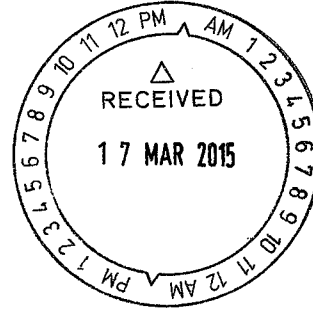




ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-15028



The Hon Simon O'Brien MLC
Chairman
Standing Committee on Environment and Public Affairs
Parliament House
PERTH WESTERN AUSTRALIA 6000

Dear Mr O'Brien

PETITION NO 70 – WA TRUCK DRIVERS' WORKPLACE SAFETY

I acknowledge your letter of 19 February 2015, requesting comments regarding Petition No 70 (the Petition).

Please find attached a response to the Petition.

The WorkSafe division of the Department of Commerce has the jurisdiction, under the *Occupational Safety and Health Act 1984* (the OSH Act), for work-related incidents involving "on duty" truck drivers. The Major Crash Unit (MCU) of the Western Australia Police is responsible for motor vehicle accidents that are not work-related or where charges can be laid under the *Criminal Code or Road Traffic Act 1974* (WA). WorkSafe and the MCU cooperate to determine the appropriate jurisdiction for an investigation.

Thank you for providing me with the opportunity to respond to the issues raised in the Petition.

Yours sincerely

Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

Att.

16 MAR 2015

**Petition No.70 – WA Truck Drivers' Safety – Response from the Hon Michael Mischin
MLC, Minister for Commerce**

Recording all accidents and incidents involving employed truck drivers as a workplace rather than a road statistic; and

Treating any death of a truck driver on the job as a workplace death

The jurisdiction of the *Occupational Safety and Health Act 1984* (the OSH Act) is predominantly framed by the definition of workplace:

workplace means a place, whether or not in an aircraft, ship, vehicle, building, or other structure, where employees or self-employed persons work or are likely to be in the course of their work.

The term 'vehicle' is undefined so it takes on its ordinary meaning, and can include a truck a motorbike or a car being used in the course of work. Commercial truck drivers, postal workers delivering the mail and workers travelling from one place of work to another are examples of workers considered to be "on-duty" while driving.

The phrase "in the course of their work" generally excludes a worker who dies while commuting (eg travelling from home to work) unless a work-related factor can be identified, such as fatigue from working excessive hours or inadequate maintenance of a vehicle provided by the employer.

The jurisdiction of the OSH Act is also framed by the duties it imposes on workplace participants. Section 19 of the OSH Act provides the general duty for employers, which requires that:

An employer shall...provide and maintain workplaces, plant, and systems of work such that, so far as is practicable, the employees are not exposed to hazards...

Where a hazard cannot be completely eliminated, an employer must put in place control measures to minimise the risk of injury or harm. In relation to commercial vehicle drivers, practicable control measures include ensuring that:

- the vehicle is appropriately maintained and safe to drive;
- loads are adequately secured; and
- routes are planned to ensure that drivers do not suffer reduced judgement as a result of fatigue.

Making improvements to a public road or modifying the behaviour of other road users are outside an employer's control – it is not practicable for an employer to implement control measures for matters of public safety. If a control measure is not practicable, an employer cannot be held accountable for failing to implement it and WorkSafe has no statutory power to take action against them.

Deaths by natural causes (such as heart attack) or by self-inflicted injuries (suicide) are also not included in the statistics for on-duty driver fatalities. In the absence of compelling evidence to the contrary, it is difficult to establish beyond reasonable doubt that death by heart attack or suicide was caused by a work-related issues, such as stress or bullying.

Consequently, there is no purpose in recording the fatality of an on-duty driver caused by the poor maintenance of a public road or by a heart attack as being work-related as there are no lessons for workplace participants or regulators to be gleaned from the information.

The inclusion of all on-duty injuries or deaths of truck drivers as work-related would inflate the statistics for work-related deaths and injuries when there is no practicable means for

workplace participants to address or mitigate the causes. Inflated figures may result in a misallocation of government resources to deal with hazards that lie outside the scope of the OSH Act.

The tripartite Commission for Occupational Safety and Health (the Commission) has discussed jurisdictional issues for recording injury and fatality data for work-related journeys on a number of occasions since 1992. The exclusion of incidents that are not work-related was affirmed at meetings of the Commission held in August 2002, February 2005 and discussed most recently in October 2013.

