



**SENATE EDUCATION AND EMPLOYMENT COMMITTEE  
FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023**

**AUSTRALIAN TRUCKING ASSOCIATION SUBMISSION  
29 SEPTEMBER 2023**

**1. About the Australian Trucking Association**

The Australian Trucking Association is a united voice for our members on trucking issues of national importance. Through our [ten member associations](#), we represent the 59,000 businesses and 200,000 people who make up the Australian trucking industry.

**2. Summary of recommendations**

**Recommendation 1**

The Senate should pass the provisions of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 relating to—

- the road transport industry
- unfair contract dispute resolution

subject to the other recommendations in this submission.

**Recommendation 2A**

The Fair Work Commission should not be able to set minimum freight rates in either minimum standards orders or road transport industry contractual chain orders.

**Recommendation 2B**

In the alternative, the Fair Work Commission's power to set rates should be limited to orders requiring the separate billing of prescribed recoverable costs.

**Recommendation 2C**

If ATA recommendations 2A or 2B are not adopted, the Fair Work Commission should, in the alternative, be able to set minimum freight rates through the contractual chain.

**Recommendation 3**

Proposed s 40F(2) should be amended so the members of RTAG can include other organisations prescribed by regulation.

**Recommendation 4**

Proposed section 40J should be replaced by expanded provisions setting out the powers of the Fair Work Commission to make road transport industry contractual chain orders.

**Recommendation 5**

The list of parties able to apply to make, vary or revoke minimum standards orders and guidelines should be expanded, in each case, to include bodies prescribed by regulation.

**Recommendation 6**

Proposed s 536KC should be amended to provide that an association of affected persons or bodies be entitled to make written submissions to the Fair Work Commission in relation to the draft of a road transport minimum standards order.

**Recommendation 7**

The Government should align the contractor high income threshold with the high income threshold for employees, after the contractor's business costs are deducted.

**Recommendation 8**

Proposed s 15C should be amended to enable the Government to set more than one high income threshold, to reflect the different costs faced by businesses in different industries.

**Recommendation 9**

Proposed s 536LA should be replaced with expanded provisions setting out the internal merits review process for road transport minimum standards orders and road transport industry contractual chain orders.

**Recommendation 10**

A new subsection, 536KN(1A), should be added to provide the Fair Work Commission with guidance about when another law comprehensively covers a matter relating to road transport.

### 3. Introduction

On 7 September 2023, the Senate referred the provisions of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 to its Education and Environment Committee for inquiry and report by 1 February 2024.

This submission outlines some of the issues facing the trucking industry (section 4), before examining how the bill would address those issues (section 5). Section 6 discusses our concerns with the proposed role of the FWC in setting minimum freight rates. We propose other amendments to the bill in section 7.

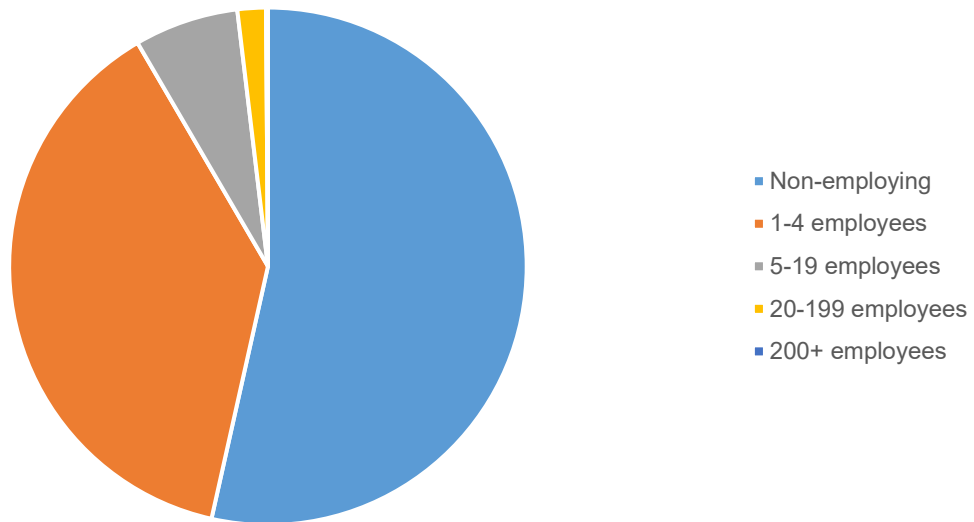
The ATA's position on the bill was developed by a member committee that met throughout July, August and September 2023.

