OWNER-DRIVERS (CONTRACTS AND DISPUTES) AMENDMENT BILL 2022

Second Reading

Resumed from an earlier stage of the sitting.

MR D.R. MICHAEL (Balcatta — Parliamentary Secretary) [2.56 pm]: Just before 90-second statements and the lunchbreak, I was wrapping up my speech and going through some of the ways in which the government supports transport workers around the state. I was talking about the improvements to truck rest stop areas and I want to go through a few more. There will be improvements to 10 key heavy vehicle sites in the Pilbara, midwest, Gascoyne, goldfields–Esperance and south west. At the moment, upgrades are being rolled out at Newman, Auski, Karijini and Leonora. The state rest area strategy is under review and includes an audit of current facilities and the development of a database of all roadhouses, towns and petrol stations to better identify gaps in the freight network. I say that because that is part of the $50 million that our Minister for Transport was able to secure, as well as federal government funding, with the support of the Western Roads Federation and the Transport Workers' Union, to get these truck stops up to scratch. I thank the minister for that.

I went through some key things that the government is doing for transport workers, including this legislation. I think I mentioned the Minister for Industrial Relations and the Steering Healthy Minds program that helps with mental health issues in the transport industry. I read out myriad road projects that are being championed by our Minister for Transport. That is where I got up to.

Again, I think that Parliaments around Australia will have to continue to look at future work in the gig economy because there will be apps and services that we have not contemplated yet that our legislation will lag behind, a little like this, and that we will have to deal with because that is the nature of modern society. Again, I commend the minister for the commitment to looking at further owner–driver legislation for coverage for operators who drive vehicles under 4.5 tonnes. This is a significant issue for owner–drivers around our state and the country and I know that the Transport Workers' Union federally will take this up with the federal government given the lack of action by the former federal government and all its ministers.

In conclusion, Western Australian owner–drivers and hirers deserve the benefits of rights that many others now take for granted, and I support the state government's measures, which will assist the Road Freight Transport Industry Tribunal in the performance of its functions and support its role in giving owner–operators and workers safety and dignity in the job that they do every single day. These amendments are the result of several years' work; I think the member for Moore mentioned that a review commenced in 2018, and there may have been a review before that as well, to look at the operational effectiveness of the legislation. Throughout the review process, consultation was undertaken with all industry associations and unions. I recognise this achievement on behalf of all transport workers and owner–operators in WA.

This has come about through significant consultation with industry through the Road Freight Transport Industry Council, and I thank members of the council, including the Western Roads Federation; the Transport Workers' Union of Australia especially, and its secretary, Tim Dawson, and all the hardworking people in that union; and other industry representatives, for their work on these amendments. I commend the bill to the house.

MR C.J. TALLENTIRE (Thornlie) [3.00 pm]: I am very pleased to make a contribution to the second reading debate on the Owner-Drivers (Contracts and Disputes) Amendment Bill 2022. I have never worked as an owner–driver, but I am very pleased to say that I have a truck licence and have had occasion to use it and to enjoy the various opportunities that it has given me. It has also made me aware of the challenges that people face when they are driving a heavy vehicle on the road. It requires a skill set and involves a set of responsibilities when people are in charge of such vehicles. I was involved in driving livestock, which really does involve driving in a quite different fashion from simply driving a car. I have also driven loads of hay and other agricultural produce.

Driving a heavy vehicle with a heavy vehicle licence enabled me to see at close quarters the sorts of situations a truck driver faces. However, an owner–driver has an entirely different set of challenges to face, especially in respect of their complex relationship with the people who hire them as owner–drivers. I am thinking particularly of the shift work that is involved. One of my neighbours does the very valuable work of subcontracting to the various supermarket chains, delivering goods from the warehouses to the shopping centres. I noticed during the lockdown that their truck pulled out of my street around 11.00 pm, so it was clearly nightshift work and involved very long hours. It is valuable work and, as is the case with so many other jobs that we take for granted, we were able during the COVID lockdown period to gain a real sense of appreciation of essential work—the work that enables us to keep functioning as a society. We have gained a new appreciation for people whose occupations were not always as visible in the past. Owner–drivers who are involved in that distribution network are very important to us, as are a whole host of other jobs such as the people who work in checkouts and stack shelves in supermarkets. That is very important and extremely valuable work for all of us.

There are a lot of other challenges for owner–drivers, and other members have touched on these. There are the health impacts of this occupation. It is a fairly sedentary activity, sitting in a truck, although it requires degrees of exercise at different times. However, when drivers are doing long hauls, they can be sitting for an extended time. There is also concern about the quality of food that is available to owner–drivers or, indeed, anyone who travels long distances in Western Australia. I really think the issue of often unhealthy roadhouse food is something that we need to examine further, because it is the staple diet of many people who drive long distances across the state and the nation. We have to make sure that there is better food available. We should also not discount the fact that if we want to promote ourselves as a driving holiday state, we have to be able to entice people not only with the wonderful experience of travelling in a big, open state, but also by being able to assure them that they will be able to get good food along the way. That is another important aspect. There are many other challenges that owner–drivers face, including the power imbalance that can exist between the hiring firm and the owner–driver, and that is where this legislation is so valuable.

I turn now to another particularly important issue with regard to sharing the road. Much of this legislation is centred on the importance of good road safety and of sharing the road space. I note some of the progressive and really positive things that are going on when we could have faced—indeed, sometimes still do face—challenges in sharing the road space. I am thinking in this case about the road space being shared between truck drivers and cyclists and the cycling community. I want to highlight a particular example that I have spoken to the member for Geraldton about, but it also occurs in the electorate of the member for Moore. In the Chapman Valley area, around the time of grain carting, there are mostly farmer-owned trucks carting grain to the various wheat bins, and therefore a lot of trucking activity on roads such as Chapman Valley Road, Rudds Gully Road and Morel Road. The local cycling community recognises that these are all beautiful roads to ride on, but at times they are dominated by grain trucks. It has made the very sensible decision, working with the local trucking community, to say, "This is a time of year when we are better off not riding on those roads, and we need to find alternatives." That good sense and communication between professional truck drivers and the cycling community is a real indication of the way things have to go—good use of the road space, recognising that there are significant engineering constraints on some of those roads, where it is just not feasible for a truck to pass another truck and come around a blind corner to encounter a peloton of road cyclists.

Mr R.S. Love: Would you support widening Chapman Valley Road?

Mr C.J. TALLENTIRE: I do not know Chapman Valley Road —

Mr R.S. Love interjected.

Mr C.J. TALLENTIRE: I thank the member for his interjection. I do not know Chapman Valley Road, so I cannot speak to its engineering constraints. I am simply going on what I have heard about this very good Geraldton-based cycling advocacy group that includes members of the local cycling clubs, including Spokes Cycle Club and the Geraldton Mountain Bike Club, and I acknowledge the relationship that they have built up with their local truck driving professionals.

I am glad the member for Moore raised this matter. The Backroads Fields of Gold gravel bike race is on this Saturday. That is in the member for Moore's electorate; I notice that he is not sponsoring the event, but the member for Geraldton is. This is a very positive development. People are getting more and more into riding on these gravel back roads. People just need a bike that is slightly adapted to have wider tyres than the typical road bike and a high degree of fitness, because the blue-ribbon event is 160 kilometres. They are very proud of the Fields of Gold race. I think it will be the first such race, and it is a good one for the member for Moore to be aware of. I think this event will be very successful. It is a further indication of the passion that many people in the community are developing for road cycling. This new form, gravel racing, is an option people might like to look at.

While I am on this topic, I acknowledge that the Minister for Transport has created and given me the honour of chairing the bike riding reference group, which has a diversity of interests represented around the table. Indeed, we often find ourselves discussing things like the interaction between the cycling community and professional truck drivers, as well as new emerging issues such as how to cope with e-rideables. I note the excellent contributions from the Road Safety Commissioner, and representatives from WA police, WestCycle, Tourism Western Australia, the Australian Institute of Traffic Planning and Management, the Department of Health, the Road Safety Commission and the Western Australian Local Government Association. It is really an excellent forum, and I commend the minister for her support of the group. A very valuable and high-level discussion goes on. I do not think I mentioned that the Department of Education and the Department of Biodiversity, Conservation and Attractions are also at the table. We have a meeting tomorrow morning with a full agenda already. This relationship with all road users is absolutely germane to every aspect of our meetings.

I note in the technical detail of the bill that it has the primary objective of clarifying the tribunal's jurisdiction over expired contracts, and I can see how important that will be. It also aims to enhance the tribunal's powers by expanding the scope for determining unconscionable conduct by hirers of owner–drivers. This is a really key issue because it would be easy for unconscionable conduct to involve hirers imposing exhausting shifts and hours on owner–drivers.

