Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness

Draft Report on Road Transport Sector Regulation

Michael Rawling, Nicole Shepherd, Richard Johnstone and Igor Nossar

November 2017

This draft report reports on research undertaken for an Australian Research Council funded project, Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness, DP120103162.

It reports on legal and research material current as of 29 November 2017, and may be updated from time to time.

Table of Contents

This is one of two reports (the other is on the operation of supply chain regulation in the Textile Clothing and Footwear Sector) reporting on an Australian Research Council funded project entitled *Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness* (DP120103162). This project examined the implementation of Australian regulation of supply chains in two industries – the road transport industry and textile clothing and footwear industry. As part of the field work for the project the project team conducted over 50 interviews with people from relevant government departments, unions and businesses. At least 25 interviews pertaining to the road transport industry were conducted. The road transport aspect of the project is a study of the operation of regulation in two states – NSW and Queensland. Therefore, the analysis in this report will be confined to the legislative schemes in NSW and Queensland, and applicable federal legislative schemes.

This report maps the regulation of road transport supply chains and includes interview data on how road transport industry supply chain regulation in NSW and Queensland is being implemented. It also maps the regulators involved, some of their implementation activities and relationships between the various regulators and actors involved in road transport. Government regulators include Commonwealth and State bodies. At the Commonwealth level is the Fair Work Ombudsman (FWO), the Road Safety Remuneration Tribunal (RSRT) and the National Heavy Vehicle Regulator (NHVR). At the State level are the transport departments (in New South Wales the Department of Roads and Maritime Services (RMS), and in Queensland, the Department of Transport and Main Roads (TMR)), the work health and safety regulators and the police. The union regulator is the Transport Workers Union (TWU). Retailers and organisations further down the supply chain also act as regulators, for example, by requiring, introducing or monitoring safe driving plans. As will be clear from the following discussion, the regulators do not take a common approach to standard setting, monitoring/inspection or enforcement.

The first part of the report outlines the key characteristics of the road transport industry, the supply chains found in that industry and discusses the structures of supply chains in the industry. The second part outlines the regulatory provisions addressing road transport supply chains, and also briefly discusses business's approach to compliance with these provisions. The final part provides a short conclusion to the report.

1. What are the key characteristics of the Road Transport industry and its supply chains?

This section of the report details the problems in the road transport industry that regulators are trying to deal with. The road transport sector rates amongst the worst industries for occupational health and safety outcomes. In 2011, Safe Work Australia reported that fatalities among truck drivers occurred at a rate of 38 deaths per 100 000 truck drivers, which is three times greater than machinery operators and 15 times the rate for all occupations.[1] 'Over the 10 year period 2003 to 2012, 787 workers were killed in truck-

[1] Safe Work Australia, *Work-Related Traumatic Injury Fatalities, Australia 2008-2009*, Commonwealth of Australia, Canberra, Commonwealth of Australia, 2011.

related incidents. These deaths amount to 30% of all worker fatalities over this period'.[2] The industry is difficult to regulate due to its fragmented and disaggregated nature – it is made up of major transport operators, smaller truck companies and owner drivers, which can all be tied together within complex supply chains. Trucking routes pass through multiple states and therefore have to contend with a variety of state and federal regulatory requirements.

The two key sectors in the road transport industry are long haul (long distance) and general transport. Regulation of working conditions in the long haul sector has been unsatisfactory because, until recently, much of the work health and safety and industrial relations laws have been state-based. Businesses that carried freight between states could only be prosecuted using the laws of the state in which their head office was based.

General transport up until the 1980s had been regulated with state awards, and a majority of transport workers were directly hired by manufacturers. According to one union representative, around 75% of transport workers were union members. The introduction of enterprise bargaining in the 1990s meant that there was a splintering of agreements across the industry. Since the 1980s there has been a reduction in union membership.

The transport industry has been growing, particularly in general transport – because of the popularity of online shopping and home delivery. One union representative said they often came across new transport companies:

> *Now, oh, it's just every day, you think oh, I haven't seen that company before. Where'd they come from? ... And they can be big. They just spring up. Somebody goes oh, I've got some money hanging around, I need a tax dodge, let's start up a transport company. Won't make any money but it'll reduce my tax*. (Union representative 6)

Supermarkets have been increasing their market power in recent decades. Supermarkets are large clients of the road transport industry with some union representatives saying that supermarkets are responsible for one or two in every three freight movements.

The splintering of industrial agreements instead of broader, industry level regulation, the reduction in union membership and increase in number of transport companies mean that these big retailers have been able to able to play transport operators off against each other to drive down their costs.

> *Enterprise bargaining has a deal to answer for, not because it was the cause, but it really normalised that fragmentation ... and gave clients – really those clients that were amassing power – a real institutionalised opportunity to drive wages to the lowest common denominator … And along with that a dilution of … collective rights across that period of time.* (Union representative 2).

The consequence for the industry is that there is pressure on contractors to reduce standards and safety to obtain the work.

---

[2] Safe Work Australia, *Work Related Fatalities Involving Trucks, Australia, 2003-2012*, Commonwealth of Australia, Canberra, Commonwealth of Australia, v.

(a) Supermarkets' pursuit of aggressive cost cutting practices

The supermarket sector is a key sector of the road transport industry. Supermarket business practices are continually evolving with the aim of reducing transport costs.

> *The market is ruling now – the market made a decision because of these external influences. The previously external influences were largely the Union and the company and the capacity to pay and, you know, seen as a holistic supply chain, a holistic manufacturing, which transport was a piece of, rather than, you know, where transport has now been segmentised into how do you reduce the costs and how does this piece of input into the cost structure be reduced.* (Union representative 8)

> *And I saw something from the … [supermarket] logistics manager, and … their stated goal is to reduce their logistics cost by 2% each year. ... And [transport company] managers will tell you that they're going to them and saying … "If you want our work you're going to have to have a cost reduction this year."… So that creates pressure then on [transport company] to go to their suppliers who gives them tyres, who does their mechanical work, who supplies their fuel … so it's pushing everything down.* (Union representative 5)

> *… So, I mean, when you've got [supermarket] saying we're going to reduce transport costs by 5% a year, year on year? That's what happens – what you clearly get out of that is the…situation where people roll trucks over.* (Union representative 1)

Supermarkets use a range of sophisticated business practices to achieve this. For example, contracting out some parts of the business reduces supermarkets' vehicle maintenance costs, and competition between contractors keeps prices low and, as a consequence, driver pay low.

> *[Large transport operator] will operate it. But the body trucks which deliver to the smaller stores, [they] aren't to buy company trucks, they've got to use subcontractors which [supermarket] will pay for because it's cheaper. Now those subcontractors are buying second-hand trucks off the company. That means they'll be individuals, they won't be able to afford to pay the right wages, let alone workers comp., let alone superannuation.* (Union representative 6)

Another business practice supermarkets use is to have a trailer fleet that is pulled by contracted carriers for metropolitan areas and to use contractors with their own trailers for regional areas. In a bid to reduce transport costs even further supermarkets request access to the accounts of transport companies. They send in their accounting experts to examine how they could reduce the cost of their bid.

(b) Expansion of home delivery

The popularity of online shopping has increased the size of the general transport sector. Parcel delivery has become the most profitable part of Australia Post, and home delivery for groceries has become a bigger part of supermarket business. This has presented some challenges for the union, as retailers have sought to employ delivery drivers under the General Retail Industry Award 2010.

> *And we have an issue with [supermarket] at the moment because the retail award is a weaker award than the transport award. So there's a battle going on about which award is supreme. The retailers … are saying we believe it's a shop assistant's award … which cuts out penalty rates on weekends and those sorts of things. They're not shop workers. They're transport workers as far as we're concerned.* (Union representative 7)

> *What's happening there is [the supermarket], again, being the tight arses that they are, decided to reclassify these little online truck drivers as customer service agents – CSAs. And pay them under a retail award. So the girls that are the checkout chicks, they're saying they are under the same sort of deal as them. The reason they do that is because under our transport awards they have to pay them penalties working at night after hours, they have to pay them penalties on the weekend. And our award rates are a lot higher than the retail award.* (Union representative 4)

With the entry of multinational online retail giant, Amazon, into the Australian market, home delivery is set to expand rapidly.

(c) Workforce characteristics

Workers in the road transport industry can be employed in a number of different circumstances. It is not as simple as a division between employee and owner-drivers. Union representatives described the workforce as follows:

> *There's a lot of owner-drivers. There's a lot of company drivers. But remember, there's two categories of owner-drivers, too. There's what we refer to as the captive owner-drivers, where instead of a company using its money and buying trucks and all that, they think, well we can save that and buy a new warehouse and set up a DC centre. But we still need to do the distribution, oh we'll hire owner-drivers. When I mean captive owner-drivers, they paint them up in the company's colours, they work solely for that company… Then you get the other freelance owner-drivers which all work for you today, you tomorrow, and the next day for me. They'll work for anywhere where the money is going.* (Union representative 4)

> *[Transport company] has a fleet of sub-contractors that they engage to supplement the contract, it's about fifty-fifty, so they'll have 50% direct hire, 50% contractors in their business, and, you know, they'll allocate the contractors. Often it will be direct owner drivers or it will be small fleet operators, so like ten trucks you know running out of the yard, or a small company sort of thirty trucks that they supplement the work with. And then you have a component of the industry… they call it factory-gate pricing where they go direct to the industry through an online bidding system so you can actually bid for work.* (Union representative 6)

This flexibility is desirable for transport companies because it gives them the ability to hire in extra drivers in busy periods.

The different ways of engaging transport workers makes it difficult for regulators to find all road transport workers. Some owner drivers might only work for one company and not advertise their services widely. Other workers may be employed by a farm or nursery, and therefore will be classified under a different award.

> *If I look at some of the academic papers on statistics of ancillary fleet versus transport fleet I'm told that ancillary fleet is 80% of the transport fleet in Australia…so when we are advising on the occupational health and safety of the transport drivers, … it's hard for us to target them … there's a lot of truck drivers out there that we're not covering because… we have no way of knowing where they are.* (Government regulator 2)

A strategy used by the Union has been to organize based on distribution centres. This gives them access to more types of workers.

> *We're working through the system now of trial and error, to see how that's going to be developed. The main theme of that is that we're out on site at a DC. We talk to all the truck drivers that are coming in. We work out their issues. And we get them signed up, delegate structures in place in all their companies, et cetera.* (Union representative 10)

> *If you get a lone wolf, a guy that's out there on his own, it is hard. You can only capture him if he's doing the wrong thing and if you've got him sort of coming in full of beans or something like that. We use the pressure on where – if he's delivering into our sites, we use that as muscle.* (Union representative 4)

Owner drivers can be under financial pressure if they have debts to service on their vehicle. This makes them willing to accept a low price for contracts.

> *… they go to a company and that company says, yeah, I'm prepared to give you work. I'll give you three trips to Sydney per week, that's worth X amount of bucks. So they take it to the bank and the bank lends on that. All of a sudden - where the drama begins - the three trips are happening, it's great. All of a sudden there's a downturn and the guy's got all this debt over his head and it's only one trip that he's getting. That's when all the rubbish starts.* (Union representative 4)

(d) Supply chain structures in Road Transport

In the supermarket sector of the road transport industry, supermarkets, which are off-road transport industry clients, dominate the road transport supply chain in an economic sense. One business representative interviewed mentioned 'the pull . . . and the economic clout of the retailers' (Business Representative 5). Supermarkets contract out a significant amount of road transport work to major transport companies. The economic clout wielded by supermarkets is illustrated by statements made by a union representative that a major transport company has had to perform a major contract for a major supermarket at a loss in order to maintain ongoing work for that supermarket.[3]

One union official strongly suggested this was a broader corporate policy:

> *they went to the market two to three years ago, October/November, and rang up all the people that provided services to them and said we want you to take a – depending on who they were talking to – a five to 10% cut in your rate and transport companies who*

[3] Union representative 2.

had contracts, and I understand this was happening in manufactures as well, they said, "Well, we've got a contract." "No. We would like you to demonstrate how you want to have a partnership with us and how you value your relationship with us. We want you to take a five to 10% cut." (Union representative 3)

These major transport companies, although the next step down the chain from supermarkets, are also significant intermediaries and maintain a supply chain of many smaller truck companies and owner drivers. It is difficult for the regulators to access these lower level entities further down the supply chain. This is where it is likely that there will be compromises on work health and safety.

So there are probably fewer players in the transport industry in one way. In that those with the economic power has probably to some extent consolidated with companies like [major Australian transport companies]. But their fragmentation about how they operate and the number of companies in their supply chain is still growing. And we haven't yet done what we need to do where we turn to the B and C grade companies where there's a number of abuses occurring. They're significant and they're dramatic. That concerns us. (Union representative 1)

[Supermarket] are the main offenders, by letting contracts out economically. That's why the transport companies bidding for these contracts are then outsourcing the work down the chain. So the poor old owner-driver doing interstate work or doing metropolitan work has to abuse his driving hours to make bread out of it. So that's basically the supply chain, how it works in the transport industry. (Union representative 7)

The structure of the road transport supply chain in Australia discussed above is set for a major shake up with the entry of Amazon into the Australian market.

(e) Long supply chains and road safety

The way businesses structure their supply chains has a direct impact on driver pay and road safety. Poorly maintained vehicles and fatigued drivers are more likely to be involved in serious accidents, some of which may lead to loss of life. A significant proportion of accidents are linked to the operation of road transport. The commercial behaviour of retailers is a factor in these accidents and this impacts on the whole community.

… [W]e've seen a spate of accidents … where the trucks weren't maintained correctly. Why weren't they maintained? Because of the price of the pressure on them to do the contract, they [the supermarkets] were pushing the fuel prices down and down so the margins were small so these companies are going "Well we've still got to make money. Well this truck should have been serviced, no, we'll let it go for another, you know, six weeks before we do it." (Union representative 5)

When [transport company] they won the contract they were at the lower level of the top - less than a dozen companies on wages. They had an efficient fleet. They had relatively trained drivers, less in comparison to what [others] had … so some of their cost infrastructures with having a safe workplace was less, but if you compared it across the road transport industry they were still seen as part of the cream of the crop … So you're seeing this ratcheting down. Then when [company] sold the

operation to equity funds [they] started to sweat the capital and they sweated the capital and changed the training arrangements and did a whole series of things to decrease their costs to eventually onsell, which meant that older vehicles, less maintenance … the fleet wasn't being replaced, the trailers were older and they won contracts … they certainly got them on price, and when they onsold it, and then eventually onsold again. …The last company that's had it, they ended up with these vehicles that were way too old, management systems that were being cut to the bone, so there wasn't efficient management systems and a sense of safety or performance of the vehicles and maintaining the fleet, but they were winning contracts because they were cheap ... and hence we see a series of people get killed. …The Mona Vale crash is directly related to not having best practice. Did they, at that point, meet the law? I think they did, but they weren't best practice in this industry. You want best practice. You don't want someone just meeting the minimum requirements. (Union representative 3)

2. What are the regulatory provisions that regulate supply chains in Road Transport and how have they been implemented?

(a) The New South Wales and Queensland Work Health and Safety Acts 2011 and supply chains

Since 2012, work health and safety in both New South Wales and Queensland has been regulated by the *Work Health and Safety Act 2011 (NSW)* and *Work Health and Safety Act 2011 (Qld)* respectively, both of which adopted a *model Work Health and Safety Act* developed in the period 2008-2010. The terms of reference of the National OHS Review Panel that developed the *model Work Health and Safety Act* specifically included a requirement that the Panel 'take into account the changing nature of work and employment arrangements'. It is not surprising, therefore, that the New South Wales and Queensland *Work Health and Safety Acts 2011* (*WHS Acts*) eschew the 'employment' paradigm, and instead impose key duties and rights on persons who conduct a business or undertaking and workers, respectively. As this section of the report shows, key features of the *WHS Acts* require retailers, head contractors, contractors and subcontractors to identify who is actually doing the work in the supply chain, and to consult, cooperate and coordinate their WHS activities to ensure, as far as is reasonably practicable, the health and safety of the workers actually carrying out the work in the chain.

