Regulating Supply Chains To Protect Road Transport Workers: An Early Assessment Of The Road Safety Remuneration Tribunal

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Abstract

The *Road Safety Remuneration Act 2012* (Cth) (the Act) explicitly enables the Road Safety Remuneration Tribunal to make orders that can impose binding requirements on all the participants in the road transport supply chain, including consignors and consignees at the apex the chain, for the pay and safety of both employee and independent contractor drivers. The tribunal is also specifically empowered to make enforceable orders to reduce or remove remuneration related incentives and pressures that contribute to unsafe work practices in the road transport industry. Recently the tribunal handed down its first order. The article considers whether, and the degree to which, the tribunal has been willing to exercise its explicit power to impose enforceable obligations on consignors and consignees — such as large supermarket chains — at the apex of road transport supply chains. It examines the substance and extent of the obligations imposed by the tribunal, including whether the tribunal has exercised the full range of powers vested in it by the Act. We contend that the tribunal's first order primarily imposes obligations on direct work providers and drivers without making large, powerful consignors and consignees substantively responsible for driver pay and safety. We argue that the tribunal's first order could have more comprehensively fulfilled the objectives of the Act by more directly addressing the root causes of low pay and poor safety in the road transport industry.

I. INTRODUCTION

A key feature of organisational arrangements in the contemporary Australian trucking industry is the extensive use of contracting chains — what we will refer to in this article as 'supply chains' — for the supply of road freight services. At the apex of many of these supply chains are influential consignors and consignees, such as large supermarket chains, department stores, and manufacturers and the firms to which manufactured items are supplied. In a supply chain, the consignor, rather than transporting goods using its own truck driven by its own employees, contracts with a transport company which in turn uses its own employee drivers, or subcontracts the driving work to an owner driver, or, perhaps, to another transport company which itself sub-contracts the work to an owner driver. Some road freight arrangements involve carting goods through distribution centres where freight is unloaded and then loaded on to other trucks.

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As this description of contracting arrangements shows, the major transport companies that directly enter into contracts with consignors to haul their freight, or that receive road transport work via an intermediary, are at least one step down the general freight supply chain. As we discuss in the next section of this article, over recent decades the bargaining power of transport companies relative to many of their client consignors has weakened to the point that many transport companies have become the price taker and the consignor the price-maker. Powerful consignors and consignees also have the power to set other parameters within which work is undertaken by road transport workers, including the maximum time available for delivery of goods.[1] The transport companies then need directly to engage both employee and contract owner drivers to drive the trucks which carry the freight under arrangements that enable the transport company to take its share of financial return. To ensure financial return, major transport companies sometimes further contract out work to smaller transport company operators who will then directly engage the road transport workers – either their own employees, or owner drivers. The weight of the cumulative economic pressures from the top of the chain is passed down the supply chain and induces intense competition between employee drivers and owner drivers who frequently are compelled to accept work terms and conditions dictated to them or fail to receive work at all.[2]

Thus, in the absence of preventive regulation, drivers at the bottom of the supply chain – particularly owner drivers needing work to meet the expenses of owning a truck – are compelled to accept low freight rates and unsustainable delivery timetables. These, in turn, provide incentives to work longer hours – which can result in fatigue – and to engage in hazardous work practices that compromise the health and safety of drivers.[3] The literature — which we discuss in the next section of the article — shows how the use of elaborate, pyramid subcontracting results in reduced freight rates and returns to drivers. It also demonstrates a strong link between low returns and client demands for tight time schedules, long hours, and poor queuing practices that reduce opportunities for drivers to rest.[4] Intensification of these pressures in an already competitive industry has resulted in unsafe and unhealthy work practices such as excessive hours

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[1] See Michael Quinlan, *Report of Inquiry into Safety in the Long Haul Trucking Industry*, Motor Accidents Authority of New South Wales, (2001) 152-153; *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination* (2006) 158 IR 17 at 24; Igor Nossar, *Briefing Paper: Consequential Amendments to OHS Amendment (Long Distance Road Freight Transport) Regulation Draft*, Textile Clothing and Footwear Union of Australia, Sydney (2004) 1.

[2] National Transport Commission, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry* National Transport Commission, Melbourne (2008) 24-25.

[3] See Michael Quinlan and Lance Wright, *Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission* (2008) which found at p 49 'that the overwhelming weight of evidence indicates that commercial/industrial practices affecting road transport play a direct and significant role in causing hazardous practices.'

[4] Claire Mayhew and Michael Quinlan, 'Economic Pressure, Multi-tiered Subcontracting and Occupational Health and Safety in Australian Long Haul Trucking' (2006) 28 *Employee Relations* 212; Michael Quinlan, *Supply Chains and Networks*, Safe Work Australia (2011) 5-6. Note also Stephanie Premji**,** Katherine Lippel and Karen Messing, '"We work by the second !" Piecework remuneration and occupational health and safety from an ethnicity- and gender-sensitive perspective' 2008 (10) *Perspectives interdisciplinaires sur le travail et la santé* 2-27, which shows that a connection between pay and safety has been found in other industries.

of work, increased use of kilometre or trip-based payment systems, speeding, drug use (to combat fatigue) and cuts to maintenance.[5]

Over the past 15 years, Australian road transport and work health and safety regulators have developed various regulatory provisions designed to address the health and safety risks from supply chain pressures on drivers. These measures include the 'chain of responsibility' provisions of the heavy vehicle legislation, now to be found in the *Heavy Vehicle National Law*,[6] which sets out 'a chain of responsibility' for all parties (including firms packing, loading and receiving goods) involved in road transport work even if they have no *direct* role as a driver or transport operator.[7] The aim of these provisions is to make each party in the chain with the capacity to exercise control or influence over any transport task equally responsible for compliance with the road transport laws, including provisions for fatigue management requirements (Chapter 6 of the National Heavy Vehicle Law), breaches of speed limits (Chapter 5), and breaches of mass, dimension, or loading requirements (Chapter 4). Further, in 2005, New South Wales introduced the *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW), made under the *Occupational Health and Safety Act 2000* (NSW). These provisions required large consignors, consignees and head carriers to assess risks to employee drivers and owner drivers from fatigue in long haul driving arrangements, and to develop a fatigue management plan to address identified risks. The regulation was repealed at the end of 2011 when the *Occupational Health and Safety Act* was replaced by the harmonised *Work Health and safety Act 2011* (NSW).

In addition, since 1979 in NSW, rates and conditions of work for contractor drivers have been provided for by 'contract determinations' (which are akin to industrial awards) and 'contract agreements' (similar to union collective agreements).[8] These provisions are, however, confined to regulating the direct contract worker/hirer arrangement and do not extend to regulate clients at the top of the transport supply chain. Also, due to State jurisdictional limitations, they do not cover any road transport work beyond NSW local work.[9]

Then, in 2012, the *Road Safety Remuneration Act 2012* (Cth) ('the Act') established the federal road safety remuneration tribunal ('the tribunal').The tribunal is responsible for determining working conditions in the road transport industry across Australia. The Act explicitly empowers the tribunal to make orders that can impose binding requirements on all the participants in the road transport supply chain, including consignors and consignees at the apex the chain, for the pay and safety of both employee and independent contractor drivers. The tribunal is also specifically

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[5] Quinlan, above n 4.

[6] The *Heavy Vehicle National Law Act 2012* was passed by the Queensland Parliament in 2012, and amended in 2013. Queensland also developed four Heavy Vehicle National Regulations. The amended *Heavy Vehicle National Law*, and the regulations were adopted by the Australian Capital Territory, New South Wales, South Australia, Tasmania and Victoria, and came into operation in all six jurisdictions on 10 February 2014. The Northern Territory and Western Australia have yet to implement the *Heavy Vehicle National Law* and regulations.

[7] https://www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility. See, for example, *Heavy Vehicle National Law 2012* ss 202-3.

[8] See *Industrial Relations Act 1996* (NSW), Chapter 6.

[9] Michael Rawling and Sarah Kaine, 'Regulating Supply Chains to Provide a Safe Rate for Road Transport Workers (2012) 25 *Australian Journal of Labour Law* 237, 249.

empowered to make enforceable orders to reduce or remove remuneration related incentives and pressures that contribute to unsafe work practices in the road transport industry. It can also approve road transport collective agreements for contractor drivers and deal with disputes between road transport industry participants.

