



Australian Government



Australian
Small Business and
Family Enterprise
Ombudsman

Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses

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1. Executive Summary

Introduction

On 8 May 2016, the Hon Kelly O'Dwyer MP, former Minister for Small Business requested the Australian Small Business and Family Enterprise Ombudsman (the ASBFEO) to conduct an Inquiry into the effect on Australian small businesses of the Road Safety Remuneration Tribunal's *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016*.¹

The Minister also directed the Inquiry to consider the ways in which the government can consult with small businesses in the development and operation of tribunals and other similar bodies.

The Inquiry was made under section 42(1) of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth). Under s 42(1), the Minister may request the Ombudsman to inquire into the effect of relevant legislation, policies and practices on a class of small businesses or family enterprises and the ways in which relevant legislation, policies and practices might be improved to assist a class of small businesses or family enterprises.

Background to the Inquiry

The *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* (Payments Order) was issued by the Road Safety Remuneration Tribunal (the Tribunal) on 18 December 2015. The Payments Order was initially due to commence on 4 April 2016. It set minimum rates of pay on a per kilometre and per hour basis for contractor drivers undertaking routes either in supermarket distribution or long distance operations.

Between March and April 2016, the industry, including owner drivers and small family businesses, sought to have the Payments Order delayed. This was through the formal processes of the Tribunal and the Federal Court. These attempts were unsuccessful. The Payments Order took effect on 7 April 2016.

On 18 April 2016, legislation was passed by the Parliament abolishing the Road Safety Remuneration System. This saw the operation of the Tribunal and its orders cease to operate from 21 April 2016.

In total, the Payments Order was in operation from 7 April to 21 April 2016.

Approach to the Inquiry

Scope of the Inquiry

The Inquiry considered the impact of the Payments Order on Australian small businesses in the months leading up to commencement of the Payments Order as well as during its operation and after its abolition.

¹ See Appendix A.

To consider the ways in which the government can consult with small businesses in the development and operation of tribunals and other similar bodies, the Inquiry examined:

- the conduct and operation of the Tribunal in how it treated and engaged with owner drivers in relation to the Payments Order; and
- how governments, including tribunals, should consult with owner drivers and other small businesses in the development and operation of tribunals and other similar bodies, as well as in the development and implementation of regulation.

Given the Ombudsman's role as an advocate for small business, the Inquiry has captured concerns and issues of owner drivers, small transport businesses and others relating to safety, regulation of the industry, and the competitive pressures in the industry.

Consultation process

On 16 May 2016, a roundtable was held by the Ombudsman with industry groups, including those representing owner drivers, to gather initial feedback on the issues facing those affected by the Payments Order and how best to engage with owner drivers.

Groups represented at the roundtable included the Australian Trucking Association, Australian Chamber, Council of Small Business Australia, National Road Transporters Association, Australian Logistics Council, Heavy Vehicle Industry Australia, Trucking Support Agency of Australia, National Farmers Federation, National Road Freighters Association and Australian Livestock and Rural Transporters Association. The National Owner Drivers Association was also represented. Apologies were received from the Transport Workers Union, the Australian Industry Group and Industry and Independent Contractors Australia.

Between 1 June 2016 and 30 June 2016, the Ombudsman invited owner drivers impacted by the Payments Order to share their story. The Ombudsman promoted the Inquiry widely through various means such as newspaper notices, the Ombudsman's website and other media. The Ombudsman appeared on 20 regional radio stations to encourage owner drivers to participate in the Inquiry. At the request of the office, industry associations also advertised the Inquiry on their website and/or social media pages.

A number of avenues were made available to enable owner drivers and other interested parties to share their story and views with the Inquiry:

- public forums were held in Adelaide, Perth, Toowoomba, Dubbo, Mildura, Shepparton, Wagga Wagga, Tamworth and Devonport;
- an anonymous survey was made available online and at public consultations. The survey questions and responses are at Appendix A;
- written submissions were taken either through an online 'share your story form' or by direct email to the ASBFEO Office; and
- submissions were taken over the phone by the ASBFEO Office.

A breakdown of the response rate is provided at Table 1. It should be noted that the categories overlap as participants may have been involved in more than one form of consultation.

For example, many people who attended a public forum also completed a survey.

Description	Count
Number of attendees at the public forums	122
Number of surveys completed	138
Number of written submissions	34
Number of oral submissions made by phone	6

Table 1 - Response Rate to Survey

A total of 122 individuals attended the public forums. These individuals largely comprised small business transport owners, owner drivers and employees of small transport businesses. The balance of attendees constituted relatives of owner drivers, employee drivers of larger transport companies, financiers, small non-trucking businesses in the industry, Transport Workers' Union (TWU) representatives and representatives from industry associations.

A total of 138 surveys were completed. Of these, 75 per cent of respondents identified as an owner driver or as involved in a small trucking business, 12 per cent identified as a business reliant on owner drivers, 4 per cent identified as being employed in the trucking industry and 9 per cent identified as other (such as financiers, truck sellers, industry associations, retired farmers and family members of a trucking company).

Written and oral submissions received by the Inquiry were predominantly from owner drivers and small trucking businesses.

Methodology

Although only a relatively small number of truck drivers participated in the Inquiry, there was broader representation of their interests through representative organisations. Also, given that it is not unusual for a consultation process to attract only limited numbers of submissions, we believe that the submissions made through the various consultation processes provide a representative sample of owner drivers and small businesses in the road freight industry.

Submissions and representations made to the Inquiry have been accepted at face value. They were not investigated or otherwise verified. The ASBFEO and its officers do not have cause to believe false representations were made to the Inquiry. The views and stories presented to the Inquiry were consistent across Australia and between the different submission processes.

The Ombudsman has kept written submissions of drivers and small businesses made to the Inquiry confidential. 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. Given these considerations, written submissions of drivers and small businesses have not been published. However, a representative sample of quotes and examples provided in these submissions are presented in this report.

The Inquiry also drew upon other sources of information including:

- transcripts and decisions of the Tribunal; and
- two reviews of the Road Safety Remuneration System.

Key findings of the Inquiry

- 1. 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.**
- 2. 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.**
- 3. Uncertainty for owner drivers continues beyond abolition of the Tribunal and the Payments Order.**
- 4. It is with great regret and sympathy that it was reported to the Inquiry that some owner drivers found they were unable to cope with further hardship caused by the Payments Order and took their own lives.**
- 5. 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.**
- 6. 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.**
- 7. 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.**
- 8. Owner drivers who appeared before the Tribunal were not treated with due respect and felt that the Tribunal lacked independence and impartiality.**
- 9. Tribunals are suited to resolving disputes; they are not appropriate vehicles for developing complex industry-wide regulation that intervenes in market forces.**
- 10. Although the issue of compensation was raised during consultation, there are significant difficulties in compensating small business impacted by the Payments Order, particularly approaches to eligibility and quantum would be extremely difficult to implement fairly.**
- 11. Fatigue management laws under the National Heavy Vehicle Law are inflexible and as a result may lead to perverse situations, such as permitting a person to drive when they are fatigued.**
- 12. Safety in the transport industry should not be addressed by legislating rates of pay.**

13. It is costly and onerous for heavy vehicle drivers who unload/load to have to complete site specific induction at every site for work health and safety purposes. Induction can vary between 15 minutes and 4 hours and some drivers can have as many as 40 induction cards.

Recommendations

1. When developing regulation that will have a significant impact on small businesses, consideration should be given to the potential impact on people's mental health.
2. The Inquiry notes future consideration by the NSW Industrial Relations Commission of rates of pay for owner drivers covered by the General Carriers Contract Determination (NSW) should consider the experience of the Payments Order on small businesses. Given the example of the Payments Order and its detrimental impact on owner drivers, the Inquiry strongly discourages the setting of mandated rates of pay that only apply to owner drivers and small businesses.
3. Existing and future tribunals dealing with small businesses should employ less formal and legalistic processes, not be adversarial, facilitate self-represented parties and be free of bias, actual or perceived. Processes should be collaborative and consultative.
4. Given that tribunals are not appropriate vehicles for developing complex industry-wide regulation that intervenes in market forces, governments should consider other bodies or frameworks with expertise in regulation and facilitative processes to achieve negotiated and appropriate outcomes.
5. The development of any major piece of regulation by a government agency that impacts on small businesses, including the establishment of tribunals or similar bodies, should:
 - involve significant consultation with all players in the industry, with proactive and targeted efforts made to reach and involve small businesses;
 - take into account the concerns and views of small businesses; and
 - be based on ongoing and accessible feedback mechanisms for small businesses before, during and after implementation of the regulation or establishment of the body.
6. The implementation of new regulation should afford small businesses sufficient time to understand, seek advice and be able to make any business changes to adapt to the regulation.
7. Where government introduces significant regulation that intervenes in a market, it has a responsibility to provide education and adequate support, and to consider providing compensation where appropriate.
8. The Australian Small Business and Family Enterprise Ombudsman encourages industry associations to work with the media to ensure that in reporting accidents involving

trucks, fault is not impliedly attributed to truck drivers before the outcome of a police investigation.

9. The Australian Small Business and Family Enterprise Ombudsman encourages the Transport and Infrastructure Council and the National Heavy Vehicle Regulator to consider funding national advertisements to educate road users about how to drive near and around trucks, given that the vast majority of multi-vehicle accidents involving trucks are not the fault of the truck.
10. Governments should consider establishing an apprenticeship/traineeship scheme to get more young people into the trucking industry to overcome the growing lack of experienced and professional drivers and an ageing workforce.
11. Given the strong support of owner drivers, the Australian Small Business and Family Enterprise Ombudsman should inquire into ways to reduce payment terms for owner drivers as part of its Inquiry into Payment Terms.
12. The Australian Small Business and Family Enterprise Ombudsman recommends that the Department of the Treasury and the Australian Competition and Consumer Commission work with the industry to investigate developing a Code of Conduct for the road freight industry under the *Competition and Consumer Act 2010* (Cth).
13. The Australian Competition and Consumer Commission should target information materials (e.g. fact sheets) for owner drivers and small businesses about the unfair contracts regime with respect to the reforms that take effect in November 2016.
14. The Australian Small Business and Family Enterprise Ombudsman encourages industry associations in the road freight industry to proactively engage with owner drivers and small businesses and to represent their views in government processes and build upon communication networks.

2. Background to the Inquiry

Introduction

This chapter provides the context for the coverage in future chapters of the Payments Order that was the product of the Road Safety Remuneration System. The chapter provides an overview of the System, the Payments Order, and key events leading to the Order's commencement. The nature of the road freight industry is also covered in order to provide context and a baseline for understanding the impact of the Payments Order on owner drivers and small family businesses.

The Road Safety Remuneration System and the Road Safety Remuneration Tribunal

The Road Safety Remuneration System was established under the *Road Safety Remuneration Act 2012* (Cth). It was comprised of the Road Safety Remuneration Tribunal (the Tribunal) and a separate education and compliance function of the Fair Work Ombudsman (FWO).

The Tribunal commenced operation on 1 July 2012. It ceased operation from 21 April 2016 following repeal by the Parliament of the *Road Safety Remuneration Act 2012* (Cth) (RSR Act). The Tribunal's two road safety remuneration orders, including the Payments Order, also ceased to operate from 21 April 2016.

The objective of the RSR Act was to 'promote safety and fairness in the road transport industry'. The Tribunal had a number of powers under the Act, including making road safety remuneration orders (orders), approving road transport collective agreements and resolving disputes between participants in the road transport industry. The Tribunal was also required to inquire into sectors, issues or practices of the road transport industry as part of its annual work program.

The making of road safety remuneration orders

An order could be made by the Tribunal on its own initiative or on application by certain persons identified under the Act.²

An order could be made 'in relation to remuneration and related matters', including minimum rates of remuneration for road transport drivers, conditions for loading and unloading vehicles, and reducing or removing remuneration-related incentives, pressures and practices that contribute to unsafe work practices.³

Before making an order, the Tribunal was required to consult and publish on a draft order.⁴ The Tribunal's consultation processes are covered in subsequent sections of this report.

² *Road Safety Remuneration Act 2012* (Cth) s 19.

³ *Ibid* s 27.

⁴ *Ibid* ss 22–23.

The Tribunal issued two orders during its period of operation:

- *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014* (First Order); and
- *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* (Payments Order).

The Tribunal's First Order was issued on 17 December 2013 and took effect on 1 May 2014.⁵ It was due to expire on 30 April 2018 but ceased from 21 April 2016 with the abolition of the Road Safety Remuneration System. The Order applied to all road transport drivers in the supermarket distribution or long distance road transport sectors. It imposed a number of obligations on employee drivers, contractor drivers and other supply chain participants with respect to safe driving plans, written contracts, drug and alcohol policies, and work, health and safety training. It also required hirers to pay contractor drivers within 30 days of receiving an invoice.⁶

The Payments Order

Overview of the Payments Order

The Payments Order was issued on 18 December 2015.⁷ The Payments Order was due to take effect on 4 April 2016 according to its terms but took effect on 7 April 2016 following Federal Court action. It was to expire on 3 April 2020 but ceased from 21 April 2016 with the abolition of the Road Safety Remuneration System.

The Payments Order set mandatory minimum rates of pay on a per-kilometre and hourly basis for contractor drivers working either in the supermarket distribution or long distance road transport sectors. The Payments Order did not cover employee drivers.

PricewaterhouseCoopers estimates that around 39,000 owner drivers were covered by the Payments Order, approximately half of all owner drivers in the road freight industry.⁸ However, 35,000 owner drivers is the figure used widely.⁹ The differences in figures may be explained by the ambiguity in determining the coverage of the Payments Order, as well as limitations of available data. These figures may also be under-representative given that many owner drivers are small businesses with family members involved and/or reliant on the business.

⁵ *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014 Decision* [2013] RSRTFB 7.

⁶ First Order cl 9.

⁷ *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 Decision* [2015] RSRTFB 15.

⁸ Based on modelling prepared for the Department of Employment.

⁹ National Road Transport Association, 'Will the Implementation of the Contractor Driver Minimum Payments Order Mean the Demise of the Owner Driver Sector of the Transport Industry' (Media Release, 19 February 2016) <<http://www.natroad.com.au/will-the-implementation-of-the-contractor-driver-minimum-payments-order-mean-the-demise-of-the-owner-driver-sector-of-the-transport-industry/>>.

The pay rates provided in the Payments Order were largely based on a cost model developed by the professional services firm KPMG. The Payments Order contained schedules which set out the minimum rates that hirers were required to pay contractors depending on the following factors:

- the driver’s transport worker grade (based on the type of vehicle being ndriven);
- whether the hirer or driver supplied the trailer(s);
- the type of trailer(s)(if any); and
- the class of vehicle.

Other key features of the Payments Order included:

- that contractor drivers be paid for time spent taking mandatory fatigue breaks, loading or unloading, cleaning, inspecting, and making repairs to a hirer supplied vehicle and/or a trailer;¹⁰
- that contractor drivers be entitled to take up to 4 weeks unpaid leave in circumstances where a hirer regularly engaged the contractor driver for a period of 12 months;¹¹
- a general obligation on participants in the supply chain (including consignors, consignees and intermediaries) to take ‘all reasonable steps’ to ensure their contract with another party in the supply chain was consistent with the Payments Order;¹² and
- an obligation on some supply chain participants to undertake annual audits of hirers of contractor drivers to ensure compliance with the minimum pay rates and to report non-compliance to the FWO.¹³

Issues with the interpretation and application of the Payments Order are covered further in Chapter 3.

