

## **Explanatory Memorandum**

### **Owner-Drivers (Contracts and Disputes) Amendment Bill 2022**

#### **Background to the *Owner-Drivers (Contracts and Disputes) Act 2007***

The *Owner-Drivers (Contracts and Disputes) Act 2007* established the legislative framework to regulate the relationship between parties that enter into contracts to transport goods in heavy vehicles in Western Australia (owner-drivers) and those that hire them to do so (hirers). It promotes a safe road freight transport industry by setting sustainable guideline rates for owner-drivers and cost schedules through a code of conduct.

The *Owner-Drivers (Contracts and Disputes) Act 2007* also established the Road Freight Transport Industry Council to assist in the development of a safe and sustainable road freight industry and the Road Freight Transport Industry Tribunal which provides for dispute resolution between owner-drivers and hirers.

The *Owner-Drivers (Contracts and Disputes) Act 2007* was passed by Parliament in May 2007.

#### **Overview of Bill**

The Owner-Drivers (Contracts and Disputes) Amendment Bill 2022 makes amendments the *Owner-Driver (Contracts and Disputes) Act 2007*. The amendments are designed to improve operational and administrative arrangements and provide clearer legislative protections between heavy vehicle owner-drivers and hirers in the Western Australian road freight transport industry.

The amendments will promote safe and sustainable operations across the road transport industry in Western Australia by enhancing the existing state owner-driver legislative framework. The bill includes new provisions setting enforceable minimum notice periods for the termination of owner-driver contracts and clarifies the Road Freight Transport Industry Tribunal's powers and jurisdiction in regard to owner-driver contract disputes to ensure greater consistency in determinations.

The objectives of the Bill are as follows:

- Clarify Tribunal's jurisdiction in relation to expired contracts.
- Enhance the Tribunal's powers by expanding the scope for determining 'unconscionable conduct' by hirers or owner-drivers.
- Introduce Right of Entry provisions to investigate suspected breaches of the *Owner-Drivers (Contracts and Disputes) Act 2007*.
- Introduce Statutory minimum notice periods or payment in lieu of termination of all owner-driver contracts.

- Address various administrative deficiencies that have emerged since the *Owner-Drivers (Contracts and Disputes) Act 2007* commenced operations in 2008. These administrative amendments include replacing obsolete terminology and clarifying procedures in relation to dispute resolution.

A clause-by-clause commentary on the Bill is provided below.

## **PART 1 - PRELIMINARY**

### **Clause 1      Short Title**

The short title of the proposed Act is the *Owner-Drivers (Contracts and Disputes) Amendment Act 2022*.

### **Clause 2      Commencement**

Clause 2 provides for various commencement dates to apply to different sections of the Act as follows:

Subsection (a) provides that sections 1 and 2 will come into operation on the day on which the Act receives the Royal Assent.

Subsection (b) provides that section 12 commences immediately after the *Industrial Relations Legislation Amendment Act 2021* section 65 comes into operation which amends section 98 of the *Industrial Relations Act 1979* dealing with 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 2007* will be updated by section 12, which amends section 32.

Subsection (c) provides that sections 17 and 18 commence immediately after sections 35 and 36 of the *Owner-Drivers (Contracts and Disputes) Act 2007* come into operation. Sections 35 and 36 must be commenced by proclamation (as provided by section 2 of the *Owner-Drivers (Contracts and Disputes) Act 2007*).

Subsection (d) provides that the remaining provisions of the Act commence on proclamation. This is necessary as consequential regulation amendments will need to be made to the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* in support of the Bill and 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 the Bill.

**Clause 3     Act amended**

This Act amends the *Owner-Drivers (Contracts and Disputes) Act 2007*.

**Clause 4     Section 3 amended**

Clause 4 inserts various new terms for interpretation of the *Owner-Driver (Contracts and Disputes) Act 2007* in section 3 in alphabetical order. They are:

<b><i>Minimum notice period</i></b>	90 days; or 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.
-------------------------------------	---

The 90 day minimum notice period is intended to apply for sequential short-term contracts of similar scope between the same parties to ensure that hirers and owner-drivers do not enter into a series shorter contracts to avoid compliance with the 90 day minimum notice period provisions. For example, this means in the case of a series of 89 day contracts between the same parties for substantially similar work, the notice of termination period will be 90 days (not 7 days).

