# *Compromising Road Transport Supply Chain Regulation: The Abolition of the Road Safety Remuneration Tribunal*

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***Abstract***

Many truck drivers and other road users are killed each year in heavy vehicle crashes. Client influence over road transport supply chains, weak bargaining power of drivers, unpaid working time, intense competition and trip-based or incentive-based payment methods have resulted in reduced driver pay. In this context, remuneration-related incentives to engage in hazardous practices can lead to poor safety outcomes. To address these factors, the Road Safety Remuneration Tribunal was established and began operation in July 2012, only to be abolished by the Turnbull Coalition Government in April 2016. This article examines the Tribunal's *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* (Cth) ('*2016 RSRO*') and the political backlash to the Order. The *2016 RSRO* set minimum pay rates for contractor drivers on a national basis for the first time and established supply chain accountability provisions with the potential to address the causes of low pay and poor safety in the road transport industry's supermarket and long haul sectors. We argue that the Tribunal should have been given the opportunity to introduce the *2016 RSRO*, instead of being prematurely abolished. We suggest that concerns about the *2016 RSRO* could have been addressed by the Tribunal amending the Order.

## I Introduction

For some time now, research has highlighted how supply chains can generate adverse working conditions and outcomes for supply chain workers. That same research has noted that mandatory regulation of supply chains as a whole has the potential to counter these adverse outcomes by making accountable powerful entities within the chain and harnessing their influence to address low pay and poor working

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conditions.[1] Nevertheless, legislation that explicitly regulates supply chains for employment policy purposes has, so far, been rare.[2] For these reasons, the recent introduction of an Australian Road Safety Remuneration Tribunal to regulate entire road transport supply chains — by addressing the low pay and poor conditions of road transport workers — has been of great interest for labour lawyers and regulatory scholars alike. The subsequent abolition of that Tribunal by a conservative Australian Federal Government has, likewise, been a salutary lesson in the brutal politics of regulation.

The way that the Australian road transport industry currently operates poses considerable health and safety risks both for those working as truck drivers and for everyday road users, with hundreds of people killed each year in crashes involving heavy vehicles.[3] Workers engaged as truck drivers are made up of two main groups: owner-drivers, who are typically considered to be contractors at common law; and drivers who are employees at common law. Those engaged as employees are usually entitled to a broader range of industrial rights and entitlements (such as those provided under the *Fair Work Act 2009* (Cth)) than their contractor counterparts. The threat to health and safety occurs within an industry where commercial power wielded by powerful 'off-road' clients (in particular, major supermarkets) over the whole supply chain strongly influences the working conditions of road transport owner-drivers — known as 'contractor drivers' in the *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* (Cth) ('*2016 RSRO*').[4] Economic pressures emanating from clients at the top of the supply chain are passed down the chain. Drivers do not have the bargaining power to resist these economic pressures and consequently bear the burden of unpaid working time, intense competition for

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1 See, eg, David Walters and Phil James, 'What Motivates Employers to Establish Preventive Management Arrangements within Supply Chains?' (2011) 49(7) *Safety Science* 988; Phil James et al, 'Regulating the Employment Dynamics of Domestic Supply Chains' (2015) 57(4) *Journal of Industrial Relations* 526; Michael Quinlan, 'Supply Chains and Networks' (Safe Work Australia, July 2011); Tess Hardy and John Howe, 'Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains' (2015) 57(4) *Journal of Industrial Relations* 563; Chris F Wright and William 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; Chris F Wright and Sarah Kaine 'Supply Chains, Production Networks and the Employment Relationship' (2015) 57(4) *Journal of Industrial Relations* 483; David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve It* (Harvard University Press, 2014); Igor Nossar, Richard Johnstone and Michael Quinlan, 'Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia' (2004) 17 *Australian Journal of Labour Law* 137; Igor Nossar, 'The Scope for Appropriate Cross-Jurisdictional Regulation of International Contract Networks (Such as Supply Chains): Recent Developments in Australia and their Supra-National Implications' (Keynote presentation to ILO Workshop on Better Health and Safety for Suppliers, Toronto, 17 April 2007).

2 A notable exception is the industry-specific legislative regulation of textile clothing and footwear supply chains in Australia.

3 See, eg, Bureau of Infrastructure, Transport and Regional Economics, Department of Infrastructure and Regional Development (Cth), *Fatal Heavy Vehicle Crashes Australia Quarterly Bulletin* April–June 2017, 1; Department of Education, Employment and Workplace Relations (Cth), *Safe Rates, Safe Roads: Directions Paper*, Commonwealth of Australia (2010) 2; Safe Work Australia, 'Work-Related Fatalities Involving Trucks, Australia, 2003 to 2012' (Safe Work Australia, May 2014).

4 Road Safety Remuneration Tribunal, *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016*, PR350441, 18 December 2015.

work, and trip-based or incentive-based payments.[5] Thus multi-tiered, sub-contracting or supply chain arrangements are an element contributing to reduced contractor driver pay rates (and the payment of those reduced rates is frequently delayed), which has also placed downward pressure on the pay of employee drivers.[6] These factors together create, and sustain, remuneration-related incentives for transport operators to engage in hazardous on-road practices that can result in poor health and safety outcomes for truck drivers and other road users.

To address these factors, the *Road Safety Remuneration Act 2012* (Cth), ('*RSR Act*') established a workplace tribunal, the Road Safety Remuneration Tribunal ('the Tribunal'), which began operation on 1 July 2012. The Tribunal was established after government reports concluded that there was a need for specific regulation of the road transport industry because of the competitive nature of the industry, commercial pressures — including the supply chain dynamics in the industry — and a range of other factors.[7] The Tribunal was given the power to impose mandatory regulation — including enforceable orders — on all parties in road transport supply chains, with the aim of improving safety and fairness in the road transport industry.[8] We note that this is a 'responsive' form of regulation: Federal Parliament delegated regulatory functions to the Tribunal, with the aim that 'government … more closely harmonize regulatory goals with laissez-faire notions of market efficiency'.[9] Rather than impose inappropriately blunt measures on supply chain parties, the Tribunal was able to consult widely with all stakeholders, and craft orders that were responsive to the needs of industry parties, while at the same time seeking to achieve the overall regulatory aim of improving the safety of truck drivers and other road users.

An enforceable order, the *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014* ('*2014 RSRO*'),[10] was introduced by the Tribunal in 2014. Previously, we have argued that the *2014 RSRO* inadequately regulated supply chains in the road transport industry because it only imposed weak, process obligations on the most influential parties in the supply chain — road transport industry clients.[11] Then, in December 2015, the Tribunal made the *2016 RSRO*, which regulated a typical, four-level, road transport supply

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5 Michael Quinlan and Lance Wright, 'Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission' (National Transport Commission, October 2008) 10.

6 Ibid.

7 Ibid; Lance Wright and Michael Quinlan, 'Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry' (Final Report, National Transport Commission, October 2008); Michael Quinlan, 'Report of Inquiry into Safety in the Long Haul Trucking Industry' (Motor Accidents Authority of New South Wales, November 2001).

8 See the repealed *Road Safety Remuneration Act 2012* (Cth) ss 9, 19(1), s 9 (definition of 'participant in the supply chain'), 27(3).

9 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 158. See also John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *University of British Columbia Law Review* 475.

10 Road Safety Remuneration Tribunal, *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014*, PR350280, 17 December 2013.

11 Richard Johnstone, Igor Nossar and Michael Rawling 'Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal' (2015) 43(3) *Federal Law Review* 397.

chain. Most relevantly, the two parties above the direct hirer — such as supermarkets and major transport companies — who give out road transport work in a typical supply chain were required to conduct an annual audit of the direct hirer's compliance with minimum rates in the *2016 RSRO*.[12] In so doing, not only did the *2016 RSRO* set minimum pay rates for contractor drivers (in the supermarket and long distance sectors of the industry) on a national basis for the first time, but it also largely rectified the deficiencies of the draft 2016 Order and the *2014 RSRO* (which lacked substantive supply chain obligations). The *2016 RSRO* was a significant ruling establishing a robust set of supply chain obligations with the potential to address the root causes of low pay and poor safety in the supermarket and long haul (also known as 'long distance') sectors. Further, mandatory regulation of these domestic supply chains might be more practically viable than in other industries where work can easily be offshored,[13] because the workers at the base of the road transport supply chain work in Australia, and, indeed, are usually located in the same Australian national jurisdiction as all of the commercial parties in the supply chain. And despite some uncertainties in the *2016 RSRO* about specifying the obligations of the parties at, or near the top of, the road transport supply chain,[14] the *2016 RSRO* was a world-leading regulatory initiative to address low pay and poor safety in the road transport sector. In April 2016, however, the *RSR Act* was repealed by the *Road Safety Remuneration Repeal Act 2016* (Cth) and the Tribunal thereby abolished by the Turnbull Coalition Government.

In this article, we examine the *2016 RSRO*, and the subsequent political backlash to its introduction. We argue that the Tribunal should have been given the opportunity to amend the *2016 RSRO* instead of being prematurely abolished. We suggest that the Tribunal was abolished for political reasons, rather than because of any lack of evidence about the necessity of the Tribunal.

Part II of the article examines the supply chain dynamics in the Australian road transport industry, with a particular focus on the consequences of the rising influence of road transport industry clients — such as large supermarket chains situated at the apex of road transport supply chains — who are consignors and consignees of goods carted by road. This analysis supports our argument that mandatory regulation of pay and conditions within road transport supply chains is necessary. Part III of the article then briefly explains how the (now repealed) *RSR Act* provided the Tribunal with the power to impose substantive obligations regarding the pay of road transport drivers on all the parties in the supply chain, including clients at the apex of the chain.

Part IV analyses the orders made by the Tribunal, beginning briefly with the *2014 RSRO*, but focusing on the proceedings leading to the draft 2016 Order, and the Tribunal's responses to concerns with the draft 2016 Order. We outline the *2016 RSRO*, and examine the extent to which it imposed obligations regarding the pay of drivers on influential parties in the supply chain, including consignors and consignees. We argue these Tribunal processes demonstrate the superior responsiveness of this form of regulation. We also argue that an amended *2016*

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12 *2016 RSRO* cl 8.
13 See James et al, above n 1, 526–7.
14 See Part IV(B)(3) below in this article.

*RSRO* could form the basis of a blueprint for any future measures to establish effective regulation of pay and safety within road transport supply chains. The article then analyses the events leading up to the abolition of the Tribunal. We present evidence of media bias and of the zeal and opportunism that the Federal Coalition Government exhibited in capitalising on this media bias, and we also analyse the business campaign against the Tribunal. The final Part of the article analyses the government reports released by the Coalition at a crucial time in the campaign against the Tribunal, and we show that these reports did not provide a conclusive case in favour of abolition.