The ATA would like to acknowledge the consultative approach taken by the Minister for Employment and Workplace Relations, Minister Burke, and his staff during the development of the bill. ATA representatives met in person with the minister three times to discuss the bill and were able to review and provide detailed comments on the in-confidence exposure draft.

### 4. The hire and reward trucking industry

The 59,000 businesses in the hire and reward trucking industry are predominately small- and medium-sized businesses, as figure 1 shows.

**Figure 1: Road freight transport businesses by employment size, June 2022**



Source: ABS, Counts of Australian Businesses, including entries and exits, June 2018 to June 2022.

Regardless of business size, the industry is characterised by low margins and a significant vulnerability to contract pressures. These include—

- meet the market (reverse auction) requirements<sup>1</sup>
- mandatory productivity improvements,<sup>2</sup> which effectively drive down rates
- a lack of rate review provisions, or reviews that are discretionary or linked to productivity<sup>3</sup>
- contracts that require the lease of new assets but are shorter than standard four year capital leases<sup>4</sup>
- fuel levy clauses and how they generally fail to reflect increases in the price of fuel and the road user charge<sup>5</sup>
- no commitment clauses and one-way terminations for convenience<sup>6</sup>
- reflexive indemnity clauses<sup>7</sup>
- excessively long payment terms, such as payments being made up to 97 days after the end of the month the customer received a compliant electronic tax invoice.<sup>8</sup> This makes sound cashflow management all but impossible.

## 5. How the bill would address these issues

### Road transport minimum standards orders

The bill would add new provisions to empower the FWC to make minimum standards orders for regulated workers, including regulated road transport contractors.

In making an order, the FWC would need to consider the road transport objective inserted into the Act as section 40D.

Under this objective, the FWC would need to have regard to the need to avoid unreasonable adverse impacts on—

- sustainable competition among road transport industry participants
- road transport industry business viability, innovation and productivity
- administrative and compliance costs for road transport industry participants.

The FWC would also be required to—

- have regard to the commercial realities of the road transport industry
- be satisfied that making the order would not unduly affect the viability and competitiveness of owner drivers or other similar persons.<sup>9</sup>

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<sup>1</sup> Mahon, G. *What minimum standards look like*. Trucking Australia 2023 presentation. 30 March 2023.

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*; Bristow, G. *'Safe rates' – more laws for the transport industry*. Trucking 2023 presentation. 30 March 2023.

<sup>4</sup> Mahon, 2023.

<sup>5</sup> *ibid*.

<sup>6</sup> Bristow, 2023.

<sup>7</sup> *ibid*.

<sup>8</sup> ATA, [Payment Times Reporting Bill 2020; Payment Times Reporting \(Consequential Amendments\) Bill 2020](#). Submission to the Senate Education and Employment Committee, July 2020. 2.

<sup>9</sup> Proposed s 536KA.

A minimum standards order must not include matters primarily of a commercial nature that do not affect the terms and conditions of engagement of the regulated workers or road transport contractors covered by the order.<sup>10</sup>

Under proposed s 536JF, a road transport minimum standards order would not come into force earlier than 24 months after the FWC published a notice of intent for the order.

### **Road transport industry contractual chain orders**

Division 4 of proposed Part 1-4 would provide a power for regulations to be made about the road transport industry contractual chain.

The regulations could empower the FWC to make road transport industry contractual chain orders that would confer rights and impose obligations on road transport industry contractual chain participants.

The EM notes that this head of power would give the Government flexibility to extend the operation of the new road transport jurisdiction to contractual chains, should it become apparent this was necessary.<sup>11</sup>

### **Low cost dispute resolution**

Under proposed Part 3A-5, a person (or an organisation representing the industrial interests of a person) would be able to apply to the FWC for an unfair contract term remedy if their income was lower than the contractor high income threshold.<sup>12</sup> An application fee may apply.<sup>13</sup>

The FWC would only be able to make an order if the unfair contract term would, in an employment relationship, relate to a workplace relations matter.<sup>14</sup>

### **Interaction with road transport safety regulation**

Under proposed s 536KN, a road transport minimum standards order would not be able to include terms about matters relating to road transport that were otherwise comprehensively dealt with—

- by the *Heavy Vehicle National Law (HVNL)*, or
- by another law of the Commonwealth, a state or a territory.