The Hon Kate Doust MLC suggests that deaths of truck drivers have been increasing and now number 80 each year. No source is provided to support this assertion.

In terms of reporting, section 231 of the OSH Act requires that all fatalities occurring at a workplace are reported to WorkSafe which can include deaths by natural causes and deaths that are not work-related.

In relation to injuries, the OSH Act only requires mandatory reporting of certain types of injuries and diseases.

Investigation of road traffic accidents

The submissions made in support of the Petition assert that incidents involving "on duty" truck drivers are not covered by the OSH Act and that all such incidents are investigated by the Major Crash Unit (MCU) of the WA Police.

WorkSafe and the WA Police work together to determine the appropriate jurisdiction for an investigation. As a practical matter, the WA Police are usually the first to arrive at a motor vehicle accident (MVA), particularly one which involves a serious injury or fatality. Initial investigations are conducted by the WA Police which may involve identifying elements that may be within the jurisdiction of the OSH Act. On many occasions it is the WA Police who are the first to notify WorkSafe of a fatality and incidents involving significant injuries.

The Major Crash Unit (MCU) of the WA Police has the expertise, resources and powers to investigate MVAs on public roads. However, if a work-related factor is identified and the WA Police decide not to lay charges, they may formally refer the incident to WorkSafe if safety and health matters are identified. In some circumstances it may be appropriate for the MCU and WorkSafe to conduct investigations into different aspects of a MVA. However, WorkSafe will normally wait for the MCU to complete their investigation to avoid the potential for evidence to be compromised by simultaneous investigations.

The expertise of WorkSafe Inspectors is in safety and health matters and not broader concerns of public safety. If WorkSafe was the primary agency for investigation of MVAs involving workers, the investigation would be constrained to only the elements of the case that related to safety and health matters. Other factors, such as the existence of appropriate signage on a public road, or the contribution of another driver to a collision, are outside the jurisdiction of the OSH Act and would therefore not be considered as relevant factors.

Investigation of road accidents requires significant resources and expertise. If WorkSafe was to take on the investigation for all on duty MVAs as suggested in the Petition, appropriate resources and funding would be required.

Adequate rest stop facilities

The provision of adequate rest stops on major freight routes is not within the jurisdiction of the OSH Act. However, it can be noted that the existence of rest stop facilities is a factor that workplace participants should consider when developing safe systems of work for commercial drivers.

Division 10 of Part 3 of the Occupational Safety and Health Regulations 1996 (the OSH Regulations) creates duties in relation to commercial vehicle driver fatigue (the commercial vehicle operating standard) which provides for working hours and mandatory rest breaks. Duty holders must comply with the commercial vehicle operating standard so far as is reasonably practicable, which means there is some flexibility in managing hours to ensure the safest possible outcome. However, the schedule should ensure that there is adequate rest time, which includes recognising the availability of rest stops and other facilities.

Further details in relation to driver fatigue can be found in the Commission for Occupational Safety and Health's *Code of practice: Fatigue management for commercial drivers* (the driver fatigue code).

The driver fatigue code was developed by the tripartite Commission in 2004, in consultation with industry stakeholders, to provide practical guidance for the application of the commercial vehicle operating standard. It includes information on medical fitness and sleep, sample trip schedules that are compliant with the OSH Regulations, and information on appropriate record keeping.

The Hon Kate Doust MLC, the Deputy Leader of the Opposition in the Legislative Council, made a submission in support of the Petition on 17 December 2015. In her submission, she makes the following statement in relation to rest stops:

If a shift ceases, but the driver is still on the road, he or she is required to stop driving and take a break for a period of time. If this happens to be in the middle of nowhere they cannot just drive on to the nearest roadhouse or truck stop, they just have to stop driving.

The same point is made by Mr Tim Dawson, the Secretary of the Transport Workers Union (WA Branch) in his submission to the Committee.

While the statements made by Ms Doust and Mr Dawson are largely consistent with the requirements of the OSH Regulations, the driver fatigue code provides a little flexibility and states (on page 10):

For example, if a commercial vehicle driver was due for a long break and delays meant that a roadhouse with facilities was within a short distance, it may be reasonable for the driver to exceed the hours permitted under the operating standard to continue to the roadhouse where a longer and more comfortable rest break could be taken.