If a hirer wants to get rid of owner–drivers or pay them less, and the owner–drivers are not willing to agree to a lower paid contract, a tactic could be employed—unconscionable conduct as it would be—to simply exhaust the poor owner–drivers. They would be then left with no other option but to resign and look for other work, but that is not good for the industry. That is exactly the sort of thing that leads to a general downward spiral, and, ultimately, to unsafe practices on the roads. Drivers would be driving in a state of heightened fatigue, unable to pay attention to the detailed things that happen on public roads.

Another objective of the bill is the introduction of right-of-entry provisions. Other members have talked about this. It applies for suspected breaches of an owner–driver's contract or disputes, so the right of entry is very important as well.

The introduction of a statutory minimum notice period or payment in lieu of termination of all owner–driver contracts is especially important because it will give owner–drivers the certainty they need to know when their various contracts will come to an end. As we often hear, certainty in business is vital for ensuring that business owners are in a position to invest. In the trucking industry, investment in a good and reliable truck is essential for ensuring the safe operation of the vehicle, for ensuring it is fuel-efficient and not one of the old polluting clunkers, and for ensuring that it is a clean and efficient vehicle that can be driven safely and do the job reliably. We want to facilitate investment in this part of the trucking industry, and the statutory minimum period is vital when it applies to a contract termination. It is the extra level of certainty that business owners need.

Finally, I make a point about addressing the various administrative deficiencies that emerged since the Owner-Drivers (Contracts and Disputes) Act 2007 commenced. Important technical work is to be done there.

My interest in the trucking industry probably goes back to days when I worked on the wheat bins. I thought that it looked like more fun to be driving trucks into the wheat bins than doing the receival point sampling or weighbridge operating. That was what inspired me to get my truck licence. It really is a job that requires a high degree of responsibility and skill. At the time, the challenge of being able to double declutch was just a very small part of it. A lot of forward thinking was required—looking ahead to see potential obstacles on the road and any bottlenecks that might emerge. I can certainly say that when I was driving a vehicle with livestock on board, in my case stud cattle, they were valuable livestock. You have to drive particularly carefully in that case. That is another skill set in itself. During Royal Show time, I enjoy seeing people driving from the country into Perth with trucks laden with magnificently groomed show cattle. Family members talk about driving into the city along Hay Street with its various speed humps on the approach to the Rokeby Road and Hay Street intersection in Subiaco. They talk about going over the speed humps with cattle on board and seeing the city lights for the first time. It is all a part of their Royal Show experience, which they are more than ready for. They go down to Claremont Showground for that important event, which is an opportunity for the state to demonstrate how, through careful bloodline examination, we are breeding livestock that is best adapted to our Western Australian conditions. Our animals are efficient in converting feed into muscle, are easy to work with and have all the other traits we look for in our livestock. Getting them around the place requires some very careful driving.

I commend the work of anyone involved in the trucking industry, especially owner–drivers who face challenges coping with the pressures put on them by sometimes unscrupulous hirers. Sometimes, it has to be said, unscrupulous hirers have wanted to push them to the limits and force them into situations in which they are either driving vehicles that are not particularly modern but not knowing when they can upgrade because of uncertainty about the longevity of their contracts or having to face serious fatigue matters.

Finally, I also acknowledge a former student of Thornlie Senior High School who was at a recent school graduation a few months back now. Senator Glenn Sterle spoke to the Thornlie Senior High School community about his time at that school and the life opportunities that opened up to him through his truck-driving career. That was something that captured the imagination of the graduating class at Thornlie Senior High School. It was a nice demonstration of the opportunities provided through truck driving. He is now a senator, of course, and someone who makes a great contribution to the nation in that way.

I commend the bill to the house and thank the minister for her work in ensuring the comprehensive nature of the bill.

MS R. SAFFIOTI (West Swan — Minister for Transport) [3.21 pm] — in reply: I thank everyone for their contributions to the debate on the Owner-Drivers (Contracts and Disputes) Amendment Bill 2022. I have learnt a lot about members. The member for Thornlie gave us an insight today into his quite interesting firsthand experiences. I thank the Deputy Leader of the Opposition for his contribution to the debate, his acknowledgement of the legislation, and also the fact the opposition will support the bill. I also acknowledge the work that has been undertaken by the key stakeholders in the bill. I acknowledge the Transport Workers' Union of Australia, the Western Roads Federation and the Livestock and Rural Transport Association. I have engaged with the association positively on a number of issues and I will make it a point to further engage with it in future as well.

I will go through some of the points raised by the Deputy Leader of the Opposition.

I also wanted to acknowledge all those who are involved in the industry. Sometimes it is a very tough job, travelling long distances from family and loved ones. The government is investing a record amount in road safety to help address longstanding road safety issues, particularly in the north of the state. For example, the government is trying to replace one-lane bridges with two-way bridges and, of course, it is implementing the regional road safety program. The other key area is rest stops. We are partnering with the commonwealth government to provide $50 million to be spent on new rest stops and better facilities across the state.

I will go through some of the issues raised by the Deputy Leader of the Opposition and other members and try to address some of those in my response. I refer to the right-of-entry provisions. Sections 35 and 36 of the act never became law. Soon after the act was passed, it became apparent they would cause difficulties and were inconsistent with the right of entry under the industrial relations legislation. The amended right-of-entry provisions proposed in clauses 13 to 18 of the bill provide for a holistic right-of-entry scheme, which is consistent with the equivalent right-of-entry provisions prescribed in the Industrial Relations Act 1979. The new provisions set out defined processes, with supporting protections for authorising, suspending or revoking a right-of-entry authority consistent with the right-of-entry provisions under the WA Industrial Relations Act 1979, and they will facilitate the procurement of evidence to inform the tribunal's dispute resolution processes. The enhanced right-of-entry provisions were developed in consultation with the WA Industrial Relations Commission and the Department of Mines, Industry Regulation and Safety.

With regard to owner–driver consent regarding right of entry, proposed section 34E provides that written authority by the owner–driver is required to ensure that an authorised representative expressly has the owner–driver's consent to act on their behalf to investigate a suspected breach under an owner–driver's contract. The right-of-entry provisions in proposed section 35 in division 3 of part 8 are consistent with section 49I of the Industrial Relations Act 1979, which also does not require an authorised person to identify whether an employee has authorised the representative to act on their behalf; rather it is implicit that an authorised representative is authorised to represent an owner–driver by virtue of them holding an authority consent by virtue of holding a written authority. This allows an owner–driver to confidentially seek an authorised representative to carry out investigation while preventing further discrimination of an owner–driver for raising concerns. If it was suspected that the authorised representative did not have an owner–driver's consent, proposed section 34D(3) will provide for anyone, including the occupier of a workplace or hirer, to apply to the tribunal to suspend or revoke the right-of-entry authority. Under proposed section 34D(3), the tribunal can suspend or revoke on the grounds of being satisfied that the authorised representative has acted in an improper manner in the exercise of their powers to conduct an investigation under division 3.

The provision for confidential reporting of suspected breaches of the act, code of conduct or individual owner–driver contracts provides for issues to be addressed to enhance industry practice without fear of discrimination or jeopardising an individual owner–driver's future work opportunities. In addition, proposed part 6B provides that discrimination against an owner–driver is grounds that the tribunal can take into account when making a determination of unconscionable conduct. Unlike section 49K of the WA Industrial Relations Act, an authorised representative under the owner–driver legislation will not have the right to enter a part of a workplace that is principally used for habitation by an occupier of a workplace or a member of the occupier's household.

Key industry and government stakeholders were consulted during the development of the bill. They include the Road Freight Transport Industry Council, comprising the Transport Workers' Union and the Western Roads Federation. As I said, the Livestock and Rural Transport Association will be further consulted as we progress. I have met with the association on a number of issues over the years I have been minister, and I also try to attend its conference when I can. Other stakeholders include the Road Freight Transport Industry Tribunal; the Registrar of the WA Industrial Relations Commission; the Department of Mines, Industry Regulation and Safety; and the Small Business Development Corporation.

As I said, the Road Freight Transport Industry Council has industry representation from both owner–drivers and hirers through their peak industry bodies and will continue to be consulted. Up to eight people can be appointed to the council. Members are to have the experience, skills and qualifications considered appropriate to enable council members to make a contribution to the work of the council.

In relation to membership of the council, they can nominate and they will be appointed by me through cabinet. Membership nominations are sought during the term of the current council members' term of appointment, and will be approved by the relevant minister, like me, and cabinet.

The government has committed to continue further considerations and we will be working with the department and also with key stakeholders to continue to reform this space. We see this in a sense as the first tranche. We are committed to investigating further amendments to the WA owner–driver laws to broaden the scope of the act. Members have raised the issue of wider use of employment activities in the transport industry and looking at how we can improve the safety and minimum conditions of everyone involved in the transport industry. The government has committed to this and will continue to work on with a view to a second stage of reforms.

I thank government members and the opposition for their contributions to this bill. I would like to see it progress. I understand we will be going into consideration in detail to answer some questions that the opposition might have. I thank everyone for their contributions.

I commend this bill to the house.

Question put and passed.

Bill read a second time.

[Leave denied to proceed forthwith to third reading.]

