EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 198

Issued by the authority of the Minister for Employment and Workplace Relations

Subject - Road Safety Remuneration Act 2012

Road Safety Remuneration Regulation 2012

Section 121 of the Road Safety Remuneration Act 2012 (‘the Act’) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act establishes the Road Safety Remuneration Tribunal (‘the Tribunal’) which has the objective of promoting safety and fairness in the road transport industry. The Tribunal will be empowered to, where appropriate, determine minimum rates of pay and related conditions for employee drivers and owner-drivers. These determinations, to be known as Road Safety Remuneration Orders, will be in addition to any existing rights employee drivers have under industrial instruments or contracts of employment, and contractor drivers have under their contracts for services.

The Tribunal will also be empowered to approve road transport collective agreements between hirers and contractor drivers with whom the hirer proposes to contract. The Tribunal will also have the power to resolve disputes between drivers, their hirers or employers, and participants in the road transport industry supply chain about remuneration and related conditions.

This Regulation prescribes the work health and safety laws (however named) of the States and Territories as capable of acting concurrently with the Act. The Tribunal will also be required to take the work health and safety laws of the States, Territories and Commonwealth into account when deciding whether to make a road safety remuneration order.

This Regulation allows for representation by an industrial association in small claims matters in the Federal Magistrates Court or a court of a State. It also prescribes the information which the President of the Tribunal must provide to the Minister and the Fair Work Ombudsman regarding the operation of the Act and the functions of the Tribunal.

Finally, this Regulation sets out the record keeping requirements for employers and hirers of road transport drivers, as well as for participants in the supply chain.

Extensive consultation on the Road Safety Remuneration project has been undertaken with the Safe Rates Advisory Group. This group includes representatives of employer and employee organisations, individual businesses, industry clients and regulation and safety experts.

Details of this Regulation are in Attachment A.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in

Explanatory Statement to F2012L01712
accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement’s assessment is that the measures in the Regulation are compatible with human rights. A copy of the Statement is at Attachment B.

The Act does not impose any conditions that need to be satisfied before the power to make the proposed Regulation may be exercised.

This Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required.

This Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.
Part 1 – Preliminary

Division 1 – Name and commencement

Regulation 1.1 – Name of Regulation
1. This regulation sets out the name of the proposed Regulation as the Road Safety Remuneration Regulation 2012 (the Regulation).

Regulation 1.2 – Commencement
2. This regulation provides that the Regulation will commence on the day after it is registered on the Federal Register of Legislative Instruments.

Regulation 1.3 – Definitions
3. This regulation defines ‘Act’ as the Road Safety Remuneration Act 2012.

Regulation 1.4 – Concurrent operation with State and Territory laws
4. Section 10 of the Act provides that the Act is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory that is capable of acting concurrently with the Act. For clarity, subsection 10(2) provides a list of legislation which is not intended to be excluded or limited by the Act. Paragraph 10(2)(f) permits further legislation to be prescribed by regulation.

5. The listing of the legislation in subsection 10(2), and the prescribing of further legislation by this regulation serves to make clear that the Act does not exclude or limit them.

6. The work health and safety laws (however named) of the States and Territories are prescribed for the purposes of 10(2)(f). They are:

   a) Work Health and Safety Act 2011 (NSW)
   b) Occupational Health and Safety Act 2004 (Vic)
   c) Work Health and Safety Act 2011 (Qld)
   d) Occupational Safety and Health Act 1984 (WA)
   e) Occupational Health, Safety and Welfare Act 1986 (SA)
   f) Workplace Health and Safety Act 1995 (Tas)
   g) Work Health and Safety Act 2011 (ACT)
   h) Workplace Health and Safety (National Uniform Legislation) Act 2011 (NT)

7. This regulation is not intended to be a static list but would be amended from time to time as necessary to reflect changes in the legislative landscape which would have a bearing on the Road Safety Remuneration laws.