The HVNL is the co-operative national scheme that regulates heavy vehicle safety in the eastern states and South Australia.<sup>15</sup>

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<sup>10</sup> Proposed s 536KM(1)(c).

<sup>11</sup> Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023. [1016].

<sup>12</sup> Proposed s 536ND.

<sup>13</sup> Proposed s 536NE.

<sup>14</sup> Proposed s 536NA(1).

<sup>15</sup> *Heavy Vehicle National Law (ACT) Act 2013*; *Heavy Vehicle (Adoption of National Law) Act 2013* (NSW); *Heavy Vehicle National Law Act 2012* (Qld); *Heavy Vehicle National Law (South Australia) Act 2013*; *Heavy Vehicle National Law (Tasmania) Act 2013*; *Heavy Vehicle National Law Application Act 2013* (Vic).

The HVNL includes a strong primary safety duty and due diligence obligations for directors and executives. These obligations apply to trucking businesses and off-road chain parties alike. The maximum penalty for a category 1 primary safety duty offence for an individual is more than \$350,000, or five years imprisonment, or both. The maximum penalty for a corporation is more than \$3.5 million.<sup>16</sup>

Under proposed s 536KN(2), the regulations would be able to specify whether a particular matter was, or was not, dealt with comprehensively by the HVNL or another law.

The ATA welcomes the Government's approach of establishing a clear demarcation between industrial and safety regulation and looks forward to working with the Government on the details of the regulation.

## **Recommendation 1**

**The Senate should pass the provisions of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 relating to—**

- **the road transport industry**
- **unfair contract dispute resolution**

**subject to the other recommendations in this submission.**

## **6. The FWC should not be able to set minimum freight rates**

One of the key issues the committee needs to consider is whether the FWC should have the power to set minimum freight rates.

The attempt by the former Road Safety Remuneration Tribunal (RSRT) to set minimum freight rates for owner drivers was a failure. Setting minimum rates for the entire road transport contract chain would be even harder and would weaken the incentives for firms to make the decisions needed to increase productivity.

### **The RSRT's attempt to set minimum freight rates was a failure**

The RSRT attempted to set minimum freight rates in the *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* for owner drivers across the long distance and supermarket sectors.

PricewaterhouseCoopers' economic analysis of the order found it would have increased costs by 20-30 per cent.<sup>17</sup>

Before the order even came into force, PwC pointed out that the assumption that hirers would have no alternative but to pay the increased rates was flawed. PwC argued that hirers could instead choose to reduce their use of road freight or substitute owner driver services with employee drivers or small fleets.<sup>18</sup>

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<sup>16</sup> HVNL, s 26F as indexed.

<sup>17</sup> PricewaterhouseCoopers, *Review of the road safety remuneration system: final report*. January 2016. 50.

<sup>18</sup> *ibid*.

The ASBFEO's review of the impact of order confirmed PwC's prediction.<sup>19</sup> As one Queensland owner driver told the ombudsman—

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

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

'As soon as the RSRT had been abolished I went back to work the next day. So my current financial hardship is a direct result of the RSRT.'<sup>20</sup>

In addition to setting minimum rates that were too high for some markets, the RSRT failed to take into account—

- backloading, where an owner driver charges a lower freight rate for a return trip or the last leg of a multi-leg job, in order to receive income for a journey that has to be made anyway
- part loads, where an owner driver such as a livestock transporter consolidates loads from multiple consignors.<sup>21</sup>

### **Setting minimum freight rates through the contracting chain would be even harder**

It would be even harder to set workable rates across the more complex and dynamic contracting chain.

Road transport and logistics businesses have a diverse range of charging models. Providing that a firm can operate safely and meet its legal obligations, it is perfectly reasonable for it to—

- spread costs across the whole of a contract period, multiple customers or more than one leg of a multi-leg job
- offer transport services as part of a broader contract package. For example, a provider may offer transport services as part of a broader 3PL service that includes storage, pick and pack, tracking and tracing, and cross-docking.