## II Reports on the Necessity of Mandatory Regulation of Truck Driver Pay and Safety

This Part outlines research supporting the previous (2010–13) Federal Labor Government's initiative to introduce mandatory legal regulation of road transport supply chains in order to address low pay and poor safety in the Australian road transport industry. That research substantiates our contention in this article that the abolition of the Road Safety Remuneration Tribunal was unjustified.

There is a growing body of research into the adverse effects of supply chain dynamics on workers labouring within supply chains.[15] These dynamics are particularly evident in the road transport industry. Prior to the establishment of the Tribunal, government reports[16] found that commercial pressures passed down road transport supply chains can lead to reductions in truck driver pay, which in turn can encourage hazardous on-road practices leading to poor safety outcomes.[17] It is in undermining pay and related conditions that the power dynamics in road transport supply chains are most evident.[18] Economically powerful industry clients have the commercial influence to set the price for transport services and also, in many instances, to set other key parameters for the performance of transport work, such as time taken to deliver goods and materials by road.[19] This influence establishes

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[15] See Wright and Quinlan, above n 7; Walters and James, above n 1, 989; Phil James et al, 'Regulating Supply Chains to Improve Health and Safety' (2007) 36(2) *Industrial Law Journal* 163, 166–70; Christopher Wright and John Lund, 'Supply Chain Rationalization: Retailer Dominance and Labour Flexibility in the Australian Food and Grocery Industry' (2003) 17(1) *Work, Employment and Society* 137, 142–51.

[16] Quinlan, above n 7, 152–3; Quinlan and Wright, above n 5, 49-50; Department of Education, Employment and Workplace Relations (Cth), above n 3, 15–16. See also Claire Mayhew and Michael Quinlan, 'Economic Pressure, Multi-Tiered Subcontracting and Occupational Health and Safety in Australian Long-Haul Trucking' (2006) 28(3) *Employee Relations* 212; David A Hensher and Helen C Battellino, 'Long-Distance Trucking: Why Do Truckies Speed?' (1990) 15 *Papers of the Australasian Transport Research Forum* 537, 553; Michael H Belzer, 'The Economics of Safety: How Compensation Affects Commercial Motor Vehicle Driver Safety' (Paper presented at Safe Rates Summit, Canberra, 21 November 2011); Daniel A Rodríguez, Felipe Targa and Michael H Belzer, 'Pay Incentives and Truck Driver Safety: A Case Study' (2006) 59(2) *Industrial and Labor Relations Review* 205.

[17] *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* [2015] RSRTFB 15 (18 December 2015) 6 [11].

[18] Australian Trucking Association, Submission to the National Transport Commission, *Safe Payments Inquiry*, September 2008, 8.

[19] Ibid; Igor Nossar, 'Consequential Amendments to OHS Amendment (Long Distance Road Freight Transport) Regulation Draft', Textile Clothing and Footwear Union of Australia (Briefing Paper 2004) 1.

industry clients as the 'price makers'[20] or 'effective business controllers'[21] of the road transport supply chain.

Included in this category of influential clients is two dominant food and grocery supermarket retailers (Coles and Woolworths)[22] with substantial road transportation requirements as consignors and consignees of goods transported by road.[23] As consignors of goods, they typically set the price for road transport services and impose sanctions for failing to meet contractual obligations. As consignors and/or consignees of goods, they dictate a range of client requirements including delivery schedules and specifications for loading and unloading of goods transported.[24] Since the 1980s, the influence of these consignors and consignees has been consolidated, while road transport companies, including major road transport employers, have experienced a significant dilution of their bargaining power relative to many of their off-road clients.[25] Many major road transport companies have struggled to make a profit in circumstances where they offer fair pay and conditions to road transport workers under enterprise agreements, while receiving inferior terms themselves in freight contract terms and conditions set by dominant clients.[26] In order to meet the onerous cost requirements of large clients from the retail sector, major transport companies, in addition to employing drivers whose remuneration may be set by an enterprise agreement, often contract out work at lower pay rates to smaller fleet operators who may undertake the work themselves, or further subcontract the work out to contractor drivers at even lower rates.[27]

The contractual demands originally determined by major retailer clients can impose cost discipline and delivery time constraints on parties throughout the remainder of the road transport supply chain structure.[28] The parameters set by clients — such as maximum price paid and the maximum travel time available for truck journeys to deliver client freight — thus shape practical outcomes for truck drivers at the base of the chain.[29] The weight of this cumulative contractual pressure induces intense competition in the local market between readily substitutable employee drivers and contractor drivers who have become 'price takers' and frequently must accept pay rates and conditions dictated to them or else fail to

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20 See Natalie James (Fair Work Ombudsman), 'A Compliant Supply Chain is Everyone's Business' (Media Release, 10 March 2016) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/march-2016/20160310-compliant-supply-chain-op-ed>.

21 Nossar, above n 1, 6.

22 According to Roy Morgan Research, Coles and Woolworths have a combined market share of 69.5%: Roy Morgan Research, 'Supermarket Weep: Woolies' Share Continues to Fall and Coles and Aldi Split the Proceeds' (Press Release, Finding No.7021, 24 October 2016).

23 Michael Rawling and Sarah Kaine, 'Regulating Supply Chains to Provide a Safe Rate for Road Transport Workers' (2012) 25(3) *Australian Journal of Labour Law* 237, 240–41.

24 See Quinlan, above n 7, 180; Quinlan and Wright, above n 5, 50.

25 Quinlan, above n 7, 180.

26 Johnstone, Nossar and Rawling, above n 11, 404.

27 See Mayhew and Quinlan, above n 16, 213, 215; Quinlan and Wright, above n 5, 19, 23.

28 Department of Education, Employment and Workplace Relations (Cth), above n 3, 6; Nossar, above n 19, 2.

29 See *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* (2006) 158 IR 17, 25; Nossar, above n 19, 3.

receive the work.[30] Contractor drivers' inferior bargaining capacity, the weight of supply chain pressures and the competitive nature of the transport industry have produced a steady decline in pay rates in real terms over the last 30 years.[31] Compounding the problem is the fact that drivers continue to be unpaid for time spent queuing and loading and unloading.[32] Rates for some contractor drivers have become so unsustainably low that some transport providers and contractor drivers cut corners on matters such as essential truck maintenance, and use rest breaks to load and unload, causing drivers to become fatigued and creating unsafe conditions for drivers and the public on the road.[33] Consequently, the road transport industry is among the most dangerous industries in which to work in Australia, with around 200 people killed each year on Australian roads in crashes involving heavy vehicles.[34]

Thus, without mandatory regulatory measures designed to create supply chain accountability for the pay and conditions of road transport drivers, pay and safety in the road transport industry will continue to remain inadequate.[35] A clear justification for regulation to ensure increases in driver pay rates is provided by research demonstrating that higher compensation results in lower probability of a driver being involved in a crash.[36]

## III The Statutory Powers of the Tribunal to Impose Supply Chain Obligations regarding Contractor Driver Pay and Conditions

As we note in Part II above, some road transport industry clients already regulate supply chains for their own commercial interests. This provides an opportunity for regulators to harness the existing powers of these clients over their own supply chains in order to enhance, rather than undermine, the pay, conditions and safety of road transport workers. Mandatory regulation could, for example, require clients to monitor and enforce compliance with pay and conditions throughout their supply

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30 Wright and Quinlan, above n 7, 22, 24–5; Quinlan and Wright, above n 5, 25; *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* (2006) 158 IR 17, 75.

31 Regulation Impact Statement, Road Safety Remuneration Bill 2012 (Cth), xii; Quinlan and Wright above n 5, 16, 19, 26, 40; Quinlan, above n 7, 180.

32 Wright and Quinlan, above n 7, 13.

33 Quinlan and Wright, above n 5, 16, 19, 26, 40; Quinlan, above n 7, 180; Ange Lavoipierre, 'Coles Truckies Break the Law due to Pressure from Supermarket Chain, Union Says', *ABC News* (online), 4 June 2015 <http://www.abc.net.au/news/2015-06-04/coles-truck-drivers-under-pressure-to-break-the-law/6522816>.

34 Bureau of Infrastructure, Transport and Regional Economics, Department of Infrastructure and Regional Development (Cth), above n 3.

35 See Wright and Quinlan, above n 7, 55; Quinlan and Wright, above n 5, 61.

36 Daniel A Rodríguez et al, 'Effects of Truck Driver Wages and Working Conditions on Highway Safety: A Case Study' (2003) 1833 *Transportation Research Record* 95; Rodríguez, Targa and Belzer, above n 16; Belzer, above n 16; Michael H Belzer, Daniel Rodriguez and Stanley A Sedo, 'Paying for Safety: An Economic Analysis of the Effect of Compensation on Truck Driver Safety' (10 September 2002) <https://www.researchgate.net/publication/242737359_Paying_for_Safety_An_Economic_Analysis_of_the_Effect_of_Compensation_on_Truck_Driver_Safety>; Ann Williamson et al, 'Driver Fatigue: A Survey of Long Distance Heavy Vehicle Drivers in Australia' (Information Paper No CR 198, National Road Transport Commission, September 2001).

chains.[37] This is exactly what the Road Safety Remuneration Tribunal was empowered to do. Under the *Road Safety Remuneration Act 2012* (Cth), the Tribunal had regulatory powers that applied nationally across all road transport sectors[38] and could make orders to impose obligations in relation to pay and conditions of road transport workers binding on all of the participants in the road transport supply chain, including consignors and consignees.[39] The Tribunal had the power to make such orders consistent with the objects of the *RSR Act*,[40] which included: developing and applying enforceable standards throughout the road transport supply chain to ensure the safety of road transport drivers;[41] ensuring that hirers and supply chain participants take responsibility for implementing and maintaining those standards;[42] removing remuneration-related incentives, pressures and practices that contribute to unsafe work practices;[43] and ensuring that road transport drivers were paid for time spent loading, unloading and waiting for someone else to load or unload.[44] The *RSR Act* explicitly included the power to make orders about minimum 'rates of remuneration and conditions of engagement for contractor drivers'[45] and conditions for loading and unloading vehicles and waiting times.[46]

To make a road safety remuneration order ('RSRO'), the Tribunal had to prepare, and consult on, a draft order.[47] Once those procedural requirements were met, the Tribunal could make any order it considered appropriate about remuneration and related conditions for road transport drivers.[48] This puts paid to the suggestion — raised in the media furore (discussed further below) leading up to the abolition of the Tribunal — that the Tribunal had somehow exceeded its powers by setting minimum rates for contractors.[49]

The *RSR Act* empowered the Tribunal to impose RSROs on an employer or hirer of a road transport driver or 'a participant in the supply chain'.[50] A 'participant in the supply chain' was defined in s 9 explicitly to include a consignor or consignee (of a thing in respect of which a road transport driver is providing road transport services)[51] and an intermediary (that is, a party to a contract for the carriage of goods that is about the transport of a thing in respect of which a road transport driver is providing road transport services)[52] — as long as they fell within the broad range of legislative powers now available to the Commonwealth pursuant to the *Australian*

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37 Walters and James, above n 1, 989.
38 *Road Safety Remuneration Act 2012* (Cth) ss 3, 6–7, 79.
39 Rawling and Kaine, above n 23, 250.
40 *Road Safety Remuneration Act 2012* (Cth) s 19(1).
41 Ibid s 3(d).
42 Ibid s 3(e).
43 Ibid s 3(b).
44 Ibid s 3(c).
45 Ibid s 27(2)(b).
46 Ibid s 27(2)(c).
47 Ibid s 22.
48 Ibid s 27(1).
49 See Kelly quoting Senator Nick Xenophon as saying the new minimum payments rates power had gone 'way beyond what I thought it would do': Joe Kelly, 'Top Court Challenge for Road Tribunal', *The Australian* (Canberra), 7 April 2016, 6.
50 *Road Safety Remuneration Act 2012* (Cth) s 27(3)(b).
51 Ibid ss 9(2)–(3).
52 Ibid s 9(4).

