



Department of
Transport

Review of the *Owner-Driver (Contracts and Disputes) Act 2007* Report



Report of the review of the *Owner-Drivers (Contracts and Disputes) Act 2007*

Prepared by the Department of Transport

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Executive Summary

In 2008 the *Owner-Driver (Contracts and Disputes) Act 2007*, (the Act) became operational in Western Australia (WA). This Act regulates the relationship between owner-drivers within the road freight transport industry and the parties that hire them to transport goods (hirers). It also promotes a safe and sustainable road transport industry by setting guideline rates and cost schedules for owner-driver businesses.

Section 59 of the Act requires that the Act be reviewed and its impact evaluated after five years of operation as well as the operation and effectiveness of the Road Freight Transport Industry Council (the Council) and Road Freight Transport Industry Tribunal (the Tribunal), for which it provides.

Review methodology

As the agency responsible for leading the review, the Department of Transport (DoT) conducted research into similar legislation and arrangements in other jurisdictions and held preliminary consultations with relevant persons and organisations. It also developed a discussion paper (including a feedback form) and online survey to seek detailed stakeholder comment. DoT received five written submissions providing comment on the issues canvassed and 12 responses to the online survey.

Review findings

In general terms, the review found that the regime established by the Act represents a relatively effective and low-cost mechanism to help establish fair and equitable payment rates for owner-drivers and to assist in the resolution of disputes that arise between owner-drivers and hirers. Conversely, there is little evidence to demonstrate at this point in time a need for any change to the existing provisions of the Act.

Reasons for retaining the Act in its current form include the following:

- Heavy vehicle crashes are not increasing at a time when numbers of heavy vehicles and road freight use in Western Australia is growing.
- The Tribunal had a peak rate of activity in 2010. The rate of use of the Tribunal has declined significantly since then suggesting that the Act has had an impact on establishing safe rates for owner-drivers.
- For owner-drivers, the Tribunal represents a convenient and low-cost alternative to settling small commercial contract disputes which would normally be dealt with by the WA Magistrate's Court.
- The existing regulatory and administrative burden of the Act on both industry and government is low. The Department of Commerce (DoC) and the DoT consider the required level of expenditure appropriate to retain the current level of effectiveness.

- While lessening powers conveyed by the Act would weaken the positive outcomes experienced to date, any changes that strengthen these powers, such as the introduction of penalties in support of enforcement activities, would have uncertain consequences and be likely to substantially increase costs.
- National legislation relating to the remuneration of road freight transport drivers was passed in 2012 and is currently under review. Given the uncertainty of the outcomes of this review and the future of the legislation, it is not appropriate to initiate changes to the local Act in WA at this time.
- There is no evidence that the operation of the Act has created unintended or adverse impacts on the road freight transport industry such as distortion of market prices through institutional involvement of transport unions in contract negotiations between owner-drivers and hirers.

The Act

There is a lack of qualitative data to reliably indicate the impact of the Act on road safety outcomes or the long term viability of owner-drivers. However statistics do indicate that the number of truck crashes has not risen in the five years between 2008 and 2012, despite increasing numbers of heavy vehicles and road freight use during that period in Western Australia.

Other jurisdictions in Australia have introduced legislation which is broadly similar in principle and operation to WA's Act. In 2012, Commonwealth legislation established a National Road Safety Tribunal to govern remuneration-related matters in the road transport industry and it is currently unclear how this will impact on WA owner-drivers. The Federal Government is currently reviewing this legislation as part of its review of fair work laws. The future of this legislation and its established benefits are uncertain and will take some time to emerge.

Most respondents to the stakeholder consultation process believed the Act does positively contribute to boosting the safety and sustainability of the road transport industry and support its continuation, although some submissions suggested that compliance rates in some industry areas were low leading to potential for rate undercutting to occur.

Most respondents supported the continuation of the Act although many agreed that greater awareness of its provisions is required amongst some sections of the road transport industry.

Recommendation 1

It is recommended that

- the Act be retained in its current form
- the Department of Transport consider strategies for improving awareness of the Act within the WA road freight transport industry as well as the duties and obligations it imposes on hirers and owner-drivers
- the Department of Transport evaluate the outcome of the national review of the *Road Safety Remuneration Act 2012* (RSR Act) due to be completed in 2014 and any impact this may have on the operation of the WA Act

The Council

The review considered the effectiveness of the operation of the Council which provides advice to the Minister on owner-driver issues, including the development and review of a code of practice and guideline rates. It notes that the focus of the Council's work has shifted over the past five years from development to the review and updating of guideline rates. Terms of appointment for the last Council members expired at the end of 2012 and a Council has not been convened since that time.

Stakeholders were generally supportive of the work developed by the Council to date, in particular the online cost calculator and other tools to assist owner-drivers.

Some respondents, however, argued that its membership did not appropriately represent all interests in the owner-driver industry and that its work could more effectively be undertaken by a government agency with reference to industry stakeholders.

Chairing of the Council by a government staff member reflects the changing focus of the Council's work and ensures a high level of independence from the particular interests of owner-drivers, hirers and other parties within the road transport industry. It also eliminates the need to provide a specific remuneration package to a non-government Council member and boosts the resources available to the Council to carry out its activities.

These issues could be addressed by Ministerial discretion in seeking nominations and appointing members to the Council. This discretion is provided under existing provisions within the Act.

Recommendation 2

It is recommended that

- the Council be retained as established under Part 3 of the Act to meet when and if necessary
- the Council be chaired by a senior executive from the Department of Transport
- the Minister for Transport ensures that, through the nomination and appointment process, Council membership appropriately reflects the interests of regional and single-vehicle owner-driver businesses

The Tribunal

The review considered the effectiveness of the operations of the Tribunal which was created to provide a relatively informal, quick and low cost mechanism to resolve disputes arising between owner-drivers.

Since its inception in 2008 more than 110 disputes have been referred to the Tribunal and the majority of these were discontinued or dismissed before matters proceeded to hearing. Most cases related to owner-drivers seeking payments for services. DoC estimates that the Tribunal has been instrumental in the recovery of more than \$400,000 from hirers to be paid to owner-drivers.

Most stakeholders agreed that, despite some limitations, the Tribunal provided a credible, cost effective instrument for dispute resolution in the road transport industry and increased the likelihood of parties reaching agreement. The majority of respondents believed it contributed

to improving overall road safety and sustainability of owner-drivers, performed its work 'somewhat to reasonably well' and should be continued.

Recommendation 3

It is recommended that

- the Tribunal be retained as established under Part 9 of the Act

Conclusion

The overall benefits of the Act have been to improve the knowledge of owner-drivers in the operation of their businesses, to provide for reasonable business dealings between owner-drivers and hirers and to provide an avenue for enforceable dispute resolution. The legislation is cost effective and there is no apparent need to either strengthen or weaken the regulatory regime.

Introduction

Background

Owner-drivers have a key role to play in helping WA to meet its growing freight task. In Australia, there are about 231,900¹ truck drivers in the road transport industry, including an estimated 71,000 owner-drivers.