The most important provision in the *WHS Acts* is the 'primary duty of care' in section 19. The duty is not imposed on an 'employer', but expressly on the 'person conducting the business or undertaking' (PCBU), whether as employer, occupier or in some other capacity, and whether on their own or with others.[4] The duty clearly is imposed upon all 'lead businesses' (including retailers at the top of a supply chain), head contractors, contractors, and sub-contractors. Furthermore, the section 19(1) duty to ensure health and safety so far as is

[4] See s 5; Safe Work Australia, *Interpretive Guideline: model Work Health and Safety Act – The meaning of 'person conducting a business or undertaking'*, http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/interpretive%20-guideline-pcbu.

practicable is owed to 'workers', who according to section 7(1), are persons who carry out work 'in any capacity' for a PCBU, and include not just employees, but also contractors, employees of contractors, labour hire employees, outworkers, apprentices or trainees, work experience students and volunteers. The duty is owed to workers who are 'engaged', 'caused to be engaged', 'influenced' or 'directed' by the PCBU: there does not have to be a direct contractual relationship between the PCBU and the worker. The section 19(1) duty is owed to workers 'while they are at work in the business or undertaking'. If, for some reason, the person carrying out the work in a supply chain does not fall within the definition of 'worker', they are owed the section 19(2) duty, which requires the PCBU to ensure that persons who are not workers are not 'put at risk' from work carried out as part of the conduct of the business or undertaking. Both section 19(1) and (2) duties are ongoing duties, so that if measures are not systematic and are not maintained and reviewed over time to ensure that the measures are institutionalised, the PCBU will be in breach of the duty. Further, the duty is inchoate, in that it will be contravened if workers are exposed to risks that can be removed with reasonably practicable measures, even if workers do not suffer any form of illness or injury.[5]

Thus, provided a supply chain worker is engaged, caused to be engaged, influenced or directed by a retailer, transport operator, principal contractor, contractor, or sub-contractor and so on (each of whom is a PCBU), each PCBU in the chain will owe the section 19 primary duty to all workers below them in the chain even though other PCBUs owe the same duty (sections 15 and 16 of the *WHS Acts*). This requires each PCBU to know of the existence and location of each worker in the chain, and to ensure their health and safety as far as is reasonably practicable.

The second key provision is the duty, in section 27(1), owed by each 'officer' of each PCBU to 'exercise due diligence to ensure that' the PCBU 'complies with' a duty or obligation that the PCBU owes under the Act. This is a positive and proactive duty, in that an officer of a PCBU can breach of their section 27 duty whether or not the PBCU has been found guilty of an offence under the Act.[6] Further, an officer is not absolved of liability merely because their PCBU complies with its obligations. 'Officer' includes a director or secretary of the corporation; or a person who makes, or *participates in making*, decisions that affect the whole, or a substantial part, of the business of the corporation (for example, a chief executive officer, managing director, chief operating officer or a chief financial officer).[7] The section 27(1) duty is a far-reaching due diligence duty,[8] requiring each officer to have extensive knowledge of the supply chain and the WHS risks faced by all workers in the supply chain.

Some may argue that a lead business may discharge its section 19(1) duty to 'ensure' the health and safety of workers in the supply chain as far as is reasonably practicable by engaging contractors and sub-contractors with expertise in the activity carried out by the worker.[9] This argument first has to account for section 14, which provides that where there

---

5 See eg *R v Australian Char Pty Ltd* (1995) 5 VIR 600 at 612; *Haynes v C I & D Manufacturing Pty Ltd* (1995) 60 IR 149 at 157–9.

6 See s 27(4).

7 S 4 of the *WHS Acts*, referring to s 9 of the *Corporations Act 2001* (Cth).

8 See the definition of 'due diligence' in s 27(5).

9 See *Reilly v Devcon Australia Pty Ltd* (2008) 36 WAR 492; *Tobiassen v Reilly* (2009) 178 IR 213; *Laing O'Rourke (BMC) Pty Ltd v Kirwin* [2011] WASCA 117; *Kirwin v The Pilbara Infrastructure Pty Ltd* (2012) 217 IR 203; and *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [65] (Heydon J, obiter); and *WorkCover Authority of NSW v Eastern Basin Pty Ltd* [2015] NSWDC 92 at [143].

are multiple primary duty holders, a duty cannot be transferred to another person.[10] It also has to account for section 16, which provides that more than one person can concurrently have the same duty; that each duty holder must comply with that duty to the required standard even if another duty holder has the same duty; and that if more than one person has a duty for the same matter, each person (a) retains responsibility for the person's duty in relation to the matter; and (b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter.

It also would appear to be defeated by the third key provision, section 46, which provides that:

> *If more than one person has the same duty concurrently under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.*

The *Code of Practice: Work Health and Safety Consultation, Cooperation and Coordination* makes it clear that PCBUs in supply chains cannot assume that other PCBUs will take care of a WHS matter, and requires each PCBU to find out who else is carrying out work, and to work together with other PCBUs in a cooperative and coordinated way to eliminate or minimise risks so far as is reasonably practicable.

If section 46 establishes a 'horizontal duty' to consult, the fourth key provision, section 47, establishes a 'vertical' duty. It provides that a PCBU must, so far as is reasonably practicable, consult with workers (or their health and safety representative (HSR)) who carry out work for the business or undertaking and who are, or are likely to be, directly affected by a WHS matter. This means that each PCBU must consult all the workers below them in the supply chain to the extent that consultation can be suitably accomplished in the circumstances, and must consult, co-operate and co-ordinate with other PCBUs in doing so.[11]

The fifth set of key provisions is found in Part 5 of the *WHS Acts*. This Part enables all workers (including owner drivers) to be part of a work group electing a HSR, and to refuse dangerous work (section 84). An elected HSR has extensive powers to monitor PCBU compliance with sections 19, 27, 46 and 47, and these powers include the power to issue a provisional improvement notice (PIN) if the representative has the reasonable belief that a PCBU is not complying with those provisions, and to direct that work cease if it causes a serious, imminent and immediate risk to workers to (section 85). Note that because the sections 19 and 27 duties are inchoate, and because the section 27 duty is a positive and proactive duty, a PIN can be issued against a PCBU where the PCBU is breaching any one of its duties, including section 19, and can be issued against any officer who is not exercising full due diligence, even if there are no risks to health and safety in the supply chain.

Finally, Part 6 of the *WHS Acts* includes union entry provisions enabling WHS permit holders to investigate suspected contraventions of the Acts.

The WHS regulators have realised that the harmonised WHS Acts address many of the difficulties that they faces trying to inspect and enforce WHS provisions under the pre-harmonisation statutes:

[10] See also s 272.
[11] See again s 46.

Those are some of the difficulties [for inspectors]. The makeup of the industry, the contracting, sub-contracting chain that happens. Sometimes the PCBU and the person driving the vehicle can be four times removed through that chain. That's very difficult to manage … Luckily we were able, through the networks to go around and talk to the industry and inspectors that were doing these about the changes to our legislation that would have the biggest impact on our industry. That was the definition of the worker. The consultation with overlapping duty holders, brilliant stuff. I think it's been really a very useful thing in our industry. (Government regulator 4)

You've got a transport company that is engaged to transport, say, cement for example. There is the transport company that has a fleet of trucks and they operate out of this yard but there is also a sub-contractor who also delivers cement. And this company has a system for doing a particular activity but they're not making the sub-contractors do it. So even though the sub-contractors are separate entities this company has the ability to control what they do because they have the knowledge and they hold the contract so they can say well hey you can't do this job until you start playing by our rules. (Government regulator 7)

… reasonably practicable does get defined in the legislation. I think the biggest stickler's going to be the degree of influence and control and how they coordinate their risk mitigation in regards to their obligations. I think that'll be the bigger argument … Because reasonably practicable is – from the regulator's point of view, after the Kirk decision in New South Wales, one of the things that WorkCover has to demonstrate is how they might be able to do that. That would there, ergo, demonstrate the reasonable practicality. So when you've got the five levels, it might be quite easy to demonstrate that the paperwork goes and all the instructions go with the paperwork. These days with electronics, I think there's a – I don't think, I know there's a hire company out there that has those little QR codes that you can just scan stuff and it goes back to their database. I think the same thing with consignment notes and paperwork. You can go back to electronic databases. You can find out information, et cetera … It's quite easy to push information up the line. (Government Regulator 6)

Particularly important are the horizontal and vertical duties to consult in sections 46 and 47 respectively, although, as regulators note, their implementation can raise complex issues.

One of the projects that I'm involved in now is working with a construction company and a manufacturer who both have great safety, don't have injury rates except for in the transport arm which isn't them, its 15 companies that they contract with to transport the products and that's where the injuries are occurring. I'm actually working with those companies to get at those 15 together, similar to a network. To talk to them about what the obligations and expectations are on both sides in relation to safety so they're all singing off the same sheet. (Government regulator 2)

Consultation is our catch word. We're constantly saying, have you talked about it, you need to talk to them, you need to have that discussion and you need to make some note of that discussion. We talk about the different ways of communicating, it doesn't have to be face to face and the consultation in all the scenarios I just talked

about would be different. Getting them to understand that. It's just an education, identifying. We started very early when I said we did that road show. That was the point that I really harped on is that you now need to consult. Go to a distribution centre where they have, there could be 30 companies that load and unload there. They need to have a conversation, they need to have something in place to say that they're all aware of the same thing. (Government regulator 4)

… so the consultation [under s 47] certainly with the workers. Actually involving them in a simple example of that would be when a decision is made to purchase a new prime mover, who gets involved in that? Is it the accountants, is it the business managers, is it the workers, is it all of them? What we're finding is, there's a mixed response but for the most part it's an accountant-type decision … for larger companies. When you get down to the smaller businesses, it becomes very much the worker or the driver is far more involved in that. (Government regulator 5)

At least in New South Wales, the revamped worker consultation provisions in the WHS Act posed challenges for the WHS regulator.

Under the old act the HSR provisions, you've got the workers and they say they want a HSR. So who wants to be a HSR, okay you've got three HSRs, great done. Now you've got the work groups aspect to it. It's not just a matter of saying who wants to be a HSR, you have to define your work groups and say who within that work group that's an appropriate person to be a HSR and vote and all that sort of stuff. What I'm seeing at distribution centres and its opening up a big can of worms is some places are going to double the number that they previously had. It's a better way of going about it definitely but it is a lot harder on the workplace to actually manage if they have to go down that path. And also all the powers of the HSRs are now much more set in stone. Cease work notices, provisional improvement notice. (Government regulator 7)

The WHS regulators do not, however, appear to recognise, or pay much attention to, the potential usefulness to them of the officer's duty in section 27.

… if we had an incident where a driver was not doing something right, or sorry an employee was not doing something right, and an incident occurred, we then started looking at the whole system and the employer, because that's how our legislation was geared, that's how we think. Whereas the [transport enforcement officers] were like, okay, why are you driving this truck, you're the captain of the ship, and that used to really be a real schism between - we'd look at it and go, geez, that's a bit a strange way of doing things the way the treat the drivers there ... if there was incidents in the past where it was a transport company and we did go to prosecution, one of the things we'd have to look at was the officers of the company … So we had tools in regards to how to exercise due diligence. There were actually tools there for that sort of stuff, in regards to general companies. So I think it's something we did well, I think we still do it reasonably well. (Government regulator 6)

Yeah look again particularly, this is sort of a little bit of an interesting point I mean the officers provisions we generally take as being directors, like people with influence over the company performance or how the company does their work and that in

> *larger companies again is very difficult to connect an officer with the incidents that's happened because normally there's a number of intermediary people, there's normally general systems in place. So again yeah getting the officers in these sorts of instances are hard but yeah I suppose it sort of depends how you define officers and that's the definition we generally apply, we don't generally look at middle level management so much.* (Government regulator 8)

In practice, and despite the huge potential of the WHS Acts to regulate health and safety at all levels of a supply chain, the WHS regulators tend to defer to other regulators when it comes to on road work health and safety issues. This has always been the case, and it is certainly the case that today WHS legislation appears to be of secondary importance, or at least not routinely applied to road transport, due to the chain of responsibility laws to be found in the provisions regulating heavy vehicles (currently the *Heavy Vehicle National Law*):

> *No. Look, interestingly, the Work Health and Safety Laws still apply to the road transport industry … but the practical outcome is that the work health and safety regulators will look at the road transport industry and say, well, look, there's an active regulator - the National Heavy Vehicle Regulator, supported by the road agencies in each jurisdiction so, given the economic climate that we're in, why would another regulator intervene and duplicate the work? Why do you have two regulators doing the work of one? … where you've got an active regulator, I don't know that you'd be able to identify any prosecution, nationally, where a health and safety agency has pursued a transport industry player for an on-road incident under the Work Health and Safety laws, despite those incidents clearly involving general safety risks …* (Government Regulator 13)

(b) State WHS Regulators

Earlier we noted the powers that HSRs and authorised union officials or employees have to inspect and enforce the provisions in the *WHS Acts*. The Acts are a very good example of decentred (or better, 'soft-centred') and polycentric enforced self-regulation,[12] in that

- the section 19 and 27 duties require each PCBU, in collaboration with the other PCBUs, to carry out systematic WHS management across the business or undertaking (for example, the whole supply chain), and require each officer of each PCBU to exercise due diligence;
- the systematic WHS management process must be carried out in consultation with workers and/or their HSRs;
- HSRs and authorised union officials and employees can inspect the business or undertaking to monitor compliance;
- HSRs can take action (using PINs) where any contraventions are detected, and can direct that dangerous work cease;
- Individual workers can refuse to carry out dangerous work;

[12] See I Ayres and J Braithwaite, *Responsive Regulation*, OUP, New York, 1992, chs 3 (tripartism) and 4 (enforced self-regulation); J Black, 'Decentring Regulation: The Role of Regulation and Self-Regulation in a "Post-Regulatory" World' [2001] *Current Legal Problems* 103. See further R Johnstone, 'Regulating Health and Safety in "Vertically Disintegrated" Work Arrangements: The Example of Supply Chains' in J Howe, A Chapman and I Landau, *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions*, The Federation Press, Sydney, 2017.

- Workers, HSRs and the union can inform the WHS inspectorate in each jurisdiction of any WHS issues they detect in the supply chain or franchise arrangements.

Both HSRs and, especially, unions can be seen as external third parties in a networked model of regulation. The WHS inspectorates, as external state regulators, have broad discretion as to how they monitor and enforce the provisions of the *WHS Acts*. Traditionally, the inspectorates have made significant use of 'informal' approaches to enforcement, preferring to educate, advise and persuade duty holders to take measures to comply with their WHS obligations. Most inspectorates also issue informal (in the sense of having no legal mandate) oral or written directions.