<b><i>Notice period</i></b>	In relation to the termination of an owner-driver contract, is the period –  (a) beginning on the day on which one party gives the other party written notice of termination of the contract; and (b) ending on the day on which the termination of the contract is to take effect.
-----------------------------	--

<b><i>Prescribed representative body</i></b>	means a body that represent the interests of owner-drivers or hirers that is prescribed by the regulations for the purposes of this definition.
--	---

In relation to section 18 this provides that the Minister shall seek nominations for appointments to the Road Freight Transport Industry Council from prescribed representative bodies as well as other person or bodies prescribed in section 18 subsection (3). Following passage of

the Bill it is intended for the *Owner-Driver (Contracts and Disputes) (Code of Conduct) Regulations 2010* to be amended to prescribe the “Western Roads Federation” as a representative body.

**Transport association** means –

- (a) representative body prescribed by the regulations for the purpose of this definition; or
- (b) the Transport Workers Union of Australia, Industrial Union of Works Western Australian Branch.

In relation to proposed section 34B. this relates to who can apply to be an authorised representative for the purposes of right of entry to conduct and investigate a suspected breach of the Act.

In relation to section 40, this relates to who can refer disputes and matters to the Road Freight Transport Industrial Tribunal.

## **PART 2 – CONTENT OF OWNER-DRIVER CONTRACTS**

### **Division 1 – Prohibited provisions**

#### **Clause 5      Section 10A. inserted**

This inserts the new proposed section **10A. Prohibited: provisions allowing less than minimum notice period** after section 10 and inserts substantive provisions to set out that a provision in an owner-driver contract has no effect if it purports to allow a party to terminate the contract by giving notice of less than the minimum notice period.

This provision relates to a new definition included in clause 4 which provides that a *minimum notice period* means 90 days; or 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. And is to be read in conjunction with the termination of contract implied provisions set out in Schedule 1 Division 4.

## **Division 2 – Implied provisions**

### **Clause 6      Section 15A inserted**

Clause 6 inserts new proposed section **15A. – *Minimum period of notice for terminating contract*** after section 15 and inserts substantive provisions that set out that the provisions in Schedule 1 Division 4 – termination of contract provisions, are implied in an owner-driver contract that does not have a valid provision about the notice period required to be given to terminate an owner-driver contract.

This provision is to be read in conjunction with new definition of *minimum notice period* proposed in clause 4 which provides that a *minimum notice period* means 90 days or 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.

## **PART 3 – ROAD FREIGHT TRANSPORT INDUSTRY COUNCIL**

### **Clause 7      Section 18. – Membership of Council amended**

Clause 7 deletes existing section 18(3)(b) which removes the obsolete reference to the organisation known as “the Transport Forum WA Inc.” which is no longer in existence and inserts a new proposed section 18(3)(b). Clause 7 inserts a section 18(3)(b) to provide that the Minister is to seek Council membership nominations from a prescribed representative body as defined in clause 4.

The purpose of the amendment is to ensure that the Minister seeks Council Membership nominations from organisations that represent a balanced perspective representing interests of both owner-drivers and hirers.

Clause 7 also makes a minor grammatical correction to section 18(3)(c) by inserting a comma after the second occurrence of the word “workers”.

## **PART 6 – UNCONSCIONABLE CONDUCT**

### **Clause 8      Section 30. – Unconscionable conduct by hirers amended**

Amends section 30 subsection (2) for the purpose of clarifying the matters that the Tribunal may have regard to for determining whether a

hirer has engaged in conduct that is unconscionable. In particular, whether any term of the contract is an “unfair term”, with respect to the acquisition of services under an owner-driver contract.

An equivalent provision in respect of owner-driver’s conduct is set out in clause 10 below for the purpose of empowering the Tribunal to take into consideration actions which may constitute unconscionable conduct on the side of both parties to the owner-driver contract.

Similar provisions are prescribed under the Victorian *Owner Drivers and Forestry Contractors Act 2005* section 44 subsection (2) which sets out what the Tribunal may have regard to when determining whether a term of a regulated contract is unjust.

#### **Clause 9      Section 31. – Unconscionable conduct by owner-drivers amended**

This amends section 31 subsection (2) for the purpose of clarifying the matters that the Tribunal may have regard to for determining whether an owner-driver has engaged in conduct that is unconscionable. In particular, including whether any term of the contract is an “unfair term” with respect to the provision of services under an owner-driver contract.

An equivalent provision in respect of hirer’s conduct is set out by clause 8 above for the purpose of empowering the Tribunal to take into consideration actions which may constitute unconscionable conduct on the side of both parties to the owner-driver contract.

#### **Clause 10      Section 31A. inserted**

This clause inserts a new proposed section **31A. Unfair terms** at the end of *Part 6 – Unconscionable conduct* and substantive provisions relating to unconscionable conduct by hirers set out in section 30 subsection (2)(l) and unconscionable conduct by owner-drivers set out in section 31 subclause (2)(k).

Subclause (1) prescribes the particular matters that the Road Freight Transport Industry Tribunal may have regard to in determining whether a term of an owner-driver contract is unfair.