Industry sources estimate that owner-driver businesses transport about 70 per cent of road freight in Western Australia². Large freight and logistics firms employ the other 30 per cent of heavy vehicle drivers. By taking short-term contracts, owner-drivers provide a flexible service that enables hirers to meet peaks of demand and the needs of specialist freight transport markets.

However, owner-driver businesses may be characterised by low levels of earning, high rates of business failure, difficult working hours and conditions as well as a poor negotiating position when competing with other heavy vehicle drivers for work.

Prior to the introduction of the *Owner-Driver (Contracts and Disputes) Act 2007*, (the Act) specific concerns about owner-drivers and the road transport freight industry included:

- inequity in the bargaining positions of hirers and owner-drivers for negotiating contracts for freight transport services, with rates often being imposed by the hirers rather than negotiated;
- increasing and volatile fuel prices leading to raised levels of financial pressure on already marginal owner-drivers in the road freight industry, particularly long-distance operators; and
- road safety risks that result from payment of low and unsustainable rates to owner-drivers because of intense competition in the trucking industry. Drivers working for these rates were considered more likely to drive hours above safe levels, use stimulant drugs, inadequately maintain vehicles and have unsafe work schedules and loads.

The introduction of the Act established a legislative framework to regulate the relationship between parties that enter into contracts to transport goods in heavy vehicles and those that hire them to do so. It promotes a safe road freight transport industry by setting sustainable guideline rates for owner-drivers and cost schedules through a code of conduct.

The Act also established the Road Freight Transport Industry Council (the Council) to assist in the development of a safe and sustainable road freight industry and the Road Freight Transport Industry Tribunal (the Tribunal) which provides for dispute resolution between owner-drivers and hirers.

¹ Based on data provided on WA vehicle fleet September 2013 by Driver and Vehicle Services, Department of Transport
² *Road Safety Remuneration Bill 2012 Explanatory Memorandum*

Review of the Act

Section 59 of the Act requires the Minister for Transport to carry out a review of the operation and effectiveness of the Act five years after its commencement. This review is required to consider the effectiveness of the operations of the Council and Tribunal and the need for their functions to continue.

A review of the Act was initiated by the Minister for Transport in late 2013, the results of which are summarised in this report.

Review methodology

The review has considered the first five years of the Act's operation (1 August 2008 to 31 July 2013).

Guided by the Public Sector Commission's *Guidelines for the review of legislation* published in July 2013, the review focused on how the Act has impacted on owner-drivers working in the WA road transport industry and includes comparisons with owner-driver legislation in other jurisdictions.

Preliminary consultation was undertaken by the DoT with the following organisations/people:

- Transport Workers Union (TWU) of WA – Tim Dawson (TWU Organiser); Adam Dzieciol (TWU Legal/Industrial Officer)
- WA Road Transport Association (previously Transport Forum) – Ian King (Chief Executive)
- WA Industrial Relations Commission sitting as the Road Freight Transport Industry Tribunal (the Tribunal) – Commissioner S J Kenner
- Road Freight Transport Industry Council – Howard Croxon (previous Chair); Heather Jones (previous Deputy Chair and owner-driver); Ray Pratt (previous Chair)
- Department of Commerce - Joseph Lee (Director Compliance and Education)
- Department of Commerce, Labour Relations Division (WageLine)
- Small Business Development Corporation, Western Australia
- Main Roads Western Australian, Heavy Vehicle Operations
- Office of Road Safety, Western Australia
- Department of Training and Workforce Development, ApprentiCentre

On the basis of this initial consultation DoT developed a discussion paper and questionnaire (Appendix 1) inviting comment from people and organisations involved in the WA road freight industry supply chain on the operation and effectiveness of the Act, Council and Tribunal. This paper was released in November 2013 and included a written feedback form that could be submitted by email or post.

An online survey instrument was also made available on the Department's website which included specific questions about the effectiveness and operations of the Act.

A call for submissions to the review was advertised in the West Australian newspaper in addition to relevant heavy vehicle industry publications. These included *Owner-Driver* magazine and *The TWU Wheel*. The *Owner-Driver* magazine and *The TWU Wheel* also published articles encouraging their readers to participate in the review.

The formal consultation period closed on 31 January 2014. DoT received a total of 17 responses through the online survey (12 responses) and emailed submissions (5 responses).

The Department of Transport assessed the information provided to the review and concluded with the recommendations in this report.

The Act

Overview

The Act aims to promote a safer and more sustainable road freight industry by regulating the relationship between owner-drivers that enter into contracts to transport goods in heavy vehicles and those that hire them to do so.

The Act establishes a code of conduct (the code) which was developed after consultation with the Council and industry representatives. It includes:

- guideline rates;
- provisions regarding the ability of the owner-drivers to negotiate on a collective basis with principals;
- model contracts and contracts not in writing; and
- requirements as to how the parties are to interact.

Other matters covered by the Act, include issues relating to:

- unconscionable conduct;
- access to records;
- right of entry; and
- inspectors.

Cost of implementing the Act

Over the past five years, the cost of implementing the Act has included the funding of:

- initial awareness campaigns conducted in the first two years of its operation;
- development of guideline rates, model contracts and regulations;
- remuneration for certain Council members; and
- a full-time Senior Project Officer provided by DoT (this ceased in 2012).

Role of government agencies

The Department of Commerce (DoC) Wageline service provides information to owner-drivers about rates of pay, conditions of employment and workplace awards and agreements. It also receives complaints from both hirers and owner-drivers about contract disputes. DoC also engages industrial inspectors that investigate complaints about pay, hours of work and general work entitlements. While investigating complaints, industrial inspectors may provide basic information about rights and obligations to parties in the dispute and, where an applicant agrees and there is appropriate jurisdiction, an industrial inspector may refer a matter to the Tribunal.

The DoT provides assistance and resources to owner-drivers and hirers including the provision of an online cost calculator to assist owner-drivers in WA to calculate appropriate and safe

rates, as well as advice and information resources about some of the Act's other provisions. Until recently, DoT has employed a full-time Senior Project Officer to provide secretariat and project support to the Council.

A summary of DoT's budget for implementation of the Act is provided below.

Table 1: DoT budget associated with implementing the Act 2008-2013

Activity	2008-09	2009-10	2010-11	2011-12	2012-13
Awareness Campaign - Initial	\$100,000	-	-	-	
Awareness Campaign - Code of Conduct	\$100,000	\$65,000	-	-	
Guideline Rates, Model Contracts and Regulations	\$20,000	\$10,000	\$10,500	\$11,000	
Council Remuneration	\$8,000	\$4,000	\$4,200	\$4,300	
DPI/DoT Staff Resources	\$93,000*	\$96,000*	\$99,000*	\$117,300*	
Total	\$321,000	\$175,000	\$113,700	\$132,600	

*plus on-costs

The Department of Commerce is unable to identify specific costs associated with implementation of the Act because the cost of funding those activities cannot be disaggregated from its normal operating budget.

Owner-driver legislation in other jurisdictions

Several other Australian jurisdictions have laws in place to regulate the relationships between owner-drivers and hirers.