*Constitution* under the corporations power (s 51(xx)), the trade and commerce power (s 51(i)), the territories power (s 122) and the power to regulate the Commonwealth public service (s 52). A supply chain participant was also defined to include a constitutional corporation that operated premises used to load and unload an average of at least five vehicles each day.[53] The Tribunal had clear powers to make off-road clients who were consignors and consignees of goods accountable for the pay and conditions of road transport drivers. These powers were necessary to address the commercial pressures on driver pay and safety in the road transport supply chain discussed above.

Of course, the confident exercise of such broad powers by the new Tribunal was necessarily dependent on the Tribunal having a secure expectation of continuity and government support in the exercise of those powers. The election in 2013 of a Coalition Government ideologically committed to the abolition of the Tribunal could well have been expected to erode any such confidence that the Tribunal might otherwise have been expected to exhibit.

The next Part of this article considers the extent to which, before it was abolished, the Tribunal carried out processes to ensure it was responsive and accountable in the RSROs it made in the supermarket and long distance sectors.

## IV Road Safety Remuneration Orders Made by the Tribunal

### A *The* 2014 RSRO

The *2014 RSRO* applied to the supermarket and long distance sectors of the road transport industry.[54] In making that RSRO, the Tribunal rejected arguments to place substantive obligations upon supply chain participants. Instead, the Tribunal mainly focused on the obligations of employers and direct hirers, and only imposed partial (and weak) obligations on consignors and consignees.[55] Under the main clause regarding consignor and consignee responsibility, there was a requirement for a supply chain participant, including a consignor and consignee, to take reasonable measures to ensure that any contract it had with another participant in the supply chain was consistent with the requirements of the *2014 RSRO*.[56] However, as argued elsewhere,[57] absent a beneficial reading, there was a real concern about the lack of substance to client responsibility under this clause because, while the clause imposed obligations on a client to contract consistently with the requirements of the Order, the Order did not impose any major requirements on clients elsewhere in the *2014 RSRO*. In addition, the clause required consignors and consignees to *contract* in a manner consistent with the Order, but did not require them to *take action* to ensure compliance with the Order.[58] The Tribunal's cautious approach fell well short of fully utilising the broad powers it had under the *RSR Act* to make orders that were

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53 Ibid s 9(6).
54 *2014 RSRO* cl 4.
55 Johnstone, Nossar and Rawling, above n 11.
56 *2014 RSRO* cl 8.
57 Johnstone, Nossar and Rawling, above n 11, 417.
58 Ibid.

binding on supply chain participants with the objectives of developing and applying enforceable standards throughout the road transport supply chain.[59]

Various submissions about minimum payments were made in the proceedings leading to the *2014 RSRO*, but the Tribunal declined to provide for minimum rates in the *2014 RSRO*. The Tribunal did, however, foreshadow that it would convene a conference on minimum rates and that minimum rates would be the subject of future tribunal proceedings.[60] Thus, the scene was set for the Tribunal to take further measures to regulate road transport supply chains in a manner that would more directly address issues of low pay and poor safety.

This cautious approach could well have been a symptom of the Tribunal's lack of confidence in its own survival, given the September 2013 election of a Coalition Government dedicated to the Tribunal's abolition.[61] Indeed, the Tribunal's lack of confidence could only have been reinforced when the Federal Coalition Government, clearly antagonistic to the existence of the Tribunal, commissioned a report into the road safety remuneration system.[62]

## B *The* 2016 RSRO

### 1 *Measures Taken by the Tribunal prior to the Draft RSRO*

The Tribunal's Deputy President Asbury convened a number of conciliation conferences in 2014 to develop areas of agreement, and to narrow differences between the parties, on clauses for a draft order for minimum payments for contractor drivers in the road transport industry. A parallel set of meetings of a working group of representatives of road transport drivers, and those who engaged them, were convened to draft RSRO clauses. A number of interested parties did not, however, join the working group because they wished to reserve their position on all relevant matters and foreshadowed jurisdictional and substantive objections about whether an RSRO regarding minimum payments should be made.[63]

The working group went on to draft and circulate to interested parties what became known as a 'party proposed draft RSRO'.[64] Deputy President Asbury delivered her final report to the President of the Tribunal in December 2014 and Annexure D to the report contained the party proposed draft RSRO. Clause 7 of the party proposed draft contained a number of supply chain provisions covering tendering for road transport services; contractual obligations; and auditing and supply chain transparency arrangements including obligations of consignors and

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59 Ibid 419.

60 *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* [2015] RSRTFB 15 (18 December 2015) 4 [8].

61 Liberal Party of Australia, *The Coalition's Policy to Improve the Fair Work Laws* (Canberra, May 2013) 10.

62 Rex Deighton-Smith, 'Review of the Road Safety Remuneration System' (Departmental document No EM16, Department of Employment (Cth), 16 April 2014) ('2014 Report').

63 Ingrid Asbury, 'Report on Conferences in Relation to Party Proposed RSROs' (Road Safety Remuneration Tribunal, 22 December 2014) 3.

64 Ibid Annexure D – Party Proposed Draft RSRO.

consignees and recovery of underpayments.[65] These supply chain provisions did not reflect a consensus position, because various parties reserved their position on particular wording or provisions. For example, parties such as Toll, Linfox, Coles, the Australian National Retailers Association and the Australian Industry Group ('AIG') were opposed to a clause on the recovery of underpayments provisions proposed by the Transport Workers' Union ('TWU').[66] In the draft 2016 Order and the *2016 RSRO* the supply chain provisions did not include any provisions specifically referring to tendering arrangements or recovery of underpayments.

In April 2015, the Tribunal published on its website an independent research report by KPMG, a leading accountancy and global finance firm that provides professional audit, tax and advisory services.[67] That KPMG report contained a cost model and associated minimum payments for contractor drivers in the supermarket and long distance operations sectors of the road transport industry.[68] Parties then had the opportunity to ask questions about the KPMG report and to make submissions on the Tribunal report by Deputy President Asbury, the KPMG report and any other matter relevant to payments for contractor drivers and associated matters.

## 2 *The Draft* 2016 RSRO

On 26 August 2015, the Tribunal made and published a draft RSRO covering payments and associated issues for contractor drivers.[69] Like the *2014 RSRO*,[70] the draft order applied to the supermarket retail sector and the long distance sector of the road transport industry. The new draft order proposed requirements on supply chain participants and hirers of road transport drivers, covering long distance operations within the private transport industry.[71] It also proposed requirements on supply chain participants (including hirers) involved in the provision by a road transport driver of a road transport service wholly or substantially in relation to goods, materials or anything destined for sale or hire by a supermarket chain.[72]

Significantly, the Draft Order proposed that hirers of drivers in those supermarket and long haul sectors pay their drivers a minimum hourly rate or a minimum per kilometre rate.[73] Those rates were set out in schedules A and B of the Draft Order. The rates in the schedules to the Draft Order were those from the KPMG report.[74] An alternative method of payment in the KPMG report — a higher rate per hour and no rate per kilometre — was not included in the Draft Order.[75] Under the Draft Order, the proposed rates were to be paid for driving time, as well as time

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65 Ibid Annexure D – Party Proposed Draft RSRO cl 7.

66 See note in Ibid Annexure D – Party Proposed Draft RSRO cl 7.15.

67 *Road Safety Remuneration Tribunal Statement* [2015] RSRTFB 11 (26 August 2015) 4 [16].

68 *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* [2015] RSRTFB 15 (18 December 2015) 7 [19]. See below n 157 for definition of 'long distance operation'.

69 Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (Cth).

70 *Road Safety Remuneration Tribunal Statement* [2015] RSRTFB 11 (26 August 2015) 7 [30].

71 Within the meaning of Fair Work Australia, *Road Transport (Long Distance Operations) Award 2010*, PR986381, 3 April 2009, as in force on 1 July 2012.

72 Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (Cth) cl 4.1.

73 Ibid cls 9, 10.

74 *Road Safety Remuneration Tribunal Statement* [2015] RSRTFB 11 (26 August 2015) 9 [41].

75 Ibid.

spent: queuing and/or waiting; loading and unloading; cleaning; inspecting, servicing or repairing a vehicle provided by a hirer; inspecting or attending to a load; refuelling; and recording information or completing a document regarding the vehicle used.[76] Earlier, in May 2015, the Tribunal had issued a statement specifying that any party who wished to make a submission about the payments derived from the KPMG cost model was required to provide the Tribunal with the analysis and data that formed the basis for its submission.[77] Although a number of parties, including AIG and the Retail Council, submitted that the KPMG rates were higher than market rates, no party provided the required analysis and data by the initial date set by the Tribunal.[78] The level of the pay rates in the Draft Order was opposed by a number of parties, including the Retail Council[79] and major transport companies,[80] but welcomed by the TWU.[81]

Clause 8 of the Draft Order contained proposed supply chain accountability provisions to regulate the contract between one supply chain participant ('the first party') and another supply chain participant ('the second party'). While these draft provisions ultimately did not come into force in the form of the final order, it is instructive to consider the draft provisions in order to help identify the strengths and weaknesses of the final order provisions discussed below. Draft cl 8 proposed that a first party would be required to take all reasonable measures to ensure that any contract it had with a second party contained provisions consistent with the order proposed, which were sufficient for (and required compliance with) the proposed order, and which permitted (and required) cooperation with an annual audit of such compliance.[82] The draft clause also proposed that the first party had to conduct an annual audit of the second party, except in respect of irregular contracts.[83] Moreover, where the first party had a reasonable belief that the second party was not complying with the Order, the clause specified that the first party had to provide the second party with written notice about the non-compliance and notify regulatory bodies.[84] If the non-compliance was not rectified after a reasonable period, the draft clause specified that the first party was able to terminate its contract with the second party.[85]

The effectiveness of clauses providing for a right of termination in instances of non-compliance is discussed further below. Such a right of termination was omitted from the *2016 RSRO*. Aside from this, draft cl 8 had significant deficiencies

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76 Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (Cth) cl 11.