Subclause (2) provides that for the purpose 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, unless the hirer can demonstrate otherwise. For example, this may include that the owner-driver has been able to achieve cost savings across their operations which are factored into their negotiated rate for the provision of services under the owner-driver contract.

Subclause (3) provides that in considering whether any contract terms are unfair, 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.

These provisions mirror the Victorian *Owner Drivers and Forestry Contractors Act 2005* section 44 – ‘Powers of the Tribunal’ subclause 2 which sets out what the Tribunal may have regard to when determining whether a term of a regulated contract is unjust.

## **Clause 11    Parts 6A and 6B inserted**

This clause inserts new parts 6A and 6B before Part 7 – Inspectors.

### **Part 6A - Misleading or deceptive conduct**

#### **Proposed section 31B. Misleading or deceptive conduct by hirers**

This provides that a hirer must not engage in conduct that is misleading or deceptive, with respect to an owner-driver in relation to the acquisition or possible acquisition by the hirer of services from the owner-driver under an owner-driver contract. The purpose of the provision is to prohibit misleading and deceptive conduct in regard to procuring an owner-driver’s services by a hirer under an owner-driver contract.

An equivalent provision in respect of owner-driver’s conduct is set out in proposed section 31C for the purpose of proscribing misleading or deceptive conduct on the side of both parties to the owner-driver contract.

#### **Proposed section 31C. Misleading or deceptive conduct by owner-drivers**

This provides that an owner-driver must not engage in conduct that is misleading or deceptive with respect to a hirer in relation to the provision or possible provision by the owner-driver of services to the hirer under an owner-driver contract. The purpose of the provision is to prohibit misleading and deceptive conduct in regard to the delivery of services by owner-drivers to the hirer under an owner-driver contract.

An equivalent provision in respect of hirer’s conduct is set out in proposed section 31B. for the purpose of proscribing misleading or deceptive conduct on the side of both parties to the owner-driver contract.

## **Part 6B – Discrimination**

### **Proposed section 31D. Discrimination against owner-driver**

This inserts a new proposed section 31D. subclause (1) sets out that a hirer must not subject or threaten to subject an owner-driver or a person associated with the owner-driver to any detriment for claiming a benefit or exercising a power or right under the *Owner-Driver (Contracts and Disputes) Act 2007*.

Subclause (2) provides that a hirer must not subject or threaten to subject an owner-driver to any detriment because the owner-driver, or a person associated with the owner-driver, has raised an issue of health and safety in relation to the performance of services under an owner-driver contract or in negotiating or renegotiation of an existing owner-driver contract.

Subclause (3) specifies the types of actions that are considered to subject an owner-driver to detriment for the purpose of determining whether a hirer has discriminated against an owner-driver.

## **PART 7 – INSPECTORS**

### **Clause 12 Section 32. Functions of inspectors amended**

This deletes subclause (1)(b) to reflect consequential amendments being made by section 65 of the *Industrial Relations Legislation Amendment Act 2021* which deletes section 98(3)(a) which includes among other things, removing reference to the term “instrument” and will commence when clause 2 subsection (c) comes into effect.

## **PART 8 – RIGHTS OF ENTRY, INSPECTION AND ACCESS TO RECORDS**

### **Clause 13 Part 8 Division 1 inserted**

This inserts a new Division 1 heading and substantive provision at the beginning of Part 8 – rights of entry, inspection and access to records.

#### **Division 1 - Preliminary**

##### **Proposed section 33A. Term used: record**

This defines that the term ‘*record*’ means a record required to be kept under the Owner-Drivers Code of Conduct made under Part 4 of the



*Owner-Drivers (Contracts and Disputes) Act 2007* and prescribed in Schedule 1 of the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*.

**Clause 14    Part 8 Division 2 heading inserted**

This inserts a new heading ***Division 2 – Access to records*** in Part 8 – rights of entry, inspection and access to records before section 34.

**Clause 15    Section 34 Access to and inspection of records amended**

This amends section 34 subsection (2)(a) by inserting the word *hirers* before the word *records* and in subsection 2(b) deleting the words “*concerned that are required to be kept by the hirer under the code of conduct; and*” and inserting the words “*concerned; and*”.

These amendments are consequential in relation to the new definition of ‘*record*’ in proposed section 33A inserted by clause 13, which prescribes the information relating to an owner-driver that a hirer must produce on request by a ‘*relevant person*’ as defined in section 34 subsection 1 of the *Owner-Drivers (Contracts and Disputes) Act 2007*.

Clause 15 also makes minor amendments to reflect current drafting style by deleting the words “or extracts from” in section 34(3)(c)(ii) and deleting “seventh” and inserting “7<sup>th</sup>” in section 34(3)(d).