8. As the National Heavy Vehicle laws are implemented in the States and Territories, it is envisaged that those laws would also be prescribed for the purposes of subsection 10(2) of the Act.
Part 2 – Road safety remuneration orders

Regulation 2.1 – Matters tribunal must take into account

9. Section 20 of the Act requires the Tribunal to have regard to particular matters when deciding to make a road safety remuneration order. Paragraph 20(1)(g) states that the Tribunal must have regard to the need to avoid unnecessary overlap with the Fair Work Act 2009 (‘FW Act’) and any other laws prescribed for the purposes of this paragraph.

10. The work health and safety laws (however named) of the States and Territories and the Commonwealth are prescribed for the purposes of paragraph 20(1)(g). They are:

   a) Work Health and Safety Act 2011 (NSW)
   b) Occupational Health and Safety Act 2004 (Vic)
   c) Work Health and Safety Act 2011 (Qld)
   d) Occupational Safety and Health Act 1984 (WA)
   e) Occupational Health, Safety and Welfare Act 1986 (SA)
   f) Workplace Health and Safety Act 1995 (Tas)
   g) Work Health and Safety Act 2011 (ACT)
   h) Workplace Health and Safety (National Uniform Legislation) Act 2011 (NT)
   i) Work Health and Safety Act 2011 (Cth)

11. This regulation is not intended to be a static list but would be amended from time to time as necessary to reflect changes in the legislative landscape which would have a bearing on the Road Safety Remuneration laws.

12. As the National Heavy Vehicle laws are implemented in the States and Territories, it is envisaged that those laws would also be prescribed for the purposes of paragraph 20(1)(g) of the Act.

Part 5 – Compliance

Regulation 5.1 – Small claims procedure

13. Section 69 of the Act provides that proceedings are to be dealt with as small claims proceedings if certain conditions are met. The conditions are:

   - if a person applies for an order (other than a pecuniary penalty order) under Division 1 of Part 5 of the Act from a magistrates court or the Federal Magistrates Court;
   - the order relates to an amount that another person is required to pay under the Act or an enforceable instrument under the Act; and
   - the person indicates that he or she wants the small claims procedure to apply to the proceedings.

14. Subsection 69(8) of the Act enables regulations to provide for a party to small claims proceedings, in specified circumstances, to be represented by an official of an industrial association. Subsection 69(9) provides that if small claims proceedings are heard in a court
of a State, the regulations may so provide only if the State law allows representation by an official of an industrial association in the circumstances specified in regulations made under subsection 69(8).

15. This regulation provides that a party to a small claims proceeding can be represented by an official of an industrial association where the proceedings are in the Federal Magistrates Court and the Court has granted leave for the official to represent the party, or where the proceedings are in a court of a State, a law of the State allows the party to be represented by the official and the State court has granted leave for the official to represent the party in accordance with any rules of the court.

16. This is consistent with the *Fair Work Regulations 2009* (‘FW Regulations’), which are made under similarly drafted provisions under the *Fair Work Act 2009* (‘the FW Act’). These regulations were made following the decision of the Federal Magistrates Court in *Corcoran & Ors v Bansley Pty Ltd [2011] FMCA 440*. In that decision, it was held that as the FW Act provided that an ‘industrial association’ may only represent a party to a small claim in specified circumstances as provided in the regulations, and as no such regulations were made, the applicants were not able to be represented by an employee of an industrial association. The decision highlighted the potential for unfairness to result if parties in the small claims jurisdiction are not able to be represented by their industrial association. This regulation aims to address that issue.

**Part 6 – Road Safety Remuneration Tribunal**

**Regulation 6.1 – Information and documents President must provide**

17. The President must provide certain information to the Minister and the Fair Work Ombudsman as prescribed by paragraph 117(1)(b) of the Act.

18. The table in subregulation 6.1(1) sets out information that the President must provide for each quarter for the purposes of paragraph 117(1)(b) of the Act. The information relates to the application for and making of road safety remuneration orders under section 19 of the Act, draft orders (including draft orders prepared but not made into road safety remuneration orders), the review and variation of orders under sections 31 and 32, approval of collective agreements under section 32A, disputes, and the number of applications dismissed by the Tribunal under section 84 of the Act.