77 *Road Safety Remuneration Tribunal Statement* [2015] RSRTFB 11 (26 August 2015) 4 [15].

78 Ibid 5–6 [20]–[21].

79 Retail Council, 'Submissions on Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016' (25 September 2015) 8.

80 Toll Holdings Ltd, 'Submissions on Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016' (25 September 2015) 3; Linfox Australia Pty Ltd, 'Submission of Linfox Australia Pty Ltd (on Draft *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016*)' [5].

81 Transport Workers' Union of Australia ('TWU'), 'Submissions by Transport Workers' Union of Australia (on Draft *Contractor Driver Payments Road Safety Remuneration Order 2016*)' (25 September 2015) 1.

82 Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (Cth) cl 8; *Road Safety Remuneration Tribunal Statement* [2015] RSRTFB 11 (26 August 2015) 8 [37].

83 Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (Cth) cl 8.2.

84 Ibid cls 8.4(a), (b).

85 Ibid cl 8.4(c).

which, as discussed below, the Tribunal largely rectified in the final order. Arguably, the practical application of draft cl 8 would not have been sufficient in achieving adequate accountability of supply chain participants for pay and conditions of road transport drivers.[86] There are four main reasons for this. The first three reasons resulted from a lack of specificity in the clause. The fourth reason was the result of narrow drafting of the clause. We now examine each of these in turn.

The first difficulty with cl 8 of the Draft Order was that it could be read as a link-by-link form of regulation: it sought to regulate each link in the supply chain separately and not the supply chain as a whole. Once there was an elongated supply chain of more than three parties, the top of the chain obligations were so diluted under draft cl 8 as to not be meaningful regulation of the top of the supply chain. In other words, the draft clause did not adequately make the top of the supply chain accountable for the pay and conditions of road transport drivers in any real sense, because the draft provision was limited to regulating a contract between a first party and a second party in the supply chain. Although each participant in the supply chain would have obligations, the provision failed to provide a form of obligations adequately regulating the supply chain because at no point in the supply chain would cl 8 enable a party to have information about an entire supply chain made up of three or more parties.[87] For example, under the draft provision, where a consignor outsourced road transport services to a major transport company, the clause would regulate the contract between the consignor, as the first party, and the major transport company, as the second party. If the major transport company then outsourced road transport services to a smaller, direct hirer or employer of road transport workers, then the clause might have regulated the contract between the major transport company as the first party and the smaller direct hirer or employer as the second party, but the consignor (that is, the original 'first party') might not have been able to easily ascertain complete information, records or documents that would have disclosed the contractual arrangements that made up the entire road transport supply chain.[88] In particular, the consignor might not have had any records about the road transport services contract between the major transport company and the direct hirer or employer. The consignor, therefore, might not have had sufficient information to conduct an audit on the pay and conditions of drivers within its supply chain. Thus, the information might have been insufficient for the consignor to be accountable for the pay and conditions of those road transport drivers engaged by the small hirer.

The second reason draft cl 8 might not have achieved adequate accountability of supply chain participants for the pay and conditions of road transport drivers was that the second supply chain participant[89] might not have had any standalone

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86 Witness Statement of Michael Rawling in the matter of Contractor Driver Minimum Payments Road Safety Remuneration, Road Safety Remuneration Tribunal (RTP 2014/1, RTP 2013/1, RTO 2015/3, RTP2013/2, RTO2013/3, RTO2013/4, RTO 2013/5, RTO 2014/1, 9 October 2015) 4.

87 Ibid.

88 Unless the first party was able, in its audit, to access the audit undertaken by the second party of the next party down the supply chain and so on.

89 An explanation of who may be a consignor, consignee, intermediary or operator of premises for loading and unloading was contained in the definition of 'participant in the supply chain' and 'participant in the supply chain in relation to a road transport driver' in the Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (Cth) cl 3. These parties may not necessarily directly hire road transport drivers.

obligations under the Order. So, unless the supply chain participants also happened to directly hire road transport drivers, the clause would have had little utility: it would have required the first party to ensure the second party complied with the Order, but the second party might not have had any obligations under the Order with which to comply.[90] To rectify this deficiency, the TWU submitted that the clause needed to specifically require all supply chain participants to take reasonable measures to ensure that the road transport driver ultimately performing the work was remunerated in accordance with the Order,[91] no matter how many parties there were in the supply chain.

The third reason for inadequate accountability was that draft cl 8 did not sufficiently specify which parties had which particular supply chain obligations. The clause only specified that there was a first supply chain participant with certain obligations and a second supply chain participant with certain obligations. The clause did not specify which particular supply chain participants[92] held the obligations of the first party, and which particular supply chain participant would have had the obligations of the second party. For example, the draft clause did not explicitly state that the first party was the consignor or consignee of goods or materials and the second participant was the party that entered into arrangements with the consignor to transport by road the goods owned by the consignor. Given this insufficient identification of the first party (or the second party), the Retail Council submitted that it was possible to read draft cl 8 as regulating from the bottom up, as well as the top down. In particular, a perhaps unintended consequence of the lack of specificity in the clause meant that the clause could be read as requiring a fleet operator to audit a consignor (such as a supermarket operator) at the top of the chain and a hirer or intermediary (such as a small fleet operator) to audit a major road transport company.[93] Therefore, the Retail Council recommended that the obligation to conduct an audit be amended to make it clear that the audit obligation is imposed upon the 'upline' participant. A 'downline' participant should not be required to conduct audits of 'upline' participants and an 'upline' participant should not have to consent to such an audit by a 'downline' participant.[94]

Fourth, Linfox[95] and the TWU[96] submitted that promoting the *RSR Act*'s object of ensuring safety and fairness in the road transport industry necessitated the adoption of a holistic approach whereby supply chain participants were required not only to comply with the requirements of the Order, but also with other legislative obligations aimed at managing fatigue, driving hours and work health and safety matters generally. Hence, these parties highlighted that draft cl 8 would confine the accountability of supply chain participants to contractor driver rates only, by specifying supply chain participants need only comply with the provisions of the

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90 TWU, above n 81, 8–9 [24]–[27].

91 Ibid 10 [28].

92 Within the meaning of the definitions of 'participant in the supply chain' and 'participant in the supply chain in relation to a road transport driver' in the Draft Order, which included a consignor or consignee, intermediary or operator of premises for loading and unloading: Draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (Cth) cl 3.

93 Retail Council, above n 79, 8 [4.11].

94 Ibid 16 [4.12].

95 Linfox Australia Pty Ltd, above n 80, [3.5].

96 TWU, above n 81, 10–12 [30]–[34].

Order and not any further relevant legal requirements pertaining to conditions of work for road transport drivers.[97] Given that only part of ensuring that drivers are not fatigued is to have adequate pay, it was important to have other legal obligations included in supply chain provisions to ensure that any problem of non-compliance by a direct hirer was not simply shifted from pay to fatigue or maintenance of vehicles. Equally, the clause needed to ensure that direct hirers would not simply pay a higher contractor rate but then, to offset the pay increase, cut back on matters directly affecting safety such as vehicle maintenance.

### 3 *The Finalised* 2016 RSRO

The *2016 RSRO* (made by the Tribunal in December 2015) was scheduled to take effect from 4 April 2016. However, an interim stay of the *2016 RSRO* was handed down by Justice Collier in the Federal Court of Australia on 1 April 2016.[98] This stay was lifted by a full bench of the Federal Court on 7 April 2016, when it dismissed the claim for interlocutory relief.[99] Thus, the *2016 RSRO* took effect on 7 April 2016. The *2016 RSRO* represented the Tribunal taking further measures to regulate road transport supply chains to address more directly issues of low pay and poor safety. While the Order appeared to reflect the Tribunal's greater confidence in its future prospects, and the further development of its jurisdiction, this confidence turned out to be misplaced because the Federal Coalition Government remained committed to the Tribunal's abolition.[100] Indeed, shortly after the *2016 RSRO* was made, the Government received the report of a second consultant commissioned to review the justification for the entire statutory scheme upon which the Tribunal rested.[101]

The *2016 RSRO* set minimum payments for contractor drivers in the supermarket and long distance sectors of the road transport industry.[102] This needs to be emphasised in the light of what followed the making of the Order — the *2016 RSRO* was not going to apply to all road transport contractor drivers, but only those in the supermarket and long haul sectors. In both of these sectors, there were pressing reasons for the introduction of minimum pay rates for contractor drivers: in the supermarket sector, there was a particularly pressurised work environment for truck drivers with the influence of powerful supermarkets passing economic pressures

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97 Such as requirements under the *Road Safety Remuneration Act 2012* (Cth), minimum standards under the *Fair Work Act 2009* (Cth) and work health and safety legislation: Linfox Australia Pty Ltd, above n 80, [3.5].

98 *National Road Transport Association Ltd v The Hon J Acton, President of the Road Safety Remuneration Tribunal* (Unreported, Order No QUD226/2016, Federal Court of Australia, Collier J, 1 April 2016).

99 *National Road Transport Association Ltd v Road Safety Remuneration Tribunal* [2016] FCAFC 56 (7 April 2016).

100 The Federal Coalition Government did not change the relevant party platform provision: Liberal Party of Australia, above n 61, 10. See also Department of Employment (Cth), 'Discussion Paper: The Road Safety Remuneration System' (Departmental document No EM16, 29 March 2016) — one of the options in this discussion paper was to abolish the Tribunal.

101 PriceWaterhouseCoopers, 'Review of the Road Safety Remuneration System: Final Report' (Departmental document No EM16, Department of Employment (Cth), January 2016) ('2016 Report').

102 *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* [2015] RSRTFB 15 (18 December 2015) 4 [1].

down the supply chain; and in the long distance sector, there was heightened pressure on driver pay due to unpaid working time spent on back trips.

Furthermore, as is canvassed below, the media discussion of pay rates handed down in the *2016 RSRO* focused on the claim that the pay rates were too high and largely brushed aside the fact that the Tribunal had revised the KPMG report rates and set some rates that were considerably lower than those specified in the draft 2016 Order.[103] This was still a significant reform because, for the first time, contractor driver rates applied nationally[104] using the expansive powers that the Federal Parliament has under the corporations power[105] and other powers of the *Australian Constitution*.[106] The rates provided that contractors in the long distance and supermarket sectors were entitled to be paid the full cost of their operation and provided for payment for time spent waiting and queuing, time spent loading and unloading and time taken to clean, inspect, service and repair vehicles.[107] This would have significantly addressed a number of pressing factors which have kept the pay of contractor drivers unsustainably low.

