ROAD TRANSPORT SAFETY REMUNERATION BILL

ROAD SAFETY REMUNERATION (CONSEQUENTIAL AMENDMENTS AND RELATED PROVISIONS) BILL 2011

Submission to the House Standing Committee on Infrastructure and Communications

30 January 2012

Summary of Ai Group's position

The Australian Industry Group (Ai Group) has prepared this submission in response to the House Standing Committee on Infrastructure and Communication's inquiry into the *Road Safety Remuneration Bill 2012* (the Bill) and the *Road Safety Remuneration (Consequential Amendments and Related Provisions) Bill 2012*. Our submission follows an extensive consultation process with employers in the road transport industry and other relevant industries over a period of several months. It is also informed by our involvement as a registered organisation of employers for more than a century.

Ai Group makes this submission on behalf of the road transport industry and those industries which are the users of road transport. Based upon Ai Group's analysis of the Bill there is virtually no industry which will not be directly affected should the Bill become law.

The Parliament of Australia needs to keep the interests of all stakeholders foremost in mind when considering changes to the existing arrangements governing workplace relations and safety in the road transport industry. This Bill should not be conceived as a Bill which only affects those engaged in the road transport industry. In its current terms it will have major effects not only on businesses in industries which engage the road transport industry, but also Australian consumers generally.

Ai Group is strongly supportive of effective measures to improve safety in the road transport industry. Unfortunately the Bill falls short of providing any real measures to improve safety in the industry. The Bill focusses on providing remuneration mechanisms without any requirement to ensure that such mechanisms will improve safety.

The powers conferred on the Road Safety Remuneration Tribunal (RSR Tribunal) would interfere with normal commercial arrangements between transport companies and their clients.

With regard to employee drivers – the remuneration arrangements in the Bill are at odds with the position that the *Fair Work Act 2009* (FW Act) and modern awards provide a safety net for employees, and that enterprise agreements have an important role to play. The Bill has the potential to undermine the integrity of essential elements of the *Fair Work* workplace relations system.

The establishment of the RSR Tribunal would distract Government and industry 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 and enforcement mechanisms.

The notion that improved road safety will be achieved through paying drivers more or differently is flawed.

The Bill would increase operating costs within the road transport industry with flow on effects to all users of road transport services, including sectors which are currently encountering difficult trading conditions such as manufacturing and retail.

Ai Group's **primary position** is that the Bill should be rejected by Parliament for the reasons set out above and in later sections of this submission.

If Ai Group's primary position is rejected by Parliament, then the Bill should be amended as set out in this submission, including:

- Defining the 'road transport industry' exclusively in terms of the coverage of the *Road Transport Industry (Long Distance Operations) Award 2010* with no ability for a Regulation to be made expanding the coverage of the legislation;
- Removing employees from coverage of the legislation with wages and conditions set by modern awards, the National Employment Standards (NES), enterprise agreements and contracts of employment, as currently occurs;
- Inserting more balanced objectives into the legislation, including the requirement for the Tribunal to take into account the impact of its decisions on businesses in the road transport industry and other industries, and the impact on the Economy;
- Ensuring that the Bill ousts the operation of State and Territory laws dealing with similar matters to avoid businesses being subjected to a complex web of overlapping and inconsistent Federal, State and Territory laws;
- Limiting the powers of the Tribunal to circumstances where it is established that exercising particular powers would result in safer outcomes;
- Addressing the unfair and unbalanced provisions which give unions and workers wide powers to make applications under the legislation but businesses and employer organisations very limited powers.

Ai Group is one of the largest national industry bodies in Australia representing employers in the transport, manufacturing, engineering, construction, automotive, food, information technology, telecommunications, labour hire, printing, defence, mining equipment, aviation and other industries.

Ai Group is closely affiliated with more than 50 other employer groups in Australia and directly manages a number of those organisations. Significantly, it represents the industrial interests of the Australian Trucking Association of New South Wales ("ATANSW"), the peak trucking industry body in NSW, which has a membership encompassing hundreds of organisations in the private road transport industry. Together, Ai Group and its affiliates represent the interests of approximately 60,000 businesses which employ in excess of 1.2 million staff.

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

We have significant experience of the practical operation of State-based regimes regulating contractor remuneration in the road transport industry. Ai Group is represented on the Transport Industry Council in Victoria and is also a recognised State Peak Council under 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 under the various 'contract determinations' which have been established by the NSW Industrial Relations Commission.