Events leading to the issuing of the Payments Order

Between February 2014 and the date on which the Payments Order was issued, 18 December 2016, a number of consultation processes occurred.¹⁴ These processes are outlined below in the table and descriptions with greater detail are provided at Appendix B.

Date	Event
14 February 2014 – 22 December 2014	Conciliation conferences held on ‘payments for road transport drivers and associated issues’. A working group was convened alongside the conferences to draft clauses for a draft Road Safety Remuneration Order.
22 December 2014	The Tribunal released a report on the conciliation conferences. This included a draft Road Safety Remuneration Order drafted by the working group. However, the draft order did not represent a consensus position according to many parties involved in the process.

¹⁰ Payments Order cl 11.

¹¹ Ibid cl 12.

¹² Ibid cl 8.2.

¹³ Ibid cls 8.3–8.12.

¹⁴ *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 Decision* [2015] RSRTFB 15.

Date	Event
10 April 2015	The Tribunal published research commissioned by KPMG which included a cost model and associated minimum payments for contractor drivers (KPMG cost model) in distribution and long distance operations.
April to August 2015	The Tribunal invited written submissions on the Tribunal's December 2014 report, the KPMG cost model and any other matters relevant to payments for contractor drivers.
26 August 2015	The Tribunal published a draft of the Payments Order which covered payments and associated issues for contractor drivers either in supermarket distribution or long distance operations.
26 August to 7 October 2015	The Tribunal invited written submissions on the draft Payments Order.
22 – 24 October 2015	The Tribunal conducted hearings on the draft Payments Order.
30 October 2015 – 9 December 2015	The Tribunal invited written submissions on the inputs in the KPMG cost model and particular rates to be used in the Payments Order.
18 December 2015	The Tribunal issued the Payments Order.

Table 2 - Timeline of events leading to 2016 Payments Order

Attempts to delay commencement of the Payments Order

The Tribunal process

Between 3 and 22 March 2016, 39 applications seeking to vary the Payments Order were lodged with the Tribunal.¹⁵ The majority of the applications sought to delay the commencement of the Payments Order. The application by the Australian Industry Group also sought a 3 year phasing in of the minimum rates. Some applications sought a stay of the Payments Order until the substantive applications had been heard and determined by the Tribunal. Other applications sought to have the Tribunal issue an interim variation extending the commencement date of the Payments Order. Some applications also sought to have the Order varied on other bases but these were not heard by the Tribunal.

On 15 March 2016, the Tribunal held a hearing on the applications to delay the Payments Order. It decided not to grant a stay or interim variation.¹⁶ At the end of this hearing, the Tribunal published a draft variation of the Payments Order. The variation proposed that the Order commence on 1 January 2017 and expire on 3 April 2020. The Tribunal gave all persons and bodies likely to be

¹⁵ *National Road Transport Association Ltd v Road Safety Remuneration Tribunal* [2016] FCAFC 56, [9] (7 April 2016).

¹⁶ *Variation of road safety remuneration order - application - Statement and directions* [2016] RSRTFB 2.

affected by the variation until 21 March 2016 to make any written submissions and until 24 March 2016 to make written comments on the written submissions received. The Tribunal also indicated that it would hold a mention on 24 March 2016 to determine whether hearings would be required to be heard over the Easter long weekend.

The Tribunal received more than 800 written submissions in relation to the variation applications.¹⁷

On **24 March 2016**, the Tribunal held a mention at which it decided to proceed with hearings over the Easter long weekend to consider submissions and evidence on the draft variation. Before the mention, the Tribunal also issued orders to 31 people to attend the hearings of 26 to 28 March 2016 and to produce certain documents.¹⁸

Between **26 and 28 March 2016** of the Easter period, hearings were held on the draft variation.

On the afternoon of Friday **1 April 2016**, the Tribunal handed down its decision on the variation applications.¹⁹ The Tribunal decided not to grant a delay of the Payments Order. The Payments Order was to commence on 4 April 2016.

Federal Court action

The Tribunal's decision prompted parties to apply to the Federal Court for a stay of the Order on 1 April 2016.²⁰ Australian Industry (AiG), the Australian Chamber of Commerce and Industry, Linfox Australia Pty Ltd and Toll Transport Pty Ltd (the AiG Application) jointly sought an interlocutory injunction from the Federal Court in the Sydney registry to stay (delay) commencement of the Payments Order until the Court heard an application for the Tribunal's decision to be judicially reviewed.

The National Road Transport Association (NatRoad) applied separately to the Federal Court in the Brisbane registry for an order staying the commencement of the Payments Order (NatRoad Application). Justice Collier granted an interim stay pending a further order of the Court. On 2 April 2016, the Transport Workers' Union (TWU) applied to the Federal Court for an order setting aside the stay order granted by Justice Collier.

On **6 April 2016**, a Full Bench of the Federal Court heard the AiG and NatRoad applications together for a continuing interim stay of the Payments Order until the Court heard substantive arguments about whether the Tribunal had made jurisdictional errors in its decision to hand down the Payments Order (18 December decision) not to vary the Order (1 April decision). The TWU appeared as a respondent opposing the applications. The Federal Government intervened in support of the applications.

On **7 April 2016**, the Full Bench of the Federal Court handed down its judgment. It dismissed the applications by AiG and NatRoad to continue the interim stay of the Payments Order until a final

¹⁷ *Variation of road safety remuneration order - application – Decision* [2016] RSRTFB 6, [22].

¹⁸ Transcript of RSRT proceedings, 24 March 2016, PN789.

¹⁹ *Variation of road safety remuneration order - application – Decision* [2016] RSRTFB 6.

²⁰ *National Road Transport Association Ltd v Road Safety Remuneration Tribunal* [2016] FCAFC 56, [9] (7 April 2016).

hearing of the applications. The Court also rejected a further application by NatRoad for a temporary stay pending an urgent application to the High Court. The Payments Order came into effect at 4.15pm on 7 April 2016.

On **18 April 2016**, the Government introduced legislation into the Parliament to repeal the RSR Act.²¹ The legislation successfully passed both houses of Parliament on that day. As a result, the Road Safety Remuneration Tribunal, and its orders, ceased to operate from 12am on 21 April 2016.

Observations on the overall consultation process of the Tribunal

Chapter 4 will address in detail the conduct of the Tribunal in relation to the period in which the industry, including many owner drivers, sought to have the Payments Order delayed. However, it is necessary to comment on the overall consultation of the Tribunal leading up to the Payments Order.

In its decision of 1 April 2016, the Tribunal stated that the establishment of the Payments Order had 'followed extensive research, consultations and hearings with the RSRT regularly publishing relevant material and conducting proceedings on the matter over the period from 2012 to the end of 2015'.²² It further stated that it had conducted '60 days of conciliation conferences and hearings which were open to all interested parties'. It is not clear why the Tribunal considered it had commenced consultation from 2012, given that it appears from available information that it commenced consultations on 'payments for road transport drivers and associated issues' from February 2014. In any case, the consultation process between February 2014 and December 2015, as outlined above, may have appeared extensive.

In spite of this, there was a very low level of awareness in the Tribunal's process by owner drivers until February and March 2016. According to the survey conducted by this Inquiry, 75 per cent of respondents said they first found out about the Payments Order after it was issued on 18 December 2015. This was also a view consistent in consultations. While the Tribunal had conducted consultations over an extended period, it had failed to reach the very people it considered that the Payments Order would assist.

²¹ *Road Safety Remuneration Repeal Act 2016* (Cth).

²² *Variation of road safety remuneration order - application – Decision* [2016] RSRTFB 6, [13].

**When did you first hear about the RSRT Payments Order?
(select one option)**

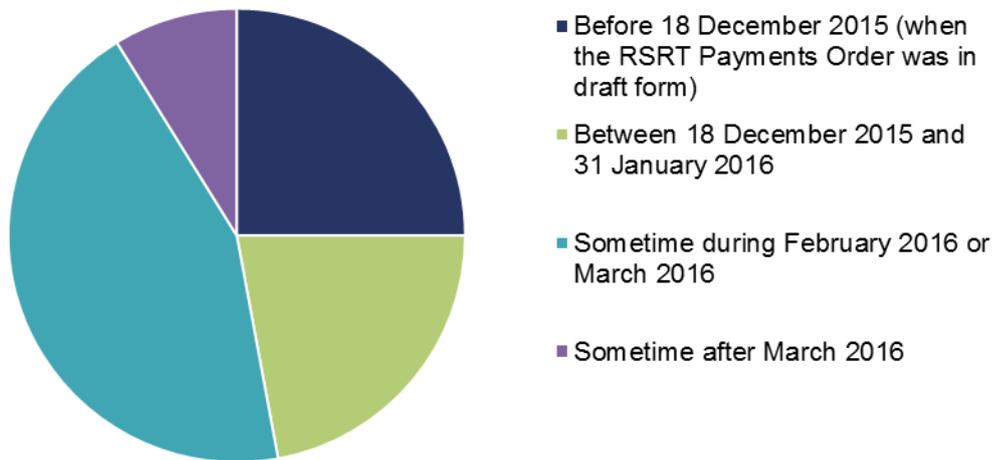


Figure 1 - Survey Responses - Question 3

The RSR Act required the Tribunal to consult on a draft of the Payments Order.²³ It was also required to ensure that 'all persons and bodies likely to be affected' by the Payments Order were afforded 'reasonable opportunity to make written submissions to the Tribunal for its consideration'.²⁴

The Tribunal did publish a draft Payments Order on its website. It also published a notice on its website advising parties that they could provide written submissions on the draft Payments Order. However, we have been unable to find anything in the Tribunal's reasons or elsewhere to suggest that the Tribunal actively tried to reach owner drivers and small businesses that were to be affected by the Payments Order beyond an official notice on its website. It is hard to understand how such a notice could effectively reach owner drivers who are on the road up to 6 days a week and working in remote and regional areas and where, according to industry associations, the majority of owner drivers do not belong to an industry association.

²³ *Road Safety Remuneration Act 2012* (Cth) s 22.

²⁴ *Ibid* s 24.

The road freight industry in Australia and the role of owner drivers

The road freight industry is highly competitive.²⁵ This competitiveness has been attributed to the following factors:

- competition with other modes of transport, including rail and air;²⁶
- a handful of major transport companies having significant market power in the supply chain, although the industry has low market share concentration.²⁷ These companies and major customers in retail and manufacturing set the freight rates they are prepared to pay which is passed down the supply chain;²⁸
- there is strong competition between small to medium operators in the industry.²⁹ This may be explained by low barriers to entry, namely the ability to buy a truck and obtain the appropriate heavy vehicle licence;
- small to medium operators have little power to negotiate rates given the fragmented nature of the industry and competition – they are price takers;³⁰ and
- there has been consolidation in the number of entities in the industry which is set to continue into the future.³¹

Owner drivers at the public forums spoke proudly of the role that owner drivers play in the industry. They take routes that are not profitable for larger operators, such as routes in very remote areas of Australia. They are also prepared to offer a different level of service. For example, one owner driver told the Inquiry that they would help farmers round up livestock if they were still in the paddock but said it would be unlikely that larger companies would be prepared to offer that level of service.³²

Despite the different role that owner drivers and small businesses are able to provide in the market, they are at the bottom of the supply chain with limited ability to negotiate higher rates and set conditions. Given this position, owner drivers are more susceptible to periods of slower growth, such as periods of low demand and events impacting on the industry such as the mining downturn in Western Australia.³³

It was against this competitive environment that the Payments Order was introduced. As discussed further in Chapter 3, there are many stories of owner drivers losing work and contracts because they were no longer regarded as competitive. This was the result of large and medium companies seeking alternatives to avoid the Payments Order by moving work to entities that were not subject to the Payments Order or taking the work on themselves through the expansion of their fleet and employees.

²⁵ Bureau of Infrastructure, Transport and Regional Economics (BITRE) (2011) *Truck Productivity: Sources, Trends and Future Prospects*, Report 123, Canberra, p. 41.

²⁶ BITRE (2009) *Road and Rail Freight: Competitors or Complements*, Information Sheet 34, Canberra.

²⁷ IBISWorld (2016) *Industry Road Freight Transport in Australia*, Report I4610, April 2016; BITRE (2011) *Truck Productivity: Sources, Trends and Future Prospects*, Report 123, Canberra.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Dubbo Public Consultation, 23 June 2016.

³³ IBISWorld (2016) *Industry Road Freight Transport in Australia*, Report I4610, April 2016, p. 18.

3. Effect of the Payments Order



'The Payment Order has aspects of being good, but the Order needed to apply across the board and be fair. It affected people before it came into force, and it affected people even more after it came into force.'

(Small transport business owner, rural NSW³⁴)

Introduction

This chapter examines the effect of the Payments Order on owner drivers and small transport businesses as they were reported to the Inquiry.

From the outset, owner drivers and small transport business owners reported similar impacts on their businesses and personal lives that they attributed to the Payments Order. While owner drivers and small transport business owners felt the impacts more severely than others, most submissions and feedback at public forums described the negative consequences of the Payments Order in terms of:

- financial hardship from the loss of work and income, increased financial debts and reduced equipment values;
- widespread uncertainty in the sector before, during and after the Payments Order; and
- significant stress on families, relationships and mental health.

In examining these impacts, this Chapter also addresses the drivers of these impacts, including:

- the terms of the Payments Order;
- widespread confusion about the interpretation and application of the Order; and
- the limited time for industry to implement the Order.

Finally, this Chapter considers whether the discriminatory approach of the Payments Order in its application to owner drivers only was justified.

Issues with the terms and application of the Payments Order

Many owner drivers and others in the industry raised a number of issues with the Payments Order during consultations. The overwhelming majority strongly felt the Payments Order was unfair and discriminatory in its application only to owner drivers and small family businesses.

Many owner drivers acknowledged that rates in the industry are too low but stated that this is the result of large companies in the industry dictating and setting low rates. This issue is discussed further in Chapter 6.

At the public forums and in submissions made to the Inquiry, there was consistency in the issues owner drivers raised about the practicability of the Payments Order. These issues were also raised with the Tribunal in applications, or submissions in support of, seeking a delay of the Payments Order's commencement.

³⁴ Quote from small transport business operator, Tamworth community forum, 30 June 2016.

At a general level, many owner drivers made similar comments to the effect that the Tribunal demonstrated a lack of how the industry worked. Many suggested that the Payments Order provided a “one size fits all approach” which was flawed. It was clear that there are differences in freight tasks, including:

- the type of freight being carried (e.g. livestock vs refrigerated goods vs specialised machinery);
- the particular route (e.g. within Tasmania vs from Melbourne to Brisbane);
- whether the route involves a return route where back loading is required to make the trip viable (e.g. returning from Perth or Brisbane); and
- the position of the owner driver or small business within the supply chain (e.g. being contracted directly to a client or sub-contracted through another transport company).

