MINERALS COUNCIL OF AUSTRALIA

RESPONSE TO DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS CONSULTATION PAPER: *"EMPLOYEE-LIKE' FORMS OF WORK AND STRONGER PROTECTIONS FOR INDEPENDENT CONTRACTORS'*

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12 MAY 2023

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OVERVIEW

On 14 April 2023, the Department of Employment and Workplace Relations (**DEWR**) released its consultation paper on ‘‘Employee-like’ forms of work and stronger protections for independent contractors’ (**the Consultation Paper**).

The Consultation Paper seeks feedback on the direction the government should take in implementing three commitments:

- ‘Empowering… the Fair Work Commission, to set minimum standards for workers in ‘employee-like’ forms of work, including the gig economy’
- ‘Considering allowing the Fair Work Commission to set fair minimum standards to ensure the Road Transport Industry is safe, sustainable and viable’
- ‘Amending relevant legislation to give workers the right to challenge unfair contractual terms’.

This submission responds to the Consultation Paper and sets out the MCA’s proposed approach to each of these policies.

The MCA recognises the need to consider appropriate regulation to address the emergence of digital work platforms, ensuring that arrangements for gig economy workers are fair and transparent.

While digital platforms may create risks for some vulnerable workers, regulation must be balanced and embrace technological change and the benefits it brings. An overly restrictive regulatory approach will stifle innovation and competition, resulting in poorer outcomes for Australian consumers, a less dynamic economy, and fewer opportunities for workers.

The MCA remains concerned that businesses outside the gig economy that have structured their affairs in good faith based on existing legal frameworks of ‘employee’ and ‘contractor’ are at risk of having these arrangements rendered unviable through inappropriate regulation. Any provision for employee-like relationships must provide certainty and ensure businesses are not unfairly attacked for conducting their business in a certain way.

The MCA strongly opposes any proposal that would extend the scope of the FWC power to set minimum standards to an open-ended range of independent contractors, including those that do not engage in work through a digital platform. Such an approach would discourage businesses from engaging self-employed tradespeople, engineers, drivers and other professionals because of the risk of non-compliance while disrupting the right of individuals to pursue their livelihood in the manner they choose.

AUSTRALIAN MINING ALREADY PROVIDES SECURE JOBS AND BETTER PAY

Independent contractors make up approximately 2 per cent of the mining industry workforce, far less than the average across all industries (8.3 per cent).[1]

However, through its supply chains, the mining industry engages and supports thousands of small and medium regional businesses, mostly in rural and regional Australia, including manufacturing, transport, construction, and professional services (which may include a larger proportion of independent contractors). The mining industry:

- Employed 286,000 people in 2020-21 – and directly and indirectly supports over 1.1 million jobs at over 200 operating mine sites and in supply chains.[2]
- Pays more on average than any other industry in Australia ($148,000 a year compared to $96,800 across all industries) – with 99 per cent of mining workers earning above-award wages and conditions.[3]
- Provides secure jobs, with 86 per cent of mining workers employed on a permanent basis and 96 per cent employed full time.[4]

Just one company, BHP, has paid $16.5 billion to suppliers for the purchase of utilities, goods and services in the decade to FY2022, with a focus on supporting Indigenous businesses and local suppliers.[5]

Almost 40 per cent of workers employed in the mining industry are employed through service contractors.[6] Service contractors can be small, medium or large businesses that provide services to the mining industry under an agreed scope of work. They mostly employ permanent workforces and offer highly paid and highly sought-after jobs.

Independent contracting and self-employment are also important arrangements in some regional and remote communities, where mining companies and the broader Mining Equipment, Technology and Services sector provide opportunities to local small businesses and tradespeople.

[1] Australian Bureau of Statistics, *Characteristics of Employment*, August 2022 (released 14 December 2022), table 4.1.

[2] Australian Bureau of Statistics, *Labour Force, Australia, Detailed*, November 2022, released 22 December 2022, table 6.

[3] Australian Bureau of Statistics, *Average Weekly Earnings, Australia*, May 2022, released 23 February 2023, table 10H; Australian Bureau of Statistics, *Employee Earnings and Hours, Australia*, May 2021, released 19 January 2022, data cube 5.

[4] Australian Bureau of Statistics, *Labour Force, Australia, Detailed*, November 2022, released 22 December 2022, table 6; *Characteristics of Employment, Australia*, June 2022, released 14 December 2022, table 3.1.

[5] BHP, *Economic Contribution Report 2022*, p. 3.

[6] Deloitte Access Economics, *Economic effects of changes to labour hire laws*, report prepared for the MCA, 4 June 2019, p. 47.