Under the Act the tribunal must, in consultation with industry,[10] prepare and publish an annual work program.[11] The tribunal began its operations on 1 July 2012, and soon thereafter it conducted a series of consultations with the road transport industry. Interested persons were invited to make submissions on the matters the tribunal should identify and prioritise in its annual work program. The tribunal then published its first annual work program in December 2012, in which it would inquire into, and consider making orders covering, the retail, livestock, bulk grain sector, interstate and intrastate long distance sectors of the road transport industries.

The first order of the tribunal covered the retail and long distance sector. The process began in December 2012 and culminated in an order made in December 2013. This order is examined in detail in this article. The tribunal conducted further consultations on its second annual work program, which it published in December 2013. According to the second work program, the tribunal would inquire into the cash-in-transit sector, the long distance sector and the sector pertaining to transportation of materials or goods destined for sale or hire in supermarket chains. In addition, the tribunal has held conferences (initially arising out of the first annual work program) concerning quantum of rates and cost recovery for contractor drivers. These matters were not determined by the tribunal's first order and a separate order covering these matters had not been made at the time of writing this article. Finally, under the Act the tribunal can deal with disputes about remuneration and related conditions.[12] In 2014 it dealt with a dispute concerning the sector of the road transport industry which transports oil, fuel and gas.

This article analyses the proceedings in the retail and long distance sector leading to the making of the tribunal's first order regulating road transport supply chains – the *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014*. These proceedings and order are particularly significant because this is the first time that any Australian court or tribunal has considered the extent of road transport industry clients' obligations for the pay and safety of road transport drivers. Indeed, mandatory, industrial obligations have rarely been imposed in any industry on business controllers who are removed from direct relations with workers due to supply chain outsourcing. The only other industry in which firms ('business controllers') at the top of supply chains have mandatory obligations towards the workers throughout their supply chains is the textile, clothing and footwear industry, where mandatory retailer codes are currently in place in New South Wales and South Australia.[13]

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[10] *Road Safety Remuneration Act 2012* (Cth) s 18(3).
[11] Ibid s 18.
[12] See Ibid s 40.
[13] For detailed analyses of these provisions, see Igor Nossar, Richard Johnstone, Anna Macklin and Michael Rawling, 'Protective Legal Regulation for Home Based Workers in the Australian Textile, Clothing and Footwear Industry' (2015) 57 *Journal of Industrial Relations*, in press; Michael Rawling, 'Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations' (2014) 27 *Australian Journal of Labour Law* 191.

The article particularly addresses whether, and the degree to which, the tribunal has been willing to exercise its explicit power to impose mandatory and enforceable obligations on clients (which, in this article, refers to consignors and consignees) such as large supermarket chains at the apex of road transport supply chains. It examines the substance and extent of those obligations imposed on clients by the tribunal, and assesses the extent to which the tribunal has exercised the full range of powers vested in it by the Act.

The article begins with an examination of the economic and industrial factors in the road transport industry — and in particular the rising influence of road freight clients — which necessitate the regulation of entire road transport supply chains to address the issues of low pay and poor health and safety in the industry. It then outlines how the Act clearly empowers the tribunal to impose substantive economic obligations on parties throughout the supply chain, including the clients at the top of the chain. The remainder of the article analyses the tribunal's first retail and long distance sector matter. The focus of this analysis is on whether and how the parties' submissions, and the tribunal's deliberations, considered the issue of imposing obligations on all supply chain participants, including upon clients at the top, for the pay and safety of drivers. It also examines the subsequent orders made by the tribunal.

While we consider the tribunal clearly to be a very important initiative to regulate supply chains in the road freight industry, we argue that its first retail and long distance order does not fully address commercial pressures emanating from the top of the supply chain and which (as we know from the literature) are a contributing factor to poor health and safety outcomes for road transport drivers. While we acknowledge the significant political pressures on the tribunal, and the pressures from large economic interests, we argue that the health and safety issues facing truck drivers will only be adequately addressed if the tribunal fully implements the objectives of the Act by placing substantive economic obligations concerning driver pay and conditions upon all participants in the supply chain, including clients at the top of the chain.

The literature has identified an Australian model of supply chain regulation initially and comprehensively applied in the textile clothing and footwear sector and more recently adapted to partially apply to the road transport sector.[14] This model includes provisions (i) creating rights of recovery, buttressed by rebuttable presumptions, enabling workers to claim for unpaid wages against virtually any party in the contracting chain (who can then seek redress from the person actually liable); (ii) importing into retailer contracts compulsory, standardised, enforceable provisions informing retailers where and under what conditions workers are working; and (iii) enabling regulators, including unions, to access this information and to enforce fair working

[14] See Nossar Johnstone, Macklin and Rawling, above n 14; Igor Nossar, Richard Johnstone and Michael Quinlan, 'Regulating Supply Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia' (2004) 17 *Australian Journal of Labour Law* 137; Michael Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing' in Chris Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 520; Igor Nossar, 'The Scope for Appropriate Cross-Jurisdictional Regulation of International Contract Networks (Such as Supply Chains): Recent Developments in Australia and Their Supra-National Implications' Business Outsourcing and Restructuring Regulatory Research Network Working Paper No 1, 2007 at http://www.borrrn.org/attachments/003_Nossar%20ILO%20FINAL%20DRAFT%20.pdf.

conditions. The analysis in this article demonstrates that the tribunal, in its first order, appears to be reluctant to accept and institutionalise this model, at least at this point in time.

II. THE ECONOMIC AND INDUSTRIAL FACTORS LEADING TO THE NEED FOR SUBSTANTIVE, MANDATORY SUPPLY CHAIN OBLIGATIONS

Both the commercial and industrial contexts in the road transport industry have changed dramatically in the past 40 years. Until the 1970s there were few, if any, pressures on major transport companies to outsource driving tasks, and most directly engaged drivers, and had the financial capacity to provide for adequate work terms and conditions for drivers.[15] There was little scope to evade statutory work entitlements. Under the legislated industrial system of conciliation and arbitration, awards set market rates and conditions reaching across an entire industry. These industry-wide standards largely undermined any attempts of road transport industry clients to create supply chains to circumvent, undercut or avoid these standard terms and conditions because, at that time, all road transport employers in the same sector were required to provide the same market terms and conditions to their employees. In short, transport industry clients were not significantly pressured, and had little opportunity, to seek out road transport operators who could offer them cheaper transport services by providing lower terms and conditions to their employees than those established in centrally set industry standards. A significant proportion of retailers and other industry clients directly engaged, as principal employers, their own fleets of trucks and paid their employee drivers good wages and conditions for employees as set out in awards and agreements.

Since the 1970s the dynamics of the road freight transport industry have changed, and retailers and other industry clients have realised that they can achieve considerable cost-savings by contracting out road transport work, and at the same time maintaining influence over the parameters of that work.[16] Two interrelated commercial changes have transformed the Australian road transport industry and increased the pressure to outsource driving work through supply chains: the fragmentation of work[17] and a consolidation of the influence of road transport clients ─ consignors and consignees ─ at the top of the road transport supply chain. From the 1980s, an increasing amount of work previously undertaken by direct employees of major road transport industry employers has fragmented to become work contracted to an increasing number of smaller transport operators, who, in turn, engage owner-drivers, largely operating outside the federal system of industrial awards. This has been accompanied by a considerable

[15] Interview with union official.

[16] Witness statement of Michael Kaine, In the matter of Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) 12 August 2013, 9.

