REVIEW OF THE ROAD SAFETY REMUNERATION SYSTEM

AUSTRALIAN INDUSTRY GROUP

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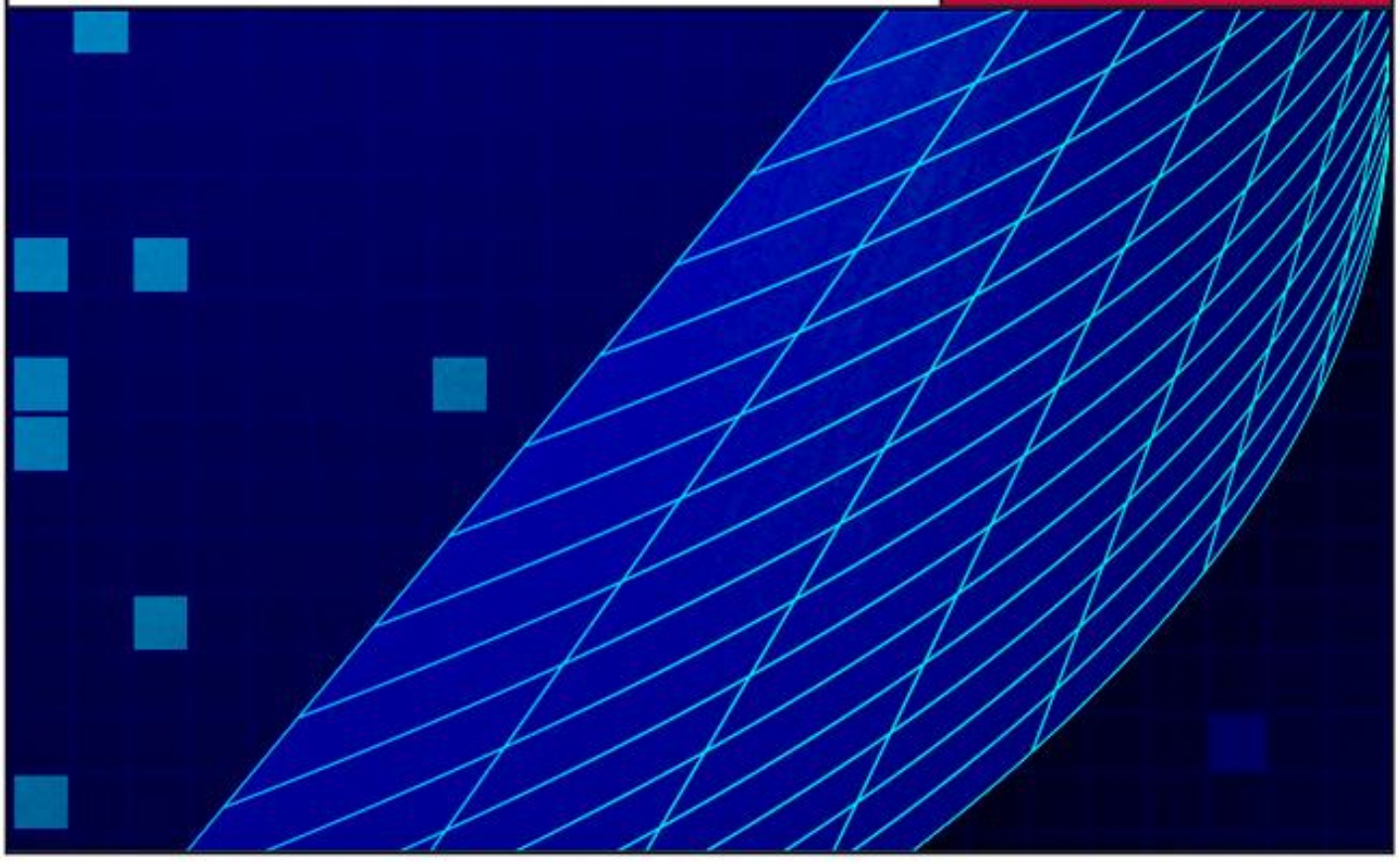

SUBMISSION TO THE REVIEW OF THE ROAD SAFETY REMUNERATION SYSTEM

1. Introduction

Ai Group welcomes the opportunity to comment in relation to the Review of the Road Safety Remuneration System (RSR System).

We make this submission on behalf of the road transport industry plus the industries which are users of road transport (ie. virtually all industries).

Ai Group and its members are committed to improving safety in the road transport industry. However, improving safety in the industry requires a whole-of-government approach rather than a narrow focus upon the method and quantum of remuneration. It requires an approach which has broad support, including the support of the Federal Government, State and Territory Governments, and industry.

The RSR System does not have broad support. It is a flawed system which was implemented by the previous Government in response to the Transport Workers Union's *Safe Rates, Safe Roads* industrial campaign.

The RSR System is distracting Government and industry attention resources away from the measures which are widely recognised as improving safety, towards a regime which is not widely supported nor underpinned by robust economic modelling.

For the reasons set out in the submission, the RSR Act should be repealed and the RSR Tribunal should be disbanded without delay.

2. About Ai Group

Ai Group is the leading industry organisation representing employers in the transport, manufacturing, engineering, construction, automotive, food, information technology, telecommunications, labour hire, printing, defence, mining equipment, aviation and other industries. Together, Ai Group and its affiliates represent the interests of approximately 60,000 businesses which employ in excess of 1.2 million staff.

Significantly, Ai Group represents the industrial interests of the ATA NSW, the peak trucking body in NSW.

Our submission follows consultation with employers and principal contractors as well as participants in the broader supply chain regarding not only the deliberations of the Road Safety Remuneration Tribunal (RSR Tribunal) but also the preceding development and implementation of the *Road Safety Remuneration Act 2012* (RSR Act) and *Road Safety Remuneration Regulation 2012* (RSR Regulation)

The submission is also informed by our involvement in Australia's workplace relations system as a registered organisation of employers for more than a century. In the context of the road transport industry, Ai Group has played a major role in the development of the relevant modern awards and the recent review of such instruments by the Fair Work Commission (FWC).

We are also represented on the Transport Industry Council in Victoria and are recognised as a State Peak Council under the New South Wales legislation governing owner drivers in that State, the *Industrial Relations Act 1996* (NSW). Within the NSW jurisdiction, Ai Group plays a leading role in proceedings relating to the setting and variation of minimum rates and conditions for the owner drivers.

Ai Group regularly represents and advises businesses in the road transport industry in relation to matters involving employee drivers and owner drivers.

We have appeared in and made submissions in all significant proceedings before the RSR Tribunal. We also participated in the House Standing Committee on Infrastructure and Communications inquiry into the *Road Safety Remuneration Bill*.

Given the above experience, we are well placed to comment on practical matters associated with the operation of the RSR system including the utility of maintaining the RSR system in light of other regulatory responses aimed at improving safety in the industry and the potential for the RSR system to damage or disturb key elements of other regulatory regimes applicable to the industry.

3. Introductory comments

The establishment of the RSR System was the product of a long running TWU campaign. It represents a very significant re-regulation of elements of the Australian economy and Australia's workplace relations system.

Ai Group and its members are strongly committed to measures that improve road safety. Nonetheless, the contention that tangible improvement in safety outcomes can be achieved through a narrow focus on paying drivers more or differently is flawed. The proposition is overly simplistic and aspirational at best.

The road transport industry is already one of the most heavily regulated sectors of the Australian economy. To a very significant extent elements of the RSR System have the potential to duplicate or overlap with other regulatory measures already in place.

The new system risks undermining the good progress that is being achieved through other initiatives and to distract industry participants and Government from pursuing measures that likely to continue to result in tangible improvements in safety.

Under the RSR System the Tribunal is afforded the power to regulate both the road transport industry and the broader supply chain. Its decisions will potentially have major impacts on road transport companies, businesses which use road transport in industries such as manufacturing, construction and retail, and on Australian consumers.

There is a risk that orders flowing from the Tribunal will result in specific adverse effects including;

- Interfering with normal commercial arrangements between transport companies and their clients;
- Imposing increased costs upon road transport companies;
- Imposing increased transport costs upon the manufacturing, construction, retail and other industries;
- Imposing higher prices for transported goods upon the community;
- Distracting industry and Government attention and resources away from the measures which are widely recognised as improving safety, such as: risk identification and control, improved roads, fatigue management, education and training, drug and alcohol policies, use of technology, and strong compliance mechanisms;
- Undermining the integrity of the National Employment Standards (NES) in the *Fair Work Act 2009* (FW Act);
- Undermining the integrity of modern awards in providing a fair and relevant safety net for employees;
- Undermining the enterprise agreement making system;
- Conflicting with key objects of the FW Act such as the need to promote economic prosperity, economic growth, productivity and flexibility;

- Imposing an unreasonable compliance and red tape burden upon road transport companies and/or businesses which use road transport;
- Undermining the integrity, objectives and operation of a raft of State laws and initiatives relating to relating to matters such as work health & safety and general transport regulation and industrial/contractual conditions of contractor drivers/owner drivers; and
- Undermining the Heavy Vehicle National Law.

Ai Group has consistently raised strong concerns regarding the implementation and operation of the RSR System.

Our submissions in relation to the development of the reforms in response to the "Safe Rates, Safe Roads Directions Paper" released on behalf of the previous Commonwealth Government and our comprehensive contributions to the House Standing Committee on Infrastructure and Communications inquiry into the *Road Transport Safety Remuneration Bill* and the *Road Safety Remuneration (consequential Amendments and Related Provisions) Bill 2011 detail our concerns*. These are attached at **Annexures A, B and B1**. Given that the final form of the RSR Act is very similar to the initial Bill, these submissions remain highly relevant to the Review.

Ai Group has made a series of submissions to the RSR Tribunal regarding the setting of its 1st and 2nd Annual Work Program. These submissions provide an insight into the operation of the Tribunal and the RSR System. They are attached at **annexures C, D, E, J and K.**

Finally, Ai Group has made a number of detailed submissions to the RSR Tribunal regarding various proposed Road Safety Remuneration Orders (RSROs). These submissions are attached at **Annexures F, G, H and I.**

4. Relevant preliminary considerations for the Review

The incidence of road safety accidents is of course tragic and it is important that Governments implement appropriate measures to tackle this persistent problem.

All industry participants are anxious to see continued improvement in the safety performance of the road transport industry and its associated supply chain. However, Ai Group believes that the central premise underpinning the establishment of the RSR System, the notion that this can be achieved by paying drivers more or differently, is flawed.

Any assessment of whether the RSR System represents an effective, efficient and appropriate means of delivering safety improvements must be considered in the context of statistical evidence of the causes of crashes. It should also involve consideration of whether there is evidence that similar regulatory regimes have been effective in addressing such matters.