COMMENTS ON THE GOVERNMENT'S 'GUIDING PRINCIPLES'

The Consultation Paper sets out five guiding principles which purport to form the policy rationale for its principles. The origin of these principles, and their process and rationale, is not stated in the Consultation Paper and there has been no consultation process to determine these principles.

The MCA's comments in relation to each of the principles is set out below.

Principle:

> Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.

Response:

The principle does not reflect the need to balance the goal of a workplace relations system capable of 'evolving with emerging forms of work and business practices' with the need for certainty and simplicity.

Changes to the workplace relations system that create additional uncertainty and complexity will cement Australia's unfortunate international standing as a high-cost jurisdiction with complex workplace relations laws that are difficult to comply with.

Principle:

> All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.

Response:

The principle is broad, suggesting that minimum standards should apply to every independent contractor and not be restricted to (yet to be defined) 'employee like' forms of work. It also assumes that certain forms of independent contractors lack rights or protections even when they may be successful and viable family businesses. It is not correct assert that workers who are not in employment relationships all have their 'rights fall off a cliff'. This is a crude and inaccurate assertion.

It also ignores the fact that independent contractors already have rights and protections under the *Fair Work Act 2007* and *the Independent Contractors Act 2006*, including protection from:

- Adverse action and coercion
- Abuses of freedom of association
- Harsh and unfair contracts
- Sham contracting.

This principle points to a critical inconsistency in the government's position – does the government propose to improve protections for all independent contractors by adjusting the protections for all independent contractors, or to create a new and distinct category of regulation confined to certain circumstances where independent contractors are in 'employee-like' arrangements? Unless the government provides clarity on this fundamental issue it cannot be said to be conducting an open or transparent consultation process.

Principle:

> Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.

Response:

The MCA agrees with this principle. Any proposal that creates additional complexity, compliance burden or uncertainty in the workplace relations system will damage competition and innovation.

It is essential that any new form of regulation does not discriminate against one form of work by imposing unfair restrictions. For example, the former Road Safety Remuneration Tribunal (RSRT) grotesquely discriminated against owner-driver operators by imposing contract terms that did not apply to employee drivers. This example is outlined in Box 1 below. It would be unconscionable for any government to consider re-introducing anything like the punitive unfairness of the RSRT.

It is equally essential that it not allow for cartel behaviour or price fixing within an industry, which appears to be the intent of the Consultation Paper proposal for the Fair Work Commission (FWC) to 'approve' agreements between businesses. The proposals in the Consultation Paper in this respect are dangerously open-ended. They would allow for legalised price fixing – conduct that would currently be in breach of Competition and Consumer legislation. The notion of giving the FWC jurisdiction over agreements between businesses – as opposed to between businesses and workers – is a radical proposal for which the government has no mandate, for which no case has been made, and for which the FWC would be fundamentally ill-suited.

Principle:

> The Fair Work Commission should set minimum standards that:
>
> - are fair, relevant, proportionate, sustainable and responsive
> - reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with
> - mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market

Response:

The MCA considers that simplicity, consistency and certainty should also guide the proposed new powers of the commission.

The requirement that any minimum standards should mitigate unintended consequences for workers, businesses, consumers and other aspects of the labour market is an important principle, which is considered further in this submission.

Principle:

> The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.

Response:

In addition to the objectives mentioned, any standard-setting framework must be efficient and cost-effective. Any proposal that ties up the resources of Australian businesses in constantly responding to applications that aim to interfere in commercial arrangements – as opposed to arrangements for the performance of work – would create inordinate complexity and uncertainty

A central element of 'certainty' is the ability for existing businesses and forms of work to continue operating in their current form, without being subject to unnecessary new restrictions. Neither government nor the Consultation Paper have clarified whether the government's intention is to simply introduce new regulations restricted to new forms of work such as 'gig' work, or whether it intends to use this exercise to impose much more far-ranging regulation across many existing forms of work, such as independent tradespeople and owner-drivers. Such an approach would create unprecedented uncertainty for all affected parties. The government must answer this threshold question before business can have any confidence that it has been conducting this consultation process in good faith.