Inspectors also have significant formal enforcement powers under the *WHS Acts.* They have an array of statutory notices that they can issue. These include improvement notices, requiring a duty holder to remedy a contravention of the Act;[13] prohibition notices, requiring a person to stop an activity that poses a serious risk to any person emanating from an immediate or imminent exposure to a hazard;[14] and, in most jurisdictions, infringement notices (on-the-spot fines) for some contraventions.[15] Inspectors can also take 'remedial action' where a person to whom a prohibition notice is issued fails to take reasonable steps to comply with the notice.[16] Regulators can also require PCBUs to produce documents.[17] WHS regulators report that they have not had difficulty getting documentation about contractual arrangements in contractual chains, particularly when they seek the documentation from parties in the middle of the contractual chain. Regulators can also accept enforceable undertakings offered to the regulator by a person who is alleged to have breached an obligation in the harmonised Acts.[18] Enforceable undertakings are excellent regulatory tools, but there are limitations in their use by regulators. First, they can only be used with a duty holder who allegedly has breach a *WHS Act*. Second, the undertaking has to be offered by a duty holder, although, as one WHS regulator put it, the regulator can 'frame the conversation around the content of the undertaking', and can indicate the kinds of terms that need to be in the undertaking for it to be accepted. WHS regulators generally require the duty holder to offer far more than simply to comply with its obligations under the *WHS Act*, and SafeWork NSW and Workplace Health and Safety Queensland (WHSQ) generally require the undertaking to include improvements to WHS at the offeror's workplace, in the industry generally, and in the general community.

Finally, the regulator can initiate a prosecution for an offence against the Act, with potential maximum fines as high as $3 million (for corporations 'reckless as to the risk of death or serious injury or illness')[19] and $1.5 million (for corporations where there is a risk of death or serious injury or illness). [20] The *WHS Acts* also contemplate the making of a range of orders for non-pecuniary sanctions. These include:

---

13 *WHS Acts* ss 191-193.
14 Ibid ss 195-197.
15 See A Stewart et al, *Creighton and Stewart's Labour Law*, 6 ed, Federation Press, Sydney, 2016, [18.133]-[18.134].
16 *WHS Acts* s 213.
17 Ss 155 and 171, and see *Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment*) [2014] NSWSC 1580.
18 WHS Acts Part 11.
19 Ibid s 31 (category 1 offences). Individuals committing category 1 offences may face up to 5 years imprisonment.
20 Ibid s 32 (category 2 offences).

- *Adverse publicity orders* requiring an offender to publicise the offence, its consequences and the penalty imposed (section 236).
- *Restoration orders* requiring the offender to take specified steps 'to remedy any matter caused by the commission of the offence' (section 237).
- *WHS project orders* requiring an offender to 'undertake a specified project for the general improvement' of WHS (section 238).
- *Court-ordered WHS undertakings*, which enable the court to adjourn proceedings against an offender for up to two years on the offender giving specified undertakings (section 239).
- *Injunctions* requiring an offender to cease contravening the Act (section 240).
- *Training orders* requiring the person to undertake, or arrange for one of more workers to undertake, a specified course of training (section 241).

These enforcement powers certainly provide inspectors with many possible approaches to enforcement. The breadth of sections 19 (the PCBU's primary duty) and 27 (the officer's duty), and their inchoate nature, provide a bold inspectorate with the opportunity to prompt, cajole and otherwise oversee the self-regulatory measures of PCBUs and their officers at all levels of a supply chain. The positive and proactive nature of the section 27 officers' duty, in particular, means that an inspector or a HSR can issue an improvement notice or PIN, respectively, if an officer is not exercising due diligence.

As noted above, there is very little evidence that the WHS inspectorates have, to date, taken a creative approach to regulating vertically disintegrated work arrangements. But there are signs that things are changing. Safe Work Australia[21] has a focus on improving WHS 'through supply chains and networks.' The Heads of Workplace Safety Authorities recently began a supply chain project, which plans to:

- develop, in consultation with industry, an agreed, nationally consistent definition for supply chain networks;
- develop harmonised guidance material to define the chain of responsibility and duties of PCBUs involved in supply chains;
- disseminate guidance material.

WHSQ's Industry Action Plans for the metals manufacturing, meat processing and road freight industries include the intended strategic outcomes of ensuring that supply chain participants 'understand their cumulative impact' and 'actively improve the health and safety of the supply chain'; use 'commercial relationships within supply chains … to improve' WHS; and that 'industry leaders champion' WHS in supply chains. The quote below describes the perspective of a WHS inspector who had been working in the road transport sector for over 10 years:

> *As a general inspector I was going to those two person workshops, going to those small places and they quite regularly they didn't even understand the question…. Before they could answer the question I had to explain it to them and that was*

[21] *Australian Work Health and Safety Strategy 2012-2022*, 7.

happening a lot. Now I don't see that as much. I have seen the more corporate end of town is committing more resources in the industrial setting in the form of actual people and certainly across the board, the conversation is at the same level. So the questions, they understand the questions, they understand the concepts, they understand everything involved and they are giving answers to questions that previously they wouldn't have been able to. (Government regulator 7)

This inspector described seeing a change toward a more holistic attitude to seeing the link between WHS and road safety.

I see that they're changing their views. There is a much stronger focus on Work Health and Safety now then what I noticed three years ago. There is a segregation from that view of compliance versus road safety versus worker safety as well, so they're actually seeing that as all important issues. (Government regulator 5)

The following quotes provide further detail about the approach taken by WHS regulators:

A lot of transport operators at those lower levels if they're perhaps an owner operator or a small operator they may well have all their workload already sorted out through contracting arrangements and you know the prime contractor may be [transport company] and so they don't advertise their services and they're very had to reach… And so I'm very interested in using those prime contractors to reach those businesses and at the time influencing those prime contractors to take seriously their duty to them. (Government regulator 3)

Interviewer: *Just going back to how you deal with the supply chain reactively, if there is an assessment would you go through a similar process but more in problem solving mode? Or is that what you do, you go in and you would start with the company and see what they do and then what they should do, your mind frame would be different?*

Respondent: *There are two different aspects to the way we work. The first is we've got a complaint so we deal with the complaint. We need to know who the corporate entity is because we have to write notices. And we try and solve that complaint. Depending on workload, I will tell the inspector to restrict themselves to that and not do anything else. Like in this case a couple of weeks ago, we wanted to go further. This was a company that we had a couple of engagements with previously, we wanted to build a relationship with them and we also wanted to get more knowledge on what they did. We spent four hours and we went right through their corporate structure, went right through their health and safety structure, their safety management systems and how they manage things. And then we went out and looked right around the whole workplace and it was a big workplace.*

… it's very much questioning. We will say to them "Well, what's your role? How is your role described? How do you know what your goals are? How do you inform your management on how-?"… And if they're giving us all answers that we would expect then we would just leave it. But if they say "We haven't got any of that" then "Okay, what have you got?" and we try and see if there is anything we can help them build for their systems. We have a lot of advisory material. Not every inspector can go into a fairly complex corporate arrangement and start giving advice on how they can do

things. I can, I feel I can. And so in that case while we could've just gone in and said show us this particular scenario, because of the history, because what we knew about them we wanted to take it a bit further. And sometimes we go in purely as advisory. And we will specifically not go out into the workplace so we can have that pure dialogue arrangement with them. (Government regulator 7)

(c) OHS Long distance truck driver fatigue regulation 2005 (NSW)

Before its repeal in early 2012, the *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW) operated as a binding regulation under the *Occupational Health and Safety Act 2000* (NSW) (OHSA(NSW)). This regulation was an extension of, or an elaboration on, general duties in the OHSA(NSW) (repealed to make way for the WHSA(NSW) in 2012) which made these duties specific to certain parties at the apex (and throughout) road transport supply chains.[22] The regulation imposed obligations on business operators throughout the transport supply chain, including consignors and consignees at the apex of the chain in relation to drivers who transport freight, in a vehicle of 4.5 tonnes or over, for a distance of more than 500km.[23] The regulation applied to long haul trucking activity that partly entered the NSW, regardless of the origin of the affected drivers and regardless of the state in which the relevant transport entities were registered.[24] The regulation prohibited employers from causing or permitting their employee drivers to transport freight long distance unless they had first assessed the risk of harm from fatigue, and to the extent to which the employer's activities contribute to the risk, eliminated, or controlled the risk.[25] The regulation also prohibited consignors, consignees and head carriers from entering into a contract or series of contracts with a self-employed carrier without first having assessed and eliminated fatigue-related risks.[26]

A consignor, consignee and a head carrier who entered into long haul transportation contract (or series of contracts) with self-employed carriers had to prepare a driver fatigue management plan for each self-employed carrier who transported freight under the contract.[27] Similarly, an employer had to prepare a driver fatigue management plan for all of its employee drivers who transported freight long haul.[28] The fatigue management plan had to address: time required to perform tasks safely and time actually taken to perform tasks safely; rest periods; the cumulative effects of fatigue and the effect of the time of day or night on fatigue; management methods for assessing the suitability of drivers; managements systems for reporting hazards

---

22 P James, R Johnstone, M Quinlan and D Walters, 'Regulating Supply Chains to Improve Health and Safety (2007) 36 *Industrial law Journal* 163,184

23 S Kaine and M Rawling, '"Comprehensive campaigning" in the NSW transport industry: Bridging the divide between regulation and union organizing' (2010) 52 *Journal of Industrial Relations* 183-200, 191.

24 Ibid 192.

25 R Johnstone, S McCrystal, I Nossar, M Quinlan, M Rawling and J Riley, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney, 2012 (Johnstone, McCrystal et al 2012), 161; cl 81B(1) *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW).

26 Johnstone, McCrystal et al 2012, at 161; cl 81B(2), *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW).

27 cl 81D, *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW).

28 ; cl 81D, *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW).

and incidents and for monitoring health and safety; work environment and amenities; training and information about fatigue; loading and unloading schedules including queuing practices and systems; and any accidents or failures.[29] This list of matters addressed by a fatigue management plan did not include remuneration.

Also under the regulation consignors or consignees were prohibited from entering into contracts with head carriers unless they had satisfied themselves on reasonable grounds that the delivery timetable was reasonable and that each relevant driver who would transport freight long distance was covered by a fatigue management plan.[30] The regulation also provided for union access to information and a union role in enforcement.[31]

> *The key point about the OHS regulation is … there were two direct obligations. One about the driver fatigue management plan, that a consigner had to ensure that a driver fatigue management plan followed the work. And a second about a matter that the consigner had direct control over, and that was scheduling. They had to ensure schedules were reasonable. They were two break through provisions that had the effect of – it may not have had the effect of increasing safety outcomes, although I'd argue it probably did. But we don't have any empirical evidence of that. But certainly what it did was it changed the dynamic of the conversations we were having with consigners so that they understood there was force in what we'd been saying for some time, and they could no longer just ignore what we were saying. And similar to that, the risk of direct liability. That meant they had to take steps in their supply chain… And it was one of the key moments where chain of responsibility type approaches got a real push along.*
> (Union representative 2)

(d) Road Safety Remuneration Act 2012 (Cth) ('RSR Act')

The RSR Act established the Road Safety Remuneration Tribunal[32] ('RSR Tribunal') which commenced operation from 1 July 2012.[33] Repeal legislation passed by the federal Parliament on 18 April 2016 abolished the RSR Tribunal. The principal object of the RSR Act was to promote safety and fairness in the road transport industry.[34] The RSR tribunal's role in meeting this principal object was to address the relationship between remuneration (and related conditions) and safety in the road transport industry[35] by amongst other things:

- Ensuring that road transport drivers did not have remuneration-related incentives to work in an unsafe manner;
- Removing remuneration-related incentives, pressures and practices that contributed to unsafe work practices;

---

29 Cl 81D(4) *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW).
30 Johnstone, McCrystal et al 2012, 161.
31 Ibid.
32 RSR Act, s 79
33 See RSR Act, s 79, s 2.
34 RSR Act, s 3.
35 Jennifer Acton, 'Road Safety Remuneration Tribunal and Fair Work Australia: Plans and Priorities' Address to the AIG National PIR Group conference, 22 October 2012, Canberra) ('Acton October 2012') at 6.

- Developing and applying reasonable and enforceable standards throughout the road transport industry supply chain to ensure the safety of road transport drivers.[36]

The main functions of the tribunal were:

- Making road safety remuneration orders;
- Approving road transport collective agreements; and
- Dealing with disputes between road transport industry participants.[37]

(i) Provisions for the making of Road safety Remuneration Orders

The RSR Tribunal could make binding road safety remuneration orders consistent with the object of the RSR Act.[38] In deciding whether or not to make an order, the Tribunal was to have regard to a range of matters including the safety and fair treatment of road transport drivers and the likely impact of any order on the viability of businesses in the road transport industry.[39] However, the Act did not impose any substantive threshold to making orders.[40] In particular, there was not any requirement to re-inquire every time an order is made as to whether or not there is a link between pay and safety or whether or not the order was necessary for the safety of the particular drivers to be covered by the order.[41]

The tribunal could make an order of its own initiative or on application by a road transport driver, employer or hirer of a road transport driver, participant in the supply chain or an industrial organisation or association entitled to represent the interests of road transport drivers (i.e. this included the TWU) or employer to whom the order will apply.[42]

Tribunal orders could have been imposed on employers, hirers of road transport drivers and all other participants in the supply chain.[43] Therefore tribunal orders could have been used to establish a safe rates system that applied to all of the supply chain participants, including the responsibility of clients at the apex of the supply chain for safe rates, safe work performance and safe work planning.[44]

Tribunal orders could have included any provision the Tribunal considered appropriate in relation to remuneration and related conditions for road transport drivers to whom the order applies.[45] Such provisions might have included but were not limited to:[46]

- 'Conditions about minimum remuneration and other entitlements for road transport drivers who are employees'

---

36 Jennifer Acton 'Complementary Jurisdictions: The Road Safety Remuneration Tribunal and Occupational Health and Safety Laws' Address to the ACTU OHS/Workers' Compensation Conference, 6 September 2012, Sydney (Acton September 2012) at 2; RSR Act s 3.
37 S 80 RSR Act; Acton September 2012, 2.
38 RSR Act, s 19(1).
39 RSR Act s 20.
40 M Rawling and S Kaine, 'Regulating supply chains to provide a safe rate for road transport workers' (2012) 25 *Australian Journal of Labour Law* 237, 251 (Rawling and Kaine 2012).
41 Ibid, 251.
42 S19 RSR Act; Acton October 2012, 9.
43 S 27(3) RSR Act; Rawling and Kaine 2012, 251.
42 Rawling and Kaine 2012, 252.
45 RSR Act, s 27(1).
46 Acton, September 2012, 8; Rawling and Kaine 2012, 253; RSR Act s 27(2).

