Submission No 32

INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW

Organisation: Transport Workers' Union NSW

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REVIEW OF TRIBUNALS IN NEW SOUTH WALES

Submissions of the TWU

Part 1—Introduction

1. The Review

1.1 This is the submission of the Transport Workers' Union of NSW (**TWU**) to the inquiry of the Legislative Council's Standing Committee on Law and Justice into "Opportunities to consolidate tribunals in NSW". It responds to the "Review of Tribunals in New South Wales – Issues Paper" (**Issues Paper**) accompanying the media release "Should NSW have a Super Tribunal?" released on 21 October 2011 and is authorised by State Secretary Wayne Forno.

1.2 The interest of the TWU is in the continuing effective operation of the NSW *Industrial Relations Act* (**IR Act**), the NSW Industrial Relations Commission (**IRC**) and the Industrial Relations Commission in Court Session (**the Industrial Court**). This submission deals with other tribunals only insofar as is relevant to the future of the IR Act, IRC and Industrial Court. The submission will make some general observations about the issues but will focus in particular on the provisions of the IR Act dealing with owner drivers and on the significant implications of any restructure for owner drivers.

1.3 It must be noted at the outset that the title of the inquiry is apt to mislead. Although described variously as an inquiry into "Opportunities to consolidate tribunals in NSW" and a "Review of Tribunals in New South Wales", it is apparent inter alia from the Issues Paper that the review is in truth an investigation of the future of the NSW Industrial Relations Commission.

1.4 Similarly, although the Issues Paper does not refer to any potential amendment of the IR Act, it is apparent that any restructure of the NSW IRC or of tribunals generally has the potential to impact the operation of the Act in a practical sense. This is a matter which must be squarely raised and dealt with as a first-order issue.

Part 2—The case for a specialised industrial tribunal

2. The nature of work performed by the Industrial Relations Commission and the Court

2.1 The work currently performed by the IRC includes:

(a) making and varying awards for employees and contract determinations for owner drivers;

(b) dispute resolution;

(c) dealing with industrial action; and

(d) unfair and unlawful dismissals.

2.2 It is trite to say that this work is important and that it requires a high level of expertise. Members of the IRC bring to bear a level of knowledge and skill commensurate with the significance of their work.

2.3 It is also obvious that making an award with potentially major effects on employees and employers, or dealing with industrial action which may be highly disruptive, is entirely unlike dealing with tenancy disputes or complaints about warranties. There is simply no analogy between the areas of industrial and consumer/commercial disputation. It would be impossible for members of an administrative tribunal who lack extensive industrial knowledge and expertise to properly discharge industrial functions.

2.4 The work of the Industrial Court requires a similarly high level of practical industrial expertise, combined with a high level of legal training. It deals, inter alia, with:

(a) award enforcement and underpayment matters;

(b) interpretation and declaratory relief;

(c) unfair contracts; and

(d) regulation of industrial organisations.

2.5 Importantly, the performance of these functions by the Industrial Court has a major effect in promoting access to justice. Access to justice – that is, the practical capacity of citizens to access legal remedies – is a major issue in NSW and Australia more broadly. This is a particular concern in the case of employment and industrial matters where judicial proceedings typically involve actions by individuals against substantially better-resourced employers.

2.6 The Industrial Court, although bound by rules of evidence and legal formality, is far more accessible to employees compared to the general court system. The reasons for that relative accessibility include:

(a) the extensive specialised expertise of the members of the Industrial Court, which tends to reduce the scope of proceedings and therefore costs (for example, it reduces or avoids the need to explain the history and context of awards in award enforcement proceedings);

(b) a flexible and relatively informal approach to matters, which tends to reduce costs and improve accessibility;

(c) specific procedures and regulations (including lower filing costs) designed for dealing with industrial matters, as compared to uniform procedure rules designed to deal generally with commercial litigation;

(d) the capacity to conduct proceedings via industrial associations, which in many cases is the only practical and cost-effective avenue for employees.

2.7 A removal of the functions of the Commission in Court Session into the general courts would have a significantly negative impact on the capacity of employees to access legal remedies for breaches of industrial law. In fact it will effectively destroy the capacity of most employees to enforce industrial and employment rights. This is an outcome which should be avoided.

3. Quality of decision making

3.1 The Issues Paper identifies "*a high level of complaints about the [Consumer Trader and Tenancy] Tribunal and dissatisfaction with the outcome of its decisions*" and "*considerable concerns about the quality of decision-making in the CTTT*".