EMPLOYEE-LIKE FORMS OF WORK

- The scope of the proposed FWC jurisdiction must only extend to new work arrangements that have been made possible by new and emerging technology (such as 'gig' work based on digital plaforms).
- The jurisdiction should not extend to well-established forms of work that are more accurately characterised as small business rather than 'employee-like', for example, self-employed trades people in the building industry and owner-drivers in the transport industry.
- A digital plaform should be defined to exclude services that merely facilitate job matching and placement because they do not play an ongoing role in governing the work relationship.
- The jurisdiction of the FWC should only be exercisable where a class of vulnerable workers has been identified, having regard to relative bargaining power, remuneration, and the degree of dependence of the class of workers on a single digital platform.
- The FWC should set minimum standards independently for the relevant cohorts, on an as-required basis. These minimum standards must be adapted to the nature of the work being performed and targeted to addressing the vulnerability that has been identified.
- The government proposal to establish a framework for 'approving' agreements between groups of independent contractors and unions is an extremely radical proposal that goes beyond the policy intent and would see the FWC regulating commercial contracts.
- Minimum standards must not create barriers to workers securing work (for example through imposing compliance costs that render them uncompetitive or creating compliance risks for their client businesses).
- To promote integrity the MCA supports a requirement that parties to an application for a minimum standards order be prohibited from obtaining a direct or indirect financial benefit because of the making of the Order.

The MCA's comments in response to the proposals in the Consultation Paper are set out below.

Scope of workers

The MCA supports the creation of a new power for the Fair Work Commission to set minimum standards for digital platform or 'gig' workers, provided these powers are limited to vulnerable workers and do not extend to independent small businesses.

The Consultation Paper's working concept of the gig economy as set out in figure 1, encompassing vertical and horizontal digital platforms, provides a reasonable starting point. However, a digital platform should be defined to exclude services that merely facilitate job matching and placement. Such services, although digital, do not play an ongoing role in governing the work relationship after the placement or match has occurred.

The Consultation Paper acknowledges 'the gig economy is a priority for the Government' and seeks views on 'an approach which positions the engagement of a worker through a platform as the primary factor in determining coverage'. Extending the scope of the proposed regulation beyond digital platforms (for example to potentially include any independent contractor) would create unacceptable uncertainty for businesses, upending the distinction between an independent contractor and an employee.

The Consultation Paper refers to the Government's intention that the scope of the policy be 'future focused', supported by Minister Tony Burke's speech to the Transport Workers Union which refers to digital platforms 'changing their algorithm faster than we can regulate'.[7] Whilst this assertion is contestable, if the government has a concern that the emergence of new technologies may further alter work patterns and create classes of vulnerable workers, the scope of the power could be appropriately targeted to deal with emerging technologies. Such an approach would promote certainty for businesses who engage independent contractors outside the gig economy, who can be confident that they will not be at risk of being captured in future.

The scope of the proposed FWC jurisdiction must:

- Only extend to novel work arrangements that have been made possible by new and emerging technology (such as a digital plaform)
- Only cover classes of vulnerable workers, having regard to relative bargaining power, their remuneration level, and the degree of dependence on a single platform
- Exclude partnerships, as no issue has been identified with the regulation of partnerships.

Such an approach would ensure the new jurisdiction remains targeted to the identified areas of concern, while remaining flexible enough to deal with emerging technologies that could in future create vulnerable classes of workers.

Responses to questions

1. *What is the best approach to defining the scope of the Fair Work Commission's new functions, taking into account the engagement of a worker through a platform as the primary factor?*

   Answered above.

2. *What other factors should be considered?*

   Some digital services simply provide job matching or support recruitment and placement of workers, who have no dependence on the platform in terms of possible future work or directions for how the work is performed and, as such, are not 'employee-like'. Such services should not be encompassed by the concept of a digital platform because they have no ongoing role in determining the work relationship.

Parameters for the Fair Work Commission

The Consultation Paper seeks views on appropriate legislative 'guardrails' to be put in place to govern the exercise of the FWC's proposed powers.

The most important guardrail is to legislate the appropriate scope of the jurisdiction, ensuring it does not introduce a new layer of interference into established forms of work that should be regarded as small businesses rather than 'employee-like'.

The MCA does not support the automatic extension of standards set by awards and enterprise agreements to employee-like workers. These instruments are designed for employment relationships and are incompatible with other forms of work. The FWC should set minimum standards independently for the relevant cohorts, on an as-required basis. These minimum standards must be adapted to the nature of the work being performed. It would not be possible to do this through existing awards or collective agreements.

Guardrails must also ensure that once a cohort of workers has been identified as being 'in scope', minimum standards are targeted to addressing the problem of vulnerability that has been identified.

[7] The Hon Tony Burke MP, Minister for Employment and Workplace Relations, *Address to Transport Workers' Union Delegates Conference*, 26 August 2022.

For example, if evidence indicated that the relevant class of workers is deemed to be vulnerable to being paid under the equivalent award minimum wage, a minimum remuneration standard could be applied. This would ensure regulation supports vulnerable workers while avoiding a higher regulatory burden. It would also promote confidence that 'gig' work cannot be used as an avoidance mechanism to undercut employment arrangements. In this respect, it should remove any asserted incentive for algorithms to adapt to 'out-run' the minimum wage rate.