Victoria

Victoria's *Owner-Drivers and Forestry Contractors Act 2006* (Victorian Act) provides basic protections for small business owner-drivers, forestry contractors and haulage contractors and a framework for the effective resolution of commercial disputes between these contractors and their hirers, and vice versa.

The Victorian Act imposes requirements on hirers to provide information to owner-drivers in longer-term relationships (more than 30 days in any three-month period). It also:

- provides a framework for groups of owner-drivers to negotiate with their common hirer, and to appoint an agent to negotiate on their behalf;
- sets requirements for termination of longer term contracts;
- prohibits deductions by hirers (for example, for insurance) unless certain conditions are met; and
- makes unconscionable conduct by hirers and owner-drivers unlawful.

Like WA legislation, Victoria's Act does not contain any pecuniary penalties or other enforcement provisions.

NSW

NSW differs from the WA and Victorian legislation in the regulation of relationships between owner-drivers and hirers. Chapter 6 of the *Industrial Relations Act 1996* provides the NSW Industrial Relationships Commission with the power to make a contract determination in the transport industry that set minimum terms and conditions of engagements between principal contractors and owner-drivers.

Companies generally have set job rates, which are paid to drivers for each job performed and vary depending on the weight, distance travelled, and time required to perform that work. No matter what 'job rates' a principal contractor pays an owner-driver, it must be at least as much as the safety net amount prescribed by the applicable contract determination. Superannuation contributions are also set out in the applicable contract determination.

The NSW Act differs from the WA Act by including a provision for an industrial court to order a person to pay a pecuniary penalty of up to \$10,000 for breach of industrial instruments.

Commonwealth

In 2012, the Commonwealth introduced a *Road Safety Remuneration Act 2012* (RSR Act) to make provision in relation to remuneration-related matters to improve safety in the road transport industry. The RSR Act operates concurrently with state-based heavy vehicle owner-drivers legislation such as WA's Act. However, the RSR prevails to the extent of any inconsistency with state laws.

The Road Safety Remuneration Tribunal made its first Road Safety Remuneration Order (RSRO) on 17 December 2013. The RSRO became operational on 1 May 2014 and will expire on 30 April 2018. The RSRO sets out requirements regarding payment times, written contracts, drug and alcohol policies as well as other relevant matters for owner-drivers and hirers.

The policy objectives of the federal and Western Australian acts are broadly similar. Both seek to promote safety in the road freight transport industry by putting into place measures that reduce the financial incentive for owner-drivers to operate in ways that increase the risk of death and injuries on the road. Both acts also aim to improve fairness for owner-drivers by encouraging hirers to pay equitable rates, and both acts facilitate access to dispute resolution procedures relating to remuneration and related conditions for road freight drivers. The RSR Act has broader coverage and wider powers – such as providing for the making of road safety remuneration orders and collective agreements – than the WA Act.

However the RSR Act differs from WA legislation in that it includes compliance and enforcement powers that are lacking in the WA Act. Additionally, Section 50 of the RSR Act gives eligible courts the power to order a person to pay to the Commonwealth an appropriate pecuniary penalty for breaches under that Act. As the WA Act has no pecuniary penalties or other enforcement powers it relies on education and cooperative dispute resolution to achieve its policy objectives.

Given that the Commonwealth Act has been operating for a relatively short period, its impact on the operation of the WA Act is not yet clear. For example, it is not yet known to what extent WA owner-drivers and hirers may refer matters to the RSR Tribunal rather than WA's Tribunal. The RSR Tribunal has not yet heard any disputes involving WA-based drivers, hirers or other participants in the supply chain.

The Australian Government is currently reviewing the RSRT as part of its review of fair work laws. The review is due for completion in 2014, the outcomes of which are uncertain in terms of the extent of revision, effect and timing.

Issues for consideration

Ensuring the ongoing sustainability of the owner-driver industry is a key objective of the Act. In addition to protecting the livelihood of owner-drivers, a strong and healthy owner-driver industry provides an essential flexibility to support WA's freight task.

The following issues were highlighted through preliminary consultation with stakeholders for consideration and focus in the review, including the impact of the Act on:

- the commercial viability of the WA road freight industry;
- rates paid to owner-drivers and the sustainability of any changes to rates; and
- heavy vehicle road safety, in particular, truck crashes related to driver fatigue.

Impact of the Act

The impact of the Act on sustainability

The original intention of the Act was to improve owner-driver business sustainability. There is no readily available data on the proportion of owner-drivers that are operating profitably, or whether that has changed during the past five years. As such, it is not possible to determine to what extent the Act has impacted on the viability of owner-driver businesses in the WA road freight industry since 2008.

When WA's Parliament was debating the Act, it was suggested that its operation could distort market prices, leading to a reduction in the number of owner-drivers in the industry. Concern was expressed that the legislation might lead to institutionalised involvement of transport unions in contract negotiations between hirers and owner-drivers. It was feared that this could lead to some owner-drivers earning less money, which could in turn result in the disappearance of small operators in favour of large monopolistic operators. This does not appear to have occurred.

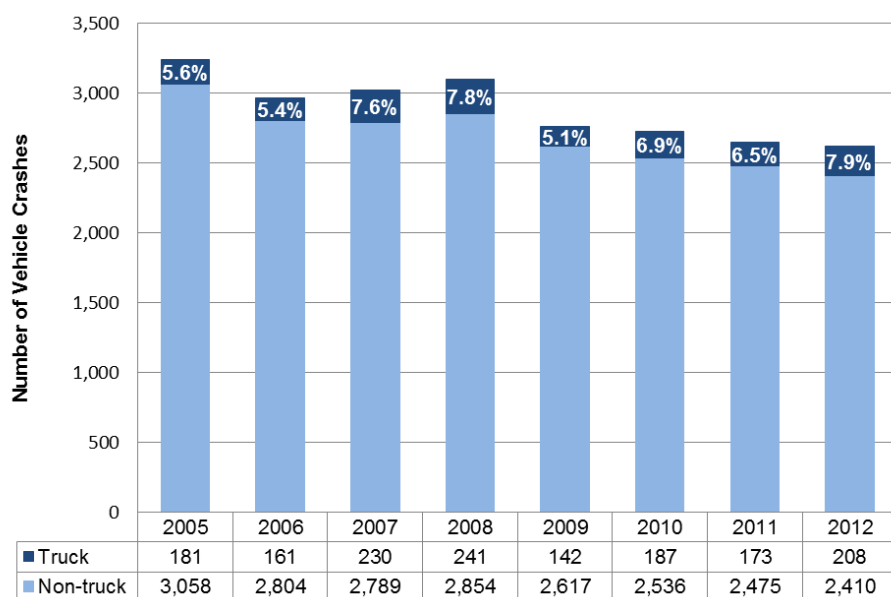
Industry stakeholders suggest many owner-drivers operate on low margins which may be partly because some do not have strong business management skills. They may have a limited knowledge of cost structures, accounting and contract management issues. These vulnerabilities can contribute to the commercial failure of owner-driver businesses and possibly increase the pressure on owner-drivers to engage in unsafe work practices.