**Clause 16    Part 8 Division 3 inserted**

This inserts new heading ***Division 3 – Authorised representative’s right of entry to conduct investigation*** and substantive provisions in proposed section 34A after section 34 in Part 8 – rights of entry, inspection and access to records.

**Division 3 – Authorised representative’s right of entry to conduct investigation**

**Proposed section 34A. Terms used**

This inserts section 34A. to define the intended meanings of new terms under Division 3 – Authorised representative’s right of entry to conduct investigation.

‘*Authorised representative*’ means a person to whom an authority is issued under section 34B(2). Similar provision is set out in section 49G. of the *Industrial Relations Act 1979*.

‘Occupier’ of a workplace, includes a person in charge of the workplace.

‘Officer’ has the meaning given in the *Industrial Relations Act 1979* section 7, which provides that an officer is a person who carries out, or whose duty is or includes the carrying out of, the whole or part of the functions of an office in an organisation.

‘Organisation’ has the meaning given in the *Industrial Relations Act 1979* section 7, which provides that an organisation is an organisation that is registered under Division 4 - Industrial organisations and associations of Part II - The Western Australian Industrial Relations Commission.

### **Proposed section 34B. Authorised representative**

This inserts section 34B. subsection (1) which provides that 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 Part 8 – rights of entry, inspection and access to records, division 3 – Authorised representative’s right of entry to conduct investigation.

The policy intent of this provision is to provide that only a transport association that is also an organisation registered under the *Industrial Relations Act 1979* (WA) or the *Fair Work Act 2009* (Cwlth) that by its constitution and rules can represent the interests of the road transport industry, and enrol owner-drivers as members, is able to apply to be an authorised representative or to nominate persons to be an authorised representative for the purpose of investigating suspected breaches under the *Owner-Drivers (Contracts and Disputes) Act 2007*. This effectively limits potential authorised representatives to being persons with expertise in the road transport industry and organisations subject to the rigour of the requirements of registered organisations under the respective commonwealth and state acts.

Subsection (2) provides that 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. Registrar is defined under section 3 as having the meaning given to that term by the *Industrial Relations Act 1979* (WA) section 7. That is the chief executive officer of the registrar’s Department or, if another person is designated as the Registrar under the *Industrial Relations Act 1979* (WA), that person.

Subsection (3) provides that the Registrar must not issue an authority unless the person nominated in the application is an officer or employee of the organisation that makes the application under subsection (1) and; is the holder of a valid authority issued under section 49J(1) of the

*Industrial Relations Act 1979* (WA) or an entry permit issued under section 512 of the *Fair Work Act 2009* (Cwlth); and which has not previously been revoked by the Tribunal.

Subsection (4) provides that despite section 43 – applied provisions: practice, procedure and appeals, section 49 of the *Industrial Relations Act 1979* (WA), does not apply to a decision of the Tribunal under subsection (3)(c) that a new authority may be issued. This means that there is no right of appeal for a Tribunal decision to reissue an authority under the *Owner-Driver's (Contracts and Disputes) Act 2007*.

Subsection (5) provides that an authority issued under subsection (2) remains in force until it is revoked or suspended. This sets out that the owner-driver right of entry authority does not have a prescribed expiry date.

These provisions align with section 49J – Authorising authorised representatives under the *Industrial Relations Act 1979*.

#### **Proposed section 34C. Authorised representative who ceases to hold authority or entry permit**

This inserts new section 34C. subsection (1) provides that an authorised representative must, within 28 days of ceasing to hold an authority or permit referred to in section 34B subsection (3)(b), that is either an authority issued under section 49J(1) of the *Industrial Relations Act 1979* or an entry permit issued under section 512 of the *Fair Work Act 2009* (Cwlth), inform the Register that they no longer hold the authority or permit.

Subsection (2) provides that a contravention of subsection (1) is not an offence, but that subsection (1) is a civil penalty provision for the purposes of the *Industrial Relations Act 1979* section 83E. This provision applies the penalties framework from the IR Act and applies it to the *Owner-Driver's (Contracts and Disputes) Act 2007*. This means that for a contravention of these provisions, an industrial magistrate's court may, among other things, make an order imposing a penalty on the person, not exceeding \$5000 for an employer, organisation or association or \$1000 for in any other case.

These provisions align with section 49J(9) – Authorising authorised representatives and section 49O - Enforcement provisions under the *Industrial Relations Act 1979*.

### **Proposed section 34D. Revocation or suspension of authority**

This inserts new section 34D. subsection (1) provides that subject to subsection (2), the Registrar must revoke an authorised representative's authority either on application by the secretary of the organisation that made the application under section 34B(1) or if the Registrar becomes aware that the authorised representative no longer holds either an authority issued under section 49J(1) of the *Industrial Relations Act 1979* or an entry permit issued under section 512 the *Fair Work Act 2009* (Cwlth).

