



Australian Government

**Australian Government Response to the
Australian Small Business
and Family Enterprise
Ombudsman inquiry
report into the effect of the
Road Safety Remuneration
Tribunal's Payments
Order on Australian
small businesses**

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The document must be attributed as the *Australian Government Response to the Australian Small Business and Family Enterprise Ombudsman inquiry report into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses*.

Foreword



On 8 May 2016, the Australian Government requested that the Australian Small Business and Family Enterprise Ombudsman (the Ombudsman), Ms Kate Carnell AO, conduct an inquiry into the effect of the Road Safety Remuneration Tribunal's (the Tribunal) Payments Order on Australian small businesses.

Despite the abolition of the Tribunal and its orders on 21 April 2016, the Government remained concerned that owner driver small businesses had suffered, and continued to suffer, financial and personal hardship as a result of the mandatory rates of pay in the Payments Order.

The Ombudsman's report, which was publicly released on 14 September 2016, confirms the Government's concerns and that the decision to urgently abolish the Tribunal was necessary.

The Ombudsman found that the Payments Order was discriminatory and anti-competitive towards owner drivers; and caused significant uncertainty and anxiety in the road transport industry. The individual impact of the Payments Order on owner drivers was also significant, with the Ombudsman finding that it caused financial hardship and stress, placing pressure on family relationships and people's mental and physical health.

Further supporting the Government's decision to abolish the Tribunal, the Ombudsman also found that safety in the road transport industry should not be addressed by setting mandatory rates of pay.

The Government supports in full or in principle many of the Ombudsman's 14 recommendations. The Government has already made a number of commitments that are consistent with these recommendations, including that it will:

- never re-establish the Tribunal, or a similar body that sets mandatory rates of pay for owner drivers and small transport businesses;
- provide a \$4 million increase per year in funding to the National Heavy Vehicle Regulator to deliver tangible improvements in road safety; and
- deliver significant improvements in road safety infrastructure.

The Government stood up for owner drivers by abolishing the Tribunal and we will continue to defend hard working small business owners into the future.

Senator the Hon Michaelia Cash

Minister for Employment

Introduction

The Road Safety Remuneration Tribunal (the Tribunal) was established in July 2012 by the former Labor Government.

The Tribunal issued two orders during its nearly four-year existence and did not issue a remuneration based order until 18 December 2015, with a start date of 4 April 2016. The *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* (Payments Order), among other things, set mandatory minimum rates of pay on a per-kilometre and hourly basis for contractor (owner) drivers operating in supermarket distribution and long distance operations. The Payments Order was discriminatory in its application to owner drivers and small transport operators and generated a high level of confusion throughout the industry over its coverage and impact.

The Australian Government received hundreds of letters and phone calls from owner drivers and small business owners who were worried about the impact of the Payments Order. They said large companies were cancelling their contracts due to the uncertainty and told of the resulting struggle to make repayments on truck and home mortgages. This confusion and anxiety was made worse when they tried and failed to get answers from the Tribunal and the Fair Work Ombudsman about the practical implications of the Payments Order.

After concerted attempts by members of the industry to delay the commencement of the Payments Order, it took effect on 7 April 2016. In response to the widespread concerns, the Government introduced legislation to abolish the Road Safety Remuneration System, including the Tribunal. The legislation passed the Parliament on 18 April 2016 and the Tribunal and all orders it made ceased to operate on 21 April 2016. After the abolition, concerns remained about the detrimental impact the Payments Order had had on owner drivers and small businesses. Therefore, on 8 May 2016, Senator the Hon Michaelia Cash, Minister for Employment, and the Hon Kelly O'Dwyer MP, then Minister for Small Business, announced that the Government would request the Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) to conduct an inquiry into the effect of the Tribunal's Payments Order on Australian small businesses.

To inform its inquiry, the Ombudsman sourced input from the road transport industry, particularly owner drivers. This occurred through a roundtable of key

stakeholders; a series of public forums, held mainly in regional areas; an anonymous survey; and written and oral submissions. The Government tabled the Ombudsman's report in the Parliament on 14 September 2016.

In its report, the Ombudsman made 13 findings and 14 recommendations. The Government notes the Ombudsman's findings and supports 11 of the recommendations in full or in principle. The Government notes the remaining three recommendations.

Australian Government Response

The Government notes the Ombudsman's findings and outlines a response to the recommendations below.

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.

The Government **supports in principle** this recommendation.

The Government recognises that regulation can have a disproportionate impact on small businesses, which can increase the stress, costs and demands on individual business owners. This can add to other factors and negatively impact on an individual's mental health.

The Government requires regulation impact analysis of all legislation and also encourages departments to separately consider the regulatory impact on small businesses when developing regulation. For example, the 2014 Guide to Regulation and the Office of Best Practice Regulation's 2016 Small Business Guidance Note set out approaches to minimise the burden of regulation on small businesses, including by tailoring regulatory regimes and compliance obligations proportionately to the size of the affected businesses.