[17] On work fragmentation generally, see Mick Marchington, Damian Grimshaw, Jill Rubery and Hugh Wilmott (eds), *Fragmenting Work: Blurring Organizational Boundaries and Disordering Heirarchies* (Oxford University Press, Oxford, 2005); Richard Johnstone, Shae McCrystal, Igor Nossar, Michael Quinlan, Michael Rawling and Joellen Riley, *Beyond Employment: the Legal Regulation of Work Relationships* (Federation Press, Sydney, 2012); Judy Fudge, Shae Mcrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart, Oxford, 2012); Katherine V W Stone, and Harry Arthurs (eds), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage, New York, 2013).

rise in the power and influence of road transport industry clients, including a duopoly of food and grocery retailers with substantial road transportation requirements.[18]

These changes in the Australian road transport industry have occurred within broader developments world-wide, in which large 20th century integrated firms — which previously engaged large numbers of employees to perform work in-house — have restructured to outsource work to other firms which indirectly (through arrangements such as labour hire and sub-contracting) and cost-effectively provide labour back to those large firms.[19] As a result of these developments, and mergers and takeovers of other business entities in the same industry, many large and powerful corporate structures now effectively control a network or supply chain of suppliers, distributors and other businesses providing labour.[20] Consistent with this global trend, Australian road transport industry clients now exercise significant bargaining power across all of their supply chains including those in the road transport industry. Conversely, all road transport companies, including the major road transport employers, have experienced a significant dilution of their bargaining power relative to many of their clients.[21] In their negotiations with large and powerful clients, the road transport companies frequently have to accept the price set by the client for the cost of road transport services, and a range of client requirements in freight contracts, including transportation schedules, and specifications for the loading and unloading of goods transported.[22]

These adverse effects on Australian road transport operators have been exacerbated by the decentralisation of the industrial relations system, initiated by the Keating Labor government in 1993, and resulting in an enterprise bargaining system in which transport operators bargain at an enterprise, rather than industry, level for market rates above a safety net of minimum standards. As a result of these developments, in the road freight market, major road transport employers now have to compete with smaller road transport operators with lower labour costs and inferior health and safety standards. Setting market rates at an enterprise, rather than industry, level enables smaller operators to offer their frequently non-unionised workforces the minimum safety net rates for employees and/or a low per kilometre rate to owner drivers. The major transport employers who have entered into registered enterprise agreements have found it increasingly difficult to negotiate with influential clients because those clients can avoid the use of the major transport operators altogether by engaging smaller, alternative operators that are not bound by the same enterprise agreement market rates and conditions.[23] The rise of road transport industry client power has placed significant pressure on the entire Australian road transport industry, including major transport operators, which have struggled to make a profit if they offer fair pay

[18] Rawling and Kaine, above n 10 at 24.
[19] Michael Rawling and John Howe, 'The Regulation of Supply Chains: An Australian Contribution to Cross-National Legal Learning' in Katherine V W Stone, and Harry Arthurs (eds) *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage, New York, 2013) 233, 234; David Weil, 'Enforcing Labour Standards in Fissured Workplaces: The US Experience (2011) 22 *Economic and Labour Relations Review* 33; David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve It*, (Harvard University Press, Cambridge MA, 2014) especially ch 3.
[20] See Jennifer Bair, 'Global Capitalism and Commodity Chains: Looking Back, Going Forward' (2005) 9 *Competition and Change* 153.
[21] See Quinlan, above n 1, 180.
[22] Ibid, 20; Quinlan and Wright, above n 3, 50.
[23] Interview with union official.

and conditions to their road transport workers under enterprise agreements while receiving the inferior terms (including monetary payments) set by clients in the freight contracts with those major transport operators. In order to meet the stringent cost requirements of large clients, major transport operators, particularly those contracting with large retail clients, have, instead of employing their own drivers at rates set by their enterprise agreement, further contracted out road transport work to road transport companies that offer inferior safety standards, pay and conditions.[24]

As a consequence of these three developments – the fragmentation of work, the rise in the power of the retailers and the decentralisation of the industrial relations system – commercial pressures driven down the supply chain by powerful road transport clients, resulting in cost reductions and unrealistic delivery timetables, have led to the extensive use of owner-drivers at low and arguably often unsustainable rates, and to lower levels of compliance with basic pay and conditions standards for employees.[25] Supply chain pressures and the competitive nature of the industry have produced freight rates and pay rates so low that some transport providers and owner-drivers cut corners on essential truck maintenance, creating unsafe conditions for drivers and the public on the road.[26] This link between economic pressures in the industry and poor safety outcomes has been substantiated by academic research[27] and government commissioned reports.[28] It is also consistent with a growing body of research on the adverse effects of supply chain outsourcing for workers working at the bottom of supply chains more generally.[29] This research suggests that without regulatory measures to counter these adverse effects of the three developments described in this section and to impose mandatory supply chain obligations upon large clients ensuring decent pay and the safety of road transport drivers, work standards and health and safety conditions in the road transport industry will remain inadequate.

III. STATUTORY POWERS OF THE TRIBUNAL TO REGULATE ALL PARTICIPANTS IN THE SUPPLY CHAIN, INCLUDING CONSIGNORS AND CONSIGNEES.

[24] Quinlan and Wright, above n 3, 19;
[25] Ibid 50; Quinlan, above n 1, 21.
[26] Quinlan above n 1, 180; Quinlan and Wright above n 3, 16, 19, 26, 40.
[27] Ann Williamson et al, *Driver Fatigue: A Survey of Long Distance Heavy Vehicle Drivers in Australia*, National Road Transport Commission, Information Paper/CR 198, September 2001; David Hensher, and Helen Battellino 'Long Distance Trucking: Why do Truckies Speed?' (1990) 15 *Papers for Australasian Transport Research Forum* 537, 553; Michael Belzer *The Economics of Safety: How Compensation Affects Commercial Motor Vehicle Driver Safety* prepared for Safe Rates Summit, Canberra, November 2011; Daniel A Rodriguez, Felipe Targa and Michael Belzer 'Pay Incentives and Truck Driver Safety: A Case Study' (2006) 59 *Industrial and Labor Relations Review* 205.
[28] Quinlan above n 1; Quinlan and Wright above n 3; Department of Education, Employment and Workplace Relations *Safe Rates Safe Roads Direction Paper* Commonwealth of Australia, Canberra, 2010, 15-16.
[29] See, eg, David Walters and Phil James, 'What Motivates Employers to Establish Preventive Management Arrangements within Supply Chains?' (2011) 49 *Safety Science* 988 at 989; Phil James, Richard Johnstone, Michael Quinlan and David Walters 'Regulating Supply Chains to Improve Health and Safety' (2007) 36 *Industrial Law Journal* 163, 166–170; Chris Wright and John Lund, 'Supply Chain Rationalization: Retailer Dominance and Labour Flexibility in the Australian Food and Grocery Industry' (2003) 17 *Work, Employment and Society* 137, 142–151.

The above analysis, well documented in key government reports into the national road transport industry,[30] suggests that what is required to ensure safe driving in the road freight industry is regulatory intervention that targets the root causes of low pay and poor health and safety in the road transport industry. For regulation to be effective, it needs to address the economic pressures driven down the supply chain which induce road transport operators and drivers to engage in hazardous practices.

The *Road Safety Remuneration Act 2012* (Cth), which, as we have noted in our introduction, established the road safety remuneration tribunal to address working conditions in the road transport industry,[31] and empowers it to make orders to remove remuneration-related incentives, pressures and practices that contribute to unsafe work practices, was established to provide this very kind of effective regulation. The tribunal has the potential to establish this kind of supply chain regulation on an industry or sector basis, potentially addressing the pressures from road transport industry clients to circumvent enterprise level regulation.

The regulatory powers of the tribunal can be applied nationally across all road transport sectors, including general road transport, distribution (including couriers and construction industry drivers), the cash-in-transit industry and the waste management industry.[32] The key power vested in the tribunal is to make road safety remuneration orders which are consistent with the objects of the Act.[33] The objects of the Act include: removing remuneration-related incentives, pressures and practices that contribute to unsafe work practices;[34] developing and applying enforceable standards throughout the road transport supply chain to ensure the safety of road transport workers;[35] and ensuring that hirers of road transport drivers and participants in the supply chain take responsibility for implementing and maintaining those standards.[36] The Revised Explanatory Memorandum to the Road Safety Remuneration Bill 2012 states that the object of the Bill is to:

> promote safety and fairness in the road transport industry by doing such things as ensuring that the drivers do not have remuneration-related incentives to work in an unsafe manner and *ensuring that all participants in the supply chain take responsibility for ensuring standards are maintained and commercial incentives and pressures and industry practices that contribute to unsafe work practices are removed.*[37]

A 'participant' in the supply chain is defined in section 9 of the Act. Consignors or consignees (of a thing in respect of which a road transport driver is providing road transport services)[38] as well as intermediaries (that are party to a contract for the carriage of goods which concerns the transport of a thing in respect of which a road transport driver is providing road transport services)[39] are captured by the definition of supply chain participant as long as they fall within the