Subsection (2) provides that the Registrar must not revoke an authority under subsection (1) if proceedings pursuant to an application made under subsection (3) in relation to the authority are pending or in progress.

Subsection (3) provides that 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) if satisfied that the authorised representative has acted in an improper manner in the exercise of any power conferred by Part 8 – Rights of entry, inspection and access to records Division 1 – Preliminary, or has intentionally and unduly hindered a hirer or owner-driver during their work time, or no longer holds an entry permit issued under either authority issued under section 49J(1) of the *Industrial Relations Act 1979* or an entry permit issued under section 512 of the *Fair Work Act 2009* (Cwlth).

Subsection (4) provides that an application under subsection (3) for the revocation of an authority must set out the grounds on which the application is made.

Subsection (5) provides that an authorised representative whose authority is revoked must, within 14 days of being informed in writing by the Registrar that their authority is revoked, return their written authority to the Registrar. Equivalent to provision set out in section 49J(9) of the *Industrial Relations Act 1979*.

Subsection (6) provides that a contravention of subsection (5) is not an offence, but that subsection is a civil penalty provision for the purposes of the *Industrial Relations Act 1979* section 83E. This provision applies the penalties framework from the IR Act and applies it to the Owner-Drivers (Contracts and Disputes) Act 2007. This means that for a contravention of these provisions, an industrial magistrate's court may, among other things, make an order imposing a penalty on the person, not exceeding \$5000 for an employer, organisation or association or \$1000 for in any other case.

These provisions align with section 49J – Authorising authorised representatives and section 49O - Enforcement provisions under the *Industrial Relations Act 1979*.

#### **Proposed section 34E. Written authority of owner-driver required**

This inserts new section 34E. which provides that an authorised representative is not entitled to exercise a power conferred by Part 8 – Rights of entry, inspection and access to records Division 1 – Preliminary, for the purpose of conducting an investigation into a suspected breach of an owner-driver contract to which the owner-driver is a party unless they are authorised in writing by the owner-driver who is a party to the contract to carry out the investigation. The purpose of the provision is to ensure that the owner-driver provides consent for the authorised representative to carry out an investigation into a suspected breach of an owner-driver contract.

Similar provisions is included is s.49I of the *Industrial Relations Act 1979*, whereby an employee is employed under an “employ-employee agreement” where the employee must authorise the authorised representative to investigate a suspected breach of an industrial law, instrument of Occupational Health and Safety law.

#### **Clause 17 Section 35. Authorised representative’s right of entry**

This deletes section 35 which is subject to the commencement provisions set out in clause 2(B). The clause inserts provisions that an authorised representative, that is a person who holds an authority issued under proposed section 34B(3)(b) may enter an owner-drivers workplace to investigate any suspected breach under the *Owner-Drivers (Contracts and Disputes) Act 2007*, *Owner-Drivers (Contracts and Disputes) (Code of Conduct) 2010* or an owner-driver contract to which the owner-driver is a party.

Under the *Owner-Drivers (Contracts and Disputes) Act 2007* the term ‘workplace’ is defined as 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.

Similar provision is included is s.49I – entry to investigate certain breaches, of the *Industrial Relations Act 1979*.

### **Proposed section 35A. Authority must be shown on request**

This inserts a new section 35A. to provide that an authorised representative must not enter or remain in a workplace if they fail or refuse to show, on request by the occupier, their written authority to enter the workplace.

Similar provision is included in the *Industrial Relations Act 1979* section 49L – Authority must be shown on request.

### **Proposed section 35B. Conduct in the workplace**

This inserts new proposed section 35B to provide that 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.

The proposed section 35B aligns with existing section 49K of the *Industrial Relations Act 1979*. However, it does not adopt the amendments to section 49K made by the *Industrial Relations Amendment Act 2021*, which enables an authorised representative to apply to the Commission for an order permitting entry to habitation premises under s. 49I(1). Section 495(3) provides that the Commission may only make the order if it is satisfied that exceptional circumstances exist. As the amendment to section 49K aims to provide a balance between privacy considerations and the need to ensure appropriate protection for employees that work in their employer's home, it is not considered relevant in the context of the owner-driver legislation.

Subsection 2 provides that 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.

Subsection (3) provides that a request made under subsection (2) is not unreasonable only because the route is not that which the authorised representative would have chosen.

### **Proposed section 35C. Authorised representative's powers relating to the production and inspection of record or other document**

This inserts new section 35C. that provides that for the purpose of investigating a suspected breach referred to in section 35, an authorised representative may under subsection 1(a) subject to section (2), require the hirer to produce for the authorised representative's inspection, during working hours at the workplace or at any mutually convenient time and

place, a record or other document kept by the hirer that is related to the suspected breach.

