

WORKPLACE RELATIONS

23 December 2015

NAT 026/15

New order setting minimum payments for contractor drivers

SUMMARY

The Road Safety Remuneration Tribunal (RSRT) has issued the *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* (Minimum Payments Order) prescribing minimum payments for certain contractor drivers. It applies to contractor road transport drivers in relation to items destined for sale or hire by a supermarket chain and to long distance operations. It will commence operation on 4 April 2016.

The Minimum Payments Order also imposes related obligations on hirers of contractor drivers as well as other businesses in the relevant supply chains. These relate to the content of supply chain contracts, the granting of unpaid leave and the conduct by certain supply chain participants of compliance audits of hirers of contractor drivers to whom the Minimum Payments Order applies.

Overview

The RSRT issued the [Minimum Payments Order](#) and an [accompanying Decision](#) on 18 December 2015.

The Minimum Payments Order will impose requirements on a hirer of a contractor driver to whom it applies, as well as participants in the supply chain in relation to such a driver.

Subject to certain exemptions, the coverage provisions of the Minimum Payments Order are the same as those in the [Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014 \(2014 RSRO\)](#), which primarily deals with a range of matters other than payments for contractor drivers.

The following important points should be noted about the Minimum Payments Order:

- It creates, for the first time, a national regime of mandatory minimum rates that must be paid to certain contractor drivers by the parties that engage them.

- It requires hirers to grant regular contractor drivers unpaid leave.
- It imposes new obligations on supply chain participants in relation to the content of supply chain contracts.
- It creates a regime for the auditing of hirers by certain other supply chain participants.

Relevant background to the RSRT and its activities is explained in Member Advice [Nat 017/15](#), [Nat 006/14](#), [Nat 019/13](#) and [Nat 007/12](#).

The release of the Minimum Payments Order follows the publication of a draft order earlier this year that was strongly opposed by Ai Group in proceedings before a Full Bench of the RSRT.

The rates contained in the Minimum Payments Order are lower than those contained in the draft order that was published earlier this year. A number of particularly problematic proposed provisions have also been removed or significantly varied. Nonetheless, the Minimum Payments Order is likely to have a significant impact upon many parties that will be subject to it.

What is the coverage of the Minimum Payments Order?

The Minimum Payments Order applies to a road transport driver employed or engaged in:

- the road transport and distribution industry within the meaning of the *Road Transport and Distribution Award 2010* as in force on 1 July 2012, in respect of the provision by the road transport driver of a road transport service wholly or substantially in relation to goods, wares, merchandise, material or anything whatsoever destined for sale or hire by a supermarket chain; or
- long distance operations in the private transport industry within the meaning of the *Road Transport (Long Distance Operations) Award 2010* as in force on 1 July 2012.

However, the Minimum Payments Order does not apply to a contractor driver engaged in:

- the cash in transit industry within the meaning of the *Transport (Cash in Transit) Award 2010* as in force on 1 July 2012;
- the waste management industry within the meaning of the *Waste Management Award 2010* as in force on 1 July 2012;
- the sector of the road transport industry which is directly related to wharf and port container work; and
- the oil, fuel and gas sectors of the road transport industry.

What minimum rates are contained in the Minimum Payments Order?

The Minimum Payments Order contains separate schedules with minimum payments for contractor drivers engaged in:

- distribution operations (not including long distance operations); and
- long distance operations.

The applicable rates are determined by various factors including the employee's classification, the class of vehicle, the type of trailer and whether it is supplied by the driver.

The RSRT has indicated that it will shortly publish an online payments calculator on its website. Ai Group anticipates that this will assist parties to identify the specific rate applicable to individual drivers.

What is the effect of the facilitative provision contained in clause 11?

The Minimum Payments Order generally requires payment for the time a contractor necessarily spends in providing the road transport service and the kilometres the contractor necessarily travels. Clause 11 (titled 'Facilitative provisions') impacts upon how such time and kilometres will be measured.

Clause 11.1 identifies specific activities that are to be included in the identification of time which attracts a payment. For example, it specifies that such time includes (amongst other periods) certain legally mandated rest periods of less than 30 minutes, time spent inspecting or attending to a load, loading or unloading a vehicle and completing certain documentation required by the hirer.

Clause 11.2 identifies certain time that does not attract payment. This includes time that is lost due to a breakdown of a contractor's vehicle or trailer or due to an accident involving the contractor.

Clause 11.3 defines the locations between which the kilometres necessarily travelled must be counted.