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[30] Quinlan and Wright, above n 3, 61-62**;** Quinlan, above n 1.
[31] *Road Safety Remuneration Act 2012* (Cth) ss 3, 79.
[32] *Road Safety Remuneration Act 2012* (Cth) ss 6-7; Rawling and Kaine, above n 10, 252.
[33] *Road Safety Remuneration Act 2012* (Cth) s 19(1).
[34] Ibid s 3(b).
[35] Ibid s 3(d).
[36] Ibid s 3(e).
[37] Revised Explanatory Memorandum to the Road Safety Remuneration Bill 2012 cl 8, emphasis added.
[38] *Road Safety Remuneration Act 2012* (Cth) ss 9(2)-(3).
[39] Ibid s 9(4).

broad range of legislative powers now available, in the Australian Constitution, to the Commonwealth Parliament under the corporations power (section 51(xx)),the trade and commerce power (section 51(i)), territories power (section 122) and power to regulate the Commonwealth public service (section 52). A supply chain participant is also defined to include a constitutional corporation which is an operator of premises that are used by a road transport driver to load or unload an average of at least five vehicles a day.[40]

The tribunal is then explicitly empowered to impose on all participants in the supply chain — including consignors and consignees — requirements addressing the pay and safety of drivers at the foot of the supply chain. Sub-section 27(3) of the Act specifies that a road safety remuneration order made by the tribunal can 'impose requirements' on "a participant in the supply chain in relation to a road transport driver to whom the order applies".[41] The Revised Explanatory Memorandum to the Road Safety Remuneration Bill 2012[42] explains that the Bill operates to impose responsibility on all parties in the supply chain for road transport services to ensure the objects of the Act is given effect to the fullest extent . . .'

The tribunal has clear powers to address economic pressures emanating down the supply chain and the next section of this article examines whether the tribunal has fully used these powers in the first tribunal order.

IV. THE TRIBUNAL'S FIRST ORDER.

A. The Annual Work Program, Consultations and Draft Order

The Road Safety Remuneration Tribunal began operation on 1 July 2012. It published its first Annual Work Program in December 2012 after consultations with, and submissions from, interested persons.[43] The tribunal received 14 initial written submissions from, unions, employer organisations and individuals, including Professor Michael Quinlan. There were then four further submissions replying to initial submissions by unions and employer organisations and six submissions on a draft annual work program from individuals and employer organisations. The Program identified the retail, livestock, bulk grain, interstate and intrastate long distance sectors of the road transport industry as sectors that the tribunal proposed to inquire into with a view to making a road safety remuneration order.[44] Before the tribunal can make an order, it is required to prepare, and consult on, a draft order.[45] In order to consult with interested parties, the tribunal made a series of public visits to transport and logistics sites, and sought and received written submissions,[46] including proposed orders.[47]

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[40] Ibid s 9(6).
[41] See also Jennifer Acton, 'Complementary Jurisdictions: the Road Safety Remuneration Tribunal and Occupational Health and Safety Laws', Address to the ACTU OHS/Workers' Compensation Conference, Sydney, 6 September 2012, 3.
[42] Cl 27.
[43] *Road Safety Remuneration Tribunal Decision* [2013] RSRTFB 7 (17 December 2013) para 13.
[44] *Re Annual Work Program* [2012] RSRTFB 3 (10 December 2012)
[45] *Road Safety Remuneration Act 2012* (Cth) s 22.
[46] *Road Safety Remuneration Tribunal Statement* [2013] RSRTFB 3, (12 July 2013).
[47] See *Road Safety Remuneration Tribunal Decision* [2013] RSRTFB 7 (17 December 2013) para 27.

The TWU submitted draft orders, which at least to some extent, sought to implement the Australian model of supply chain regulation by proposing substantive obligations for consignors and consignees at the apex of the road transport supply chain. These proposed obligations included a requirement that consignors and consignees make payment on demand to drivers for any unpaid amount owed to the driver by his or her employer or hirer[48] and a requirement that consignors and consignees ensure compliance with safe driving plans[49] — a safe work method statement made before driving work commences and designed to address the link between pay and safety.[50] Safe driving plans are discussed further below.

The Australian National Retailers Association ('ANRA') submitted that all of these proposed substantive obligations on consignors and consignees were inappropriate.[51] The Australian Industry Group urged the tribunal to 'adopt a cautious approach' when considering the scope of any draft order,[52] strongly opposed the right of drivers to recover unpaid amounts from consignors and consignees and submitted that requirements upon consignors and consignees for safe driving plans would unnecessarily duplicate obligations.[53] Coles Supermarkets Australia Pty Ltd (Coles), a major consignor and consignee, questioned the practicality and utility of imposing obligations regarding safe driving plans on consignors and consignees.[54]

In July 2013 the tribunal issued a draft order covering road transport drivers who provide road transport services involving retail goods, livestock, bulk grain or long distance travel.[55] Despite the tribunal's clear mandate noted above, to regulate *all* the parties in the supply chain, the major obligations proposed in the tribunal's draft order were imposed only on direct employers and hirers who are parties to a road transport contract with a driver. Under the draft order an employer or hirer of a driver would have had to provide the driver with a written contract prior to commencing work, specifying matters including the wage (or contract driver pay rate), a mechanism for the annual review of driver rates, any guaranteed minimum hours of work, and the period of the contract, period of notice of termination or payment in lieu of notice.[56] Despite the evidence discussed earlier in this article that large commercial interests at the apex of the supply chain wield considerable influence over the road transport supply chain, the draft order proposed to impose obligations on the party with the least bargaining power in the entire chain – the driver. In particular, the draft order specified that the written contract had to include a clause that effectively required drivers to provide an annual driver history report from the

[48] Transport Workers Union, 'Draft Road Safety Remuneration (Retail Sector) Order', Submission in *Re Annual Work Program* [2012] RSRTFB 3, 4 March 2013, cl 5.
[49] Ibid cl 13.
[50] Rawling and Kaine, above n 10, 249.
[51] Australian National Retailers Association, Response to TWU application for Road Safety Remuneration Orders, Submission in *Re Annual Work Program* [2012] RSRTFB 3, April 2013, para 3.12; para 3.48.
[52] Australian Industry Group 'Submission Regarding the Potential Preparation of Draft Road Safety Remuneration Orders' Submission in *Re Annual Work Program* [2012] RSRTFB 3, 8 July 2013 para 20.
[53] Australian Industry Group 'Submission in Response to Road Safety Remuneration Orders Proposed by Various Parties' Submission in *Re Annual Work Program* [2012] RSRTFB 3, 22 April 2013, p 32; p 48.
[54] Coles Supermarkets Australia Pty Ltd 'Submission to Road Safety Remuneration Tribunal' submission in *Re Annual Work Program* [2012] RSRTFB 3, 22 April 2013, p 3.
[55] See Road Safety Remuneration Tribunal *Draft Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2013*, (12 July 2013) cl 4.
[56] Ibid cl 7.

relevant state or territory licencing authority.[57] This requirement imposed on drivers was retained in the final, binding order.[58]

Under the tribunal's draft order each employer or hirer was required to prepare a written safe driving plan for each road transport driver they engaged to perform long distance haulage services.[59] Safe driving plans are not a new regulatory instrument – they were previously required, in the form of driver fatigue management plans, for entire supply chains covered by the Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005 (NSW) noted above and for both employee and contractor drivers under the NSW mutual responsibility award and mutual responsibility contract determination.[60] Under the tribunal's draft order the proposed safe driving plan would have had to state: the period covered by the safe driving plan; pick -up and delivery addresses; the applicable industrial instruments; the applicable hourly or per kilometre pay rate; a draft travel plan including distance to be travelled at any one time and when breaks are to be taken; and provisions allowing the driver to take additional rest breaks if they are necessary to manage fatigue and ensure the safe completion of the road transport services. It would also have to require the driver to record actual timeframes and distances travelled as evidenced by odometer readings.[61] These are similar matters to those required in the safe driving plans under the mutual responsibility award and contract determination.[62] The mutual responsibility award and contract determination did, however, on one matter create a stronger link between pay and safety than the draft order: it stated that the safe driving plan had to state *the system by which the effect of the method of remuneration on driver fatigue* may be monitored and measured. The award and determination also required an additional matter to be identified in safe driving plans: the means by which the number of hours performed by drivers was to be limited in order to prevent excessive hours being worked. By way of contrast, the tribunal's draft order included one matter not found in a safe driving plan in the award and determination: the driver was required to record actual timeframes and distances travelled.