Consideration in Detail

Clause 1 put and passed.

Clause 2: Commencement —

Mr R.S. LOVE: This commencement clause has four paragraphs. I must admit I have found it very hard to follow the process. I actually went to the Clerk, who helped me to work through the progression of these different paragraphs and how it will all happen. Can the minister explain for the benefit of the chamber why there are four different paragraphs for the commencement, and especially the operation of paragraph (c), which refers to sections 17 and 18?

Ms R. SAFFIOTI: The staged commencement of the bill is necessary to ensure that industry has time to adjust to the reforms, and to enable the necessary supporting systems, consequential proclamations and subsidiary legislation to be put in place. I will go through it. Paragraph (a) provides that sections 1 and 2 will come into operation on the day on which the act receives the royal assent. Paragraph (b) provides that section 12 will commence on the day after the act receives the royal assent. This reflects section 65 of the Industrial Relations Legislation Amendment Act 2021, which amends section 98 of the Industrial Relations Act 1979 to limit the powers of industrial inspectors by condensing and modernising these provisions. Existing references to section 98 of the Industrial Relations Act 1979 in the Owner-Drivers (Contracts and Disputes) Act will be updated by proposed section 12, which amends section 32.

Paragraph (c) provides that sections 17 and 18 will commence immediately after sections 35 and 36 of the Owner-Drivers (Contracts and Disputes) Act 2007 come into operation. Paragraph (d) provides that the remaining provisions of the act will commence on proclamation. This is necessary as consequential amendments will need to be made to the Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010 in support of the bill, and for resourcing, procedural and communication activities to be undertaken by various agencies, including the Department of Transport, Department of Mines, Industry Regulation and Safety, and Western Australian Industrial Relations Commission, in support of the operation of this bill.

Mr R.S. LOVE: Paragraph (c) states —

> sections 17 and 18 — immediately after the *Owner-Drivers (Contracts and Disputes) Act 2007* sections 35 and 36 come into operation;

Sections 35 and 36 have been in the act for 15 years but have not come into operation. What will prompt those sections coming into operation? What will be the trigger? Also, how will we know when that has occurred? Will it be gazetted? What underlying change will need to happen to bring sections 35 and 36 into operation?

Ms R. SAFFIOTI: Sections 35 and 36 as they were passed in 2007 will need to be proclaimed. They will then be amended under clauses 17 and 18 of the bill. We will be proclaiming provisions that have been sitting there since 2007 but have not been proclaimed. We have to proclaim them first before we are able to amend them. That will happen immediately.

Mr R.S. LOVE: Is the minister saying that sections 35 on 36 will actually be brought into operation under paragraph (d); that is, when the rest of the act is proclaimed?

Ms R. SAFFIOTI: They will be proclaimed separately. There will be two proclamations. There will be the proclamation of sections 35 and 36, and then the remainder, under paragraph (d). What we have to do under paragraph (c) is proclaim those parts of the existing legislation that never have been proclaimed. The other parts will then be proclaimed separately, and sections 17 and 18 will impact sections 35 and 36.

Mr R.S. LOVE: To be clear, the fact that it does not say that sections 35 and 36 will be proclaimed is because they are already in the original act and is not subject to legislation per se?

Ms R. SAFFIOTI: Correct.

Mr R.S. LOVE: Thank you.

Clause put and passed.

Clause 3 put and passed.

Clause 4: Section 3 amended —

Mr R.S. LOVE: Clause 4 seeks to insert in section 3 of the act various new terms for the interpretation of the Owner-Drivers (Contracts and Disputes) Act. One of those is "minimum notice period". It states that the "minimum notice period" is —

(a) 90 days; or

(b) if the aggregate term of the original contract and any consecutive series of successive contracts between the same parties that contain substantially similar terms and conditions is less than 90 days — 7 days;

I want to get an understanding of how contracts will be judged. An owner–driver may have been working more or less for the same contractor for a period of well over 90 days, but has been doing discrete and separate jobs for all that time, such as being hired to take a truck to Mt Newman, or to head off to Kalgoorlie. There may also be many different small, short contracts. A contract may involve the use of different trailers, or include a range of different matters, but that owner–driver may have been working for the same contractor continuously for that 90-day period. What will be considered when making a judgement about whether the period is 90 days or a lesser period?

Ms R. SAFFIOTI: It will depend upon the nature of the contract and whether the length is more than 90 days. The contract may contain different destinations, different types of work and different types of trucks. It is not the type of activity, but the length of the contract. That contract may mean that the driver is not there every day doing the same work. The length of the contract is the key determinant, not the nature of the activity, the type of vehicle, or how regular it is.

Mr R.S. LOVE: I want to move on to the term "prescribed representative body". The bill states —

prescribed representative body means a body that —

(a) represents the interests of owner-drivers or hirers; and

(b) is prescribed by the regulations for the purposes of this definition;

In order for a person to be a prescribed representative body, will it be necessary for that person to be recognised in regulation as such? If that is the case, how will it interact in a situation in which owner–drivers may be represented by a union? In this case, the only union that is mentioned is the Transport Workers' Union of Australia, but I would imagine it could be others. Could an owner–driver also be represented at the tribunal by one of the transport groups, like the Western Roads Federation? This might not be the right clause to talk about it. If not, we will get to it later.

Ms R. SAFFIOTI: The TWU is already prescribed in the regulations. The bill will prescribe the definition of "transport association" as "a representative body prescribed by the regulations for the purposes of this definition". The regulations will prescribe the Western Roads Federation as a transport association. I understand the member's point about the Livestock and Rural Transport Association of Western Australia. I had a number of meetings with its representatives, and they have been very, very good to deal with. I have also had them involved in the Freight and Logistics Council of Western Australia more recently. Currently, we are prescribing the Western Roads Federation, but in the future if we need to expand that definition, we can do so by regulation; we would not need to amend the act.

Mr R.S. LOVE: So, the Transport Workers' Union is already in the act and it is just a tidy-up of its name. If another union were to be nominated by a person—they may have a bad history with the Transport Workers' Union, for instance, or they may have previously been a member of a different union or whatever—what would be the process for that union to be involved as their representative?

Ms R. SAFFIOTI: It could be prescribed. It would just require approval and, of course, an amendment to the regulation to prescribe it.

Mr R.S. LOVE: Would that be an amendment to the regulation, not to the actual act?

Ms R. SAFFIOTI: Yes.

Clause put and passed.

Clause 5: Section 10A inserted —

Mr R.S. LOVE: This is listed in the explanatory memorandum under the heading "Part 2—Content of Owner–Driver Contracts: Division 1—Prohibited provisions". Proposed section 10A, "Prohibited: provisions allowing less than minimum notice period", is a direct instruction that any attempt, by contract, to try to reduce the notice period is unacceptable. It is quite clear in the act that there are many other provisions that either say or imply that, so why was it deemed necessary to put this in the bill?

Ms R. SAFFIOTI: I am advised that this explicitly strikes out any possible clause in a contract. I think it is just very clear and explicit; that is how legislation is drafted.

Clause put and passed.

Clause 6: Section 15A inserted —

Mr R.S. LOVE: This implies a minimum period of notice if an owner–driver contract does not have a valid provision about the notice period. Is it possible to have a different arrangement for termination, such as one that may seek to vary the types of termination arrangements without seeking to limit them? It would not run contrary to proposed section 10A, but it may be a different arrangement that could be entered into by the parties.

Ms R. SAFFIOTI: I am advised that the termination period can be longer but not shorter.

Mr R.S. LOVE: There is a financial arrangement as well, in lieu. Is it possible for that to be varied in any way to offset a different arrangement? What I am getting at is that there may be a mix of notice and payment that may suit both parties. It may be that a larger contract is coming to an end. Is there a way of working out the notice that suits everybody better? It might be a different mix between finance and the actual amount of time.

Ms R. SAFFIOTI: Again, it can be a larger figure but not a smaller figure.

Clause put and passed.

Clause 7: Section 18 amended —

Mr R.S. LOVE: Clause 7 talks about the membership of the Road Freight Transport Industry Council being amended. It deletes the Transport Forum WA, which was the forerunner of the Western Roads Federation, and puts in place a representative body prescribed by the regulations for the purposes of this legislation. I guess the minister has already explained this, but why is it that the Transport Workers' Union appears in this legislation, now that we are seeing its name being amended? There is an amendment, so it is fair enough to ask. Why is it necessary to specify one particular union?

Ms R. SAFFIOTI: The TWU is already prescribed in the legislation. It has been there since day one, and it has consistently represented the workers in that industry. This will give us the ability to have representative bodies prescribed under regulation; the Western Roads Federation will be the first. Should bodies change their name, as has happened in the past, this will give us the flexibility to change the body's name and also to add others in the future if there are other bodies that we believe should be appointed to the council.

Mr R.S. LOVE: I take the point that it is just having the union there. There is no mention of a successor name or anything like that, so if a union wants to change its name, the government would have to make a legislative change. I would have thought there might be some way of recognising that. But that is by the bye, and I am not going to pursue that any further.

