



**Submission to the Senate Select Committee on the Future of  
Work and Workers**

**Inquiry on the Impact of Technological and Other Change on  
the Future of Work and Workers in Australia**

20 February 2018

## Introduction

1. The National Road Transport Association (NatRoad) is pleased to provide a submission on some of the important issues about the future of work raised by the Select Committee's terms of reference.
2. The principal motivation for NatRoad making this submission is to rebut some of the assertions and related recommendations made by the Australian Road Transport Industrial Organisation (ARTIO) and the Transport Workers Union (TWU) in their submissions to the Committee.<sup>1</sup> In addition, NatRoad's policy perspective relating to the introduction of semi-autonomous and autonomous vehicles is set out. That perspective is relevant to the Committee's term of reference dealing with the impact of the foreshadowed change in work on workers in the road transport sector likely to occur because of the introduction of more autonomous vehicles.
3. In this submission NatRoad emphasises concern that the issue of so-called "safe rates" models may receive credence when it is clear that this model of alleged protection for owner drivers is discredited. NatRoad opposes legislating rates for owner-drivers or any other contractor.
4. NatRoad is Australia's largest national representative road freight transport operators' association. NatRoad represents road freight operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tippers, express car carriers, as well as tankers and refrigerated freight operators. NatRoad's principal policy focus is on the regulation of heavy vehicles that is vehicles over 4.5 tonnes.
5. More than 75 per cent of non-bulk freight is transported by road. The road freight transport industry continues to play a major role in Australia's supply chain, with the ability to provide quick and reliable door-to-door delivery nationwide.

## Automation

6. While automated heavy vehicles have the potential to deliver improvements in safety, we have doubts about the ability of Australia's current infrastructure to support high levels of automation. For example, Lane Keeping Assist systems have the greatest potential for preventing deaths and serious injury but are unlikely to function on roads without highly visible lane markings (compare this with the number of poorly maintained or unsealed roads in Australia).<sup>2</sup> It is this issue of appropriate infrastructure that is likely to slow the development of the introduction of autonomous vehicles in this country.
7. There are also still many unanswered questions about how automated systems will cope with various road freight tasks and who will be held liable in the event of an accident.
8. Guiding NatRoad policy in this area is the proposition that until vehicles become fully automated and no longer require any human input, even in the event of a system failure, the driver must be prepared to reclaim manual control of the vehicle. A range of factors

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[https://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Future\\_of\\_Work\\_and\\_Workers/Future\\_ofWork/Submissions](https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/Future_ofWork/Submissions) submissions 59 and 35 respectively

<sup>2</sup> Safety Benefits of Cooperative ITS and Automated Driving in Australia and New Zealand, Austroads Research Report, 2017

including loss of skill, loss of situation awareness and overreliance may cause difficulties with drivers taking over the dynamic driving task. That is why the transition to the automated driving task must be carefully studied and planned.

9. That planning is currently occurring. The National Transport Commission (NTC) is working on many reforms to prepare Australia for automated vehicles. NatRoad is providing input into this process through our submissions to the NTC discussion papers and industry consultation forums.
10. In all those communications NatRoad stresses that there is a significant amount of anxiety amongst smaller operators that the introduction of automated heavy vehicles will put members out of work. The impact on jobs in the transport industry must be integral to any policy relating to the introduction of automated heavy vehicles. Governments must work with the industry on the issue of how jobs are expected to transition in an automated environment. This work should commence as soon as possible and be integrated into work on technological and regulatory change.

11. As the Productivity Commission has noted:

*With rapid advances in computing power, connectivity, mobility, and data storage capacity over the last few decades, digital technologies offer opportunities for higher productivity growth and improvements in living standards. But they also pose risks of higher inequality and dislocation of labour and capital.<sup>3</sup>*

12. There is also the issue of trust in the new technology; social acceptance will affect the roll out of autonomous vehicles. The Productivity Commission has said:

*(T)he uptake of technology takes time and is strongly dependent on changes in consumer preferences and their attitudes to technology. The wider community is more likely to 'trust' and adopt technology when the consequence of something going wrong is relatively small. For example, it is one thing for a credit assessment to go awry, but quite another for a self-driving vehicle to make an error (MHFI 2014). Even when machines are able to perform risky tasks more reliably than humans, trust needs to be earned and new ways of thinking about accountability and liability need to be developed — both of which take time.<sup>4</sup>*