The MCA would caution against a 'template approach' being adopted by the FWC, which would see standard minimum requirements being applied regardless of whether there was any vulnerability that needed to be addressed. The FWC must first be required to determine whether there is any need to exercise its powers, based on the clear 'guardrails'.

The MCA would strongly oppose any proposal that enabled standards to set actual remuneration rather than minimum remuneration. This would be an unwarranted expansion of the policy, ultimately harming self-employed workers by denying them work, or preventing them being paid more in response to demand. The MCA has comprehensively addressed the problems associated with such policies in its submission on the government's 'Same Job, Same Pay' policy.

Responses to questions

3. *What 'guardrails' should be set to guide the Fair Work Commission in exercising its functions?*

   Answered above. In summary, minimum standards must:

   - Be developed independently of enterprise agreements and awards
   - Only be made to address the vulnerabilities identified in the relevant class of workers
   - Set minimum, not actual, remuneration rates
   - Not create barriers to workers securing work (for example by creating a compliance risk for the businesses from which they obtain work).

4. *What factors should be included in the Fair Work Commission's 'objective' for setting standards?*

   Any minimum standards must prioritise certainty and simplicity to ensure businesses are able to access skilled workers to drive innovation without being confronted with rigid requirements and compliance burden.

   The legislative 'guardrails' should also include the requirement that the FWC not impose new standards on long-established forms of work that are more appropriately regarded as small businesses rather than 'employee-like', such as self-employed tradespeople and owner-drivers.

Content of minimum standards

Minimum standards should be adapted to the form of work and not impose 'employment' conditions that are incompatible with gig work.

The principles developed in 2022 by Uber and the Transport Workers Union (TWU) reflect this approach and are an appropriate starting point for any legislative reform.[8] They acknowledge the reality that 'gig' work is not employment that that its minimum standards should not – and cannot – be designed to replicate employment standards. Consistent with these principles, standards should relate to:

- Minimum earnings
- Transparency in relation to pay setting and conditions
- Effective and efficient dispute resolution

[8] Uber Newsroom, media release, *Uber and TWU strike deal that lays the foundations for the future of gig workers*, 28 June 2022.

- Recognition of the right to freedom of association.

The Uber-TWU principles were as follows:[9]

1. Set minimum and transparent enforceable earnings and benefits/conditions for platform workers based on the principle of cost recovery, taking into account the nature of the work.
2. Facilitate a cost effective and efficient mechanism to resolve disputes such as deactivation of relevant platform worker accounts. Any dispute resolution mechanism must be fit for purpose for platform work.
3. Ensure the rights of platform workers to join and be represented by the relevant Registered Organisation are respected and that platform workers have an effective collective voice.
4. Ensure that appropriate enforcement exists to meet these standards and objectives.

As stated in the previous section, the MCA is opposed to a 'template approach' that applies a pre-defined list of standards to each situation.

Responses to questions

5. What kinds of minimum standards are needed and why?

Answered above.

Process for making minimum standards

The legislative framework for the FWC should constrain its role to setting relevant minimum standards in accordance with certain principles, namely:

- Employee-like workers should be defined in legislation according to the criteria set out above (see 'scope of the policy' above)
- The FWC should have discretion to determine whether or not certain forms of work meet the criteria in the legislation
- Where a form of work is deemed by the FWC to be 'employee-like', this should not require the FWC to then impose 'employment-style' conditions
- The minimum conditions should be adapted to the form of work and may differ between different types of work (e.g. passenger transport versus food delivery)
- The minimum conditions should not have the effect of stifling such work, except to the extent necessary to prevent undercutting or avoidance arrangements.

Integrity and transparency must be a key objective of the FWC in setting minimum standards. As such, the MCA supports a requirement that parties to an application for a minimum standards order be prohibited from obtaining a direct or indirect financial benefit because of the making of the standard (for example, where a minimum training standard is created, and an eligible party directly or indirectly secures rights to provide that training).

The 'example process' set out in Figure 2 of the Consultation Paper illustrates the complexity that would inevitably be involved in the process of creating new minimum standards. If the scope is not very tightly confined to the gig-economy as recommended above, there is a real risk of such complexity harming businesses across the economy that engage independent contractors. Such businesses could find themselves exposed to constant stream of overlapping claims seeking to establish or vary minimum standards.

Agreement-making

The Consultation Paper outlines the idea of 'introducing a framework to allow the Fair Work Commission to approve consent agreements reached between individual businesses and groups of independent contractors that supply services to them'.