If the minister would indulge me, I would like to know whether at the moment eight persons are appointed to the council, how many are appointed, and what groups they might represent.

Ms R. SAFFIOTI: Anne-Marie, from the department, chairs the meeting. There are four representatives on that council, including from the Transport Workers' Union of Australia; the Western Roads Federation; Heather Jones from Success Transport, a regional representative; and Robbie Marks from Marks Haulage. Robbie is representative of regional WA and also an Aboriginal representative on the council.

Clause put and passed.

Clause 8: Section 30 amended —

Mr R.S. LOVE: Clause 8 will amend section 30 so that it refers to unconscionable conduct by hirers and then clause 9 mirrors it but refers to owner–drivers. It refers to "unfair" activity and later there is quite a degree of definition around that. I want to know whether the minister could give me an interpretation of "unconscionable" as used in both clauses 8 and 9.

Ms R. SAFFIOTI: For unconscionable conduct, business behaviour may be deemed unconscionable if it is particularly harsh or oppressive and is beyond hard commercial bargaining. Unconscionable conduct does not have a precise legal definition and it is a concept that has been developed on a case-by-case basis by courts over time. Conduct may be unconscionable if it is particularly harsh or oppressive. To be considered unconscionable conduct, it must be considered more than unfair. It must be against conscience as judged against the norms of society. For example, Australian courts have found transactions or dealings to be unconscionable when they are deliberate, involve serious misconduct or involve conduct that is clearly unfair and unreasonable.

A court will consider a number of factors when assessing whether conduct in relation to the selling or supplying of goods and services to a customer, or to the supplying or acquiring of good or services to and from a business, is unconscionable. These include the relative bargaining strength of the parties; whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party; whether the weaker party could understand the documentation used; the use of undue influence, pressure or unfair tactics by the stronger party; the requirements of applicable industry codes; the willingness of the stronger party to

negotiate; and the extent to which the parties acted in good faith. This is not an exhaustive list and it should be noted that the court may also consider any other factor it thinks relevant.

Clause put and passed.

Clause 9 put and passed.

Clause 10: Section 31A inserted —

Mr R.S. LOVE: Clause 10 is the provision we alluded to before when we spoke about unfair terms. It provides a list of what is considered to be unfair terms that the tribunal may have regard to; it goes through from proposed section 31A(1)(a) to (o), so quite a few terms are outlined there. I wonder whether the minister could talk to a couple of them. In particular, I am looking at proposed section 31A(1)(d), which reads —

> whether the term provides for the payment by the hirer to the owner-driver of the guideline rate;

I wonder whether the minister can explain what the guideline rate is, how the guideline rate is calculated and how often the guideline rate is updated. Is there input from industry into the development of the guideline rate?

Ms R. SAFFIOTI: The guideline rates are a series of pre-calculated rates in both per kilometre and per hour dollar amounts. The guideline rates deal with metropolitan and regional driving environments and can be a range of vehicle types. They do not set a minimum or maximum but provide a clear starting point for negotiation. The council is consulted in determining the guideline rights. It has to formally approve the guideline rates. Factors that are considered include CPI, the cost of fuel and other key components. As I said, they are advertised and available on the Department of Transport website.

Mr R.S. LOVE: It mentions a guideline rate, but I am assuming there must be a range of rates depending on the configuration that is being used for the vehicle and also perhaps for the different types of industries and the terrain that has to be covered. I will not delve too far into it. I am merely pointing out that a wide leeway would have to be given when judging whether the guideline rate was applicable or represented the type of work that was being undertaken. For instance, going backwards and forwards in heavy traffic on Leach Highway may have a different effect on a vehicle than travelling on gravel roads in the far north of the state. I will leave it at that, but I point out that I hope there would be a lot of flexibility around the interpretation of what would be a fair or unfair guideline rate.

Ms R. SAFFIOTI: That is correct. As is outlined in the bill, there are guideline rates. The guidelines try to give some variation but we cannot go down to the level of every truck. It is a reference rate that everyone can use to assess what rate they should be charged or that they should pay.

Mr R.S. LOVE: Now that we have established that the guideline rate cannot be held to account for everything, that might be relevant later. I want to talk briefly about the two points that are listed at proposed section 31A(1)(g) and (j) that go to the heart of the level of understanding that perhaps an owner–driver will have around the contract. Proposed section 31A(1) states —

> (g) the extent to which a party understood the term and its effect before the term was agreed to;
>
> …
>
> (j) whether a party obtained independent legal or other expert advice before agreeing to the term;

I am conscious that there will always be a degree of naivety—I do not want to use the word "naivety", but there probably is—by some individuals who are venturing into business or who have been in business for a long time and have come across a term they might not be aware of. Will this set up a situation whereby many contracts could actually run, to some extent, foul of the unfairness provision? I know it refers to individual terms for the whole contract, but it seems to me that an argument could be made in pretty much every circumstance that unless the owner–driver sought independent expert legal advice, they would not have the ability to fully understand the term. Would it be better to have prescribed in the legislation a body like the Small Business Development Corporation or some other place where people could go and quickly seek advice? Will such a body be available for people? I think this will lead to contracts being regularly overturned.

Ms R. SAFFIOTI: We will not have the same advisory function as the SBDC, but a model contract is available on the website with different key clauses that those in the industry can use to help them develop their own contracts for their own situations. The other point is the word "may". This will give the tribunal guidance on things it may consider, but it will not have to consider every item and it may even have other items to consider. There is, as I said, a model contract available to those in the industry.

Mr R.S. LOVE: An argument could be made about many of these terms. They all basically mean the same thing. I move now to proposed section 31A(2), which states —

> For the purposes of subsection (1)(d), a term of an owner-driver contract that provides for the payment by the hirer to the owner-driver of less than the guideline rate is presumed to be unfair …

Earlier, the minister said that the guideline rate was not actually a minimum rate, but that provision seems to set it up very much as a minimum rate. Is that the intention? That does not seem to allow for the variation that we talked about earlier.

Ms R. SAFFIOTI: I do not quite get the question. What is the member's point? Is it that this proposed section sets out —

Mr R.S. LOVE: Earlier, I was talking about judging whether the term was unfair. Proposed section 31A(1)(d) states —

> whether the term provides for the payment by the hirer to the owner-driver of the guideline rate;

The minister said that the guideline rate was not a hard-and-fast minimum but that it is merely a guideline. However, I read that proposed section in conjunction with proposed section 31A(2), which states —

> For the purposes of subsection (1)(d), a term of an owner-driver contract that provides for the payment by the hirer to the owner-driver of less than the guideline rate is presumed to be unfair …

It more or less sets it up as a minimum rate because if someone goes to the tribunal and says they have been paid less than the guideline rate, the presumption will be that it is unfair.

Ms R. SAFFIOTI: It is a rebuttable presumption. The guideline rate is not mandatory. In a sense, it is a guideline rate for a reason. It is what is believed to be a safe and sustainable rate. People are able to try to rebut it, but the presumption is that the guideline rate should be the rate that is charged. Rebuttable is the terminology. I love legal terms! That is why I did not do law. The owner is placed on the highly justified deviations from the guideline rates due to the potential imbalance of power between the hirers and the owner–drivers. No, it is not mandatory, but the whole point is that someone can charge a different rate but they must be ready to justify those different rates. It is a rebuttable presumption. I love those terms.

Mr R.S. LOVE: Perhaps we should be saying that there is a presumed guideline minimum rate that there must be a good argument for. I am quite interested in the whole concept of the guideline rate because surely quite a bit of the rate must also include a fair return to the owner–driver, which will be based upon the value of the unit they are using, as well as the maintenance. If I have a vehicle that is 10 years old, I will have higher maintenance costs but virtually no depreciation, and if I have a vehicle from the showroom, I will have huge depreciation and little maintenance, although some, obviously. To make a presumption about what an average figure has to be for a particular rate, unless people argue it or have another way of determining it, seems to me to be setting up the possibility of a lot of confrontation around whether it is a fair rate or whether it should be followed as a presumption or rebutted.

Ms R. SAFFIOTI: I have a copy of just one page from the owner–drivers' cost calculator. There are some sophisticated models that are already up and available on the website that allow people to input all the types of different factors. It does not include every road and every type of truck, but it does include, for example, the driving environment—whether it is regional or metropolitan—the number of drivers, the type of vehicle and other key factors that are input into the equation such as overtime and superannuation. A significant calculator is available that allows the owner–drivers in particular to input their costs to help identify what they believe their rate would be as part of their negotiations. Again, it will be subject to negotiation, but it gives as many tools as possible to owner–drivers in the industry. The whole point is that we do not want rates to be unsustainable. Basically, a lot of key representatives from the major companies I speak to want a fair and sustainable industry. When people try to undercut or drive to the bottom, serious concerns about the sustainability of the industry and the safety of the industry arise. That is what we are trying to manage.