19. This information allows the Minister to monitor the operation of the Act and of the Tribunal.

20. Subregulation 6.1(2) provides that the information must be provided as soon as practicable after the end of the quarter.

**Part 7 – Miscellaneous**

21. Divisions 7.1 – 7.3 set out the record keeping requirements for employers and hirers of road transport drivers and for participants in the supply chain.
22. Subsection 119(1) of the Act requires a person who is the employer or hirer of a road transport driver to make, and keep for 7 years, records of the kind prescribed by the regulations in relation to each road transport driver the person employs or engages.

23. Subsection 119(2) provides that the records must be in the form, if any, prescribed by the regulations and must include any information prescribed by the regulations. Subsection 119(3) allows regulations to provide for the inspection of these records.

24. Subsections 119(1) and (2) are civil remedy provisions, making it unnecessary for each regulation made under those provisions to be separately identified in the regulations as civil remedy provisions. The penalty for contravention of these provisions is set out in the Act (see section 46).

25. Subsection 121(1)(b) allows regulations to be made prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

**Division 7.1 – Records to be kept by employer of road transport driver**

26. Division 7.1 deals with employer obligations to make and keep employee records.

27. The record-keeping obligations for employers reflect, to the extent relevant, the record-keeping obligations for employers under the FW Regulations. The employer may already have these records as part of making and keeping records for the purposes of the FW Act and the FW Regulations. Where this occurs, keeping only one set will satisfy the requirements of both the FW Act and the Act, and both the FW Regulations and this Regulation.

**Regulation 7.1 – Records**

28. Under subsection 119(1) of the Act, a person who is the employer of a road transport driver must make, and keep for 7 years, records of the kind prescribed by the regulations in relation to each road transport driver the person employs.

29. This regulation provides that where a road safety remuneration order or arbitration order imposes requirements on the employer in relation to an employee driver, the employer is required to keep records of the kind prescribed in this regulation, and additional records in particular circumstances.

30. For clarity, a note points out that an inaccurate record is not a record of the kind prescribed.

31. A second note points out that if the employer already has records as part of making and keeping records for the purposes of the FW Act or FW Regulations, then there is no obligation to keep a second copy of the record for compliance with the Act.

32. This regulation requires employers who have requirements imposed on them by an enforceable instrument to keep records of the following information about employee road transport drivers:

- general records, including details about the employer and employee, the employment status of the driver, the rate of remuneration of the driver, gross and
net amounts paid to the driver and any deductions made from the gross amount paid to the driver;

- details on pay, including hours worked by a driver with a guaranteed rate of pay set by reference to a period of time worked, any other entitlements to be paid to a driver including an incentive-based payment, bonus, loading, penalty rate or another monetary allowance or separately identifiable entitlement;
- details on overtime;
- details on averaging of hours;
- details and information on any road safety remuneration order or arbitration order which imposes requirements on the employer in relation to the driver under the order;
- details about leave;
- any superannuation contributions; and
- details on the termination of a driver’s employment.

Regulation 7.2 – Form

33. This regulation provides that records made and kept for the purposes of section 119 of the Act must be legible, in English and readily accessible by an inspector. An inspector is defined in the Act to mean a Fair Work Inspector under the FW Act.

Regulation 7.3 – Inspecting and copying record

34. Subregulation (1) requires employers to make records of the kind prescribed by Division 7.1 available to the individual to whom the record relates, for inspection or copying upon request.

35. Subregulations (2), (3) and (4) set out how, when and in what form records must be made available.

36. The requirement that employers make records available for inspection and copying by inspectors is dealt with in section 74 of the Act, which provides that an inspector may exercise compliance powers within the meaning of the FW Act (apart from sections 715 and 716 of the FW Act). Section 709 of the FW Act sets out the powers of an inspector while on premises and section 712 of the FW Act empowers an inspector to compel the production of documents by notice to produce.

Regulation 7.4 – Information about records

37. This regulation requires employers to tell a driver where records relating to the driver (or former driver) are kept when a driver or former driver makes a request to inspect the record.