We were comprehensively involved in the development of the FW Act through our participation in the Australian Government's Business Advisory Group, the National Workplace Relations Consultative Council and the Committee on Industrial Legislation (COIL). Ai Group is accordingly well placed to comment on the effects of this Bill in disturbing a number of key provisions and principles within the FW Act. Ai Group is extremely concerned that this Bill, if enacted into law, will damage key elements of the FW Act including the role of modern awards, the NES and enterprise bargaining. At the same time it will unnecessarily duplicate other provisions such as the general protections and dispute resolution processes.

Importance of a competitive road transport industry

The maintenance of a globally competitive road transport industry is of crucial strategic importance to the Australian Economy. It is estimated that the industry contributes approximately 1.7 per cent of Australia's total gross domestic product and approximately 2.3 per cent of the total Australian employment.[1]

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, and 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:

[1] Regulatory Impact Statement; p.v.

"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."[2]

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. The Bill's outcomes are likely to have an extremely damaging effect on the road transport industry, including negative employment / engagement effects on owner drivers and employee drivers.

[2] Regulatory Impact Statement, p.xliii.

The proposed ‘safe rates’ regime will not improve safety

The notion that paying people more or differently will improve safety, is flawed

Ai Group and its members are strongly committed to improving safety in the road transport industry, but the notion that this can be achieved through paying drivers more or differently is flawed.

The Bill implements a longstanding claim of the Transport Workers Union (TWU).

The TWU’s ‘safe rates’ claim, as delivered by the Bill, would distract Government and industry attention and resources away from measures which are widely recognised as improving safety towards a regime which is not widely supported or underpinned by robust economic modelling and which is unlikely to result in any tangible improvements in safety.

A causal connection between remuneration and road safety has not been definitively established. The RIS acknowledges that the link between remuneration and safety outcomes is uncertain:

"*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 it is a much harder task to prove that drivers were speeding because of the manner or quantum of their remuneration.*[3] "

(Emphasis added)

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 further incentivise individuals to engage in behaviours such as the working of excessive hours in order to reap the 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.

Improving Safety in the Road Transport Sector requires a holistic approach

Improving safety in the road transport industry requires a holistic approach rather than a narrow focus upon the method and quantum of remuneration. Paying road transport drivers more or in a different fashion assumes a cause and effect relationship between remuneration and safety which it simply unproven. Instead, key aspects of an effective approach to improving safety within the industry should include:

[3] Regulatory Impact Statement, p.xxvii.

- Risk identification and control;
- Improved roads & associated infrastructure;
- Fatigue management;
- Education and training;
- Measures to address drug and alcohol misuse; and
- Better use of technological solutions.

A whole-of-government approach is needed, including:

- Appropriate regulation;
- Public education campaigns;
- Codes of Practice; and
- Strong compliance and enforcement mechanisms.

Education and enforcement of the existing laws needs to be a key focus. It is simplistic to perceive increases in remuneration as the silver bullet which will strike down problems of safety in the road transport industry. Such an approach will also be counterproductive to a range of important new measures to improve safety which have already been implemented and which need to be supported plus given time to work, including:

- The new national work health and safety laws;
- Chain of responsibility laws; and

- The National Heavy Vehicle Regulator.

In concert with the efforts of Governments, road transport industry employers have worked hard to improve safety by investing in technology such as on-board GPS enabled telematics, together with improved safety systems and training. It is accepted by the National Transport Commission (NTC) that increased usage of in-vehicle technology will lead to a more competitive and safer transport and logistics industry.[4]

Often when GPS enabled telematics are introduced by transport operators, there is strong resistance from drivers and their representatives, often citing breach of privacy. Higher levels of Government assistance and promotion of these measures would have a stronger positive impact on safety than the proposed 'safe rates' remuneration regime.

Safety hazards in the road transport industry, such as inappropriate speeding, fatigue and road conditions, have been the subject of reforms by the Federal and State Governments over many years, e.g. increased penalties for speeding offences and improvements to roads. Such reform efforts need to continue. The focus needs to be on measures to improve safety. It is not in the public interest that the Australian Government or the industry shift its focus to the concept of 'safe rates'. Increased remuneration for employee drivers and owner drivers will not increase safety in the road transport industry. Improvements in safety will only be achieved if safety hazards are appropriately identified, controlled, and where possible, eliminated.

[4] National Transport Commission, *In-vehicle Telematics. Informing National Strategy*, June 2010, p.7.