Mr R.S. LOVE: Proposed section 31A(3) states —

> In considering for the purposes of sections 30(2)(l) and 31(2)(k) whether a term of an owner-driver contract is an unfair term, the Tribunal must not have regard to any unfairness arising out of circumstances that were not reasonably foreseeable when the parties agreed to the term.

When I saw this, I scratched my head and wondered what it meant. Perhaps the minister can explain what the unfair terms will be?

Ms R. SAFFIOTI: This proposed section outlines transitional provisions. Proposed section 31A(3) basically says that if arrangements are established prior to this legislation coming into effect, the minimum term of a termination will not be considered as part of the unfair contract. It is a transitional provision to facilitate movement to the new regime. It means that the minimum notice of termination provision does not apply to contracts that have been entered into because the provision did not exist when that contract was entered into.

Clause put and passed.

Clause 11: Parts 6A and 6B inserted —

Mr R.S. LOVE: Again, the provisions for both the hirer and owner–driver mirror each other, but this time they are included in the same clause. Part 6A, "Misleading or deceptive conduct", includes proposed section 31B, "Misleading or deceptive conduct by hirer", which is mirrored in proposed section 31C for the owner–driver. Can the minister explain what possible sanctions there will be under the remedies that are listed in the bill to prevent misleading or deceptive conduct by an owner–driver? I can see there would be plenty of ways in which a hirer, who is the person responsible for making payments et cetera, could be penalised. But what misleading or deceptive conduct by an owner–driver does the minister envisage will lead to anything other than the cancellation of a contract?

Ms R. SAFFIOTI: I think that the member is asking for examples of what an owner–driver could potentially do. They could mislead someone about their capabilities; for example, they may have a refrigerated unit that does not work properly and that leads to the product being spoilt. It would be the inability to deliver the quality of a product as required under the contract.

Mr R.S. LOVE: We can talk about this under remedies, but I want to get to the bottom of it. If we use the minister's example, and that leads to a hirer suffering real losses, the remedy for that loss is not set out or is it? Could the hirer, for instance, seek some sort of recourse under the legislation if the owner–driver simply does not do the job or does it poorly or it leads to breakage or spoilage or some other loss that actually flows through to the hirer and to the detriment of the hirer?

Ms R. SAFFIOTI: This provision just allows for the early termination of a contract should there be that type of behaviour. Proposed section 47A provides for remedies. They include, mainly, the termination of a contract without further payments being made. I also suspect much of this will be covered by some form of insurance potentially, especially in the example I gave. The bill does not allow for a refund of some of the value of the product. It allows for the early termination of contracts.

Mr R.S. LOVE: I have one last question on proposed section 31D(3), which states —

> For the purposes of this section, subjecting an owner-driver to detriment includes doing one or more of the following —
>
> …
>
> (d) refusing to engage a person as an owner-driver;

If someone is not engaged as an owner–driver, they are not in a contractual relationship, so how can they in any way cause discrimination to someone in an existing contractual situation? They can cause detriment to a person by discriminating, but proposed paragraph (d) states, "refusing to engage a person as an owner–driver". That seems contradictory, because if the person is not engaged, how can they fall under the provisions of this bill?

Ms R. SAFFIOTI: That is an interesting question; we are having our own discussion here as to whether an existing contractual relationship needs to exist. The view of the advisers is that yes, it is in a sense a re-engagement, in that there would have to have been an existing contractual relationship. I put forward the proposal that it could be a situation in which someone's contracts work out and someone comes up and says, "I'll do that work", and they say, "We won't engage you under this form; we'll try to engage you under a different form." I asked whether that could be the case, but we will seek to clarify that for the upper house. We will have it clarified before the debate in the upper house, because it is a good question.

Clause put and passed.

Clause 12 put and passed.

Clause 13: Part 8 Division 1 inserted —

Mr R.S. LOVE: Clause 13 will insert, at the beginning of part 8, proposed section 33A under the heading "Division 1—Preliminary". It states —

> **33A. Terms used: record**
>
> In this Part —
>
> ***record*** means a record required to be kept under the code of conduct.

I had the code of conduct and now I have lost it; I had to speak before I could find it. Could the minister give the chamber an explanation of what that is under the code of conduct?

Ms R. SAFFIOTI: It is a series of regulations proclaimed in 2010. The schedule to the regulations sets out the code of conduct and outlines things like guidelines around contract negotiations; guidelines around rates of payment, penalty clauses and deductions for money payable to owner–drivers; and other things, like rates of interest, overdue amounts and records to be kept by a hirer. That is what it relates to. Clause 13 identifies that records need to be kept by the hirer; division 7 of the regulations outlines the records that need to be kept. Under regulation 43, records to be kept by the hirer are prescribed under the code of conduct and include owner–driver and service provider names;

a description of services provided; dates of services provided; amount payable due, and how calculated; and actual amount paid.

Clause put and passed.

Clause 14 put and passed.

Clause 15: Section 34 amended —

Mr R.S. LOVE: This clause amends section 34(2)(a) by inserting the word "hirer's" before the word "records" and deleting the words "concerned that are required to be kept by the hirer under the code of conduct; and", and inserting "concerned; and". Does this have any effect on anything, or is it simply a reordering of information? What does this clause actually seek to achieve?

Ms R. SAFFIOTI: There are two things. It will allow for access to and inspection of records that may include not only information that is required by the code of conduct, but also other information that may be held. It will provide access to that information. It will also update these provisions to reflect a more modern drafting style, so it is also an administrative change.

Clause put and passed.

Clause 16: Part 8 Division 3 inserted —

Mr R.S. LOVE: This clause will insert division 3, which is headed "Division 3—Authorised representative's right of entry to conduct investigation". There is quite a number of proposed sections. I suppose this is a modification of the original sections in the act that were never enacted because they were seen to be quite draconian. These are some of the provisions that will be affected by the commencement date we talked about earlier. Presumably there will be a proclamation, under the existing act, of proposed sections 35 and 36, and then these proposed sections will come into effect immediately after that, so there is no further need to proclaim them; they will just naturally occur at that point.

This is obviously a matter of some concern to people; it has been raised as a concern with me by various people—not just representative organisations, but also hirers. It is a matter of some note. I also note that there are a number of changes to what was originally envisaged, which will enhance the personal security of those people who may be expected to open their workplaces to inspection et cetera. In my view, it has tried to achieve a balance to actually get the information without making it onerous on the person. In some cases, it may be their home office or what have you. Members can see the need to handle this sensitively; we do not want people to be invaded, as such, in their home.

I just want to work through a couple of issues. I refer to division 3, "Authorised representative's right of entry to conduct investigation". Proposed section 34A refers to terms that will be put in place. It states —

> ***authorised representative*** means a person to whom an authority is issued under section 34B(2);

We will get to that in a little while. I just want to clarify the next line —

> ***occupier***, of a workplace, includes a person in charge of the workplace;

In explaining that, perhaps the minister can also tease out what is meant by "workplace" because it may be that a person works from a depot or they may have signed their contract in a managerial office but there may be another place where records are kept and that information is stored. Could the minister just explain the definitions? I know the proposed section does not, strictly speaking, define a workplace, but it does define an occupier of a workplace, so perhaps the minister could explain a little about what constitutes a workplace.

Ms R. SAFFIOTI: The Owner-Drivers (Contracts and Disputes) Act 2007 actually defines "workplace". It states —

> ***workplace*** means a place, whether or not in a vehicle, building or other structure, where owner-drivers or hirers work or are likely to be in the course of their work.

It is where they normally work from in their capacity as either the hirer or the owner–driver.

Mr R.S. LOVE: Proposed section 34B(1), "Authorised representative", states —

> The secretary of an organisation that is a transport association may apply to the Registrar for a person nominated in the application to be issued with an authority for the purposes of this Division.

Can the minister explain exactly what those organisations are? Is that simply the Transport Workers' Union or does the minister envisage that will apply to other organisations?

Ms R. SAFFIOTI: It is currently the Transport Workers' Union. It is a registered organisation under the IR act and a transport association.

Mr R.S. LOVE: I refer to proposed subsection (2), which states —

> Subject to subsection (3), the Registrar to whom an application is made under subsection (1) must issue a written authority for the purposes of this Division to the person nominated in the application.

This is the written authority that must be produced when entering the workplace and, presumably, has to be with the person at all times. I will just read through the explanatory memorandum. I am not going to read all about subsection (2) again. The explanatory memorandum states —

> … Registrar is defined under section 3 as having the meaning given to that term by the *Industrial Relations Act 1979* —

I am not greatly familiar with that act —

> … That is the chief executive officer of the registrar's Department …

Is that the chief executive officer of the Department of Mines, Industry Regulation and Safety? What is that role?

Ms R. SAFFIOTI: It is the registrar of the WA Industrial Relations Commission.

Mr R.S. LOVE: Is that also the chief executive officer of the registrar's department? Which department is that?

Ms R. SAFFIOTI: It is the Industrial Relations Commission. The registrar and the CEO are the same thing in the Industrial Relations Commission.