[9] Statement of Principles 28 June 2022 (twu.com.au)

This is an extremely radical proposal, which would be a fundamental paradigm shift for the Fair Work Commission by giving it a power to regulate what are commercial contracts between businesses, which are neither employment relationships, nor 'employee-like'. Businesses can already enter into their own commercial contracts with suppliers, or set their own procurement terms, subject to relevant laws, including competition laws. Neither the Consultation Paper nor the government have made any case as to why the Fair Work Commission should have any role in such processes, let alone a role in approving commercial arrangements between businesses.

The MCA does not support the establishment of the proposed framework for the following further reasons:

- The scope of the proposed framework would cover more than just 'employee-like' workers. It is therefore well beyond the policy intent of providing minimum standards for employee-like workers in the gig economy
- There is a fundamental distinction between the FWC setting minimum standards for 'employee-like' working arrangements between business and workers and it regulating commercial arrangements that are relationships between businesses. No case has been made for such a concept
- The content of matters agreed between 'groups of independent contractors' and individual businesses is not limited and could be much broader than the minimum standards the FWC would create for 'employee-like' work under the proposed jurisdiction. It is not appropriate for the FWC to assess and endorse wide-ranging contractual agreements
- As independent contractors and businesses can already make agreements, it is unclear what the effect or purpose of 'approval' from the FWC would be. It would not be appropriate to extend the enforcement mechanisms in the *Fair Work Act* to such agreements made between businesses
- Such a proposal is likely to waste regulator resources, while undermining innovation, and competition. New suppliers who do not agree to 'sign up' to an agreement could be frozen out of supplying clients.

In practice, such a framework would be open to abuse by larger businesses at the top of supply chains. It would enable them to engage in conduct that would otherwise constitute unlawful cartel or price fixing conduct under Competition and Consumer legislation.

The MCA notes that a current Enterprise Agreement between the TWU and major road transport company Toll commits both parties to seeking to change competition law to ensure their chosen conditions can be applied to owner drivers, labour hire and smaller businesses to reduce competition from them:[10]

> (h) Toll will engage constructively with the Union on removing any potential barriers that may exist within competition laws, that may prevent the parties from being able to establish obligations and guidelines that provide for safe and fair conditions for Owner-Drivers and Outside Hire operators.

[10] Toll - TWU Enterprise Agreement 2021-2023 clause 45(h).

UNFAIR CONTRACT TERMS

The Consultation Paper proposed increasing 'avenues for independent contractors to challenge unfair contract terms.'[11]

The MCA does not support an expansion of the Unfair Contracts jurisdiction in the *Independent Contractors Act* as no case has been made to support this in the Consultation Paper or elsewhere by the government.

Unfortunately, the Consultation Paper does not provide sufficient clarity on two key issues:

1. What is the perceived shortcoming of existing dispute resolution provisions?
2. Is the government's intention to modify existing dispute resolution provisions or introduce a new regime?

In consultations with DEWR it has been stated that the justification for this proposal is that the existing remedies under the Independent Contractors Act have not been extensively utilised and that they involve recourse to a court. This is not a sufficient justification. In the absence of any evidence of how the existing system has disadvantaged independent contractors or led to unjust outcomes, it is difficult to discern what the agenda of the government is. This naturally creates further concerns that there may be other agendas behind the government's proposal.

The most appropriate forum for dispute resolution in relation for unfair contracts is the court system – not the Fair Work Commission. The FWC does not have a history of dealing with commercial and contractual matters which have long been dealt with by courts. No case has yet been made for any transfer of such powers to the FWC, nor is it clear what if any perceived shortcomings of the existing regime require such reform.

The MCA would not oppose proposals that improve the accessibility, affordability and efficiency of dispute resolution for independent contractors. However, the Consultation Paper fails to provide clarity on what the government is proposing in this area.

The MCA may make further comment on the proposal once it has been more clearly defined.

What is the government's actual agenda?

The MCA notes that the TWU has long campaigned for 'transparency in contracts' to gain valuable information about the rates charged by non-unionised road transport users and use it to apply pressure to these operators to apply payments and terms more similar to employee-drivers with TWU EAs, making them less competitive in the market and giving the union greater control over negotiations with them.

For example, the TWU is currently sending letters to road transport users calling on them to commit to the TWU's 'principles for fair and sustainable standards' in the face of a threat of a public campaign against them by the TWU. These terms include:[12]

> **TRANSPARENCY**
>
> To ensure no worker fall through the cracks we commit to ensuring our transport contracts are transparent about the nature of the work, the working conditions and who performs this work

A 2022 Senate Committee report from chaired by former TWU National Secretary Senator Tony Sheldon recommended that the government expand the FW Act to encompass all forms of work and

[11] p 19 and Q20.
[12] https://www.twu.com.au/press/protesting-transport-workers-serve-claim-on-40-largest-retailers-for-safe-fair-sustainable-supply-chains/

to ‘arbitrate on contracts with independent contractors that are unfair or harsh’,[13] effectively giving unions standing to challenge (and view) private contracts.