- ‘Conditions about minimum rates of remuneration and conditions of engagement for contractor drivers’;
- ‘Conditions for loading and unloading vehicles, waiting times, working hours, load limits, payment methods and payment periods’; and
- ‘Ways of reducing or removing remuneration-related incentives, pressures or practices that contribute to unsafe working practices’.[47]

Given that orders could bind all participants in the supply chain, such provisions empowered the tribunal to address commercial pressures emanating from the top of the road transport supply chain (such as unreasonable deadlines or unsustainable price discipline) which are passed down the chain and could result in unsafe on-road practices such as speeding or excessive working hours.[48]

(ii) Road Transport Collective Agreements

Instead of the TCF industry approach of extending collective bargaining rights to contractors by treating them as employees, the RSR Act maintained the contractor status of drivers but created a separate collective-agreement making system which applied to them as contractors.[49] Crucially the Act created both a mechanism for the enforcement of collective agreements, and a safety net against which those agreements could have been negotiated.[50] The Tribunal could have approved road transport collective agreements which were agreements that could have been negotiated between a collective of contractor drivers and a hirer or potential hirer, and which specified remuneration or related conditions for those drivers.[51] Such an approval might have only been made where a road safety remuneration order that applied to the relevant drivers was in effect; a majority of drivers approved of the agreement and would have been better off overall under the agreement than under the order; and there was a method under the agreement for adjusting remuneration levels where the agreement operates for more than one year.[52] In deciding whether to approve an agreement, the Tribunal would have had to have regard to whether the benefit of approving the agreement would have outweighed the detriment to the public caused by any lessening of competition that might have resulted, or would be likely to have resulted from the tribunal approving the agreement.[53] If the Tribunal approved an agreement it must have been satisfied that the remuneration and related conditions in the agreement did not have remuneration-related incentives to work in an unsafe manner.[54] Anything done by a participating hirer or a contactor driver in accordance with an approved agreement was specified and specifically authorised for the purposes of sub-section 51(1) of the *Competition and Consumer Act 2010* (Cth).[55]

(iii) Resolution of disputes by RSR Tribunal

The RSR Tribunal could have dealt with three main types of disputes. The tribunal could have dealt with disputes about remuneration or related conditions that might have affected whether

47 RSR Act, s 27(2).
48 Rawling and Kaine 2012, 253.
49 Johnstone, McCrystal et al 2012, 149.
50 Ibid.
51 Acton September 2012, 10; RSR Act, s 33.
52 RSR Act, s 34.
53 RSR Act, s 32A; Johnstone, McCrystal et al 2012, 148.
54 RSR Act, s 35(1).
55 RSR Act, s 37A.

a road transport worker worked in an unsafe manner.[56] The tribunal could have also dealt with disputes about the practices of participants in the supply chain beyond the employer or hirer of the road transport worker where the employer or hirer contended that those practices affect the employer or hirer's ability to provide safe remuneration rates and working conditions.[57] Finally, the tribunal could have dealt with disputes about the dismissal of an employee driver, or termination of a contractor driver's road transport contract, because the driver refused to work in an unsafe manner.[58]

The Tribunal could also have dealt with disputes as it considered appropriate including by mediation or conciliation, by making a recommendation or by expressing an opinion or, if the parties agreed, by arbitrating the dispute.[59] If the Tribunal arbitrated, it could have made an arbitration order to ensure that the driver did not have remuneration-related incentives to work unsafely.[60] Such an arbitration order might have been be imposed on a party to the dispute or a supply chain participant who was not party to the dispute but who had agreed to be bound by the outcome of the arbitration.[61]

(iv) Coverage of RSR Act

As previously mentioned, a road safety remuneration order could have bound all participants in the supply chain. Here the RSR Act used the broad scope of the Commonwealth Parliament's legislative powers with respect to industrial legislation to cover participants in the supply chain, including consignors and consignees of goods transported by a road transport worker and intermediaries party to relevant contracts for the carriage of goods who are constitutional corporations, the Commonwealth or a Territory, who operate for the purposes of a business undertaking of a constitutional corporation or who undertake any dealings in interstate trade or commerce within a Territory.[62] A supply chain participant was also a constitutional corporation who operated premises used by road transport drivers to load or unload vehicles (at which an average of at least five vehicles are loaded or unloaded on each relevant day).[63] The entire supply chain might have still been regulated even if the consignors or consignees were not constitutional corporations but another party down the supply chain was a constitutional corporation.[64]

RSR orders, agreements and disputes could have related to road transport drivers who were employee and independent contractors (including those operating with a corporate status).[65] To be covered these drivers must have operated in the road transport industry which was expansively defined to cover those contractors and employees driving in the road transport and distribution industry, the long distance operations in the private transport industry, the cash in transit industry and the waste management industry within the scope of federal legislative competence – covering all dealings with constitutional corporations, the

[56] See RSR Act, ss 40-43.
[57] Rawling and Kaine 2012, 254; RSR Act, s 43.
[58] Acton October 2012, 11; RSR Act s 41(2), s 42(2)
[59] RSR Act s 44(1).
[60] RSR Act s 44(2).
[61] RSR Act s 44(3).
[62] Rawling and Kaine 2012, 251; RSR Act s 9.
[63] Rawling and Kaine 2012, 251-252; RSR Act s 9(1), s 9(6).
[64] Rawling and Kaine 2012, 252: RSR Act s 9(2)(a); s 9(2)(b)(iii).
[65] Rawling and Kaine 2012, 252.

Commonwealth, in the Territories and in interstate trade and commerce.[66] Despite this broad coverage of the RSR Act, it was not intended to exclude or limit the operation of Chapter 6 of the *Industrial Relations Act* (NSW).[67] For employees, RSR orders, agreements or dispute arbitration orders applied to the extent that any relevant federal award, agreement, order or instrument was less beneficial than the order;[68] for contractors, RSR orders, agreements and dispute arbitration orders applied regardless of the terms of any road transport contract to which they are a party.[69]

(v) RSR Act – Compliance Monitoring and Enforcement

The RSR Act provided for an active enforcement role for the relevant trade union and wide-ranging Fair Work Ombudsman enforcement powers.[70] The Fair Work Ombudsman (FWO) was charged with the responsibility of monitoring compliance with the RSR Act and order and agreements made under the Act. It also had the power to inquire into and investigate any practice or act that might have been contrary to the Act or instruments made under the Act and its inspectors could exercise inspection and enforcement powers to determine whether the Act or an enforceable instrument was being complied with.[71] The FWO also had the function of commencing court proceedings to enforce the Act and instruments made under the Act and to represent road transport drivers who might have been party to such proceedings.[72] The relevant union could have also initiated enforcement proceedings in relation to any contraventions of road safety remuneration orders, collective agreements and dispute orders as well as exercise powers of inspection for suspected contraventions of the Act or instruments made under the Act.[73]

Two government regulators made the following comments about the then newly formed Road Safety Remuneration Tribunal soon after the tribunal was established:

> *… the way the design of the regulation if you like is that we're empowered to use our powers that we have as Fair Work inspectors to assist in the compliance of these [Road Safety Remuneration] orders in addition to the education and the monitoring activities. It's fair to say though we have not yet been besieged with work. I'm only aware of at the moment one particular matter that we're looking into about an owner driver from memory who has been in and out of a series of contracts and really is chasing up… some outstanding monies through contract. So we're not yet testing the order and we're not yet - we're not fully I think in the heart of this new regulatory design yet* (Government Regulator 12)
>
> *… the Road Safety Remuneration Tribunal obviously sits within the Fair Work Commission. We sort of view their orders in the same way we view the orders made by the Fair Work Commission. We always treat them as important pieces of work because we consider them - well really core framework to the system working. So if*

---

66 Johnstone, McCrystal et al 2012, 116; Rawling and Kaine, 2012, 252; RSR Act definition of road transport industry, s 4; RSR Act, ss 5-8.
67 RSR Act, s10.
68 Johnstone, McCrystal et al 2012, 116; RSR Act s12
69 Johnstone, McCrystal et al 2012, 116; RSR Act s13.
70 Rawling and Kaine, 2012, 255.
71 RSR Act, s 73, s 74.
72 RSR Act s 73.
73 Rawling and Kaine 2012, 256; RSR Act s 46, s 78.

> *the commission makes an order and it's not ultimately complied with then we can assist the commission to achieve compliance then...it makes their work even more meaningful and ensures the system's respected by those people it seeks to regulate. So … the tribunal's orders in this space will be treated with a similar level of priority and urgency*. (Government regulator 12)

The RSR Tribunal also had powers to resolve disputes in the supply chain.

> *Well, I'd have to go back to my Act, but my recollection is that the disputes resolution sections do allow them to resolve disputes between consigners and consignees, people in the supply chain. So, section 43. So that's pretty straightforward. The collective agreement process also would bind people in the supply chain. So you can – a contractor being a driver can make, or a group of drivers can make an arrangement with their hirer. So therefore those wage rates, as with the RSRO would be binding on those up the supply chain. …So the dispute can be about … the driver contends the termination [of employment] was mainly because the driver refused to work in an unsafe manner, or the dispute occurred because someone refused to work in an unsafe manner. So it actually is intrinsically linked to that sort of health and safety idea, I suppose. So that's kind of the hook that brings it in.* (Government regulator 11)

(vi) Orders finalised by the tribunal

As outlined above, the RSR Tribunal could make nation-wide orders which were binding on all participants in the road transport supply chains regarding the pay and safety of both independent contractor and employee road transport workers.[74] However, the first order made by the tribunal[75] (covering the long haul and supermarket sectors of the road transport industry) did not deal with pay rates for independent contractor drivers. (Pay rates for employees are dealt with under awards and industrial agreements). The first order also did not impose substantive supply chain auditing provisions upon supply chain participants at the top and middle of long haul and supermarket sector road transport supply chains.[76]

By contrast, the second order of the RSR Tribunal[77] (also covering the long-haul and supermarket sectors) set minimum payments for independent contractor drivers; and imposed substantive obligations upon certain supply chain businesses to conduct audits of their (usually small or medium size) subcontractor businesses – which, in the order were known as the (direct) 'hirers' of contractor drivers. The second order of the road safety remuneration tribunal took effect on 7 April 2016 after a Federal Court stay was lifted.

That second order required *the two parties above* the direct hirer in the road transport supply chain to annually audit direct hirers' compliance with the minimum pay rates in the second order (provided that those parties were party to a contracts of carriage on 270 or more days

---

74 For details see Rawling and Kaine, 249; R Johnstone, I Nossar and M Rawling, 'Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal' (2015) 43 *Federal Law Review* 397-421,at 405-406 (Johnstone, Nossar and Rawling 2015);

75 *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014.*

76 For details see Johnstone, Nossar and Rawling 2015.

77 *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016*.

in a year).[78] The 2016 order also required a direct hirer to take all reasonable steps to facilitate the annual audit of direct hirer compliance with the order's minimum pay rates.[79]

As a result of these auditing provisions the 2016 order would have regulated from the top down a common four party road transport supply chain. For example, in a common supply chain where a consignor supermarket is a party to a contract for the carriage of goods with a major transport company who, in turn, gives out road transport work to a direct hirer, the consignor and major transport company would have been required to conduct an annual audit of the direct hirer.[80]

Built in to this supply chain auditing clause in the second order was a simple and arguably essential process for pursuing instances of non-compliance.[81] If either of the two persons party to a contract of carriage above the direct hirer in the road transport supply chain formed a reasonable belief, that the hirer had not complied with the order, they were required to give written notice to the hirer of the non-compliance and required the hirer to take action to rectify the non-compliance.[82] If the hirer did not rectify the non-compliance, the person party to the contract of carriage who gave notice of the non-compliance would have had to advise the national governmental industrial regulator – the FWO – of that non-compliance.[83] Notably, although the person who was to undertake an audit of the direct hirer could have required the hirer to take action, the clause stopped short of empowering that person to terminate the contract with the hirer.[84] The abolition of the RSR Tribunal on 18 April 2016 — 11 days after the second order took effect — prevented the order's implementation.

(vii) Lost opportunity for the RSR Tribunal to better regulate road transport supply chains

The premature abolition of the RSR Tribunal is to be lamented given the potential of the tribunal to address underlying causes of road transport industry safety issues. Prior to its abolition, a number of interviewees expressed the belief that the tribunal was an opportunity for improved regulation of road transport supply chains. One of our interviewees stated:

> *Yeah, if it does continue we see it as having, as a really great opportunity to get some significant changes through the industry particularly down the supply chain not just the contracting, subcontracting but we hear again and again the large retail, wholesale companies are really driving the market and the really low margins make it really difficult to introduce changes. And I guess whilst no-one wants goods and services to increase in price, I think it's an area where at least there needs to be*

---

[78] *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* Clause 8.6.
[79] *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* Clause 8.3-8.10.
[80] Rawling, M, Johnstone, R and Nossar, I, (2017), 'Compromising Road Transport Supply Chain Regulation: The Abolition of the Road Safety Remuneration Tribunal', *Sydney Law Review*, vol. 39, 2017, 303-332 (Rawling, Johnstone and Nossar 2017).

[81] Ibid.
[82] *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* Clause 8.11.
[83] *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* Clause 8.12.
[84] Rawling, Johnstone and Nossar 2017.

*some redistribution in profits. That's a recognition that the transport task is a key part of that and you have to fund it properly if you want it done properly. But yeah the Tribunal, if it continues, may sort out some of those issues. (*Government Regulator 1)

However, at the time interviews were being conducted, the role of the FWO in the implementation of RSR Act was in its infancy:

But we really - we have been on standby and we are using as I see - the way the design of the regulation if you like is that we're empowered to use our powers that we have as Fair Work inspectors to assist in the compliance of these orders in addition to the education and the monitoring activities. It's fair to say though we have not yet been besieged with work. I'm only aware of, at the moment, one particular matter that we're looking into about an owner driver (from memory) who has been in and out of a series of contracts and really is chasing up just a bit more - some outstanding monies through contract. So we're not yet testing the order and we're not yet - we're not fully I think in the heart of this new regulatory design yet. (Government regulator 12)

Some business representatives were positive about the RSR Tribunal being part of the regulatory environment:

It's changed a number of things. It hasn't changed so much in the way drivers are paid because that something that we've already had in place. So when we set up our contracts with carriers, we've got certain things in place including knowing how their drivers are paid, ensuring that they're paid correctly, including waiting times et cetera, et cetera. So we were comfortable with that side of things. But what the order did to is it, I guess, it put in place, or it prompted us I guess to review more often things like safe driving plans.

Because one of the requirements is that we need to be able to validate that for each trip now, whereas in the past we would validate that over a period of 12 months for example, or unless there was some major change in we had a new destination to contract to. So now, that's a regular review process. We retain all of those now so that we can validate them every time we need to.

I guess at the end of the day it's about being open and transparent in everything as well, so having the unions working with this instead of against this. At the end of the day, it's all about making sure that things are done safely and are done in a manner that benefits everyone and doesn't take away or decrease the safety side of things. (Business Representative 1)

(v) Heavy Vehicle National Law

Another difficulty with the WHS statutes is that they do not provide detailed obligations on parties in road transport arrangements. But detailed provisions for road freight transport are to be found in the *Heavy Vehicle National Law*. The original *Heavy Vehicle National Law*, introduced in 2013, set out 'a chain of responsibility' for all parties involved in road transport work (including firms packing, loading and receiving goods), even if they have no *direct* role

as a driver or transport operator.[85] The aim of the 'chain of responsibility' provisions is to make each party (whether a corporation, partnership, unincorporated association, other body corporate or an individual) in the chain with the capacity to exercise control or influence over any transport task equally responsible for compliance with the road transport laws. Parties with such obligations include[86]

- employers,
- company directors,
- exporters/importers,
- primary producers,
- drivers (including an owner-drivers),
- prime contractors of drivers,
- the operator of a vehicle,
- schedulers of goods or passengers for transport in or on a vehicle, and the scheduler of its driver,
- consignors, consignees and receivers of the goods,
- loaders and unloaders of goods, and
- loading managers – that is, the person who supervises loading or unloading, or manages the premises where this occurs.

Any one party can have duties in more than one capacity. The chain of responsibility obligations apply to a range of situations, including breaches of fatigue management requirements (Chapter 6), breaches of speed limits (Chapter 5), and breaches of mass, dimension, or loading requirements (Chapter 4). They cover any instructions, actions or demands that cause or contribute to an offence under a road transport law, including anything done, or not done (directly or indirectly) that has an impact on compliance. This would, for example, include practices of schedulers that place unrealistic timeframes on drivers which cause them not to take rest options, and transport operators who do not provide drivers with a sleep environment (approved sleeper cab, access to rest stops) that allows for quality sleep if their work requires them to sleep away from home. Each person in the supply chain must take all reasonable steps to ensure a heavy vehicle driver can perform their duties without breaching road transport laws. Each party in the supply chain must also ensure that the terms of consignment or work contracts do not result in, encourage, reward or provide an incentive for the driver or other party in the supply chain to contravene any road transport laws. Contracts that require a driver to break the law are illegal.