Mr R.S. LOVE: I will move on to subsection (4). The explanatory memorandum states —

> … despite section 43 … section 49 of the *Industrial Relations Act 1979* … does not apply to a decision of the Tribunal under subsection (3)(c) that a new authority may be issued.

I think this is one of several instances when there are no rights of appeal that appear in other legislation. Why is there no right of appeal in this particular circumstance?

Ms R. SAFFIOTI: There is no discretion in the act about whether the registrar can issue the authority. As a result, there is no right of review or appeal because discretion has not been implemented.

Mr R.S. LOVE: I refer to proposed section 34C(2), which states —

> A contravention of subsection (1) is not an offence but that subsection is a civil penalty provision for the purposes of the IR Act section 83E.

For the purposes of explaining this to the chamber, what do those civil penalty provisions provide for?

Ms R. SAFFIOTI: The civil penalty for serious contraventions may be amounts not exceeding $650 000 for a body corporate and $130 000 for individuals; non-serious contraventions are $65 000 for a body corporate or $13 000 for individuals.

Mr R.S. LOVE: We are talking about an authorised representative. In the penalties the minister just read, there was mention of a body corporate. Does that imply that a body corporate can also be an authorised representative or does this refer to circumstances when the organisation—the transport association—has actually failed to do some act or, perhaps, advise the registrar or some other body that a particular person is no longer a representative of it? Otherwise, why is there a mention of that in the answer?

Ms R. SAFFIOTI: The penalties I outlined are contained in section 38E of the Industrial Relations Act. We believe there will not be penalties for the body corporate in this instance. It picks up the definition of a civil penalty from that section of the IR act.

Mr R.S. LOVE: I move to proposed section 34D, "Revocation or suspension of authority", which states —

> (1) Subject to subsection (2), the Registrar must revoke an authorised representative's authority —
>
> (a) on application by the secretary of the organisation that made the application under section 34B(1); or
>
> (b) if the Registrar becomes aware that the authorised representative no longer holds —
>
> (i) an authority issued under the IR Act section 49J(1); or
>
> (ii) an entry permit issued under the *Fair Work Act 2009* (Commonwealth) section 512.

That was the germ of the question I just asked. Is there an implied requirement on the organisation if a person moves on from their role to inform the registrar of that?

Ms R. SAFFIOTI: It is the personal responsibility of the authorised representative.

Mr R.S. Love: Not the organisation, essentially?

Ms R. SAFFIOTI: No.

Mr R.S. LOVE: Proposed section 34D(3) reads —

> The Tribunal may, on application by any person, revoke, or suspend for a period determined by the Tribunal, an authority issued under section 34B(2) …

That is, if it finds a number of factors to be the case. That "any person" would not have to be one of those representative organisations or a hirer themselves. Could they make an application of this nature for an owner–driver if they no longer wanted a particular matter to be pursued?

Ms R. SAFFIOTI: Yes.

Mr R.S. LOVE: I want to clear up a matter we discussed at the briefing around the effect of the written authority of an owner–driver being required. Proposed section 34E states —

> An authorised representative is not entitled to exercise a power conferred by this Division for the purpose of conducting an investigation into a suspected breach … unless the representative is authorised in writing by the owner-driver who is a party to the contract to carry out the investigation.

How would the hirer know that the person is in fact authorised by the owner–driver; and, if they do not know, is that not running a risk that the representative could be having a bit of a fishing expedition and not have a complaint?

Ms R. SAFFIOTI: Proposed section 34E provides that when an authority by an owner–driver is required to ensure that an authorised representative expressly has the owner–driver's consent to act on their behalf to investigate a suspected breach under an owner–driver contract, the part A, division 3, section 35 right-of-entry provisions are consistent with section 49I of the Industrial Relations Act 1979, which also does not require an authorised representative to identify an employee as an authorised representative to act on their behalf; rather, it is implicit that an authorised representative is authorised to represent an owner–driver by virtue of them holding an authority consent by virtue of holding a written authority. This will allow the owner–driver to confidentially seek the authorised representative to carry out an investigation or prevent further discrimination of the owner–driver for raising concerns. If it was suspected that authorised representatives did not have an owner–driver consent, proposed section 34D(3) will provide for anyone, including the occupier of a workplace or hirer, to apply to the tribunal to suspend or revoke the right-of-entry authority. Under proposed section 34D(3), the tribunal could suspend or revoke on the grounds of being satisfied that the authorised representative has acted in an improper manner in the exercise of their right-of-entry powers to conduct investigations under division 3.

Mr R.S. LOVE: I thank the minister. That clears it up and gives some comfort that someone can verify there is a complaint that is being acted on. Given notice is required for the production of records in any case, I assume the person would have the opportunity to contest that issue if they were concerned, before they had to produce records et cetera. Is that the time line that this would work to? I would receive notice that the representative wanted to look at the pay sheet, the run sheet, the manifests or whatever and that would be sufficient time for the hirer, if concerned, to go to the authority to seek confirmation there was a complaint.

Ms R. SAFFIOTI: Yes, that is correct.

Clause put and passed.

Clause 17: Section 35 replaced —

Mr R.S. LOVE: Clause 17 will delete the existing section 35 and insert a new section 35. This is interesting because when we discussed the operation of the commencement clause, we were told that because section 35 already exists in the act, it does not need to have a separate proclamation and it would be proclaimed under the provisions of the existing act. But we are seeing the entirety of it being deleted, so it is no longer the same provision as it is in the original act and it will now be a separate and new provision. That raises some concern for me about whether the proposed method is valid. I would have thought it would have its proclamation listed in the commencement date. I will get the minister's view on that and we might discuss the clause in detail.

Ms R. SAFFIOTI: Under this bill, existing sections 35 and 36 will come effect; and, immediately after that, proposed sections 17 and 18, which amend sections 35 and 36, will come into effect. That is how this will be done.

Mr R.S. LOVE: As I have said, I have struggled with the concept of the commencement clause, and I have had a discussion with the Clerk. I am very confused when I see that section 35, which was supposedly in the original act and did not need to have a fresh proclamation date given to it, will be completely changed—in fact, deleted altogether. Clause 17 states, "Delete section 35 and insert". It is no longer the section 35 that was in the original act. This seems to be a bit of a conundrum. Maybe this could go to the Standing Committee on Legislation in the other place and it could talk about these types of things. I do not think that committee has met yet in this term of Parliament. This might be an excellent opportunity for that committee to tease out some of these discussion points that we are going through. As part of my third reading contribution, I might suggest that this matter go to that committee, which is a valuable resource that has not been used for the entirety of this Parliament. That may well be a very good

exercise. Given the public interest in making sure that these provisions are well known and considered to be very fair, that may be an excellent path forward. That is a comment. I am still struggling to accept that the commencement matters are appropriate, but I will accept the will of the house and move along after making that point.

Section 35 is proposed to be replaced with a new section 35, "Authorised representative's right of entry". It states —

> An authorised representative may enter any workplace where an owner-driver works, during working hours at the workplace, for the purpose of investigating any suspected breach of —
>
> (a) this Act; or
>
> (b) the code of conduct; or
>
> (c) an owner-driver contract to which the owner-driver is a party.

Would an authorised representative need to have been given a complaint from an owner–driver in order to check the premises to see whether there has been a breach of the code of conduct? It is not looking at the terms of the contract. It is looking at whether the code of conduct is being abided by. The contract could be with a group of owner–drivers rather than one owner–driver. I ask the minister for her view of that.

Ms R. SAFFIOTI: They would need to have the consent of the owner–driver under proposed section 34E.

Mr R.S. LOVE: New section 35B, for instance, does not set up a separate power or a separate circumstance where the authorised representative could enter where an owner–driver or an owner–driver group works during working hours to investigate a suspected breach of the code of conduct, as opposed to a contract.

Ms R. SAFFIOTI: They would need to have consent in relation to the owner–driver.

Mr R.S. LOVE: Presumably the inferred place where the owner–driver works is the hirer's workplace or the premise from which the owner–driver may from time to time come and go.

Ms R. SAFFIOTI: The definition, as I read out before, is where the majority of the work is undertaken and where we would expect to find the hirer and the owner–driver, as I recall. It is where the owner–driver or hirer are known to be in the course of their work. It will depend on where the hirer is working from and where the owner–driver is working from.

Mr R.S. LOVE: I want to ask about the situation where there might be a series of contracts rather than just one contract. The example I have here is an article on the options that Co-operative Bulk Handling Ltd has for moving grain. There are a couple of options. CBH can use its own trains; it can use trucks that are provided by farmers; it can subcontract to a group known as Cropline Haulage; it can joint contract with farmers on certain routes; and farmers can subcontract to a current CBH road contractor, which is unspecified. In terms of where the authorised representative can go to understand whether the contract is fair and appropriate, may they enter only the workplace of the owner–driver's direct hirer, or may they enter the workplace of another organisation that has set up the basic terms for the whole fleet, which may involve several subcontractors, but none of them determine the price, if you like, and the conditions; they are determined by another organisation that has subcontractors working for it? In that case, can the authorised representative go to both that workplace and the workplace of the head contractor?