The impact of the Act on safety

The road safety data for heavy vehicles collected in Western Australia does not identify whether deaths and serious injuries have involved an owner-driver or employee driver. The number of truck crashes has not evidently declined since 2008. However, the amount of truck use and road freight in Western Australia has continually increased throughout many years³. It can be argued, therefore, that the rate of crashes involving trucks per heavy vehicle kilometre travelled has improved in WA during the past five years.

3 Bureau of Infrastructure, Transport and Regional Economics (2010), Research Report 121: *Road freight estimates and forecasts in Australia: interstate, capital cities and rest of state*.

Figure 1: WA truck and non-truck crashes (2005-2012)



Heavy vehicle crash statistics⁴ indicate that there has been a decline of fatal crashes in WA by 25% in the period from 2008 to 2013, despite the number of heavy vehicles on WA roads and road freight use rising significantly during that period. However, those statistics do not disaggregate between vehicles driven by owner-drivers and other types of drivers.

Other impacts

Figures provided by the DoC show that the number of complaints regarding owner-driver matters dealt with by the DoC have dropped since the Act commenced.

Year	No of Complaints	Amount Recovered
09/10	36	\$227,701
10/11	20	\$58,697
11/12	7	\$62,598
12/13	4	\$33,166
13/14	3	\$8,400
Total	70	\$390,562

The number of direct queries to DoT to provide assistance, resources and advice to owner-drivers and hirers has also decreased from about 144 in 2010/11 to about 60 in 2012/13.

Summary of stakeholder submissions to the review

The majority of survey responses and emailed submissions expressed moderate to strong support for the role that the Act plays in ensuring safe and sustainable operation of the road freight transport industry in WA. Many respondents indicated that prior to the Act, there was little or no protection for owner-driver businesses and the balance of power was weighted too strongly in favour of hirer businesses. The Act was important for providing owner-drivers with a

⁴ Bureau of Infrastructure, Transport and Regional Economics (BITRE): *Fatal Heavy Vehicle Crashes Australian, April-June 2013*

legal framework to support them against the pressure applied to carry out unsafe and illegal practices.

Several of the responses supporting the Act also suggested that a greater awareness of the Act and its provisions would be of benefit to the owner-driver industry.

Five of the 17 respondents expressed strong concern that many of the Act's provisions, including the rates that are set and published annually by the Road Freight Council, are not enforceable by law. Some stakeholders also suggested that many hirers are paying less than the guideline rates and that widespread undercutting continues to occur. The Livestock and Rural Transport Association of Western Australia commented that it believed rates of compliance outside the more regulated areas of general freight were likely to be quite low.

One respondent suggested that the Act could only have a limited impact on the long term viability of owner-drivers within the road freight transport industry based on a belief that there was often a lack of formal agreements or contracts between owner-drivers and hirers and that owner-drivers inherently had no security of tenure.

The Livestock and Rural Transport Association of Western Australia in its submission to the review commented on the lack of criteria and evidence to measure the success of the legislation in terms of road safety and owner-driver viability outcomes. If the Act was to continue, it suggested, consideration should be given to establishing performance parameters for further assessment in the future.

Most respondents supported the continuation of the Act although some submissions or survey responses suggested that refinements should be made to ensure its provisions can be enforced. The Transport Workers Union indicated the incidence of industrial disruption in the road freight sector has reduced since the introduction of the Act and its cessation would undoubtedly lead to an increase in industrial disputes. A very small minority of respondents suggested that the Act should not continue on the basis that it had little impact on the long term viability of owner-drivers and that there was no link between remuneration rates and road safety outcomes.

Findings

The review notes the lack of qualitative data that can be used to reliably measure the impact of the Act on road safety and long term viability of owner-drivers. This is partly because heavy vehicle ownership and crash statistics do not separately identify owner-drivers from other drivers within the road freight transport industry.

It is also difficult to ascertain the impact of the Act on the medium to long term viability of owner-driver businesses. Although statistics⁵ are available on business entries and exits from 2008-2012 which indicate that the percentage of road transport businesses that survived between 2003-2007 (60.2%) are similar to businesses that survived between 2008-2012 (60.7%), there are many factors outside the introduction of the Act that impact on business sustainability such as changes in fuel prices and other cost factors.

However, it is worth noting that the introduction of the Act appears to have had a measurable impact on decreasing the number of complaints recorded by the DoC in relation to owner-driver matters.

⁵ Counts of Australian Businesses, including Entries and Exits (cat. No 8165.0), Australian Bureau of Statistics

Most stakeholders believed that the Act has played a positive role in improving conditions for owner-drivers and support its continuation, although some are concerned about a lack of awareness of the Act's provisions within the road transport industry as well as levels of compliance outside the regulated freight industry. Those stakeholders expressed concern that without adequate enforcement provisions, rate-cutting and associated road safety risks will remain prevalent in WA's road transport industry.

Although some submissions suggested that stronger compliance and enforcement provisions should be included within the Act, this is unlikely to attract the support of either WA government or industry because of the regulatory burden it would impose and potential increases in the overall cost of road freight. Greater awareness of the Act, however, in particular provisions that require hirers to provide specific information to owner-drivers, may assist to improve compliance rates.

Overall, the review finds the following arguments for retention of the Act:

- Heavy vehicle crashes are not increasing at a time when numbers of heavy vehicles and road freight use in Western Australia is growing.
- The rate of use of the Tribunal has declined significantly since 2010 suggesting that the Act has had an impact on establishing safe rates for owner-drivers. Additionally the Tribunal represents a low-cost, convenient option for owner-drivers seeking dispute resolution with hirers.
- The existing regulatory and administrative burden of the Act on both industry and government is low. The Department of Commerce (DoC) and the DoT consider the required level of expenditure appropriate to retain the current level of effectiveness.
- While lessening powers conveyed by the Act would weaken the positive outcomes experienced to date, any changes that strengthen these powers, such as the introduction of penalties in support of enforcement activities, would have uncertain consequences and be likely to substantially increase costs.
- National legislation relating to the remuneration of road freight transport drivers was passed in 2012 and is currently under review. Given the uncertainty of the outcomes of this review and the future of the legislation, it is not appropriate to initiate changes to the local Act in WA at this time.
- There is no evidence that the operation of the Act has created unintended or adverse impacts on the road freight transport industry such as distortion of market prices through institutional involvement of transport unions in contract negotiations between owner-drivers and hirers.