In addition, supply chain participants had substantive accountability to take all reasonable measures to ensure that the contracts they entered into with other supply chain participants did not prevent or impede a hirer from making the payments of minimum rates to contractor drivers.[108] This finalised provision dealt, to a significant extent, with the lack of specificity contained within cl 8 of the Draft Order. In particular, it appeared to address the problem, identified above, that the Draft Order clause did not sufficiently apply to a driver ultimately performing the work because the *2016 RSRO* referred specifically to a hirer 'who engages a contractor driver'.[109]

Part of the Tribunal's approach in the *2016 RSRO* was to place more obligations on supply chain participants 'directly rather than through a contract'.[110] As a consequence, the *2016 RSRO* established a system of supply chain auditing, by requiring the two parties above the hirer in the road transport supply chain[111] to annually audit direct hirers (provided those persons were a party to a contract of carriages or contracts of carriage on 270 or more days in the relevant year).[112] The *2016 RSRO* also required a direct hirer to take all reasonable steps to facilitate an annual audit of the hirer's compliance with the pay rates in the Order.[113] Hirers were already required to keep the records that could be used in the audits. The Tribunal

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103 See Ibid 48 [149].

104 *Road Safety Remuneration Act 2012* (Cth) s 6, 8; *2016 RSRO* cls 3 (definitions of 'contractor driver' and 'road transport driver'), 9, 10.

105 *Australian Constitution* s 51(xx); *New South Wales v Commonwealth* (2006) 229 CLR 1.

106 *Australian Constitution* ss 51(i) (the trade and commerce power), 122 (the territories power), 52 (power to regulate the Commonwealth public service).

107 *2016 RSRO* cl 11.

108 Ibid cl 8.2.

109 Ibid.

110 *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* [2015] RSRTFB 15 (18 December 2015) 26 [89].

111 *2016 RSRO* cl 8.5.

112 Ibid cl 8.6.

113 Ibid cls 8.3–8.10.

emphasised that, under the *Road Safety Remuneration Regulation* (Cth),[114] a hirer of a contractor driver had to keep records if an order imposed requirements upon them and this would have included records about what the hirer paid to a contractor driver.[115]

As a result of these auditing provisions, the *2016 RSRO* regulated from the top down the kind of four-party supply chain (see below Diagram 1) commonly found in the sectors of the Australian road transport industry that were to be regulated by the Order. For example, where a consignor supermarket (Party A) is a party to a contract for the carriage of goods with a major transport company (Party B) who, in turn, gives out the road transport work under a contract for the carriage of goods to a direct hirer of contractor drivers, the consignor and major transport company were required to conduct an annual audit of the direct hirer's compliance with the newly set minimum rates in the Order.

These auditing provisions in the *2016 RSRO* would have largely resolved the first three issues, identified above in Part IV B(2) of this article, about the lack of specificity in cl 8 of the Draft Order. Clause 8 in the *2016 RSRO* much more clearly identified specific parties in the supply chain who would have had the auditing obligations. In particular, the *2016 RSRO* was clear about who audits whom: that is, cl 8 specified the 'upline' parties who were required to audit the direct hirer, and specified that it was the hirer who was to be audited by the 'upline' parties.[116] This clearly eliminated the problem raised by the Retail Council, discussed above, that the draft cl 8 might allow or require a downline party such as a fleet operator to audit an 'upline' party such as a consignor.

Supply chains can, however, change rapidly and can be more complex than the four-party structure illustrated in Diagram 1 below. For example, Party A in the Diagram 1 might hire an intermediary party (Party A1) to enter into a contract of carriage on its behalf with party B. If that occurs, a five-party supply chain is created and Party A1 would have the auditing obligations. Party A may no longer have had any auditing obligations. Thus the Order's supply chain obligations may have been avoided by a party at the apex of the supply chain hiring an intermediary party to enter into contracts of carriage on its behalf. For example, a consignor may have hired an intermediary party to enter into contracts of carriage with a major transport company. The major transport company may then have given out the road transport work to a direct hirer. In that situation the major transport company and the intermediary party (Party A1) would have had auditing obligations under the *2016 RSRO*, but the consignor may not have had any obligations. Consequently, a consignor such as a supermarket chain would not have necessarily had auditing obligations under the *2016 RSRO* unless the supply chain was as simple as, or simpler than, the typical four-party structure illustrated in the diagram above. It is possible that the Tribunal had intended that supermarket chains were to have auditing obligations where they were the consignor of goods being transported. But this was not necessarily the case under the *2016 RSRO* supply chain clause. The consignor was not specifically named as a party who needed to conduct an audit.

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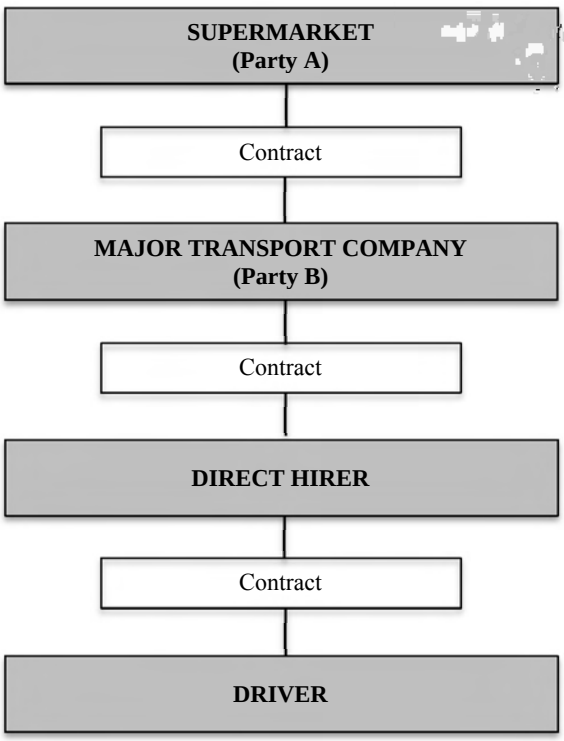
114 Regulations 7.7, 7.12.

115 *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* [2015] RSRTFB 15 (18 December 2015) 25 [86].

116 *2016 RSRO* cls 8.5, 8.8.

Rather, the *2016 RSRO* used the term 'a party to a contract for the carriage of goods'.[117] Therefore, although the clause was much clearer and more precise than the Draft Order clause, what the clause might have done is to name consignors as having auditing obligations. By way of contrast and illustration, under regulation of the Textile Clothing and Footwear ('TCF') industry, the retailer at the apex of the chain who is the party originally giving out the work is specifically named as having supply chain obligations.[118] It has been crucial for the efficacy of TCF industry regulation that the party originally giving out the work be specifically and explicitly regulated. Similarly there is a strong argument that clients such as supermarket chains ought to be explicitly regulated in the road transport industry given the evidence that commercial pressures extending down the supply chain have originated with such clients.[119] If a large consignor or consignors in the supermarket or long distance sectors of the road transport industry were to engage an intermediate Party A1 along the lines described in this paragraph, then there would be a strong argument in favour of placing auditing obligations directly upon consignors.

**Diagram 1**: Four-party supply chain




117 *2016 RSRO* cl 8.

118 Igor Nossar et al, 'Protective Legal Regulation for Home-Based Workers in Australian Textile, Clothing and Footwear Supply Chains' (2015) 57(4) *Journal of Industrial Relations* 585; Michael Rawling, 'Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations' (2014) 27(3) *Australian Journal of Labour Law* 191; Nossar, 'Cross-Jurisdictional Regulation of International Contract Networks', above n 1.

119 See Quinlan, 'Report of Inquiry into Safety in the Long Haul Trucking Industry', above n 7.

Furthermore, as we have argued above**,** economic pressures emanating not only from consignors, but also, in some cases, large consignees make a significant contribution to low pay and poor safety in the road transport industry. Both consignors and consignees have been subject to supply chain accountability, including auditing obligations, under previous New South Wales ('NSW') legislative regulation of safety in the long haul sector of the road transport industry.[120] However, under the *2016 RSRO*, it appeared that large consignees may not have had auditing obligations unless they formally were 'a party to a contract for the carriage of goods'.[121] A consignee — even one with the capacity to exert considerable control over road transport work — might have argued that it was merely in receipt of goods and not party to a contract for the carriage of goods. This stood in contrast to the party proposed draft RSRO, which contained specific obligations on consignees to use due diligence to ensure that their contractual arrangements with a consignor required the consignor to comply with the Order.[122]

In relation to the fourth issue with cl 8 of the Draft Order — limiting the supply chain provisions to compliance with minimum pay and other requirements in the Order — the Tribunal decided that it would limit any audit to compliance with the *2016 RSRO* only and not extend the audit to compliance with other relevant legislative requirements.[123] Under cl 8 of the *2016 RSRO*, if either of the two persons party to a contract of carriage above the direct hirer in the road transport supply chain had formed a reasonable belief, arising out of the audit, that the hirer had not complied with the Order, they were required to give (to the hirer) written notice of the non-compliance. Those two parties in the supply chain above the direct hirer also bore the obligation of requiring the hirer to take action to rectify the non-compliance.[124] If the hirer did not rectify the non-compliance, the person who gave notice of the non-compliance had to immediately advise the Fair Work Ombudsman of their reasonable belief that the hirer had not complied with the Order and the nature of that non-compliance.[125]

Thus, built in to cl 8 was a simple and essential process for pursuing instances of non-compliance. Although the person who was to undertake the audit of the direct hirer could have required the direct hirer to take action to rectify non-compliance, the clause stopped short of empowering that person with the influential commercial sanction of terminating the contract of carriage where such non-compliance persisted. Such a power of termination was included in the Draft Order,[126] but the Tribunal ultimately decided that 'the termination of a contract for non-compliance . . . is better left to other law'.[127] Clause 8 also fell well short of an actual prohibition on clients entering into contracts unless they carry out certain obligations —

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120 *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW) cls 81B(3), 81C, 81D(3); Nossar, above n 1.

121 *2016 RSRO* cl 8.

122 Asbury, above n 63, Annexure D – Party Proposed Draft RSRO cl 7.9.

123 *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* [2015] RSRTFB 15 (18 December 2015) 25 [83].

124 *2016 RSRO* cl 8.11.

125 Ibid cl 8.12.

126 Draft Contractor Driver Minimum Payment Road Safety Remuneration Order 2016 (Cth) cl 8.4(c).

127 *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* [2015] RSRTFB 15 (18 December 2015) 26 [88].

a provision included in the now repealed NSW long haul regulation under which clients were prohibited from entering into contracts with a transport company unless they had satisfied themselves that delivery timetables were reasonable for drivers or there was a safe driving plan in place.[128] Similarly, TCF industry regulation includes the explicit right of a clothing retailer to terminate a contract with a clothing supplier in instances of non-compliance[129] — and we argue that has been a factor contributing to the effectiveness of that regulation in addressing worker exploitation.[130]

Depending on their market leverage and the terms of the particular contract entered into, a party to a contract of carriage may still terminate a contract of carriage where the hirer is not compliant in the absence of explicit authority to do so in a tribunal order.[131] Indeed, if a party entering into contracts of carriage was so minded, they could have made non-compliance with a tribunal order an explicit ground justifying their right to terminate a contract.[132] Moreover, the mere threat of termination, rather than the actual invoking of termination, might have been used to encourage a direct hirer to rectify non-compliance with a tribunal order. We argue, however, that a clause in an order explicitly providing a termination right would make a previously recalcitrant road transport direct hirer more compliance-focused. Further, it might overcome the likely argument by some parties that termination had not been pursued because there was no explicit authority to terminate in instances of non-compliance. It could also facilitate the allocation of road transport work away from direct hirers prone to non-compliance, and towards direct hirers more inclined to comply — thus enhancing the overall effectiveness of the road transport industry regulation.