A NHVR officer summarised those legal provisions as follows:

> *there's a set of provisions that create offences to do with speeding, fatigue, mass, dimension and loading and … defective vehicles. Each of those four broad areas can be broken down into … hundreds of different offences. For many of those offences, the person who's liable for the offence is usually either the person doing the thing or a person who permits another thing to be done. The idea of that is to capture an employer or an operator who's permitting, for example, a driver to drive a vehicle*

[85] https://www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility.
[86] Ibid.

that's defective. So those are the basic provisions and they tend to be punishable by fines and the fines tend to be put into different categories of degrees of seriousness.

There's provisions in the law, which set out what they are for different types of offences. Generally … a large number of those offences … can be dealt with via what's called an infringement process and typically a fine of approximately 10% of the maximum would be imposed as a standard procedure. Most of the fatigue laws require record keeping and then there's a whole series of provisions that create obligations and offences for failing to do certain things to do with filling out books, giving copies of books to other people, storing those copies, reporting back, et cetera, et cetera.

So the law really does attempt to force drivers and operators to do a series of things in order to – well – comply with the law, but really to achieve safety, to make sure that they're not driving whilst fatigued, to make sure that they're not driving whilst overloaded, et cetera, et cetera. The components of the law to do with mass are the most easy to enforce, because they're the most easy to detect. You put a vehicle over a series of scales and you find out if it's overloaded. Most obviously has an effect on the safety of the vehicle, because it affects performance, braking and steering. But primarily the problem with mass is that it's bad for roads, so you might say that there's a bias in the law to protecting infrastructure, rather than safety, certainly in its enforcement.

There's other provisions in the law that give certain concessions to people who are accredited. That is that they voluntarily undertake to subscribe to a higher standard of behaviour and management and in return they are relieved of some of the obligations of regular maintenance checks or they're allowed to carry extra weight. Then there's a whole series of administrative rules and requirements about that. They're the main parts of the regulatory law. …

Then there's three or four main provisions that we call extended liability provisions, that say that if a person is convicted of one of these type of offences, then these other parties can also be liable for the offence. That's where we use the terminology of the chain of responsibility and we talk about the party, in the chain of responsibility. There's a whole series of definitions about what each of those parties are ─ loaders, checkers, schedulers, officers, et cetera. For different offences, the people in that list can change for various reasons.

As noted above, one of the things that is interesting about the chain of responsibility obligations is that some WHS regulators – for example the WorkCover Authority of New South Wales – defer to these provisions, in the sense that they confine their proactive health and safety inspection programs to health and safety issues such as loading and working at heights that arise at depots, retailers' premises etc. On road issues such as speeding, fatigue and loads they leave the inspection and enforcement activities to the National Heavy Vehicle Regulator. Some large transport companies report that they treat the 'chain of responsibility' provisions under the *Heavy Vehicle National Law* as the detailed provisions that flesh out the broad provisions of the primary duty in the *WHS* Acts.

Of course, a key issue is how these provisions are inspected and enforced by the various state road inspectorates, under the frameworks established by the National Heavy Vehicle Regulator. In 2014, an *ABC Four Corners* program[87] on the trucking industry showed that whilst the law formally regulated all participants in the road transport supply chain, the burden of the regulation was disproportionately born by truck drivers. The program depicted government regulators and police handing down fines and infringement notices to truck drivers on a mass scale and stated that: 'Chain of responsibility law are supposed to make everyone in the chain responsible for safety. But so far no major retailer or manufacturer and no major trucking firm has ever been prosecuted.'[88]

However, there is some suggestion that one government regulator has been recently taking proactive measures to ensure all parties in the supply chain comply with the Heavy Vehicle National Law. That regulator deploys a bottom up approach by using on-road enforcement data to investigate 'all the parties in the chain' (Government regulator 10). The approach includes taking court action but also includes compliance seeking measures short of prosecution including inspections of sites such as distribution centres, investigations and improvement notices. That same government regulator also identified that 'the heart of the problem is the off-road parties pressure' (Government regulator 10) and has now moved to taking measures to address this problem. As that government regulator stated:

> *to be a bit crude . . . if I walk into the playground and punch the biggest kid in the nose, everybody else takes attention. They do.*
>
> *So we march into [a supermarket chain A]. I receive a phone call the next day from the national compliance manager of [supermarket chain B], and said, well I see you're in [supermarket chain A]. Expect you here, we'd like to invite you. I said, okay. He said, and we'll put a bit of morning tea on, come round and have a little bit of a look. How many will be coming? I said … you've got to get outside your comfort zone if you're going to achieve high performance in compliance. We're going to have a good look at what's going on, and if I tell you we're going to be there Thursday, we're going to be there Wednesday.* (Government regulator 10)

We interviewed a range of regulators and transport operators on the chain of responsibility provisions in the *Heavy Vehicle National Law*.

> *I think [an awareness of obligations in supply chains] it's really emerging. When we're talking about transport it's somewhat overwhelmed by chain of responsibility. Though I think the message is getting through, for other industries which don't have a good understanding of chain of responsibility, some of the transport operators are actually doing a good job in educating their - I guess, people - in their supply chain about their responsibilities and chain of responsibility that's starting to extend in to Work Health and Safety requirements as well, so I think it's having an influence. It would be interesting to see whether they actually do follow that through, where a failure occurs and whether we would prosecute under that section. There hasn't been a really good*

[87] 'This Trucking Life', reported by Stephen Long and presented by Kerry O'Brien, Monday 3rd February 2014 at 8.30pm on ABC1.
[88] Ibid.

history with chain of responsibility with prosecution, so whether we would take that on would be interesting. (Government regulator 5)

Just with the chain of responsibility … around our obligations and the entire business understanding their obligations from senior management through to packers of product, who are strapping our steel. Loaders, supervisors, despatch operators and even out into our sales and customer service team, to give them the level of awareness that they need to have for the benefit of the drivers … So, as an example, from a sales team and customer service team, we make it very clear that they cannot in any way, shape or form make phone calls to put pressure on a driver to make a destination to meet the customer's requirements. (Business representative 3)

So the first thing about I guess understanding COR obligations is that we have training in place so that the people who have something to do with transport, whether it be that you're planning trips, or you're loading trailers, or you're receiving trailers, that they have an understanding of what chain of responsibility is. … The second point is, being part of the RLSC and running through those audits is a continual test to make sure that we've got things in place to manage the… five main areas under that chain of responsibility: speed, fatigue, load restraint, mass dimension. It's a continuing, evolving of compliance and enforcement legislation. So you are regularly assessing, you are regularly measuring, regularly keeping updated and also regularly talking and discussing it with other transport partners for example. (Business representative 1)

I think, the concept of the chain of responsibility … has actually made people think twice. The argument's more aggressive about responsibility and who's accountable. So yeah, the technical legal aspects have really – the enforcement capacity of the chain of responsibility under the national system's pretty ordinary. You have model codes and there's a get-out-of-jail clause. To try and bring an enforcement is pretty difficult. I know there's been one successful, maybe a couple of successful ones, but that doesn't mean it's not – hasn't changed the culture, or it's starting to generate a cultural change … There's not many employers out there that don't have an awareness that they have an exposure and have some responsibility to what happens when the trucks leave their workplace. (Union representative 6)

Your property is on these trucks. You are therefore also responsible for speeding. Now these particular matters – the way it works, to bring them into the loop, there were – there are no tickets issued in that. Alright? These systems monitor from A to B. Yet when you pass through them they record who you are, and how fast you're going. Now that's data. Now having a smart think about the law, I thought, how can we use this to our best advantage? The law says you don't have to be convicted of a speeding offence for chain of responsibility … All you have to do is not prevent it in the first place. So the question is asked …"What reasonable steps did you do to prevent these 600 incidents of speeding? What have you got to monitor it? ... Look, your own GPS tracking says that they're speeding. Tell me what you've done about it? ... Nothing. Then off to see the magistrate … Whose goods were on the truck?... Who loaded it? Who was the consignee? Who was the consignor? Who sent it? Who loaded it? Who packed it? Who scheduled it? Because we're going to charge all

them too" … So you've got to – you identify first who commits the offence. It then tacks onto the rest of the supply chain. (Government regulator 10)

Particularly around fatigue, with our drivers we do a lot of night work and those sorts of things in particular. Fatigue's a big issue for us, other road users are a huge issue for us and condition of roads is often a big issue for us as well … we do … a lot of monitoring of driver run sheets, making sure that rosters are in place and they're accurate and they're not breaching the fatigue laws from that perspective from the word go. So we have you know weekly fatigue reports that come out based on the information from the run sheets so we can go back and say, "Hey listen you're not having enough breaks, watch this for the next week" and work with the site and the drivers and the sub-contractors on improving that requirement. (*Business representative 4)*

The establishment in 2010 of the National Heavy Vehicle Regulator (NHVR) was a key development, but according to interviewees at the time of interviews, the NHVR was taking time to run smoothly:

We certainly with [State transport department] we thought we were on to quite a good relationship with some joint programs and then the heavy vehicle regulator came along and really, you know, we started from scratch again. It's less than that because they've got so much of a focus on getting it up and running that they'd have no time for anything else. They've also reformulated their major industry consulting body so it's again that was an avenue that we were working quite well with, which is less effective now than it was. I think we're kind of working through the Transport Industry Associations and some of the major players to influence back, so closing the loop. (Government regulator 1)

… I think one of the challenges also is that now we've got a national regulator and they've got a lot of work to do…So they've put a team together of industry representatives now to consult and I think that sort of process is going to benefit in the long term. In the past, we've had regulators trying to put layers down, but it's just adding more and more layers without having some smarts behind it I guess. So hopefully now that there's more industry involvement, they will be able to find that fine line between being a regulator and doing it, or at least targeting, the right areas in the industry that need to be dragged up to a better level. (Business representative 1)

According to government regulators there were some limitations of the chain of responsibility provisions in the *Heavy Vehicle National Law* as originally enacted in 2013:

I've been driving for a while now perhaps changes in this law, and to align it better with work health and safety provisions. Because some of these [crashes] – there was a crash out at the M4 near the Northern Road, where a tip truck ran over three pushbike cyclers. Killed one and dragged three underneath the truck. We've got Menangle, drunk driver. Fatigued, could hardly stand up, kills three members of one family. Now I've always been of the belief that … other parties should be charged with manslaughter. Now the road transport law in that doesn't provide penalties anywhere near sufficient enough ... But Crimes Act clearly does … I suppose what barred us in this is the causal factors. There were drugs involved in both. Now if there not be drugs

involved and it be fatigue, we'd probably have the tick in the box for the gross criminal negligence. We would have perhaps been able to go with Crimes Act ... What we want is … a general duty provision. Similar to work health and safety stuff. (Government regulator 10)

… the investigators do look at off-road parties as well [as trucking companies], but there are some inherit limitations in the legislation that make it a bit difficult … the statutory powers – so, for example, the Work Health and Safety Law has similar statutory powers, so people can be compelled to provide information about offences. Under the Heavy Vehicle National Law people can be compelled to provide documents that they're required to keep under the law but, of course, if they don't keep documents…investigators are restricted to requiring someone to give information about a vehicle or its load or intended load. So, obviously, if you're looking at driver fatigue or any of those systemic management issues, you have to be very careful about how you compel people to produce that information, otherwise the statutory power's not validly exercised. … Oh, look, I think it has improved it … but I don't think it has improved anywhere near as much as it could have if the law was framed appropriately to start with. Looking back at the process, I think most road agencies were caught on the hop when the chain of responsibility laws were introduced. New South Wales has come a long way but the other States, I think, are still back where we were in 2005. (Government regulator 13)

Government regulators have introduced sophisticated speed camera technology to monitor speeding. This enables them to track vehicles over their trip and identify cases of speeding. This quote illustrates how one regulator made use of this information:

Now having a smart think about the law, I thought, how can we use this to our best advantage? The law says you don't have to be convicted of a speeding offence for chain of responsibility. You don't have to receive a ticket, nor pay a fine. All you have to do is not prevent it in the first place. So the question is asked [of the transport company] "What reasonable steps did you do to prevent these 600 incidents of speeding? … So we only use the really bad ones. So there's 123 kilometres an hour in here. Whose goods were on the truck? Okay. It was "Joe". Who loaded it? Who was the consignee? Who was the consignor? Who sent it? Who loaded it? Who packed it? Who scheduled it? Because we're going to charge all them too … So you've got to - you identify first who commits the offence. It then tacks onto the rest of the supply chain. (Government regulator 10)

Interviewees were of the view that the penalties in the original *Heavy Vehicle National Law* were too feeble:

The penalties are feeble, I mean geez in speed limiter tampering, we had to lay 200 or 200 charges and then the courts don't like it….there's no continuing offence idiotically the law. So speeding Tuesday sight 4.00pm Wednesday, Thursday. The courts got very shitty…I suppose the bottom line would be I think you need intelligent regulation otherwise it's not going to work and also political will or it's not going to work and not everyone has them lined up. So there's quite a disparate level of effort and level of success across the states. (Government regulator 14)

Enforcement is effectively handed over to the New South Wales Department of Roads and Maritime Services (RMS), the Queensland Department of Transport and Main Roads (TMR), and the police:

> *… with the new legislation, of course, we lost the specific requirements in the regulation for transport. And plus a lot of that has been picked up now under road transport legislation … so a lot of the responsibility really has shifted…to road and maritime and the police ... And they've got the legislation which is broad enough now to be able to pick up like the consigners, their legislation back when we had our regulation was very narrow so it was just pretty much all focused on the driver…* (Government regulator 15)

> *Speeding was one area tackled by one of the state government regulators. There is a commercial pressure to speed. Over long distances, a small increase in speed can lead to big time savings. This may even allow an extra trip – meaning extra revenue.*

The government regulator spoke about the effectiveness of a campaign to reduce speeding, which led to some large prosecutions, fines and confiscation of trucks. The regulator had also monitored whether drivers had their correct fatigue breaks. These enforcement actions had facilitated a change in attitudes towards managing driver fatigue*:*

> *I was talking to a driver the other day who said to me "Oh I've just been called up to … see if I can do another trip tonight. The guy said, oh no you won't be back in time therefore you won't have your seven hour break. You can't do it." That would never have happened before. Because we're sitting over the top watching that movement.* (Government regulator 10)

The approach favoured by regulators was compliance promotion:

> *Industry liaison is also an important part of the branch's responsibilities, not mine directly but I provide support to there in terms of developing information and occasionally presenting in respect of various aspects of the legislation. We've got a focus on the idea of what compliance looks like and how important that will become in the future particularly given the quite comprehensive nature of COR but also because for the moment COR is done differently depending on what obligation you're talking about. So we're trying to make it quite clear to operators and drivers and other parties in the supply chain how it applies to them and the things that they might do to protect their interests and ensure that they comply.* (Government Regulator 16)

In 2016 the *Heavy Vehicle National Law* was amended, to align it (in the sense of making its provisions more consistent) with the approach taken in the *WHS Acts* (and the *Rail Safety National Law*). A new Chapter 1A has been inserted into Part 2 of the Act, and enacts the principle that 'the safety of transport activities relating to a heavy vehicle is the shared responsibility of each party in the chain of responsibility for the vehicle' (s 26A)(1)), and that the level and nature of the duty depends, amongst other things, on the function the person is required to perform, the nature of the public risk created by the activity, and the party's 'capacity to control, eliminate or minimise the risk' (s 26A(2)). Sections 26B(2) and (3) replicate in substance the provisions of sections 14 and 16 of the WHS Acts by providing that a duty cannot be transferred to another person and that more than one person can concurrently have a duty and that each must comply with the duty.