Recommendation 1

It is recommended that

- the Act be retained in its current form
- the Department of Transport consider strategies for improving awareness of the Act within the WA road freight transport industry as well as the duties and obligations it imposes on hirers and owner-drivers
- the Department of Transport evaluate the outcome of the national review of the *Road Safety Remuneration Act 2012* (RSR Act) due to be completed in 2014 and any impact this may have on the operation of the WA Act

The Council

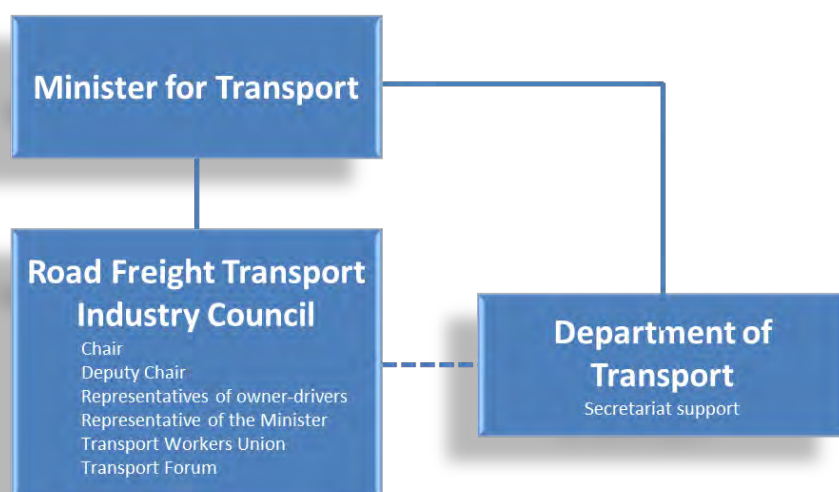
Overview

The Act establishes the Council to provide advice to the Minister for Transport in relation to owner-driver issues, including the development and review of the code. This includes reviewing the guideline rates and encouraging compliance with the code and the rates.

Members of the Council represent the WA Road Transport Association, the Transport Workers' Union and other bodies considered appropriate by the Minister. In practice, the Council reports directly to the Minister. Cabinet approves appointments to the Council.

Under the Act, the DoT provides administrative and other support services to the Council as required.

Figure 2: The Road Freight Transport Industry Council



Council meetings

The Council meets as needed and, when first established, met frequently to establish the Code of Conduct. Since then it has met to review and approve updates to the guideline rates, the model contract and the owner-drivers cost calculator.

In the past five years the Council has met a total 20 times with the last meeting held on 5 November 2012. The terms of appointment for all seven RFTI Council members including the chair ended on 31 December 2012 prior to the review of the Act.

Council costs

Section 25 of the Act requires DoT to provide the Council with any support services that it reasonably requires. These support services have included meeting expenses, development and publication of guideline rates, remuneration of certain Council members and advice and assistance from Department staff where required.

Under section 24 of the Act, certain Council members are paid remuneration and allowances determined by the Minister on the recommendation of the Public Sector Commissioner. Sitting fees are paid in part to partially offset income foregone to attend meetings (particularly for self-employed owner-drivers). Council members who represent unions, member associations or the government are not paid.

Table 1 on page 12 indicates the approximate amounts that have been used for remunerating Council members and the costs associated with the delivery of support services over the past five years.

Councils in other jurisdictions

Commonwealth

The Commonwealth Act does not establish a stakeholder council.

Victoria

The Victorian Act establishes two industry councils: the Transport Industry Council; and the Forestry Industry Council. The councils, which comprise representatives of relevant industry associations, provide the Victorian government with advice on:

- codes of practice to provide guidance to industry about fair business practices;
- information booklets and rates and costs schedules; and
- model commercial contracts.

New South Wales

Chapter 6 of the NSW Act does not establish road transport industry councils. In NSW, owner-drivers, hirers and other road freight transport industry stakeholders make representations directly to the government.

Issues for consideration

The following activities of the Council were highlighted through preliminary consultation with stakeholders for consideration and focus in the review, including:

- the effectiveness and associated use of a range of resources that the Council has played a crucial role in developing that are now widely available within the road freight transport industry;
- whether the Council should continue to play an ongoing role in the revision of the cost calculator and guideline rates on a regular basis; and
- whether the Council's consultative role could be filled through a different mechanism to oversee the development of revisions to the cost calculator and guideline rates on behalf of owner-drivers and hirers, such as a DoT convened reference group.

Achievements of the Council

Since it commenced in August 2008, the Council has supported Western Australia's road freight industry, consistent with the Act, by developing regulations and other resources and by being an advocate for the industry.

Key achievements of the Council include:

- *Participating in the development and enactment of the Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010 (The Code).* The Council played a significant role in the development of the code which regulates owner-driver contracts and dealings between hirers and owner-drivers.
- *Development of information materials and resources.* The Council has overseen the development of support materials including the *WA Owner-Drivers (Contracts and Disputes) Act 2007 Information* booklet, pamphlet and compact disc. The Code requires that hirers provide owner-drivers with a copy of the information pamphlet and current guideline rates before entering into an owner-driver contract.
- *Guideline rates.* In conjunction with DoT, the Council has overseen the development of guideline rates for a range of heavy vehicle types. It has also regularly revised and updated the published guideline rates. The guideline rates provide pre-calculated rates in both per kilometre and per hour dollar amounts. The rates cover both metropolitan and regional driving environments. The guideline rates are published on the owner-driver's section of the DoT website.
- *Owner-drivers' cost calculator.* The Council has overseen the development of a cost calculator with support from DoT. The cost calculator is a Microsoft Excel worksheet that gives users the ability to modify more than 100 different business cost inputs, providing rates tailored to specific circumstances. The cost calculator is distributed free-of-charge as a download from the DoT website and as a compact disc.
- *Model contract and schedule for owner-drivers.* The Council has overseen DoT's development of the model owner-driver contract and associated schedule, which represents a fair industry benchmark for typical owner-driver contract terms and conditions. The model contract and schedule have been designed to allow any of the terms and conditions to be modified to suit individual contract needs. These are published on the owner-driver section of the DoT website.
- *The Act – frequently asked questions.* The Council assisted in development of a frequently asked questions sheet, which is published on the owner-driver section of the DoT website.

Summary of stakeholder submissions to the review

The majority of respondents believed that the Council played an important role in ensuring the safe and sustainable operation of the road transport industry and should continue to operate.

Respondents also expressed support for the model contract and cost calculator developed by the Council as useful tools.

However two industry stakeholders did suggest that consideration should be given to an alternative mechanism, such as the DoT with assistance of a reference group to oversee the development of revisions to the cost calculator and guideline rate on behalf of owner-drivers and hirers.

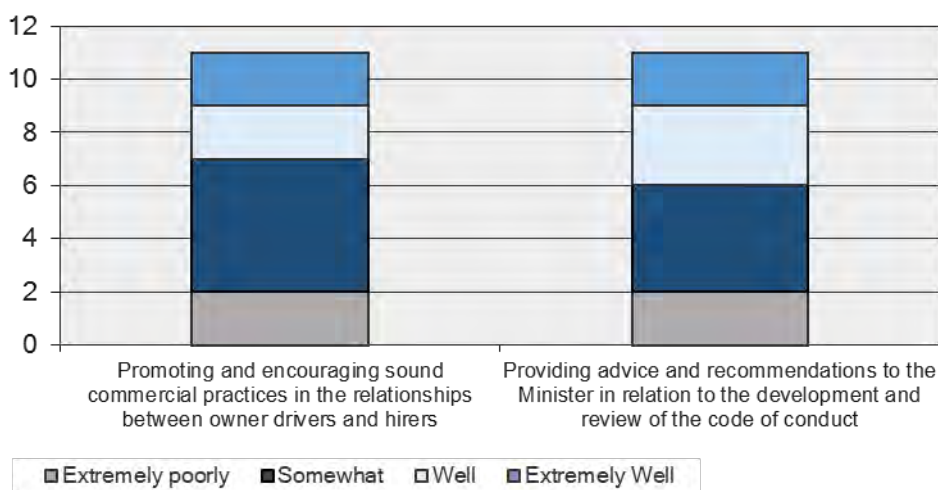
One respondent also commented that the Council’s consultative role would more effectively be filled through appointment of an Ombudsman under the auspices of the DoT.