### **Setting minimum rates through the chain would reduce productivity growth**

As the *Working Future* white paper points out, productivity growth is the key driver of improvements in living standards over the long term. Labour productivity has been the most important source of real income growth in Australia over the past 30 years.<sup>22</sup>

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<sup>19</sup> Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses*.

<sup>20</sup> *ibid*, 17.

<sup>21</sup> *ibid*, 16.

<sup>22</sup> Commonwealth of Australia, [Working future: the Australian Government's white paper on jobs and opportunities](#), September 2023. 75.

But Australia's productivity growth has sagged since the 1990s, from an average of 2.2 per cent per year to 1.4 per cent per year. Real incomes would, on average, be \$25,000 per year higher if Australia had maintained its productivity growth at its 1990s level.<sup>23</sup>

Setting minimum freight rates through the road transport contractual chain would reduce the incentive for firms to innovate and adopt new technologies, which the white paper acknowledges as a key to boosting productivity growth.<sup>24</sup>

### **The protections in the bill do not, and cannot, go far enough**

The ATA thanks the Government for including consultation requirements and protections in the bill, including the establishment of the Road Transport Advisory Group,<sup>25</sup> the road transport objective,<sup>26</sup> the requirements for making road transport minimum standards orders<sup>27</sup> and the 24 month notice of intent period.<sup>28</sup>

The recommendations in section 7 of this submission would strengthen those protections further.

At a broader level, though, the protections and consultation requirements in the bill do not, and cannot, go far enough to protect businesses in the industry from adverse outcomes like the ones caused by the RSRT, because—

- no one person, advisory group, expert panel or commission can know the details of every business arrangement in any industry. The knowledge is dispersed across the firms involved
- the road transport objective envisages there could be adverse impacts on sustainable competition, business viability, innovation and productivity, and administration and compliance costs. The bill would just require that those impacts not be unreasonable<sup>29</sup>
- the requirements for road transport minimum standards orders envisage that an order could affect the viability and competitiveness of owner drivers, as long as it did not unduly affect them.<sup>30</sup>

For all these reasons, the ATA recommends that—

### **Recommendation 2A**

**The Fair Work Commission should not be able to set minimum freight rates in either minimum standards orders or road transport industry contractual chain orders.**

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<sup>23</sup> Productivity Commission, [Productivity growth and wages – a forensic look](#). PC productivity insights, September 2023. 5,7.

<sup>24</sup> Commonwealth of Australia, 78.

<sup>25</sup> Proposed s 40E.

<sup>26</sup> Proposed s 40D.

<sup>27</sup> Proposed s 536KA(2).

<sup>28</sup> Proposed s 536JF(3).

<sup>29</sup> Proposed s 40D(b).

<sup>30</sup> Proposed s 536KA(2)(e).



### **Restricting orders to the recovery of specific business outgoings**

An alternative to setting minimum freight rates would be to enable the FWC to order that some costs be billed separately and paid as outgoings. These outgoings could be prescribed by regulation and could include costs such as—

- fuel costs
- toll road charges
- port charges
- washout charges, and
- weighbridge charges.

This approach would deliver a safety net for operators with fewer business and productivity impacts than setting minimum rates.

### **Recommendation 2B**

**In the alternative, the Fair Work Commission’s power to set rates should be limited to orders requiring the separate billing of prescribed recoverable costs.**

### **If recommendations 2A or 2B are not adopted**

If the Senate does not adopt recommendations 2A or 2B, the ATA considers that the Fair Work Commission should have the ability to set minimum freight rates through the contractual chain as well as for regulated road transport contractors.

We consider this would be justified to protect regulated road transport contractors from unregulated competition and as an anti-avoidance measure.

### **Recommendation 2C**

**If ATA recommendations 2A or 2B are not adopted, the Fair Work Commission should, in the alternative, be able to set minimum freight rates through the contractual chain.**

## **7. Other proposed amendments**

### **Membership of the Road Transport Advisory Group**

Proposed s 40E would establish a Road Transport Advisory Group (RTAG), which would consist of persons who were members of or nominated by—

- an organisation entitled to represent the industrial interests of one or more regulated road transport contractors
- an organisation entitled to represent the industrial interests of one or more road transport businesses.<sup>31</sup>

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<sup>31</sup> Proposed s 40F(2).