3.2 To state the obvious, these concerns will be exacerbated, rather than improved, by any consolidation of the CTTT with the NSW IRC. As has been explored above, the nature of the work performed by the industrial commission is entirely different to the work carried out by the CTTT and other tribunals. It would be unfair and entirely counterproductive to ask members of the CTTT to assume industrial functions which are well outside their areas of knowledge and competence.

Part 3—Potential efficiencies?

4. Current workload of the NSW IRC

4.1 The Issues Paper released by the government states that:

(a) between 10 and 15% of NSW employees fall within the jurisdiction of the NSW IRC;

(b) the number of NSW IRC commissioners has since 2006 reduced by almost half from 12 to 7;

(c) the jurisdiction of the NSW IRC has expanded since 2009 with the addition of GREAT and TAB work to near pre-Workchoices levels; and

(d) the current spare capacity of IRC commissioners is a third of one commissioner.

4.2 It is important to recognise at the outset that that the figure of 10 – 15% of NSW employees amounts to between 360,000 and 540,000 employees[1] in addition to tens of thousands of lorry owner drivers. That is, the NSW IRC has complete responsibility inter alia for award making, agreement approval, unfair and unlawful dismissal and dispute resolution for some half a million workers. There is no reason to think that the powers exercised in relation to local and state employees are likely to lapse in the foreseeable future. To the contrary, that workload is likely to increase: see for example changes to the employment arrangements of RailCorp employees.

4.3 The basis of the statement that there are seven commissioners is unclear. To the TWU's knowledge there are in fact only three full-time commissioners (Tabaa, Bishop and Ritchie CC) and two part-time dually appointed commissioners (Macdonald and Stanton CC). That number is likely to decline with further retirements in the short term.

4.4 As to the judicial members, it must be noted that:

(a) judges of the Industrial Court are members of the NSW IRC, both at first instance and in appeals (where each Full Bench includes two or more judicial/presidential members); and

(b) the members of the Industrial Court are judges of a superior court of record and cannot be unseated by any unilateral decision of the government.

4.5 The Paper identifies some likely future reduction in workload as a result of OHS harmonisation. The solution in this regard is obvious: OHS jurisdiction should remain with the Industrial Court. Any genuine concern about efficiencies or savings would be addressed in this manner.

4.6 Whether the Industrial Court retains OHS jurisdiction or not, it will continue to perform an important function. The Court has a crucial role including in award and determination enforcement, interpretation and declaratory relief and regulation of industrial organisations. For the reasons previously discussed, it is important that these functions continue to be performed by a specialised industrial court.

4.7 Having regard to:

(a) the substantial current workload of NSW IRC;

(b) the likely decline in the number of commissioners in the short term; and

(c) the capacity of judicial members to assume an increasing amount of the Commission's first instance work as OHS matters decline;

it cannot be said that the NSW IRC is currently underutilised, nor is there any evidence to suggest that it is likely to be underutilised in the future.

5. Synergies and savings resulting from consolidation

5.1 This is a matter which can and must be dealt with briefly. Nowhere in the Issues Paper, or elsewhere, is there a clear identification of synergies arising from consolidation. There is certainly no identification of value of synergies as against the presumably substantial costs

[1] The Australian Bureau of Statistics report "1367.0 - State and Territory Statistical Indicators, 2011" (accessed at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by+Subject/1367.0~2011~Main+Features~Employed+Persons~2.6> on 7 November 2011) provides that there were, as of September 2011, 3.6 million employees in NSW.

of a broad re-arrangement of administrative tribunals across the state. Absent identification of such "synergies" there is no compelling case for any reform on grounds of efficiency of financial prudence.

5.2 It might also be noted that, to the extent that loss of expertise is remedied by creation of separate divisions within a general tribunal, that will defeat the advantages of consolidation.

Part 4—Chapter 6 of the Industrial Relations Act

6. Chapter 6 – the basics

6.1 Owner drivers are small businessmen and women who operate a single vehicle and work for a single corporation which in most cases has the ability to unilaterally set the terms of their engagement.