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[57] Ibid cl 7(h).

[58] See Road Safety Remuneration Tribunal *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014* PR350280 (17 December 2013), cl 7.2(j).

[59] Road Safety Remuneration Tribunal *Draft Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2013*, (12 July 2013) cl 11.1, cl 11.2.

[60] Industrial Relations Commission of New South Wales *Transport Industry – Mutual Responsibility for Road Safety (State) Award (2006)*; Industrial Relations Commission of New South Wales *Mutual Responsibility for Road Safety (State) Contract Determination (2006*). Under these mutual responsibility instruments the responsibility for the safe driving plans is or was imposed upon all parties in the road transport supply chain except, due to jurisdictional limitations, consignors and consignees who do not directly engage road transport workers: Rawling and Kaine, above n 10, p 249

[61] Road Safety Remuneration Tribunal *Draft Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2013*, (12 July 2013) cl 11.8.

[62] See Industrial Relations Commission of New South Wales *Transport Industry – Mutual Responsibility for Road Safety (State) Award (2006)* cl 3.2; Industrial Relations Commission of New South Wales *Mutual Responsibility for Road Safety (State) Contract Determination (2006*) cl 3.2.

Aside from one new substantive responsibility of participants in the supply chain not to take adverse action against a driver,[63] the tribunal's draft order imposed only a few, arguably weak, responsibilities on parties in the top and middle of the supply chain. Perhaps the most significant proposed draft order obligation was for participants throughout the supply chain, including consignors and consignees, to consult with employers and hirers and to take reasonable steps, through their 'contractual arrangements *and otherwise,* to satisfy themselves that the road transport services covered by a safe driving plan can be performed in accordance with the safe driving plan.'[64] This would have imposed a pro-active obligation on consignors and consignees to take measures to ensure compliance with safe driving plans. As we discuss later in this article, this proposed obligation was omitted from the final, enforceable order.

The tribunal's draft order also included some other, weaker, provisions involving participants in the supply chain in the process of implementing safe driving plans. It required an employer or hirer, when preparing and implementing a safe driving plan, to consult other participants, including consignors and consignees, in the supply chain.[65] Further, a participant in the supply chain would be required to witness safe driving plans.[66]

Clause 7.4 of the draft order specified that a participant in the supply chain 'must take reasonable steps to ensure that any contract for the provision of a road transport service relevant to them is consistent with the requirements' of the order. It is difficult to work out whether or not this provision would have added any substantial obligation upon participants in the supply chain over and above obligations imposed upon them elsewhere in the draft order. One broad, beneficial reading of the clause is that this sub-clause 7.4 requirement on a supply chain participant to take reasonable steps applies to *all of the obligations of all of the parties* subject to the order. A more likely, but narrower, reading is that the requirement in sub-clause 7.4 would only have been triggered by another requirement upon a supply chain participant elsewhere in the order. If this narrow reading is preferred, sub-clause 7.4 appears not to add anything to a participant's obligations regarding safe driving plans. If this is the correct view, aside from the requirement not to take adverse action against a driver, the main requirement on participants in the supply chain under the draft order was to ensure compliance with safe driving plans, including through contractual arrangements. In any case, it is clear that sub-clause 7.4 of the draft order proposed a weak obligation upon consignors and consignees only to include or exclude terms in their contract, rather than a stronger obligation actually to take action to ensure adequate pay and safe driving conditions for drivers in their supply chains.

B. The Interested Parties' Submissions and Evidence Presented to the Tribunal

[63] See Road Safety Remuneration Tribunal *Draft Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2013*, (12 July 2013) cl 6. This responsibility was maintained in the final order and is discussed below in this article.
[64] Ibid cl 11.5.
[65] Ibid cl 11.4.
[66] Ibid cl 11.6; cl 11.8(k).

The Act requires the tribunal to allow affected persons to comment and make submissions on a draft order.[67] Professor Michael Quinlan, a key expert on the connection between economic structures and work health and safety conditions in the road transport industry and the author of two major reports on the road transport industry,[68] provided a written statement to the tribunal soon after the draft order was issued. Professor Quinlan's statement, which was made available on the tribunal's website, provides perhaps the clearest and most authoritative recent account of the evidence supporting the imposition of substantive obligations on major consignors and consignees in order to improve health and safety in the road transport industry. The statement highlighted 'the power exercised by those at the top of the transport supply chain' and 'how an elaborate subcontracting network was used … to disguise the role played by clients.'[69] It argued that subcontracting:

> enabled clients … to set conditions relating to the transport of goods (such as timeliness, the state of the produce on arrival etc) but remain agnostic about the work practices and working conditions required to secure this for the price paid. Clients would claim that they neither knew, nor did they have influence over, such arrangements (even though the conditions they set on other aspects of transport contract just mentioned belied this).[70]

According to Professor Quinlan, arrangements in which commercial power is exercised at the top of the transport supply chain to safeguard clients' interests are longstanding. They existed before he conducted his 2001 inquiry and the 'intensity of client pressure . . . to reduce costs has grown over the past 20 years'.[71] Professor Quinlan's point was reinforced during the Road Safety Remuneration Tribunal proceedings, when, during cross-examination, a general manager of transport for Coles revealed that his Key Performance Indicators included reducing Coles' transport costs by 5% in a year.[72]

Professor Quinlan recommended that instruments such as safe driving plans in the tribunal's order 'need to address … the problem of complex webs of subcontracting and clients often in a position to exert considerable influence on the conditions under which drivers work …'[73]

The admission of Professor Quinlan's witness statement into evidence in circumstances where he would not be available for cross-examination was opposed by the major retail clients of the road

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[67] Road Safety Remuneration Act 2012 (Cth) s24; *Road Safety Remuneration Tribunal Decision* [2013] RSRTFB 7 (17 December 2013) para 30.
[68] Quinlan, above n 1; Quinlan and Wright, above n 3.
[69] Witness statement of Professor Michael Quinlan, in the matter of Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1)(30 July 2013) para 26.
[70] Ibid para 31.
[71] Ibid para 48, para 49.
[72] See Transcript of Proceedings *Road Safety Remuneration Order – Application by Transport Workers Union of Australia*, (Road Safety Remuneration Tribunal, RSRT 2013/1, 13 August 2013) para 1924-1930.
[73] Witness statement of Professor Michael Quinlan, in the matter of Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) (30 July 2013) para 40.

transport industry, major transport companies and employer peak associations. The tribunal agreed with these submissions, 'given the reasons for opposition by other interested persons.'[74]

Although Professor Quinlan's evidence was not admitted, his governmental inquiry reports in 2001[75] and with Wright in 2008,[76] were presented to, and considered by, the tribunal. Indeed, the tribunal specifically quoted the conclusion of the Quinlan report in 2001 that customer and consignor requirements on price, schedules, loading/unloading and freight contracts generally encourage unsustainable freight rates and dangerous work practices.[77] The tribunal also quoted the finding by Quinlan and Wright in 2008 that the 'overwhelming weight of evidence indicates that commercial/industrial practices affecting road transport play a direct and significant role in causing hazardous practices.'[78]

The TWU submitted that the tribunal had the means to regulate the entire road transport supply chain and to ensure that the power of clients is countered by a safe rates system.[79] The TWU, however, submitted that the tribunal's draft order did not adequately deal with the client pressures pushed down the road transport supply chain, and that the draft order's supply chain responsibility clause 7.4 would not make real improvements to levels of safety in the industry. It argued that the clause 7.4 obligation in the draft order would be satisfied simply if a contract contains the requisite provision, even if it did not reflect the reality of the circumstances in which driving was carried out. According to the TWU, clause 7.4 would not achieve anything, because it did not make clients with the ultimate power to determine rates responsible for ensuring that appropriate payments were made to drivers.[80]

The TWU suggested that the safe driving plan provision in clause 11 of the draft order did not adequately make consignors and consignees responsible for ensuring that their subcontractors prepare safe driving plans and nor did it oblige consignors and consignees to monitor compliance with safe driving plans.[81] It submitted that clients must be compelled to take pro-active steps to monitor compliance with safe driving plans, and to take action where they know of non-compliance with safe driving plans. According to the TWU, if these obligations were not part of the safe driving plans then safe driving plans might become 'an additional layer of industry regulation without addressing the root cause of the industry's safety issues.'[82]