38. A driver (or former driver) is able to interview the employer, or a representative of the employer, at any time during ordinary working hours, about a record that the employer has made or will make.

39. This regulation ensures that drivers and/or their agents are able to gain access to their own records and/or information about those records in a timely and efficient manner.
Regulation 7.5 – Records – transfer of business

40. This regulation sets out how employee records must be dealt with when a transfer of a business occurs (see section 311 of the FW Act).

41. Subregulation 7.5(2) requires the old employer to transfer to the new employer each record relating to a transferring employee that the old employer was required to keep under subsection 119(1) of the Act.

42. Subregulation 7.5(3) allows a Commonwealth authority to provide copies of the records (rather than originals).

43. Subregulations 7.5(4) and 7.5(5) ensure that where an employee of the old employer later transfers, the new employer is able to request their employment records.

44. Subregulation 7.5(6) provides that where an employee of the old employer transfers to the new employer, the records received by the new employer from the old employer are records of a kind that must be kept by the new employer. The employer is not required to make new records in relation to the period of employment with the old employer (proposed subregulation (7)).

Regulation 7.6 – Records – accuracy

45. In order to ensure that records are accurate at all times, employers are not permitted to alter records except to correct errors that come to their attention. Employers are also required to ensure, to the extent possible, that other persons (such as managers or other employees) do not alter records except to correct errors. Corrections are required to be made immediately upon discovery of error, and the record needs to note that a correction has been made (as well as what the correction is).

46. This regulation also prohibits a person (including managers, other employees and bodies corporate) from using information in a record where the person knows that information is false or misleading.

Division 7.2 – Records to be kept by hirer of contractor driver

Regulation 7.7 – Records

47. Under subsection 119(1) of the Act, a person who is the hirer of a road transport driver must make, and keep for 7 years, records of the kind prescribed by the regulations in relation to each road transport driver the person engages.

48. This regulation provides that where a road safety remuneration order or arbitration order imposes requirements on a hirer in relation to a contractor driver, or an approved road transport collective agreement imposes obligations on the hirer in relation to the contractor driver, the hirer is required to keep records of the kind prescribed in this regulation.

49. For clarity, a note points out that an inaccurate record is not a record of the prescribed kind.

50. This regulation requires hirers who have requirements imposed on them by an enforceable instrument to keep records of the following information about contractor drivers:
• general records, including identifying details about the hirer and contractor driver, the services provided under the road transport contract, the amount paid or payable by the hirer to the contractor driver and a description of how the amount was calculated and details of any deductions made;
• any superannuation contributions as required;
• details of any road safety remuneration orders or arbitration orders which impose requirements on the hirer in relation to the contractor driver under the order;
• details of approved road transport collective agreements which impose requirements on the hirer in relation to the contractor driver under the agreement; and
• details of the termination of a contract between a hirer and a contractor driver.

51. Under subparagraph 7.7(3)(e), a hirer is required to keep a record that describes the road transport services to be provided under the road transport contract between the hirer and the contractor driver. This will not necessarily require a new document to be created. A description of the road transport services may, for example, be contained in a contract, consignment note, running sheet or other working document.

52. Under subparagraph 7.7(3)(h), a hirer is required to keep a record of the amount paid or payable by the hirer to the contractor driver for the road transport services, and a description of how the amount was calculated.

53. Subparagraphs 7.7(3)(i) and (j) deal with recording deductions that have been or will be made from the amount paid or payable by the hirer to the contract driver for road transport services.

54. In some instances the amount of a deduction to be made in future will not be known, and in these instances it is sufficient to record when the deduction will be made, and the reason for the deduction. For example, where a deduction is to be made in future for the cost of fuel used, it will be sufficient to record when that deduction will take place, and why, but the amount does not have to be recorded until the time it is actually deducted.

55. The regulations require records to be kept in a manner that reflects this situation. Accordingly:

• under subparagraph 7.7(3)(i), where a deduction was or is to be made from the amount paid or payable by the hirer to the contract driver for road transport services, the hirer is required to keep a record of when the deduction was made or will be made and the reason for the deduction.