6.2 It has long been recognised by governments of all persuasions that contract carriers are a vulnerable class of worker who require special protection. That protection is currently enshrined in Chapter 6 of the IR Act. The Chapter empowers the IRC to create "contract determinations" – industrial instruments analogous to awards which set minimum rates of pay and play a crucial role in ensuring minimum cost recover for owner drivers. It also gives the IRC powers to deal with industrial disputes involving owner drivers (disputes which in many cases have the potential to cause serious disruption to the supply of goods and services) as well as unfair dismissals and goodwill disputes.

6.3 Strictly speaking the Chapter applies to "contract carriers" and "bailee drivers". In short, a "contract carrier" is a person who owns and operates their own vehicle and who is responsible for all the costs associated with the running of their vehicle. Contract carriers are essentially bound to a principal contractor, meaning that all of their work is performed for one principal contractor. Owner drivers are small businesspeople, with most now operating as their own proprietary companies in order to carry out their work.

6.4 Bailee drivers are essentially taxi cab drivers. These bailees are in a similar position to contract carriers and require similar protections. Submissions referring to owner drivers should be taken to apply equally to bailee drivers.

6.5 The TWU alone covers over 10,000 owner drivers and taxi drivers in the state of NSW.

7. Legislative history of owner driver provisions in NSW

7.1 The legislative history of Chapter 6 and its predecessors is characterised by a remarkable degree of bipartisan support for the provisions.

7.2 Owner driver protections were first legislated in 1959, when the *Industrial Arbitration Act 1940* was amended to include provisions deeming certain categories of workers, including owner drivers, as employees for the purposes of that Act. These deeming provisions provided owner drivers with some legislative protections for the first time.

7.3 In 1968, the Askin Government directed the Industrial Court to report on the 1959 deeming provisions. The purpose of the report (delivered to Minister for Labour and Industry, the Honourable E. A. Willis and commonly known as the Willis Report[2]) was to clarify the

[2] Report to the Honourable E. A. Willis, Minister for Labour and Industry, on Section 88E of the *Industrial Arbitration Act*, 1940-1968, in so far as it concerns drivers of taxi-cabs, private hire cars, motor omnibuses, public vehicles and lorry owner-drivers.

operation of the provisions and make recommendations as to the future regulation of owner drivers.

7.4 The Report declared, among other things, that:

The evidence in the Inquiry has established that in a number of sections owner-drivers have been in the past exploited as to rates and subjected to oppressive and unreasonable working conditions...the truth is that an owner-driver with one vehicle (on which there is a heavy debt load) and no certainty of work is in a weak bargaining position and the transport industry is not lacking in operators prepared to take the fullest advantage of this vulnerability.[3]

7.5 The Willis Report also identified the link between regulation and safety in the transport industry, finding that:

Industrial regulation, although certainly not a panacea for the bad practices of overloading and speeding which are prevalent in some sections, must assist in reducing them. We say this because we have already found that they stem to an appreciable extent from depressed rates and adverse conditions.[4]

7.6 Acting on the Willis Report, the NSW Parliament in 1979 passed the *Industrial Arbitration (Amendment) Act 1979*, inserting provisions allowing for the conciliation and arbitration of industrial disputes specifically involving owner drivers, contract determinations allowing for cost recovery for owner drivers and unfair dismissal rights for owner drivers.

7.7 In 1991, the Greiner Government reproduced the 1979 provisions in its *Industrial Relations Act 1991*.

7.8 Shortly thereafter in December 1992, the Minister for Industrial Relations John Hannaford announced a review into "the regulations of 'Public Vehicles and Carriers', Chapter 6 of the NSW Industrial Relations Act 1991" (**the Hannaford Review**). In response to the recommendations of the Hannaford Review, the Fahey Government introduced the *Industrial Relations (Public Vehicles and Carriers) Amendment Act 1993* which closed a loophole by extending the definition of owner drivers from "motor lorries" to "motor vehicles", thereby including drivers using motor vehicles and bicycles as well as motor lorries. In relation to the maintenance of Chapter 6 and the expanded definition of owner driver, the Honourable Kerry Chikarovski said:

'The first area this bill addresses is a situation which is a cause of considerable concern in certain sectors of the industry – it is known as the "motor lorry loophole"... That definition excluded motor cycles, which are now commonly used in the contract courier industry. In order to ensure that the New South Wales Industrial Relations Commission has jurisdiction to make determinations and register agreements which are applicable to the industry as it presently operates, the bill replaces the term "motor lorry" with "motor vehicle".[5]

