepted significant elements of the union's claim, including safe driving plans, requirements for health and safety training, and the requirement for operators to have a drug and alcohol policy.

4.23 For the purpose of the present submission, the following observations about this decision are made:

- the scope of the instruments extends along the supply chain to the consignor;
- the IRC heard evidence regarding safe pay, but made no determinations in this regard (see decision paras 33 – 35);
- The IRC made a number of general observations about the industry and relevant occupational health and safety issues (paras 1 – 27);and
- The decision applies to all transport operations in NSW falling within the scope of the instruments made, irrespective of their status as constitutional corporations (paras 91 – 153).

4.24 This decision demonstrates that the NSW IRC has the jurisdictional capacity under Chapter 6 to consider a wide range of relevant factors, including complex occupational health and safety considerations and to give them due regard in its final decision.

4.25 In intervening in this major industrial case, counsel for the Minister for Industrial Relations indicated that the Government opposed the Union's application to the extent that the claim included matters already encompassed in existing occupational health and safety regulation. To the extent the claim includes matters outside existing regulation, the Government supported the jurisdiction of the Commission to hear and determine such matters. This remains the Government's position.

4.26 In addition, counsel for the Minister for Industrial Relations submitted that *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (the 2005 Regulation) deals specifically with the issues and difficulties identified by the Union in its claim for an award and contract determination. The Government argued that these responsibilities cannot be derogated from, notwithstanding the fact that more than one person has a responsibility for the occupational health and safety of a particular employee. In these situations each person retains responsibility and needs to coordinate efforts with the other person(s).

4.27 The NSW IRC noted that the NSW Government's submission explained that the *Occupational Health and Safety Act 2000* and the 2001 Regulation introduced legislative changes to formalise the joint and several responsibilities in order to ensure adequate occupational health and safety in contract business situations, such as where a consignor engages a company to transport freight or a freight transporting company engages drivers of trucks in arrangements other than employment.

4.28 In oral submissions before the NSW IRC, counsel for the Minister advanced the Government’s current position that there was a real concern of the risk of confusion arising from two obligations which overlap on the same subject matter. Accordingly, the Minister proposed an alternative model clause requiring recognition by all parties to the instrument of their respective obligations under the *Occupational Health and Safety Act 2000* and the *Occupational Health and Safety Regulation* (together referred to as 'OHS law’). The model clause also contained a provision noting that an employer's responsibilities under OHS law include the requirement for an employer to identify, assess and eliminate or control risks to health and safety, including fatigue.

4.29 At para 186 – 187 of the decision, the NSW IRC noted that:

> …(w)e have carefully considered the employers' and the New South Wales Government's submissions concerning the undesirability of duplication between the Union's proposal and matters properly dealt with under the *Occupational Health And Safety Act* and associated regulations, particularly the 2005 Regulation. We would agree with the industry's acknowledgement of the New South Wales Government's initiatives in introducing the 2005 Regulation. The Regulation together with a greater awareness of the need to manage fatigue arising from the *Hitchcock* judgement will no doubt have a major impact on focusing the industry's attention on its safety responsibilities. However, the fact there may be duplication or phasing in difficulties with what is required by the 2005 Regulation and an award provision would not of itself be a sufficient basis for rejecting the Union's claim.
>
> 187 Indeed, the very fact that the New South Wales Government introduced a discrete and specifically focused Regulation to address driver fatigue in the industry, is supportive of the proposition that the more general obligations under the *Occupational Health and Safety Act* would be assisted by further regulation to meet the industry needs and, in the public interest. Any further regulation or requirement which provides an even greater emphasis and focus for the parties as to their obligations and duties to provide a safe working environment for employees is to be encouraged particularly given the parlous state of safety in the transport industry; accepting of course that such further obligations should not be in conflict with other legislative or regulatory requirements.

Section 5: New South Wales Award Regulation of the Transport Industry

5.1 As well as owner drivers, the transport industry also includes employees in the usual legal sense of the term. No definitive figures separately tabulating employee and non-employee numbers are available.

5.2 Employees and their employers are subject to the jurisdiction of 'normal' industrial legislation, and depending whether the employer is a constitutional corporation, will be subject to the federal or relevant State jurisdiction. The transport industry in NSW has traditionally been regulated by common rule awards, such as:

- *Transport Industry (State) Award;*
- *Transport Industry - Mixed Enterprises Interim (State) Award;*
- *Transport Industry - Waste Collection and Recycling (State) Award;*
- *Motor Bus Drivers and Conductors (State) Award;*
- *Transport Industry - Tourist and Service Coach Drivers (State) Award; and*

The *Transport Industry - Mutual Responsibility for Road Safety (State) Award* operates in conjunction with these awards.