56. Where existing documents (for example, contracts, consignment notes or running sheets) contain the information that is required by the record keeping requirements there is no need for the hirer to create new documents to record this information. It may be that the information required is already contained within a combination of different documents or records.
Regulation 7.8 – Form

57. This regulation would provide that records made and kept for the purposes of section 119 of the Act must be legible, in English and readily accessible by an inspector. An inspector is defined in the Act to mean a Fair Work Inspector under the FW Act.

Regulation 7.9 – Inspecting and copying record

58. Subregulation (1) requires hirers to make records of the kind prescribed by Division 7.2 available to the individual to whom the record relates, for inspection or copying upon request.

59. Subregulations (2), (3) and (4) set out how, when and in what form records must be made available.

60. The requirement that hirers make records available for inspection and copying by inspectors is dealt with in section 74 of the Act, which provides that an inspector may exercise compliance powers within the meaning of the FW Act (apart from sections 715 and 716 of the FW Act). Section 709 of the FW Act sets out the powers of an inspector while on premises and section 712 of the FW Act empowers an inspector to compel the production of documents by notice to produce.

Regulation 7.10 – Information about records

61. This regulation requires a hirer to tell a contractor driver where records relating to the driver (or former driver) are kept when the driver or former driver makes a request to inspect the record.

62. A driver (or former driver) is able to interview the hirer, or a representative of the hirer, at any time during ordinary working hours, about a record that the hirer has made or will make.

63. This regulation will ensure that contractor drivers and/or their agents are able to gain access to their own records and/or information about those records in a timely and efficient manner.

Regulation 7.11 – Records – accuracy

64. In order to ensure that records are accurate at all times, hirers are not permitted to alter records except to correct errors that came to their attention. Hirers are also required to ensure, to the extent possible, that other persons (such as managers or other employees) do not alter records except to correct errors. Corrections also need to be made immediately upon discovery of error, and the record must note that a correction has been made (as well as what the correction is).

65. This regulation also prohibits a person (including managers, other employees and bodies corporate) from using information in a record where the person knows that information is false or misleading.
Division 7.3 – Records to be kept by the participants in the supply chain

Regulation 7.12 – Records to be kept

66. If a road safety remuneration order or arbitration order imposes requirements on a participant in the supply chain, the participant is required to make and keep records that show they have complied with those requirements.

67. Subregulation (1) ensures that these obligations apply to a participant in the supply chain who is an employer of a road transport driver or a hirer of a contractor driver.

68. Subregulation (2) applies the obligations to all participants in the supply chain.

69. A note provides that Division 7.1 applies if the participant in the supply chain is also an employer, and Division 7.2 applies if the participant in the supply chain is also a hirer.

70. For clarity, a note points out that an inaccurate record is not a record of the kind prescribed.

Regulation 7.13 – Records – accuracy

71. In order to ensure that records are accurate at all times, a participant in the supply chain is not permitted to alter records except to correct errors that come to their attention. Participants are also required to ensure, to the extent possible, that other persons (such as managers or other employees) do not alter records except to correct errors. Corrections need to be made immediately upon discovery of error, and the record must note that a correction has been made (as well as what the correction is).

72. This regulation also prohibits a person (including managers, other employees and bodies corporate) from using information in a record where the person knows that information is false or misleading.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Road Safety Remuneration Regulations 2012

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Legislative Instrument

This Regulation prescribes the work health and safety laws (however named) of the States and Territories as capable of acting concurrently with the Act. The Tribunal is also required to take the work health and safety laws of the States, Territories and the Commonwealth into account when making a road safety remuneration order.

This Regulation further allows for representation by an industrial association in the small claims division of a Federal Court or a court of a State. It also prescribes the information which the President of the Tribunal must provide to the Minister and Fair Work Ombudsman regarding the operation of the Act and the functions of the Tribunal. Finally, this Regulation sets out the record keeping requirements for employers and hirers of road transport drivers, as well as for participants in the road transport supply chain.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Bill Shorten, Minister for Employment and Workplace Relations