7.9 In response to the 1993 *Pioneer*[6] decision, whereby the Federal Court rejected the claims of owner drivers for recovery of substantial amounts paid for goodwill, Mr Peter Nagle MP introduced the *Industrial Relations (Contracts of Carriage) Amendment Bill*. Although the Greiner Government opposed the Bill in its initial form, the Honourable Kerry Chikarovski noted:

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[3] Willis Report, paragraph 30.8.
[4] Willis Report, paragraph 30.24.
[5] Hansard *Industrial Relations (Public Vehicles and Carriers) Amendment Bill* 27 October 1993 p 4573.
[6] *Gallagher v Pioneer* (1993) 113 ALR 159; 46 IR 304

New South Wales has engaged in industrial regulation of contracts of bailment and carriage for many years. The reasons have been mainly social and have reflected concerns to prevent the exploitation of individual drivers who have been regarded as having little bargaining power.[7]

7.10 Following negotiations and amendments, the Bill became the *Industrial Relations (Contracts of Carriage) Amendment Act 1994* and passed both legislative chambers with support of all parties. During the second reading of the Bill on 12 May 1994, The Honourable Virginia Chadwick said:

In supporting the bill, the Government recognises the difficulties that can arise from the practice, found in some parts of the transport industry, whereby lorry owner-drivers pay goodwill premiums for the right to obtain work from a principal contractor. The government appreciates the financial predicament of lorry owner-drivers who have made a substantial investment in such premiums and then find their contracts terminated without compensation.[8]

7.11 The Honourable Edward Pickering stated in support:

I support the legislation for two reasons. First, when I was an engineer I had a great deal to do with lorry owner-drivers and grew to understand and have affection for them. They are salt of the earth, very hard-working people, who often find themselves in extraordinarily difficult commercial circumstances. That is a longstanding facet of the industry...I took the time to meet some of the wives of the lorry owner-drivers...one could only be absolutely struck by the terrible circumstances in which they found themselves...this Parliament ought to be able to help them.[9]

7.12 During the same debate, the Reverend the Honourable Fred Nile said:

The passage of this bill will bring great satisfaction and, we hope, eventual justice when cases are heard for compensation. The bill will benefit up to 15,000 families and help save them from financial hardship, family disintegration and health problems. This bill was passed unanimously in the other place.[10]

7.13 The Honourable Elaine Nile said:

This legislation will offer lorry owner-drivers and their families some relief. On a number of occasions I sat with a number of the wives of lorry owner-drivers and listened to what they hade to say, and watched them cry. When their husbands were dismissed or threatened with dismissal and were replaced by employee drivers with company vehicles the effect was devastating on these women and their families. They lost all economic security. Overnight, the $50,000 or $60,000 that was the goodwill component of their contract became valueless. They no longer had an opportunity to sell it. Many lorry owner-drivers regarded that goodwill component as their superannuation. The loss of income meant that some lorry owner-drivers had to sell their homes as they could no longer meet mortgage repayments and other commitments.[11]

7.14 The Honourable Duncan Gay said:

I support the Industrial Relations (Contracts of Carriage) Amendment Bill... Lorry owner-drivers make this country work. Other honourable members have referred to the hurt that

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[7] Hansard *Industrial Relations (Contracts of Carriage) Amendment Bill* 21 May 1993 p 2660.
[8] Hansard *Industrial Relations (Contracts of Carriage) Amendment Bill* 12 May 1994 p 2395.
[9] Hansard *Industrial Relations (Contracts of Carriage) Amendment Bill* 12 May 1994 p 2396.
[10] Hansard *Industrial Relations (Contracts of Carriage) Amendment Bill* 12 May 1994 p 2397.
[11] Hansard *Industrial Relations (Contracts of Carriage) Amendment Bill* 12 May 1994 pp 2398-2399.

has been experienced by lorry owner-drivers. I congratulate all those who have contributed to formulating this legislation.[12]

7.15 The Carr government enacted the entire suite of owner driver provisions in the 1996 *Industrial Relations Act* in its current form, Chapter 6. During the second reading of the Act, the Honourable Jeff Shaw said about the Chapter:

Chapter 6 of this Bill carries forward, with some variations and streamlining, the provisions of the 1991 Act that apply a modified 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...it is...the legislative intention to retain the chapter as a discrete system of regulation.[13]