Policy makers are encouraged to consider alternatives to regulation, such as:

- flexible compliance options;
- differentiated regulatory requirements, and ways of administering them, based on turnover or number of employees;
- simpler, lighter touch compliance options for small businesses or risk-based enforcement;
- principles-based approaches augmented with minimum compliance standards; or
- use of existing data sources and coordination among regulators to minimise reporting requirements.

By adopting these tailored approaches, the Government attempts to reduce the potential negative impact any regulation would have on an individual's mental

health. Safe Work Australia is leading a collaborative Commonwealth project to assist government officials who are involved in policy development to take steps at all stages in the policy cycle to help eliminate or minimise work health and safety risks that might arise in the delivery of a government policy or program. Work health and safety risks include risks to workers' psychological health.

The Government currently provides free and confidential financial counselling services to small businesses and others in personal financial difficulty. These services can be accessed by calling the national Financial Counselling Helpline on 1800 007 007.

See also Recommendation 6 for the Government's response regarding the impact of regulation on small 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 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.

The Government **supports** this recommendation.

In light of the detrimental impact the Payments Order had on owner drivers, the Government is concerned by the Transport Workers' Union's application in the NSW Industrial Relations Commission (NSWIRC) to vary the General Carriers Contract Determination (the Contract Determination). The variation seeks to impose mandatory hourly and kilometre rates of pay on owner drivers across NSW. The Commonwealth Government supports the NSW Government's decision to become a party to the proceedings.

The Government is committed to never re-establishing the Road Safety Remuneration Tribunal, or a similar body that sets mandatory rates of pay for owner drivers and small transport businesses.

The Government will continue to monitor the proceedings in NSW, as well as a recently announced Victorian Government review into the *Owner Drivers and Forestry Contractors Act 2005* (Vic) and associated regulations.

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.

The Government **notes** this recommendation.

Responsibility for tribunals is spread across Commonwealth, state and territory governments. Commonwealth tribunals can specialise in different functions including resolving disputes, making orders and determinations, and reviewing administrative decisions in relation to small businesses. Generally, they aim to be less adversarial and technical, and provide informal, low cost and timely avenues for resolving disputes, where possible. This can include active case management, alternative dispute resolution, and assisting parties who are self-represented.

As noted in Recommendation 2, the Government is committed to never re-establishing the Road Safety Remuneration Tribunal, or a similar body that sets mandatory rates of pay for owner drivers and small transport businesses.

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.

The Government **supports** this recommendation, as outlined in Recommendation 6 below.

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.

The Government **supports** this recommendation, as outlined in Recommendation 6 below.

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.

Recommendations 4, 5, and 6 of the inquiry report are concerned with the impact of regulation on small business. The Government **supports** these recommendations.

The Government agrees that the impact of regulation on small business should be a significant consideration for governments, regulators and policy makers. The impacts, concerns and views of small businesses should be adequately considered for any regulation.

The Government agrees small business should be appropriately consulted and supported so that regulation can be implemented successfully. Engaging with small business before a regulation is designed provides an important opportunity to gain on the ground insight into the workings of a regulation and its impacts on small businesses. The Government has adopted a set of Small Business

Engagement Principles to guide agencies in how they should consult and engage with small business:

Principle 1 – Australian Government agencies will actively identify ways to eliminate unnecessary red tape in all policies, programmes and initiatives that affect small business.

Principle 2 – Australian Government agencies will consult and collaborate with small business early and throughout the policymaking and programme design process.

Principle 3 – Australian Government agencies will make information targeted to small business available through the Government’s primary small business communication channels.

Principle 4 – Australian Government agencies will strive to adopt whole-of-government small business solutions to simplify the way business interacts with Government online.

Principle 5 – Australian Government agencies will communicate with small business in clear, simple language and present information in an accessible format.

In addition, the Government has developed a Regulator Performance Framework, to encourage regulators to minimise their impact on those they regulate. The first assessment period concluded on 1 July 2016 and the initial reports were finalised in late 2016.

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.

The Government **supports in principle** this recommendation.

The Government agrees small business should be appropriately informed and supported so that regulation can be implemented successfully. That is why the Government, in 2013, requested that the Fair Work Ombudsman set up a Small

Business Helpline to provide small businesses with prioritised and tailored advice on workplace relations issues. One of the important roles of the Fair Work Ombudsman is to educate and assist small businesses to comply with Australia's workplace relations laws.

While there may be individual cases where compensation relating to the introduction of new regulation is warranted, the Government does not accept a general principle on compensation for small business. The Ombudsman's inquiry report also separately notes the difficulty of providing compensation in relation to the Payments Order (Finding 10).

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.

The Government **supports** this recommendation.

The Government acknowledges that this is a matter for industry associations to consider. The Government considers the use of any fatality for political purposes abhorrent and encourages all parties to carefully consider the facts of each accident when reporting or commenting on them.

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.

The Government **supports in principle** this recommendation.