The Review should also involve careful analysis of the broader regulatory environment. The road transport industry is already one of the most heavily regulated sectors of the economy. It is subject to specific laws addressing work health and safety but also subject to specific laws addressing safety in the road transport context (i.e. State based transport regulation embracing concepts such as the 'chain of responsibility'). Moreover there is a raft of measures that address the industrial or contractual entitlement of drivers, be they employees or contractors. The RSR System cannot be regarded as an appropriate regulatory response if it unnecessarily or inappropriately duplicates or overlaps with such regimes. Nor can it be said to represent an appropriate response if it risks undermining the integrity and operation of other legislation, such as the FW Act.

Any assessment of the RSR System must involve a critical review of the RSR Tribunal, including its operations, structure and the powers which are afforded to it under the RSR Act.

Given the RSR Act does little to directly regulate the terms and conditions of road transport drivers, but instead largely relies upon the operation of the Tribunal it creates, the Review should consider whether the RSR Act places appropriate parameters around the Tribunal's operation so as to ensure that it delivers balanced regulation likely to improve safety without also resulting in disproportionate negative consequences for industry along with the broader community and economy.

Moreover, consideration should be given to whether the RSR Tribunal is necessarily the best placed or structured entity to perform this role or whether other specialised bodies, such as the Heavy Vehicle National Regulator, is better placed to develop measures aimed at improving safety in the industry.

A key element of the RSR System is the Tribunal's capacity to make RSROs and to conduct 'annual work programs'. The Tribunal's actions to date in relation to such matters should be carefully considered.

The Review should also consider the utility and operation of other elements of the RSR System including:

- The disputes jurisdiction;
- Road Safety Collective Agreements;
- Research functions to the Tribunal; and
- The system's reliance upon the Fair Work Ombudsman as the relevant enforcement body.

Finally, it should be borne in mind that the terms of reference for the Review squarely place the emphasis on considerations relating to improvements in safety. This is appropriate as a key purported justification for the RSR System was its alleged capacity to delivering improvements in safety.

The RSR Act does not place a sufficient emphasis on the achievement of improvements in safety. It encompasses industrial considerations distinct from safety. This has led to significant concern within industry that the system has been structured to regulate industrial conditions for road transport drivers rather than to achieve a meaningful improvement in safety. The Review should assess the RSR System's capacity to deliver tangible improvements in safety.

Ai Group believes that when the abovementioned matters are properly considered they reveal that the RSR System constitutes a highly deficient regulatory response to safety issues in the road transport sector.

5. The lack of evidentiary justification for the implementation of another layer of regulation

There is an inadequate evidentiary basis for implementing the RSR System.

There is significant uncertainty regarding the nature of any causal connection between remuneration and safety. Indeed a causal connection has not been definitively established. As the Regulatory Impact Statement accompanying the Road Safety Remuneration Bill succinctly noted:

> *"There is some research to suggest that the remuneration for drivers is a factor in safety outcomes, however data at this point in time is limited and being definitive around the causal link between rates and safety is difficult. For example, speed and fatigue are often identified as the primary cause*

for a crash but is a much harder task to prove that drivers were speeding because of the manner or quantum of their remuneration."

Doubts have been publically cast on the evidentiary justifications for the regime by a former senior employee of the TWU. In an article published in the Australian Financial Review, Seth Tenkate, a former TWU employee who allegedly reported to the Union's National Secretary Tony Sheldon for nearly four years as his press secretary, policy writer and on the lobbying campaign that led to the establishment of the tribunal indicated in relation to the formation of the Tribunal that there was:

"…barely a specific case study where a death is involved to support [the link between rates of pay and safety]"[1]

He is reported to have observed that;

"The safe rates legislation is so broad it can effectively regulate costs in up to 14.5 per cent of GDP, yet it exists on the premise that the main link between heavy vehicles and the rate of deaths on our roads is solely linked to rates of pay."

"It largely ignores other evidence, including the roles of trucking finance companies, workplace and sustainable business training for drivers and improvements in truck safety, and puts the onus of individual driver behaviour on someone who isn't in the cab."

"Since 2007, there has been a raft of changes across the industry, from award modernisation, Fair Work Australia and the introduction of the National Heavy Vehicle regulator – all which could have looked at this issue but instead you see another layer of regulation on a critical part of the economy"

[1] Ex-union official slams 'safe rates', published in the Australian Financial review on 3 May 2013

The above quoted former TWU employee raises salient points for the Review's consideration.

Much if not all of the analysis of any purported link between remuneration and safety was carried out prior to the commencement of Australia's current workplace relations system, the newly harmonised work health and safety laws and the development of the Heavy Vehicle National Law.

A great deal of the academic analysis routinely relied on by supporters of the RSR System is attributable to a relatively small number of individuals and to an extent is based on overseas studies of doubtful relevance to the Australian context. Other support or purported evidence is often comprised of anecdotal or hearsay assertions by individuals, repeated TWU rhetoric or surveys conducted with doubtful rigour by unions.

Moreover, there is a clear absence of data demonstrating a positive impact on safety resulting from past measures to regulate the remuneration or conditions of drivers, such as those adopted in NSW, Victoria and WA. This was identified in the regulatory impact statement accompanying the *Road Safety Remuneration Bill*:

> "*Implementation of the WA and Victorian legislation which include guideline rates as industry codes, has occurred recently and evaluations have not been undertaken, so drawing any firm conclusions regarding their impact would be difficult. Victoria has experienced a decline in relative fatality numbers since 2004. The regulatory system took effect in December 2006. There is currently no data or analysis on compliance with the guideline rates or take-up of other aspects of the legislation in that state. There is also no obvious trend of improved fatality performance since the commencement of the regulatory framework in WA (in WA, legislation was enacted in 2007 and came into effect 1 August 2008 (with the Code of Conduct taking effect from the 1 July 2010).*

NSW has for many years operated a system of contract determinations under its industrial relations system, setting rates other employment like conditions for independent contractors in the transport industry, resulting in drivers being provided with award-style protections. The NW System applies only to the intrastate or short haul sector (covering a diverse array of transport activities from refrigerated transport to courier services) and only to owner drivers of a single vehicle operation.

While the NSW industry has had its rates subject to determination by an industrial tribunal, available data does not allow for a meaningful analysis of performance. In 2007, NSW accounted for 32.4 per cent of fatalities involving articulated trucks but only 20.5 per cent of kilometres travelled by articulated trucks."[2]

(Emphasis added)

In light of the absence of such data there can be little justification for seeking to replicate any of the State regimes on a National basis. Ai Group called on the RSR Tribunal to inquire into such matters in its first annual work program and has effectively echoed such calls in relation to the Tribunal's second annual work program. Such proposals have been repeatedly opposed by the TWU in the course of proceedings before the Tribunal.[3] Unfortunately, the Tribunal did not give detailed consideration to these matters in its first annual work program and has not identified these matters in its second annual work program.

Even if a causal connection between remuneration and unsafe practices is presumed to exist it does not follow that establishing higher minimum rates or prohibiting certain methods of payment will result in drivers changing their unsafe practices. Rather, if it is accepted that an individual's on-road behaviour is influenced by the quantum of their remuneration it is conceivable that increased rates may

[2] Regulatory Impact Statement accompanying the *Road Safety Remuneration Bill* p13.
[3] See TWU submissions pertaining to the setting of the first annual work program

further incentivise individuals to engage in behaviours such as the working of excessive hours in order to reap greater rewards. Similarly, other unsafe practices such as drivers who fail to undertake maintenance of their vehicles in order to make savings, may simply continue regardless of their level of remuneration.

Regrettably, the RSRT has not sought to grapple with these underlying issues as threshold considerations in any meaningful way. Instead it has focused on undertaking a process aimed at facilitating the development of an RSRO.

Such an outcome is a foreseeable product of the unbalanced nature of the RSR Act and an unsurprising practical consequence of the establishment of the RSR Tribunal. This risk was foreshadowed in Ai Group's submissions regarding the RSR Bill:

> *"The Explanatory Memorandum accompanying the Bill specifies that the Tribunal will:*
>
> > *"…be empowered to inquire into sectors, issues and practices within the road transport industry and, where appropriate, determine mandatory minimum rates of pay and related conditions for owner drivers."*
> >
> > *As argued elsewhere in our submissions, we are concerned that the Bill impinges upon the Tribunal's capacity to determine whether it is genuinely necessary or 'appropriate' to make such orders and effectively dictates certain outcomes.*
>
> *We also doubt the practical likelihood that a Tribunal which is established to create orders addressing remuneration will determine that its role is redundant by exercising a purported discretion not to make such orders. Our concern regarding the potential nature of the Tribunal's operation is illustrated by the High Court's observation regarding the nature of tribunals of limited jurisdiction in the Kirk Case (at 122):*

> *"So too courts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that mischief has arisen are accepted. Courts which are "preoccupied with special problems", like tribunals or administrative bodies of that kind are "likely to develop distorted positions."*[4]

(Emphasis Added)

The Capacity for the RSR System to deliver safety improvements must be considered in the context of existing evidence of the precise nature of the causes of crashes. Driving is an inherently risky activity and drivers are disproportionately exposed to such risks. Similarly crashes involving heavy vehicles are of course likely to serious outcomes, such as fatalities. However the extent to which they could be attributed to the manner that a driver is paid should not be overstated. The Regulatory Impact Statement contained the following pertinent observation in relation to the causes of fatalities involving heavy vehicles:

> *"..in terms of fatalities involving heavy vehicles, most accidents are not primarily the fault of the truck driver. In fatal heavy vehicle crashes involving other vehicles, the other driver was at fault in 82 per cent of the accidents."*[5]

It is unclear how altering truck driver remuneration would address these situations.

There is also significant evidence that the safety performance in the road transport industry is improving. As identified by the Regulatory Impact Statement:

[4] Ai Group submission to the House Standing Committee on Infrastructure and Communications concerning the *Road Safety Remuneration Bill* (Annexure B);*Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v Workcover Authority of New South Wales (Inspector Child)* [2010] HCA 1 (3 February 2010).
[5] Regulatory Impact Statement Accompanying the Road Safety Remuneration Bill Pxix

"The Australian road transport industry generally has a strong safety performance and key safety initiatives, such as CoR and fatigue management laws which are being bedded down, so further improvements in road safety can be expected to continue. Important initiatives including the NHVR and the National Road Safety Strategy should have a positive effect on road safety. Governments are also continuing to invest in road infrastructure, including quality rest stops, divided roads and improved freight corridors, which the NTC put forward as major catalysts for a safer road transport industry."[6]

Ai Group agrees with these observations, although we would add to this initiatives such as the new harmonised work health and safety laws, the implementation of the Heavy Vehicle National Law (HVNL) and the introduction of the FW Act.

Ai Group does not raise these matters to suggest that this progress is sufficient or that there is not reason to strive for further progress. Nonetheless such improvements suggest existing measures are having a beneficial impact and cast doubt on the utility of adopting the narrow approach reflected in the RSR System.