The group would advise the FWC about road transport minimum standards orders and, most likely, road transport industry contractual chain orders.

The proposed membership of RTAG is too narrow.

A minimum standards order or a contractual chain order would potentially affect the industry's customers and other parties, particularly if the orders imposed minimum freight rates or other contract requirements.

The orders could also raise business to business issues that fall within the remit of industry associations rather than industrial organisations.

The EM argues that RTAG could establish subcommittees. The membership of these committees could be drawn from the broad range of organisations and interests in the road transport industry under the leadership of RTAG members.<sup>32</sup>

This subcommittee process would not adequately represent the interests of parties that are not in the road transport industry or that are themselves leaders on specific industry issues.

Accordingly, the ATA proposes that the members of RTAG be expanded to include other bodies prescribed by regulation.

The Government would then be able to make a judgement about who to include in the advisory group.

### **Recommendation 3**

**Proposed s 40F(2) should be amended so the members of RTAG can include other organisations prescribed by regulation.**

### **Road transport industry contractual chain orders**

Proposed section 40J would enable the Government to put in place regulations empowering the FWC to make the road transport industry contractual chain orders discussed in section 5.

At present, this section is a placeholder. In the ATA's view, road transport industry contractual chain orders will be as important as road transport minimum standards orders. Accordingly, the Act should set out the FWC's powers, rather than leaving them to subordinate legislation.

We propose that the new provisions about contractual chain orders should parallel the following provisions about road transport minimum standard orders—

- the 24 month notice period before orders come into force (proposed s 536JF(3))
- who can lodge applications for the FWC to make, vary or revoke orders (proposed s 536JZ and 536KP, as varied by recommendation 5 in this submission)
- the particular matters the FWC must take into account in deciding on an order (proposed s 536KA)
- the addition of associations of affected persons or bodies as stakeholders that must have a reasonable opportunity to make submissions (see recommendation 6)

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<sup>32</sup> EM. [1013].

- terms that must not be included (proposed s 536KN and recommendation 10)
- merits review (see recommendation 9).

An alternative would be to generalise the provisions relating to road transport minimum standards orders to apply to contractual chain orders.

#### **Recommendation 4**

**Proposed section 40J should be replaced by expanded provisions setting out the powers of the Fair Work Commission to make road transport industry contractual chain orders.**

#### **Applying for road transport minimum standards orders and guidelines**

Under proposed sections 536JZ and 536KP, the following parties would be able to apply to the FWC to make, vary or revoke a road transport minimum standards order—

- an organisation entitled to represent the industrial interests of one or more regulated workers who would be covered by the order
- an organisation entitled to represent the industrial interests of one or more of the regulated businesses that would be covered by the order
- a regulated business that would be covered by the order, or
- the Minister.

The same parties would be able to apply to make, vary or revoke a road transport guideline.<sup>33</sup>

In the ATA's view, this list of parties is not broad enough. The industry's customers, consignees, suppliers and even the end users of freight may have interests that would be served by applying to make, vary or revoke an order or guideline.

The ATA accordingly proposes that the list of parties able to make these applications should be expanded to include bodies prescribed by regulation.

#### **Recommendation 5**

**The list of parties able to apply to make, vary or revoke minimum standards orders and guidelines should be expanded, in each case, to include bodies prescribed by regulation.**

#### **Role of industry associations in making submissions**

Proposed s 536KC would require the FWC to ensure that 'affected persons' have a reasonable opportunity to make written submissions on the draft of a road transport minimum standards order.

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<sup>33</sup> Proposed sections 536KS and 536L.

Proposed ss 536KC(6) would define an 'affected person' as a person<sup>34</sup> likely to be affected by the making of such an order. The EM notes that this subsection would not prevent any other interested person or association from making submissions during this process.<sup>35</sup>

In the ATA's view, however, the bill should be amended to strengthen the role of associations of affected persons or bodies to make submissions.

This is because—

- many road transport businesses in regional areas are members of industry associations (including ATA member associations), local business chambers or progress groups rather than registered organisations
- the extension of the commission's role to making business-to-business contractual chain orders warrants more recognition of the role of industry associations, including those representing the road transport industry's customers.