National Heavy Vehicle Regulator

The improvement in safety in the heavy vehicle sector has been a focus of governments at the Commonwealth and State level for many years. In 2003, the Australian Transport Council developed the *National Heavy Vehicle Safety Strategy 2003-2010* to complement the *National Road Safety Strategy 2001-2010* with the aim of "*reducing the number of fatal and serious injury crashes involving heavy vehicles, whether the heavy vehicle was at fault or not*"[5] by:

- Increasing seatbelt usage by heavy vehicle drivers;
- Safer roads;
- More effective speed management;
- Reduced driver impairment; and
- Safer heavy vehicles.[6]

Interestingly, the *National Heavy Vehicle Safety Strategy 2003-2010* did not recommend an increase in driver remuneration to improve safety in the industry, nor did it entertain the connection between driver remuneration and safety.

[5] Australian Transport Council, National Heavy Vehicle Safety Strategy 2003-2010, p.3.
[6] Ibid

More recently, the Council of Australian Governments announced the establishment of the National Heavy Vehicle Regulator (NHVR) for all heavy vehicles over 4.5 tonne. The NHVR will be operational from January 2013 and will be responsible for administrating the Heavy Vehicle National Law (National Law), which will also become operational at that time.

The NHVR aims to achieve a national safety monitoring and reporting system dedicated to heavy vehicles. The National Law is pivotal in achieving this aim as it seeks to promote and improve safety by consolidating a myriad of laws into one model law.

As was the case with the *National Heavy Vehicle Transport Strategy*, the NHVR and the National Law do not contemplate that a increase in driver remuneration would increase safety. Rather the NHVR and National Law focus on easing the already heavy compliance burden on road transport operators.

Overregulation has a direct impact on the ability for road transport operators to make safety their primary focus. Inappropriately and inconsistently, the Government is seeking to increase the regulatory burden on Australian business via this Bill at the very same time it is seeking to reduce this compliance burden by introducing the National Law.

Measure to address excessive speed through the use technology and associated mechanisms

The adoption of various forms of in-vehicle safety technology can assist both drivers and the companies that engage them to better manage driving behaviors which contribute to unsatisfactory road outcomes. This includes, among others, measures such as compliance with speed limiter regulations and vehicle monitoring systems utilizing GPS enabled telematics.

While speed limits for all road vehicles are regulated and enforced by the relevant road safety agencies and police in the respective States and Territories, heavy vehicles over 12 tonne are required to be fitted with a speed limiter set at 100 km per hour. Although it is acknowledged that a speed limiter does not necessarily prevent a vehicle from exceeding 100 km per hour in all instances due to environmental factors such as the gradient of the road a vehicle is travelling on, they nonetheless represent an important tool in reducing the capacity for excessive speed to contribute to incidents involving heavy vehicles. It is important that greater efforts be made to enforce requirements relating to speed limiter technology in accordance with applicable legislation in order to overcome problems associated with tampering and inappropriate calibration of such devices which inhibit the proper functioning of this technology.

The use of in-vehicle monitoring systems utilising telematics represent an additional tool capable of facilitating safe driving behaviour by enabling employers or fleet operators to both monitor and manage practices associated with both fatigue and speeding. As such, they greatly increase the capacity of organisations to effectively take responsibility for managing and enforcing workplace health and safety among their drivers.

More specifically, technology such as GPS enabled onboard monitoring or tracking systems can enable an employer to locate the position of a vehicle and the speed at which it is travelling. It also allows the employer to monitor whether the driver is complying with relevant fatigue management principles by assisting it to identify factors such as where, when and for how long a driver has stopped for a rest break.

Technology such as black boxes, GPS tracking systems and speed limiters are safety measures which directly promote good driving practices by facilitating meaningful safety management practices. Accordingly, the measures are capable of playing a vital role in encouraging cultural and behavioural change within the industry. Governments should give consideration to measures aimed at encouraging organisations to adopt appropriate technological measures to rectify unsafe practices.

In addition to the abovementioned technological measures, Safe-T-Cam systems and Point-to-Point speed enforcement have been adopted by State Governments to discourage unsafe driving by heavy vehicle drivers.

Ai Group is strongly supportive of appropriate mechanisms which encourage safe driver behaviour and that positively impact the safety culture within the road transport industry. However, Ai Group is of the view that a 'safe rates regime' as contemplated under the Bill will not effectively achieve such behavioural and cultural change and that the focus for Governments should be on utilising the abovementioned technological advancements and other recognised safety measures to improve safety in the industry.

Driver impairment and State / Territory chain of responsibility legislation

Driver impairment includes driving while fatigued or under the influence of alcohol or drugs. Legislation has been enacted by State and Territory Governments prohibiting drivers from driving while fatigued or under the influence of alcohol or drugs, and heavy penalties apply if such laws are breached.