Ms R. SAFFIOTI: It is the relationship between the owner–driver and the hirer. It does not include the head contractor. Although that may be the ultimate hirer or the ultimate contractor, it is the relationship between the owner–driver and the hirer, and maybe the subcontractor.

Mr R.S. LOVE: That is the end of the trail; we cannot go any further in the discussion beyond that. That brings me to a point I would like to ask: if one of the subcontractors was a smaller operator and perhaps also an owner–driver, presumably that person could be used to enter up the scale. At what point does someone stop being an owner–driver and become ineligible to fall under this act, just as a matter of interest? I neglected to ask that at the start.

Ms R. SAFFIOTI: Section 4(2)(a) of the act defines owner–driver, and it is a driver —

> (i) who carries on the business of transporting goods in one or more heavy vehicles supplied by that person; and
>
> (ii) whose principal occupation is the operation of those vehicles …

Basically, they both drive and own the vehicle.

Mr R.S. LOVE: If we move on to proposed section 35B, "Conduct in workplace", before, we touched on the fact that the workplace could well be a person's house. The first proposed subsection of this is —

> (1) An authorised representative does not have the right under section 35 to enter into any part of a workplace that is principally used for habitation by an occupier or a member of the occupier's household.

Quite clearly, that is there to protect against any unwanted intrusion into a person's household. I am interested to read in the explanatory memorandum that this aligns with existing section 49K of the Industrial Relations Act.

However, it does not adopt the amendment to section 49K made in 2021 because the balance of privacy considerations does not need to be made, as it does under that act, because someone could be employed in the household.

I think understanding that provides some comfort to people that their houses will not be invaded, and their workplaces—if they are also their homes—will not necessarily be subject to intrusions, which are to be moderated. Further, it goes on to say —

> (2) An authorised representative must comply with any reasonable request by an occupier to take a particular route to reach a room or area in the workplace.

In other words: do not walk through my lounge room; go around the side, or whatever. That is a good thing to see in there, given the circumstances that some of the smaller operators may be working under.

Proposed section 35C(1) then refers to the production of records and other documents —

> (c) during working hours at the workplace, inspect, and take photographs, film and audio, video or other recordings of, any work, material, machinery or appliance that is relevant to the suspected breach.

To me, that sounds more like going into a workshop and seeing, for instance, that the equipment is up to standard; I would have thought it is not so applicable to the production of records. Can the minister explain to me exactly what is meant by taking "photographs, film and audio, video or other recordings of, any work, material, machinery or appliance" and why is it relevant in this particular piece of legislation?

Ms R. SAFFIOTI: This is modelled on section 49I(2) of the Industrial Relations Act, and it tries to reflect the different ways and mechanisms by which a record of information can be taken. It replicates section 49I(2) of the Industrial Relations Act and recognises that electronic recordings are an accurate and efficient way of investigating a suspected breach.

Mr R.S. LOVE: I appreciate it probably does mirror it, but I do not see how it is a necessary provision of the act because it is clearly designed for another circumstance. The proposed section could be ended after "work, material". The inclusion of "machinery or appliance", and taking "photographs, film and audio" of them, does not seem to have any relevance to this legislation. I would put it to the minister that perhaps that is another area that the legislation committee could look at and tidy up.

May I continue because I have a different matter? Proposed section 35C(3) says —

> The Tribunal may, on the ex parte application of the authorised representative, waive the requirement under subsection (2) to give the hirer notice of an intended exercise of a power if the Tribunal is satisfied that to give such notice would defeat the purpose for which the power is intended to be exercised.

Can the minister describe the process for that application and the effect on the workplace? The person would be able to go straight into the workplace without giving notice, inspect any record and look at any matter they wanted to. Can the minister run through the process of how that application would work and what factors would be taken into account in coming to an order that would allow it to happen?

Ms R. SAFFIOTI: If the tribunal believes that the evidence or information would be destroyed or hidden, it may waive the requirement for notice.

Clause put and passed.

Clauses 18 to 20 put and passed.

Clause 21: Sections 38A and 38B inserted —

Mr R.S. LOVE: Clause 21 is erroneously described as clause 22 in the explanatory memorandum, which had me thrown for a little while. I thought I was having a sense of deja vu. Clause 21 is headed "Sections 38A and 38B inserted", and if we go to proposed section 38A, we see —

> (1) The Tribunal may determine (a ***summary determination***) a dispute or matter referred under this Part without a hearing if —

It then gives a number of reasons that are to be discussed. The last point of proposed section 38A(1)(b) states —

> (ii) a party's case has no merit.

Could the minister outline what the outcome could possibly be from a summary determination under this proposed section, other than simply to dismiss the matter altogether?

Ms R. SAFFIOTI: It is to ensure that the tribunal is better equipped to deliver just and more efficient outcomes; a party can apply to a court or tribunal to give judgement in their favour without having to go through a formal trial process if a party can show that the other party has no reasonable prospect of succeeding. It allows for more efficiency. The tribunal can implement any of its remedies under proposed section 47A.

Mr R.S. LOVE: It would appear—correct me if I am wrong—that there will also be no appeal under proposed section 38A(5). Can the minister explain why there will be no appeal in this matter?

Ms R. SAFFIOTI: Again, because there is no discretion in that sense, there is no right of appeal.

Mr R.S. LOVE: If we move to proposed section 38B, "Tribunal's power to make default determination", we see that it states —

> (1) This section does not apply to —
>
> (a) a failure to comply with the determination of a dispute or matter by the Tribunal; or
>
> (b) an order made in, or as a consequence of, the determination of a dispute or matter by the Tribunal.
>
> (2) The Tribunal may make a determination (a ***default determination***) against a party to the proceedings without a hearing if the party —
>
> (a) does not comply with a direction, order or declaration made by the Tribunal during the course of the proceedings; or
>
> (b) fails to file a response within the prescribed period.

I read it several times and looked at it from different angles, and it just seemed to me that those two proposed subsections do not sit together. They appear to be contradictory, so perhaps the minister can explain why the first provision says that it does not apply to a failure to comply with a determination or dispute but then the tribunal can make a determination without a hearing if the party does not comply with a direction, order or declaration.

Ms R. SAFFIOTI: The first refers to after the event and the second refers to in the process of court proceedings.

Mr R.S. LOVE: That concludes my discussion on that particular point.

Clause put and passed.

Clause 22: Section 40 amended —

Mr R.S. LOVE: Clause 22 will amend section 40 by inserting subsection (2) to provide that despite subsection (1) a dispute or matter under or in relation to an owner–driver contract cannot be referred to the tribunal under subsection (1)(a) or (c) more than 12 months after the contract expires. The purpose of this provision is to clarify the tribunal's jurisdiction in relation to expired owner–driver contracts. As I understand it, there was some concern that if a contract had expired, there would no longer be a relationship and no ability to look at a contract or a situation. The government has set the bar at allowing the contract to be re-examined over 12 months. I am wondering why 12 months was chosen as the period that someone could go back and look at such an owner–driver contract.

Ms R. SAFFIOTI: It is based on consultation with key stakeholders, the tribunal, the council and industry.

Clause put and passed.

Clause 23: Section 41A inserted —

Mr R.S. LOVE: This clause looks at payments. It inserts proposed section 41A. I will read from the explanatory memorandum —

> subsection (1) provides that this section applies if a payment dispute (the *first payment dispute*) arising under or in relation to, an owner–driver contract is referred to the Tribunal under Part 9—Road Freight Transport Industry Tribunal.
>
> Subsection (2) provides that when determining the first payment dispute, the Tribunal may determine a subsequent payment dispute (the *subsequent payment dispute*) if it arises under the same owner–driver contract and is substantially similar to the first payment dispute.

We spoke earlier about diversity of Western Australia and the industry, so when we are talking about what is substantially similar to the first payment dispute, could the minister clarify exactly what factors will be taken into account to determine whether it is a substantially similar payment dispute?

Ms R. SAFFIOTI: Things that would be taken into consideration are whether the payment disputes are on the same owner–driver contract—in other words, between the same hirer and owner–driver.

Mr R.S. LOVE: It hinges, really, on whether that is the ongoing contract, not whether the payment might be for a completely different piece of work that the person has undertaken. They could be carting different material. They could be going to different destinations on different types of roads. It does not alter the ability for the tribunal to look at this as a string of payments.

Ms R. SAFFIOTI: Correct.

Mr R.S. LOVE: Could the minister explain whether there is any interaction between the code of conduct and what would be considered good payment practice?

Ms R. SAFFIOTI: What was the question?

Mr R.S. Love: It was about whether the code of conduct gives any guidance on what is good payment practice.

Ms R. SAFFIOTI: Yes, it does. It has different components, like rate of interest and other components and deductions and so forth.