The main issues and concerns consistently put to the Inquiry about the Payments Order are briefly summarised:

- the Payments Order was confusing, including to lawyers and industry associations;
- small businesses could not employ a family member or they would be covered by the Payments Order. This was considered discriminatory towards family businesses;
- the Payments Order did not appropriately account for the common practice of back loading. Owner drivers would either have to charge full rates for a return trip (and likely not get the work) or would have to return empty as they would be unlikely to get a load back at rates under the Payments Order. It was suggested back-loading is how owner drivers are compensated to return from a trip, especially from a long haul trip to Brisbane or Perth;
- the Payments Order did not account for part loads. It required the owner driver to charge full rates for each load regardless of whether it was a part load or a full load. This was an issue for those in the industry, such as livestock carriers, that would make full loads from part loads; and
- minimum rates would become the new maximum in instances where owner drivers had been paid above the rates in the Payments Order for certain routes.



‘My business services multiple customers in any one load, making it impossible to comply with the 2016 RSRO’. **(Owner driver)**

Most of these issues relate to the competitiveness and viability of owner drivers in the industry. Given the consistency in these views from across the industry, including owner drivers, industry associations and large enterprises, the Inquiry has no reason to doubt that these concerns are valid. Further, these issues and concerns explain why it was that owner drivers and small transport businesses became unattractive in the market and lost work.

Financial impacts of the Payments Order



'It's a ludicrous order. If a little guy owner driver picks up cattle at three different sale yards on one day, he has no choice but to charge the full rate for every pick-up, however many head he is carrying. It will simply get rid of all the smaller owner-operators.'

(Retired farmer, Tamworth region)

Reported financial impacts of the Payments Order were varied. Some reported severe financial impact while others reported no financial impact on their business. The variation in financial impact can be attributed to a number of factors, including:

- business maturity (newer businesses appeared to be at increased risk);
- level of business debt and/or personal debt;
- clientele of the business (some were aware of the pending Payments Order and chose not to use owner drivers, whilst some were unaware of the Payments Order and continued to engage owner drivers); and
- the specific industry that the business was involved in (for example, mining industry downturn reduced freight leaving Perth or upturn in other industries).

Some owner drivers reported financial impacts only during the period the Payments Order was in effect. However, many reported losing work before the Payments Order commenced and some are still struggling after the Payments Order to regain sustainable levels of work and to recover financially from the period of reduced or no work.

Financial impact

Financial impacts leading up to and during the Payments Order



'I sat down with the owner of the company I do most of my work for and he told me even though he liked the way I worked and that I was reliable and consistent in all that I did for him, he could simply not afford to pay the "safe rates" that were brought in.'

'As a result of the change in rates my work dried up overnight, I did not work for three weeks which put both my family and myself under massive financial pressure, which I'm still feeling.'

'As soon as the RSRT had been abolished I went back to work the next day. So my current financial hardship is a direct result of the RSRT.'

(Owner driver, QLD)

Leading up to the implementation of the Payments Order, it was reported that larger companies started to shift away from engaging small transport operators, in some cases as early as December 2015:



'For us as tow operators the RSRO had a big effect right from December, when the company we towed for started to have trouble getting loads.'

Another operator of a small family business in NSW stated,

 *'When the two weeks was in, our one truck business became virtually unemployable. I sat in Sydney for two nights and then returned empty. I don't own the truck (few people actually own their trucks, some own their trailers). Some of us mortgaged our homes to pay for our trucks, which we never actually owned outright. We couldn't make any payments (during the time the Order was in place).'*³⁵

Other owner drivers reported they did not operate at all during the period of the Payments Order:

 *'Nobody continued business as usual while we waited to see what would happen. Everyone just stopped'*.³⁶

'Lots of people were told by the companies, "you're not working until we know what's happening"'.³⁷

'We got a phone call saying we haven't got a job'.³⁸

An attendee at the Tamworth consultation reported that some of her trucks were held over in Adelaide because she was told they would not be unloaded in Melbourne.

An owner driver in North West Victoria, who also reported not working during the period of the Payments Order, stated:

 *'I'm a (live animal) transporter and I would've been paid \$2,000 less each fortnight under the Order'*.³⁹

Some small transport operators reported that during the period the Payments Order was in force jobs were undertaken at a loss in order to maintain a relationship with a customer. This was particularly evident with small transport operators working in rural and regional markets.

The director of a finance broking business in Adelaide wrote,

 *'When the RSRT was introduced we received considerable calls from extremely worried operators telling us that they had either lost their work or were about to lose their work'*.

Some small transport operators reported large companies were also affected:

 *'Even Toll drivers were told to pull-up wherever they were on 4 April (2016) because they became too expensive to employ (as contractors). There were hundreds of trucks on the side of the road all across Australia'*.⁴⁰

³⁵ Quote from husband and wife small business owner-operators, Shepparton community consultation, 24 June 2016.

³⁶ Quote from small transport business owner, Mildura community consultation, 23 June 2016.

³⁷ Quote from owner-driver, Mildura community consultation, 23 June 2016

³⁸ Quote from wife of owner-driver, Mildura community consultation, 23 June 2016.

³⁹ Quote from owner-driver, Mildura community consultation, 23 June 2016.

⁴⁰ Quote from small transport business owner, Shepparton community consultation, 24 June 2016.

Ongoing financial impacts

While the Payments Order was only in effect from 7 April to 21 April 2016, owner drivers and small transport business owners reported a range of ongoing financial impacts attributed to the Payments Order. In a written submission to the Inquiry, a small business owner driver informed us:

“ *‘Because of the RSRT it put us into almost \$40,000 debt. We nearly lost our truck, our livelihood. Not to mention the strain it has put on our home life.’*

Inability to secure a profitable volume of work

Some owner drivers reported they have already been partially forced out of the industry after finding difficulty securing a profitable volume of work since the Payments Order was abolished. An owner-driver in rural NSW stated:

“ *‘I have lost two jobs/contracts as a consequence of the Order.’*

Another small transport business owner in rural NSW reported,

“ *‘It’s still affecting our work. If we fold up, there will be a huge flow-on effect. Our employee will be an unemployed man with a family.’*

A small transport business owner who reported that her husband has extensive experience in the transport industry overseas, stated the company they worked for wrote to them on 18 March 2016 and informed them there was no further work available.

Inability to make truck, trailer and other business-related expenses

Small transport operators frequently reported falling behind or becoming unable to make payments on their equipment. They reported being in arrears to accountants and fuel suppliers and using credit cards to pay for fuel, truck payments and other business-related expenses during and after the application of the Payments Order.

A Tasmanian owner driver made a telephone submission to the Inquiry. He reported he has his own truck and trailer (encumbered), and is contracted solely for a major transport company and drives a daily route in Tasmania. He stated:

“ *‘Something definitely did need to be done before the RSRO came in. We were barely getting by financially and on some runs I’d only cover fuel or even run at a loss. When the RSRO came in we calculated I was going to be \$300 per day better off. But that counted for nothing when I didn’t receive any work during this time. The Order didn’t do what I thought it would and I lost between \$5,000 and \$6,000 over fourteen days. I couldn’t pay my fuel bill or my truck payment. I used a credit card to pay both and I’m still paying it off today.’*

Similar to the Tasmanian owner driver’s example above, small transport operators commonly reported using credit cards to pay for fuel and other expenses, thereby incurring debt at higher interest rates.

In a written submission from a co-director of a small transport business in Queensland, the director confirmed a total financial loss of more than \$50,000, with interest continuing to accrue on truck payments and a business credit card that was used to pay costs.

Difficulty or inability to meet personal financial commitments

Financial difficulties experienced by small businesses inevitably led to financial pressure in the household, with owner-operators commonly reporting difficulty meeting mortgage payments and other household bills and expenses. Again, some reported increased debt as they used credit cards to pay household bills.

 *'It caused us incredible stress, after we purchased another truck and trailer (in December 2015), wondering if we will literally survive'.*

(Husband and wife owner operators, North-West Victoria⁴¹)

Reliance on family for financial assistance

Several attendees at community consultations reported having to rely on family members for financial assistance during and following the Payments Order. One couple stated they are partially dependent on their son, who is an apprentice tradesman on a low income. In a written submission to the Inquiry, the wife of a small transport operator reported that they also are reliant on their apprentice son for financial assistance.

Decreased value of trucks and trailers

Devaluation of trucks, trailers and affiliated transport equipment was a widely reported concern. Some owner-operators reported a willingness to leave the industry if they were able to achieve a fair price for their equipment. It was widely believed that both trucks and trailers had lost significant value as a consequence of the Payments Order, and it was believed that larger transport companies had been able to purchase cheap trucks and trailers after the market became 'flooded'.

 *'My truck and trailer are on the market but due to a flooded market I am unlikely to find a buyer'.*

An attendee at the Toowoomba Community Consultation reported he has had a truck and trailer on the market for three months.⁴² He and other attendees stated that finance companies were not repossessing transport equipment because they are unable to re-sell the equipment.

Minimum rates has effectively become 'maximum rates'

 For some smaller transport operators, minimum rates had effectively become maximum rates because much of their negotiating power was removed.

 *'Unfortunately we are mainly price takers not price makers and these continual rate reductions have led us to becoming largely unviable which is particularly distressing given that our long term financial commitments were made in good faith without the knowledge that these reductions in rates were likely to be imposed'.*

Small transport operators commonly described increased difficulty in negotiating with customers during and following the Payments Order.

 *'Nobody will get work when the big company knows what your minimum rate is. You can always be beaten'.⁴³*

⁴¹ Quote from husband and wife owner-operators, Mildura community consultation, 30 June 2016.

⁴² Attendee at Toowoomba community consultation, 16 June 2016.

Some owner-operators reported that they were already receiving similar rates to those imposed by the Payments Order but the additional paperwork and red tape was a real issue:

“ ‘I was able to work out that the money our hirer was currently paying us was actually close to the proposed minimum rates. Our hirer agreed that the rates were similar, but pointed out they did not want to have all the extra paperwork and auditing to be able to prove that they were paying correctly’.

A small transport business owner in rural NSW stated a minimum rate was not required to be legislated because:

“ ‘Owner-drivers are already setting minimum rates. When people phone us up and request we do a job for a lower rate than we quoted we say “no”. We have to, and we do make a minimum profit’.⁴⁴

Key finding 1: 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.

Impact on other small businesses

There was general agreement across our community consultations that larger transport companies do not use local (especially rural) businesses in any significant way. People involved in our consultation informed us that it was the small operators that ‘prop up’ local mechanics, parts suppliers and tyre dealerships. It was generally agreed that the larger companies source parts and tyres in large quantities and employ their own service personnel. It was suggested that if enough smaller transport operators exit the industry, such affiliated businesses would struggle. Many Inquiry participants, informed us that such flow-on impacts had already begun. A manufacturer of stock crates said there was flow on consequences for his business. When the Payments Order came in, his manufacturing orders (worth \$3 million) were either cancelled or put on hold.

Owner drivers and small transport operators anecdotally reported flow-on effects of the Payments Order to other businesses such as second-hand truck and equipment suppliers, heavy vehicle mechanics, tyre dealerships, retailers and accountants.

Uncertainty in the industry

Prior to commencement of the Payments Order

Most owner drivers became aware of the Payments Order between January and March 2016. Many owner drivers reported uncertainty and confusion about how the Payments Order applied and how they would be affected.

⁴³ Quote from owner-driver at the Mildura community consultation, 23 June 2016.

⁴⁴ Quote from owner-operator attendee, Tamworth community consultation, 30 June 2016.

Lawyers, industry associations, larger operators and owner drivers agreed that the Payments Order was complex and confusing. The uncertainty and confusion culminated in a concerted effort by the whole industry to have the Payments Order delayed (these efforts were outlined in Chapter 2). A document by the Commonwealth Government in support of the applications to delay the Payments Order analysed a sample of submissions made to the Tribunal.⁴⁵ Of the 331 submissions analysed, 231 (or 70 per cent) expressed general confusion about the operation of the Payments Order.

Many owner drivers said they had tried to obtain information about the Payments Order from the Tribunal and the Fair Work Ombudsman (FWO) in the few months leading to its implementation. Given the FWO's role in enforcing the Payments Order, the Tribunal referred any queries it received about the Payment Order's interpretation and application to the FWO.

Many owner drivers told the Inquiry that they had difficulty in obtaining information from the FWO. Comments included that the FWO did not have any 'usable advice', that the FWO struggled to provide advice about the Order even up to three days before it was due to come into effect, and that the FWO had updated a checklist that was supposed to assist owner drivers several times before the Payments Order commenced.⁴⁶

The Inquiry was informed by the FWO that it had taken a number of actions after the Payments Order was issued including referring all enquiries it received to a technical liaison officer. However, the FWO indicated to the Inquiry that the application of the Payments Order was complex given that most of the enquiries depended on the specifics of a particular journey including what was being carried, who undertook the journey, and the structure of the business carrying the freight. The FWO therefore had to provide highly tailored advice to queries and in most cases was unable to provide a simple answer.

The FWO also informed the Inquiry that between December 2015 and April 2016, it was working with industry organisations to develop an interpretation of the Payments Order. This included reaching a consensus position on a number of aspects of the Payments Order which were complex, including how the Payments Order should be applied to part loads, the definition of a long distance operation, as well as issues surrounding multiple hirers and the definition of a supermarket. The FWO indicated to the Inquiry that it was common practice as a risk-based and proportionate regulator to work with industry to develop a practical and workable interpretation of determinations that it has responsibility for enforcing.⁴⁷

It is clear that the uncertainty or confusion about the Payments Order was largely due to the complexity of the Payments Order and the limited time between when the Payments Order was issued and its commencement. We understand that the FWO was still working with industry into April 2016 to develop a working interpretation of a number of complex aspects of the Payments Order. This was not unreasonable given that the Payments Order was only issued on 18 December 2015 and was followed by the Christmas period.

⁴⁵ Commonwealth Submission in support of Application by AiG Group and Others to delay commencement of the Payments Order, Commonwealth Common Themes Matrix, 24 March 2016.

⁴⁶ Attendees at Wagga Wagga community consultations, 27 June 2016, and Toowoomba community consultation, 16 June 2016).

⁴⁷ One channel the FWO uses for this is known as Knowledge Connect. This is a collaborative online space to seek industry knowledge and experience. The FWO uses the practical information obtained to help inform its regulatory position.

This uncertainty and confusion was not limited to owner drivers. Lawyers, industry bodies and the FWO agreed that the Payments Order was complex. This was reiterated in the FWO's media release of 15 April 2016:



Given ongoing confusion and concern surrounding the introduction of the 2016 Order, the Fair Work Ombudsman wishes to make it abundantly clear that as the Regulator charged with monitoring and enforcing compliance with the Order, it has no intention of seeking enforcement outcomes to early contraventions that may be identified. Such action would not be in the public interest.⁴⁸

Three and a half months was clearly insufficient time for the industry to understand and change its business practices to comply with the Payments Order. Further, the Tribunal did not make an online calculator available until 3 March 2016, one month before the Payments Order was due to commence.

Further details of the FWO's role and the actions it took in respect of the Payments Order are provided at Appendix C.