Section 26C(1) now imposes a primary duty of care on 'each party in the chain of responsibility for a heavy vehicle' to 'ensure, so far as is reasonably practicable, the safety of the party's transport activities relating to the vehicle.' Sections 26C(2) and (3) flesh out this duty by requiring each party, as far as is reasonably practicable, to eliminate (or minimise) public risks and to ensure that the party's conduct does not directly or indirectly cause or encourage the driver of a heavy vehicle to contravene the *Heavy Vehicle National Law* or to exceed the speed limit, or directly or indirectly cause or encourage another party in the chain of responsibility to contravene the Law.

Section 26D replicates section 27 of the *WHS Acts* to impose a positive and proactive duty of due diligence on an executive of a legal entity that has a duty under section 26C.

Section 26E(1) prohibits a person from asking, directing or requiring (directly or indirectly) the driver of a heavy vehicle or a party in the chain of responsibility to do or not do something the person knows, or ought reasonably to know, would have the effect of causing the driver to (a) exceed a speed limit, (b) drive a 'fatigue-regulated' heavy vehicle[89] while impaired by fatigue, (c) drive a 'fatigue-regulated' heavy vehicle while in breach of the driver's work and rest hours option, or (d) drive a fatigue-regulated heavy vehicle in breach of another law in order to avoid driving while impaired by fatigue or while in breach of the driver's work and rest hours option.

Part 1A.3 then provides for the same high maximum penalties for breach of these new duties as are found in the *WHS Acts* Part 2 Division 5.

(f) *Fair Work Act 2009* (Cth)

The provisions in the *Fair Work Act 2009* (Cth) (FW Act) apply to all national system 'employers' and govern the working conditions of their 'employees'. Therefore, to the extent that truck drivers are 'employees' of national system employers, they are covered by the National Employment Standards, modern awards[90] and enterprise agreements in the FW Act. Employees, unions or the Fair Work Ombudsman (FWO), can initiate civil penalty proceedings under section 539 of the FW Act for breaches of the National Employment Standards, or a modern award or an enterprise agreement.

Division 6 of Part 3-1 of the FW Act prohibits a person from misrepresenting an actual or proposed employment relationship as an independent contracting arrangement (s 357); from dismissing or threatening to dismiss an employee in order to engage them to perform substantially the same work as an independent contractor (s 358); and from making what they know to be false statements to induce a current or former employee to agree to such an engagement (s 359).

---

89 See *Heavy Vehicle National Law* s 7, and Part 6.

90 See *Road Transport and Distribution Award (Cth) Award 2010* No MA000038; *Road Transport (Long Distance Operations) Award 2010* No MA00003; *Transport (Cash in Transit) Award 2010* MA000042; *Waste Management Award 2010* (Cth).

The FWO regularly brings civil proceedings for breaches of these 'sham contracting' provisions.

> *We've found different ways of doing this in the past. I'll just give you a quick example, so where an employee's been held out to be an independent contractor, we can obviously sue the engager of the labour for noncompliance with sham contracting provisions. That's good and proper work for us to do…. The limitations of 357 are that the employer wasn't reckless. That's hard to make out sometimes. So the alternate for us if we think the person deserves it is to use Section 45 award breach and then ping them for a contravention of the award. If we want to get the director of that company involved, not just the company themselves, we use Section 550 to drag them in too. So I see this new jurisdiction is allowing us to do that through a different mechanism.* (Government regulator 12)

Another important provision in the FW Act, which has increasingly been used with supply chains, is the provision for accessorial liability in section 550. Where a person or body breaches a civil remedy provision, liability for a contravention of that provision will also fall on anyone else who is 'involved' in the contravention (s 550(1)). Section 550(2) makes clear that 'being involved' can include aiding, abetting, counselling, procuring or inducing (by threats or promises or otherwise) a contravention. It can also include being in any way (directly or indirectly) 'knowingly concerned in or party to' a contravention, or conspiring with others to effect a contravention. FWO now uses accessorial liability provisions in 92% of civil penalty proceedings.

> *Respondent 1: It's kind of hard. We don't want to be perceived as the lazy regulator that won't even exercise 550 – 550 is a great provision. I would think we should be considered very active in bringing in directors and other people involved in contraventions.*
>
> *Respondent 2: HR, practitioners.*
>
> *Respondent 1:Yeah and also managers. But that being said, the judiciary is – because we are bringing so many 550 matters before the courts, they are starting to consider what ...*
>
> *Respondent 2: What is the appropriate reach… How far does this provision go?* (Government regulator 12)

As the FWO's *Compliance and Enforcement Policy* indicates, the FW Act offers the FWO a range of compliance promotion and enforcement methods in a hierarchy of informal and formal processes and sanctions.[91] The informal tools, measures and processes at the foot of the pyramid constitute the 'bulk of the regulator's enforcement activities, at least in a qualitative sense'.[92] They include**:**

[91] See also the FWO Litigation Policy [4.3]–[4.5]. For a full discussion of the FWO's approach to enforcement, see A Stewart et al, *Creighton & Stewart's Labour Law*, 6th ed, Federation Press, Sydney, 2016, 619-637.

[92] J Howe, T Hardy and S Cooney, *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012*, Report of the Centre for Employment and Labour Relations Law, July 2014: 237 (Howe, Hardy and Cooney 2014).

- *Advice, support and assistance*, including the Fair Work Infoline and Small Business Helpline, and web-based information, tools and resources, including an online learning centre, factsheets, best practice guides, and a Pay Calculator.

- *Compliance partnerships*, where the FWO invites employers to enter partnership agreements which can be tailored 'for individual businesses and circumstances'. These can include 'employer initiatives to engage with employees, self-audits, the monitoring of contractors and franchisees, ensuring effective dispute resolution processes', as well as training for staff. For example, the National Franchise Program (NFP), launched in 2012, offers large franchisors the opportunity to work with the FWO to improve compliance in their franchise systems.[93]

- *Enrolling* key non-government organisations, such as unions, migrant resource networks, ethnic business groups, community legal centres and training providers, as 'critical contact points for both awareness raising and whistleblowing'.[94]

- *Early involvement* to help parties themselves to 'resolve issues at workplace level', including by providing tailored advice, and access to employment tools and resources.

- Free *mediation* in a confidential and voluntary process, conducted by an accredited, impartial mediator, usually by telephone.

- *Inquiries*, in which FWO officers encourage all parties to speak to the officers and to provide information that supports their point of view. Inquiries can result in an informal resolution of the issues, a comprehensive inquiry, or one of the measures outlined below.

Stronger, and sometimes more 'formal', enforcement measures usually begin with an investigation,[95] in which a Fair Work Inspector 'considers allegations and gathers and examines evidence to determine if there have been breaches of Commonwealth workplace laws'.[96] An investigation can give rise to a range of measures, including:

- a 'findings letter' sent to the parties, setting out what the FWO found in the evidence gathered during the investigation, and requesting any identified breaches to be remedied;[97]

- the FWO referring an employee to the small claims process, and directing them to tools and resources that explain the process;

[93] D 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: 224 (Weil 2014).

[94] T Hardy, 'It's Oh So Quiet": Employee Voice and the Enforcement of Employment Standards in Australia' in A Bogg and T Novitz, Voices at Work: Continuity and Change in the Common Law World, Oxford University Press, Oxford, 2014: 261-2 (Hardy 2014).

[95] See Hardy 2014: 264.

[96] As to the powers of an inspector to gather evidence, see FW Act ss 708–712.

[97] See Howe, Hardy and Cooney 2014: 239.

- a letter of caution, which is a written warning to a party when the FWO has found breaches and wants to put the party on notice that future breaches could result in monetary penalties.[98]

The more formal enforcement methods available to the FWO include:

- issuing an *infringement notice*, which is effectively an 'on the spot fine';
- issuing a *compliance notice*, which is a written notice that requires a person to do something to remedy a breach;
- accepting an *enforceable undertaking* offered by a person who has committed a serious breach;[99] and
- *litigation*, in which the FWO initiates court proceedings to enforce the law or seek a penalty.

In 2014, the Fair Work Ombudsman, Natalie James,[100] explained the approach the FWO takes to enforcing the provisions in the FW Act in the context of supply chains.

> *If a business is interested in looking down the supply chain and taking responsibility for what is going on within it, then the Fair Work Ombudsman would love to have a conversation about how we can help.*
>
> *To those who choose not to look down the supply chain, to keep their eyes fixed narrowly, that may be a legitimate choice. But I can't promise that we won't be having a different sort of interaction at some point – perhaps one that takes place in a court.*

The FWO has also signalled that it is willing to use the accessorial liability provisions where lead businesses in supply chains are 'involved' in contraventions of the FW Act by contractors further down the chain.[101] In 2012 the FWO initiated court action against the retailer Coles for being knowingly involved in the underpayment of trolley collectors employed by unrelated subcontractors. In October 2014 the litigation was discontinued when Coles formally agreed to take 'ethical and moral responsibility' for the underpayments and entered into an enforceable undertaking.[102] The main trolley collecting contractor engaged by Coles also entered into a compliance partnership (formerly known as a proactive compliance deed) with the FWO.

---

98 Letters of caution have usually been used where employees have been misclassified as independent contractors. They are particularly useful as a means of putting the employer on notice that if similar claims arise in future, the FWO will have 'stronger grounds on which to pursue an allegation of sham contracting': Howe, Hardy and Cooney 2014: 239.

99 The FWO also makes use of proactive compliance deeds, as will be discussed below.

100 N James, *Risk, Reputation and Responsibility*, Speech to the Australian Labour and Employment Relations Association National Conference, Gold Coast, 29 August 2014 (James 2014)

101 See James 2014, 3; J Webster, 'Why Australian Business Should Take Notice of Supply Chains' (Address to AiG Personnel and Industrial Relations (PIR) Conference, Canberra, 5) May 2015.

102 FWO, 'Coles accepts "ethical and moral responsibility" to help end exploitation of vulnerable trolley collectors', media release, 7 October 2014.

In addition to paying more than $200,000 in compensation to 10 employees, in the enforceable undertaking Coles:[103]

- accepted that the contracting model for trolley collection services lacked transparency, and publicly acknowledged its responsibility for compliance with all aspects of the law across its business operations, including for trolley collection;
- agreed to 'revamp its trolley collection services, admitting its former practices were highly vulnerable to exploitation and poor employment practices';
- promised to conduct annual random audits of at least 20% of the direct subcontractors of its main trolley-collecting service provider, to ensure they were meeting their obligations;
- agreed to establish in its head office a telephone hotline service to enable store managers to escalate any concerns raised by trolley collectors;
- promised to investigate every underpayment complaint from trolley-collection workers received through its hotline service or from the FWO, and to report to the FWO on how the complaint was resolved;
- agreed to establish workplace training for employees involved in trolley collection services about their legal obligations; and
- established a $500,000 fund to cover any future underpayments.

The deed was entered into with United Trolleys, which had been engaged by Coles to collect trolleys at its supermarkets.[104] The aim of the deed was not only to improve compliance with workplace laws by employees of United Trolleys, but by employees of the trolley-collecting subcontractors they engaged throughout Australia. One of United Trolleys' motivations for concluding the deed was to set an industry standard. Under the deed United Trolleys agreed to develop and implement systems and processes to assist its subcontractors to comply with labour law obligations. This included adopting a third-party payroll system and establishing a workplace relations training program for all subcontractors. United Trolleys also undertook to take reasonable steps to ensure that its subcontractors complied with workplace laws and to work directly with them to resolve future complaints and to rectify underpayments. It also agreed independently to audit the pay packets of 10% of the trolley collectors engaged by its subcontractors.[105] Coles has since re-employed trolley collectors (ie re-hired trolley

[103] This summary is drawn from Coles Supermarkets Australia Pty Ltd Enforceable Undertaking (4 September 2014); and see T Hardy and J Howe, 'Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains' (2015) 57 *Journal of Industrial Relations* 571 (Hardy and Howe 2015).

[104] Proactive Compliance Deed with United Trolley Collections Pty Ltd (13 May 2014). This summary of the deed is drawn from Hardy and Howe 2015: 575.

[105] For a further example, see 'Baiada required to engage HR specialist to report back to regulator' *Workplace Express*, 26 October 2015, detailing the obligations undertaken by the poultry processor Baiada, which had been sourcing labour through a network of subcontractors under arrangements that involved the underpayment and exploitation of a large number of foreign workers on working holiday visas.

collectors as direct employees of Coles instead of using an intermediate trolley collection company) at a large number of its supermarkets across Australia.[106]

As noted above, **trade unions** also play a key role as a regulator under the FW Act. Unions adopted a range of strategies in regulating supply chains.

> *… if you have a look at the draft order that we put up initially in retail and long-distance, you'll see that we're after a very direct approach. We don't think that the evidence supports anything but that. That is, that clients in the industry should be required to ensure that the rates and conditions that apply in its supply chain … [are] safe and fair. The question is what mechanisms, what provisions you can have to achieve that, but that's the obligation that we say is appropriate. And in a very real sense – I suppose those of us that have been thinking about it for some time and have gone through all these different manifestations and trying to – it almost seems – it now almost seems alien to think that that's going to be achieved in any other way because of the way the market works, because of consolidation of power in major corporations. It now seems almost ludicrous to think that there could be any other solution or a solution at all if it doesn't involve quite direct obligations on those that have the money in the first place.* (Union representative 2)

> *The big picture for us is that what we want, and we haven't gone this far in the discussions with [retailer] yet, but we don't just want a bilateral charter that gives us access to the DCs and the companies and all those things which are then necessary but they're not sufficient. There are hundreds of companies going in and out of these DCs. We cannot bargain with each of them. Even if we could bargain with each of them, we couldn't service them all … We'd be creating a sail that had so much drag that we wouldn't be able to – you know, the ship wouldn't be able to [sail].* (Union representative 2)

> *So what would you do to combat that in the early stages, and from the 90s – in the early 90s it was that people were seen – there wasn't as – as the same degree of pressure, so there wasn't any, there certainly was, but it wasn't the same degree of pressure about work being outsourced for these major companies. It really took a long time for the leadership to understand the dynamic of what happened because even when it was outsourced at the next level, it was going to high quality - largely higher quality operators ... So, again, we looked, well, who's the principal employer. What's the economics driving this. So for all of these attempts to hold old systems that we had applied or systems that we had started to apply in organising company by company – it became very clear that that was not a proposal that was going to work*. (Union representative 8)

> *So how do we regulate the market? In a whole series of ways. Road laws, occupational and safety, through leverage, client contracts, government procurement*

[106] 'Coles subcontractor underpaid trolley collectors by $220,000' 10 March 2016 http://www.news.com.au/finance/business/retail/coles-subcontractor-underpaid-trolley-collectors-by-220000/news-story/69fe152c8c8240f5b5d8ebe4c84876c9

and workplace demand. Those things needed to be met. And then community demand and political demand, for those things to be kept. (Union representative 8)

[The agreement with major transport operator] … that's the only way in which it works. Because the smaller operators as you know, they run through the back door straight up. And you've got to just keep trying to wind them back in. And then, at the appropriate time, you wield a big stick. Say [company], this is what's happening. You are responsible for your contractor. He's not doing this, this and this. They sit with him, make a phone call, whatever they do. And then there is a change. It's got to come down to that level. You've got to have that availability. You can't rely upon Fair Work Commission as it is now, taking six to 12 months to deal with the matter. This here can all happen over weeks or months. (Union representative 10)

Business attitudes towards the role of the Union in regulating supply chains included:

… we've spent a fair bit of time with … people like [X] of TWU to make sure that we're aligned to some of their thinking. We'll always have some points of difference to what they want to do, but there's some really good stuff comes out of the union movement, so we've aligned that … Chain of responsibility is – to give them credit – was really originally driven by the union movement pushing hard to make sure people like us were accountable. (Business representative 3)

The other thing we've been working on with the Transport Workers Union is a safety charter. So [X] and the TWU are developing a safety charter and that's in its early days of being piloted in one of our DCs… I guess at the end of the day it's about being open and transparent in everything as well, so having the unions working with this instead of against this. At the end of the day, it's all about making sure that things are done safely and are done in a manner that benefits everyone and doesn't take away or decrease the safety side of things…So that's a common goal that we all have. So we try and work together to meet that. Obviously it's a negotiation. (Business representative 1)

(g) Queensland state law for the Road Transport Industry

The Quinlan and Wright report stated that 'Queensland ... [does] not have any currently operating system to support owner-drivers.'[107] In particular, there is no parallel scheme to Chapter 6 of the *Industrial Relations Act 1996 (NSW*) (NSW IR Act). In particular there are not any contract determinations and contract agreements currently operating to cover owner-drivers under Queensland state law. Therefore the introduction of instruments made by the federal RSR Tribunal would have had considerable impact for owner-drivers in Queensland. Note, however, that section 275 of the *Industrial Relations Act 1999* (Qld) empowers a Full Bench of the Queensland Industrial Relations Commission, on application by a union or employer association, a State peak council or the Minister, to make an order declaring (a) a class of persons who perform work in an industry under a contract for services to be employees; and (b) a person to be an employer of the employees.