13. NatRoad submits that sensible interventions in the market and Government action to correct any identified market failures should be the policy perspective brought to bear in the context of the introduction of more autonomous vehicles. Those interventions should exhibit the following characteristics:

- be consistently adopted by all states and territories;
- be principles-based and technology-neutral;
- support road safety outcomes;
- support innovation;
- be updated and kept relevant as the capability of automated vehicles develops;
- have regard to all levels of driving automation;
- assist road transport agencies when considering the consequences of granting exemptions from traffic laws; and

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<sup>3</sup> Productivity Commission *Digital Disruption: What Governments Need to Do* June 2016  
<http://www.pc.gov.au/research/completed/digital-disruption/digital-disruption-research-paper.pdf> at p1

<sup>4</sup> Id at p73

- not affect current rules for drivers of non-automated vehicles.

### Chain of Responsibility

14. In its submission the TWU indicates its view that “the intermediaries, platforms and economic employers at the top of the supply chains – must be made accountable and cannot be allowed to escape providing fair and safe conditions for workers.”<sup>5</sup> Yet the TWU does not indicate the very positive steps that governments have taken to increase responsibility for heavy vehicle safety along the supply chain and which will facilitate the accountability that the TWU urges. Amendments to the Heavy Vehicle National Law (HVNL) imposing new obligations along the chain were passed in the Queensland Parliament in December 2016 and are expected to commence in mid-2018 in all jurisdictions that have adopted the HVNL.
15. The changes involve a new chapter of regulation directed at chain of responsibility parties and the principle of shared responsibility. They include a proactive primary duty on chain of responsibility parties to ensure the safety of transport activities.<sup>6</sup>
16. This primary duty supplements the current provisions where parties are only liable once breaches are detected. The new provisions also include a ‘due diligence’ obligation on executive officers of entities with a primary duty and prohibit requests and contracts that would cause a driver or chain of responsibility party to breach fatigue requirements or speed limits.
17. The list of parties in the chain of responsibility remains the same. A **party in the chain of responsibility** for a heavy vehicle means:
  - If the vehicle’s driver is an employed driver – an employer of the driver
  - If the vehicle’s driver is a self-employed driver – a prime contractor for the driver
  - An operator of the vehicle
  - A scheduler of the vehicle
  - A consignor and consignee of any goods in the vehicle
  - A packer of any goods in the vehicle
  - A loading manager
  - A loader and unloader
18. A person may be a party in the chain in more than one way, e.g. they may have duties as the employer, the operator and the consignor of goods. More than one person can also have a duty for the same activity, e.g. loading a truck. Each person must discharge their duty to the extent of their capacity to influence and control that activity and the associated risks. Duties cannot be transferred to someone else.
19. The definition of a ‘party in the chain of responsibility’ under the HVNL limits the primary duties to specific persons and does not capture everyone who influences or controls the safety of transport activities in the supply chain. For example, there is currently debate about whether persons who prepare livestock for transport can be classified as a ‘packer’ under the definition; there is, separately, a need to vest responsibility in those persons who promote “platforms” for the undertaking of work but who protect themselves from any legal

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<sup>5</sup> Above note 1 at p3

<sup>6</sup> A detailed explanation of the laws appears here: <https://www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility/about-the-chain-of-responsibility>

responsibilities related to the tasks promoted. There should be further investigation into expanding parties in the chain of responsibility.

20. In contrast, the harmonised WHS laws cast a much wider net by applying duties to ‘persons conducting a business or undertaking’ and to ‘workers’, broadly defined.
21. Transport operators must comply with the duties under WHS law in addition to the HVNL. Ultimately, transport safety requirements could be rationalised by accommodating specific regulations for heavy vehicles under the WHS laws. This should improve compliance and efficiency where heavy vehicle safety is managed holistically as part of a safe system of work under the WHS laws. It will also ensure that contractors and employees are treated in the same manner when safety obligations are considered.