The Australian Livestock and Rural Transporters Association (ALRTA) emphasised the uncertainty the Payments Order had on the industry prior to its commencement. In a written submission to the Inquiry,⁴⁹ ALRTA provided the following examples of how some owner drivers sought to protect their concerns:

- prime contractors sent letters to sub-contractors either asking them to declare whether or not they were covered by the 2016 Payments Order or simply declaring that sub-contractors would no longer be used from 4 April 2016;
- some affected small transport companies delayed investment;
- some affected small transport companies commenced to exit the industry, selling businesses, vehicles and equipment; and
- finance companies discontinued lending to potentially affected operators because the ongoing viability of businesses was uncertain.

Key finding 2: 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.

⁴⁸ FWO, 'Enforcement of RSRO 2016' (Media Release, 15 April 2016) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/april-2016/20160415-rsro-order-2016>>.

⁴⁹ Written submission from the Australian Livestock and Rural Transporters Association (ALRTA), 10 June 2016.

Ongoing uncertainty in the industry post the abolition of the Tribunal

Uncertainty in the industry remains. Community consultations revealed the following concerns held by owner-drivers:

- some medium to large transport operators are yet to reinstate owner drivers;
- owner drivers expressed uncertainty with regard to the Federal Election and how the result would affect them financially;
- Small business operators expressed concern about whether they will be forced to reduce employee numbers, including family members (if the Payments Order was to be reinstated);
- small business operators expressed uncertainty about whether to purchase new equipment;
- many small operators expressed regret at purchasing expensive equipment prior to the implementation of the Payments Order;
- some owner-drivers reported that ongoing uncertainty in the industry has led them to transfer truck and trailer registrations into their partner's name; and
- some small operators reported that they forewent minor maintenance that was not safety-related until they received certainty about their future in the industry.

In a written submission, the operator of a 22 year old family transport business that employed 25 permanent owner-operators stated:



'The abolishment of the Order on 18th April did not assure our customers that this issue was gone. As a result, most of our customer base reacted to the uncertainty of operating with us by moving their freight requirements to other companies that were not required to charge the RSRT rate. With the decreased work available, we were forced to make a decision to downsize our fleet capacity by terminating our owner driver contracts and selling equipment so that we might remain feasible in the long term.'

Further,



'Also as a regretful result of this, we had to terminate the employment of those staff that supported these contractor activities.'

Key finding 3: Uncertainty for owner drivers continues beyond abolition of the Tribunal and the Payments Order.

Impact on families, relationships and mental health

“ *‘There has been many sleepless nights worrying about how we are ever going to get back on top of all the bills and payments we owe. [My husband] has been driving for eighteen years and when we finally went out on our own this happens’.*

(Small business owner, NSW)

Submissions and feedback at public forums frequently described the impact of the Payments Order in terms of the personal flow-on effects. The loss of work, financial pressure and uncertainty manifested in relationship and family stress, mental health concerns, and in some cases, exacerbation of physical health issues.

“ *‘My doc said my stress levels from all this have made my health issues worse and he wants me to give it [driving] away before it kills me. But I can’t afford to yet’.*

(Owner-driver, NSW)

An owner driver in Tasmania stated:

“ *‘My wife is now looking for full-time work when we’d rather she was looking after our two young kids. There’s been a lot of family tension at home due to all the stress, and the financial stress continues’.*

Terms such as *‘mental anguish’*, *‘immense stress’*, *‘sleepless nights’* and *‘worry and anxiety’* were used to describe uncertainty around owner drivers’ ability to earn a sustainable income and the effect of the Payments Order on themselves and their families.

“ *‘It was really awful to see how all this affected these two’s relationship. They were always snapping at each other because they were so stressed out. I’d never seen them like it before, ever. They were just really, really worried about losing the truck, the house, everything’.*⁵⁰

(Family member of owner driver family business operator in Mildura)

The following is an extract from a written submission by the manager of a small transport business in Western Australia:

“ *‘Our company went into liquidation on the 19th April....We had to let our drivers go – two in January and one last week. My son has been in trucking all his adult life. He knows no other life. He has a wife and child, mortgage and personal debt. He now has no work and is in a state of turmoil. It has been a very stressful time for all of us. I get to sleep only to wake at 1 or 2 in the morning with chest pain and palpitations and general feelings of anxiety. I burst into tears whenever I talk about our situation. We have a creditors meeting in the next week and I have no idea how this goes or what to expect from it. Our life has been torn apart and destroyed’.*

⁵⁰ Quote from family member of owner-driver family business operator, Mildura community consultation, 23 June 2016.

In a written submission to the Inquiry, the wife of an owner driver reported that their business lost \$20,000 in income during the period of the Payments Order. She described the impact on their family:

“ *‘This put tremendous amounts of stress on the whole family. Not only did [my husband] worry about losing his business that he had built up over 14 years, but also the very real possibility of losing our family home and going into bankruptcy. As much as you try to protect your children they feel the stress and pressure their parents are under and they themselves become very stressed and upset about a situation that is out of our control.’*

Another wife and business partner of an owner driver reported:

“ *‘Being new in this industry and my husband new to this country, it has been an absolute turmoil in our relationship, our finances and it psychologically has devastated us both. My husband was living in his truck at the servo in Adelaide unable to come home due to lack of funds’.*

Further,

“ *‘So yes this ideology... has almost killed my husband and I, and we are almost bankrupt ourselves. Without some compensation or relief grant, I honestly do not know how we will recover our losses’.*

A representative of a driver’s association who attended the Shepparton public forum stated that mental health service hotline operators had contacted them and requested information on ‘how to respond to desperate people that engaged their service’. The representative further stated:

“ *‘The effect on the families – children etc, was all consuming. And in some cases it still is.’⁵¹*

Regrettably, attendees at several community forums and at least one telephone submission and one written submission referred to owner drivers ‘they knew’ that had taken their own lives as a consequence of financial pressure, at least in part, imposed by the Payments Order. Attendees at multiple forums stated that they were aware of small operators who are reportedly considering suicide once they have their personal affairs in order.

“ *‘I have a mate in Dubbo that lost his job just because of it. And a gentleman I know in Queensland definitely killed himself over it. And that’s all I want to say about that.’*

(Owner driver, NSW)

Attendees at the Toowoomba community consultation reported the suicide of an owner driver.

Key finding 4: It is with great regret and sympathy that it was reported to the Inquiry that a few owner drivers found they were unable to cope with further hardship caused by the Payments Order and took their own lives.

⁵¹ Quote from Allison Ballard, Natroads representative, Shepparton community consultation, 24 June 2016.

Overall impact

Many owner-drivers and small transport operators reported narrow profit margins and financial stress previous to the RSRT and such businesses may have initially welcomed an order that could increase the rates that they received. However, difficulty in securing work before, during and after the Payments Order meant that these operators actually found themselves in a worse financial position than before the Payments Order, with many reportedly continuing to suffer the Payments Order's negative effects on their business and livelihood. Personal relationships and mental health has suffered under increased financial strain, and uncertainty about the Payments Order continues.

Key finding 5: 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.

Recommendation 1: When developing regulation that will have a significant impact on small businesses, consideration should be given to the potential impact on people's mental health.

Discriminatory approach

Owner drivers and industry associations were overwhelmingly of the view that the Payments Order was discriminatory and unfair since it applied only to owner drivers and small transport businesses in the long distance and supermarket distribution sectors. As previously mentioned, this discrimination led to owner drivers becoming uncompetitive in the market and having to endure financial and personal consequences.

Many also questioned the rationale for the Payments Order stating it had nothing, or very little, to do with safety in the industry. Two main reasons were generally advanced. Firstly, it was asserted that there is limited evidence of a link between safety and remuneration. Secondly, it was said that there is no evidence that owner drivers are more unsafe and involved in more road accidents than employee drivers.

Link between safety performance and remuneration

In the 2014 Review of the Road Safety Remuneration System, Jaguar Consulting conducted a comprehensive literature review of the evidence examining the link between safety performance and remuneration in the trucking industry.

A summary of the findings is as follows:

- research literature on an established link between driver remuneration and safety is 'relatively limited in extent, addresses a range of specific relationships and reaches mixed conclusions',⁵²

⁵² Jaguar Consulting (2014) *Review of the Road Safety Remuneration System*, p. 60.

- ‘Few studies have found clear links between driver remuneration and the likelihood of accident involvement.’ Of the four studies, two found a small relationship. Two studies found a large relationship. However one of those studies found a “U shaped” relationship in which remuneration above a certain level was linked to poorer safety outcomes;⁵³ and
- the studies finding a direct link between driver remuneration and accident involvement focused on employee drivers only. Thus, they are limited in their application to understanding the relationship between remuneration and safety performance amongst owner drivers.⁵⁴

The 2016 Review of the Road Safety Remuneration System by PricewaterhouseCoopers (PwC) considered the literature linking remuneration and safety performance and came to a similar conclusion. It stated:

‘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.

While there remains the potential for concern about the link between remuneration and road safety, PwC has not found any additional information to change our original view expressed in the Regulation Impact Statement we prepared for the Department of Education, Employment and Workplace Relations in 2011 prior to the establishment of the System. Namely, that the focus of the System should be on the link between remuneration and road safety and only once the link has been appropriately established should those issues be targeted proportionately and directly’.⁵⁵

Owner drivers vs employee drivers

Owner drivers were overwhelmingly of the view that they were unfairly targeted because of a false assumption that they are less safe than employee drivers. Many said that the Payments Order was discriminatory, as illustrated by the following comments:



*‘The biggest concern was how discriminatory the legislation was i.e. only singling owner drivers and family businesses’.*⁵⁶

*‘The Order was totally discriminatory towards the small family business sector, and, I personally was disturbed at the suggestion that my business was targeted as being unsafe’.*⁵⁷

*‘The RSRT discriminated against one sector of the industry. If safety was the driving force behind the Order, then why did it not apply to everyone?’*⁵⁸

Employee drivers or ‘company drivers’ are taken to refer to those drivers that generally work for medium to large operators who are entitled to minimum rates of pay under an applicable industrial award. Owner drivers strongly rejected the assumption that they engage in more unsafe practices and are involved in more accidents than employee drivers.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ PwC (2016) *Review of the Road Safety Remuneration System*, p. iii.

⁵⁶ Question 7 of the Survey, respondee number 3.

⁵⁷ Question 7 of the Survey, respondee number 5.

⁵⁸ Question 7 of the Survey, respondee number 33.

Many owner drivers and small businesses explained that given the high level of personal and financial investment in their trucking operation, they could not afford to risk engaging in unsafe practices. It was imperative to have their vehicles well maintained to avoid them being 'parked' and unable to generate income, and to avoid penalties for overloading, speeding and breaching fatigue management laws.

Many were also of the view that there was no evidence to suggest that owner drivers engaged in unsafe practices to a greater extent than employee drivers. Based on their own experience in the industry, some owner drivers believed employee drivers were involved in more accidents than owner drivers. A few reasons were put forward in support of this view, including that many employee drivers are not adequately trained, are inexperienced and are essentially 'steering wheel attendants'. They are also not as financially or personally invested as owner drivers. Many owner drivers also expressed great pride in running a compliant and safe operation.

The Jaguar Consulting 2014 Review of the Road Safety Remuneration System examined the available evidence on the safety performance of employee drivers compared with owner drivers. It concluded that 'studies that have assessed owner driver safety performance specifically have found either that it is similar to that of employee drivers or that it is significantly better than that of employee drivers.'

In light of the findings of the two reviews of the Road Safety Remuneration System, the Inquiry considers that the Payments Order was not predicated on a sufficient evidence base for a government entity to interfere with contractual arrangements that effectively discriminated against owner drivers in a highly competitive market.

Key finding 6: 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.

Future setting of rates in the road freight industry

The challenge with setting payment rates to address safety or other industry concerns can distort the market by eliminating the price differential which allows owner drivers to compete against larger competitors. At the same time, an imposed payment rate sets limitations on how owner drivers can operate their business in addition to the national heavy vehicle safety regulations. The RSRT, in setting the Payments Order, demonstrated the disastrous effect that this can have on many small businesses in this industry.

The NSW Industrial Relations Commission (IRC) interim determination on the General Carriers Contract Determination (NSW) and a decision to extend this across NSW may lead to similar distortions, particularly at the second stage of the process when rates are considered. The Australian Small Business and Family Enterprise Ombudsman would highlight the comparison between the RSRT Payments Order and its detrimental impact on owner drivers, and any future NSW IRC decision, and note the potential implications for small business operators working in that state, irrespective of whether they are NSW-based.

The effect that the NSW IRC determination could have on interstate operators who enter or pass through NSW in the course of their operations concerns the Australian Small Business and Family

Enterprise Ombudsman. Without expressing a view on whether rates should be set in the road freight industry generally, the setting of rates should not discriminate between owner drivers and employee drivers and between small and larger businesses.

Recommendation 2: The Inquiry notes future consideration by the NSW Industrial Relations Commission of rates of pay for owner drivers covered by the General Carriers Contract Determination (NSW) should consider the experience of the RSRT Payments Order. Given the example of the Payments Order and its detrimental impact on owner drivers, the Inquiry strongly discourages the setting of mandated rates of pay that only apply to owner drivers and small businesses.

4. Conduct and operation of the Tribunal

Introduction

As examined in Chapter 3, the effect of the Payments Order was significant for many owner drivers and small businesses in terms of financial hardship, uncertainty, and the stress on health and family relationships. However, the conduct and operation of the Tribunal was a source of additional stress for many owner drivers and small businesses who participated in the Inquiry. There was particular stress in relation to the period in which all parts of the industry, big and small businesses alike, sought to have the Payments Order delayed.

As discussed in Chapter 2, the Tribunal received 39 applications to have the Payments Order delayed. This triggered a process in which the Tribunal held an initial hearing on the matter on 15 March 2016, followed by a period of consultation on a draft variation that proposed a delayed commencement of the Payments Order from 4 April 2016 to 1 January 2017. The Tribunal's consultation involved a written submission process and hearings held over the Easter 2016 holiday.

Although this inquiry is not a judicial review of the Tribunal, it was apparent that owner drivers and small businesses had been personally impacted by the conduct and process of the Tribunal particularly in relation to its consideration of delaying the Payments Order. They raised concerns that the Tribunal's conduct and processes were not fair and adequate for owner drivers and small businesses. The main issues raised with us during the Inquiry were:

- the overly formal nature of the proceedings which were conducted in an adversarial manner;
- lack of understanding of small business needs; and
- a perceived absence of independence and impartiality of the Tribunal towards small businesses.

These issues are explored in more detail below.

General views about the Tribunal

The Inquiry's survey provides a useful snapshot of small businesses' experience with the Tribunal. The survey consisted of 8 questions and sought to capture general views about the Tribunal and the impacts of the Payments Order.

Specifically, Question 5 of the survey asked respondents to indicate whether they had personal experience dealing with the Tribunal. Of the 136 people who responded to this question, 80 responded 'no'. The remaining 56 people selected one or more ways in which they had personally engaged with the Tribunal.

Despite only a small number⁵⁹ of the survey respondents indicating that they had appeared before the Tribunal, 25 people had attended the hearings and witnessed first-hand the conduct of the Tribunal either as an observer or a participant in the proceedings.