The TWU submitted that for the draft order not to require effective steps to deal with the economic forces imposed by clients on the supply chain parties in the road transport industry would be contrary to the intent of the legislation and the significant body of evidence

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[74] *Annual Work Program – Decision* [2013] RSRTFB 11 (16 October 2013) para 4.
[75] Quinlan, above n 1.
[76] Quinlan and Wright, above n 3.
[77] *Road Safety Remuneration Order - Decision* [2013] RSRTFB 7 para 64.
[78] Cited in ibid, para 75.
[79] Transport Workers Union of Australia 'Outline of Submissions for the TWU' submission in Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1)(1 August 2013) para 4.
[80] Ibid para 22.
[81] Ibid para 66, para 73.
[82] Ibid para 75.

underpinning the legislative intent.[83]It further submitted that if the tribunal only dealt with the symptoms of safety issues in the road transport industry instead of the economic pressures imposed by clients, it may in fact make the industry worse off[84] because the draft order's failure to address supply chain pressures would put more regulation on drivers and transport companies without addressing client power and influence.[85]

(a) Client Argument and Response

The response of the large retailer clients to the argument that they should have responsibility for the working conditions of drivers in their supply chains was to deny they have the control over the supply chains. This response echoes the strategy of effective business controllers in industries like textiles, clothing and footwear, where retailers have resisted mandatory regulation by asserting that they do not control the conditions under which goods are manufactured.[86]

In particular, Coles put forward evidence to distinguish their role in receiving inbound freight from their role in sending outbound freight. It argued that inbound freight concerns the movement of freight from a supplier or manufacturer to a Coles distribution centre.[87] In most cases of inbound freight (about 70%) the manufacturer or supplier is the consignor, and either themselves or using a transport company transports the freight to Coles as the consignee; 30% of the inbound freight movement is organised by Coles Collect in a direct relationship with the supplier consignor and delivered to Coles as consignee.[88] Coles then argued that outbound freight is the movement of freight from a Coles distribution centre to another Coles distribution centre or to Coles' stores.[89] Here Coles argued that they were consignor in 60% of outbound freight movements, and a third party logistics provider was consignor for the remaining 40% of the outbound freight movements.[90] Coles stated that approximately 80% of Coles costs spent on road freight transport was on outbound freight.[91]

Coles then argued that there was a distinction between the control it had as a consignor, and the control it had as a consignee. It suggested that when it was a consignor only it had the requisite control to regulate the supply chain — it was 'readily able to impose contractual obligations on the primary freight provider and also ensure that the primary freight provider in turn places certain contractual obligations on a subcontractor …'[92] Coles, however, denied it had the requisite control over any supply chain in which it was the consignee, in which case it argued that it was purely receiving the freight, and that it had 'no role or oversight in respect of the freight

[83] Ibid para 11.
[84] Ibid para 5.
[85] Ibid para 11, p3.
[86] In the clothing industry there is evidence of control wielded by major retailers over the conditions of clothing manufacture: see Nossar, Johnstone, Macklin and Rawling, above n 14.
[87] Witness statement of Craig Wickham in the matter of Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) 1 August 2013, p 2.
[88] Ibid p 2.
[89] Ibid p 2.
[90] Ibid pp 2-3.
[91] Ibid p 3.
[92] Ibid p 4.

movement.'[93] The ANRA made a similar statement that obligations should not be imposed on retailers where the retailer was a consignee of inbound freight.[94]

Although this was not explicitly stated by Coles, the argument that their only role with inbound freight was receiving freight and not in any way overseeing or controlling the process presumably excluded the inbound freight movements where which were organised by Coles Collect — here Coles would have oversight over the supply chain as the freight organiser, even though the freight originated with the supplier.

Coles' evidence that it had no oversight of inbound freight as consignee was, however, contradicted by some of Coles' other evidence, which indicated that Coles had direct contact with, and indeed did exercise some influence over, drivers delivering supplier freight. For example, it stated that Coles' distribution centre employees were trained to challenge any drivers about a range of matters including fatigue and situations in which the driver was delayed in unloading. 'Coles may . . . require drivers to complete a declaration form which requires the driver to declare key facts regarding the condition of the vehicle, the load and the driver's condition.'[95] Further, during our own discussions with union officials,[96] an official suggested, in relation to inbound freight, that even though large retailers do not have a direct contract with the transport operator, the retailers know when the freight arrives and they indicate to the supplying party or parties when they want the freight to arrive. Presumably such delivery matters are in their contract with the supplier.[97] Coles also stated that it had undertaken audits of its contract partners to ensure its partners impose a consistent chain of responsibility regime across their networks.[98] This indicates that, even when it is receiving road freight, Coles is able to impose requirements on its contract partners which relate to the activities throughout the supply chain.[99]

Coles opposed the draft order clause requiring supply chain participants to consult over the safe driving plan and to take reasonable steps to satisfy themselves that the road transport services covered by the plan can be performed in accordance with the plan,[100] arguing that it was

[93] Ibid p 4.
[94] Australian National Retailers Association 'Comments on Submissions to the Road Safety Remuneration Tribunal on its Draft Order of July 2013, submission in Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) 8 August 2013 p 13.
[95] Witness Statement of David Vaughan in the matter of Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) 1 August 2013, para 15.
[96] Australian Research Council funded project, *Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness*, DP120103162.
[97] Interview with union official.
[98] Witness Statement of David Vaughan in the matter of Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) 1 August 2013, para 20.
[99] Transport Workers Union of Australia, 'Outline of Submissions for the TWU in Reply' submission in Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) 8 August 2013 p 10.
[100] Road Safety Remuneration Tribunal *Draft Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2013*, (12 July 2013), cl 11.5.

unnecessary, unreasonable or unduly burdensome given the sheer volume of safe driving plans this requirement would cover.[101]

(b) *TWU amendments to draft order*

In response to these retailer submissions, the TWU submitted that consignors and consignees had a clear capacity to intervene in contracts throughout their supply chains. The entire rationale for the Road Safety Remuneration Act 2012 was to address the economic pressures imposed by powerful parties such as the retail giants on road transport supply chains which led to low pay and poor safety in the road transport industry. Therefore the TWU argued that the retailer submissions could not be accepted.[102]

The TWU proposed amendments to the tribunal's draft order that, if accepted, would have imposed a suite of obligations designed to ensure that clients with the most economic power in the supply chain have the responsibility for ensuring that safe rates and conditions flow to all drivers performing the work within those supply chains.[103] In particular, the TWU amendments to the draft order:

- placed a stronger obligation on clients to take action to ensure compliance with industrial obligations throughout their supply chains;
- placed an obligation on clients to ensure freight is carted in compliance with safe driving plans;
- provided for a right of drivers to recover unpaid money owed to them for hauling freight against any relevant participant in the supply chain, including retail clients;
- placed an obligation on retail clients to ensure that payments they make for provision of road transport services were sufficient to enable drivers who provided those services to be paid in accordance with applicable industrial instruments; and
- imposed record keeping requirements on participants in the supply chain, including retail clients.[104]

More specifically, the first TWU amendment outlined above was designed pro-actively to address the commercial pressures passed down the road transport supply chain by clearly requiring all supply chain participants, including retail consignors and consignees, to ensure that all transport work conducted pursuant to a freight contract to which they are a party is carried out in compliance with the applicable safe driving plan, the eventual order of the tribunal and any

[101] Witness statement of Craig Wickham in the matter of Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) 1 august 2013, paras 24-28.
[102] Transport Workers Union of Australia 'Outline of Submissions for the TWU in Reply' submission in Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) 8 August 2013, p 9.
[103] Interview with union official.
[104] Transport Workers Union, 'Draft Road Safety Remuneration (Retail Sector) Order', Submission in *Re Annual Work Program* [2012] RSRTFB 3, 4 March 2013 proposed cls 6-13.

applicable award, agreement or other relevant industrial instrument.[105] This first TWU amendment would have more effectively dealt with supply chain pressures because retail clients would have been required to take action —including termination of the transport operator's contract with the client — if that transport operator breached any safe driving plan, the tribunal order or any applicable industrial instrument.[106] This proposed clause might have induced retail clients to ensure the safe performance of work by compelling road transport operators to comply with their industrial obligations and safe driving plans. The legal sanctioning of a power to terminate contracts is an important measure, not so much to encourage actual action to terminate (although it may need to be in certain instances), but more because the mere existence of the provision and the potential threat of termination would send an important message to transport operators that their compliance with industrial obligations would be a condition of receiving business from retail clients.