The Livestock and Rural Transport Association of Western Australia suggested that the composition of the Council’s membership risks being exclusive and unrepresentative because it does not necessarily represent the interests of regional Western Australia⁶. It suggests that if the Council is to continue, membership should be broadened to include other representative bodies and specifically include rural membership.

Another respondent also indicated that there were issues of imbalance in the Council membership with over-representation of larger transport companies at the expense of single vehicle owner-driver businesses.

Survey results from the review indicate that respondents generally believe that the Council has mostly performed its functions somewhat effectively to well over the past five years.

Figure 3: How effectively has the Council performed its functions over the past 5 years?



Findings

While many stakeholders support the work of the Council and the tools it has developed, it has also been suggested that its work could be effectively undertaken by alternative mechanisms within existing government agencies with reference to relevant industry representatives. Additionally there is some concern about whether its membership is adequately representative of single-vehicle owner-drivers and owner-drivers operating in regional areas.

Other than Victoria, other Australian jurisdictions’ legislation in respect of owner-drivers does not provide for a Council or equivalent agency.

The ongoing costs of remunerating Council members and supporting its work have decreased since the introduction of the Act as its main focus has shifted from the development to the review of guidelines rates, model contracts and the cost calculator. As its meetings have become less frequent, this has reduced the need for a full time Senior Project Officer to assist the Council’s activities.

⁶ Section 18 (3) (d) of the Act currently provides that the Minister will specifically seek nomination from persons able to represent the interests of regional WA.

Given stakeholder comments and the changing focus of the Council's work over recent years, the review suggests that if a DoT senior staff member chaired the Council, it would introduce a high level of independence to its activities and eliminate the need for that Council member to be separately remunerated. The Council could then effectively be convened as an industry reference group to oversee the regular review of the code of conduct and guideline rates by departmental staff.

Overall, the review finds that the Council should be retained, but recommended that the process to nominate and appoint members should ensure that the owner-driver industry is appropriately represented and reflects the perspectives of regional and single-vehicle owner-driver businesses.

These changes can be achieved through the current Council appointment process without an Act amendment. Although section 18 of the Act provides some terms of reference for the nomination process, the Minister of Transport retains final control over the appointment of members.

Recommendation 2

It is recommended that

- the Council be retained as established under Part 3 of the Act to meet when and if necessary
- the Council be chaired by a senior executive from the Department of Transport
- the Minister for Transport ensures that, through the nomination and appointment process, Council membership appropriately reflects the interests of regional and single-vehicle owner-driver businesses

The Tribunal

Overview

The Act establishes the Tribunal, which is intended to provide quick, relatively informal, low-cost and readily accessible dispute resolution. The Tribunal is administratively supported by the Western Australian Industrial Relations Commission (WAIRC)⁷.

The Tribunal conducts conciliation and arbitration proceedings in the event of disputes between parties. When appearing before the Tribunal, owner-drivers and hirers may represent themselves or they may elect to be represented by an agent such as a lawyer. All declarations by the Tribunal are binding on all courts and all persons with respect to the matter subject to the declaration⁸.

The Tribunal has jurisdiction to deal with:

- disputes arising under or in relation to the terms of an owner-driver contract;
- disputes arising under or in relation to breaches of the Act (including whether a party has acted in an unconscionable manner);
- disputes arising under or in relation to breaches of the code of conduct; and
- matters arising in relation to the conduct of joint negotiations (collective bargaining) for an owner-driver contract.

The Tribunal can determine disputes and matters referred to it by

- a person who is a party to the owner-driver contract;
- a transport association;
- an inspector; and
- the Minister.

Under the Act, the Tribunal may issue orders that:

- require a party to pay a sum of money to another party;
- require specific performance;
- declare that a debt is or is not owing;
- declare that certain arrangements represent or do not represent the payment of safe and sustainable rates;
- require a party to do or refrain from doing something (including paying a sum of money to another party); and
- assist in resolving a dispute in a manner in which it considers to be fair, but which does not vary a contract or insert a term into a contract.

⁷ The WAIRC is an independent quasi-judicial tribunal established under the *Industrial Relations Act 1979* to deal with industrial matters by conciliation or, if necessary, arbitration. The main objective of the WAIRC is to prevent and settle industrial disputes. The WAIRC is responsible to the Minister for Commerce.

⁸ Sections 44 and 46 of the *Industrial Relations Act 1979*.

The Tribunal can refer matters to other regulatory agencies. For example, if the Tribunal considers that the fatigue management code or other safety legislation has been breached, it can refer the matter to DoC inspectors.

In making a determination, the Tribunal must endeavour to ensure that the matter is resolved taking into account any agreement reached by the parties. Further, matters must be resolved on terms that could reasonably have been agreed between the parties in the first instance or by conciliation.

Tribunal costs

A member of the WAIRC sits as the Tribunal on an as needs basis. Commissioners work on other WAIRC matters when they are not hearing matters related to the Act.

The WAIRC does not separately identify the cost of the Tribunal's operations, however, the Commission estimated that the cost of Tribunal hearing time over the past three financial years is approximately \$25,000 per annum. This estimate does not take into account compulsory conferences and the time spent by Commissioners in writing determinations.

Tribunals in other jurisdictions

Commonwealth

The Commonwealth Act establishes the Road Safety Remuneration Tribunal (Commonwealth Tribunal), which began hearing disputes in January 2013. The Commonwealth Tribunal can:

- make orders relating to minimum rates and conditions for drivers;
- resolve disputes between drivers, their employers/hirers, and businesses in the supply chain;
- approve collective agreements between drivers and hirers; and
- conduct research into remuneration matters affecting safety in the road transport industry.

The Commonwealth Tribunal has not been operating for sufficient time to accurately determine its workload, outcomes or impact on the Western Australian Tribunal. During the 2013 federal election campaign, the Coalition stated that if it won the election, it would 'urgently review' the Commonwealth Tribunal as part of its review of fair work laws.

Many Western Australian owner-drivers are able to choose to have their disputes heard by either the Commonwealth or Western Australian Tribunal. It is possible that some Western Australian operators may opt to have matters heard by the Commonwealth Tribunal because it provides broader coverage and has stronger powers than the Western Australian Tribunal, particularly regarding businesses in the supply chain.

Victoria

Under the Victorian Act, Victoria's Small Business Commissioner provides an independent, low-cost and effective alternative dispute resolution service between owner-drivers, forestry workers and their hirers. Disputes not resolved by this process can be referred to the Victorian Civil and Administrative Tribunal for determination.