6. The impact to date of the Tribunal on the road transport industry and its safety performance

The RSR System has been in force since 1 July 2012. It would be difficult to assert that, to date, the RSR System has delivered any identifiable positive impact on safety in the road transport industry. Its first RSRO is yet to commence.

Nonetheless, we note that the system has resulted in a significant level of uncertainty and anxiety within industry regarding the potential changes to the regulatory environment that may flow from the Tribunal's operation. Such uncertainty

[6] Regulatory Impact Statement accompanying the Road Safety Remuneration Bill 2012,Pxxvi.

undermines business confidence and productivity. It undermines industry's capacity to make and implement relevant decisions regarding their operations, and it undermines safety. Improved safety is not furthered by complexity and confusion.

The implementation of the RSR System has already imposed a significant burden and distraction on industry. It has been forced to come to terms with an entirely new legislative regime that interacts with existing laws in an extremely complex manner.

Moreover, industry has been obliged to attempt to engage with the new RSR Tribunal concerning the making of RSROs with the potential to impose significant and problematic new obligations. Unfortunately, this burden has been insurmountable for the vast majority of stakeholders. Very few employers have directly participated in the Tribunal's operations.

The increased regulatory burden imposed on industry by the RSR System comes at a time when industry is still grappling with the implementation of important reforms to work health and safety laws and Transport Regulation along with successive and ongoing changes to the workplace relations system (both in the legislative context and in relation to the content of relevant modern awards).

The burden will be exacerbated by the recent release of the Tribunal's first RSRO which will commence on 1 May 2014. Ai Group submissions regarding the similarly worded provisions of the Tribunal's Draft RSRO highlighted a raft of problem. We urge the Review to give consideration to these submissions. While the RSR Tribunal modified its final orders in important respects, it is still likely to have significant adverse consequences for industry, with little if any improvement in safety.

7. The operations of the RSR Tribunal

7.1 RSROs

During the first annual work program there were only four applications for RSROs. Two of these were from unions. The most comprehensive proposal was provided by the TWU. All of these application were filed in response to an invitation and timetable for the first annual work program released by the Tribunal. No party has sought the making of a RSRO outside of the scope of the Tribunal's work program.

On17 December 2013 the Tribunal issued its first RSRO. The order applies to drivers engaged in long distance operations and engaged in the provision of transport services relating to the 'supermarket sector'. It purports to impose requirements on associated employers, hirers and supply chain participants (as defined in the RSR Act).

The RSRO does not seek to broadly regulate remuneration. More specifically, it does not set minimum rates of pay. Instead it deals with a raft of broader issues. It addresses:

- Dispute resolution
- Adverse conduct protection
- Written contracts for road transport drivers
- Other contracts
- Payment times
- Safe driving plans
- Training
- Drug and alcohol policy

The Tribunal has indicated that the issue of rates of pay will be the subject of a conference conducted by the President of the RSR Tribunal. This has been listed for 10 February 2014.

The Provisions of the RSR Act failed to ensure that, in making the first Road Safety Remuneration Order, the RSR Tribunal engaged in sufficient consultation with Industry.

The making of a RSRO represents a sweeping regulatory reform and warranted an extremely cautious approach, as called for by Ai Group.[7]

The Tribunal released its draft order on the 12 July 2013 and expected submissions and evidence by 26 July. Similarly short time frames were afforded to provide written material in response to submissions and evidence filed by other parties. Given the complexity of issues being considered and the sheer volume of material submitted in the proceedings (e.g. the TWU filed over 3000 pages of material) such time frames were not procedurally fair.

On at least two occasions' parties, including Ai Group and 8 other industry bodies, implored the Tribunal to significantly extend the time frame for consideration of the Draft RSRO. Our requests were not granted to any meaningful extent.

Similar concerns over the level consultation were raised by the NSW Small Business Commissioner.[8]

Ai Group consulted with many employers who wished to contribute to the conduct of the Tribunal's annual work program but were simply not in a position to do so given the expedited time frame imposed by the Tribunal.

[7] This has been raised in a number of Ai Group submissions to the Tribunal, see for example annexure C.
[8] Submissions concerning the draft road safety remuneration order dated the 18th of August 2013.

The approach of the Tribunal severely limited industry's involvement in the making of the first RSRO.

In contrast to the development of the first RSRO, the Heavy Vehicle National Law and harmonised work health and safety laws were the product of extensive and detailed consultation and input from a very broad array of industry participants over several years. This represents a far more effective approach to the development of safety regulation.

Disappointingly, the Tribunal appears to have approached the task of conducting its first annual work program with a presumption that the making of an RSRO was inevitable. Relevantly, it commenced its first annual work program by calling for draft or suggested RSROs. Crucially, this approach provided little scope for any consideration of contentious threshold issues such as the nature of the connection between remuneration and safety or for a critical assessment of complimentary regulatory regimes.

The RSR Tribunal's decision making the first RSRO reveals that the Tribunal has concluded that it has power through the making of RSROs to regulate far more than remuneration. This expanded view of the Tribunal's power is not appropriate or consistent with the rational for its implementation. If effectively means that Tribunal is afforded a very broad capacity to regulate both the road transport industry along with its supply chain and issues of safety generally.

The broad scope of the Tribunal's power does not accord with indications by the previous Government that the Tribunal would deal with matters associated with 'pay and pay related issues'. Nor does it appear to accord with the nature of reform contemplated by the regulatory impact statement accompanying the *Road Safety Remuneration Bill* which stated:

"The economic framework in this RIS responds directly to answering the key economic question, namely:

> *'will the societal benefits from improved road safety offset the expected increase in the resource cost and productivity of freight and cost to government from establishing and implementing a road safety remuneration system for owner and employee drivers?'[9]"*

The regulatory impact statement's presumption that the RSR System would focus on remuneration is also reflected in the following extract:

"PricewaterhouseCoopers (PwC) was engaged by the Department of Education, Employment and Workplace Relations (DEEWR) to prepare a Regulation Impact Statement (RIS), including a Cost Benefit Analysis (CBA), for establishing a Road Safety Remuneration Tribunal (tribunal) for employee and owner drivers in the road transport industry. The tribunal's approach to setting pay and/or pay related conditions would be research focused and evidence based. The tribunal would have discretion to set rates of pay and/or pay related conditions for drivers operating in sectors of the road transport industry, where necessary to improve safety outcomes.

The tribunal would also have discretion not to set a rate or remuneration related conditions."[10]

There is no consideration in the RIS accompanying the *Road Safety Remuneration Bill* of actions undertaken by the Tribunal in imposing mandatory contracting requirements, Safe Driving Plans and compulsory training or of the development of what is in effect an expanded general protections regime. The Tribunal appears to operating in a manner that was not contemplated by Parliament.

[9] Regulatory Impact Statement Accompanying the Road Safety Remuneration Bill, p.v
[10] Regulatory Impact Statement Accompanying the Road Safety Remuneration Bill

Similarly, the Tribunal's broad interpretation of its powers does not accord with the preamble to the RSR Act which describes the purpose of the legislation as: *"An Act to make provision in relation to remuneration-related matters to improve safety in the road transport industry, and for related purposes."*

The RSR Tribunal's broad interpretation of its powers greatly expands the potential for overlap between the RSR System and other regulatory regimes.

7.2 Annual Work Programs

The Tribunal did not specifically identify the matters it was proposing to inquire into in the first annual work program or define the sectors it was inquiring into. Although it identified certain purported 'sectors' of the road transport industry, it did not provide any precise definition of what these constituted. Consequently many industry participants were unaware or uncertain of the scope or potential impact or the Tribunal's inquiries. Such uncertainty operated against promoting their involvement.

Ultimately, very few employees or industry participants sought to formerly engage with the Tribunal except through the medium of their relevant industry body. The limited level of meaningful consultation with industry typified by the conduct of the first annual work program will result in negative consequences not contemplated by the Tribunal.

We acknowledge that the Tribunal did undertake a number of visits to transport and logistics sites as part of its first annual work program. Nonetheless, such visits would have, at best, provided a very limited insight into the highly diverse nature of the industry. There is also a risk that they would have provided a potentially skewed perspective as the Tribunal's invitation to suggest sites to be visited appears to only have been formerly extended by the Tribunal to parties that proposed a road safety

remuneration order.[11] Also, while the visits were announced on the Tribunal's website, the details of the visits were often only published very shortly before the visits were undertaken. This difficulty has been identified by others.[12] Significantly, the Tribunal visited very few facilities of the participants in the supply chain who would be impacted by the RSRO which it made in December 2013.

During the first annual work program The Tribunal conducted 'facilitative discussions' involving several industry associations along with a small number of large employers and owner drives. This culminated in the production of a report which was prepared by a Member of the Tribunal and provided to the Tribunal for the purpose of deliberations relating to the issuing of a draft.

The discussions were conducted prior to any consideration of jurisdictional issues associated with the scope of the Tribunal's powers or consideration of threshold issues associated with the nature of the connection between remuneration and safety. Instead the discussions focussed on proposals put forward by certain parties. Moreover they were conducted in an extremely expedited manner.

A review of the facilitative discussions report reveals that it closely resembled elements of the proposals put forward by the TWU and a single large transport company, Linfox, although it is acknowledged that there were significant modifications that were made as a product of the discussions. Nonetheless, the facilitative discussions reflected an attempt to achieve a level of consensus around the content of an RSRO rather than a process for considering whether such regulation would be effective in addressing safety outcomes.

The content of the report was not broadly supported by industry bodies involved in the proceedings and representing the largest proportion of industry participants, such as Ai Group, ATANSW or NatRoad, among others. Regrettably, this was not fully

[11] See RSR Tribunal's decision regarding the making of first annual work program; [2012] RSRTFB3.
[12] Business SA submissions to the Tribunal's second annual work program dated 26 November 2013

reflected in the terms of the Report. Ai Group's concerns about the report were addressed in submissions to the Tribunal.

Ai Group is concerned that the conduct of the first annual work program was not undertaken in accordance with the technical requirements and time frames contemplated by the RSR Act. Such issues were ventilated in our submissions to the first annual work program[13] and its second annual work program.[14] These concerns arise from the lack of certainty or specify in the terms of the first annual work program and the proper commencement date for the respective work programs. Such issues cast doubt over the validity of the RSRO made pursuant to the first annual work program.

7.3 The Tribunal's dispute resolution function

The RSR Act requires the Tribunal to report certain statistical information regarding its operation. The Tribunal has released a series of reports which are available on its website.

A review of the reports released by the Tribunal reveals an extremely limited utilisation of the Tribunal's dispute resolution functions. It appears that, throughout Australia, there have only been 5 applications seeking to access the Tribunal's dispute resolution services and that the Tribunal has not issued a decision in relation to any dispute.

We note that it is not possible to verify whether these disputes raised issues of any particular significance or merit. It is also not possible to verify whether they were properly within the jurisdiction of the Tribunal or whether they could have been dealt with through other previously existing forums, such as through the various mechanisms established under the FW Act or under the relevant State jurisdictions

[13] See annexures C,D and E
[14] See annexures J and K

dealing with independent contractors. There is significant overlap between such forums.