5.3 In addition, many industry parties have entered into referral agreements pursuant to s146A of the IR Act, which provide for the NSW IRC to settle disputes about matters agreed in a common law deed of agreement.

5.4 In terms of payments to drivers, some awards pay an both an hourly rate and a kilometre rate for long distance work (as defined). Clauses in the latter category have a longer history than hourly rates clauses, and it could be concluded such clauses were crafted at a time when the industry was rather different to what it is now.

5.5 One of the possibly unforeseen consequences of kilometre rate clauses is that they may encourage drivers to attempt to increase their remuneration by driving further and longer, thus engaging in the hazardous behaviour described in Section 2.

5.6 In some cases, awards place limits on the hours that can be worked: for example, clause 36 of the *Transport Industry (State) Award* prescribes maximum shift hours (15 hours), and limits overtime to 20 hours per week.

5.7 Award employees have been the target of compliance activity by the NSW Office of Industrial Relations (the OIR). During the period 1 July 2007 to 30 June 2008 the Office conducted 15 Transport Mutual Responsibility Campaigns. During these campaigns, 247 employers were visited, with 26 workplaces identified breaching industrial relations laws. The total number of breaches identified was 48, with the majority being failure to display a copy of the award (48% or 26 occasions). Other breaches where mainly failure to maintain employment records and not providing a pay slip.

5.8 It should also be noted that, after 27 March 2006, all corporate employers in the transport industry became subject to the federal workplace relations jurisdiction, with the State awards that covered such employers and their employees being converted to Notional Agreements Preserving State Awards (NAPSAs). As such, the regulatory provisions governing a particular workplace became a function of the corporate status of the employer, rather than a matter of choice, creating confusion and uncertainty in the industry.

5.9 The NAPSAs so created, as well as the relevant federal awards, are now subject to the process of award modernisation being conducted by the Australian Industrial Relations Commission (AIRC). The private transport industry is scheduled for consideration in Stage 2 of the award modernisation process (Oct 2008 – April 2009)[7].

5.10 The NSW Government has some concerns about the modern awards resulting from this process, and in particular in the context of this Inquiry, is concerned about how effectively the relevant modern award(s) will regulate the transport industry.

5.11 As it stands, current federal awards in the transport industry[8] appear to contain conditions less favourable than those of existing State awards and NAPSAs. In particular, the *Transport Workers (Long Distance Drivers) Award 2000* provides for pay rates rewarding distance travelled, which may encourage hazardous behaviour as noted at para 5.5 above. Further, federal awards appear to be more restrictive of the matters which they can comprehend, so whether modern awards will, or can accommodate NSW community standards remains moot. The AIRC has only recently released the first exposure draft modern awards[9], so it is perhaps somewhat premature to reach a final conclusion on this point.

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[7] AIRC Statement Award Modernisation 3 September 2008, available at http://www.airc.gov.au/awardmod/databases/general/decisions/statement_030908.htm

[8] See, for example*, Transport Workers Award 1998, Transport Workers (Long Distance Drivers) Award 2000*

[9] AIRC Statement 12 September 2008, available at http://www.airc.gov.au/awardmod/databases/general/decisions/2008aircfb717.htm

5.12 However, the NSW Government remains concerned that award modernisation may result in a modern award for the transport industry which dilutes or even erases the important gains made for the industry through the NSW award system.

Section 6: New South Wales Occupational Health and Safety Regulation of the Long Distance Trucking Industry

6.1 This section briefly sets out, by way of background, the means by which occupational health and safety is regulated in the long distance trucking industry.

6.2 Long distance trucking is regulated under the *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (the Regulation), which commenced on 1 March 2006. A copy of the Regulation is attached (Appendix C).

6.3 The Regulation consists of a number of sections focusing on the duty of consignees and consignors to take responsibility in assessing and managing their carrier fatigue.

6.4 The Regulation enforces the implementation of a driver fatigue management plan. Assistance in the formulation of this plan is provided from WorkCover in the form of:

- Driver Fatigue Management: A guide to managing driver fatigue in long haul trucking;
- Driver Fatigue Management Plan Verification Tool; and
- Driver Fatigue Management Plan Verification Brochure.

6.5 These aids allow employers in the transport industry to make informed decisions regarding the conditions that carriers work under (e.g. timetables, fatigue, hazard reporting).

6.6 In addition to the Regulation, WorkCover has entered into an inter-agency agreement with the Roads and Traffic Authority, New South Wales Police and the Department for Environment and Conservation titled *Inter-agency Guidelines for the Prevention and Investigation of Long Haul Heavy Trucking Incidents*. A copy of the Guidelines (and three related protocols) is attached (Appendix D).

6.7 The inter-agency agreement recognises the long haul trucking industry as being a tough and competitive business, with pressure on all participants. The agreement aims to ensure that proper coordination occurs between government agencies to minimise duplication and minimise the impact of regulation on business without compromising safety.