### **Industrial Relations Considerations**

22. ARTIO in its submission suggests that there is a failure in the workplace relations system which requires the creation of the class of worker known as a dependent contractor. This solution is proposed for workers who “earn their living by providing regular services through a technological platform on a regular basis – examples include Air-tasker, Uber, Deliveroo and related operations.”<sup>7</sup>
23. For the heavy vehicle industry, the issue is one of placing responsibility in intermediaries that are able to have influence or control in the supply chain, as discussed earlier. They must be recognised as being part of the chain of responsibility.
24. More broadly, the distinction between an employment relationship and an independent contractual relationship should be strengthened not supplanted by the amorphous notion of a dependent contractor relationship. Economic vulnerability, the key underlying principle of the flawed notion of dependent contracting, is not a concept that should underpin the existence of a legal relationship.
25. The idea of dependency based on economic vulnerability purportedly has relevance where there is a contractor who works only for one client, but exclusivity and vulnerability are not one and the same. To determine whether the relationship is one of dependency, the test of whether the worker is in the category of employee or contractor must still be applied. The courts in Canada where the category of dependent contractor has been recognised apply a highly discretionary test.<sup>8</sup> The elements that are applied do not have a sufficiently clear application to become part of Australian law. Further, which protections would be extended from the laws that currently govern employment are unclear. If they are to be equated with employees should the full range of protections be available? Concepts which blur the distinction between employee and independent contractor should be rejected and the tests associated with the distinction strengthened. The protections that are currently available to independent contractors are discussed below.
26. Further the TWU submission gives the impression that award wages and conditions are being undercut because of independent contracting arrangements: the allegation is that “many riders and ridesharing workers are made to become ‘independent contractors’ and as a result they are effectively paid below award rates and are denied basic benefits.”<sup>9</sup>

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<sup>7</sup> Above note 1 at p9

<sup>8</sup> See for example *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916

<sup>9</sup> Above note 1 at p3

27. This statement ignores the protections currently available to independent contractors and to workers under the *Fair Work Act, 2009 (Cth)* (the FWA) and the *Independent Contractors Act, 2006 (Cth)* (the ICA).

28. Sections 357, 358 and 359 of the FWA provide protections against “being made” to become an independent contractor. As the Productivity Commission has noted:

*Currently, there are three sections in the FW Act that are aimed at curbing the incentives for employers to instigate sham arrangements. These provisions prohibit an employer from:*

- *misrepresenting an employment relationship or a proposed employment arrangement as an independent contracting arrangement (s. 357)*
- *dismissing or threatening to dismiss an employee for the purpose of engaging them as an independent contractor (s. 358)*
- *making a knowingly false statement in order to persuade or influence an employee to become an independent contractor (s. 359).*<sup>10</sup>

29. The Commonwealth also has in place legislation which protects independent contractors. Indeed, the signal case showing the effectiveness of the ICA arose in the context of a transport industry matter: *Keldote Pty Ltd & Ors v Riteway Transport Pty Ltd*<sup>11</sup>. That decision made it clear that one of the powers vested in the court by the ICA was to avoid the undercutting of wages:

*Section 15(1)(c), like its predecessors, was partly designed to prevent the undercutting of wages.*<sup>12</sup>

30. NatRoad supports the application of commercial law to owner driver arrangements rather than an extension of labour law based regulation.

31. Owner drivers are small business operators, not employees who require the paternalistic protection of labour laws. They want to be treated as independent operators of commercial businesses and be free to negotiate their own terms of trade. They hold fiercely to that outlook. Owner-drivers should be regulated by commercial laws rather than by laws which are built on an industrial relations perspective.

32. In its submission the TWU specifically supports the system in New South Wales that is labelled as being designed to mitigate the vulnerabilities of owner-drivers. NatRoad does not support the legislation.

33. Since 1984, a little known and largely under-utilised industrial determination has prescribed rates of pay for certain owner-drivers working in restricted geographical areas of NSW (primarily metropolitan Sydney and short journeys of less than 50 kilometres elsewhere in NSW).

34. In December 2013, the TWU applied to the Industrial Relations Commission of NSW (the Commission) to increase the rates payable to owner-drivers operating in restricted parts of NSW, and also to expand the geographical and industry coverage of a legal determination known as the General Carriers Contract Determination (the GCCD). As stated, the GCCD has

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<sup>10</sup> Productivity Commission *Workplace Relations Framework Vol 2* (2015) at p813

<sup>11</sup> [2008] FMCA 1167 (22 August 2008)

<sup>12</sup> Id at para 124

operated in limited parts of NSW since 1984, covering all freight tasks undertaken in metropolitan Sydney (and also elsewhere in NSW if the journey is less than 50 kilometres).