Nonetheless, it is clear that there is very limited demand for the Tribunal's dispute resolution services.

7.4 Approval of Road Safety Remuneration Collective Agreements

The Tribunal has not yet approved any Road Safety Remuneration Collective Agreement.

Nonetheless, Ai Group is aware that the TWU has approached a number of road transport businesses seeking that they enter into such agreements.

7.5 The performance of the Tribunal' research function

Section 80 of the RSR Act provides that one of the functions of the Tribunal is:

> *"… to conduct research into remuneration-related matters that may affect safety in the road transport industry."*

The RSRT has published a range of information regarding rates of remuneration and conditions for road transport drivers. It has published such information on its website in accordance with the requirements of the RSR Act. It appears that all such published information was already publically available through other sources.

The Tribunal has not undertaken any independent qualitative research regarding the connection between remuneration and safety, the operation of existing complementary regulatory regimes or ways to improve safety in the sector. Nor has it commissioned any such research, to our knowledge.

The research undertaken by the Tribunal is of very limited assistance in seeking to identify ways of improving safety in the road transport industry. It sheds little light on how remuneration-related matters may affect safety.

8. The appropriateness of the Tribunal model as a means of addressing safety performance in the road transport industry

As discussed above Ai Group doubts the capability of the Tribunal to facilitate tangible improvements in safety. We also have significant concerns regarding the nature of the Tribunal established under the RSR Act and the manner in which the Act regulates the Tribunal's operation. To a significant extent our concerns have been borne out by the Tribunal's limited activities to date.

The model of empowering a Tribunal to regulate the remuneration and condition of drivers, complemented by dispute resolution functions, is by no means unprecedented or even novel. The NSW industrial relations system has regulated the remuneration for contract drivers for decades. The relevant provisions are currently reflected in the provisions of Chapter 6 of the *Industrial Relations Act 1996* (NSW). There are many similarities between the NSW system and that created under the RSR Act.

The NSW system has culminated in the establishment of a raft of detailed industrial instruments known as 'contract determinations.' The NSW Commission is also empowered to exercise more interventionist dispute resolution functions than contemplated by the RSR Act.

If the Tribunal model represented an appropriate, effective or efficient means of addressing safety performance of the road transport industry this would have been borne out through tangible improvements in safety outcomes in NSW. Sadly, this is simply not the case.

9. Concerns over appointments

Additional concerns arise from the specific appointments to the RSR Tribunal. The Tribunal is comprised of dual members of the Fair Work Commission (FWC) along with part-time industry participants.

The dual appointees from the FWC undoubtedly have significant experience in the regulation of the employment relationship. However they do not have significant experience dealing with the regulation of independent contractors. More specifically they do not have experience dealing with the often complex diverse commercial and contractual arrangements in play within the road transport industry.

It is not desirable or appropriate that individuals accustomed to considering matters of industrial regulation through the prism of the employment relationship be appointed to regulate the terms and conditions of commercial parties involved in an independent contractor relationship. It is even less appropriate for such individuals to be empowered to develop regulation that interferes with commercial arrangements between businesses in the supply chain.

It must also be borne in mind that members of the FWC predominantly focus on matters of an industrial character rather than dealing with the regulation of matters associated with safety or the performance of on-road activities. In contrast, specialised bodies such as the National Heavy Vehicle Regulator and Safe Work Australia are far better placed to tackle issues associated with safety issues.

Further concerns arise from the part-time appointments to the Tribunal. We set these out below but please note that we do not seek in any way to impugn the integrity of the individuals appointed.

9.1 The appointment of a current representative of an industrial association with a significant interest in the operations of the Tribunal

Mr Ryan is the National Industrial Advisor for the ARTIO, a body that has made submissions to, and appeared before, the RSR Tribunal. This includes proceedings in which Mr Ryan was a Member of the RSR Tribunal Bench.

Further, Mr Ryan has continued to represent ARTIO in proceedings before the FWC while appointed to the RSR Tribunal. There is significant overlap between matters likely to be considered by both Tribunals.
Obvious concerns regarding potential conflict of interest arise in the above described circumstances.

9.2 The Appointment of Professor Williamson

Concerns also arise in relation to the appointment of Professor Williamson. In proceedings before the RSR Tribunal the TWU has relied on research undertaken by the Professor in support of their claims.

Professor Williamson was a Member of the Bench conducting the first annual work program. In such circumstances inevitable concerns arise regarding apprehended bias.

9.3 Concerns regarding the collective experience of the part-time Members

The remaining members of the Tribunal comprise, Steve Hutchins, a former State Secretary of the TWU and a Labor Senator, as well as Tim Squires, a small business owner affiliated with a State based trucking association.

There does not appear to be a part-time Member with significant experience working in or representing the interests of the broader supply chain. Instead there appears to

be a narrow range of experience focused on matters associated with the conduct of trucking operations. This is not reflective of the broad powers of the Tribunal to impose obligations on all parties in the supply chain.

Similarly, there does not appear to be any part-time Member that has any particular economic expertise. Indeed the RSR Act does not even identify this as a relevant consideration for the appointment of part-time Members. This is concerning given the potential for orders issued by the Tribunal to have a sweeping impact on not only the economic viability and performance of elements of the road transport sector but also Australia.

10. The Tribunal's capacity to perform research functions

As well as performing arbitral functions the Tribunal is empowered to undertake research activities.

The dual members of the Tribunal are accustomed to the adversarial system of the FWC. Accordingly they are not necessarily well placed to perform research based activities as contemplated by section 80 of the RSR Act. This is perhaps best demonstrated by the very limited research that has been undertaken by the Tribunal to date.

11. The capacity of the FWO to enforce RSROs

The effectiveness of the operation of the Tribunal model is also limited by its reliance upon the Fair Work Ombudsman (FWO) as the body primarily responsible for enforcing any order created by the system. Ai Group has significant doubts about the capacity of the FWO to perform this role effectively. It is a body well versed in enforcing employment regulation. It is not well placed to enforce the regulation of

independent contractors or the commercial arrangements between other participants within the supply chain.

Difficulties associated with enforcement were recognised in the Regulatory Impact Statement accompanying the RSR Bill.[15] Similarly, experience of the NSW jurisdiction of contract determinations highlight the limited capacity for Government inspectorates to effectively enforce comparable regulation.

12. Regulatory overlap and complexity, and the burden this imposes on industry

The potential level of overlap between the RSR System and other laws is very significant. The continued operation of the RSR System risks direct regulatory collision with the following laws and instruments:

- The FW Act and associated regulations;
- Modern awards and enterprise agreements;
- Orders and determinations of the Minimum Wages Panel of the FWC;
- Work health and safety laws in place throughout Australia, including but not limited to:
    - *Work Health and Safety Act 2011*;
    - *Work Health and Safety Act 2011* (NSW);
    - *Occupational Health and Safety Act 2004* (Vic);
    - *Work Health and Safety Act 2011* (QLD);
    - *Occupational Safety and Health Act 1984* (WA);
    - *Occupational Health, Safety and Welfare Act 1986* (SA);

[15] Regulatory Impact Statement Accompanying the Road Safety Remuneration Bill 2012 at pxl

- *Workplace Health and Safety Act 1995* (Tas);
- *Work Health and Safety Act 2011* (ACT);
- *Work Health and Safety (National Uniform Legislation) Act 2011* (NT);

- The *Independent Contractors Act 2006*;
- The *Corporations Act 2001*;
- The *Competition and Consumer Act 2010*;
- State based laws relating to employment matters such long service leave, jury service leave, workplace surveillance and workers' compensation;
- The *Industrial Relations Act 1996* (NSW) (along with the array of industrial instruments created pursuant to this legislation);
- The *Owner Drivers and Forestry Contractors Act 2006* (Vic);
- The *Owner Drivers (Contracts and Disputes) Act 2007* (WA)
- Various Industry codes of practice and accreditation schemes currently in place.

However, it is difficult to outline the precise nature of such matters in a comprehensive way because it will in part be dependent on what future action is taken by the RSR Tribunal and in particular what content is ultimately included in RSROs.

It is important to recognise that the current RSRO is potentially only the first of many orders to be made by the new Tribunal.

While the RSR Act is intended to operate concurrently with existing laws, both the legislation and instruments or orders made under it will have the capacity to override existing Commonwealth and State laws. Sections 10, 11, 12, 13 and 14 of the RSR

Act govern the interaction between the RSR System and other Commonwealth and State laws.

Section 10 of the RSR Act indicates the intent that the legislation will operate concurrently with other laws. The provision states:

> ***"10 Concurrent operations generally intended***
>
> *(1) This Act is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory that is capable of operating concurrently with this Act.*
>
> *(2) In particular, this Act is not intended to exclude or limit the operation of:*
>
> *(a) the Fair Work Act 2009; or*
>
> *(b) the Independent Contractors Act 2006 (but see section 14); or*
>
> *(c) Chapter 6 of the Industrial Relations Act 1996 of New South Wales (and any other provision of that Act to the extent that it relates to, or has effect for the purposes of, a provision of Chapter 6); or*
>
> *(d) the Owner Drivers and Forestry Contractors Act 2005 of Victoria; or*
>
> *(e) the Owner-Drivers (Contracts and Disputes) Act 2007 of Western Australia; or*
>
> *(f) a law of a State or Territory that is specified in regulations made for the purposes of this paragraph, to the extent that the law is so specified.*
>
> *(3) However, this section is subject to the other provisions of this Subdivision."*

Section 10 makes it clear that the RSR Act is intended to *add* to the level of regulation imposed on the industry. The Act is not an attempt to necessarily cover the field in relation to any matter it regulates. In particular it is not intended to completely oust the operation of the laws identified in Subsection 10(2).

Notwithstanding section 10, the provisions of the RSR Act will override any State laws to the extent of actual or direct inconsistency as contemplated by section 109 of the *Commonwealth of Australia Constitution Act 1901*. Section 10 also only relates to the operation of the Act itself, not the enforceable instruments made by the RSR Tribunal.

Sections 11, 12, 13 and 14 deal with the interaction of enforceable instruments made under the RSR System and other laws. The sections provide for varying and complex rules relating to the interaction with different types of laws. The provisions state:

> ***"11 Interaction of enforceable instruments with State and Territory laws***
>
> *An enforceable instrument prevails over a law of a State or Territory, to the extent of any inconsistency.*
>
> ***12 Interaction of enforceable instruments with other Commonwealth instruments (employees)***
>
> *(1) A term of a modern award, an enterprise agreement, an FWC order or a transitional instrument has no effect in relation to a road transport driver to whom an enforceable instrument applies to the extent that the award, agreement, order or instrument is less beneficial to the driver than a term of the enforceable instrument.*
>
> *(2) In this Act:*

enterprise agreement *means an enterprise agreement made under the Fair Work Act 2009.*

FWC order *means an order of the Fair Work Commission made under the Fair Work Act 2009.*

transitional instrument *means a transitional instrument within the meaning of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.*

13 Interaction of enforceable instruments with road transport contracts (independent contractors)

A contractor driver is entitled to be provided, by the required provider under an enforceable instrument that applies to the driver, with at least the remuneration and related conditions in the enforceable instrument, regardless of the terms of any road transport contract to which the driver is party.