One unintended consequence of the *2016 RSRO*, reported in the media, was that consumers who engaged truck drivers who were removalists would have to ensure that those truck drivers were paid properly if they were moving interstate.[133] The definition of hirer in cl 3 of the *2016 RSRO* — 'the party to a road transport contract, other than the contractor driver' — was too broad.[134] This issue, which featured in the media campaign to support the abolition of the Tribunal,[135] could have been addressed expeditiously by the Tribunal making amendments to the Order to

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128 *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW) cl 81C (repealed by the *Work Health and Safety Act 2011* (NSW)). A safe driving plan is a written plan for a road transport driver providing for safety matters such rest breaks which is entered into prior to the road transport services being undertaken by the driver.

129 *Ethical Clothing Trades Extended Responsibility Scheme 2003* (NSW) cl 10(2), sch 2 pt B.

130 See Rawling, above n 118, 206; Nossar et al, above n 118, 592; Nossar, above n 1.

131 The principal situation in which a contract can be terminated without breach is where a contract 'expressly confers a right of termination': John W Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 2011) 92 [3-18]. Such an 'express right will be sufficient to enable termination': Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Lawbook Co, 5th ed, 2016) 443 [21.05].

132 'There is nothing to prevent a contract from containing a term providing for its own termination on either the occurrence or failure of some named event.': Stephen Graw, *An Introduction to the Law of Contract* (Lawbook Co, 9th ed, 2017) 509 [15.270].

133 Joe Kelly, 'Removalists Hit as PM Moves to Axe Roads Body', *The Australian* (Canberra), 13 April 2016, 6.

134 See Grace Collier, 'Welcome to Hell, Mr or Mrs Australian Citizen', *The Australian* (Canberra), 13 April 2016, 6.

135 Kelly, above n 133.

specify that only parties who frequently or continuously engaged road contractor drivers over the course of a long period (such as one year) were captured by the definition of a hirer subject to minimum pay rate obligations under the *2016 RSRO*.[136]

In addition to such minor drafting problems, one key structural deficiency in the *2016 RSRO* potentially arose from the Tribunal addressing contractor driver rates in isolation from any mechanism to also oversee the auditing of employee fleets. Further, there was no mechanism to ensure payments made to work providers for transport services were sufficient for workers to be paid adequately whether they were engaged as owner-drivers or employees, notwithstanding the Tribunal's clear capacity to deal with both of these matters at (or around) the same time. As is discussed further in Part V below, this exposed the Tribunal to ill-founded claims that the *2016 RSRO* was aimed at pricing contractor drivers out of the transport market, thereby creating an incentive for contractor drivers to be mobilised against the Order in panic about their futures.

## V The Events Leading to the Abolition of the Tribunal

A political backlash against the *2016 RSRO* derailed its implementation and led to the abolition of the Tribunal by the Turnbull Coalition Government. It is clear from the Coalition's 2013 Federal Election policy that for some time it planned to abolish the Tribunal as part of an agenda to wind back progressive reforms of the previous Labor Government. With the support of crossbenchers in the Australian Senate, the Coalition Government had already succeeded in abolishing a number of Labor Government initiatives, including the carbon tax and the resources super profits tax (also known as the 'mining tax').[137] The Senate crossbenchers were, however, reluctant to support parts of the Coalition's industrial relations reform agenda. More specifically, for a time a number of crossbenchers had supported the existence of the Tribunal and, consequently, the Coalition Government had not attempted to pass a Bill to abolish the Tribunal. Their position changed in early April 2016. As discussed below, the Coalition Government had commissioned a report into the road safety remuneration system. That report was provided to the Government in 2014 and recommended the abolition of the Tribunal. A later report commissioned by the Commonwealth Department of Employment, and provided to the Government in January 2016, also concluded that the Tribunal should be abolished. Three days before the *2016 RSRO* was originally due to take effect (on 4 April 2016), the Government released these two reports, as well as a Commonwealth Department of Employment Discussion Paper in which one of the options discussed was abolition of the Tribunal.[138]

These developments coincided with a significant industry backlash against the *2016 RSRO*. From almost the time the Order was made, and at least from January

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[136] For provisions that have this kind of narrower definition of a hirer (or principal contractor) who is the direct work provider, see *Industrial Relations Act 1996* (NSW) s 311(1)(b). See also *2016 RSRO* cl 8.6, which narrowed the application of the supply chain provisions in that order.

[137] See *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth); *Minerals Resource Rent Tax Repeal and Other Measures Act 2014* (Cth).

[138] Department of Employment (Cth), above n 100.

2016,[139] the National Road Transport Association ('NatRoad'), an industry association that represents road freight businesses from owner-drivers to large fleet operators,[140] had been leading a campaign against the Tribunal. NatRoad had been arguing that many of the road freight transport businesses it represented would not engage contractor drivers after the *2016 RSRO* came into effect.[141] NatRoad, AIG and a range of road freight transport businesses had applied to the Tribunal to stay the commencement of the Order and requested that the Minister for Employment intervene in this application.[142] The thrust of these concerns was addressed by the Tribunal when President Acton issued, on 15 March 2016, a draft variation of the payments order for further consideration and public (as well as stakeholder) consultation — leading to a further Tribunal deliberation. If this draft variation had been adopted by the Tribunal, the *2016 RSRO* would not have been varied as such, but the operation of the Order's pay rates would have been delayed until 1 January 2017. After extensive reconsideration, the Tribunal on 1 April 2016 decided not to delay commencement of the *2016 RSRO* pay rates.[143] In its decision, the Tribunal commented that NatRoad had played a role in creating 'uncertainty and confusion'[144] about the *2016 RSRO*. A specific instance noted by the Tribunal was that NatRoad had promoted to its members a petition (initiated by a manager of a road freight transport business) that stated that the *2016 RSRO* would price contractor drivers at 30% or more above current industry rates. This was despite the fact that (for some routes) the *2016 RSRO* rates were considerably less than 30% or more above current industry rates. In addition, NatRoad itself had previously issued a press release indicating that the *2016 RSRO* rates were less than 30% or more above current industry rates.[145]

The Tribunal's decision not to delay the payments order led, on 1 April 2016, to Justice Collier in the Federal Court staying the Order until further Federal Court orders were made. As discussed above, this Federal Court stay was then lifted a few days later by a full bench of the Court.[146] It is of some interest that this Full Bench gave short shrift to aspersions apparently being cast on the integrity of the Tribunal

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139 See statement from National Road Transport Association cited in Big Rigs, *Historic Decision: Safe Rates is Here for Owner Operators* (17 January 2016) <http://www.bigrigs.com.au/news/historic-decision-safe-rates-is-here-for-owner-ope/2893807/>.

140 National Road Transport Association, *About Us* (11 April 2016) NatRoad <http://www.natroad.com.au/about-natroad/>.

141 'Road Freight Interests Pushing Cash to Delay *RSRO*', *Workplace Express* (online), 1 March 2016 <https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=54264>.

142 'RSRT to Hear Stay Bid Next Week', *Workplace Express* (online), 9 March 2016 <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=54300&hlc=2&hlw=rsrt+to+hear+stay+bid+next+week&s_keyword=rsrt+to+hea>r+stay+bid+next+week&s_searchfrom_date=631112400&s_searchto_date=1505874742&s_pagesize=20&s_word_match=2&s_articles=1>. The Minister did not intervene in the Tribunal stay application.

143 *Applications to Vary Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* [2016] RSRTFB 6 (1 April 2016).

144 Ibid 17 [58].

145 Ibid 16 [56]–[57].

146 *National Road Transport Association Ltd v Road Safety Remuneration Tribunal* [2016] FCAFC 56 (7 April 2016).

and its processes.[147] NatRoad had, however, broadened its campaign into a political one involving the lobbying of Federal Parliamentarians to oppose the *2016 RSRO*. NatRoad also organised at least two truck convoys to Parliament House in Canberra.[148] It was in this context that the Coalition Government decided to publicly release the two government reports, which fuelled the existing campaign against the Tribunal and increased pressure on crossbenchers to support the Coalition's approach to the Tribunal. On 4 April 2016, the Minister for Employment, Michaelia Cash, announced that the Federal Government would introduce legislation in the week commencing 18 April 2016 to delay the introduction of the *2016 RSRO* pay rates to 1 January 2017.

In this context, attempts by the Tribunal to respond to the backlash against the *2016 RSRO* were rapidly overtaken by other events, as moves to delay the *2016 RSRO* pay rates quickly turned into a campaign to abolish the Tribunal. This campaign was fuelled by a barrage of negative media contributions about the Tribunal, including almost daily commentary in the Murdoch Press' newspaper *The Australian* in early to mid-April 2016, which was a crucial time in the unfolding of political events around the Tribunal. Analysis of the results of a database search of newspaper articles published from 1 March 2016 (when the issue began to attract significant media attention) to 20 April 2016 (two days after the abolition of the Tribunal) reveals that up to 80% of newspaper articles were critical of the Tribunal, with many articles advocating its abolition.[149] Initially commentators advocated that the Federal Coalition should abolish the Tribunal if re-elected.[150] This soon became a campaign to scrap the Tribunal immediately, with Ken Phillips — Director of the Independent Contractors Association and Research Fellow at the Institute of Public Affairs, a right wing think tank — stating that the Federal Government was 'playing politics' by holding off on legislation to abolish the Tribunal.[151]

The frequently repeated reason given for abolishing the Tribunal was that the *2016 RSRO* would directly cause the bankruptcy of truck owner-drivers. On 1 April 2016, *The Australian* reported that the *2016 RSRO* threatened to bankrupt up to 80% of Australia's 35 000 contractor drivers.[152] The *ABC News* also reported that

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147 Ibid 10–14 [27]–[39]; Jennifer Acton, 'Regulating the Gig Economy: A View from the Bench' (Paper presented at Australian Labour Law Association National Conference, St Kilda, Melbourne, 5 November 2016) 11.

148 National Road Transport Association, *Convoys to Canberra Support RSRO Del*ay *& RSRT Abolishment* (11 April 2016) NatRoad <http://www.natroad.com.au/2016/04/convoys-to-canberra-to-support-rsro-delay-rsrt-abolishment/>.

149 A search of newspaper articles was conducted on the online database Proquest. The search period was from 1 March 2016 to 20 April 2016. A search of the term 'road safety remuneration tribunal' produced 409 hits. 323 of those hits were relevant newspaper articles on the Tribunal (not some other topic). Of those 323 relevant newspaper articles, around 258 were critical of the Tribunal, with many espousing its abolition.