Without openly saying so, the Consultation Paper opens the door to legislating this recommendation, which would give unions unprecedented access to commercial contracts between businesses, as well as access to commercially sensitive information held in private contracts, as well as standing to challenge their continuation. This is a radical proposal for which no case has been made and no policy justification exists. If this is the government’s agenda behind the Consultation Paper then it should publicly confirm that this is the case.

[13] Senate Select Committee on Job Insecurity, ‘The job insecurity report’, Recommendation 10, p 152, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024780/toc_pdf/Thejobinsecurityreport.pdf;fileType=application%2Fpdf.

REGULATION OF THE ROAD TRANSPORT INDUSTRY

The MCA notes with the gravest concern the proposal in the Consultation Paper to expand the jurisdiction of the FWC to resemble that of the former Road Safety Remuneration Tribunal.

The worst possible approach would be to re-introduce anything akin to the RSRT, which was abolished in 2016 and had sought to render unviable an entire industry of owner-driver contractors. No case has been made for any such legislation. It would be unconscionable for any government to consider it. Notwithstanding the experience of the RSRT set out in Box 1, the proposals in the Consultation Paper are very deliberately designed to produce the exact same form of regulation, only this time across a much wider (and potentially unlimited) range of industries.

Box 1: The disaster of the Road Safety Remuneration Tribunal

The RSRT stands out as a clear example of poor public policy, by ruining the livelihoods of the very workers it purported to protect, under the false pretext of better standards.

The RSRT was established on the false and highly offensive assumption that owner-driver work was inherently less 'secure' and therefore less safe than the same work done by employees, and that owner-drivers drove unsafe vehicles and took drugs. The then government justified it on the following grounds when it was first established in 2012:

> The Road Safety Remuneration Tribunal will have the power to set pay and conditions for truck drivers to reduce the economic pressures on truck drivers to meet unfair and unrealistic deadlines which risk their own lives and the lives of others.
>
> Minister for Workplace Relations Bill Shorten said around 250 people are killed and more than 1,000 suffer serious injuries each year in accidents involving trucks.
>
> We know some truck drivers are pressured to cut corners on safety and maintenance and feel they need to take illicit substances to keep them awake just to get to destinations on time.[14] (emphasis added)

The RSRT made only one 'Payments Order' before it was abolished in 2016. This order applied only to owner-drivers but not employee drivers. It did not apply to big businesses with employee drivers (i.e. union members). The Payments Order forced owner-drivers to charge higher minimum rates than transport companies that directly employed their drivers. It grossly discriminated against owner drivers by imposing extra costs and restrictions on them that did not also apply to trucking companies with employee drivers.

An inquiry into the impact of the RSRT by the Small Business and Family Enterprise Ombudsman (SBFEO) concluded that:[15]

> The Payments Order resulted in owner drivers in the long distance and supermarket distribution sectors being made uncompetitive.
>
> Some owner drivers found they were unable to cope with further hardship caused by the Payments Order and took their own lives. (emphasis added)
>
> The Payments Order was discriminatory in its application to owner drivers and small family businesses and this discrimination was not based on a sound and sufficient evidence base.
>
> The Tribunal's processes were adversarial and overly legalistic with an absence of flexibility extended to owner drivers to accommodate their lack of legal representation and limited understanding of tribunal and court-like processes.
>
> "Owner drivers who appeared before the Tribunal were not treated with due respect and felt that the Tribunal lacked independence and impartiality.
>
> "Tribunals are suited to resolving disputes; they are not appropriate vehicles for developing complex industry-wide regulation that intervenes in market forces."

[14] Minister for Employment and Workplace Relations, media release, *National road safety tribunal to improve safety for Australian road users,* 30 June 2012.

[15] Australian Small Business and Family Enterprise Ombudsman, *Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses*, 2016, page 4.

The RSRT was discriminatory

The mining industry depends on efficient and safe supply chains in all parts of Australia. Suppliers in those supply chains should be free to provide their services in the manner they choose without being subject to unfair and discriminatory laws that place them at a competitive disadvantage.