14 Interaction with the Independent Contractors Act 2006

For the purposes of paragraph 15(1)(d) of the Independent Contractors Act 2006, an enforceable instrument that applies to a road transport driver whose services contract is being reviewed under that Act is a matter the Court under that Act might (but is not required to) think relevant."

Given that the RSR Tribunal has adopted a very broad view of the scope of matters that can be regulated through RSROs there is significant potential for enforceable instruments made by the Tribunal to override and oust the operation of other regulatory regimes.

There is also capacity for the interaction provisions of the RSR Act to lead to substantial uncertainty and complexity for industry parties faced with the challenge of determining which elements of respective laws apply to them. This will be a particularly confronting task for the small businesses that constitute the majority of

the road transport industry. The problem will be magnified by the fact that RSROs are likely to apply in a piecemeal manner and potentially only at certain times, based on the nature of work being performed. Consequently parties may move in and out of the coverage of the relevant systems.

The difficulties flowing from the nature of sections 11 and 12 of the RSR Act have been addressed in detail in previous Ai Group submissions.[16] In broad terms the negative outcomes flowing from the RSR System's interaction with other regimes can be summarised as follows;

- Increase in the burden and complexity of regulation in an already highly regulated sector of the economy
- The creation of significant uncertainty and ambiguity regarding applicable laws within the road transport industry and
- An undermining of the integrity, operation and objectives of existing relevant Commonwealth, State and Territory Laws
- The opportunity for individuals and unions to forum shop, by selecting the jurisdiction in which they will likely receive a more favourable outcome;
- Significant increases in the cost of engaging road transport drivers, thereby indirectly increasing costs for end user of the transported goods.

The interaction between enforceable instruments and the laws applicable to employees referred to in section 12 is particularly problematic. The section necessitates a potentially subjective assessment of the 'benefit' of the relative terms. It also appears to dictate that the test must be applied in the context of "…*a particular driver*." Accordingly the test must be applied to the specific circumstances of individuals. Depending on the terms of RSROs that may ultimately be developed by the RSR Tribunal there is the potential for section 12 to result in very uncertain and varying outcomes.

[16] See in particular annexures B, C and paragraphs 29 to 38 of annexure F

The relevant modern awards already comprehensively regulate employee remuneration. It is unclear how section 12 of the RSR Act will apply in situations where an enforceable instrument may be made setting a rate of pay for the performance of a particular activity while an award or enterprise agreement might set a level of remuneration, such as a cents per kilometre rate, that takes the performance of such activities into account without prescribing that they attract separate payment. For example, the *Road Transport (Long Distance Operations) Award 2010* sets kilometre rates that take into account that drivers often perform additional duties and have additional responsibilities such as arranging loads, purchasing spare parts, tyres etc. but does not prescribe a separate payment for such activities.[17] It would be very difficult to determine which term was more or less beneficial. Indeed the answer may vary in differing circumstances.

It should be acknowledged that section 20(1) of the RSR Act incorporates a measure aimed at requiring the Tribunal to consider issues associated with regulatory overlap and regulatory burden imposed on industry when deciding if a particular RSRO should be made. In deciding whether to make a road safety remuneration order, the Tribunal must have regard to certain listed considerations in deciding whether to make an RSRO including:

> *"(g) the need to avoid unnecessary overlap with the Fair Work Act 2009 and any other laws prescribed for the purposes of this paragraph;* "

and

> *"(i) the need to minimise the compliance burden on the road transport industry"*

However, the provision falls well short of an obligation on the Tribunal to ensure there is no overlap with obligations under other laws or instruments, or of imposing a positive obligation on the Tribunal to develop an RSRO which would have the effect

[17] See clause 14.1 of the Award

of reducing the level of regulation imposed on industry. Moreover, such considerations are merely factors to be balanced against other relevant considerations. The Tribunal is afforded significant discretion to determine how much weight will be placed on such matters.

12.1 Overlap and interference with the workplace relations system

One of the most significant and problematic areas of overlap arises in relation to the regulation of terms and conditions of employment for employees. In particular, there is a risk that the RSR System will undermine key elements and objectives of the FW Act.

Employee drivers, like other employees covered by the FW Act, are already protected by a detailed and comprehensive system and enjoy fair, relevant and modern terms and conditions of employment. Together the National Employment Standards (NES) and modern awards provide a safety-net of minimum terms and conditions that apply to employee drivers. The minimum conditions enshrined within the NES are the same for all employees in Australia and the terms of the modern awards which cover the road transport industry were the subject of an extensive deliberation process during the award modernisation process by the Australian Industrial Relations Commission, the predecessor to the FWC.

In addition to this safety-net of minimum conditions, employee drivers' conditions can be enhanced through the creation of enterprise agreements under the FW Act. This process allows any modification of the employees' wages and conditions to be negotiated and agreed at the enterprise level subject to the employee being better off overall. These arrangements have been one of the centrepieces of Australia's workplace relations system for the past two decades.

The RSR System threatens the relevance of enterprise bargaining in the road transport industry given the ability for the RSR Tribunal to centrally fix remuneration

and remuneration related conditions at a level above the safety net. This is a very retrograde step.

It is clear that the remuneration and remuneration related conditions of employee drivers (and employees more generally), are adequately dealt with under the FW Act. The RSR Act, although expressed to operate concurrently with the FW Act, overrides and undermines the FW Act and the FWC, given the power of the RSR Tribunal to issue orders which override modern awards and enterprise agreements.

There has been no evidence that the FW Act and modern awards provide an unfair or inadequate safety net for employee drivers. Indeed, if these allegations are made it is appropriate that they are raised and dealt with as part of the major reviews of the Fair Work system which will occur in 2014, ie. the Productivity Commission's inquiry into the FW Act and the FWC's 4 Yearly Review of Modern Awards.

Any argument that the wages and conditions for employees in the road transport industry are not fair, relevant or safe is an argument that the FW Act and the modern award system have not delivered fairness. Such an argument conflicts with numerous public statements made by the previous Federal Government, and conflicts with the award modernisation and Annual Wage Review decisions of the FWC.

The introduction of the RSR Act was portrayed by the former Federal Government's as its response to the *Safe Payments, Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry* report and the associated Quinlan and Wright Report. However it is crucial to recognise that these reports were published in 2008 and, accordingly pre-date the FW Act and the modern award system. Therefore, the Reports' recommendations relating to employee drivers do not take into account the protections and entitlements which now exist for employees in the road transport industry.

The creation of an additional layer of regulation to apply to employee drivers is not justified and will result in further complexity and cost for employers.

The NES

The NES provide a legislative set of 10 minimum conditions which apply to Australian employees.

The NES include maximum weekly hours and prohibit employers from requiring an employee to work more than *reasonable additional hours*. This protection is relevant in the context of fatigue management as it prohibits employees being pressured to work hours which are unreasonable. In determining whether additional hours are reasonable, the Act requires that *"any risk to employee health and safety from working the additional hours"* be taken into account.[18]

The NES also includes various forms of leave to enable employees to be absent from work in certain circumstances and to have periods of rest and relaxation each year.

Enterprise agreements

Australia's workplace relations system gives priority to enterprise bargaining in setting the wages and employment conditions of employees. This principle is equally relevant and important in the road transport industry.

Enterprise agreements under the FW Act must not exclude the NES and must pass a better off overall test against the relevant modern award/s. Also, agreements must be approved by the FWC. These requirements ensure that enterprise agreements contain wages and conditions which are fair to employees.

[18] Section 62(3) of the FW Act.

General Protections

The General Protections in the FW Act prohibit adverse action being taken against an employee because the employee has a workplace right. A "workplace right" is defined to include entitlements under laws, modern awards and enterprise agreements. The General Protections also prohibit coercion, undue pressure or misrepresentations by employers in relation to various employment entitlements. These provisions of the FW Act provide a high level of protection to employees, contractors and other persons in the road transport industry. Large penalties and unlimited damages can be imposed by a court if the General Protections are breached.

Modern awards

The *Road Transport & Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010* are the principal modern awards which operate in the road transport industry. The methods and levels of remuneration specified in these modern awards have been determined by the Australian Industrial Relations Commission (now FWC) during the award modernisation process.

Moreover, the FWC is currently concluding an exhaustive 2 review of the modern awards which commenced in 2012. In the case of the road transport industry this has been an extremely comprehensive process with numerous conferences and hearings relating to the *Road Transport & Distribution Award 2010* and the *Road Transport (Long Distance Operation) Award 2010*.

A further '4 Yearly Review' of the awards has just commenced which is scheduled to continue for the next 18 months.

The *Road Transport & Distribution Award 2010* and the *Road Transport (Long Distance Operations) Award 2010* contain fair and relevant wages and employment

conditions. Fairness and relevance were key tests which the FWC was required to ensure when modern awards were created and reviewed.

Any party who wished to argue that the wages or conditions in any modern award were not fair or relevant had the ability to make an application to the FWC to vary the award or pursue changes during the 2 Year Review of awards. Indeed the TWU did raise a number of its purported concerns in the context of the Review. A further opportunity will be afforded to such parties during the 4 Yearly Review.

The *Road Transport (Long Distance Operations Award) 2010* provides the option for employee drivers to be remunerated by means of a cents per kilometre rate of pay. During the award modernisation proceedings the TWU opposed both the creation of the *Road Transport (Long Distance Operations Award) 2010* and the inclusion of a cents per kilometre remuneration option. Relevantly in its award modernisation decision (*[2009] AIRCFB 345)* the Full Bench of the Tribunal stated:

> **"*[181]*** *The TWU submissions about this award both before and after the exposure draft were that long distance driving should not be paid by reference to cents per kilometre driven and that there was no justification for a separate modern award applying to long-distance operations; they should be contained in the RT&D Modern Award. The union made no submissions about the provisions contained in the exposure draft. Each of the employers maintained that a separate award should be made and the cents per kilometre method of remuneration, as well as other methods of remuneration that had always been in the award, should continue. We have not been persuaded to incorporate long-distance operations into the RT&D Modern Award. The long distance sector of this industry has been regulated federally for many years under a separate award and we accept the submission of the employers that it should continue to do so…."*

(Emphasis added)

The FWC has incorporated the following elements into the *Road Transport (Long Distance Operations Award) 2010* to ensure fairness to employees and to address safety considerations:

- Although the award permits employees to be remunerated on a cents per kilometre basis, this payment method is underpinned by a minimum fortnightly rate of pay which must be provided to employees.
- The cents per kilometre rates include an overtime component and an industry allowance designed to compensate drivers for the various disabilities and other features of long distance operations. It is not accurate to portray cents per kilometre rates as low rates.
- The award provides for payment to drivers engaged in loading and unloading work.
- There are restrictions placed on the hours that drivers can be required to work both in a fortnight and on any one day. These supplement the provisions of the NES.
- The award provides meal / rest break provisions.