What was your experience in dealing with the Road Safety Remuneration Tribunal? (select only one option)		
Answer Options	Response Percent	Response Count
N/A	55.2%	74
Good - They acted professionally.	3.7%	5
Bad - They didn't appear to take my concerns seriously.	9.7%	13
Terrible - They made me feel disrespected and uncomfortable.	18.7%	25
Other (please specify)	12.7%	17
Answered Question		134

Table 3 - Survey Responses Question Five

Furthermore, the survey sought information on the respondents experience in dealing with the Tribunal (Question 6). The results showed the majority of respondents who dealt with the tribunal indicated that their experience was either bad or terrible. Less than four per cent indicated their experience was “good or professional”.

Of the ‘other’ free text responses, the majority characterised their dealings with the Tribunal in a negative manner. The majority of comments noted the Tribunal’s conduct was in their view tardy, generic and generally unprofessional.

These survey results were largely consistent with the written and verbal submissions to the Inquiry, as well as feedback from public forums. These other sources of information provide a greater level of detail about the Tribunal’s conduct, and are drawn upon in subsequent sections.

Overly formal process and adversarial

Small businesses, who were generally self-represented during the hearings, felt significantly discouraged by this process which they considered was largely incomprehensible, confusing and intimidating.

The use of legal jargon and legal process

The use of legal words by the Tribunal, commonly associated with a court, emphasises the formal nature of these proceedings. Examples of the legal words and terms used from transcripts of the proceedings include:

- ‘taking of appearances’;
- ‘lawyers at the bar table’;
- ‘tendering evidence’;

⁵⁹ Three people were ‘subpoenaed and gave oral evidence’ and four people indicated in the ‘yes – other option’ that they had appeared before the Tribunal.

- 'issuing of subpoenas';
- 'cross-examining witnesses'; and
- 'contempt of court'.

In addition, small businesses participating in the Tribunal were told to address Tribunal members formally as 'your Honour'.

The hearing of 15 March 2016 provides a clear example of the Tribunal's formal approach. For many owner drivers and small businesses, this was the first time they had engaged with the Tribunal. Prior to the hearing, the Tribunal did not provide any initial information or guidance on the process, despite knowing that many participants were self-represented and had little experience with court-like proceedings. One survey participant remarked that they had never been to a court or a tribunal before and was not aware how either of them worked.⁶⁰

The Tribunal asked for appearances in a formal manner and then asked the parties to address them on complex issues relating to the Tribunal's jurisdiction and standing as follows:

'In terms of the proceeding this morning, I propose that parties address the following: firstly the section 32(2) provisions of the Road Safety Remuneration Act 2012. Those provisions set out who can make an application to vary the 2016 order. You will need to address me on what subsection and paragraph of section 32(2) that you are making your application to vary under, and why you say you fall within the paragraph under section 32(2) of the Road Safety Remuneration Act.

That section limits who can make an application, and you will need to address me on why you think you fit within that provision of the Road Safety Remuneration Act.

Secondly you should address us on - if you are seeking a stay order – the Tribunal's jurisdiction to make such an order.

Thirdly you should address us on whether the Tribunal is required to prepare, publish and consult on a draft variation to the 2016 order before deciding whether to vary the 2016 order; and if so, the nature of the draft variation, in circumstances where there are multiple applications to vary.

Fourthly you should address us on the timetable the Tribunal should adopt in the following circumstances: firstly under this fourth item, if the Tribunal stays the operation of the 2016 order and does not issue a draft variation, what timetable it should adopt; secondly, if the Tribunal stays the operation of the 2016 order and does issue a draft variation, what timetable it should adopt; thirdly, if the Tribunal does not stay the operation of the 2016 order and does not issue a draft variation, what timetable it should adopt; and fourthly, if the Tribunal does not stay the operation of the 2016 order and does issue a draft variation, what timetable it should adopt'.⁶¹

These questions used legal terminology, which would have been difficult to answer without a legal background or access to legal advice.

⁶⁰ Question 7 of the Survey, response number 21.

⁶¹ Transcript of RSRT proceedings, 15 March 2016, PN63.

In the view of one industry association, small businesses were easily intimidated by the ‘court-like environment’ where ‘they were forced to answer questions about their own legal standing to express an opinion on the jurisdiction of the RSRT’. The industry association said they could only do this by ‘referring to legislative clauses or legal precedents that they could not be expected to be aware of or understand’.⁶²

To their credit, a number of owner drivers or spouses of owner drivers did stand up and attempt to answer the questions as best they could. For example, the wife of an owner driver stood up and before addressing the four issues said ‘I have none of the understanding that these guys do. I am here as a passionate wife of an owner driver’. When asked by the Tribunal whether she would like to address the Tribunal’s power to make a stay order, the wife stated that ‘No, because I don’t know anything about that’.⁶³ A similar response was provided in relation to the consultation requirements of the Tribunal.

When asked about the issue of timetable, the spouse explained that she and her family needed time to ‘be able to understand the Order and how it applies to myself and family because I only found out that I was included in the Order on Friday and that doesn’t give me any time for restructuring in my company or personal life either’.⁶⁴ The spouse then proceeded to explain issues in obtaining advice from the FWO. This was met with clapping from others to which the Tribunal responded: ‘We not clap in formal proceedings. If it happens again I will order that the *court room* be cleared’ [emphasis added]. This example demonstrates the adversarial nature of the Tribunal and the Tribunal’s perception of itself as a court.

Another spouse, the co-owner of a small business, also appeared before the Tribunal with her husband at the hearing of 15 March 2016. She observed the following:

“ *I attended the RSRT hearing in Melbourne on 15/03/2016... The transcript of the hearing shows that although myself and other owner-operators attended in good faith expecting to discuss their submissions, the hearing was scheduled to hear legal argument plus the bona fides of speakers/those appearing. For ordinary members of the public with no legal training this was both confusing and intimidating. Luckily I realised the boundaries of what I was expected to say, but others were strongly chastised and berated for expressing confusion or displeasure at not being able to discuss their submissions as expected or told they could by officers of the RSRT.’*

The consistent complaint heard from small businesses regarding the proceedings was that they did not understand the Tribunal’s process and felt intimidated. Another small business owner remarked:

“ *At times, I became totally overwhelmed by the whole proceeding.’*

⁶² Written submission from the Australian Livestock and Rural Transporters Association, 10 June 2016, p.11.

⁶³ Transcript of RSRT proceedings, 15 March 2016, PN 199–200.

⁶⁴ Ibid PN 204.

Form over substance

Many of the comments and feedback provided by small businesses during the Tribunal process were disregarded as applications in the process because they were not considered by the Tribunal to have been made in the appropriate form. There were instances, for example, where it appeared as though the Tribunal refused to consider small businesses' comments because it was not said to constitute an "application" in the form acceptable to the Tribunal.⁶⁵

In another example, one small business owner was advised by the Tribunal that they did not have to make a formal application but could instead make a verbal submission at the hearing. The same small business owner was subsequently questioned by the Tribunal as to why they had not made a proper application.⁶⁶

The Australian Small Business and Family Enterprise Ombudsman believes that small business voices should always be heard in consultations regardless of any formal requirements and should have at least been considered by the Tribunal as general comments in the consultation process, if not a formal application.

Heavy handed approach

Small businesses were invited, and in some cases compelled, to attend the Tribunal's hearings. The Tribunal resorted to using the heavy handed approach of issuing subpoenas to some owner drivers to make them appear during the Easter hearings and/or to produce certain documents. The hearings were scheduled for unusual times, such as the Saturday during Easter, with truck drivers reporting that Easter is often the only time that they have to take a holiday during the year. This did not show empathy or understanding to owner drivers and their family members who needed to divert resources and lose income to attend the hearings.

While the Inquiry did not obtain copies of these notices, industry publication *Fully Loaded* reported that the subpoena contained the following warning:

'You should be aware that it is an offence under section 89 of the Road Safety Remuneration Act to fail to attend at the Road Safety Remuneration Tribunal in accordance with an Order requiring a person to attend.

The penalty for such an offence is imprisonment for six months'.⁶⁷

The Tribunal was prepared to allow people to be telephoned by the Tribunal rather than attend the hearings in person.⁶⁸ However, a lawyer representing his client asked the Tribunal about the penalties associated with failing to attend a hearing:

'If he [the client] maintains his telephone – mobile telephone with him throughout Saturday between 10 and 5 and for whatever reasons despite his best endeavours he's not able to take that call when it comes through, I'm hoping to be able to give him some comfort that

⁶⁵ Transcripts of RSRT proceedings, 15 March 2016, PN468, PN508, PN698, PN702.

⁶⁶ Transcripts of RSRT proceedings, 15 March, PN512.

⁶⁷ See "RSRT reminds hearing attendees of no-show jail time", Australiasian Transport News, <http://www.fullyloaded.com.au/industry-news/1603/rsrt-reminds-hearing-attendees-of-no-show-jail-time/>

⁶⁸ Transcript of RSRT proceedings, 24 March 2016, PN997 – PN1399.

he won't be locked up in gaol. Because I can tell you seriously my instructions are that my client is seriously concerned about that prospect.'

The President responded:

'Whether he's locked up in gaol is not a matter for me'.⁶⁹

This was the only explanation given which again demonstrates the adversarial approach of the Tribunal and an unwillingness to accommodate the concerns of small businesses.

Other small businesses that could not attend were asked to appear by telephone, even though they had earlier advised the Tribunal that there was no telephone reception in their area.⁷⁰ Some small businesses travelled large distances to attend the hearings in person with one small business stating they had travelled 700 kilometres to attend a hearing.⁷¹ According to one small business owner, some people withdrew their submissions on the basis they could not make themselves available due to unavoidable or unforeseen work commitments.

Lack of legal representation and disclosure of sensitive information

In many cases, the Tribunal, reprimanded small business owners treating them as if they had knowledge of the law and legal practices and procedures. In one example, the Tribunal commented that it would only give "*limited liberty*" to a participant who was asking questions in the proceedings (because the person was not legally qualified).⁷²

In other examples, small businesses who were self-represented told the ASBFEO that they felt unsure of their rights to claim privilege in regards to self-incrimination.⁷³ This was sometimes in the context of questions about whether small businesses had complied with the Tribunal's First Order. In these cases, small businesses were not encouraged by the Tribunal to seek independent legal advice, which small businesses said would have been useful. In other examples, lawyers present at the hearing interrupted proceedings to assist small businesses⁷⁴ who did not have legal representation to make all parties present aware of their legal rights.⁷⁵

The Australian Small Business and Family Enterprise Ombudsman also notes that, in circumstances where the Tribunal could have encouraged participants, the Tribunal was instead discouraging and unnecessarily harsh towards owner drivers, especially when they tried to ask the Tribunal questions about the Payments Order.

In addition, the Tribunal put questions regarding commercially sensitive information to small businesses, such as '*who do you employ?*', '*how much do you charge?*', and the identity of

⁶⁹ Transcript of RSRT proceedings, 24 March 2016, PN1402.

⁷⁰ Transcript of RSRT proceedings, 15 March, PN1070.

⁷¹ Transcript of RSRT proceeding, 15 March 2016, PN506.

⁷² Transcripts of RSRT proceedings 27 March 2016, PN4568.

⁷³ Transcript of RSRT proceedings, 26 March 2016, PN1709, PN1760, PN2016, PN2070, PN2075.

⁷⁴ These small business people were not their clients.

⁷⁵ Transcript of RSRT proceedings, 26 March 2016, PN2016, PN2070.

customers.⁷⁶ Other small businesses were asked to discuss matters concerning their employees before having the chance to broach these matters with their employees themselves.⁷⁷

The small businesses obviously felt forced to respond (often in public), despite the commercial sensitivity of their business interests. For persons giving evidence by phone, it's understand that some small businesses thought that their evidence on sensitive matters was being taken in private (the Tribunal having cleared the room). However, it was reported that some members of the public were permitted to remain in the room (at the "bar table") whilst this evidence was provided.

Perceived lack of impartiality and independence

To be effective, it is essential that members of the community feel confident about the independence of a tribunal, and that tribunal members perform their duties impartially and free from undue influence from government.

Many small business participants in this Inquiry expressed concerns about the independence and impartiality of the Tribunal and expressed that it was more about defending the Payments Order.

The following comment by a survey respondent reflects a common view put to the Inquiry:

 *'Jennifer Acton and the others failed to look at reason and they failed to look broader and the impact this would have had to the broader community. The Tribunal was more on TWU side despite the overwhelming evidence presented'.⁷⁸*

One industry association noted this was interpreted as being about the Tribunal trying to "vindicate" the purposes for which it was established.⁷⁹ The Tribunal was also described by one lawyer as acting more like "an advocate" in this process.

The Tribunal appeared to dismiss concerns that owner drivers held regarding the impact of the Payments Order on their livelihood. In written submissions made to the Tribunal in relation to delaying the Payments Order, owner drivers and industry associations raised concerns about aspects of the Payments Order that would make small businesses in the industry uncompetitive. These issues were discussed in more detail in Chapter 3 but broadly covered the issues of part loads, back loading, and the singling out of owner drivers and family businesses under the Payments Payments Payments Order.

In its decision of 1 April 2016, the Tribunal appeared to dismiss these concerns stating:

 *'However, before setting out our reasons for decision and conclusion in relation to the applications to vary and the draft variation, we correct some myths presented as facts to this Full Bench by some of the parties, including some peak bodies, and used by them to bolster their case for variation. The correct position on the issues covered by the myths is as follows:.....⁸⁰*

⁷⁶ Transcript of RSRT proceedings, 26 March 2016, PN2428, PN2207, PN1972.

⁷⁷ Transcript of RSRT proceedings, 26 March 2016, PN2428.

⁷⁸ Question 7 of the Survey, respondee number 32.

⁷⁹ Australian Livestock and Rural Transporters Association, submission no. , p.11.

The Tribunal proceeded to effectively state that part loads, backloads and the use of family members by owner drivers could occur under the Payments Order. However, this did not address the concern that owner drivers faced losing work because they would no longer be competitive as a result of how the Payments Order applied. In addition, the Tribunal suggested, in its decision of 1 April 2016, that the FWO and industry associations played a role in creating uncertainty and confusion about the Payments Order. As previously discussed, it would appear that it was the complexity of the Payments Order itself and its short implementation period that was the source of this uncertainty and confusion.

Key finding 7: 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.

Key finding 8: Owner drivers who appeared before the Tribunal were not treated with due respect and felt that the Tribunal lacked independence and impartiality.

Recommendation 3: Existing and future tribunals dealing with small businesses should employ less formal and legalistic processes, not be adversarial, facilitate self-represented parties and be free of bias, actual or perceived. Processes should be collaborative and consultative.

Tribunals deemed an inappropriate vehicle for setting industry wide regulation

The Ombudsman recognises that attempts were made to find a collaborative solution to the problems surrounding the Payments Order. However, the Tribunal ultimately deferred to an adversarial process which meant competitors in the industry were pitted against each other. This raises the issue of whether a tribunal process was appropriate for determining industry wide regulation which has significant market implications.

Setting aside the merits of the Tribunal's Payments Order, the Ombudsman considers a tribunal process, even if it took a neutral and conciliatory approach, is inappropriate for this function. Generally, the role of a tribunal is to resolve disputes between parties based on the evidence put to it. Superimposing a dispute resolution approach to the development of industry wide regulation is inappropriate.