8. The Howard Government and the *Independent Contractors Act 2006*

8.1 The Howard Government's *Independent Contractors Act 2006* substantially displaced state legislative regimes dealing with independent contractors. Recognising, however, the special position of lorry owner drivers, the Howard Government specifically exempted Chapter 6 from the operation of the *Independent Contractors Act*. During the second reading of the Independent Contractors Bill 2006, the Minister for Employment and Workplace Relations, Mr Kevin Andrews, explained the rationale for exclusion:

...the principal bill will maintain existing legislation in New South Wales and Victoria with respect to owner-drivers in the road transport industry. While the Victorian legislation has only recently been passed, in New South Wales there has been long – indeed, almost 30-year – bipartisan support for special arrangements for owner-drivers. These arrangements include allowing owner-drivers to bargain collectively with transport operators and have minimum rates of pay and goodwill compensation set by a tribunal. These provisions in state legislation will remain, given the special circumstances of owner-drivers in having to operate within very tight business margins because of the large loans they have taken out to pay for their vehicles.[14]

8.2 During the second reading of the Independent Contractors Bill 2006 Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006, the Minister noted the bipartisan support for Chapter 6 saying:

As the government has previously announced, the Independent Contractors Bill will maintain the status quo for New South Wales and Victorian state owner-driver laws at this time. The government recognises the historical bipartisan support which has existed in New South Wales for some sectors of the owner-driver industry. As such, the bill will not override the existing protections for owner-drivers in New South Wales and Victoria, the only two states with such legislation.[15]

9. The provisions of Chapter 6

9.1 Chapter 6 includes a suite of provisions dealing with the industrial concerns of owner drivers. The Chapter empowers the IRC to create "contract determinations" – industrial instruments analogous to awards which play a crucial role in ensuring minimum cost recovery for owner drivers. It also gives the IRC powers to deal with industrial disputes

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[12] Hansard *Industrial Relations (Contracts of Carriage) Amendment Bill* 12 May 1994 p 2399.
[13] Hansard *Industrial Relations Bill* 23 November 1995, p3855.
[14] Hansard *Independent Contractors Bill* 22 June 2006.
[15] Hansard *Independent Contractors Bill 2006 Workplace Relations Legislation Amendment (Independent Contractors) Bill* 13 September 2006.

involving owner drivers, register collective agreements and deal with unfair dismissals and goodwill disputes.

9.2 Part 2 of Chapter 6 of the IR Act allows the NSW IRC to make contract determinations for owner drivers across entire industries or specific enterprises. Contract determinations operate in much the same way as awards for employees, providing minimum pay and conditions. Contract determinations aim to ensure cost recovery, meaning owner drivers are able to recover costs such as fuel, vehicle maintenance, vehicle repayments and labour.

9.3 Contract determinations are essential protections for owner drivers. In the words of TWU owner driver delegate Michael Moore:

Without a contract determination, rates could be set by the company unilaterally and drivers would either have to accept them or reject the work without any base to negotiate from. Through a contract determination drivers are able to recover their costs which means that they can get the job done and turn a profit without having to work excessive and unsafe hours. In my case, the contract determination provides the basis for our contract agreement.

9.4 Of the many contract determinations currently in existence, most provide minimum rates based on cost recovery which cover entire industry sectors and underpin contract agreements. For example, the *Transport Industry – General Carriers Contract Determination* provides the minimum rates and conditions for all owner drivers in the Sydney Metropolitan area. The *Transport Industry – Courier and Taxi Truck Contract Determination* provides the minimum rates and conditions for all couriers operating in NSW. The *Taxi Industry – (Contract Drivers) Contract Determination* provides the minimum rates and conditions for all taxi drivers in NSW.

9.5 Part 3 of Chapter 6 of the IR Act allows the IRC to approve a contract agreement negotiated between owner drivers and a principal contractor. This makes the agreement binding on both parties, and either party may apply to the IRC to enforce the terms of the agreement. Owner driver Ray Childs explains the value of his contract agreement:

Our contract agreement was negotiated between the drivers, our TWU representatives and the company. An agreement was reached with the specific needs of us drivers, who had invested hundreds of thousands of dollars in our trucks and businesses, as well as with the company in mind.

9.6 Many companies and owner drivers operate under contract agreements, including for example the recently registered *TNT Australia – TWU New South Wales (Contract Carriers) Agreement 2011 – 2013* which covers owner drivers engaged by transport giant TNT Australia Pty Limited in NSW. This agreement, along with all others, gives dispute resolution functions and powers to the IRC.