150 Joe Kelly, 'Road Watchdog "To Cost $2.3bn If Not Scrapped"', *The Australian* (Canberra), 1 April 2016, 5.

151 Sarah Martin and Rosie Lewis, 'Scrap Road Body Now, Truckies Urge Turnbull', *The Australian* (Canberra), 11 April 2016, 4.

152 Kelly, above n 150.

owner-drivers feared bankruptcy as an outcome of the *2016 RSRO*.[153] In short, the political backlash to the *2016 RSRO* was cast as being a response by the contractor drivers themselves. Closer to the truth, however, was that contractor drivers were responding to threats by work providers who insisted that they would not provide contractor drivers with any work if the *2016 RSRO* was introduced. In addition, some of the 'contractor drivers' who had publicly objected to the *2016 RSRO* may have also been small fleet owners. Responding to the suggestions that there would be potential bankruptcies, Tony Sheldon, the National Secretary of the TWU, stated that many owner-drivers were forced into bankruptcy already, due to low pay rates. He also stated that the media reports of potential widespread bankruptcies were misinformation being spread by NatRoad, and that the thousands of contractor drivers who were members of the union supported the introduction of the *2016 RSRO*.[154] Nevertheless, the potential for widespread bankruptcies among owner-drivers continued to be propagated as a main reason for the need to abolish the Tribunal. For example, Ken Phillips was reported as saying that the introduction of minimum pay rates could bankrupt close to 50 000 contractor drivers.[155] The Prime Minister, Malcolm Turnbull, was also quoted as saying the Tribunal would 'put tens of thousands of small Australian businesses . . . out of business'.[156]

Yet there was a reasonable argument that the minimum pay rates in the *2016 RSRO* could have been implemented without causing bankruptcies on a large scale. At the very least, any claim that all (or most) owner-drivers would become bankrupt as a result of the *2016 RSRO* was an exaggeration. To begin with, the *2016 RSRO* did not apply to all owner-drivers — but only those in the long haul and supermarket sectors.[157] Further, in response to the *2016 RSRO*, some road transport operators may have reorganised their business operations, but the demand for the road transport

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153 'Controversial Minimum Pay Rate Rules for Owner-Operator Truck Drivers Put on Hold', *ABC News* (online), 4 April 2016 <http://www.abc.net.au/news/2016-04-04/last-minute-delay-to-pay-rate-rules/7297366>.

154 ABC Radio AM, 'Transport Workers Union Calls for Truck Driver Minimum Pay Rate to Be Reinstated', *AM with Michael Brissenden*, 6 April 2016 (Tony Sheldon). See also Rob McKay, 'O'Connor Waits on Delay Bill after Cash's Shorten Spray', *Australasian Transport News* (online) 5 April 2016 <https://www.fullyloaded.com.au/industry-news/1604/cash-accuses-shorten-of-twu-stitch-up-on-rsrt>.

155 Kelly, above n 50. Ken Phillips, on behalf of the Independent Contractors Association, submitted a constitutional challenge to the High Court that the *2016 RSRO* violated *Australian Constitution* s 92, which requires that intercourse among the Australian states shall be free: Independent Contractors Australia, 'Plaintiff's Outline of Submissions', Submission in *Independent Contractors Australia v The Road Safety Remuneration Tribunal*, HCA No S108 of 2016, 12 April 2016. On 15 April 2016, Chief Justice French of the High Court remitted the matter to the Federal Court: Transcript of Proceedings, Independent Contractors Australia v The Road Safety Remuneration Tribunal [2016] HCATrans 86 (15 April 2016). See also 'High Court Refuses Injunction against RSRO', *Workplace Express* (online), 15 April 2016 <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=54417&hlc=2&hlw=high+court+refuses+injunction+against+rsro&s_keyword=high+court+refuses+injunction+against+rsro&s_searchfrom_date=915109200&s_searchto_date=1505915940&s_pagesize=20&s_word_match=2&s_articles=1>.

156 Joe Kelly, 'Shorten Teeters on Truckie Pay Ruling', *The Australian* (Canberra), 12 April 2016, 6.

157 Long distance operation means 'any interstate operation, or any return journey where the distance travelled exceeds 500 kilometres and the operation involves a vehicle moving livestock or materials whether in a raw or manufactured state from a principal point of commencement to a principal point of destination': see *2016 RSRO* cl 4.1(b), which refers to Fair Work Australia, *Road Transport (Long Distance Operations) Award 2010*, PR986381, 3 April 2009, cl 3 (definition of 'long distance operation').

services offered by road transport workers would continue despite the implementation of minimum pay rates. Goods and materials still needed to be hauled by truck. In short, the threat by work providers that they would terminate the services of owner-drivers if those work providers had to pay the minimum rates detailed in the *2016 RSRO* was clearly overstated. A subsequent Australian Small Business and Family Enterprise Ombudsman's report into the impact of the *2016 RSRO* on small businesses was filled with anecdotal evidence from a small number of drivers and was not based on any comprehensive empirical data.[158]

Moreover, the history of employers' predictions about minimum wage provisions having major repercussions for profitability and employment rates does not instil great confidence in such predictions. Quinlan, for example, has pointed out that there was a similar outcry over 100 years ago when the minimum wage rate was first introduced: many business owners at the time claimed that the introduction of minimum wages would ruin businesses, but the overall outcome was largely a social and economic success.[159] Further, regulation to protect wage levels had already been introduced in the transport industry without negative consequences — the mainstream media largely overlooked the fact that owner-drivers conducting local work in many sectors of the NSW road transport industry are already entitled to receive minimum rates under ch 6 of the *Industrial Relations Act 1996* (NSW). These NSW statutory provisions have been in place since 1979, largely received bipartisan support and did not have any major negative repercussions for road transport business owners. Similarly, it is likely that national minimum pay rates for the long distance and supermarket sectors could be introduced without major repercussions and, indeed, could have a positive effect by operating to level the playing field so that all contractors would get paid adequately for all work done including load and unloading, thereby taking some pressure off truck drivers and ultimately improving safety in the industry.[160]

These arguments were not aired in the mainstream media. Instead, the crossbenchers began not only to withdraw their support for the Tribunal, but began actively to campaign for its immediate abolition. Independent Senator Glenn Lazarus stated he would introduce a Bill to abolish the Tribunal,[161] and Senator Jacqui Lambie called for the Tribunal to be abolished immediately.[162] On 12 April 2016, it was still being reported that the Government's position was that they would abolish the Tribunal if re-elected,[163] with Grace Collier in *The Australian* reporting that it would be a 'colossal failure' of the Prime Minister if he was gazumped by

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158 See Australian Small Business and Family Enterprise Ombudsman, 'Inquiry into the Effect of the Road Safety Remuneration Tribunal's Payments Order on Australian Small Businesses' (Final Report, Australian Small Business and Family Enterprise Ombudsman, 14 September 2016).

159 Anjali Behl, 'RSRO Won't Cause the Sky to Fall: Quinlan' *Australasian Transport News* (online), 4 April 2016 <https://www.fullyloaded.com.au/industry-news/1604/rsro-wwill-not-cause-the-sky-to-fall-quinlan-says>.

160 Ibid.

161 Grace Collier, 'Dangerous Game Could Define PM's Time in Power', *The Australian* (Canberra), 12 April 2016, 6.

162 See 'Plan to Abolish RSRT Moves into Fast Lane', *Workplace Express* (online), 13 April 2016 <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=21-102&selkey=54407&hlc=2&hlw=>.

163 Kelly, above n 156.

Glenn Lazarus successfully securing the passage of a repeal bill before the Coalition could do so.[164] The next day it was reported that the Government would immediately introduce legislation to abolish the Tribunal when Federal Parliament resumed.[165] In the face of these circumstances, the TWU applied to the Tribunal to defer the implementation of the *2016 RSRO* minimum payments for long distance operations until 1 January 2017.[166] The Federal Opposition Leader, Bill Shorten, also stated that the Opposition was willing to compromise about the pace at which the *2016 RSRO* was introduced.[167] However, the campaign to abolish the Tribunal gained further momentum as Senators Dio Wang and John Madigan stated they were inclined to support the scrapping of the Tribunal.[168] On the morning of 18 April 2016, Federal Parliament resumed and the Government introduced the Road Safety Remuneration Repeal Bill 2016 (Cth) into the House of Representatives. The Bill was passed by both Houses of Parliament on that day.

The campaign involving NatRoad was effective because the Federal Coalition Government saw the reaction to the *2016 RSRO* as an opportunity to implement its longstanding political agenda to abolish the Tribunal. The somewhat hysterical coverage of the issue by segments of the media also played an influential role. Without a sympathetic government and media, the NatRoad campaign might have petered out. If the Government had taken the impartial attitude of allowing the independent Tribunal and the courts to fulfil their statutory functions to address the issues that were of concern to some of the parties affected by the *2016 RSRO*, it is quite possible — and indeed, likely — that the Order could have been effectively implemented. The concerns might have been addressed by tribunal processes to amend the *2016 RSRO* and phase-in the introduction of minimum rates and supply chain accountability under the Order. However, the Tribunal was not given the opportunity to carry this out. The Federal Coalition Government's political agenda to roll back progressive reforms introduced by the previous Labor Government prevailed and the opportunity to adequately regulate road transport supply chains and address the root causes of pay and safety issues in the industry was lost.

## VI Coalition Government Reports

In our opinion, media reports overstated the main reasons supporting the abolition of the Tribunal: owner-driver opposition to the *2016 RSRO* and widespread contractor driver bankruptcies resulting from its implementation. These two factors may well have justified amendment to, and a delay in the imposition of, the *2016 RSRO*, but in our view they did not provide evidence-based reasons to abolish the Tribunal. Thus, any substantive reasons for Tribunal abolition had to be sought in the two respective government-commissioned reports into the operation of the

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164 Collier, above n 161.

165 Kelly, above n 133.

166 *Application to Vary Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* [2016] RSRTFB 7 (18 April 2016), [9]–[10].

167 Kelly, above n 156.

168 Samantha Donovan, 'Crossbenchers Poised to Join Coalition to Axe Road Safety Remuneration Tribunal in Senate', *ABC News* (online), 14 April 2016 <www.abc.net.au/news/2016-04-14/crossbenchers-poised-to-axe-road-safety-tribunal/7325088>.

Tribunal. But it is difficult to find any evidence for the necessity of Tribunal abolition in the findings of these reports. Rather, the reports indicated that there were competing policy considerations at play.