As PricewaterhouseCoopers noted in its 2016 report:



*'...the quasi-judicial nature of the Tribunal leads to inherent inefficiencies. Since the Tribunal largely considers information brought to them, similar to a judicial body, engagement is biased towards those who are most resourced to participate. This may reduce the extent of evidence received by road freight companies and drivers, particularly owner drivers to whom many of the Tribunal's activities relate.'*⁸¹

⁸⁰ Variation of road safety remuneration order - application – Decision [2016] RSRTFB 6, [2].

⁸¹ PricewaterhouseCoopers 2016, p.57

Industry wide regulation that impacts on competition and market forces should not be determined by judicial-like officers more familiar with weighing up legal arguments. Bodies equipped with industry, regulatory and economic expertise combined with best practice consultation processes should undertake such tasks.

Key Finding 9: Tribunals are suited to resolving disputes; they are not appropriate vehicles for developing complex industry-wide regulation that intervenes in market forces.

Recommendation 4: Given that tribunals are not appropriate vehicles for developing complex industry-wide regulation that intervenes in market forces, governments should consider other bodies or frameworks with expertise in regulation and facilitative processes to achieve negotiated and appropriate outcomes.

Compensation

The issue of compensation was raised by a number of attendees at community consultations and in submissions to the Inquiry.

Given that the interference of the Tribunal in the market had negative financial and other impacts on many small businesses, particularly small transport businesses, the government may choose to consider whether a compensation scheme should be set up. However, this Inquiry has identified a number of difficulties in compensating businesses that were clearly impacted by the Payments Order, particularly:

1. The transport industry is made up of many separate industries (the owner truck drivers themselves but the various supporting industries, whilst there are also a number of strata within the trucking industry). Some of these were affected by the Payments Order more than others. For example, not all small transport operators were adversely affected by the Payments Order, and more established businesses appear to have been less affected than newer businesses. It is reasonable to expect that many businesses were heavily impacted by the Payments Order yet survived, and never made contact with this Inquiry. The question of who would be compensated, and by what test, may prove difficult to answer.
2. The Inquiry has also established that the small business transport industry was experiencing difficulties prior to the Payments Order, although the Inquiry accepts these difficulties were aggravated by the Payments Order. As a result, it may be difficult to gather factual evidence to show the extent that financial difficulties are attributable to the Payments Order.

Key Finding 10: Although the issue of compensation was raised during consultation, there are significant difficulties in compensating small business impacted by the Payments Order, particularly approaches to eligibility and quantum would be extremely difficult to implement fairly.

General conclusions on tribunals and regulation

Tribunals generally offer a mechanism for the resolution of disputes that is fair, just, economical, informal and quick. This contrasts with the role of the courts that are usually perceived as more formal, less user-friendly, and more expensive. There is also a role of government in ensuring that these institutions are appropriate, as observed by the Productivity Commission:



*'Governments, in granting courts and tribunals exclusive jurisdiction over certain matters, have responsibility to ensure that these institutions operate as efficiently and effectively as possible.'*⁸²

While the Inquiry has determined that the Tribunal is not an appropriate vehicle to set complex industry-wide regulation, the following observation by the Productivity Commission is also relevant to government's consideration of the role and use of tribunals more generally:



*'There are concerns about 'creeping legalism' in the tribunal process, with tribunals being seen by users as increasingly formal bodies.'*⁸³

The Ombudsman has considered the extensive submissions and transcripts of evidence in relation to the Tribunal's interaction with small businesses when determining the impact of the Payments Order. This valuable insight and knowledge has contributed to a better understanding of how tribunals and other similar bodies should operate in other areas if they are to be "small business friendly".

The Ombudsman is not convinced that the views of small businesses and the organisations representing small businesses had been sufficiently considered in the Tribunal's hearing of this matter. Evidence indicates that there were inherent problems with the Tribunal in the way that it interacted with small businesses which further reinforces the view that the system was fundamentally flawed.

More thought and consideration needs to be given to ensuring that small business interests and concerns are taken into account in any tribunal processes. However, the evidence suggests that small businesses would strongly prefer to be allowed to negotiate workable and cooperative solutions and, at a fundamental level, this is not something for which tribunals are suited. There are a number of elements that need to be catered for regarding small business that include:

- significant targeted and proactive consultation with small business that is specifically designed to reach and involve small businesses;
- good consultation involves receiving the concerns and views of small businesses and engaging with, and responding to, those concerns and views;
- there should be ongoing and accessible feedback mechanisms to hear from small business;
- when implementing regulation, small businesses need to be provided with sufficient time to understand, seek advice and make any appropriate business changes; and

⁸² Productivity Commission 2014, p. 13

⁸³ Productivity Commission 2014, p. 13.

- when government introduces regulation, it has a responsibility to provide education and adequate support, and to consider providing compensation where appropriate.

Recommendation 5: The development of any major piece of regulation by a government agency that impacts on small businesses, including the establishment of tribunals or similar bodies, should:

- involve significant consultation with all players in the industry, with proactive and targeted efforts made to reach and involve small businesses;
- take into account the concerns and views of small businesses; and
- be based on ongoing and accessible feedback mechanisms for small businesses before, during and after implementation of the regulation or establishment of the body.

Recommendation 6: The implementation of new regulation should afford small businesses sufficient time to understand, seek advice and be able to make any business changes to adapt to the regulation.

Recommendation 7: Where government introduces significant regulation that intervenes in a market, it has a responsibility to provide education and adequate support, and to consider providing compensation where appropriate.

5. Safety in the heavy vehicle industry

Introduction

The regulation of safety in the heavy vehicle industry was a prominent issue in consultations given that the Payments Order was predicated on there being a link between remuneration and safety outcomes. The limited evidence of such a link was discussed in Chapter 3.

It was clear during consultations that the industry is genuinely committed to striving towards greater levels of safety. It is not the role of this Inquiry to evaluate the effectiveness of existing initiatives. However, as an advocate for small businesses, the ASBFEO has listened to the views of owner drivers and attempted to capture them in this Chapter for consideration by government and regulators.

Reporting of accidents involving trucks in the media

Analysis by Safe Work Australia found that over the period 2008-2012 while around one third of accidents involving trucks are the fault of the truck (37 per cent), only six per cent of all public road fatalities are the fault of the heavy vehicle.⁸⁴ Consistent with this, another study has found that in multi-vehicle fatal accidents involving a heavy vehicle truck, the truck driver was at fault in 16 per cent of them.⁸⁵

A common view is that truck drivers are commonly portrayed in the media as at fault in multi-vehicle accidents. One owner driver suggested that by the media calling an accident a 'truck accident' it invokes the perception that the accident was the fault of the truck driver. Another said that it feels as if truck drivers are deemed guilty until proven innocent by the media.

The South Australian Road Transport Association told the Inquiry that it had worked with the media in its state to ensure that the reporting of accidents involving trucks is more accurate and does not impliedly attribute fault to the truck driver before a police investigation has taken place.

The Inquiry has not investigated the reporting of truck crashes by the media to sufficiently form its own view. However, industry associations in the sector are encouraged to work with the media on the reporting of such accidents.

Recommendation 8: The Australian Small Business and Family Enterprise Ombudsman encourages industry associations to work with the media to ensure that in reporting accidents involving trucks, fault is not impliedly attributed to truck drivers before the outcome of a police investigation.

⁸⁴ Safe Work Australia (2014) *Work-Related Fatalities Involving Trucks, Australia, 2003 to 2012*, May 2014, pp. vi, 6.

⁸⁵ National Transport Insurance National Truck Accident Research Centre (2015) *Major Accident Investigation Report*, Brisbane, p 7.

Honesty in the public debate on road safety

During the Inquiry, the TWU produced an advertisement linking truck drivers to the deaths of children to advocate for safe rates. The advert was broadcast on social media and on commercial television.

The Australian Small Business and Family Enterprise Ombudsman strongly condemned the TWU's advertisement as using the serious issue of road safety for political purposes and for suggesting owner drivers are complicit in the deaths of children.⁸⁶ Other industry stakeholders also condemned the advertisement, including NatRoad, who described the advertisement as disgraceful and ghoulish.⁸⁷

Any road death or serious accident is a tragedy for all involved and the broader community. However, public debate on the issue of road safety and measures to address road safety should be based on sound evidence. The Payments Order was not the answer. It was based on limited evidence of a link between remuneration and safety performance and an unfounded assumption that owner drivers are involved in more accidents than employee drivers. Further, the Payments Order could not address the underlying causes of the majority of fatal multi-vehicle crashes not caused by truck drivers.

Safety regulation

In recent decades, cooperative efforts by governments at both the federal and state and territory levels has made significant advances in the safety of heavy vehicles on our roads.

According to data prepared by the Centre for Automotive Safety Research for the Australian Trucking Association, the number of fatal crashes involving articulated trucks per the number of trucks registered fell by 80 per cent between 1982 and 2001.

The focus on the need for safety is with the National Heavy Vehicle Regulator. The Inquiry notes the ongoing work of the National Heavy Vehicle Regulator, including the re-allocation of RSRT funds of \$3.8 million for:

- a National Compliance Information System (NCIS) heavy vehicle monitoring system, including cameras and connection (to commence in Victoria);
- facilitation of rapid development and uptake of Industry Codes of Practice; and
- acceleration of development and distribution of Chain of Responsibility awareness and guidance for industry and supply chain parties.

Many owner drivers and others in the road freight industry were of the view that they were heavily regulated in this regard.

Reported issues with existing safety regulation

During consultations, significant feedback from owner drivers related to safety regulation. These issues are worthy of mention for ongoing consideration by policymakers and regulators in the heavy vehicle sector.

⁸⁶ Media Release ASBFEO, 10 June 2016, <http://www.asbfeo.gov.au/news-articles/twu-ad-a-disgrace>

⁸⁷ NatRoad Australia's website and Facebook page, 10 June 2016.

Harmonisation of laws across state boundaries

There were mixed views about the National Heavy Vehicle Regulator and the law it administers, the National Heavy Vehicle Law.

At almost all of the public forums, truck drivers told the Inquiry that the fatigue management laws were inflexible and unworkable. Truck drivers explained that the way that the laws were structured often meant that they were required to drive when tired or to rest when they were not tired. This was at least in part due to a perceived lack of harmony of laws between states and territories.

Licensing of heavy vehicle drivers

The issue of inexperienced drivers was raised at a number of the public forums. It was put to the Inquiry that people are being brought in to the country on temporary visas to drive trucks and that they are inexperienced and unsafe.⁸⁸ The reports relate specifically to employee drivers. Examples provided included multiple drivers (as many as five) and others in truck cabins, issues with having insufficient English skills to communicate with other drivers through the two way radio about upcoming safety hazards, and even a lack of skills necessary to operate a truck.

Reference was made to the widely reported incident in Sydney in which two foreign drivers of a B-double truck caused significant delays on the M5 motorway because they were unable to reverse or decouple the truck.⁸⁹ The drivers were concerned that the truck was too high for the airport tunnel, so they parked in the side lanes. A Roads and Maritimes Services (RMS) inspector was required to reverse the vehicle.

Although it was asserted that these drivers were on Temporary Work (Skilled) visas (subclass 457), truck driving is not a permissible occupation on the consolidated sponsored occupations list for the Temporary Work (Skilled) visa (subclass 457).⁹⁰ However it is understood that overseas truck drivers may be on another type of temporary visa, such as a student visa, or on a permanent visa.

It was suggested that licensing requirements for overseas truck drivers are too lax. It is understood that those on temporary visas in Australia can drive under a heavy vehicle licence obtained in their country of origin (with only the Northern Territory having a restriction of 3 months).⁹¹ According to the Senate Committee Inquiry *Aspects of Road Safety in Australia*, it is only when an overseas driver holds a permanent visa that they are required to apply for a permanent licence in an Australian jurisdiction within 3 months (or 6 months in Victoria).⁹²

The Inquiry notes that the Senate Committee recommended that all visa holders undergo driver skill tests before their heavy vehicle driving licenses are recognised in Australia.⁹³ Given the concerns put by owner drivers to the Inquiry, and the Committee's recommendation, this issue warrants attention by the appropriate bodies.

⁸⁸ See e.g. Toowoomba Public Consultation, 16 June 2016.

⁸⁹ O'Rourke, Jim, "Over-height truck causes chaos on M5 East, claims foreign drivers not qualified", Daily Telegraph, 5 February 2015, <http://www.dailytelegraph.com.au/news/nsw/overheight-truck-causes-chaos-on-m5-east-claims-foreign-drivers-not-qualified/news-story/5b076a515d6b5bf9dbe2250657ebb3e3>

⁹⁰ Senate Rural and Regional Affairs and Transport References Committee, Parliament of Australia (2016) *Aspects of Road Safety in Australia, Interim Report*, May 2016, Canberra, [4.15].

⁹¹ Ibid [4.23].

⁹² Ibid [4.24].

⁹³ Ibid [4.29].

Compulsory Rest Breaks

Compulsory rest breaks was a frequently raised side-issue. There appeared to be consensus that the regulations pertaining to rest breaks are too rigid and put too much pressure on drivers. Rest breaks are often impacted by waiting, loading and unloading times, and some drivers described 'grey areas between resting and working time'. The regulations do not accommodate different types of vehicles, variations in driving conditions and driver preference. Drivers further described being compelled to rest when they felt most alert and permitted to drive when they were fatigued. Drivers were often prevented from driving to a more suitable location to rest, such as shaded areas for livestock or an air-conditioned rest stop.

Attendees at the Toowoomba community consultation reported insufficient rest bays on Queensland roads. Drivers can find themselves unable to safely park their vehicle when they are compelled to stop. Drivers who do arrive at a rest bay within the required timeframes can find the rest bay is already full if they do not arrive by a particular time.⁹⁴

There appeared to be consensus that a log-book is an insufficient tool to manage fatigue. Attendees at community consultations generally agreed that a better approach is to train drivers to recognise fatigue, and there was agreement that a fatigued driver should not be driving even if the logbook permits.

Key Finding 11: Fatigue management laws under the National Heavy Vehicle Law are inflexible and as a result may lead to perverse situations, such as permitting a person to drive when they are fatigued.

Improving safety in the industry

Education for other road users

Given truck drivers are not at fault in a significant majority of multi-vehicle fatal accidents involving another vehicle, owner drivers and industry associations alike suggested that a campaign at a national level is needed to educate other road users on how to safely drive with trucks.

Recommendation 9: The Australian Small Business and Family Enterprise Ombudsman encourages the Transport and Infrastructure Council and the National Heavy Vehicle Regulator to consider funding national advertisements to educate road users about how to drive near and around trucks, given that the vast majority of multi-vehicle accidents involving trucks are not the fault of the truck.

Apprenticeship scheme

The Inquiry heard it was difficult to find experienced drivers. There was also concern of a lack of young people in the industry outside of family businesses. The Inquiry was informed the main barriers to employing a young person are high insurance premiums for persons under the age of

⁹⁴ Toowoomba community consultation, 16 June 2016.