Accordingly, employee drivers in the road transport industry enjoy a comprehensive safety net of fair and relevant minimum wages and employment conditions, under the FW Act and modern awards, and have the ability to negotiate enterprise agreements.

Employee truck drivers often work closely with other employees such as storespersons, forklift drivers, crane drivers, maintenance employees, production employees and administrative staff. It is essential that the responsibility for determining the minimum wages and conditions of all award covered employees remain with the FWC. The transfer of responsibilities to another Tribunal, or the

duplication of responsibilities, is not sensible or desirable.

It is highly preferable that only one Tribunal be responsible for setting the minimum safety net of employee terms and conditions in order to avoid the risk of forum shopping that will undoubtedly occur if both the FWC and RSR Tribunal continue to retain the capacity to set minimum rates and conditions for employees. It is inevitable that parties will seek to pursue changes to the minimum rates or conditions of drivers in the jurisdiction they believe is most likely to deliver a favourable outcome for them. Alternatively parties dissatisfied with the outcome in one jurisdiction may seek to re-agitate such claims in the other jurisdiction. These problems have already occurred with parties effectively seeking to agitate claims in the RSR Tribunal which they agreed not to pursue in the course of the 2 Year Review proceedings before the FWC.

Ensuring only one Tribunal has capacity to set minimum rates and conditions of employees will also ensure that any proposal to alter such matters is considered in a comprehensive manner. For example, the *Road Transport (Long Distance Operations) Award 2010* currently provides rates of pay that are structured to include compensation for a raft of disabilities and activities associated with the performance of work on long distance operations. If there was a proposal for an RSRO to provide separate entitlements to drivers when undertaking activities such as waiting for vehicles to be loaded or unloaded then this would potentially also justify or indeed necessitate examining and revisiting current rates in a comprehensive manner. This would not necessarily occur if such matters were simply dealt with through the imposition of an RSRO.

12.2 State laws relating to independent contractors' terms and conditions

There are a suite of existing laws applying to independent contractors operating in the road transport industry. The RSR System and the orders made pursuant to its operation will overlap, duplicate and override elements of these laws. The RSR

System gives rise to increased complexity and a greater compliance burden on parties as they are forced to apply a further level of overarching regulation.

The difficulties are demonstrated by consideration of the interaction between the RSR System and the system of contractor regulation that operates in NSW pursuant to the *Industrial Relations Act 1996*.

There is a strong risk that significant and problematic inconsistencies will develop between the operation of RSROs and the industrial instruments in force in the NSW jurisdiction known as Contact Determinations or Contractor Agreements, both of which are effectively approved by the NSW Industrial Relations Commission (NSW IRC). These instruments set the minimum levels of remuneration and other conditions of owner divers. The Contract Determinations have been developed over a period exceeding 30 years and are aligned to the operation of niche sectors of the road transport industry or even individual principal contractor's operations. Such instruments are typically relatively complex and are a product of both negotiation and arbitrated proceedings.

RSROs will potentially override elements of Contract Determinations and Contractor Agreements where there is overlapping coverage. The capacity for this to occur in a piecemeal manner will undermine the integrity of such instruments and impose additional unforseen and unfair costs on principal contractors. In some instances this will potentially disturb longstanding industrial arrangements.

The content of the first RSRO already calls into question the continuing validity of elements of the *Mutual Responsibility for Road Safety Contract Determination* which deals with similar matters relating to the implementation of safe driving plans and drug and alcohol policies.

Further potential for overlap exists in relation to RSR Tribunal's dispute settlement functions and the operation of the NSW IRC's dispute settlement functions under

Part 4 of the *Industrial Relations Act 1996* and the NSW IRC's capacity to order reinstatement of contracts of carriage pursuant to section 314 of the Act.

There is also overlap between the Road Transport Collective Agreements provided for under the RSR Act and the system of Contractor Agreements applicable under part 3 of Chapter 6 of the *Industrial Relation Act 1996*.

Ai Group has many concerns regarding the operation of the NSW system but the operation of the RSR Act does not of itself oust the operation of the jurisdiction. Instead RSROs, Road Safety Collective Agreements and the capacity for the RSR Tribunal to perform certain dispute settlement functions give rise to complex questions and uncertainty regarding the continued validity of elements of the NSW system.

The Victorian and Western Australian laws

Both Victoria and Western Australia have existing regimes applying to independent contractors operating in the road transport industry. Similar observations to those outlined above regarding NSW can be made in relation to the RSR System's interaction with the Victorian and Western Australian Systems.

The key content of the Victorian system is set out in the submissions to the RSR Tribunal of the Victorian Department of Treasury and Finance concerning the draft RSRO.[19] These submissions highlight potential adverse implications of the RSRO for that system and demonstrate the risks of retaining the RSR System.

To a large extent the both the Victorian and Western Australian systems operate around the regulation of individual contractual arrangements and in particular through either mandating or prohibiting certain types of provisions. They also afford

[19] Submissions are dated the 8th of August and available on the RSR Tribunal's website; http://www.rsrt.gov.au/index.cfm/remuneration-orders/all-rsros/draft-pr350280/submissions-pr350280/

owner drivers forums to seek enforcement of entitlements or to challenge the conduct of the parties that engage them in relation to such matters. There are differences between the respective systems but it is important to recognise that neither imposes a system of specific minimum rates of remuneration.

The regulation of individual contractual arrangements through an RSRO combined with the broader provisions of the RSR System, such as the Tribunal's dispute resolution and collective agreement making jurisdiction, has implications for the continuing operation of both systems. The operation of section 11 of the RSR Act raises complex questions about the validity of elements of State systems and the utility in maintaining State systems. At the very least, the continued operation of the RSR System will likely result in further complexity and uncertainty for parties that operate in such jurisdictions. The significance of these issues will of course be magnified by any subsequent RSROs that may be made and which may more squarely deal with matters of remuneration. Should an RSRO impose specific mandatory rates it would be directly inconsistent with the central approach adopted in each of these States.

12.3 Potential overlap with the federal *Independent Contractors Act 2006*

In addition to the abovementioned State laws, the *Independent Contractors Act 2006* (Cth) (IC Act) already provides significant protections to owner drivers. As identified by the *Safe Rates; Safe Roads* Directions Paper which was released prior to the passage of the RSR Act:

> "*The IC Act allows for the Federal Court or the Federal Magistrates Court to review contracts, and to vary, or set aside, the contract if it is found to be unfair or harsh. In deciding whether a contract is unfair or harsh, the Court may consider the following;*
>
> - *the terms of the contract and when it was made*

- *the relative bargaining strengths of the parties to the contract*
- *any undue influence, pressure or unfair tactics which may have been used*
- *whether the total remuneration paid to the independent contractor is less than an employee doing the same work would have received; and*
- *any matters*

Every owner driver in Australia has access to the unfair contracts regime under the IC Act, provided their service contract falls within the scope of the Act. Owner Drivers in Victoria, New South Wales and Western Australia may have additional unfair contract protections created under specific state-based, owner driver legislation."[20]

(Emphasis added)

Given the operation of the IC Act it cannot be argued that the conditions of engagement for contractors were not already regulated at the Federal level prior to the implementation of the RSR System. It is simply that they were not regulated in the prescriptive manner which will result from the continued operation of the RSR System.

The IC Act provides an avenue for contractor drivers to address any perceived unfairness in their contracts.

12.4 The *Competition and Consumer Act 2010* and collective bargaining

The *Competition and Consumer Act 2010* already permits independent contractors to bargain with principal contractors on a collective basis, with authorisation from the

[20] Safe Rates Safe Roads Directions Paper, p. 36.

ACCC. This capacity has previously been utilised by the TWU to collectively bargain on behalf of owner drivers.

The RSR Act establishes a federal regime of enforceable collective agreements covering contractor drivers. The RSR Act also sets out certain exemptions from provisions of the *Competition and Consumer Act 2010* in relation to the conduct of parties.

The collective agreement making provisions of the RSR System enable a principal contractor to avoid the operation of an RSRO applicable to contractor drivers covered by the agreement. However, the utility of such instruments to principal contractors will be limited given any subsequent RSRO will override the agreement if the agreement is "less beneficial" than any subsequently made RSRO.

The utility of such provisions will also be undermined by the fact that the Tribunal's approval of an agreement ceases to have effect upon the expiry of the agreement. This will expose principal contractors to very significant industrial pressure to renegotiate such agreements if they have used the agreement to implement operational arrangements contrary to a RSRO. The approach is very different to the concept of 'nominal expiry dates' adopted under the FW Act in relation to enterprise agreements for employees.

The collective agreement making jurisdiction of the RSR System is likely to be predominantly utilised by the TWU to pursue an industrial agenda rather than to result in improvements in safety. It is telling that the test for approval of such collective agreements and the rules for their interaction with subsequently implemented RSROs focus on an assessment of the relative benefits of the RSRO to drivers rather than the safety implications. There is no capacity to implement a collective agreement displacing an RSRO even if it would result in drivers being

safer, unless it can also be established that the industrial conditions of the majority of drivers covered by the agreement would be "better off overall".[21]

The collective agreement making jurisdiction of the RSR System must be viewed as a means of delivering drivers more beneficial industrial conditions. It may also operate to the benefit of the TWU which will undoubtedly promote its role in representing drivers in negotiating such instruments as a means of increasing its membership. The jurisdiction is unlikely to be effective in improving safety.

12.5 State and Territory work health and safety laws

There are sophisticated regulatory regimes already in place throughout Australia which deal directly with work health and safety.

Crucially, significant developments have been made in recent years to develop harmonised State and Territory work health and safety laws. These initiates are extremely important and are likely to have a positive impact on improving the safety performance of the road transport industry over the years ahead.

Given the operation of section 11 of the RSR Act, there is significant potential for the RSR System to override and undermine State and Territory work health and safety regimes. The level and extent of potential overlap cannot be considered to be limited to the content of the first RSRO alone.

A key rational for the implementation of harmonised laws was to reduce the complexity of the regulatory environment. It is concerning that this has been undermined by the imposition of another layer of regulatory burden through the RSR System.

[21] See section 34 of the RSR Act.

The prescriptive approach within the first RSRO, and its provisions in relation to Safe Driving Plans in particular, are inconsistent with the modern approach to the regulation of work health and safety. The modern approach involves imposing broad duties on parties while leaving the parties to identify the best manner in which to meet those duties (an approach based on what is known as the Robens Principles).

It is industry participants that are best placed to identify the measures within their specific and diverse operating environments that will effectively address safety. Not only does the RSRO's prescriptive approach represent a deficient manner of regulating safety, it is likely to have a negative impact on productivity.