Subsection 1(b) provides that an authorised representative may make copies of the record or other document related to the suspected breach.

Subsection 1(c) provides that an authorised representative may during working hours, inspect, and take photographs, film and audio, video or other records of, any work, material, machinery or appliance that is relevant to the suspected breach.

Section 49I(2) of the IR Act has been amended to expressly provide that when investigating a suspected breach, an authorised representatives may use electronic means to record work, material, machinery or appliances, as per section 24(5) of the *Industrial Relations Legislation Amendment Act 2021*. This was a recommendation of the Ministerial Review and recognises that electronic recordings may be an accurate and efficient way of investigating a suspected breach and preserving evidence, as opposed to relying solely on the visual observations of an authorised representative.

Subsection (2) provides that an authorised representative must not require the hirers to produce a record or other document unless before exercising the power, the representative has given the hirers either at least 24 hours' written notice of the requirement where the document is kept at the workplace where the owner-driver works or at least 48 hours' written notice if the record is kept elsewhere.

Subsection (3) provides that the Tribunal may, on 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.

Subsection (4) provides that if the requirement for notice is waived under subsection (3), the Tribunal must give the authorised representative a certificate authorising the exercise of the power without notice and the authorised representative must, after entering the workplace and before requiring the production of the record or other document, give the person who is the occupier of the workplace the certificate or a copy of the certificate.

Subsection (5) provides that nothing in this section limits or otherwise affects the powers of an inspector under this Act.

Similar provisions are included in s.49I – entry to investigate certain breaches, of the *Industrial Relations Act 1979*.

**Clause 18    Section 36. Prohibiting the obstruction or delay of exercise of power amended**

This clause amends section 36 which is subject to the commencement provisions set out in clause 2(c). to provide under subsection (1) that an occupier of a workplace must not refuse, or intentionally and unduly delay, an authorised representative's entry to the workplace under section 35.

Subsection (2) provides that a person must not intentionally and unduly hinder or obstruct an authorised representative exercising a power conferred by section 35 under Part 8 – Rights of entry, inspection and access to records, Division 1 – preliminary.

These provisions align with section 49M of the *Industrial Relations Act 1979*.

**PART 9 – ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL**

**Clause 19    Section 37. Terms used amended**

This deletes the definition of “transport association” which makes obsolete reference to “the Transport Forum WA Inc”.

The definition of *transport association* inserted by clause 4 terms used, applies to Part 9 – Road Freight Transport Industry Tribunal and means a prescribed representative body or the Transport Workers Union of Australia, Industrial Union of Workers Western Australian Branch.

The purpose of the amendment is to ensure that organisations that represent the interests of both owner-drivers and hirers are able refer disputes and matters to the Tribunal under section 40 and make application to the Tribunal to enforce conciliation, direction, order or declarations as set out in sections 44 and 45 if a person contravenes these provisions in line with enforcement provisions in section 46.

**Clause 20    Section 38. Industrial Relations Commission sitting as the Road Freight Transport Industry Tribunal amended**

This amends section 38 to provide that under new subsection (1)(c) the Western Australian Industrial Relations Commission (WAIRC) has jurisdiction to enquire into, deal with, hear or determine any matter referred to in Part 8 – Rights of entry, inspection and access to records in relation to an authorised representative.



New subsection 1(d) provides that the WAIRC may make a summary determination in accordance with section 38A – Tribunal’s power to make summary determination.

New subsection 1(e) provides that the WAIRC may make a default determination in accordance with section 38B – Tribunal’s power to make default determination.

The purpose of these provisions is to enable the Tribunal to immediately dispose of payment disputes where no answering statement has been filed or there is no defense to the claim as set out in proposed sections 38A. and 38B. which is common practice in other civil proceedings.

## **Clause 21    Section 38A. and 38B inserted**

This clause inserts proposed sections 38A. and 38B after section 38. ‘Industrial Relations Commission sitting as the Road Freight Transport Industry Tribunal’.

### **Proposed section 38A. Tribunal’s power to make summary determination**

This inserts new section 38A. to provide that under subsection 1 the Tribunal may determine a dispute or matter referred under Part 9 – Road Freight Transport Industry Tribunal without a hearing if each party to the proceedings has had a reasonable opportunity to be heard and the Tribunal is satisfied that a person has frivolously or vexatiously referred or defended a dispute or matter or a party’s case has no merit.

Subsection (2) provides that the Tribunal may, upon making a summary determination, make 1 or more of the orders set out in section 47A – Remedies that may be given.