21 and lack of experience. An owner of a small trucking business said they would need to be incentivised to employ an inexperienced person.⁹⁵ It was suggested that an apprenticeship or traineeship scheme could make young people more attractive to hire in the industry. It would help to overcome the growing lack of experienced drivers and an ageing workforce. On successfully completing the apprenticeship or traineeship, insurance companies may be able to offer reasonable premiums to younger drivers.

The Australian Small Business and Family Enterprise Ombudsman encourages the industry and relevant government bodies to consider an apprenticeship or traineeship scheme for young people in the trucking industry. The apprenticeship or traineeship should include units in business skills.

Key Finding 12: Safety in the transport industry should not be addressed by legislating rates of pay.

Recommendation 10: Governments should consider establishing an apprenticeship/traineeship scheme to get more young people into the trucking industry to overcome the growing lack of experienced and professional drivers and an ageing workforce.

⁹⁵ Attendee at Wagga Wagga community consultation, 27 June 2016.

6. Competitive Pressures in the Industry

 *'We would have to be the most regulated industry in the country. We just feel like we are always having to fight. We aren't looking to get rich; we just want to make a decent, honest, safe living'⁹⁶.*

(Small business owner driver, Mildura region, VIC)

Limited market power and competitive pressures

Consultation with stakeholders revealed a range of competitive pressures in the owner driver, small transport business industry. Many of these pressures are associated with the limited market power that these players have in the industry.

Small transport operators consider there is an uneven playing field in the transport industry. Larger companies appear better equipped to negotiate contracts and to impose terms of payment. Smaller operators consistently reported cash-flow problems, as they are regularly made to wait weeks or several months for payment, often using credit to pay their own expenses in the interim. Small operators emphasised the unfairness of these payment terms.

Freight rates

It became clear that small operators are price takers, with limited ability to bargain. This is the case for the “contract driver” working for larger companies as much as the owner driver with an established customer base. Most small transport operators accepted transport prices are low and the industry already operated on small profit margins prior to the 2016 Payments Order, as noted in Chapter 3. The majority of owner drivers agreed that increasing the minimum rates would be a positive move for the industry.

As noted in earlier chapters, after the introduction of the Payments Order, some operators found the minimum rate effectively became a maximum rate, and previously limited bargaining power disappeared entirely.

Some owner drivers believed that the Payments Order was discriminating and priced them out of the market:

 *'The RSRT isn't about safety it's about dictating rates at a ridiculous increase which the current market can't pay. Only owner drivers come under this Order which is discriminating in the free enterprise market, making the big end richer and driving us out of the market place entirely'.*

Some small transport operators informed they do, in theory, support a legislated rate rise. For example:

 *'The larger companies need us but they are really ripping us off. So in that sense the RSRT was on the right track but if it was brought in it would mean that my husband could no longer drive his truck and our son who has just bought his own truck and working for us would have been affected also. Naturally that made us not want to support the RSRT. We*

⁹⁶ Quote from owner driver, Mildura community consultation, 23 June 2016.

would however be interested in a minimum pay rate across the board to force large companies to pay a workable rate for their subcontractors’.

Payment terms

Payment terms and payment timeframes was a prominent issue in the small transport business industry. Owner drivers reported that they are, on the whole, reliable account payers and they were unanimous regarding an imbalance in payment structure in the industry. One owner driver stated:

“ *‘BP requires me to pay my fuel bill at least fortnightly. But I can wait up to four months to be paid for my work. That means I often have to pay for fuel with a credit card’.*

Cash flow was a considerable issue for nearly all operators consulted. It was agreed the 30 day payment requirement was a positive aspect of the Tribunal’s First Order (issued on 17 December 2013) and should have relieved considerable pressure and made small business more competitive.

“ *‘Cash flow is the most important weapon with small business, it ensures accounts are paid on time, financial security. Many large companies are pushing their payments out to 60 and 90 days. No-one can survive with those sorts of terms. Fuel, wages, superannuation all have to be paid within a 30 day period.’*

Attendees at the Adelaide community consultation stated that large companies *‘are crushing smaller companies by not paying them’*. A payment timeframe of 7 days was suggested.⁹⁷

It was reported that multi-national companies had recently moved from paying weekly to paying monthly.⁹⁸

Recommendation 11: Given the strong support of owner drivers, the Australian Small Business and Family Enterprise Ombudsman should inquire into ways to reduce payment terms for owner drivers as part of its Inquiry into Payment Terms.

Unpaid waiting times

Small operators also drew attention to the amount of unpaid actual work time they must undertake. Waiting times are almost always unpaid or partly unpaid – loading and unloading, and these can add up quickly. A contract driver explained that he was not paid for his first half hour of loading and unloading, and he did not commence earning until the second half of the hour. Another employee contractor described waiting at a port for more than 6 hours when a shipping freighter was delayed by bad weather. Those hours were all unpaid, as was a proportion of his unloading and loading time. These kinds of scenarios, it was reported, are not uncommon.

⁹⁷ Adelaide community consultation, 10 June 2016.

⁹⁸ Toowoomba community consultation, 16 June 2016.

Mandatory Workplace Health and Safety was an issue raised in several public consultations. Drivers reported having to undergo separate training at each collection and delivery site. The training is described as being essentially the same at each site and is time consuming and not paid. An attendee at the Toowoomba community consultation stated that he was carrying forty plus 'induction cards', while another reported he has been inducted at more than 300 sites.⁹⁹

Key finding 13: It is costly and onerous for heavy vehicle drivers who unload/load to have to complete site specific induction at every site for work health and safety purposes. Induction can vary between 15 minutes and 4 hours and some drivers can have as many as 40 induction cards.

Contracts

Smaller operators often reported only having verbal or 'handshake' contracts, including with some of Australia's largest transport companies.



'I've never seen a written contract in fifty years of operation. If you do see them, they're "take it or leave it" contracts and very one-sided'.¹⁰⁰

(Owner driver, rural Queensland)

Even when a contract is in writing, owner drivers frequently reported that they feel the contract is weighted heavily in the favour of the company providing the work and is often unfair. They also described little transparency about how much hirers 'skim off the top'.

There is an opportunity to draw upon other codes of conduct for industries, such as the Franchising Code, which sets out requirements for written contracts as well as alternative dispute resolution mechanisms. Adoption of these approaches or adoption of a code which contains these mechanisms can also include penalties for non-compliance and the requirements for disclosure of certain information.

Competition with large transport companies

Small transport operators generally considered that their businesses prevented the larger companies from monopolising the transport industry. One owner driver stated:



'This (2016 Payments Order) is about money. It is definitely not about safety. Only big companies can benefit from it, and they will benefit from seeing us close down because they will make more money. And watch their rates go up when we are all gone'.¹⁰¹

It was generally believed that larger companies are more competitive than smaller operators because they have the ability to subsidise parts of their operations. Small operators believed that larger companies could secure work by running the transport component of their job at even money or even at a loss, but make good profits on storage and warehousing of freight. We were informed that income is generated for large companies each time a fork-lift machine moves freight up or down in storage.

⁹⁹ Owner-driver at Toowoomba community consultation, 16 June 2016.

¹⁰⁰ Quote from attendee at Toowoomba community consultation, 16 June 2016.

¹⁰¹ Quote from attendee at Tamworth community consultation, 30 June 2016.

Cost of inputs

Equality with primary producers in terms of fuel, vehicle rebates and registration concessions was requested by several small transport operators. It was noted that primary producers are advantaged in terms of the fuel rebate compared to truck drivers, yet the industries are linked and can often be in competition with each other.

Addressing competitive pressures

Industry code of conduct

Industry associations including NatRoad, the South Australian Road Transport Association, the Australian Trucking Association and the Australian Livestock and Rural Transporters Association indicated either publicly or directly to the Inquiry that a voluntary or mandatory code of conduct could be developed to deal with the interaction between large and smaller businesses. Both supporters and objectors to the Payments Order agreed that the large operators and companies in the supply chain had and used excessive power.

It has been suggested that a code of conduct could be developed under the existing framework in the *Competition and Consumer Act 2010* which currently sees 5 industry codes overseen and enforced by the Australian Competition and Consumer Commission.

Recommendation 12: The Australian Small Business and Family Enterprise Ombudsman recommends that the Department of the Treasury and the Australian Competition and Consumer Commission work with the industry to investigate developing a Code of Conduct for the road freight industry under the *Competition and Consumer Act 2010* (Cth).

Recommendation 13: The Australian Competition and Consumer Commission should target information materials (e.g. fact sheet) for owner drivers and small businesses about the unfair contracts regime with respect to the reforms that take effect in November 2016.

Recommendation 14: The Australian Small Business and Family Enterprise Ombudsman encourages industry associations in the road freight industry to proactively engage with owner drivers and small businesses and to represent their views in government processes and build upon communication networks.

7. Conclusion

The Road Safety Remuneration Tribunal's Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 was in operation for 14 days during April 2016. Despite the comparatively short timeframe of the Payments Order, it had a wide ranging and significant impact on a large part of the road transport industry. This Inquiry has found the Payment Order's impact to be financially and personally crippling for many small transport business owners and their families. Businesses suffered from a reduction or cessation of available work, and the financial impact of this was borne out on households in terms of personal debt, stress, poor mental health and uncertainty about the future. For some of those affected, these impacts continue.

The Inquiry has found that, overall the Payments Order:

- was imposed on owner drivers with insufficient time and resources to allow them to understand its impact and application;
- was discriminatory in its application to owner drivers and not employee drivers, and this discrimination was not based on sound evidence; and
- was uncompetitive.

The Inquiry also found the Tribunal was an inappropriate vehicle to develop industry-wide legislation, and the processes of the Tribunal were overly legalistic, adversarial and lacked collaboration.

We thank the submitters, survey respondents, forum attendees and all other members of the small business community who participated in this consultation process.

It is hoped that as a result of this Inquiry, future governments will employ proactive and targeted efforts, over a sufficient timeframe, to ensure a greater level of consultation with all stakeholders in industries.



**Minister for Small Business
Assistant Treasurer**
The Hon Kelly O'Dwyer MP

Ms Kate Carnell AO
Australian Small Business and Family Enterprise Ombudsman
Level 2, 15 Moore Street
CANBERRA ACT 2602

Dear Ombudsman

A handwritten signature in blue ink that reads "Kate".

Under section 42(1) of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* I request that you conduct an inquiry into the effect on Australian small businesses of the Road Safety Remuneration Tribunal's *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016*.

The inquiry should also consider the ways in which the government can consult with small businesses in the development and operation of tribunals and other similar bodies.

Yours sincerely

A handwritten signature in blue ink that reads "Kelly O'Dwyer".
Kelly O'Dwyer

Survey Results

What is your interest in the RSRT Inquiry?
(please choose the option which best describes your situation)

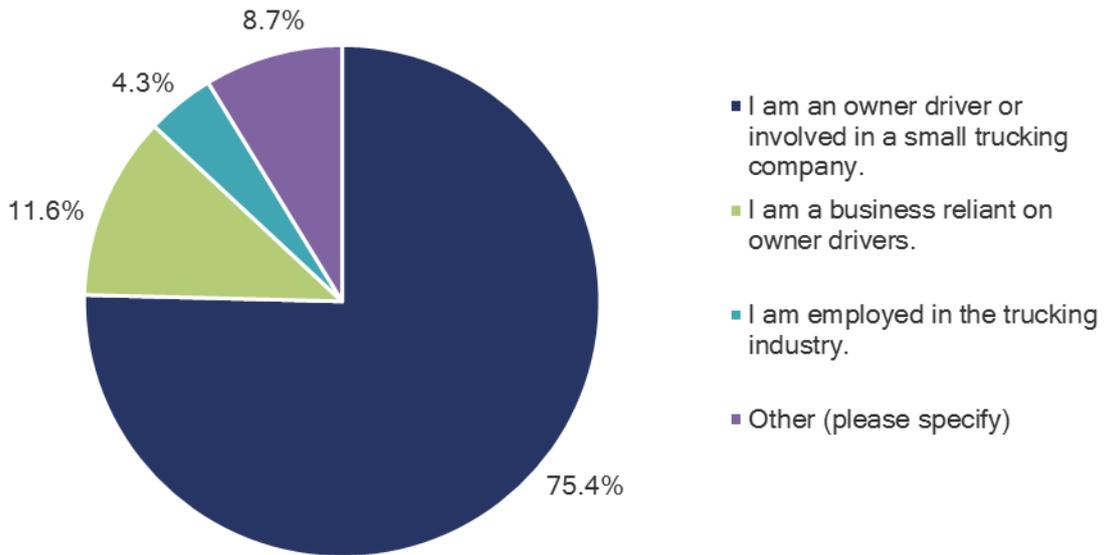


Figure 2 - RSRT Inquiry Survey Question 1

Please indicate which of the following apply to you
(select all that apply)