Special arrangements for distribution operations

Drivers necessarily travelling 400 or more kilometres

The Minimum Payments Order enables a distribution driver who is not performing 'long distance operations' and who is engaged in the provision of a service that involves traveling 400 or more kilometres in a day, to be paid in accordance with the payment provisions related to long distance operations.

Transitional arrangements for distribution operations

Until midnight on 3 October 2016, a hirer who engages a contractor driver to undertake work other than a long distance operation may pay a driver by a method other than that prescribed under the applicable minimum payment provisions of the Minimum Payments Order, provided that the other method does not result in the hirer paying the driver, less than they would be paid under such provisions over a period of 28 consecutive days.

There are additional obligations, including extra record keeping requirements, for a hirer that utilises this flexibility.

Special arrangements for long distance operations

A hirer who engages a contractor driver to provide a road transport service that involves a long distance operation may pay the driver by a method of payment other than that prescribed by the Minimum Payments Order (i.e. the hourly and kilometre rates specified), provided that it does not result in the contractor driver being paid less by the hirer than they would have under the Minimum Payments Order over a period of 28 consecutive days.

Will the rates in the Minimum Payments Order be varied?

The schedules attached to the Minimum Payments Order set out the rates that will apply for each year that it is in operation. Relevantly, it provides that the rates will be increased by 2% on the 4 April in 2017, 2018 and 2019.

What other obligations does the Minimum Payments Order impose on a hirer?

Promotion of the Minimum Payments Order

Hirers are required to display the Minimum Payments Order on their website and, where practicable, at relevant work sites or depots.

They must also take all reasonable steps to advise relevant contractor drivers that both the Minimum Payments Order and the 2014 RSRO can be accessed at such locations or at the [RSRT's website](#).

Permitting and facilitating audits

Hirers are required to permit and facilitate the conduct of audits by other supply chain participants of its compliance with the Minimum Payments Order.

Clause 8.6 limits this obligation to permitting audits by supply chain participants that have contract(s) for the carriage of goods on 270 or more days in a financial year.

Unpaid leave

A contractor driver who regularly provides a road transport service over the preceding 12 month period must be permitted to take up to four weeks' leave during the next 12 months and the hirer must not unreasonably refuse to agree to the date for taking such leave that the contractor requests.

What obligations does the Minimum Payments Order impose on supply chain participants?

Supply chain contracts

The Minimum Payments Order requires that a supply chain participant take all reasonable steps to ensure that any contract it has with a second party in the supply chain is not intended to have the effect, nor has the effect, of preventing or impeding compliance with the Minimum Payments Order by a hirer of a contractor driver.

Conduct of audits and related obligations

Certain supply chain participants will be required to audit the compliance of hirers with the minimum payment obligations contained in part 4 of the Minimum Payments Order.

Importantly, supply chain participants are only required to undertake such audits if they are a party to a relevant contract, or contracts, that provide for the transportation of goods on 270 or more days in a financial year.

Supply chain participants must also provide written notice to the hirer of a contractor driver of any reasonable belief, arising out of the audit, that the hirer has not complied with the obligations relating to minimum payments contained within the Minimum Payments Order, the nature of the non-compliance and the action required to rectify the non-compliance. The notice must also contain a requirement to rectify the non-compliance.

There is a further obligation to notify the Fair Work Ombudsman if the supply chain participant is not satisfied that any non-compliance has been rectified in accordance with the relevant notice.

When does the order commence operation?

The Minimum Payments Order provides for a commencement date of **4 April 2016**.

The order expires on 3 April 2020.

How will the order interact with current arrangements or laws relating to contractor driver remuneration?

The Minimum Payments Order contains a 'savings clause' that specifies that it does not require a hirer to reduce any remuneration or related condition that the hirer is providing to a driver under an agreement they have with the driver.

The *Road Safety Remuneration Act 2012* contains specific provisions dealing with the interaction between the terms of a Road Safety Remuneration Order and any road transport contract, or relevant Commonwealth, State or Territory law, including a Contract Determination made pursuant to the NSW *Industrial Relations Act 1996*.

Members seeking advice in relation to the application of these provisions should contact Ai Group.

Review of the Minimum Payments Order

The Minimum Payments Order will have significant implications for the road transport industry in Australia and the sectors of the economy that rely upon it. The RSRT has indicated that the Minimum Payments Order will be reviewed over time based upon experience and new evidence. It has also noted that the *Road Safety Remuneration Act 2012* permits parties to make an application to vary an order.

Do you require further advice?

For information or assistance, please contact the **Ai Group Workplace Advice Line** on 1300 55 66 77.



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