The record-keeping obligations suggested by the TWU would have required retail clients, and other supply chain participants, to retain and make available to government and union regulators information — including safe driving plans — indicating the pay rates of drivers.[107] Such record-keeping measures — a key element in the emerging Australian supply chain regulatory model discussed above — were included to address the lack of transparency that has impeded the detection and eradication of unsafe practices in the road transport industry.[108] Aside from the fact that these measures would be a principal method of a supply chain participant demonstrating their own compliance, these transparency measures would have had the effect of making clear to all parties that retailer clients have information about matters such as what pay drivers are receiving. This would potentially circumvent an argument by a supply chain participant that they do not have the requisite knowledge of work terms in their own supply chains. Furthermore, these record keeping requirements would be an essential feature of a supply chain responsibility system because they would allow regulators to monitor and enhance compliance by supply chain participants with the system.[109] Without such a clause it would be much more difficult for regulators to secure compliance by all supply chain participants with their responsibilities under the order because the records would be the main evidence used to ascertain whether or not supply chain participants had complied with their obligations.

Under the Act, the relevant union is empowered to initiate enforcement proceedings for contraventions of road safety remuneration orders, and to exercise powers of inspection for suspected contraventions of the Act or an enforceable instrument.[110] The Fair Work

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[105] Witness statement of Michael Rawling in the matter of Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) 19 September 2013, pp 8-9.
[106] Transport Workers Union of Australia, 'Draft Road Safety Remuneration (Retail Sector) Order', Submission in *Re Annual Work Program* [2012] RSRTFB 3, 4 March 2013, proposed cl 7.2.
[107] Ibid proposed cl 8.
[108] Transport Workers Union of Australia TWU 'Outline of Submissions for the TWU for Hearing on 8 July 2013', Submission in *Re Annual Work Program* [2012] RSRTFB 3, 8 July 2013, para 52.
[109] Witness statement of Michael Rawling in the matter of Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1) 19 September 2013, p 9.
[110] *Road Safety Remuneration Act 2012* (Cth), ss 46, 78

Ombudsman also has wide-ranging enforcement powers under the Act.[111] Thus both the government regulator and the relevant union are charged with the supervisory task of monitoring compliance by supply chain participants. This is consistent with the collaborative, tripartite approach to enforcement of employment standards which has previously existed in Australia.[112] Historically the task of enforcing minimum employment standards has largely been left up to unions, (although in recent years the Fair Work Ombudsman has been a more active litigant). There is some indication that in the textile, clothing and footwear industry, the relevant union has been able to adequately monitor supply chain participants to ensure compliance with legislative requirements.[113] However, questions remain as to whether the relevant union and government regulator will have adequate resources to properly oversee the implementation of tribunal orders in the road transport industry, especially in relation to drivers who are not union members and self-employed drivers.

Finally, under current supply chain arrangements in the road transport industry, transport operators can be under significant financial pressure — so much so, that some small operators cannot afford to make the legally required payments to the drivers they directly engage.[114] Insolvency is common amongst small operators in the industry. [115] The TWU's proposed right of recovery for any unpaid amounts owed to the driver against any relevant participant in the supply chain, including the retailer client,[116] is arguably a crucial part of a supply chain accountability system in the road transport industry because it gives drivers the opportunity to retrieve wages from the top of the supply chain in situations where operators in the middle of the chain —the road transport industry operators — experience financial difficulties.[117] Such a right of recovery has been in place for decades for outworkers in clothing supply chains – without any observable adverse consequences.[118]

C. The Tribunal's Final Order

None of these TWU amendments designed to address supply chain pressures emanating from retail clients were included in the tribunal's final order. Although, as we have noted, the Act clearly empowers the tribunal to make an order imposing substantive obligations about the pay and safety of road transport workers on all participants in the supply chain, the first order made by the tribunal in the long distance and retail sector[119] mainly focussed on the obligations of employers and direct hirers with only a few, weak, provisions covering road transport industry clients.

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111 *Road Safety Remuneration Act 2012* (Cth) ss 73-75.
112 Rawling and Kaine, above n 10 at 255.
113 Interview with union official.
114 Interview with union official.
115 Quinlan, above n 1, 133; Witness statement of Professor Michael Quinlan, in the matter of Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1)(30 July 2013) paras 29-30.
116 Transport Workers Union of Australia, 'Draft Road Safety Remuneration (Retail Sector) Order', Submission in *Re Annual Work Program* [2012] RSRTFB 3, 4 March 2013 proposed cl 10.4.
117 Interview with union official.
118 Nossar, Johnstone, Macklin and Rawling, above n 14.
119 The livestock and bulk grain sectors were omitted from the final order.

In relation to consignor and consignee contracting practices, the full bench noted that the ANRA raised the issue of the 'potential breadth' of application of the draft order obligations.[120] The tribunal retained a narrower form of clause 7.4 of the draft order in clause 8 of the final order by largely adopted the 'wording for such a clause proposed by the ANRA and Coles'.[121] The resulting clause 8 of the final order reads:

> A participant in the supply chain in relation to a road transport driver must take reasonable measures to ensure that any contract it has with another participant in the supply chain contains provisions which are relevantly consistent with the requirements of this order.

As we have already noted, a consignor and consignee of freight transported by road is a participant in the supply chain so this clause clearly applies to retailer consignors and consignees. Influenced, however, by submissions from retailers, the change from the draft order to the final order narrowed the range of contracts covered by this requirement from 'any contract for the provision of a road transport service'[122] to 'any contract it has with another participant in the supply chain'[123]. This is a clear narrowing of the clause. There are two other aspects to the final clause, maintained from the draft order, that are potentially even more problematic. First, as we have argued in our discussion of the draft order, the main weakness of the clause is that it only requires retail clients to have contracts the terms of which are consistent with the tribunal order, and does not require them to *take action* to ensure compliance with the order. This clause can be contrasted with Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005 (NSW) which imposed an actual prohibition on clients contracting with a transport company unless the consignor or consignee has satisfied itself that delivery timetables are reasonable for drivers and that there is a safe driving plan in place.[124] Second, perhaps the deepest problem with the new clause 8 is that there is a real concern about the lack of substance to client responsibility under the clause. Absent a beneficial reading of the clause, the phrase 'relevantly consistent with this order' means that clause 8 adds little or nothing to retail consignor and consignee obligations under the order because the order does not impose any other major requirements upon them elsewhere in the order — the major client obligation for safe driving plans was deleted, as we discuss further below. Indeed, clause 8 might prove to be circular and of little effect because it imposes a requirement to contract which only has to be consistent with the supply chain participant's very same requirement to contract under clause 8.

As noted above, after considering the evidence given by interested parties on safe driving plans — including Coles' evidence that the draft order safe driving plan obligations of consignors and

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120 *Road Safety Remuneration Tribunal Decision* [2013] RSRTFB 7 (17 December 2013) para 153.
121 Ibid para 189.
122 Road Safety Remuneration Tribunal *Draft Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2013*, (12 July 2013) cl 7.4.
123 *Road Safety Remuneration Tribunal Decision* [2013] RSRTFB 7 (17 December 2013) cl 8.
124 Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005 (NSW) cl 81C. See Igor Nossar, 'Cross-Jurisdictional Regulation of Commercial Contracts for Work Beyond the Traditional Relationship' in Chris Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds),*Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006). This regulation did not, however, address issues of pay.

consignees were unnecessary, unreasonable or unduly burdensome[125]— the full bench omitted from the final order any substantive requirement on retail clients to consult over safe driving plans and take reasonable steps to ensure road transport services be performed in accordance with safe driving plans. The TWU's proposed additions to the safe driving plan obligations of consignors and consignees were also omitted. The major safe driving plan obligations under the order fall upon direct employers and hirers and road transport drivers.[126] In its provisions for safe driving plans, it appears that the tribunal followed the exact path that the TWU had argued it should *not* take; that is, the order imposed obligations on transport companies and drivers without addressing client power and influence.[127] The remaining obligations of supply chain participants involve supply chain participants in the safe driving plan process but not in a direct and meaningful manner,[128] and are watered down versions of the provisions in the draft order. Whereas under the draft order there was a mandatory obligation on supply chain participants to witness a safe driving plan,[129] the final order only required a supply chain participant to witness a safe driving plan 'where practicable'.[130] Under clause 10.6 the safe driving plan must state 'known participants in the supply chain'. Each supply chain participant is to be identified – a clear improvement on the previous situation – but there is (as yet) no enforceable obligation as against that participant.