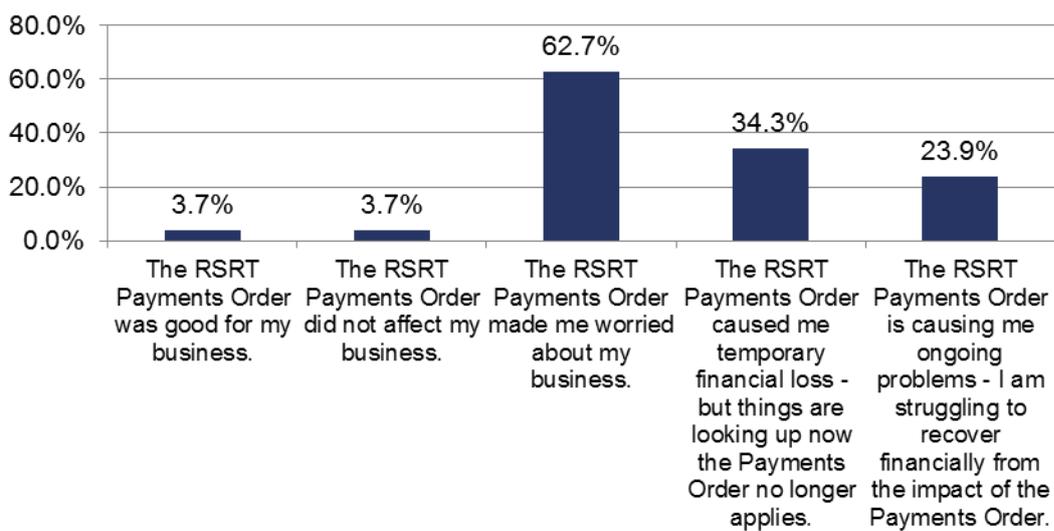


Figure 3 - RSRT Inquiry Survey Question 2

**When did you first hear about the RSRT Payments Order?
(select one option)**

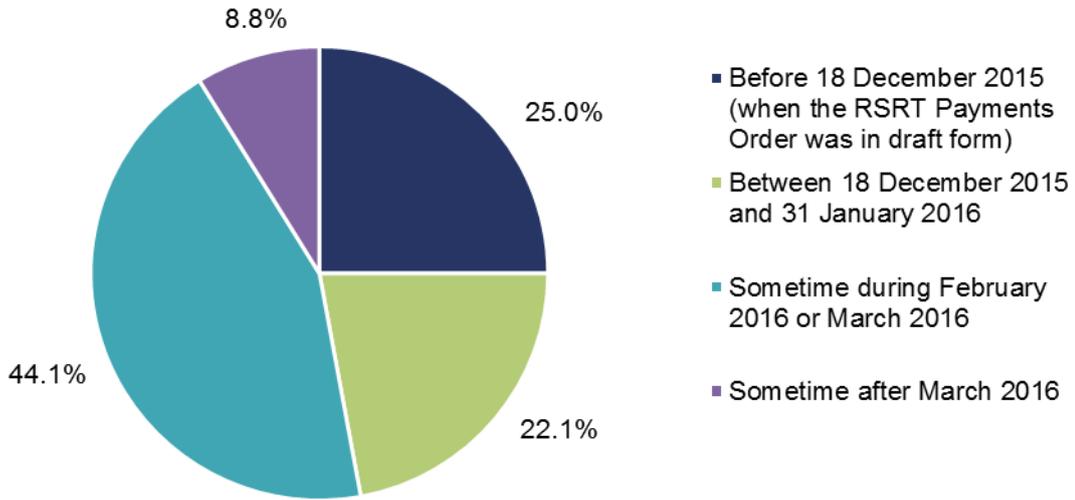


Figure 4 - RSRT Inquiry Survey Question 3

**How did you first hear about the RSRT Payments Order?
(select one option)**

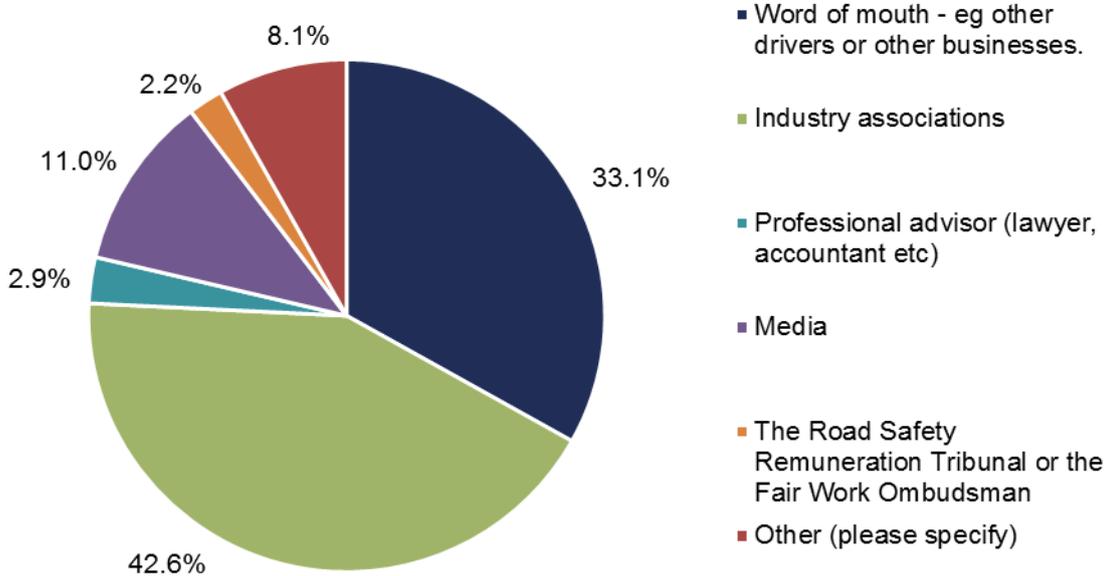


Figure 5 - RSRT Inquiry Survey Question 4

**Did you personally have contact with the Road Safety Remuneration Tribunal?
(Select all that apply)**

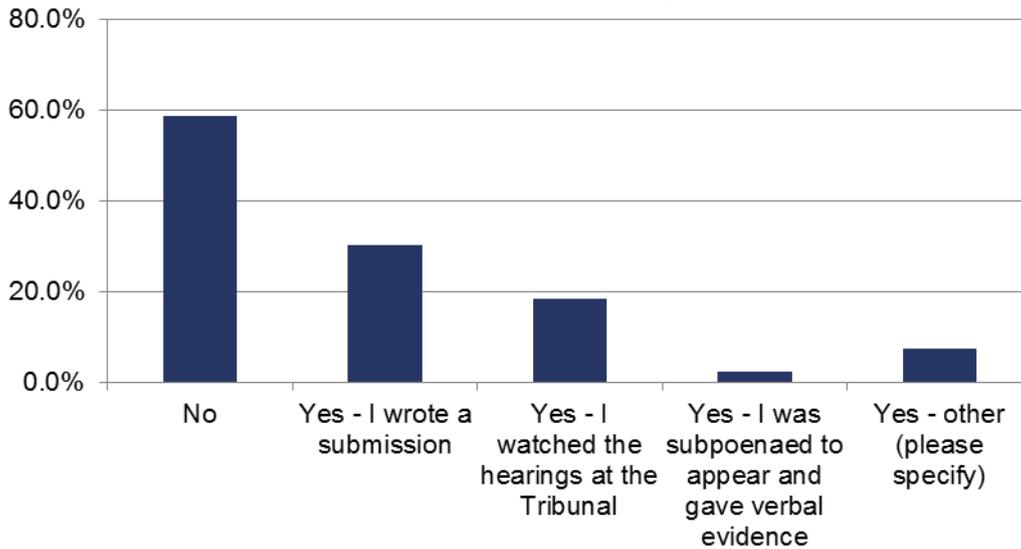


Figure 6 - RSRT Inquiry Survey Question 5

**What was your experience in dealing with the Road Safety Remuneration Tribunal?
(select only one option)**

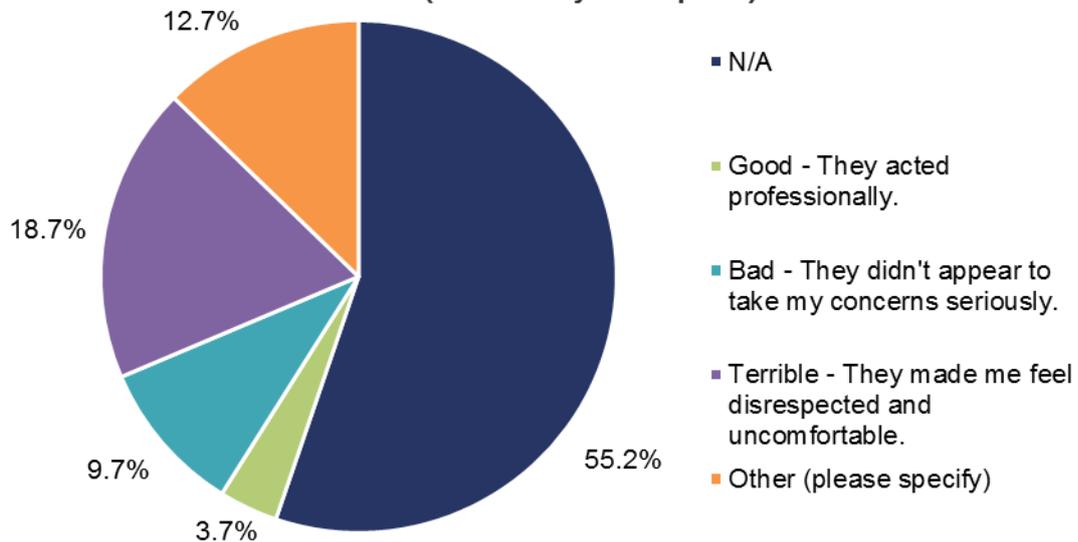


Figure 7 - RSRT Inquiry Survey Question 6

Question 7: Is there any other information you would like to tell us? (optional)

64 free text responses were provided.

Tribunal's consultation leading up to the Payments Order being issued

Proposed RSROs and conciliation conferences

In February 2014, the Tribunal invited any person seeking an order on payments for transport drivers to provide the Tribunal with an Order and the assumptions underpinning it. 7 submissions were made. Of these, 4 supported and/or proposed an Order covering remuneration. This involved the TWU, the Australian Road Transport Industrial Organisation, an owner driver association and an owner driver.

The TWU proposed that the Order should apply to employees and contractor drivers. The proposal specified rates of pay for contractor drivers. It also specified that employers were to pay employee drivers in accordance with the relevant industrial award. However it also provided that employee drivers should not be provided with incentives to work in an unsafe manner and it should be ensured that employed drivers are paid for all time worked.

A series of conciliation conferences were held between April and September 2014 in relation to the proposed Orders on payments for road transport drivers. According to the Tribunal, the object of the conciliation conferences was to 'develop – to the extent possible – a consensus position on some or all of the clauses of proposed drafts RSRO/s for road transport drivers'.

A Working Group was convened in parallel to the conciliation conferences to draft clauses for a draft Order. The Working Group consisted of several industry groups, one major transport operator, one union and a large supermarket chain. The draft Order produced by the Working Group did not reflect a consensus position. Many of the parties involved in the working group and conciliation conferences did not support an Order or reserved their position on the draft Order's contents.

KPMG Cost Model

On 10 April 2015, the Tribunal published research commissioned by accounting firm KPMG. It included a cost model with minimum payments for contractor drivers either in distribution and long distance operations. Following a hearing, the Tribunal issued a statement on 20 April 2015 inviting parties with any questions for KPMG on its research and cost model to email the Tribunal by 1 May 2015.

On 14 May 2015, The Tribunal issued a statement that it was considering the making of a draft Order covering payments and associated issues for contractor drivers covered by the 2014 Order. In doing so, it would have regard to the report of the Conciliation Conferences produced in December 2014, which included a draft Order, and the KPMG cost model. Parties were invited to provide initial submissions by 27 July 2015, in relation to the December 2014 report, the KPMG cost model and any other matter relevant to contractor pay rates.

Draft and final Payments Order

On 26 August 2015, the Tribunal published a draft of the Payments Order. The draft Payments Order contained minimum rates of pay on a per kilometre and hourly basis for contractor drivers in supermarket distribution or long distance operations. The rates were largely based on the rates in the KPMG cost model.

From August to November 2015, the Tribunal invited parties to provide written submissions and to present evidence on the draft Payments Order and the KPMG cost model. It also held hearings from 22 to 25 October 2015.

On 30 October 2015, the Tribunal issued directions inviting any submissions on the individual inputs in the KPMG cost model and any particular rates the Tribunal should make in the Payments Order. Parties were initially advised that they had until 25 November 2015 to provide submissions. This timeframe was extended to 9 December 2015.

On Friday 18 December 2015, the Tribunal issued the final Payments Order. As per its terms, the Payments Order was to commence on 4 April 2016.

The role of the Fair Work Ombudsman in relation to the Payments Order

The Fair Work Ombudsman (FWO) had a dual educative and compliance role under the *Road Safety Remuneration Act*. The FWO was required to provide education, assistance and advice to road transport drivers and other supply chain participants on the Tribunal's orders. It could also investigate, commence proceedings and represent drivers to enforce the Tribunal's orders.

The FWO told the Inquiry that it was not customary for judicial bodies to provide advance copies of determinations that the FWO enforces, and the Road Safety Remuneration Tribunal was no different, although there would be value in doing this where new jurisdictions are created in the future.

The FWO stated that its role under the *Road Safety Remuneration Act* did not drive a large workload for the FWO. Over the almost 4 year life of the Road Safety Remuneration System, the FWO had received a total of approximately 500 enquiries, 10 complaints and three referrals from the Tribunal. To put this figure in context, the FWO receives around 600,000 enquiries and 25,000 complaints per year. The Tribunal's second order, the Payments Order, generated the most enquiries relating to the Road Safety Remuneration System. During the period from when the Payments Order was issued on 18 December 2015 until the repealing legislation took effect on 22 April 2016, 377 of the approximately 500 enquiries were received.

The FWO outlined the actions it took after the Payments Order was issued on 18 December 2016:

- the FWO took steps to prepare and inform its advisers on the application of the Payments Order to assist customers via the infoline and online;
- all enquiries relating to the Payments Order were referred to specialist technical liaison officers (TLOs);
- the FWO's website www.fairwork.gov.au was continually updated with information and educational materials about different aspects of the Payments Order. This included, for example, specific information for owner drivers and supply chain contract auditing;
- the FWO used social media to alert the community to the making of the Payments Order via Twitter; and
- in April 2016, the FWO issued media releases to articulate its approach to the enforcement of the Payments Order. The FWO stated that it would take a fair and flexible approach to compliance, through a mix of guidance, advice, education and common sense. The FWO stated that it would not be in the public interest to seek enforcement outcomes to early contraventions.

As at 18 April 2016, the FWO had a range of additional educational activities scheduled in relation to the Payments Order. These included:

- a template letter and template website content for hirers;
- practical guides for both owner drivers and hirers;
- training of dedicated subject matter experts on the Payments Order; and
- further social media activities, as further educational resources were published and in the lead-up to the Payments Order commencing.

All work on these activities was discontinued following the passage of the *Road Safety Remuneration Repeal Act 2016*.

The FWO indicated to the Inquiry that the application of the Payments Order was complex. It generally found it could not provide answers to general enquiries or hypothetical situations as the application of the Payments Order depended on the specifics of a particular journey including what was being carried, who undertook the journey, and the structure of the business carrying the freight. The FWO therefore had to provide highly tailored advice to queries and in most cases was unable to provide a simple answer.

The FWO was criticised by the Tribunal for having “*crowd sourced*” its advice in relation to the application of the Payments Order. In response to this criticism, the FWO indicated to the Inquiry that it was common practice as a risk-based and proportionate regulator to work with industry to develop a practical and workable interpretation of determinations that it has responsibility for enforcing.¹⁰² The FWO explained that this approach was widely supported by industry representatives.

The FWO recognised that the Payments Order prescribed rates of pay for contractor drivers for the first time, and that this cohort had not previously been subject to regulation of this nature. Consultation with industry enhanced the FWO’s understanding of and ability to respond to important issues, and allowed for meaningful interaction between the FWO and the truck driving community.

Between December 2015 and April 2016, the FWO worked with a number of industry organisations, including the Australian Industry Group, the Australian Council of Trade Unions, the Transport Workers’ Union, the Australian Road Transport Industrial Organisation, NatRoads, Australian Chamber of Commerce and Industry and the National Independent Trucking Association to develop an interpretation of the Payments Order. This included reaching a consensus position on a number of aspects of the Payments Order which were complex, including how the Payments Order should be applied to part loads, the definition of a long distance operation as well as issues surrounding multiple hirers and the definition of a supermarket.

The FWO acknowledged that it changed its position about coverage under the Payments Order on its website and the FWO’s checklist for owner drivers was altered on two occasions.

- the first change was made on 17 February 2016.
- following further industry feedback and consideration of the issue, information on coverage was further amended on 11 March 2016.

The FWO also indicated its general approach to small business is to provide workplace relations advice and assistance that is clear and simple and to help fix problems quickly when they arise. The FWO informed us that it does this by providing information and resources that can be relied on. The FWO also stated that it does not seek to take a punitive approach to businesses that make mistakes, rather it works with them to voluntarily resolve workplace issues when they arise.

¹⁰² One channel the FWO uses for this is known as Knowledge Connect. This is a collaborative online space to seek industry knowledge and experience. The FWO uses the practical information obtained to help inform its regulatory position.