Subsection (3) provides that the power in subsection (1) may be exercised in relation to all or part of a dispute or matter and either on the Tribunal’s own initiative or on the application of a party to the proceedings.

Subsection (4) provides that the Tribunal may set aside a summary determination and may do so on conditions as to the payment of costs or as to other matters.

Subsection (5) provides that there is no right of appeal to a decision made by the Tribunal to refuse or make a summary determination or to set aside a summary determination, despite section 43 which applies various provisions under the *Industrial Relations Act 1979* to the Owner-

*Driver (Contracts and Disputes) Act 2007*, including section 49 – Appeal from Commission’s decision of the *Industrial Relations Act 1979*.

**Proposed section 38B. Tribunal’s power to make default determination**

This inserts new section 38B, subsection (1) provides that this section does not apply a failure to comply with the determination of a dispute or matter by the Tribunal or an order made in or as a consequent of the determination of a dispute or matter by the Tribunal.

Subsection (2) provides that the Tribunal may make a determination against the party without a hearing (*default determination*) if a party to the proceedings does not comply with a direction, order or declaration made by the Tribunal during the course of the proceedings or fails to file a response within the prescribed period of time.

Subsection (3) provides that the Tribunal may, upon making a default determination, make 1 or more of the orders set out in section 47A – Remedies that may be given.

Subsection (4) provides that the Tribunal may set aside a default determination and may do so on conditions as to the payment of costs or as to other matters.

Subsection (5) provides that there is no right of appeal to a decision made by the Tribunal to make a default or set aside a default determination despite section 43 which applies various provisions under the *Industrial Relations Act 1979* to the *Owner-Driver (Contracts and Disputes) Act 2007*, including section 49 – Appeal from Commission’s decision of the *Industrial Relations Act 1979*.

This provides that a person *can* appeal against the making of a summary or default judgement (as implied by subsection (4)). However, there is no right of appeal in relation to a decision of the tribunal *not* to make a summary or default judgment. That is, if the Tribunal decides to keep the matter on foot to be argued, that decision cannot be appealed against. The *Magistrates Court (Civil Proceedings) Act 2004* has similar provision for summary judgements (sections 18 and 19).

**Clause 22 Section 40. Persons who may refer disputes and matters to the Tribunal amended**

This amends 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.

**Clause 23    Section 41A. inserted**

This inserts section 41A. after section 41. – 'Intervention in proceeding'.

**Proposed section 41A. - When referral not required**

This inserts new section 41A. 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.

Subsection (3) provides that subsection (2) applies whether or not the subsequent payment dispute is referred to the Tribunal under Part 9 – Road Freight Transport Industry Tribunal.

The purpose of these provisions is to set out that multiple referrals to the Tribunal are not required where a continuing contravention has resulted in non-payment after a dispute has been referred to the Tribunal.

**Clause 24    Section 43. Applied provisions: practice, procedure and appeals amended**

This amends section 43 to clarify that various provisions of the *Industrial Relations Act 1979* apply to the exercise of the jurisdiction of the Commission as prescribed in section 43 except as otherwise provided under the *Owner-Drivers (Contracts and Disputes) Act 2007*. This relates to provisions in clause 16 and 21 which disapplies section 49 of the *Industrial Relations Act 1979*, to provide that an appeal of the Tribunal's decision cannot be made in relation to a default or summary determination or where the Tribunal has revoked a right of entry authority.

**Clause 25    Section 47. Determination of dispute where no resolution by conciliation amended**

This makes consequential amendments to section 47 by deleting subsections (1), (2) (4) and (5) and inserting a new subsection (1) that

provides that the Industrial Relations Commission sitting as the Road Freight Transport Industry Tribunal may hear and determine a dispute for the purposes of section 38(1)(a).

It further provides that the Tribunal may enquire into and deal with a matter in relation to the negotiation of an owner-driver contract for the purposes of section 38(1)(b) if the dispute or matter is not resolved by conciliation under section 44 or disposed of by the Tribunal making a summary determination under section 38A or disposed of by the Tribunal making a default determination under section 38B.

**Clause 26     Section 47A. Remedies that may be given inserted**

This inserts new section 47A. after section 47. – Determination of dispute where no resolution can be reached by conciliation.

**Proposed section 47A. Remedies that may be given**

This section applies consequential amendments. Subclause (1) provides that in making a determination under section 38A(1), 38B(2) or 47(1), the Tribunal may order the payment of a sum of money found by the Tribunal to be owing by one party to another party or by way of damages or by way of restitution, order the refund of any money paid under an owner-driver contract, make an order in the nature of an order for specific performance of an owner-driver contract, declare that a debt is or is not owing, order a party to do or refrain from doing something or make any other order it considers fair.