Section 7: Road Transport Law Regulation of the Trucking Industry and Interaction with Other Regimes

7.1 This section comments briefly on the interaction of road transport legislation with other regimes, the impact of Chain of Responsibility provisions under road transport law, and the implications of current reform proposals under consideration.

7.2 As the National Transport Commission is the proponent of new national heavy vehicle driver fatigue management regulations, and the national heavy vehicle speeding Chain of Responsibility legislation, it is not necessary to describe those laws here.

7.3 In late 2006, in anticipation of an Australian Transport Council ballot upon the fatigue management regulations, the NSW Government appointed a working group to advise, amongst other matters, upon the compatibility of the new regulations with the *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* and the *Transport Industry - Mutual Responsibility for Road Safety (State) Award* and the *Transport Industry - Mutual Responsibility for Road Safety Contract Determination*.

7.4 Relying on the advice of an independent legal advisor engaged to support its work, and assisted by NTC officers, the working group concluded that there was no conflict of laws between these various instruments.

7.5 However, the working group observed that compliance with the instruments could be facilitated if more consistent terminology was used across all instruments and if it was clearly established that records created for one instrument could be used, perhaps with supplementation, for the purposes of demonstrating compliance with the other instruments.

7.6 It is suggested that the NTC make its own consideration of these interactions.

7.7 Turning to Chain of Responsibility provisions, it is noted that, in NSW, the vigorous application of available Chain of Responsibility provisions to consignors and consignees is considered to have had beneficial impact on compliance and attitudes. In addition, the new sanctions available within the Chain of Responsibility suite have been used to good effect in NSW and have proven to be a powerful tool for intervention upon non-compliant firms.

7.8 It is suggested that the NTC give consideration to the utility of applying similar legal principles, provisions and remedies in the current area.

7.9 Finally, it is noted that the Australian Transport Council has recently agreed to recommend to the Council of Australian Governments that a single national heavy vehicle regulator should be established for Australia from 1 July 2009, followed by a single national registration scheme from 2010.

7.10 The NTC may wish to consider the interaction between any new measures it may propose and these proposed reforms. As an example, a single national registration scheme may facilitate easier use of vehicle related penalties to support compliance.

Section 8: Conclusions

8.1 The approach of successive NSW Governments to regulating pay and conditions in the road transport industry over the last three decades or more has started from acceptance that the status of owner drivers is not that of employees at law. The consistent policy approach has been to then recognise that owner drivers are nonetheless in an inferior bargaining position, and therefore deserving of and requiring some legislative protection, which now appears in the form of Chapter 6 of the IR Act.

8.2 Chapter 6 continues to be a vibrant and active jurisdiction, capably operated by the Industrial Relations Commission of NSW. In recent times particularly, the Chapter 6 jurisdiction has shown itself to be capable of comprehending and actively addressing the complex issues that prevail in the long distance transport industry.

8.3 As has been seen in Section 2 of this submission, the issues any regulator must confront in the transport industry are complex and varied, with the price of failure potentially being injury or death. The matters which the NTC has sought comment on fall squarely into this ambit, and it is particularly noted that the issue of safe payments is one that has occupied the IRC of NSW in recent times.

8.4 In the NSW Government's submission, the framework established by Chapter 6, and particularly the powers it confers on the IRC of NSW are the best, fairest and most efficient means of understanding the safe payments issues that confront the industry and crafting sustainable solutions to those issues.

8.5 The key elements supporting the successful operation of Chapter 6 are:

- An understanding that regulation based purely on either common law or conventional employment law is inadequate for the regulation of owner-drivers;
- Simple legislation setting out processes by which industry parties and their representatives can establish enforceable contract rates and conditions; and
- An independent statutory tribunal with broad powers to make determinations of contract rates and conditions, to resolve disputes and to enforce existing instruments.

8.6 The NSW Government's view is that a regulatory regime based on Chapter 6, with the characteristics described in the preceding paragraph is the best vehicle for resolving the question of safe pay, as well as many other complex issues that confront the long haul trucking industry.

8.7 The NSW Government's primary position is that Chapter 6 of the IR Act should be retained by way of a permanent exemption from the operation of the *Independent Contractors Act 2006*. Beyond that, it is recommended that Chapter 6 be adopted as the basis for a national scheme to permit issues such as safe pay to be considered by an independent umpire.

8.8 The implementation of such a national regulatory scheme would necessarily be by means of cooperation between State, federal and territory jurisdictions. In NSW, Chapter 6 could be used as the basis for mirror federal laws, although the utility of text-based referral as a means of achieving national regulation could also be considered. Relevant governance arrangements would need to be put in place to oversight such a cooperative scheme, and coordination with any concurrent scheme of national regulation of industrial relations would need to take place.