35. Among other things, the GCCD prescribes rates of pay based on variables such as vehicle configuration, age, running costs, vehicle maintenance, and office expenses. Just like the now abolished RSRT (see below), the GCCD sets the rates independent owner-drivers must charge if they are operating in certain parts of NSW. This prescriptive approach undermines the independence and competitiveness of business. Business owners should have the right to negotiate the best competitive rates for their business, and they want control over how business is done. That is why they elect to become business owners rather than remain employees – and that is why their business should be regulated by commercial law rather than labour law.
36. From 29 April 2016, the non-rates component of the GCCD affects most owner-drivers ('contract carriers') and principal contractors throughout NSW. The core obligations of owner-drivers under the GCCD are that they must be: medically fit to work, work safely and professionally, exercise due care and skill, comply with employment, road transport and fatigue management laws, be responsible for all running costs, and have valid licences and permits. These are all matters elsewhere prescribed by the law. In turn, principal contractors have obligations to repaint vehicles, promote the GCCD to its owner-drivers and pay according to the GCCD; they also have the right to specify the age and class of a vehicle prior to engaging an owner-driver, may paint and/sign-write the owner-driver's vehicle after 3 month's continuous cartage work, and may require owner-drivers to wear a company uniform.
37. In relation to the setting of rates of pay, on 16 March 2017, the Commission approved a 'so-called' modernised version of the GCCD. Rates under the old determination had not been adjusted since December 2014 but will now gradually be increased over several years, starting in January 2019. Coverage was also expanded to cover specialized industry segments such as furniture removals and refrigerated and pathology transport that were previously unregulated by the GCCD.
38. The most significant change for owner-drivers though, is the introduction of a new freight corridor for single trips commencing in Sydney and finishing close to either Newcastle or Wollongong. This is a significant expansion of the coverage of the GCCD and it creates duplication, confusion and control of freight rates for a single sector of the freight industry – the owner-driver.
39. There is no necessity for this industrial instrument. Its utility is unproven and despite being in existence for more than three decades, it has essentially operated in the breach. Its application is complex and confusing and it undermines productivity by fostering misunderstanding among transport operators within and outside NSW. The TWU is wrong in commending its operation.
40. The TWU also favourably mentions the now repealed Australian safe rates legislative model. As is evident from the prior comments about the GCCD, NatRoad was active in seeking the abolition of the Road Safety Remuneration System (RSRT) in 2016.
41. Relevant to this inquiry is the flawed way the RSRT system prejudiced independent contractors. One of the fundamental flaws in the RSRT model of regulation was that the relevant payments order applied a minimum freight rate to owner drivers which worked in a discriminatory manner. As a result, owner drivers found themselves unable to compete with

the rates offered by their competitors in the marketplace, including those operating under employer/employee arrangements.

42. The establishment of the RSRT in 2012 (and the Fair Work Ombudsman's related education and compliance function),<sup>13</sup> was intended to promote safety in the road transport industry.<sup>14</sup> However, this reform was based on a tenuous link between setting mandatory minimum freight rates and improving road safety. Unsurprisingly, the intended goal was not achieved.
43. In fact, the very opposite occurred because the complex and controversial workings of the RSRT diverted owner-driver and other member attention away from the developments in the HVNL - the primary instrument governing road regulation and safety and the legislative scheme under which the chain of responsibility reforms discussed earlier are being introduced.
44. Two reviews of the Road Safety Remuneration system (the System) found that the **costs of the system far outweighed its benefits**.
45. A review undertaken by PricewaterhouseCoopers Australia (PWC Report)<sup>15</sup> was certified as being informed by a process and analysis equivalent to a Regulation Impact Statement (RIS) as set out in the Australian Government Guide to Regulation and the corresponding guidance note.<sup>16</sup> It therefore has particular cogency.
46. The PWC Report reinforced the criticism found in an earlier report by Jaguar Consulting, dated 16 April 2014 but released only in 2016.<sup>17</sup> The PWC conclusion was that abolition of the System would result in significant net benefit to the economy and community at large. PWC found that by 2027, the costs of the RSRT's activities would have been more than \$2 billion greater than its benefits. The PWC report also found that the administration costs for small business associated with the RSRT were \$56 million a year for each order, or approximately \$2,000 per business impacted.<sup>18</sup>
47. The RSRT's Orders could not affect road safety. The Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (the Payments Order) was issued by the RSRT on 18 December 2015, and 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. The Payments Order contained schedules setting out minimum rates hirers were required to pay contractors depending on factors such as the driver's transport worker grade (based on the type of vehicle being driven) and the class of vehicle.
48. It is plain from the PWC Report that the Payments Order could not materially affect road safety as indicated by the following extract [emphasis added]:

*According to our analysis, the **costs of the Road Transport Order outnumber the benefits, by \$3 in cost to every \$1 of benefits. Our best case scenario analysis shows the Road Transport Order would have to decrease the impact of road accidents in the economy by over 20 per cent for the benefits to outweigh the costs. In 2013, the driver was only at fault (due to***

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<sup>13</sup> *Road Safety Remuneration Act 2012 (Cth)*

<sup>14</sup> *Ibid* section 3

<sup>15</sup> [https://docs.employment.gov.au/system/files/doc/other/2016\\_review\\_of\\_the\\_rsrs.pdf](https://docs.employment.gov.au/system/files/doc/other/2016_review_of_the_rsrs.pdf)

<sup>16</sup> Noted in the Explanatory Memorandum for the Road Safety Remuneration Repeal Bill 2016 [http://www.austlii.edu.au/au/legis/cth/bill\\_em/rsrb2016327/memo\\_0.html](http://www.austlii.edu.au/au/legis/cth/bill_em/rsrb2016327/memo_0.html)

<sup>17</sup> [https://docs.employment.gov.au/system/files/doc/other/2014\\_review\\_of\\_the\\_rsrs.pdf](https://docs.employment.gov.au/system/files/doc/other/2014_review_of_the_rsrs.pdf)

<sup>18</sup> Above note 10 at 46

**speed, fatigue etc.) in 18 per cent of heavy vehicle fatalities.** Since the Road Transport Order operates to control fatigue and speed, but **cannot impact the behaviour of small vehicle drivers, pedestrians, road conditions and other factors**, it is highly unlikely a 20 per cent reduction can be realised, if these factors where the driver is at fault only amounted to 18 per cent of fatal crashes in 2013. Furthermore, we have used **conservative estimates in our analysis leading to the likely conclusion that an appropriately enforced Order would impose far greater costs on industry than safety benefits.**<sup>19</sup>

49. The thrust of the PWC Report is quite clear: remuneration of owner drivers cannot be expected to in any way affect the behaviour of other motorists who share the road and the link between regulating freight rates and increasing road safety is, in any event, far from proven. The PWC Report found [emphasis added]:

*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.***<sup>20</sup>

50. NatRoad is confident that the changes to the HVNL relating to chain or responsibility will have a positive effect on safety in the road freight industry. That said, it should be noted that the figure of 18% quoted in the extract at paragraph 48 above, is indicative of the low level of fault attributable to the drivers of heavy vehicles.
51. Critical factors that affect an improvement in road safety include improvements in road conditions and design, greater general public awareness about interacting with heavy vehicles, and more investment in enforcement against rogue operators. "Safe rates" is a misnomer which fallaciously links road safety with rates of pay.
52. The report issued by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO)<sup>21</sup> following its far-reaching inquiry into the impact of the RSRT on small business, found that the operation of the RSRT Payment Orders had an extremely detrimental effect on owner/drivers.
53. The report found that the tragic effects of the operation of the RSRT's orders included being a trigger for suicide. Two key findings by ASBFEO which highlight the fundamentally flawed role of the RSRT are:
- *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.*

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<sup>19</sup> Ibid

<sup>20</sup> Above note 16 at iii

<sup>21</sup> *Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses*

<http://www.asbfeo.gov.au/sites/default/files/documents/RSRT%20Payments%20Order%20Inquiry%20Report%20-%20FINAL.pdf>

- *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.*<sup>22</sup>

54. Mandating rates of payment is not the way to achieve protections for workers or for independent contractors now or, pertinent to the Committee's terms of reference, into the future. Not only is safety not enhanced by such regulation, but as the ASBFEO made clear, market distortions are created [emphasis added]:

*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.***<sup>23</sup>

## Conclusion

55. In the transition to higher levels of automation, heavy vehicle drivers will need to maintain their driving skills. It will be important, particularly at conditional automation, that the driver remains alert and ready to take over the dynamic driving task. The lead-in period for the introduction of fully autonomous heavy vehicles is likely to be far greater than is predicted by some commentators and is heavily dependent on infrastructure improvements.
56. NatRoad considers that enhanced legal responsibility along the supply chain for safety outcomes is a reform that will be central to enhancing the protection of workers. The expansion of those who are a party in the supply chain should be investigated.
57. NatRoad asks the Committee to firmly reject the notion that introducing a category of dependent contractor into the law would be a useful reform.
58. NatRoad asks the Committee to firmly reject any arguments for the re-introduction of "safe rates" into the transport industry and to reject the utility of the scheme established via the GCCD.

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<sup>22</sup> Ibid page 4

<sup>23</sup> Id at 29