New South Wales

The provisions in Chapter 6 of the NSW Act mean that owner-drivers in NSW are subject to industrial relations control almost as though they were employees; and gives owner-drivers the right to a review of unfair contracts through the NSW Industrial Relations Commission.

Issues for consideration

Preliminary consultation with stakeholders has indicated that the WA Tribunal has a high level of credibility and is valued by the road freight transport industry.

Even though many disputes are resolved without reference to the Tribunal, it is widely considered that the Tribunal is operating effectively and that it plays an important role in settling disputes between owner-drivers and hirers. The decline in the number of cases referred to the Tribunal since 2010 also suggests that it has value in contributing to self-regulation of disputes between those parties.

In addition, it appears that the efficient resolution of disputes enhances the sustainability of the industry.

The following activities of the Tribunal were highlighted for consideration and focus in the review, including:

- actual usage of the Tribunal and its effectiveness;
- whether the mere existence of the Tribunal provides a 'safety net' resulting in more civilised and realistic relationships between owner-drivers and hirers;
- the extent to which the ability of owner-drivers and hirers to refer to previous Tribunal determinations when they negotiate contracts and have disputes has enhanced the likelihood of parties reaching agreement without Tribunal intervention;
- whether the Tribunal provides a simpler alternative to formal court processes to resolve owner-driver matters; and
- the impact that the Commonwealth Tribunal, which recently commenced operation, will have on the workload of the WA Tribunal, given its potentially to provide an alternative mechanism for the resolution of disputes.

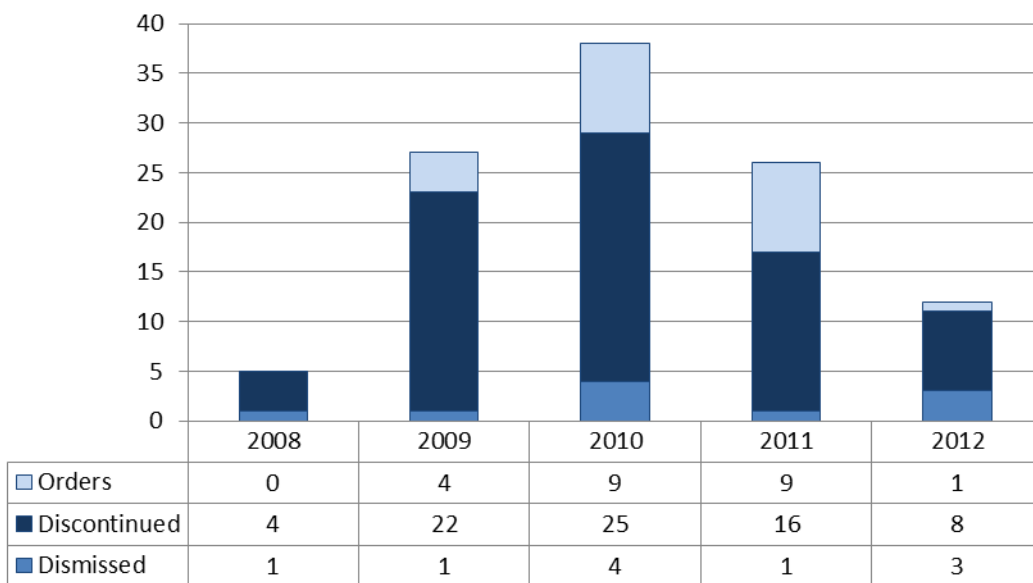
Use and effectiveness of the Tribunal

Determinations

Since its commencement in 2008, more than 110 disputes have been referred to the Tribunal. The majority of these disputes were discontinued or dismissed before matters proceeded to hearing. Most cases referred to the Tribunal are initiated by owner-drivers seeking payment for services provided under contract to a hirer.

DoC estimates that following referral of matters to the Tribunal, more than \$400,000 has been recovered from hirers to be paid to owner-drivers since the Act commenced in 2008.

Figure 4: Number of cases heard by the Road Freight Transport Industry Tribunal (2008-2012) by outcome*



* Cases that are resolved by conciliation in a mediated conference are deemed to be 'discontinued'. Where a matter is resolved by conciliation but not formally withdrawn or the Tribunal determines that it is not within its jurisdiction or that the parties are not liable, it is deemed to be 'dismissed'.

The number of disputes referred to the Tribunal rose steadily until 2010 and then gradually declined.

There is a correlation between the number of disputes referred to the Tribunal over time and the amount of funding and effort expended in raising awareness and education of owner-driver businesses during the same period. It is possible that with owner-driver businesses entering the market all the time, many owner-driver businesses may not be aware of the Act, the code and the contract dispute mechanisms available to them. It may also be that the Tribunal's previous determinations have impacted the market by informing formerly breaching hirers who did not comply with their obligations under the Act.

Summary of stakeholder submissions to the review

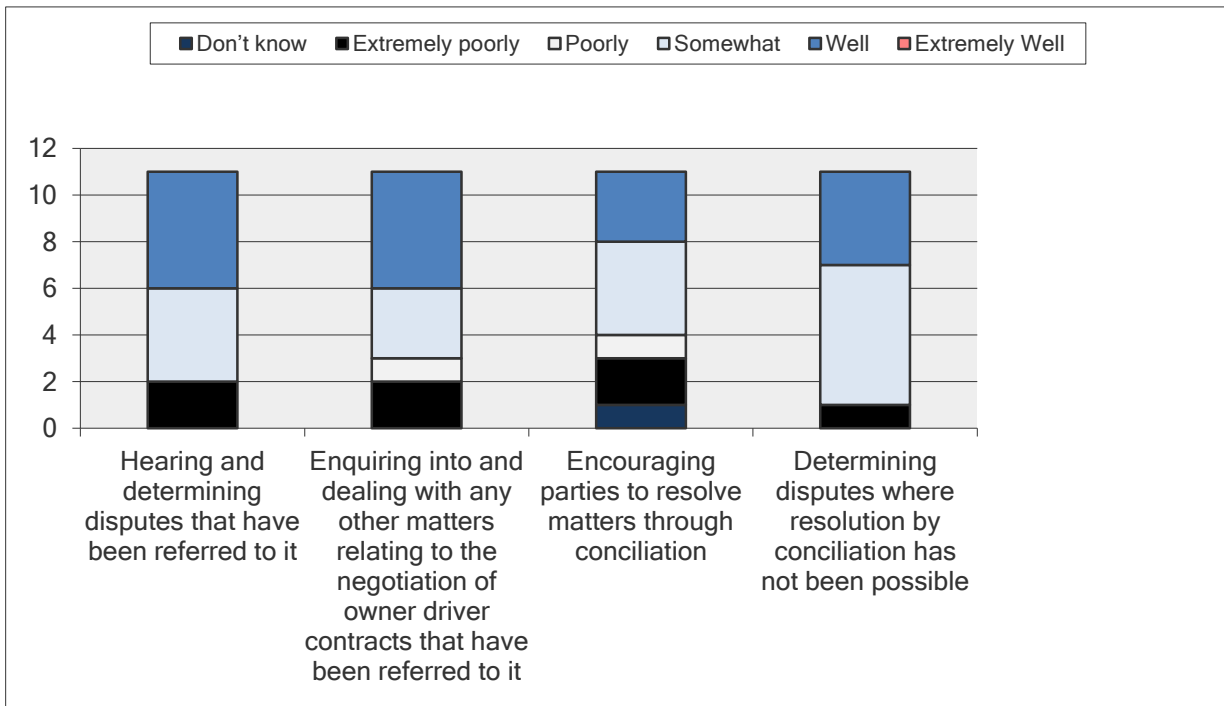
Most stakeholders agreed that the Tribunal provided a credible, cost-effective instrument for dispute resolution in the road freight industry and increased the likelihood of parties reaching agreement. The Transport Workers Union suggests that the operations of the Tribunal have resulted in a general reduction in payment times for owner-drivers and worked well to settle disputes over contracts.