There is the capacity for existing work health and safety laws (and indeed relevant transport regulation) to be further supported by the development of appropriate codes of practice to provide additional guidance to parties.

Existing work health and safety laws represent a far more balanced and effective response to safety. Crucially, this includes the capacity to impose obligations on employers and principals as well as on employee drivers and contractor drivers. In contrast, under the RSR Act, RSRO are not able to impose obligations on drivers.

Ai Group does not deny that employers, principal contractors and supply chain participants can impact on road safety and accordingly should be the subject of appropriate regulation. So too can drivers. Accordingly, it is appropriate that drivers should have a level of personal responsibility imposed upon them. Instead, the RSR System only seeks to address safety by regulating the behaviour and actions of parties not actually driving. This represents an extremely unbalanced and unfair approach.

At a practical level the inability for a RSRO to impose obligations on drivers also undermines the effectiveness of the RSR System. This can be demonstrated by the likely impact of the RSRO provisions relating to Safe Driving Plans. While the

Tribunal's first RSRO requires that transport operators undertake certain actions in relation to completing or following such plans, there is no obligation under the order for the driver to cooperate with such matters. This has the potential to significantly undermine the practical application of this element of the RSRO. Many Ai Group members have expressed significant doubt about the likelihood of contract drivers in particular filling out, returning or complying with instructions on a Safe Driving Plan.

12.6 Transport regulation – including initiates such as the Heavy Vehicle National Law and the National Heavy Vehicle Regulator

There is significant overlap between the operation of the RSR System and both existing and soon to commence transport regulation, as well as associated initiatives.

These concerns are reinforced by important developments such as the establishment of the National Heavy Vehicle Regulator and the impending commencement of the Heavy Vehicle National Law (HVNL).

The HVNL represents a far more effective and efficient means of improving road safety than the RSR System. The implementation of the HVNL negates any utility and desirability for continuing the operation of the RSR System.

The HVNL and associated regulations are planned to commence on 10 February 2014 in Queensland, New South Wales, Victoria, South Australia and Tasmania. The Australian Capital Territory and Northern Territory will commence the national law at a later date. Western Australia will not commence the HVNL at this time but has its own separate regime.

The HVNL was developed through extensive consultation with relevant stakeholders over several years. This contrasts sharply with the expedited process associated

with the development of the RSR Act and the development of the first RSRO by the RSR Tribunal.

The establishment of the HVNL, coupled with the establishment of the National Heavy Vehicle Regulator, represents a major step towards simplifying the regulatory burden on industry by achieving a greater degree of national consistency. Such initiatives should be supported and given time to work rather than undermined by the continued operation of the RSR System.

One of many major flaws of the RSR System is that it does not specifically require the RSR Tribunal to have regard to the HVNL when considering whether to make an RSRO. While the Explanatory Memorandum accompanying the *Road Safety Remuneration Bill* foreshadowed that a reference to the HVNL would be included in the relevant Regulations, so as to require this, to date this has not eventuated. Consequently the RSR Tribunal has issued an RSRO with very wide ranging application absent such an obligation.

A review of the Decision of the RSR Tribunal Full Bench concerning the making of the first RSRO suggests surprisingly little consideration was given to the role of the HVNL by the Tribunal.

Ai Group encourages the Review to give significant consideration to the HVNL in considering the extent to which the HVNL constitutes a far more effective and efficient regulatory response to improving safety than the RSR System, as Ai Group asserts. Particular regard should be had to chapters 5 and 6 which specifically address the underlying issues of speed and fatigue, factors that are commonly identified as contributing to unacceptable safety outcomes. We do not propose to set these provisions out in full but note that the preliminary sections of these respective chapters succinctly identify the purpose of these provisions and their main features.

Relevantly, in relation to measures to address speeding the legislation states;

"202 Main purpose of Ch 5

The main purpose of this Chapter is to improve public safety and compliance with Australian road laws by imposing responsibility for speeding by heavy vehicles on persons whose business activities influence the conduct of the drivers of heavy vehicles.

203 Outline of the main features of Ch 5

This Chapter—

(a) requires persons who are most directly responsible for the use of a heavy vehicle to take reasonable steps to ensure their activities do not cause the vehicle's driver to exceed speed limits; and

(b) requires anyone who schedules the activities of a heavy vehicle, or its driver, to take reasonable steps to ensure the schedule for the vehicle's driver does not cause the driver to exceed speed limits; and

(c) requires loading managers to take reasonable steps to ensure the arrangements for loading goods onto and unloading goods from a heavy vehicle do not cause the vehicle's driver to exceed speed limits; and

(d) requires particular persons who consign goods for transport by a heavy vehicle, or who receive the goods, to take reasonable steps to ensure the terms of consignment of the goods do not cause the vehicle's driver to exceed speed limits; and

(e) prohibits anyone from asking the driver of a heavy vehicle to exceed speed limits and from entering into an agreement that causes the driver of a heavy vehicle to exceed speed limits; and

(f) imposes liability on persons who are most directly responsible for the use of a heavy vehicle for offences committed by the vehicle's driver exceeding speed limits."

In relation to measure to address fatigue the legislation states:

220 Main purpose of Ch 6

(1) The main purpose of this Chapter is to provide for the safe management of the fatigue of drivers of fatigue-regulated heavy vehicles while they are driving on a road.

(2) The main purpose is achieved by—

(a) imposing duties on drivers of fatigue-regulated heavy vehicles and particular persons whose activities influence the conduct of drivers of fatigue-regulated heavy vehicles in a way that affects the drivers' fatigue when driving on a road; and

(b) imposing general duties directed at preventing persons driving fatigue-regulated heavy vehicles on a road while impaired by fatigue; and

(c) imposing additional duties directed at helping drivers of fatigue-regulated heavy vehicles to comply with this Chapter, which are imposed on particular parties in the chain of responsibility; and

(d) providing for the maximum work requirements and minimum rest requirements applying to drivers of fatigue-regulated heavy vehicles; and

(e) providing for recording the work times and rest times of drivers, amongst other things.

It is important for the Review to appreciate that the HVNL imposes obligations on the entire supply chain. This builds on the concept of the 'Chain of Responsibility' already commonly embraced by existing transport regulation.

The HVNL also has the capacity to address purported economic pressures that may be imposed on drivers by their hirers, employers or other supply chain participants. Any contention that this is a role which can only played by the RSR Tribunal is obviously incorrect.

Importantly, the HVNL prohibits parties from making requests or entering into contracts or agreements which would cause or incentivise speeding or driving whilst fatigued.

The legislation also imposes appropriate and tailored positive obligations on parties to address issues of speed and fatigue. This includes imposing different obligations on employers, prime contractors, consignors/consignees, employers, schedulers, loading managers and drivers.

There are very significant penalties for a contravention of the HVNL. Section 742 of the HVNL has the effect of rendering contracts contravening the HVNL void.

The approach within the HVNL of setting broad obligations on parties but leaving it to them to determine the best way to achieve compliance with such matters (in a manner consistent with the Robens Principles that have long underpinned modern safety laws) is a far superior approach to the highly prescriptive and likely impractical obligations imposed by the first RSRO in relation to matters such as Safe Driving Plans and Contacts. The approach within the RSRO is likely to undermine the operation of the HVNL by fostering a culture of mere compliance with the express obligations within the RSRO.

The HVNL operates in a far more flexible and instructive way than the first RSRO. For example, many provisions of the HVNL are expressed to require parties to take '*reasonable steps'* to achieve certain outcomes or to prohibit certain conduct if a party would '*know, or ought reasonably to know*' it would have a particular effect'. The legislation provides guidance as to what factors may be taken into consideration

in deciding whether such obligations have been complied with. As such, the HVNL ensures a level of practicality in the legislation's operation. The Tribunal's first RSRO generally adopts a far less sophisticated approach to regulating safety.

The RSR System undermines the benefits of regulatory simplification flowing from the move towards a single rule book (the HVNL), administered and overseen to a great extent by a single regulatory body, the National Heavy Vehicle Regulator.

If there is a concern that there are deficiencies in existing transport regulation or the HVNL they should be considered in the review of the chain of responsibility regime which is currently being conducted by the National Transport Commission at the initiation of the Standing Council of Transport and Infrastructure of the Council of Australian Governments.

13. The negative consequences and feasibility of establishing a regime of specific minimum rates for contract drivers

The first RSRO did not generally address matters of remuneration, or more specifically, it did not address the issue of rates of pay.

Nonetheless, there remains a very real likelihood that the RSR Tribunal may implement an order prescribing minimum rates of pay in the near future. Such matters have been pursued by the TWU in proceedings before the Tribunal and related issues are to be the subject of a conference convened by the President of the Tribunal on the 10th of February this year.

Ai Group opposes the development of a new federal regime for the setting of mandatory rates of remuneration for contract drivers. We are not convinced of the utility of such measures as a means to improve safety or of the practicality of developing and enforcing such a regime.

Ai Group supports the principle that businesses need to have the freedom to enter into legitimate and efficient commercial arrangements. Governments should not lightly or unnecessarily intervene into the contractual arrangements between commercial entities. The approach reflected within the RSR System profoundly and substantially disturbs this principle, not only in respect of the contractual arrangements entered into between owner drivers and their hirers, but also between transport companies and their clients.

As explained in Bills Digest No. 88, 2011-12, pertaining to the proposed Bill, a previous House Standing Committee on Communications, Transport and the Arts inquiry into fatigue in the transport industry in 2000 concluded that Governments could do little to intervene in commercial matters in respect of setting freight rates:

> *"It is simply not feasible for governments to make and impose decisions about optimal staffing levels within individual transport companies; or about the rates of payment in haulage contracts or about payment methodologies. These are matters which the industry itself needs to resolve."*

It is doubtful that any federal tribunal charged with setting mandatory rates and related conditions for contract drivers could adequately address the diverse nature of the Australian freight task or the varied nature of the road transport industry. It would need to account for variables ranging from differing operating costs associated with the type, model and age of vehicles and equipment utilised across the industry as well as the highly varied nature of the tasks performed by specific sectors of the road transport industry. For example, it would necessitate taking account of very different cost and operational considerations associated with the businesses undertaking long distance work, short-haul work, the transportation of goods such as quarried materials, refrigerated items, dangerous goods, plus those businesses providing specialised services such as occurs in the car carrying sector.

The differing tax concessions available depending on the structure of the contractor's business (i.e. its corporate status) would also need to be considered. It is also unclear as to how the Tribunal would accommodate the reality that unlike employees who generally only perform work for a single employer, contractors may be engaged by multiple hirers. This may include simultaneously transporting goods for multiple hirers. The Tribunal has an impossible task when trying to ascertain from these factors the development of an order that relates to safety and remuneration. The risk for the industry is that a "one size fits all model" will be imposed which substantially increases costs, but fails to improve safety.