Notably the final order retained the provision that a supply chain participant must not take adverse action against a road transport driver.[131] This significantly expands existing statutory adverse action rights of road transport drivers so that they may now make a claim against a retailer who is a consignor or consignee. However, this is a *potential liability* of a supply chain participant which would require a driver to make a claim to enforce their rights. In other words, this is a reactive provision, to be enforced by a private individual. This contrasts with arguably more effective *preventive* requirements that, we suggest, could be imposed on consignors and consignees *consistently and pro-actively* to address driver safety issues before the commencement of work (such as safe driving plan requirements) or client requirements to *oversee their supply chains* to ensure that driver have legal, safe terms and conditions and take action, including termination, where transport operators are not complying with pay and safety requirements.

The final order imposes requirements upon hirers of contract drivers to pay drivers within 30 days of receipt of the driver invoice.[132] On the face of it, this is an essential provision. Its effectiveness, however, depends on small transport operators having the financial capacity to pay

[125] Para 267 of the Full Bench decision.
[126] See Road Safety Remuneration Tribunal *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014*, PR350280, 17 December 2013, cl 10.
[127] Transport Workers Union of Australia 'Outline of Submissions for the TWU' submission in Road Safety Remuneration Order – Application by Transport Workers Union of Australia, Road Safety Remuneration Tribunal (RSRT 2013/1)(1 August 2013) para 11.
[128] Interview with union official.
[129] Road Safety Remuneration Tribunal *Draft Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2013*, (12 July 2013) cl 11.6.
[130] Road Safety Remuneration Tribunal *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014*, PR350280, 17 December 2013, cl 10.8.
[131] Ibid cl 6.
[132] Road Safety Remuneration Tribunal *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014*, PR350280, 17 December 2013, cl 9.1.

drivers. There is nothing in the order requiring road transport industry clients to ensure that enough funds flow down the chain so that all transport operators have the capacity to pay rates to drivers.[133] Thus transport operators, including small operators under significant financial pressures, have an additional burden under the order without any concomitant measure to lift the commercial pressures on transport operators from clients.[134]

In the face of objections by clients to substantive obligations being imposed upon them, it appears the tribunal has taken an overly cautious approach in this first tribunal matter to regulating the road transport supply chain.

This cautious approach appears to stand in direct contrast to the powers of the tribunal under the Act to make orders binding supply chain participants and the role imposed on the tribunal to fulfil the objectives of: removing remuneration-related incentives, pressures and practices that contribute to unsafe work practices;[135] developing and applying enforceable standards throughout the road transport supply chain to ensure the safety of road transport workers;[136] and ensuring that hirers of road transport drivers and participants in the supply chain take responsibility for implementing and maintaining those standards.[137]

As we have demonstrated at the beginning of this article, a key contributor to low pay and poor safety in the road transport industry is the economic pressure emanating from the top of the supply chain.[138] Clearly the tribunal was aware that relevant government reports on the road transport industry specify the clients' role in affecting the parameters of working conditions but the tribunal's first order did not adequately address client pressures. If the tribunal was concerned about imposing requirements on retail consignees for inbound freight movements where a retailer simply receives the freight, it was open to it to impose obligations on retailers as consignees *to the extent that they controlled* those freight movements. This kind of approach was taken under the federal *Fair Work Act 2009*'s special provisions for TCF outworkers. There, an outworker claim for unpaid remuneration could potentially be made against a retailer unless the retailer did not have any 'right to supervise or otherwise control the performance of work' before goods were delivered to the retailer.[139] Regulating retailers *to the extent that they have control* as consignors and as consignees would have maintained the element of caution the tribunal desired without abandoning the task of crafting substantive supply chain obligations for road transport industry clients.

Even then, this type of approach is a fall back option for a reluctant tribunal and not an ideal approach to fully achieve the objectives of the Act. We have a fundamental concern with imposing an obligation to the extent of control, given that prior research indicates that one of the reasons for the supply chain outsourcing of work by influential business controllers (such as large road transport industry clients) is to reduce the cost associated with, and to distance themselves

133 Interview with union official.
134 Ibid.
135 *Road Safety Remuneration Act 2012* (Cth), s 3(b).
136 Ibid s 3(d).
137 Ibid s 3(e).
138 Quinlan, above n 1, 20, 152-153, 162.
139 *Fair Work Act 2009* (Cth), s 789CA(5)(b).

from, legal responsibilities for the terms and conditions of workers.[140] Crafting an order to impose an obligation commensurate with the existing control of consignors and consignees might fall into the trap of further encouraging consignors and consignees to distance themselves from measures to reduce terms and conditions in their own supply chains. Rather, we argue that orders should provide road transport consignors and consignees with incentives to know and make transparent their own supply chains and to regulate their supply chains to address the issues of low pay and poor safety.[141]

The Liberal-National Party Coalition's federal workplace law policy released in May 2013 foreshadowed an urgent review of the tribunal. The review commenced on 20 November 2013, shortly after the election of the federal Coalition government and was timetabled to conclude in the first quarter of 2014. Although the effect of this review on tribunal members is unknown, their decisions in making this first order were made in the shadow of this review and may have shaped their deliberations and the form of the final order. The election of a government avowedly hostile to the newly created tribunal may explain why the tribunal did not adequately address supply chain pressures in the first order. The full bench might have hoped that restraint in the proceedings would calm those campaigning to abolish the tribunal. Whether it was this political pressure or simply a reluctance to place economic obligations on powerful commercial interests at the top of the road transport supply chain for the first time, the tribunal is yet to fully implement the *Road Safety Remuneration Act 2012* as intended by Parliament. If the tribunal is not abolished by the Coalition federal government, it will get the opportunity in subsequent orders and amendments to the retail and long distance order to put in place regulation to properly address the commercial pressures emanating down the supply chain by imposing substantive obligations on parties throughout the chain including large consignors and consignees at the top of the chain.

V. CONCLUSION

This article has examined the Road Safety Remuneration Tribunal proceedings and the resulting first order applying to the retail and long distance sectors of the road transport industry. After considering the evidence of interested parties, including large consignors and consignees, the tribunal imposed partial and very weak obligations on those consignors and consignees. It rejected arguments to place more substantive obligations on all supply chain participants, arguments which we believe would more effectively address issues of low pay and poor safety experienced by road transport drivers. The tribunal order primarily imposes obligations on direct work providers and drivers without making large powerful clients of the industry substantively responsible for driver pay and safety. We argue that the tribunal's order for the retail and long distance sectors could have more comprehensively fulfilled the objectives of the Act by more directly addressing the root causes of low pay and poor safety in the road transport industry.

[140] See for example, Rawling and Kaine, above n 10, 241; David Weil, 'Enforcing Labour Standards in Fissured Workplaces: The US Experience' (2011) 22 *Economic and Labour Relations Review* 33, 34.

[141] Note that the TCF industry retailer obligation to the extent of retailer control was in relation to a right of recovery only and there are other provisions in the *Fair Work Act 2009* (Cth) for the making of a mandatory code for retailers in the TCF sector: see Division 4, Part 6-4A of the *Fair Work Act 2009* (Cth). The existing TCF mandatory retailer codes in New South Wales and South Australia impose obligations upon retailers without any reference to the extent of retailer control: see Rawling, above n 14.

Even in the face of political pressures and pressures from large economic interests, the tribunal has the task of removing remuneration-related incentives, pressures and practices that contribute to unsafe work practices;[142] and developing and applying enforceable standards throughout the road transport supply chain to ensure the safety of road transport workers.[143] The Road Safety Remuneration Tribunal is an important initiative with the potential to address economic pressures passed down road transport supply chains and to fully implement what has been identified in the literature[144] as an Australian model of supply chain regulation. If the tribunal is abolished without the opportunity to do this, a major opportunity for effective legal redress to the exploitation of road transport supply chain labour will be lost.

[142] *Road Safety Remuneration Act 2012*, s 3(b).
[143] Ibid s 3(d).
[144] See in particular Nossar, above n 15.