Some stakeholders highlighted the limitations of the Tribunal process and indicated that there have been a number of recent cases where hirers have ignored Tribunal orders and refuse to pay monies owed. One submission suggested that some of these limitations could be overcome by the creation of an independent ombudsman to adjudicate matters currently brought before the Tribunal.

The Australian Logistics Council (ALC) also suggested that the functions of the Tribunal could be moved from the WAIRC to the WA State Administrative Tribunal (the SAT) on the basis that the matters were commercial in nature rather than industrial relations matters.

In general, however, most survey respondents indicated that the Tribunal played an important role in ensuring safe and sustainable operation of the road freight industry and supported its continuation. Survey results indicate that respondents generally believe that the Tribunal has mostly performed its functions somewhat effectively to well over the past five years.

Figure 5: How effectively has the Tribunal performed its functions over the past 5 years?



Findings

Most stakeholders believe that the Tribunal has been a success and support its continuation. Although the ALC has suggested matters might be more appropriately dealt with by the SAT, the jurisdiction of this body is restricted to determining disputes where one party is a state entity. In Western Australia, small commercial contract disputes are generally dealt with by the WA Magistrates Court (incorporates the old Small Claims Tribunal) which currently deals with civil matters including general procedure claims for debt or damage up to \$75,000; and minor case claims for debt of damages up to \$10,000.

Additionally, WAIRC Commissioners sitting as the Tribunal have the appropriate expertise and experience in the road freight transport industry to inform dispute resolution without the need for formal hearings.

Overall the review finds that the Tribunal represents a convenient, quick and low cost alternative to other mechanisms to resolve contract disputes between owner-drivers and hirers.

While it is not clear at this point what the impact of the national RSR Tribunal will be on WA owner-drivers, based on current information, it is anticipated that the need for a local Tribunal will continue.

Recommendation 3

It is recommended that

- the Tribunal be retained as established under Part 9 of the Act

Appendices

Part 5: Make a submission

You can make a submission in any of the following ways:

- [on-line survey](#);
- written feedback form submitted by e-mail or post; and
- written statement submitted by e-mail or post.

Email: ownerdriver@transport.wa.gov.au **Post:** Owner-Drivers
GPO Box C102
PERTH WA 6839

When making your submission, please advise whether the Department may publish your submission on our website. The closing date for submissions is Friday, 31 January 2014.

If you have **questions** about the form or wish to provide your submission by telephone, please phone (08) 6551 6909.

Feedback Form

The Owner-Drivers (Contracts and Disputes) Act 2007

1. Does the Act play an important role in ensuring safe and sustainable operation of the road freight transport industry in WA? Please explain your views.

2. Does the Act need to continue operating? Please outline your views.

The Road Freight Transport Industry Council

3. Does the Council play an important role in ensuring safe and sustainable operation of the road freight transport industry in WA? Please explain your views.

4. How effectively has the Council performed its functions during the past five years in the following areas?

	Extremely Well	Well	Somewhat	Poorly	Extremely poorly	Don't know
Promoting and encouraging sound commercial practices in the relationships between owner-drivers and hirers						
Please provide comments to support your assessment						

4. How effectively has the Council performed its functions during the past five years in the following areas?	Extremely Well	Well	Somewhat	Poorly	Extremely poorly	Don't know
Providing advice and recommendations to the Minister in relation to the development and review of the code of conduct						
Please provide comments to support your assessment						

5. Does the Council need to continue operating? Please explain your views.

The Tribunal

6. Does the Tribunal play an important role in ensuring safe and sustainable operation of the road freight transport industry in WA? Please explain your views.

7. How effectively has the Tribunal performed its functions over the past five years in the following areas?	Extremely Well	Well	Somewhat	Poorly	Extremely poorly	Don't know
Hearing and determining disputes that have been referred to it						

7. How effectively has the Tribunal performed its functions over the past five years in the following areas?	Extremely Well	Well	Somewhat	Poorly	Extremely poorly	Don't know
Please provide comments to support your assessment						
Enquiring into and dealing with any other matters relating to the negotiation of owner-driver contracts that have been referred to it						
Please provide comments to support your assessment						
Encouraging parties to resolve matters through conciliation						
Please provide comments to support your assessment						
Determining disputes where resolution by conciliation has not been possible						
Please provide comments to support your assessment						

8. Does the Tribunal need to continue? Please explain your views.

Respondent's details

Name

E-mail

Phone

Address

Group or interest area representing (if any)

May DoT publish your submission on its website?

Yes

No

Appendix 2: Stakeholder submissions

Five respondents emailed individual submissions while 12 responded to an online survey based on the feedback form. The individual submissions did not provide comment on the question of how well the Council and Tribunal had performed their operations.

	Answer options							
	Yes			No			No response	Total
Does the Act play an important role in ensuring safe and sustainable operation of the road transport industry?	12			3			2	17
Does the Act need to continue operating?	12			3			2	17
Does the Council play an important role in ensuring safe and sustainable operation of the road transport industry?	8			4			5	17
Does the Council need to continue operating?	10			3			4	17
Does the Tribunal play an important role in ensuring safe and sustainable operation of the road transport industry?	10			2			4	17
Does the Tribunal need to continue operating?	11			2			4	17
How effectively has the Council performed its functions during the past five years in the following areas?	Extremely well	Well	Somewhat	Poorly	Extremely poorly	Don't know	No response	Total
Promoting and encouraging sound commercial practices in the relationships between owner-drivers and hirers?	2	2	4	0	2	0	2	12
Providing advice and recommendations to the Minister in relation to the development and review of the code of conduct?	1	3	4	0	2	0	2	12

How effectively has the Tribunal performed its functions during the past five years in the following areas	Extremely well	Well	Somewhat	Poorly	Extremely poorly	Don't know	No response	Total
Hearing and determining disputes that have been referred to it?	0	4	4	0	2	0	2	12
Enquiring into and dealing with any other matters relating to the negotiation of owner-driver contracts that have been referred to it?	0	4	3	1	2	0	2	12
Encouraging parties to resolve matters through conciliation?	0	2	4	1	2	1	2	12
Determining disputes where resolution by conciliation has not been possible?	0	3	6	0		0	2	12