9.7 Contract determinations and contract agreements play an essential role in maintaining a stable transport market, including by maintaining an equilibrium between employees and owner drivers. Clearly any change which reduces or eliminates the force of these instruments will have an extremely disruptive effect on the market for transport services in NSW and must be avoided.

9.8 Under Part 4 of Chapter 6 of the IR Act, the NSW IRC can hear any industrial dispute between owner drivers and principal contractors. Owner driver Adam Fanning, who represents a group of owner drivers recently involved in a major industrial dispute, said:

Without the assistance of the NSW IRC, there is simply no way of efficiently and cost effectively resolving an industrial dispute. My experience is that the NSW IRC is able to bring both sides together, listen to the arguments put to it in an informal way and assist the parties to resolve the matter and bring about workplace harmony.

9.9 Under s314 of the Act the Commission may deal with unfair termination of contracts in a way broadly analogous to employee unfair dismissals. TWU official Michael Aird explains that:

The unfair termination of contract provisions contained in Chapter 6 works in much the same way as unfair dismissal for employees. It provides a cheap, efficient and fair means of resolving the issue using conciliation and, if necessary, arbitration. Whilst many unfair termination proceedings are resolved at the conciliation phase, there have been a number of cases in the last couple of years alone where a TWU member was found at arbitration to have been unfairly dismissed and reinstated to their previous contract.

9.10 As described above, the Fahey Government's 1994 amendments to the *Industrial Relations Act 1991* established a specialist tribunal within the NSW IRC with power to deal with disputes involving the payment of goodwill. Those provisions are now included in section 346 and following of the Act. In short, the legislation provides that an owner driver who pays a sum of money in goodwill to take over a contract, and where the principal contractor knew that this sum of money had been paid, is entitled to compensation for the value of the goodwill if his or her contract is terminated unfairly. TWU industrial officer Oshie Fagir explains that:

I have dealt with a number of cases involving loss of the value of goodwill payments worth literally millions of dollars. Without the NSW IRC and its Contract of Carriage Tribunal, our members would have been forced to fund expensive and speculative cases in higher courts at a time when they have lost their jobs and are often struggling. The expertise of the NSW IRC and Contract of Carriage Tribunal has been vital in resolving goodwill disputes fairly and efficiently.

10. The importance of Chapter 6 – fairness, safety and economic stability

10.1 It is apparent from the above that there has been a general consensus that fairness and equity require that owner drivers enjoy some legislative protection given their uniquely vulnerable position. Nothing has changed in this time which would suggest that a different regulatory approach is either desired or necessary.

10.2 Crucially, the effective operation of Chapter 6 has a direct relationship to safety on our roads. It is now beyond doubt that rates of pay and methods of remuneration have a significant effect on safety in the road transport industry, including public safety.[16] Chapter 6, and the IRC in administering it, play a critical role in ensuring that owner drivers are able

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[16] *Safe Payments Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry,* the National Transport Commission with the Honourable Lance Wright QC and Professor Michael Quinlan, October 2008. See also: *R v Randall John Harm,* District Court of New South Wales, per Graham J, 26th August 2005; *Long Distance Truck Drivers: On road performance and economic reward,* December 1991, Federal Department of Transport and Communications; In *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* [2006] NSWIRComm 328 the Full Bench of the Industrial Relations Commission of NSW said: "we consider that the evidence in the proceedings establishes that there is a direct link between methods of payment and/ or rates of pay and safety outcomes"; *National Road Freight Industry Inquiry, Report of Inquiry* to the Minister for Transport, Commonwealth of Australia, (1984), Canberra; Beyond the Midnight Oil, An Inquiry into the Managing Fatigue in Transport, House of Representatives Standing Committee on Communication, Transport and the Arts, October 2000, Canberra; C. Jones, J. Dorrian and D. Dawson, 'Legal Implications of Fatigue in the Australian Transportation Industries', 45 *JIR* 344 at 351; Professor Michael Quinlan, *Report into Safety in the Long Haul Trucking Industry,* A report Commissioned by the Motor Accidents Authority of New South Wales, 2001, Sydney; R Johnstone, 'The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement', March 2002, National Research Centre for OHS Regulation, the ANU; *WorkCover Authority of NSW v Hitchcock* (2005) 139 IR 439.

to recover their costs and drive safely and sustainably. Without it, owner drivers would be forced to drive faster, for longer and on inferior and less well maintained equipment. It is not an overstatement to say that any change which impacts on the effective operation of the provisions has the potential to cost lives in the transport industry.