[107] M Quinlan and L Wright, *Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission*, National Transport Commission, Melbourne, 2008, (Quinlan and Wright 2008).

(h) Industrial Relations Act 1996 (NSW)

NSW State Law for the Road Transport Industry – Chapter 6 of the NSW IR Act

A campaign by the TWU in NSW to regulate the working conditions of owner drivers led to an inquiry commissioned by the NSW Liberal government in the 1960s. The resulting NSW Industrial Relations Commission Report (known as the Willis Report) found that 'owner-drivers have been … exploited' and that there was an 'overwhelming case' for state regulation of owner-driver arrangements.[108] In NSW a legislative scheme specific to the road transport industry was established by provisions which were originally inserted into NSW industrial statute in 1979 (during the Wran Labor government's administration) and were carried over into Chapter 6 of the NSW *Industrial Relations Act*. This legislative scheme which was designed to address the vulnerability of owner-drivers has had a level of bi-partisan support in NSW for almost four decades.[109]

However, during that time the TWU has waged a number of campaigns to save Chapter 6 from abolition. The *Independent Contractors Act 2006* (Cth) was designed to exclude state industrial laws that had protected contractors involved in certain contracts with constitutional corporations. Chapter 6 of the NSW IR Act represented the kind of state laws targeted for exclusion by this federal takeover.[110] However, following a campaign by the TWU the *Independent Contractors Act 2006* (Cth) as passed by the federal Parliament specifically named Chapter 6 as a state law which was not intended to be excluded by that federal Act.[111]

In November 2011 the O'Farrell Coalition NSW government instigated a NSW Parliamentary Inquiry to investigate the amalgamation of NSW tribunals in order to create a super tribunal including the NSW Industrial Relations Commission (NSW IRC). The TWU was concerned that the amalgamation of the NSW IRC into a super tribunal would have an adverse impact on the operation of Chapter 6 which is administered by the NSW IRC. However after a concerted campaign by the TWU to save the full operation of Chapter 6 the O'Farrell's response in October 2012 to the Parliamentary Inquiry was to create a super tribunal but preserve the NSW IRC as a separate body due to its specialist role in administering areas such as Chapter 6.[112] Chapter 6 was also exempt from measures to introduce competitive unionism in NSW by the O'Farrell government under the *Industrial Relations Amendment (Industrial Representation) Bill 2012* after lobbying of NSW Parliamentarians by the TWU.[113] A union official described how the campaign to save Chapter 6 was part of a broader 'safe rates' campaign:

> *… in New South Wales there was a Chapter 6 of the Industrial Relations Act and that provided the capacity for owner-drivers to really have the same suite of protection as the employees had, and … as all of you guys will be aware, the move towards the Independent Contractors Act which was ... said to free up independent contractors to determine their commercial destiny but of course - actually the effect was precisely*

[108] Kaine and Rawling 2010, 188.
[109] Rawling and Kaine 2012, 248.
[110] Kaine and Rawling 2010, 191.
[111] Ibid.
[112] 'NSW Industrial Relations Commission to Remain following TWU intervention', *TWU News* – The official Journal of the Transport Workers Union NSW, Issue 71, Summer 2012, at 13.
[113] 'TWU lobbying pays off with Chapter 6 to remain', *TWU News* – The official Journal of the Transport Workers Union NSW, Issue 71, Summer 2012 at 13.

> *opposite. And its first incarnation would have wiped out chapter 6 ... We decided that we wanted more protections, higher standards for workers, not less. And so rather than curl up into a ball and just try and defend Chapter 6, we started taking this campaign about Safe Rates, which is … really just a catchphrase for a bundle of strategies designed to hold those at the top of the supply chain to account so that the economic imbalance could be re-dressed, so that workers could get fairer and safer conditions. That's what Safe Rates was about, but it used that very potent pay and safety link as a kind of pointy end of the arrow to cut through – cut through all of the opposition, and it was for that reason that we – you know, we were able to rescue Chapter 6.* (Union representative 2)

Under Chapter 6 owner drivers engaged in the NSW short haul sector[114] are protected by a system of 'contract determinations' which are akin to industrial awards and 'contract agreements' which are similar to union enterprise agreements.[115] These enforceable instruments made under Chapter 6 cover a range of industry subsectors including general transport, waste collection, couriers, breweries, waterfront, concrete, quarries, excavated material carriage, taxis and car carriage.[116] These contract determinations and agreements can provide for driver remuneration and almost any work condition.[117] Chapter 6 also provides remedies for unfair termination of owner driver contracts,[118] rights to recover 'goodwill' paid to a previous owner-driver for a road transport contract[119] and is supported by an effective enforcement regime.[120]

(i) Mutual Responsibility for Road Safety (State) Contract Determination (2006) NSW

In *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination* ('NSW Mutual Responsibility case') the NSW IRC addressed the link between pay and safety in the road transport industry.[121] This decision established a requirement to prepare a safe driving plan for all long haul trips performed by transport employees, transport labour hire workers and contract carriers, including owner-drivers covered by the NSW jurisdiction. The *Transport Industry – Mutual Responsibility for Road Safety (State) Award* (2006) (NSW) and the *Transport Industry – Mutual Responsibility for Road Safety (State) Contract Determination* (2006) (NSW) implemented the findings of this case. This mutual responsibility award and contract determination set down requirements for the implementation of safe driving plans which are safe work methods statements designed to address the link between pay and safety before driving commences.[122] The safe driving plan must identify: how the work is to be remunerated in accordance with the relevant industrial instrument, the remuneration method chosen having regard to the safety of drivers, the system of monitoring

[114] Due to jurisdictional limitations of State law, Chapter 6 does not cover transport work beyond the NSW short haul sector.
[115] Kaine and Rawling 2010, 188; Quinlan and Wright 2008, 53-54.
[116] Rawling and Kaine 2012, 248.
[117] Ss 311-313, s 322 NSW IR Act. Rawling and Kaine 2012 p248.
[118] NSW IR Act, s 314.
[119] NSW IR Act, ss 345-349
[120] See NSW IR Act, ss 343-344.
[121] (2006) 158 IR 17.
[122] Rawling and Kaine 2012, 249.

and measuring the effect of the remuneration method on driver fatigue, limits on hours to prevent driver fatigue, meal breaks, crib breaks and rest breaks and the names of other parties further up transport supply chains including consignors (for example, retailers) and head transport operators who contract out work.[123]

The responsibility for safe driving plans is imposed upon all parties in the road transport supply chain except head consignors and consignees at the apex of the chain.[124] However, a safe driving plan must be provided to consignors (such as retailers) or head carriers (such as transport operators who have contracted out long haul work).[125] Transport operators who contract out long haul work to other transport subcontractor businesses must ensure that those transport subcontractors comply with safe driving plans, the long haul driver fatigue regulation and any applicable industrial instrument. This requirement is designed to prevent transport companies from contracting out of obligations regarding safety plans.[126] Where a transport operator becomes aware that one of their transport subcontractor businesses has breached any such plan, regulation or industrial instrument they must take action to ensure that such a breach is rectified and not repeated. Such action may include terminating the subcontractor's contract.[127]

Creighton and Stewart note that 'to the extent that [the *Mutual Responsibility* case] was concerned with regulation by award, it is inconsistent with the subsequent ruling in *Endeavour Coal.'*[128] Although the *NSW Mutual Responsibility Award* is no longer in force, the *NSW Mutual Responsibility Contract Determination* is still a currently applicable instrument. One union official spoke about the effect on enforcement due to the abolition of the *NSW Mutual Responsibility Award*:

> *… It was effectively dual instruments when it was won. Mutual responsibility for awards, mutual responsibilities of termination. And having one stick out is problematic for us. So there have been some difficulties in us enforcing that. There's been heavy attacks on us when we've sought to actually use it … companies have refused to have a look at some of those standards across the board. Recently we had disputes at [the] Ports … when you're trying to have a drug and alcohol policy that's covering the board there, they've refused to acknowledge any role for employees in that. So it's been difficult for us and problematic for us to say, well owner-drivers have to have this responsibility, but then your employee workforce doesn't. That leads to a commercial arrangement where we may place our owner-driver in a situation where they're out of work.* (Union representative 1)

---

123 Cl 3, Transport Award; cl 3, Transport Contract Determination.

124 Rawling and Kaine 2012, 249

125 ; cl 3, Mutual Responsibility Award; cl 3, Mutual Responsibility Contract Determination.

126 M Rawling 'Supply chain Regulation: Work and Regulation Beyond the Employment Relationship (PhD thesis,University of Sydney, 2010) p310.

127 Cl 5, Transport Award; cl 5, Transport Contract Determination.

128 B Creighton and A Stewart, *Labour Law*, 5 ed, Federation Press, Sydney 2010, 120. This leaves leaves open the question of the validity of the contract determination. The Full Bench of the Federal Court in *Endeavour Coal Pty Ltd v CFMEU* (2007) 165 FCR 1 found that NSW Industrial Relations Commission did not have the power to make an award binding on a constitutional corporation in relation to long service leave. However this case did not decide on the validity of a contract determination applicable to owner drivers who are not employees subject to award regulation.

Another Union interviewee did not think that the contract determination had resulted in the widespread introduction of safe driving plans.

> *I think safe driving plans in particular, I think that was also picked up under the old OH&S scheme as well … So it has a life of its own, and is still in operation. But I don't think there's too much compliance with the mutual responsibility for road safety contract determination… And companies now do that in various forms because they've got other regulations which they need to comply with. So not necessarily. If you asked a boss, have you ever read the contract determination as such for mutual responsibility, they would say no. But they'll pick up facets of it because it's a requirement in other acts, OH&S. Drug and alcohol testing is the thing everyone wants to do these days, et cetera. So they're compliant with that, but I don't think anyone actually uses them. But it is in force.* (Union representative 10).

(j) Transport Industry – Cash-In Transit – State Award 2002 (NSW)

This previously applicable NSW Cash-In-Transit Award took an integrated approach to industrial relations and work health and safety. The award provisions relating to disclosure of information to the relevant trade union and principal contactor liabilities were adapted from clothing industry awards discussed above.[129] The award contained a multi-party approach to mutually assured standards with 'contractual tracking mechanisms to ensure that the major financial institutions at the apex of these supply chains were obliged proactively to protect the health and safety of those working at the base of these contractual chains.'[130] This regulatory scheme, for a time, ended the outsourcing of bulk cash transport work.[131]

(k) Multiple regulators and their relationship

So far this report has shown that the regulatory space shaping the pay, safety and working conditions in road transport is complex, with a range of regulatory provisions and actors. Despite this complexity or because of it, there is not any unifying, national regulation to make lead businesses responsible for both the pay and working conditions of road transport workers in road transport supply chains. This is largely due to the abolition of some innovative forms of regulation including the abolition of the road safety remuneration tribunal. Although the uniform national scheme of work health and safety remains and regulates all of the businesses in the road transport supply chains, it does not address the crucial element of driver pay and its impact on health and safety of drivers. Some form of obligation of lead businesses for the conditions of work in their own supply chains has been seen as one solution to inadequate working conditions in the industry for almost two decades. Certain governmental regulators also now see this as a solution to be pursued. For example:

> *… [W]ith retailer obligations. The union proposed that there was already an existing commercial structure with retailers whereby they had contractual relations throughout the supply chain and why not utilise their existing contractual authority rather than inventing parallel government bodies?...The focus became more on a government-sponsored licensing-type arrangement to more of an industry self-regulating-type*

---

[129] I Nossar, 'Cross-Jurisdictional Regulation in Commercial Contracts for Work Beyond the Traditional Relationship' in C Arup et al, *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006, 202-222 at 220 (Nossar 2006).
[130] Johnstone, McCrystal et al 2012, at 162.
[131] Ibid.

industry. It would have looked at some of the work that it had already started in the industry. So that was generally more comfortable from a government perspective, that we progress down that path. (Government regulator 9)

The solution of making businesses at or near the top of the supply chain responsible for working conditions in those supply chains received a huge boost by the introduction of specific mandatory obligations under the road safety remuneration tribunal (which as previously discussed has now been abolished). The regulation prompted businesses to take further measures in their supply chains:

[The road safety remuneration order for the long distance sector] changed a number of things. It hasn't changed so much in the way drivers are paid because that something that we've already had in place. So when we set up our contracts with carriers, we've got certain things in place including knowing how their drivers are paid, ensuring that they're paid correctly, including waiting times et cetera, et cetera. So we were comfortable with that side of things. But what the order did to is it, I guess, it put in place, or it prompted us I guess to review more often things like ***safe driving plans****. Because one of the requirements is that we need to be able to validate that for each trip now, whereas in the past we would validate that over a period of 12 months for example, or unless there was some major change in we had a new destination to contract to. So now, that's a regular review process. We retain all of those now so that we can validate them every time we need to. The only other change it's really put in place is just the questions that we ask of carriers on how they pay and their pay rates et cetera, is a little more stringent now… But at the end of the day, we don't pay drivers directly. It's a process that the carrier that we contract to have in place. So we just validate that process to make sure it's not short-changing, and it's not creating undue stress.* (Business representative 1)

As we have already discussed in this report, regulatory regimes governing road transport health and safety overlap, and require regulators to negotiate their relationship and respective roles:

Certainly fatigue's a WorkCover issue but because there's quite, I guess quite heavy duty fatigue regulations that the National Heavy Vehicle Regulator looks after we leave that up to them. There's definitely overlap there, I guess a fatigued truck driver's much more likely to injure themselves loading and unloading a truck, you can picture getting out of a cabin after many hours…Yeah drug use and the like, are managed more by, well are managed by [transport department and police]. I don't know whether I'm splitting hairs here but there'll be a few things here that can become issues when they are on the road. Perhaps if they pull off at a rest stop to resecure their load, things like that but generally those issues fatigue, speed, vehicle maintenance we don't proactively address. (Government regulator 2)

If there was systematic failures in regards to literally anything I suppose, and I suppose that's where it limits us with the transport as well, because if you start talking about systematic failures with on-road fatalities, you are starting to look at either fatigue, driver training, mechanical systems, okay. So I mean we'd go as far as- "Is there a systematic approach to servicing the vehicles and fixing the vehicles?" and I guarantee that most of the inspectors would probably be able to, would get

hoodwinked if somebody said, "Yeah, here's our service schedule, here's where we repair it. It's all there." Whereas the RTA, RMS are all mechanics, so they're a little bit more skilled in that sort of stuff. So when you take all that out of it, and you've got to then look at what's left for us to look at. I'm not sure there's that much left as far as on-road stuff goes, where we can be effective as far as our tools of the trade, if you like. Not to say that it doesn't fall under the legislation that it shouldn't, I think it should fall under the legislation. It is a work, health, safety issue, but sometimes it's more effective than others. (Government regulator 6)

We have a little bit do with, we were developing a very good relationship with Transport and Main Roads in particular the policy area. The National Heavy Vehicle Regulator which has taken over most or all of that regulatory role is emerging in terms of what they're doing. They're very focused on developing their model and delivering it, rather than building relationships with other regulators. So I think there's been a bit of a backward step there. We still have a relationship with them, but it's just not their focus any more. We have deliberately as a Health and Safety Regulator in Queensland has stepped away from adding confusion to the debate about fatigue in the industry. Whether that's appropriate or not is debatable. We are working with the industry to have them recognise that it's not just fatigue isn't just about log books and compliance, there's lots of other aspects and they actually need to focus on that as well… (Government regulator 5)

Government regulators are also required to work with the union in its capacity as regulator:

We could probably … [raise WHS issues] better if we had someone, and built a relationship up with workplace health and safety. I usually ring the local inspectors – we've got inspectors for different areas…I think a better thing to do… maybe we need to do that, is get a meeting with workplace health and safety and some of these regulators, and try to build a little bit of a relationship up. Say, look, we're not here to give you more work, but these are important issues. (Union representative 9)

Interviewer: *I was going to say ─ what's the relationship like between yourself and the unions?*

Government regulator: *Cordial. It's a balancing line. You don't want to get them offside but you don't want to be in their pocket either. You listen to what they have to say, listen to what the other party has to say because there is always the other party because you've got the employer and the union and you try and find a middle ground … just recently we had a union right of entry at an industrial workplace … and they were expressing real concerns about health and safety issues. Whether those safety issues lifted off the ground I'm about to find out. But I think union right of entry is ─ if it can be managed well ─ it will provide an invaluable resource because the union guys are not outside the industry, they're people from the industry. They also have access to a range of workplaces so like us they can bring a wealth of experience to a given situation.* (Government regulator 7)

There is also a complex relationship between regulators and industry:

I give the impression to everybody that I'm one of them, I'm part of the industry I talk about our industry, we need to do this, it's a very inclusive sort of thing. My passion

comes from, my family was transport so these people are no different than the people that sat around my kitchen table all my life. (Government regulator 4)

But I think that the key part of [breaking down barriers between industry and the regulator] is identifying who the major players in the industry are and how you actually get good communication and a sense of trust going on with those. Whether they're the companies or the businesses who actually have real issues with safety or not, it's some of them do, some of them don't, but I think it's the influencing effect and that's what we're trying to do. We're trying to get in a position where we can influence some of the people in the industry who can then influence others in the industry and obviously the segments of the industry such as the drivers who are very, very hard to get in touch with, to actually have direct communication with. (Government regulator 5).

Retailers and major transport companies have committed organizational resources to review their practices and processes and ensure they are compliant. The following section examines the ways in which business has managed the transport companies in their supply chain to improve work, health and safety.

(l) Business's approach to compliance

This report has documented firms in the road transport industry are required to meet a range of legal obligations to ensure reasonable and safe working conditions for workers involved in road freight. This section reports on business's approach to compliance.

Respondent 1: And I think that would be why, for example, we [the retailer] got involved because of the incidents occurring, the level of concern was rising out of that…

Respondent 2: But that now, once we've been involved - [we have] now got a hugely qualified OHS National Manager on board which makes it a lot easier for these things to happen and to get more valid reporting systems coming through. Clear corrective action plans, really clear lead indicators and things and activities that are happening…Absolutely, and you haven't got to spend a lot of time finding out how they're performing or what they're doing about the stuff that's not going well, it's all there, you just look at their reports. (Business representative 2)

Another business representative described their efforts to ensure the PCBUs within their supply chain are compliant with the Australian Logistics Council code of practice:

Because there are some carriers that are engaged at the more customer end of our business, in the distribution business ...They utilise local carriers. So our challenge is to continually try and utilise our contracts team to put contracts in place so we can move up to what we say we will do to engage carriers who are signatories to the [Australian Logistics Council] code. As we've acquired new businesses… we've had situations where we've had just owner/drivers operating. We've put contracts in place and we're challenging that. I'm up in [city] in a couple of weeks' time to have a look at one of our acquired sites and how well that model works as owner/drivers who just have a contract in place for exactly that level playing field and how much risk does that add to our business. (Business representative 3)

… but I think what has had a good impact is you've got a number of larger organisations who are really trying to do the right thing and are putting pressure on the rest of the industry. As [supermarket] I think we see ourselves as a leader in that field as well. With large carriers like [major transport companies] who are also putting a lot of effort into making sure that they are doing the right thing, that's having a flow on effect. We've seen it over the last about six years or so where we're getting more and more carriers to take on board a code of practice so that they're seen to be doing something, and they're testing themselves each year to make sure that they're heading in the right direction. (Business representative 1)

Some business owners employ compliance officers to complete physical inspections:

Interviewer: How do you go about complying with [chain of responsibility] obligations?

Respondent: Yeah, well , I've got a compliance team...I've got six people working for me in compliance, and we do audits. So, you know, we go round, we do about 20 audits a month on both company operations and subcontractors. So we'll get a subcontractor in and we'll audit that person…or fleet company…there's about 120 questions... driver's sheets, fatigue, all these things, vehicle maintenance, all these things come into it. (Business representative 5)

They also invest in information technology to assist in collecting and retaining information relating to compliance:

OK so pretty much we run a shared server in the organisation so we've got our intranet which gives us templates of all the documents to use and the standard S.O.P's for certain processes and all those sorts of things. Each of my sites then have a share folder for all their safety, compliance stuff that's going on…So fatigue management audits, OH&S compliance audits, chain of responsibility audits. They're also then audited nationally once a year by one of the state risk managers who goes into a different state to do it so it's a different eye coming in, so it's like a cross-divisional audit…So all sites either have OH&S meetings, toolbox meetings, management meetings, review the risk plans that each site has set up… every quarter the fatigue audit happens but randomly throughout the year the other two happen. They must raise corrective actions on a monthly basis so if the driver reports something or you find something wrong raise a corrective action in the system, you need to put it in. (Business representative 4)

Government regulators, however, don't see the auditing extending down to the next layer of subcontractors:

… my mind's out on, when I was talking about that [major transport company] principle where they audit their company, that they immediately do, and as you get further down that group is less and less. Yet from a legislation point of view, it probably shouldn't be, because they are in a position to influence it and stuff like that. My mind's out on whether they realise that that even occurs, or that they do it in good faith…I don't know – if they turn around and say, look, this is what we want, whether that's just because the [company] banner's on there or whether it's genuine, look, these workers are eventually working for us. We want to make sure that they do it. I

> *think a lot of them have got a genuine interest in keeping the industry at a level playing field and want industry best practice and want to weed out the operators that don't do that. But how that works out in that chain, it is hard.* (Government regulator 6)

However, the prior regulation implemented by the road safety remuneration tribunal clearly addressed this concern by placing an obligation on businesses at or near the top of supply chains to ensure pay safety was adequate throughout their supply chains. Moreover, the WHS Acts also requires a PCBU to ensure health and safety of all workers throughout their supply chain, and not just to ensure the health and safety of workers by their immediate suppliers. It appears the mandatory obligations of this type are required to address a lack of complacency regarding the implementation of safe conditions of work at businesses further down the supply chain beyond direct contractors.

3. Conclusion

A number of regulators, both governmental and union, using a variety of different regulatory approaches, have had some success in changing business attitudes and culture regarding the regulation of road transport supply chains for employment policy purposes. This has been made possible in part because of the existence of road transport industry supply chain legislative regulation. However, pay and safety issues in road transport supply chains are yet to be fully addressed. The RSR tribunal initiative was comprehensive and had the potential to improve the regulation of pay and safety in road transport supply chains but was prematurely abolished before tribunal regulation could be adequately implemented. Other existing initiatives regulating road transport supply chains for employment policy purposes such as the WHS legislation and the *Heavy Vehicle National Law* are an improvement on previous legislation and are having an effect on corporate attitudes but do not address the important issue of driver pay. The WHS legislation is yet to be fully implemented in the road transport industry. Improved, nation-wide, legislative regulation of pay and safety in road transport supply chains is needed to address the considerable gap left by the abolition of the RSR tribunal. We have raised the issue of complexity in road transport industry regulation but we are of the view that a consistent, comprehensive approach to regulating entire road transport supply chains (such as the prior road safety remuneration tribunal) needs to be put in place (and maintained by successive governments over a sustained period of time) before any wide-ranging process of reducing road transport regulation complexity is undertaken. The pressing policy problem of safety on the roads should take priority over the issue of reducing regulatory complexity.

Some good relationships between the parties involved in the regulation of road transport supply chains were being developed at the time interviews were conducted but there was room for improved co-operation in the regulation of road transport supply chains.

The regulation of road transport supply chains (and TCF supply chains) in Australia has significant implications for the regulation of supply chains economy wide. There is now significant scholarship examining supply chain types and business networks.[132] This scholarship provides valuable insights into variances in the exercise of power in different types of supply chains and the different types of inter-organisational relations in business networks. It does not, however, follow that, because there is variance in supply chains, only some are amenable to an effective form of mandatory, top-down regulation.

To suggest that supply chain regulation should be confined to particular product markets or industries ignores the fact that supply chain arrangements are not static or monolithic.[133] Individual supply chains change over time and supply chains vary considerably from firm to

[132] M Marchington et al (eds), *Fragmenting Work: Blurring Organizational Boundaries and Disordering Heirarchies,* Oxford University Press, Oxford, 2004; G Gereffi, J Humphrey and T Sturgeon, 'The governance of global value chains' (2005) 12(1) *Review of International Political Economy* 78–104 (Gereffi, Humphrey and Sturgeon 2005); D Weil, 'Rethinking the Regulation of Vulnerable Work in the USA: A Sector-based Approach' (2009) 51(3) *Journal of Industrial Relations* 411-430 (Weil 2009); Weil 2014.

[133] Gereffi, Humphrey and Sturgeon 2005, 96.

firm as well as among different industries.[134] Further, most supply chains have certain basic elements which make them amenable to regulation. While certain effective business controllers may have a lower capacity to exercise commercial power,[135] most firms at or near the apex of supply chains exhibit, or have the capacity for, *a requisite degree* of commercial influence. This influence need not be demonstrated by explicit coordination of other supply chain actors; rather firms can exercise market power via their strategic position at the apex of the chain.[136]

Effective business controllers at the apex of supply chains will frequently argue against the imposition of mandatory supply chain regulation on the basis that they only have knowledge of their direct suppliers and no knowledge of, or control over, working conditions further down the chain.[137] However, in particular cases, unions have disproved these claims by providing evidence of significant knowledge and control.[138] For example after publicity, business controllers are able to relatively quickly ascertain the conditions under which their supply chain workers labour[139] and the regulatory scheme itself further empowers firms at the apex to gather information about dealings further down the supply chain, and to exercise control over working conditions.

Thus it is consistent with the literature to suggest that the supply chains amenable to regulation might include those operating in a variety of private industry sectors; those in sectors where the supplier delivers not only goods but services; and those in domains where government agencies rather than private firms are the effective business controllers.[140] Indeed, as we have shown, the WHS Acts *already regulate* supply chains throughout the Australian economy. An effective business controller at the apex of any Australian supply chain owes a duty to any worker (i) who carries out work for the business controller, and (ii) who is engaged (including through sub-contracting arrangements), caused to be engaged, influenced or directed by the PCBU. Also the FWO has regulated various Australian supply chains using accessorial liability under the Fair work Act.

Our argument for further regulation is restricted to the regulation of other supply chains, rather than all business networks or 'production networks'.[141] From a legal perspective, we distinguish between supply chains, made up of a vertical series of contracts or dealings between parties in the chain, and other types of business network such as the franchise,[142]

---

134 Michael Rawling and John Howe, The Regulation of Supply Chains: An Australian Contribution to Cross-National Legal Learning' in K Stone and H Arthurs (eds) *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment, Russell Sage Foundation,* 2013, 233-252, 241 (Rawling and Howe 2013).

135 Nossar 2006; Gereffi, Humphrey and Sturgeon 2005.

136 Rawling and Howe 2013: 241; Gereffi, Humphrey and Sturgeon 2005, 98.

137 C Wright and W Brown, 'The effectiveness of socially sustainable sourcing mechanisms: Assessing the prospects of a new form of joint regulation', (2013) 44(1) *Industrial Relations Journal* 20-37, 26 (Wright and Brown 2013); G Nimbalker, C Cremen and H Wrinkle, *The Truth Behind the Barcode; The Australian Fashion Report*, Baptist World Aid Australia, 19 August 2013, 18.

138 I Nossar, R Johnstone and M 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(2) *Australian Journal of Labour Law* 137-160, 151.

139 Wright and Brown 2013, 27.

140 Rawling and Howe 2013, 242.

141 A Rainnie, A Herod and S McGrath-Champ, 'Review and Positions: Global Production Networks and Labour' (2011) 15(2) *Competition and Change* 155-169.

142 Weil 2009, 419.

the corporate group or the triangular labour hire arrangement, which are likely to give rise to different regulatory issues and solutions.[143] Having said that, there is no reason as to why each type of contractual network, perhaps by separate legal initiatives, could not be regulated for the purposes of employment law policy.

Finally, there is no obvious impediment (other than a lack of political will) preventing the regulation of transnational supply chains extending into the jurisdiction of a domestic government. In principle an effective business controller selling goods within a developed world economy could be required to insert contractual provisions into contracts with overseas suppliers and disclose information about the overseas location of production of goods and the conditions under which those goods are produced.[144]

143 Johnstone, McCrystal et al 2012, 47-76.

144 I 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, (copy on file with author); I Nossar, 'Submission for the National Review Into the Model Occupational Health and Safety Laws in Relation to Occupational Health and Safety Within the Context of Contract Networks (Such as Supply Chains) Textile Clothing and Footwear Union of Australia', (NSW/SA/Tas Branch, 2008), (copy on file with author); R Johnstone, 'Informal Sectors and New Industries: The Complexities of Regulating Occupational Health and Safety in Developing Countries', in J Fudge, S McCrystal and K Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* , Hart, Oxford, 2012, 67-80, 80; and M Rawling, 'Legislative regulation of global value chains to protect workers: A preliminary assessment', (2015) 26(4) *The Economic and Labour Relations Review* 660-677.