The MCA notes with grave concern Question 17 in the Consultation Paper:

> If the Fair Work Commission were to be given powers to set minimum standards for the road transport industry: (a) what factors should they cover; and (b) which workers should they apply to (for example, **only those in specific sectors of the industry**)? (emphasis added)

There can be no policy justification for setting terms in the road transport industry, given the precedent of the RSRT. The MCA can only assume that the proposal to discriminate between sectors of the industry reflects an (unstated) agenda to re-introduce this aspect of the RSRT. The MCA notes again the findings of the SFBEO that:

> It was clear at the outset that many owner drivers had been through a significant ordeal with the Payments Order and those that had appeared before the Tribunal had felt exposed and demeaned by the process. Many requested to remain anonymous. The Ombudsman was also told that some owner drivers were receiving anonymous threats for having opposed the Payments Order and the Tribunal...
>
> The Payments Order resulted in owner drivers in the long distance and supermarket distribution sectors being made uncompetitive. This exacerbated the competitive pressures already faced by owner drivers…
>
> There was significant uncertainty and anxiety for owner drivers (and others involved in the industry) about the application and impact of the Payments Order given its complexity and short implementation time…
>
> Uncertainty for owner drivers continues beyond abolition of the Tribunal and the Payments Order…
>
> The effect of the Payments Order on individual owner drivers and small businesses was significant, with financial hardship and stress placed on personal relationships and mental and physical health.

The 'safety' justification of the RSRT and the 2023 proposals is highly debatable

Two independent reviews of the RSRT each concluded that the purported link between remuneration rates and safety was at best, disputed and marginal.

A 2014 review by Jaguar Consulting noted that:[16]

> 'only a small number of studies have found strong links between driver remuneration and accident involvement.'

A 2016 review by PwC concluded:[17]

> 'While some of these studies have found a link between remuneration and road safety, there remains limited research and conclusions vary as to the extent and nature of this relationship.'

The 2016 PwC review used what evidence was available to estimate the safety impact of the two orders and still found they had a net cost to the economy of $2.3 billion over 15 years. This shows that while remuneration may impact safety, more targeted measures are likely to have a better impact.

The 'safety' justification was also disputed by a former official of the TWU in 2016, prior to its abolition:[18]

> A former Transport Workers Union official has claimed the tribunal that sets rates of pay for owner drivers says the link between road safety and remuneration is ''marginal'' and that the union ''doesn't care'' about small operators. Michael Wong, who worked for the union between 2009 and 2012 in the Queensland, NSW and national offices, has also apologised for allowing his ''professional skills to be used in a campaign for safe rates that would have a profoundly negative effect on the owner drivers of Australia''…

[16] 'Review of the Road Safety Remuneration System', 16 April 2014: apo-nid62461.pdf
[17] 'Review of the Road Safety Remuneration System', January 2016: apo-nid62462.pdf
[18] 'Whistleblower slams tribunal as PM vows to abolish it', Sydney Morning Herald,11 April 2016

> Mr Wong, who worked on the political campaign to establish the RSRT while at the union, said ‘‘fundamentally, the union doesn’t care about owner-drivers, it cares about its income and the political power it can achieve’’.
>
> ‘‘The practical effect of the RSRT is to push owner-drivers out of the market. Only stronger police powers could rein in the cowboys who are the problem. By that I mean the clients who will never place a driver’s safety above their own immediate needs,’’ he said.

A second former TWU official, Seth Tenkate, also reportedly disputed the ‘safety’ pretext of the RSRT in 2013:[19]

> “(There is) barely a specific case study where a death is involved to support [the link between rates of pay and safety].”

It is false to assert the proposal has ‘industry support’

The Consultation Paper refers to:[20]

> The ‘Agreed principles for a safe, sustainable and fair road transport industry’ (refer Box 1) highlight the growing support from industry to introduce minimum standards to ensure the viability of the road transport sector…

The reference from these agreed principles was, in turn, cited as a:[21]

> road transport roundtable of clients, transport operators, on-demand and rideshare platforms, transport associations, transport workers and academics

However, the ‘roundtable’ was instigated by the TWU and appears to be an extension of the TWU’s campaign TWU to reinstate a body akin to the RSRT. Its attendance dominated by the TWU and employers who are engaged with it, and the agreed principles reflective of the TWU’s campaign.

This campaign is run on the pretext that such rates are ‘safe rates’ and ‘fair rates’ that should be applied across the industry to improve road safety. However, extensive literature reviews in 2014 and 2016 examined the relationship between higher rates of pay and road safety and found no conclusive link.[22]

The TWU has also incorrectly asserted that this gathering was representative of the transport industry: TWU National Secretary Michael Kaine has said of the gathering: [23]

> This is a powerful blueprint for reform backed by every section of the industry … An industry coalition calling in unity for our system to be modernised in line with the reality of today’s transport industry is the strongest endorsement the Federal Government can receive to act quickly and with the backing of industry to get life-saving reform off the ground. (emphasis added)

As outlined above, it is incorrect to assert that the new RSRT proposal is ‘backed by every section of the industry’ or has ‘the backing of industry’.