Mr R.S. LOVE: Are there any instructions under this legislation, the code of conduct or any other legislation that determines the length of time between payments other than what generally applies between commercial parties?

Ms R. SAFFIOTI: We cannot find the exact line in the provision now, but we believe it does. We can provide that information in the upper house debate.

Clause put and passed.

Clause 24 put and passed.

Clause 25: Section 47 amended —

Mr R.S. LOVE: I did not talk about clause 24 because I think we have already discussed the appeal matter. Clause 25 will amend section 47, which is titled "Determination of dispute where no resolution by conciliation". Proposed new section 47(1) states —

> The Tribunal may hear and determine a dispute for the purposes of section 38(1)(a) and enquire into and deal with a matter for the purposes of section 38(1)(b) if the dispute or matter is not —
>
> (a) resolved by conciliation under section 44; or
>
> (b) disposed of by the Tribunal making a summary determination under section 38A; or
>
> (c) disposed of by the Tribunal making a default determination under section 38B.

In order for the tribunal to hear a dispute that has not been made by default or made a summary determination of— in other words, probably dismissed—is the legislation implying or saying that people must consider conciliation before a dispute can be heard or determined?

Ms R. SAFFIOTI: Yes.

Clause put and passed.

Clause 26: Section 47A inserted —

Mr R.S. LOVE: I think we spoke earlier about the remedies that are available other than the fines or civil penalties that would be applied. I am looking at the quite extensive list of remedies. They include ordering the payment of money; ordering restitution; ordering the refund of any money; making an order in the nature of an order for specific performance of an owner–driver contract; declaring that a debt is or is not owing; ordering a party to do, or refrain from doing, something; and making any other order the tribunal considers fair.

Proposed section 47A(2) goes on to say —

> Without limiting subsection (1), if the Tribunal determines that a hirer or owner-driver has engaged in conduct that is unconscionable having regard to an unfair term of the owner-driver contract, the Tribunal may do one or more of the following —
>
> (a) declare a term of the contract void;
>
> (b) insert a new term into the contract;
>
> (c) vary a term of the contract.

Are all those matters appealable under the legislation; and, if so, in what form will that appear and how will someone go about making such an appeal?

Ms R. SAFFIOTI: An appeal or decision of the tribunal can be made to the Full Bench of the Western Australian Industrial Relations Commission. An appeal is not an opportunity to rerun a case. An appeal of a tribunal's decision must be instituted within 21 days of the decision against which the appeal was brought on the grounds that the decision is in excess of the commissioner's jurisdiction or that the decision is erroneous in law.

Mr R.S. LOVE: What is the process for an owner–driver to ensure that the orders or the determinations that are reached and the remedies that are given are actually carried out? Let us go back to the whole genesis of this, which is that a driver is in a power imbalance working for a company that refuses to carry out the order. What recourse will the owner–driver have to ensure that the remedy is carried out?

Ms R. SAFFIOTI: It will be up to the tribunal to make sure that the orders are carried out and followed through.

Mr R.S. LOVE: When the minister says it is up to the tribunal, presumably, the owner–driver would go through the authorised representatives that they use in the first place to seek that that be enforced. Is that what the minister is saying?

Ms R. SAFFIOTI: Yes. The existing act outlines the proceedings. For example, section 50 outlines the enforcement of a monetary order and how that would be implemented.

Clause put and passed.

Clauses 27 and 28 put and passed.

Clause 29: Part 11 inserted —

Mr R.S. LOVE: This clause will insert part 11, "Transitional provisions" and proposed section 60, which is headed "Notice of termination before commencement day". Can the minister explain the intention of this provision and how it will operate with the commencement date when we have so many commencement dates?

Ms R. SAFFIOTI: As outlined before, all these transitional provisions will come into effect upon proclamation. Clause 5 sets out the provisions in section 10A regarding prohibited provisions allowing less than the minimum notice period. We discussed that. Proposed section 31(2)(k) sets out that the tribunal may have regard to the terms of an owner–driver contract, including whether the term of the contract is an unfair term. We discussed that. Proposed section 31A(3) provides that in considering, for the purposes of proposed section 31(2)(k), whether a term of an owner–driver contract is an unfair term, the tribunal must not have regard to any unfairness arising out of the circumstances that were not reasonably foreseeable when the parties agreed to the term.

Clause put and passed.

Clause 30 put and passed.

Clause 31: Schedule 1 Division 4 inserted —

Mr R.S. LOVE: I think the Deputy Speaker will be pleased to know that there is only one more clause after this one, so we cannot go for much longer!

Clause 31 is the matter we touched on earlier about the termination of a contract. It will insert the following —

> **4. Notice of termination**
>
> (1) A party may terminate this contract by giving the other party written notice of termination.

It then outlines a number of matters that must be given weight to. I want to discuss proposed subclause (4), which states —

> Subclause (3) does not apply if this contract is terminated due to —
>
> (a) a material breach of the contract; or
>
> (b) the serious and wilful misconduct of the owner-driver; or
>
> (c) exceptional circumstances beyond the control of the terminating party that were not reasonably foreseeable at the time of entering into this contract.

Proposed paragraphs (a) and (b) are self-explanatory. Can the minister explain the types of exceptional circumstances that would lead to the operation of proposed subclause (4)(c)? Will that, for instance, be for the termination of a contractor's contract with an organisation? We spoke earlier about CBH and subcontractors. If CBH were to terminate the other party's contract, for example, would that be an exceptional circumstance? It is probably reasonably foreseeable because contracts come to an end. I wonder how those things will be determined. There may be other factors. We have gone through COVID, for instance, and lockdowns, and all sorts of things can happen. They are the obvious ones. Can the minister explain how the proposed clause will operate more specifically in terms of normal commercial operations rather than what we call a one-in-500-year event such as the pandemic we have just gone through?

Ms R. SAFFIOTI: It would include severe illness, but not just a cold or a flu. For example, as the member said, a head contractor may not require the service anymore or a ship may not arrive at a destination or is caught up for three months. All those types of things will be considered exceptional circumstances.

Mr R.S. LOVE: I move to proposed clause 5, "Payment in lieu of notice", which states —

> Despite clause 4(3), the hirer may terminate this contract by paying the owner-driver —
>
> (a) if the termination is to take effect immediately — the total amount that would be payable under this contract in respect of the minimum notice period, less 25%;

Other provisions refer to the mixing together of work. Why was 25 per cent considered an acceptable discount? I would have thought that the operation of a vehicle would make up more than 25 per cent of the contract.

Ms R. SAFFIOTI: It is based on industry consultation and acknowledges that some costs are not incurred, like fuel and so forth; it is based on industry consultation.

Clause put and passed.

Clause 32 put and passed.

Title put and passed.

[Leave granted to proceed forthwith to third reading.]

Third Reading

MS R. SAFFIOTI (West Swan — Minister for Transport) [5.33 pm]: I move —

That the bill be now read a third time.

MR R.S. LOVE (Moore — Deputy Leader of the Opposition) [5.33 pm]: Before the advisers and the minister's office support staff fly the coop, I want to thank them for their patience. It was a fairly lengthy examination of a fairly short bill. I thank them for their patience and advice. I am sure that it has been a wonderful experience for them to sit there and go through all these matters at some length. I thank them very much. I thank the Minister for Transport for explaining the bill as we went through many of the clauses. This legislation is very important. Some provisions of the Owner–Drivers (Contracts and Disputes) Act 2007 were never proclaimed because there were concerns about the appropriateness of rights of entry. That is still a matter of concern for some in the industry. We went through a lot of the matters surrounding that, some of the restrictions on those rights and protocols that have been put in place, some of the matters that can be examined and the way that things can be conducted. We also discussed other matters, such as the termination provisions, and a whole raft of other things that looked at the interplay of the calculated rate. I think that it will be determined to be more a formula than a rate, because it will vary according to what figures are plugged in. We discussed some intricacies around the commencement procedures. We also discussed—I forget what division it was—whether a provision would apply when a person was not in a contract. The minister looked at those matters.

It is good for public confidence when all the intricacies of a bill are finely examined. I recommend that the other place consider sending this bill to the Standing Committee on Legislation to determine whether it will provide what we anticipate and what we want to see happen in the industry. I think everybody who has spoken in the chamber today agrees that we want a safe road transport industry. We want people to be treated fairly. Also, looking at the other side, we want the hirers treated fairly. That is what the bill will try to do. I commend the spirit in which it has been drafted. As I said, there are a couple of issues that need to be examined in further detail, but on the whole I am happy to see the bill progress to the other place for it to be interrogated and for the other place to do what it does so well—that is, to go through the legislation with a fine toothcomb to make sure that there are no unintended consequences from the legislation.

I thank the Presiding Officers and the minister for her good grace throughout the consideration in detail stage.

MS R. SAFFIOTI (West Swan — Minister for Transport) [5.37 pm] — in reply: I thank everyone for their support. I thank the advisers also.

Question put and passed.

Bill read a third time and transmitted to the Council.