

## **INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW**

**Organisation:** Transport Workers' Union NSW  
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**Wayne Forno** State Secretary

16 January 2012

Director  
Standing Committee on Law and Justice  
Parliament House  
6 Macquarie Street  
SYDNEY NSW 2000

By courier

Dear Sir/ Madam

**Re: Response to Submission Number 72**

We refer to your correspondence dated 21 December 2011 in which you invited us to provide any additional information to the Committee.

We felt it necessary to respond in detail to the submission provided to the Committee by the Australian Road Transport Industrial Organisation of NSW (**ARTIO**), Submission Number 72 to this Inquiry. Attached is our response to this submission.

If there are any further issues or questions arising please do not hesitate to contact the undersigned.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'N. McIntosh'.

**Nick McIntosh**  
Chief Advisor

## REVIEW OF TRIBUNALS IN NEW SOUTH WALES

### Submissions of the TWU in response to the submission of the Australian Road Transport Industrial Organisation, NSW Branch

#### 1. Introduction

- 1.1 These brief comments respond to the submission filed by Australian Road Transport Industrial Organisation, NSW Branch (**ARTIO**). They are authorised by State Secretary Wayne Forno.
- 1.2 The essence of the ARTIO submission is that the Road Safety Remuneration Tribunal (**Federal Tribunal**) proposed to be established by *Road Safety Remuneration Bill 2011 (Federal Bill)* “*would be capable of handling the residual matters currently being dealt with by the NSW IRC, in particular, the work that is currently being performed in relation to Contracts of Carriage*” (at p2 of its submission).
- 1.3 The Transport Workers’ Union vigorously disagrees with the ARTIO submission.

#### 2. Response to ARTIO submission

- 2.1 First, and to state the obvious, there is no federal legislation dealing with the industrial conditions of owner drivers. The *Road Safety Remuneration Bill 2011 (Federal Bill)* has been tabled and read once, but nothing more. There is no guarantee that the Bill will be passed in its current form, or at all.
- 2.2 Second, and perhaps more importantly, the ARTIO submission entirely ignores the difference between on the one hand a NSW system which has over time developed a comprehensive safety net and a set of enterprise arrangements appropriate to the needs of workers and businesses, and on the other hand an embryonic federal system which is primarily concerned to “*make provision in relation to remuneration-related matters to improve safety in the road transport industry, and for related purposes*”<sup>1</sup>. The Federal Bill is a vital and desperately needed piece of legislation which will, if passed, save lives in the transport industry; but it is a different creature to Chapter 6 of the *Industrial Relations Act*.
- 2.3 The ARTIO submission ignores the differences between the two regimes. In order to effectively respond, we briefly expand on some of the differences between the two systems:

##### **Minimum standards**

- 2.4 True it is that the Federal Bill proposes to give the Federal Tribunal the power to make “Road Safety Remuneration Orders”, setting remuneration and related conditions for owner driver. These Orders will have a focus on the need to deal with remuneration and related matters which impact on safety in the industry.
- 2.5 As discussed in our earlier submission, Chapter 6 has been the foundation of a set of contract determinations and agreements some fifty years in the making. Those determinations and agreements reflect an appropriate balance between the need for cost recovery by carriers and the operational requirements and productivity needs of businesses. They constitute the basis of the transport market in NSW.

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<sup>1</sup> See the long title to the *Road Safety Remuneration Bill 2011*.

- 2.6 The Federal Tribunal might, over time, develop a set of Orders covering some or all carriers currently subject to NSW contract determinations. The Federal Tribunal is not, however obliged to make Orders in relation to any geographical or industry area. It is likely that it will at the outset spend a significant amount of time investigating the industry nationally and assessing the areas most in need of action. It might determine that NSW, or some parts of it, should not be a priority. There is absolutely no basis to think that the Federal Tribunal could or would replicate the comprehensive safety net of determinations and agreements in the short term.
- 2.7 To simply abolish that comprehensive safety net on the basis that the proposed Federal Tribunal might eventually reproduce some or all of it is to invite chaos in the NSW transport market. It would promote dangerous exploitation of thousands of small owner-driver businesses and would disadvantage those principal contractors who wish to treat their workers fairly. It is not in anyone's interests – worker or business – to do so.

### **Contract Agreements**

- 2.8 As discussed in our earlier submission, the NSW IRC and Industrial Court have comprehensive powers to approve, interpret and enforce contract agreements which form an essential part of the transport market. The proposed Road Safety Remuneration Tribunal has a relatively limited power to approve certain agreements subject to a comparison with any applicable "Road Safety Remuneration Order" (if one exists).
- 2.9 Any major adjustment to the current regime of contract agreements would be hugely disruptive. In the concrete sector, to nominate a single example, contract agreements typically underpin ten year arrangements between concrete companies and owner drivers who invest several hundred thousands of dollars in their businesses. Any major variation to the effect or enforceability of contract agreements would potentially ruin thousands of owner-driver small businesses.

### **Dispute Resolution**

- 2.10 The NSW IRC has a broad power to deal with industrial disputes involving owner drivers. That power is closely related to the establishment and enforcement of the safety net of minimum standards and its significance for NSW was discussed in our earlier submission and need not be repeated. The proposed Federal Tribunal, by comparison, would have a more limited power to deal with disputes related to remuneration and could arbitrate such disputes only by consent.
- 2.11 Similarly, in relation to unfair termination of contract, the NSW IRC has a broad power to deal with unfair termination of contract in a manner similar to the employee unfair dismissal regime. The proposed Federal Tribunal would have the power to deal with terminations only when the termination is connected to a refusal to work unsafely, and could only be arbitrated with consent of both parties.
- 2.12 Any reduction in the power of the NSW IRC to resolve disputes, including terminations, is likely to cause significant disruption including an increase in industrial action.

### **Goodwill**

- 2.13 The Contract of Carriage Tribunal and the goodwill legislation it administers is an essential part of the NSW system. As is well known, owner driver small businesses were before its introduction subject to arbitrary termination of contract without loss of goodwill, often

valued at several hundred thousand dollars. If the Contract of Carriage Tribunal is abolished, owner drivers will again be so exposed.

- 2.14** The Federal Bill does not deal with goodwill.

### **Overlap**

- 2.15** There is no basis to suggest that the Federal Bill, if enacted, will represent a regulatory difficulty in terms of overlap of laws. There is one potential area of overlap between the two systems, in that a Road Safety Remuneration Orders of the Federal Tribunal might overlap with a contract determination of the NSW IRC. The Federal Bill deals with such scenarios, providing that a federal instrument will prevail to the extent of any inconsistency. This is an approach which has applied in respect of awards for many years and should hold no mystery for any participant in the system. The Federal Bill also provides that the Federal Tribunal must, in making any Road Safety Remuneration Order, have regard to the need to avoid overlap with other applicable laws.

## **3. Conclusion**

- 3.1** For ARTIO to suggest that if the Federal Bill is enacted into law the NSW system need no longer exist is completely incorrect and ignores the fundamental differences between the two regimes. The Federal Bill is clearly intended to operate alongside the NSW system and should the Federal Bill become law its impact upon the current workings of the NSW system will be, in the short to medium term, limited compared with States which do not have an equivalent to Chapter 6 of the *Industrial Relations Act 1996*.