Subclause (2) provides that 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 declare a term of the contract void, insert a new term into the contract to vary a term of the contract.

The purpose of this amendment is to enable the Tribunal to replace unjust contract terms once they are declared void.

**Clause 27     Section 48. Order to prevent entering into of owner-driver contracts amended**

This makes a consequential amendment to section 48 to update reference to new section 47A. Remedies that may be given as provided by clause 27.

## **PART 10 - MISCELLANEOUS**

### **Clause 28    Section 53. Confidentiality amended**

This amends section 53 by deleting “any” and inserting “a” in subclause (a) and deletes reference to “duty” in subclause (b) to “performing their function” for drafting consistency.

## **PART 11 – TRANSITIONAL PROVISIONS**

### **Clause 29    Part 11 inserted**

This inserts new Part heading and substantive provisions after section 59. – Review of Act.

#### **Part 11 – Transitional Provisions**

#### **Proposed section 60. Notice of termination before commencement day**

This provides for transitional provisions relating to the notice of determination provisions set out in clause 32 which inserts Schedule 1 Division 4 – Termination of contract.

Subclause (1) inserts new section 60 to define “commencement day” to mean the day on which the owner-driver (Contracts and Disputes) Amendment Bill 2022 sections 5 and 31 come into operation.

Subclause (2) provides that section 10A and Schedule 1 Division 4 do not apply in relation to a notice of termination given before commencement day.

This means that if before *commencement day* as defined in s. 6(1), a party to an owner-driver contracts gives the other party notice of termination of the owner-driver contract, the *Owner-Drivers (Contracts and Disputes) Amendment Act 2022* does not apply to the extent that it affects the validity of that notice of termination.

## **SCHEDULE 1 – IMPLIED PROVISIONS**

### **Clause 30    Schedule 1 – Implied provisions heading amended**

Makes consequential amendments to delete the reference after the heading to Schedule 1 and inserts s. 13, 14, 15, 15A and 16.

### **Clause 31    Schedule 1 Division 4 – Termination of contract inserted**

This inserts new division heading and substantive provisions at the end of Schedule 1 – Implied provisions, Division 3 – Making claims for payment.

#### **Proposed clause 4. Notice of termination**

This inserts new clause 4 notice of termination to payment in lieu provisions to provide that:

Subclause (1) a party (the terminating party) may terminate this contract by giving written notice to the other party (the non-terminating party).

Subclause (2) provides that a written notice of termination must state the day on which the notice is given and the day on which the termination of this contract is to take effect.

Subclause (3) provides that a notice of termination given under subclause (1) has no effect in the notice period is less than the minimum notice period.

Subclause (4) provides that subclause (3) does not apply if an owner-driver contract is terminated due to a material breach, serious or wilful misconduct of the owner-driver or exceptional circumstances beyond the control of the terminating party that were not reasonably foreseeable at the time of entering into the owner-driver contract.

Some examples of serious misconduct can include:

- Causing a serious and imminent safety risk
- Being under the influence of alcohol or drugs at work
- Assaulting a workmate
- Theft or fraud
- Damaging the reputation or profitability of the business

#### **Proposed clause 5. Payment in lieu of notice**

Clause 32 inserts new clause 5 that provides that despite clause 4(3), the hirer may terminate this contract by paying the owner-driver 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 per cent.

However, if a notice period is given but it is less than the minimum notice period, the amount payable for work performed by the owner-driver during the notice period and the amount that would be payable under this contract in respect of the balance of the minimum notice period, less 25 per cent.

The purpose of the provision is to set out that hirers may in lieu of the minimum notice period, make payment to an owner-driver to the amount representing the minimum notice period minus an amount representing variable overhead costs such as fuel, tyres, servicing, repairs and maintenance calculated as 25 percent of the contract value. These overhead costs are not incurred as a result of the remainder of the services under the contract not being carried out.

Similar provision is provided for under the Victorian *Owner Drivers and Forestry Contractors Act 2005* section 22.

## **SCHEDULE 2 – CONSTITUTION AND PROCEEDINGS OF COUNCIL**

### **Division 1 – General provisions**

#### **Clause 32    Schedule 2 clause 1 amended**

This amends clause (1) to reflect current drafting style by deleting reference to “his or her” and replacing it with reference to “their”.

Subclause (2) provides that despite subclause (1), if the term of office of a member of the Road Freight Transport Industry Council expires by effluxion of time without a person having been appointed to fill the vacancy, the member continues in office until the earlier of the following – the vacancy is filled, the member resigns under clause 3(1)(a), the member is removed from office under clause 3(2) or the member dies.

Similar Term of Office provisions are prescribed in schedule 1 clause 2(2) of the *Planning and Development Act 2005*.