Due to the nature of engagement of owner drivers the power to ensure compliance and enforceability of orders made pursuant to the terms of the RSR Act are highly questionable. Such concerns were reflected in the Regulatory Impact Statement accompanying the RSR Bill :

> "*Although the rate set by the Tribunal will be mandatory for owner drivers and supply chain businesses, in practice achieving 100 per cent compliance may be difficult. Truck drivers are very mobile and will not necessarily have the documentation or records necessary to demonstrate compliance or take action up the supply chain to ensure payment of the safe rates. With only some sectors and some trips covered by the safe rate, industry participants and compliance officers may have difficulty confirming whether or not a mandatory rate set by the tribunal applies to their work,*[22]"

Ai Group is very concerned that the RSR Act will give rise to a system of regulation which is similar to that in place in New South Wales. The New South Wales system is deeply flawed and amongst industry participants there is significant concern regarding widespread non-compliance with the regime. This problem was

[22] Regulatory Impact Statement, p.xl.

acknowledged in a Review of the operation of the New South Wales system in 2002. The Review identified that:

> *"….there is reason to believe that the rates specified in contract determinations and agreements are not actually paid in practice. Certainly, compliance with the determination rates varies from market segment to market segment.[23]"*

Such illegal behaviour from some operators results in significant hardship for reputable operators who comply with the law but are subject to competitors undercutting their position. The RSR System will potentially result in a replication of these problems at a national level.

As discussed earlier in this submission, the setting of minimum rates and/or conditions for contract drivers is not a new initiative. In NSW such regulation has been in place for over 30 years. If such measures comprise an effective mechanism for addressing safety it would be reasonable to expect that there would have been a notable increase in safety outcomes in those States. Ai Group is unaware of any evidence to suggest that such benefits have been realised. The continued persistence of unsatisfactory road safety outcomes within States which already contain mechanisms regulating owner driver rates and conditions demonstrates the limited capacity of industrial relations mechanisms to improve road safety.

14. Importance of a competitive road transport industry and associated economic considerations

The maintenance of a globally competitive road transport industry is of crucial strategic importance to the Australian Economy. It is estimated that the industry

[23] NCP Review of Chapter 6 of the NSW Industrial Relations Act, p.51.

contributes approximately 1.7 per cent of Australia's total gross domestic product and approximately 2.3 per cent of the total Australian employment.[24]

The significance of the road transport industry however is not a product of its size but also of its linkages with other sectors of the economy. The overwhelming majority of Australia's freight task is moved by road transport at some time. Accordingly when one talks about the 'supply chain' in reference to the road transport industry there are virtually no industries which are not included.

Any significant increases in road transport costs are likely to damage the competitive position of the businesses in 'the supply chain', particularly those which face international competitive pressures, including the already struggling manufacturing and retail sectors which are highly reliant upon road transport services.

Rural and regional areas are likely to experience a disproportionately onerous cost burden given their very heavy reliance on road transport as the mechanism by which products are delivered to these regions. The Regulatory Impact Statement (RIS) supports this view and identifies:

> *"Businesses in regional areas may be particularly affected because of the impact of safe rates on backhaul arrangements. In the current system, owner drivers will accept significantly lower rates on backhaul trips, given they are making that return trip anyway. The introduction of mandatory rates/and or conditions may mean that drivers could not carry loads on backhaul trips for rates below the 'safe rate'. This would increase the costs for businesses in regional areas that provide goods to larger markets."*[25]

[24] Regulatory Impact Statement; p.v.
[25] Regulatory Impact Statement, p.xliii.

Additionally, it must not be presumed that given the current reliance that many industries have on road transport, that any increase in costs will merely be accepted by these sectors. Indeed such sectors may simply be unable to sustain such costs.

The progressive implementation of RSROs will potentially have an extremely damaging effect on the road transport industry, including negative employment / engagement effects on owner drivers and employee drivers. Employee drivers can often be readily substituted for owner drivers and accordingly ill-conceived regulation puts the livelihood of owner drivers in jeopardy. Similarly, road transport services often compete with other modes of transport, such as rail, air and shipping. Excessive road transport cost increases are likely to lead to a shift to other forms of transport with a consequent adverse effect on the road transport industry and the people employed / engaged in the industry.

The implementation of the RSR System was not supported by robust economic modelling. This was effectively acknowledged by the Regulatory Impact Statement accompanying the Bill:

> *"This RIS has attempted to model a range of scenarios to illustrate the potential direct costs and benefits of different actions by the tribunal. The CBA results need to be treated with caution due to a wide range of assumptions in the face of incomplete and uncertain data. The scenario modelling results are purely illustrative and are highly sensitive to the assumptions adopted."*[26]

To an extent this was inevitable as the approach adopted within the RSR Act largely leaves the responsibility for developing specific regulatory measures in the hands of the RSR Tribunal.

The limited economic modelling that was undertaken raises significant doubts about whether the RSR System can be regarded as an efficient regulatory measure from

[26] RIS p.liv

an economic perspective. In considering the implementation of a 'mandatory system' like the RSR System, the RIS stated;

> *"The indicative CBA results indicate that the direct costs outweigh the direct benefits for Option 2 (voluntary system) and Option 3 (mandatory system)."*

This alone should casts doubt over the appropriateness of the RSR System. Although it is acknowledged that there are substantial limitations on the weight that can be afforded to the RIS, due to its reliance on numerous assumptions.

The Tribunal is not well placed to assess the economic consequences of its orders. Moreover, Ai Group believes the RSR Act places insufficient obligation on the Tribunal to have regard to the economic ramifications of any potential RSROs. Alarmingly, section 20 of the Act does not place any express obligation on the Tribunal to take into account the impact on the road transport supply chain. Even in relation to the road transport industry, the RSR Act merely requires the Tribunal to have regard to the likely impact of any order on the 'viability' of such businesses, as opposed to their profitability.

There is no obligation on the Tribunal to have regard to the potential impact of a proposed RSRO on employment.

The RSR System represents a risky and inappropriate approach to regulating safety with the potential for very significant and potentially unforeseen adverse consequences for the Australian Economy and the broader community.

15. Considerations arising from limitations on the coverage of the RSR System

The effectiveness of the RSR System is undermined by the limited constitutional

capacity of the Commonwealth Government to regulate the activities of the road transport industry and, in particular, remuneration and related conditions for independent contractors.

A significant proportion of owner drivers remain outside the potential scope of the RSR System. Such limitations are exacerbated by likely difficulties associated with enforcement.

The Regulatory Impact Statement accompanying the Bill estimated, for the purpose of its modelling, that the proposed system would cover 60% of owner drivers:

> *"For the purposes of scenario modelling in this RIS, coverage of the new owner driver legislation is assumed to be 60 per cent across the entire owner driver industry, with no variation in different segments of the industry. In practice, coverage is likely to differ by segment, for example it is expected that the legislation will achieve greater coverage of interstate long haul drivers than intrastate short haul drivers. However, 60 per cent coverage is assumed for consistency as there is limited evidence available that enables more precise estimation of coverage for the new legislation within the owner driver industry.*
>
> *Again, for the purposes of scenario modelling this RIS, it is assumed that compliance with a mandatory rate of owner driver remuneration set by a tribunal is 90 per cent. Although the rate set by the tribunal will be mandatory for owner drivers and supply chain businesses, in practice achieving 100 per cent compliance may be difficult. Truck drivers are very mobile and will not necessarily have the documentation or records necessary to demonstrate compliance or take action up the supply chain to ensure payment of the safe rate. With only some sectors and some trips covered by the safe rate, industry participants and compliance officers*

may have difficulty confirming whether or not a mandatory rate set by the tribunal applies to their work."[27]

The limits on the scope of the RSR System's coverage represent a significant limitation on its effectiveness.

16. Any preferred approaches to addressing road safety concerns in the road transport industry

Addressing unsatisfactory road safety outcomes is a complex and multifaceted challenge.

Ai Group has set out preferred approaches to addressing road safety concerns in the road transport industry in its response to the *Road Safety Remuneration Bill*, and in our prior submissions in response to the *Safe Rates, Safe Roads* Directions paper released on behalf of the previous Commonwealth Government.[28]

Addressing road safety requires a whole of Government approach. It also requires engagement and support from relevant stakeholders. The focus should be on achieving compliance with existing laws and instruments which directly address safety and on the performance of road transport operations. This must involve greater efforts to promote education and strong enforcement of existing laws, particularly the FW Act, the HVNL and work health and safety laws.

We also seek to draw the Review's attention to the detailed content of the *National Road Safety Strategy 2011-2020* published by the Australian Transport Council and committed to by all State, Territory and Commonwealth Governments.[29] This sets out an appropriate and detailed plan to address road safety outcomes. It represents the commitment of the Governments to an agreed set of national road safety goals,

[27] Regulatory Impact Statement accompanying the Road Safety Remuneration Bill, PIiv
[28] National Road Safety Strategy 2011 – 2020, Australian Transport Council
[29] ibid

objectives and action priorities. The strategy does not identify the need to change the way truck drivers are paid.

Rather than maintaining the operation of the RSR System, the Federal Government and industry should focus on identifying ways to support measures that directly address safety outcomes and which are widely supported and accepted as effective. This should include:

- Promoting better education and stronger enforcement of existing laws;
- Supporting the role of the NHVR;
- Promoting better use of technology to address safety risks and removing barriers to the implementation of such initiatives. This includes initiatives adopted by transport operators, such as in-vehicle monitoring systems using telematics. It also includes better use of technology by governments, such as Safe T Cams and implementation of point to point speed monitoring;
- Safer roads and associated infrastructure;
- Safer vehicles;
- Increasing seatbelt usage by heavy vehicle drivers;
- Supporting and promoting accreditation schemes, such as TruckSafe;
- The development of further codes of practice to underpin the operation of relevant work health and safety laws and transport regulation; and
- Considering the development of additional information, training and support services for owner drivers to ensure they are in a position to make appropriate decisions regarding the operation of a viable business

The RSR Act and associated regulation should be urgently repealed and the RSR Tribunal disbanded so that Governments, regulatory bodies and industry can focus on implementing strategies more likely to result in real improvements in safety. The

Federal Government should not pursue a narrow focus on regulating the amount and manner in which truck drivers get paid as a means of addressing the complex and multifaceted challenge of improving the road transport industry's safety performance.

Crucially, any further regulation of the industrial conditions of road transport drivers must be preceded by a rigorous analysis of the utility of existing regimes in regulating the terms and conditions of drivers. Additional intervention in this area would only warrant consideration if a consensus among Federal and State / Territory Governments and industry is achieved regarding both the existence of a problem warranting such reforms, identification of the deficiencies of current initiatives and the appropriate form of any new measures. Moreover any such approach should be structured in a manner which would simplify the existing significant regulatory burden on the road transport industry rather than adding to it, as the RSR System has done.

17. Conclusion

For the reasons set out in the submission, the RSR Act should be repealed and the RSR Tribunal should be disbanded without delay.