10.3 Setting aside matters of safety and industrial equity, Chapter 6 has a broader economic significance for the state. It is and has for many years been an important element of the transport industry in NSW and any significant impact on its operation is likely to cause significant disruption to the market for transport services. It will, for example, affect the balance between employed drivers and LODs and will impact upon current transport operators by exposing them to sharply increased competition on driver wages and conditions.

11. Chapter 6, the IRC and the Industrial Court

11.1 The effective operation of Chapter 6 fundamentally relies on the effective operation of the NSW IRC and the Industrial Court. Owner drivers rely on the IRC and its capacity to provide:

(a) efficient, timely and cost effective resolution of industrial disputes;

(b) extensive expertise in dealing with the unique and complex industrial concerns of owner drivers; and

(c) an informal manner which is accessible to all parties, often without the need for legal expertise.

11.2 Generally speaking, the administration of Chapter 6 requires an even greater level of expertise and specialised knowledge than the employee provisions of the Act. Establishment of contract carrier rates, for example, involves not only the exercise of wage-setting functions but also calculation of rates of cost recovery. This in turn requires an in-depth understanding of the nature of owner drivers' work arrangements – which range from metro courier operations in 1 tonne vans to long haul car carrying combined with econometric skills.

11.3 The Industrial Court is the essential mechanism whereby Chapter 6 is judicially enforced. The Court provides efficient and cost effective relief for owner drivers, principal contractors and the TWU. For the reasons discussed at [2] above, the functions performed by the Industrial Court cannot simply be transferred to the general courts. Any removal of the functions of the Industrial Court to the general courts will effectively end the capacity of owner drivers to pursue judicial relief.

11.4 Any change which results in Chapter 6 of the Act being administered by a non-specialised tribunal and/or court will in the TWU's view have significantly negative effects on owner drivers and the state generally, both in terms of public safety, industrial equity and economic disruption.

Part 5—Conclusion

12. Retention of the IRC and Industrial Court

12.1 Having regard to:

(a) the need for a dedicated body with the knowledge, experience and resources necessary to properly administer the industrial affairs of some 500,000 employees;

(b) the need for a body with the specialised knowledge necessary to properly administer Chapter 6 of the Act;

(c) concerns regarding the current quality of CTTT decision making, and the potentially aggravating effect of the expansion of its jurisdiction in this regard;

(d) the lack of any clearly identified financial or other efficiencies which would offset those concerns;

there is no compelling case for the absorption of the IRC into a consumer tribunal. There is, in our view, no case for change.

12.2 Assuming however that there is to be some form of consolidation, the appropriate approach is to expand the jurisdiction of the IRC to deal with certain matters analogous to its current work. Such matters might include discrimination matters and administration of professional standards. On that basis Option 1 of the Issues Paper is the most appropriate option.

12.3 If the Government decides not to adopt Option 1, we make these further observations about Options 2A and 2B:

(a) it is imperative that any alternative tribunal encompasses a separate employment/industrial division administered by members of the current IRC. Any new appointments should be made specifically to the employment/industrial stream based on specialised expertise and knowledge;

(b) any employment/industrial division of a tribunal must exercise precisely the current powers and functions as the IRC in relation to Chapter 6;

(c) any transfer of judicial power from the Commission in Court Session to the general courts will reduce access to justice and should be avoided. A specialist court must therefore remain in order to continue to provide access to justice.

(d) any changes to the operation of the IRC and Industrial Court will necessarily involve legislative change. Any new legislation must preserve the totality of Chapter 6 as above, and must also include savings provisions so that current contract determinations and contract agreements made and registered by the IRC remain in force and are enforceable by any new tribunal. Dispute resolution procedures which refer matters to the IRC must also refer the same powers and functions to any new tribunal.

12.4 As to Option 3, each of the concerns identified above arises and will be compounded by the arbitrary collection of diverse functions within a single gigantic bureaucracy.

13. Further submissions

13.1 TWU officials are available to speak to these submissions, give evidence before the Committee and respond to any questions that Committee members may have. Certain TWU members have also indicated their willingness to give evidence if required.

Transport Workers' Union of NSW

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