Additionally, existing chain of responsibility laws place obligations on each of the parties within the supply chain to ensure that safe driving practices are adhered to, including not exceeding the speed limit and not driving while impaired. For example, the client/consignor is obliged to consider the consequences of their demands on drivers, e.g. unrealistic deadlines. Obligations are also placed on fleet operators to ensure the safety of their drivers by, for example, engaging in effective and efficient scheduling and rostering practices. If organisations or individuals are already prepared to breach these laws it is foreseeable that they may similarly disregard new regulation relating to remuneration and related conditions.

The definition of the 'road transport industry'

The *'road transport industry'* in the Bill is defined in terms of the coverage of:

- The *Road Transport and Distribution Award 2010*;
- The *Road Transport (Long Distance Operations) Award 2010*;
- The *Transport (Cash in Transit) Award 2010*;
- The *Waste Management Award 2010*;
- Any other modern award prescribed in the Regulations.

Research referred to in the National Transport Commission Report, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry (October 2008)* ('NTC Report'), on which the *Safe Rates, Safe Roads* Directions Paper was based, argues that fatigue and the manner in which road transport drivers are remunerated, (i.e. per kilometre rates), are likely influential factors on safety outcomes in the industry.[7] These factors are mostly concentrated in the long haul sector. In fact, the *Road Transport (Long Distance Operations) Award 2010* is the only private non-passenger transport award that allows employees to be remunerated on a per kilometre basis. The other private non-passenger transport awards, i.e. the *Road Transport and Distribution Award 2010* and *Transport (Cash in Transit) Award 2010*, do not permit payment on this basis.

[7] For example Figure 3 in the National Transport Commission Report, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry (October 2008)*, reveals that the majority of drivers surveyed indicated that they were, at the time, paid on a per kilometre basis (56% of employee drivers and 85% owner drivers). Of the owner drivers paid on a per kilometre basis, 77% were working mainly long haul. See also pages 15-17.

Accordingly, it is invalid to use an argument for Government intervention based on the nature of driving undertaken by long haul drivers, to apply onerous new Regulations to those performing non-long haul work.

The coverage of the *Road Transport and Distribution Award 2010* extends to businesses which operate outside of the road transport industry but which have ancillary transport and distribution functions. This extremely broad coverage means that most non-transport businesses which employ a driver would be covered by this award.

In addition, the *Waste Management Award 2010* was not an award made within the transport industry for the purpose of the award modernisation process. This award was made as part of the modernisation of awards in the sanitary and garbage disposal services industry. This award does not allow for per kilometre rates and given the nature of the sanitary and garbage disposal services industry, one would assume that driver fatigue is not in the same way prevalent as it is in the long haul transport sector. It is misconceived for the proposed definition of *road transport industry* in the Bill to include this award.

Furthermore, it is inappropriate and inconsistent with the Object of the Bill for the definition of '*road transport industry*' to be able to be extended by regulation to include the coverage of any other award. This regulation-making power would give the Government of the day a sweeping power to extend the coverage of the Bill without the extension being approved by Parliament. We envisage that, given the very generous nature of the legislative provisions, the TWU and many other unions would press the Government of the day to extend the coverage of the legislation through Regulation.

Employees must be excluded

If the Bill is to be passed by Parliament, despite Ai Group's objections, it is imperative that the Government remove the regulation of employee drivers from the legislation.

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 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 by the Australian Industrial Relations Commission, the predecessor to Fair Work Australia (FWA), during the award modernisation process.

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. Should employee drivers be covered by the terms of the Bill the relevance of enterprise bargaining in the road transport industry will be substantially reduced given the ability for the RSR Tribunal to centrally fix remuneration and remuneration related conditions at a level above the safety net. This would be 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 *Fair Work* system. The Bill, although expressed to operate concurrently with the FW Act, will override and undermine the FW Act and FWA, given the power of the RSR Tribunal to issue orders which override modern awards and enterprise agreements. This is an inappropriate and unnecessary reform.

There has been no evidence that the FW Act or the safety net which applies to employee drivers is unfair or incomplete. Indeed, if these allegations are made it is appropriate that they are raised and dealt with as part of the two major reviews of the *Fair Work* system which are underway, i.e. the *Fair Work Act Review* and the *Two Year review of Modern Awards.* 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.

In addition to the FW Act, many other Commonwealth and State laws operate to deal with matters which could be covered by the concept of 'remuneration and remuneration related conditions' to thereby come within the jurisdiction of the RSR Tribunal. These include superannuation legislation, long service leave legislation, workers' compensation laws and work health and safety laws. There is simply no plausible argument for overriding these laws, which could occur if the terms of the Bill are applied to employee drivers.