Both Deighton-Smith's 2014 Report and PriceWaterhouseCoopers' 2016 Report recognised that safety in the road transport industry was a significant, ongoing policy issue.[169] The 2014 Report found that Australia's truck fatality rate was the second highest of eight countries studied, behind only South Africa.[170] The 2016 Report found that the road transport industry 'recorded the highest fatality rates of any industry in Australia in 2013'.[171] The 2014 Report then went on to state that the 'high consequences of an accident involving a heavy vehicle underline the importance of ensuring a high standard of safety performance in the industry'.[172] Furthermore, the 2016 Report indicated that the Tribunal orders would be likely to have produced benefits 'due to increased remuneration and fewer road accidents' and 'improvement in safety'.[173] Yet, despite these statements, both reports then proceed to recommend abolishing the Tribunal.[174]

The 2014 Report concluded with a reference to the neoliberal 'principle of minimum necessary legislation'.[175] So although the 2014 Report found that regulatory intervention was appropriate where a major policy problem (such as road transport safety) is being addressed,[176] it ultimately drew the opposite conclusion about the Tribunal's responsive approach to regulation.[177] This was partly due to what we see as an erroneous assumption that the regulatory model introduced by the *RSR Act* was a blunt, intrusive form of command and control regulation.[178] This type of assumption has been contested elsewhere. For example, Cooney, Howe and Murray[179] have argued that workplace tribunal regulation in Australia has been a responsive form of regulation because standards imposed by tribunals can be, and are, tailored to respond to the needs of industry and the industrial participants.[180]

The justification for the 2014 Report's conclusions largely relies on doubts it expressed about the link between pay and safety. Yet, the starting point of the pay

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169 See Deighton-Smith, above n 62, 30; PriceWaterhouseCoopers, above n 101, 7. For a full evaluation of the 2016 Report see Michael Belzer, 'Evaluating the PwC "Review of the Road Safety Remuneration System"' (Report, Wayne State University, 15 April 2016).

170 Deighton-Smith, above n 62, 57.

171 PriceWaterhouseCoopers, above n 101, 6.

172 Deighton-Smith, above n 62, 56.

173 PriceWaterhouseCoopers, above n 101, 44.

174 Ibid vi; Deighton-Smith, above n 62, 167.

175 Deighton-Smith, above n 62, 16.

176 Ibid 28.

177 Ibid 167.

178 See, eg, Deighton-Smith: 'Intrusive forms of regulation such as price regulation, which have the potential to distort market outcomes, are only appropriate where a major policy problem is being addressed and evident that less intrusive forms of regulation are ineffective.': above n 62, 28. For a succinct discussion of the criticisms of command and control regulation, see Andrew Stewart et al, *Creighton & Stewart's Labour Law* (Federation Press, 6th ed, 2016) 26–8.

179 Sean Cooney, John Howe and Jill Murray, 'Time and Money under WorkChoices: Understanding the New *Workplace Relations Act* as a Scheme of Regulation' (2006) 29(1) *University of New South Wales Law Journal* 215, 226–8.

180 See further the discussion of regulation, and in particular, responsive regulation, in Stewart et al, above n 178, ch 2 (especially 25–8, 36–42).

and safety analysis in the very same report is that such a link exists: the 2014 Report stated that the 'overall weight of the evidence . . . suggests the likely existence of some link between remuneration and safety'.[181] This reflects the findings in the evidence-based literature.[182] The 2014 Report goes on, however, to find that the 'nature and extent of any impact on safety performance of a change in driver remuneration is highly uncertain'.[183] This doubt expressed in the 2014 Report is contradicted by at least two studies in the literature. Specifically, Rodríguez, Targa and Belzer[184] found that at a large truckload company for every 10% more in truck driver mileage pay rate, the probability that a driver would crash declined by 40%. Similarly Belzer, Rodríguez and Sedo[185] found that driver pay has a strong effect on safety outcomes, and that for every 10% increase in driver pay, crash rates were 9.2% lower.

The principal rationale in the 2016 Report for the abolition of the Tribunal was based on a cost-benefit analysis: the Report concluded that it is questionable whether the benefits of the road safety remuneration system outweigh the associated costs.[186] The 2016 Report found that orders made by the Tribunal will result in a 'significant cost to the economy',[187] and that these costs included costs to 'hire and reward, and ancillary operators'.[188] In turn, those businesses would 'pass some of these costs onto the consignors and consignees that demand road freight services and consumers'.[189] Moreover, the 2016 Report found that the *2016 RSRO* 'is likely to place significant costs on business'[190] and stated that many stakeholders had expressed the concern that supply chain requirements 'will result in a high cost impost on the industry'.[191]

Given the 2016 Report's findings that Tribunal regulation would lead to significant safety improvements, the Report shows a clear preference for cutting net costs (including costs to business) over safety concerns. Weighing up business costs

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181 Ibid 60.

182 See, eg, Fredrick M Nafukho, Barbara E Hinton and Carroll M Graham, 'A Study of Truck Drivers and their Job Performance Regarding Highway Safety' (2007) 20(1) *Performance Improvement Quarterly* 65; Kristen Monaco and Emily Williams, 'Assessing the Determinants of Safety in the Trucking Industry' (2000) 3(1) *Journal of Transportation and Statistics* 69; Hensher and Battellino, above n 16; Thomas F Golob and David A Hensher, 'Driver Behaviour of Long Distance Truck Drivers: The Effects of Schedule Compliance On Drug Use and Speeding Citations' (Working Paper ITS-WP-94-12, University of Sydney Institute of Transport Studies, 1994); Williamson et al, above n 36; Mayhew and Quinlan, above n 16.

183 Deighton-Smith, above n 62, 60.

184 Rodríguez, Targa and Belzer, above n 16.

185 Belzer, Rodríguez and Sedo, above n 36, 11.

186 PriceWaterhouseCoopers, above n 101, 18.

187 Ibid iv.

188 Ibid 44.

189 Ibid.

190 Ibid 17.

191 Ibid 47. PriceWaterhouseCoopers also refers to 'compliance costs': above n 101, 43, 46. Deighton-Smith also states that '[s]ome larger organisations are concerned about the potential of the Tribunal to impose regulatory and compliance measures on supply chain participants': above n 62, 129. Deighton-Smith also noted that Coles Supermarket Australia argued that the Tribunal model of regulation 'imposes significant cost burdens': above n 62, 122–3.

against the value of human lives is a complex issue at the best of times:[192] if government does not prioritise safety over costs to business, it is not adequately performing the function of ensuring safety on the roads.[193] The cost burden to supply chain participants is reported — as were the views expressed by Coles Supermarkets Australia that the sector was complex because several different industries, including the manufacturing, retail, wholesale and construction industries, are large users of road freight services.[194] However, in our view, the 2014 Report and the 2016 Report do not appear to refute client influence over entire road transport supply chains *within* the retail sector. This is significant given that the *2016 RSRO* specifically applied to the supermarket sector (as well as the long distance sector). Overall, the evidence presented in those reports did not adequately negate the findings in the academic literature and previous government reports, discussed above, that mandatory regulation was necessary because of the commercial pressures passed down the road transport supply chain and the link between pay and safety in the road transport industry. Further, in 'weighing up' the safety benefits against the costs, the reports clearly paid only lip-service to safety considerations.[195]

## VII Conclusion

Although the Road Safety Remuneration Tribunal was abolished, the type of responsive, mandatory regulatory powers vested in the Tribunal represented a world-leading initiative for regulation of the road transport industry. It is unfortunate that the Tribunal was abolished after it had gained significant institutional knowledge on how to formulate mandatory obligations governing pay and safety within road transport supply chains. If the *2016 RSRO* was amended to address the shortcomings identified in this article, it could become a blueprint for future measures to regulate road transport supply chains to improve the pay of drivers and safety in the road transport industries worldwide. Equally, the abolition of the Tribunal demonstrates that any measures to regulate supply chains to address worker exploitation are likely to generate strong resistance from business groups, conservative governments and the media. The industry and media furore over the *2016 RSRO*, discussed in this article, shows how volatile the implementation of innovative workplace regulation can become and how things can quickly turn against progressive reform when a conservative government acts with zeal and opportunism to counter such regulation. This is so where the right wing and conservative media fuels a campaign against such regulation. This goes some way to explaining how the public debate about the Tribunal, which began with criticism of a particular tribunal order, quickly turned into an almost unstoppable groundswell to abolish the Tribunal.[196] The role that ideology plays in the making and unmaking of workplace legislation is also particularly highlighted by the fact that concerns

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[192] See, eg, Chris Maxwell, *Occupational Health and Safety Act Review* (State of Victoria, 2004) chs 10, 11 (especially [534], [563]–[566]); Neil Gunningham, *Safeguarding the Worker: Job Hazards and the Role of the Law* (Law Book Co., 1984) 101–2.

[193] On the conflict between profits and safety, see Theo Nichols, *The Sociology of Industrial Injury* (Mansell, 1997).

[194] Deighton-Smith, above n 62, 32.

[195] See Maxwell, above n 192; Gunningham, above n 192; Nichols, above n 193.

[196] See Acton, above n 147.

raised in the public debate over the *2016 RSRO* may have never eventuated and, in any event, could have been addressed by delaying and amending the Order. The events leading up to the abolition of the Tribunal are instructive about the necessary preparation required to head off a potential political backlash to the implementation of any workplace supply chain regulation.

The abolition of the Tribunal means that there has been a return to inadequate regulation of pay and conditions within the Australian road transport supply chains. It means that the regulatory space vacated by 'external' tribunal regulation is once again more expansively occupied by the 'self-regulatory' supply chain structures set in place by effective business controllers for the purpose of private gain. Commercial pressures can freely pass down road transport supply chains largely unimpeded by mandatory regulation of contractor pay. These commercial pressures are not just the figment of academic imagination. The reality of such pressures were highlighted in Road Safety Remuneration Tribunal proceedings when, in cross-examination, a general manager of transport for Coles revealed that his Key Performance Indicators included reducing Coles' transport costs by 5% in a year.[197]

Sadly, the pressing problem of truck safety on our roads is not going to disappear, and deaths from truck accidents will continue to occur. The factors leading to inadequate truck safety discussed in this article will continue to generate public concern and are likely to lead to a renewed push for responsive, mandatory regulation of pay and safety in road transport supply chains the next time there is a major public outcry over truck-related road deaths.[198] Fortunately, when this occurs, a responsive regulatory model will be available for implementation.

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[197] See Transcript of Proceedings, *Road Safety Remuneration Order – Application by Transport Workers Union of Australia*, (Road Safety Remuneration Tribunal, RSRT 2013/1, Acton P, 13 August 2013) [1924]–[1930].

[198] At the time of writing, the Victorian Labor Government had announced a review of Victorian road transport industry driver contractor legislation because, among other things, the abolition of the Road Safety Remuneration Tribunal had left contractor drivers without adequate protection. The review will aim to update the *Owner Driver and Forestry Contractors Act 2005* (Vic) to improve the conditions of contractor drivers: Natalie Hutchins, Victorian Minister for Industrial Relations 'Victoria Puts Safety First With Owner Driver Review' (Media Release, 17 November 2016) 1.