The purported justifications for the 2023 proposal are the same as the flawed justifications for the RSRT

The ‘agreed principles’ of the TWU-initiated ‘roundtable’ are remarkable similar to those that were used as a justification for the establishment of the RSRT.

The agreed principles resemble those set out in a 2010 Directions Paper that ultimately led to creation of the RSRT in 2012. The 2022 ‘agreed principles’ in substance revive the RSRT, without openly saying so.

[19] ‘Ex-union official slams 'safe rates'', Australian Financial Review, 3 May 2013
[20] Page 19
[21] Page 7
[22] Inquiry into the effect of the Road Safety Remuneration Tribunal’s Payments Order on Australian small businesses, Australian Small Business and Family Enterprise Ombudsman, p 27-28, https://ministers.dese.gov.au/sites/default/files/documents/rsrt_payments_order_inquiry_report_-_final_2.pdf
[23] TWU Press Release, 30 August 2022, https://www.twu.com.au/press/major-transport-roundtable-backs-reform-to-set-industry-standards/

	Roundtable, 2022	Directions Paper, 2010
1	establish and maintain **appropriate and enforceable standards** in relation to both traditional transport operations and on-demand delivery and rideshare platform work	Decisions have a **binding effect** on employers, employees, owner drivers, clients and other industry **participants across the Australian road transport industry**. Powers to set and maintain safe payments and payment methodologies for employees/owner drivers, taking into account health and safety implications.
2	promote best practice **supply & contract chain** industry standards	Decisions **bind industry participants in the supply chain**, as well as owner drivers across the road transport industry.
3	effectively and efficiently **resolve disputes**	**Parties seek assistance to resolve disputes** about safe payments and payment methodologies.
4	ensure transport workers are able to access and contribute to an effective **collective voice**	Parties, such as the tribunal itself, **registered organisations**, other organisations by leave with suitable interest, commence proceedings.
5	convene as necessary specialist advisory groups drawn from the industry to provide **advice and recommendations**	**Information and advice** provided to employers, employees and owner drivers, as well as others within the supply chain, about compliance with the arrangements.
6	provide appropriate **enforcement** to ensure standards and objectives are met	The legislation is **enforced** by the Fair Work Ombudsman.

The Consultation Paper is not credible in relation to Road Transport

The Consultation Paper proposes to expand the role of the Fair Work Commission to set minimum standards in the trucking industry.[24] Yet the paper fails to provide any independent evidence that such changes are warranted. Its analysis in this regard reads more like a partisan political campaign document than a factual Departmental paper.

This is confirmed by the nature of the authorities cited in support of change are primarily political and union sources. Apart from statistics and legal citations, three quarters of citations in the paper (6/8) are partisan speeches or policy announcement by the Minister and the remainder are references to TWU-initiated events.

Footnote	Content	Category
1	Explanatory Memorandum to a an ALP Bill expressing ALP policy	ALP policy
2	Minister Tony Burke speech	ALP speech

[24] Page 4

6	Minister Tony Burke speech to a Labor think tank	ALP speech
7	Labor Government announcement	ALP speech
8	'Road transport roundtable' outcome - consistent with a long-term TWU campaign and dominated by the TWU and organisations that work with (and must achieve industrial peace with) it.	TWU-instigated
9	Minister Tony Burke speech to a Labor think tank	ALP speech
10	Minister Tony Burke speech to a TWU conference	ALP speech
12	Agreements between TWU and certain on-demand service companies	TWU-instigated

In Minister Burke's speech to TWU delegates cited in footnote 10, he makes clear that the 'broad and flexible' power proposed for the Fair Work Commission was developed closely with TWU National Secretary Michael Kaine:

> So, to the extent that you're like an employee in the work that you do, the Fair Work Commission will be able to determine the appropriate minimum pay and conditions for work. …
>
> This idea of giving a flexible power to the Commission was developed really closely in consultation with Michael Kaine …[25]

The MCA is concerned that the proposals for the Road Transport sector in the Consultation Paper reflect the agenda of one party in the sector (the TWU) without disclosing that this is the case. As such, the MCA is deeply concerned that the government proposal behind the Consultation Paper is to reintroduce the RSRT in another guise through the FWC, without openly stating that this is the objective.

[25] Speech TWU Delegates Conference, Tony Burke, 26 August 2022, https://ministers.dewr.gov.au/burke/speech-twu-delegates-conference