Recommendation 4 in this submission proposes that a parallel or the same provision should apply to road transport industry contractual chain orders.

## **Recommendation 6**

**Proposed s 536KC should be amended to provide that an association of affected persons or bodies be entitled to make written submissions to the Fair Work Commission in relation to the draft of a road transport minimum standards order.**

## **Contractor high income threshold**

Proposed s 15C would define a single 'contractor high income threshold,' which could be—

- prescribed as a dollar amount in the regulations, or
- worked in using a formula set out in the regulations.

A person could only apply to the FWC for an unfair contract term remedy if their annual rate of yearly earnings was less than the threshold.<sup>36</sup>

In the ATA's view, the Government should align the contractor high income threshold with the high income threshold for employees, currently \$167,500, after the contractor's business costs are deducted,

The problem is how to handle business costs. Road transport businesses face large costs compared to some other businesses, so either—

- the formula in the regulations would need to be drafted to exclude business costs, or
- proposed s 15C could be amended to enable the Government to set more than one high income threshold to reflect the different costs faced by contractors in different industries.

Of these, amending the bill and enabling the Government to prescribe more than one threshold would be preferable.

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<sup>34</sup> 'Person' is interpreted to include a company.

<sup>35</sup> EM. [1215].

<sup>36</sup> Proposed s 536ND(2).

The formula based approach would make it more difficult for contractors to determine if they could access the FWC's unfair contract term dispute resolution process.

It would not be a low cost jurisdiction if independent contractors first needed to hire an accountant to work out if they were eligible.

### **Recommendation 7**

**The Government should align the contractor high income threshold with the high income threshold for employees, after the contractor's business costs are deducted.**

### **Recommendation 8**

**Proposed s 15C should be amended to enable the Government to set more than one high income threshold, to reflect the different costs faced by businesses in different industries.**

### **Merits review of FWC decisions**

Proposed s 536LA would enable the Government to make regulations to empower or require the FWC to review decisions to make or vary road transport minimum standards orders.

As the EM notes, there is no precedent in the Fair Work Act for internally reviewing Expert Panel or Full Bench decisions.<sup>37</sup>

The case for setting up an internal merits review system is that this is a new jurisdiction for the FWC that potentially extends the commission's ambit to issuing orders about the conduct of business-to-business transactions.

In the ATA's view, the Act should set out the merits review process, rather than leaving it to regulation.

We propose that—

- the minister, a registered organisation or an organisation prescribed by regulation be able to request a merits review of a road transport minimum standards order or a road transport industry contractual chain order
- the review be conducted by a different Full Bench or Expert Panel to the one that made the original order
- interested parties be able to be heard as part of the review
- the FWC have the ability to suspend an order or vary its commencement date to enable the review to be carried out
- the FWC be required to publish a new notice of intent under proposed s 536KB(1), with the order coming into effect no earlier than 24 months after the notice of intent was published, if it decided to vary the order or substitute a new one.

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<sup>37</sup> EM. [1272].

## **Recommendation 9**

**Proposed s 536LA should be replaced with expanded provisions setting out the internal merits review process for road transport minimum standards orders and road transport industry contractual chain orders.**

### **How to determine comprehensive coverage under proposed s 536KN**

Proposed s 536KN would provide that a road transport minimum standards order could not include terms about matters relating to road transport that were otherwise comprehensively dealt with—

- by the HVNL
- by another law of the Commonwealth, a state or a territory.

The bill would empower the Government to make regulations specifying that matters were, or were not, dealt with comprehensively by a particular law (proposed s 536KN(2)(a)).

The FWC may, however, end up considering a matter that is not addressed by the regulations. Against that possibility, the Act should provide the commissioners with guidance about when a matter is comprehensively dealt with by another law.

Accordingly, the bill should be amended to add a new subsection, 536KN(1A) to provide that in determining under paragraph 536KN(1)(a) if a matter relating to road transport is otherwise comprehensively dealt with, the FWC must have regard to—

- whether the law seeks to cover the field
- whether the law establishes a regulator, or empowers a department of state, to enforce its provisions
- whether the law is subject to periodic review.

## **Recommendation 10**

**A new subsection, 536KN(1A), should be added to provide the Fair Work Commission with guidance about when another law comprehensively covers a matter relating to road transport.**