The Government acknowledges the Ombudsman's finding that the majority of multi-vehicle accidents involving trucks are not the fault of the truck driver. This

also reflects the conclusion of two independent reviews conducted for the Department of Employment into the operation of the Road Safety Remuneration System.

The Transport and Infrastructure Minister, the Hon Darren Chester MP, in partnership with state and territory road safety ministers, is currently leading work to address a number of road safety issues, including heavy vehicle safety and community awareness issues. This work, which commenced with a meeting of transport ministers in November 2016, will identify effective priority measures for governments to pursue, under the National Road Safety Strategy 2011-2020.

In 2016-17, the Government is supporting measures to develop smarter roadside compliance systems, more flexible codes of practice arrangements, and education materials to help the road transport industry better understand their safety obligations. The Government has redirected the nearly \$4 million per year saved from abolishing the Road Safety Remuneration System to the National Heavy Vehicle Regulator to implement these measures. Consultation on heavy vehicle safety initiatives for future years has also commenced.

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.

The Government **notes** this recommendation.

The Government is committed to ensuring road transport drivers operate at the competency levels expected. This is why Austroads (the peak organisation of Australasian road transport and traffic agencies) has been tasked with reviewing the National Heavy Vehicle Driver Competency Framework. This review will work to ensure that Australia's heavy vehicle fleet operators are sufficiently skilled to meet the requirements of the 21st century freight task.

The Government is also committed to the Australian Apprenticeships system which is a central pipeline for delivering skilled workers into the Australian economy, including in trucking occupations. As at 31 March 2016, there were around 3,300 apprentices and trainees in-training as truck drivers.

Through the Australian Apprenticeships Incentive Program, the Government provides significant assistance to employers of Australian apprentices in trucking occupations. Employers of new workers may be eligible for commencement and completion payments of up to \$4,000 in total. Employers may also be eligible for other incentives.

The Government is also investing in the Australian Apprenticeship Support Network to provide integrated support to apprentices and employers from pre-commencement through to completion. The Network assists employers to recruit, train and retain apprentices and help apprentices succeed in their training. The Government has committed up to \$189.1 million in 2016-17 to support the Network.

On 17 November 2016, the Prime Minister announced the Prime Minister's Veterans' Employment Program. The program aims to raise awareness of the skills and abilities that veterans can bring to the civilian workforce. Under the program, businesses will be encouraged to partner with ex-service organisations on projects to promote employment of veterans. The Australian Trucking Association has welcomed the program as a way to assist ex-servicemen and women into employment and alleviate driver shortages in the road transport industry.

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.

The Government supports this recommendation.

The Government acknowledges this recommendation is directed at the Ombudsman, an independent body that can initiate its own inquiries. To this end, the Ombudsman commenced a self-initiated inquiry into payment times and practices on 16 November 2016, with the final report scheduled to be provided to Government in March 2017.

The Government recognises that cash flow constraint is routinely identified by small businesses as a key concern. In this regard, adverse or unclear payment

terms between businesses can have a negative impact on competitiveness, add to the cost of doing business, and can increase the likelihood of a payment dispute.

Given these concerns, the Government supports the Ombudsman undertaking any inquiry of this nature.

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).

The Government **notes** this recommendation.

The Government considers that the introduction of a new Code of Conduct should only be explored after industry-led solutions have been attempted and have failed to adequately address the problem. There is a high evidentiary hurdle that must be met before considering a prescribed code.

The Government will only prescribe codes in very limited circumstances – when it is absolutely necessary for supporting the efficient operation of markets or the welfare of consumers. Government intervention will only be considered where there is a demonstrable problem affecting industry participants or consumers which the market cannot or will not overcome, and where such intervention is likely to result in a net public benefit.

As a general principle, the Government considers that markets should be free to operate without excessive regulation, particularly in relation to small business. This allows competitive markets to deliver greater choice and benefits to consumers.

Recommendation 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.

The Government **supports** this recommendation.

The Australian Competition and Consumer Commission (ACCC) has been actively engaging with small businesses to inform them about the changes to the law that extend unfair contract terms protections to business-to-business (B2B UCT) contracts.

The ACCC has used a range of tailored educational approaches to reach small business audiences, including interactive webinars, short animated videos, social media messaging, online guidance material on the ACCC's website, and articles in industry magazines. The ACCC has also been active in messaging via the ACCC's subscription information networks (7500+ subscribers); presenting to stakeholders including law firms and industry groups; and disseminating information through the ACCC's Small Business and Franchising Consultative Committee (members comprise of industry advocates and representatives, including independent contractor groups).

In addition, the ACCC is also working with businesses to promote voluntary compliance with the law by conducting a review of standard form contracts offered to small businesses across a range of industries. On 10 November 2016, the ACCC released a report outlining its industry engagement, potentially unfair terms identified, and the willingness of traders to make changes to their contracts.

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.

The Government **supports** this recommendation.

The Government appreciates the role of industry associations in representing the views of owner drivers and small businesses generally and in informing the development of policies that affect industry sectors.