Although the Bill has been described as the Government's 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 it is crucial to recognise that these reports were published in 2008 and, accordingly predate the FW Act and the modern award system. Therefore, the Reports' recommendations relating to employees do not take into account the protections and entitlements which now exist for employees in the industry. These protections are discussed below.

Employees in the road transport industry enjoy fair, relevant and modern wages and employment conditions through:

- The NES;
- Modern awards;
- The enterprise bargaining system;
- The General Protections and other aspects of the *Fair Work Act*; and
- Federal and State laws dealing with superannuation, training, long service leave and other matters.

Compliance with and enforcement of the FW Act is the responsibility of the Office of the Fair Work Ombudsman (FWO) which is a very well-resourced and effective regulatory body.

In introducing the *Fair Work Act* into Parliament, the Hon Julia Gillard MP said:

> *"The bill being introduced today is based on the enduring principle of fairness while meeting the needs of the modern age."*[8]

In developing the modern award system FWA was required to ensure that:

[8] Second Reading Speech, *Fair Work Bill 2008.*

- *"modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions"*;[9] and
- *"a safety net of fair minimum wages"* was established.[10]

(Emphasis added)

Of course ensuring fairness and relevance involves, amongst other aspects, ensuring that wages and conditions do not lead to unsafe outcomes. Indeed, the award and the NES are referred to under the *Fair Work* system as the safety net.

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 Australian Government, and conflicts with the award modernisation and Annual Wage Review decisions of FWA.

The NES

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

[9] Section 134 of the FW Act.
[10] Section 284 of the FW Act.

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.[11]

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 FWA before they can override award entitlements. These requirements ensure that enterprise agreements contain wages and conditions which are fair to employees.

[11] 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 FWA) during the award modernisation process.

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 Tribunal was required to ensure that all modern awards met. Any relevant party who wishes to argue that the wages or conditions in any modern award are not fair or relevant has the ability to make an application to FWA to vary the award or pursue changes during the two year review of awards (which is currently underway) or during the four yearly review (January 2014).

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. Although the award is not specifically referred to in the Directions Paper, the NTC Report asserts that incentive based payment methods are a factor causing or encouraging unsafe practices in the road transport sector.

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 Tribunal 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 driving. 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.

As set out above, 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 FWA.

The existing arrangements for setting wages and conditions for employee drivers are effective and appropriate. The transfer of responsibilities to another Tribunal is not sensible or desirable.

Regulation of owner drivers

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 Bill 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 fit 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 Bill are highly questionable. Such concerns are reflected in the RIS:

"*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,*[12]"

The Bill would give rise to a system of regulation which is potentially not dissimilar to that in place in New South Wales. This system is deeply flawed and amongst industry participants there is significant concern regarding widespread non-compliance with the regime. This problem was 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.[13]"

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 proposed Bill is likely to result in a replication of these problems at a national level.

[12] Regulatory Impact Statement, p.xl.
[13] NCP Review of Chapter 6 of the NSW Industrial Relations Act, p.51.

The setting of minimum rates and/or conditions for contract drivers is not a new initiative. New South Wales, Queensland and Victoria have all developed systems for regulating the terms and conditions of contract drivers. Indeed 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. It is unclear why the Government has apparently decided that a better outcome will be achieved by introducing new legislation at the Federal level.

In addition to the abovementioned State laws, the *Independent Contractors Act 2006* ("the IC Act") already provides significant protections to owner drivers. As identified by the *Safe Rates; Safe Roads* Directions Paper:

> "*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."[14]

(Emphasis added)

Whilst appropriate road safety measures are supported by Ai Group, the case for establishing a new framework for the creation of orders setting remuneration and remuneration-related conditions, on safety grounds, has not been adequately justified.

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

The application of the Bill to road transport companies and other participants in the supply chain

Addressing unsatisfactory road safety is complex and multifaceted. Driver fatigue, unreasonable expectations regarding delivery times and waiting times, and illegal speeding are recognised problems. Whilst many businesses have already taken steps to rectify such problems, there are divergent views as to what further steps should be taken.

Road transport businesses can influence road safety outcomes; so too can individual drivers, other participants within the supply chain, and other users of the road network. All parties have responsibilities under road safety laws, work health and safety laws, State and Territory chain of responsibility laws, and other laws to ensure the safety of drivers and other members of the public. The assumption that paying drivers in the road transport industry more or differently will make them safer is counter-intuitive and inconsistent with the principles of good workplace health and safety which place heavy emphasis on risk identification and control, training, behavioural change and effective enforcement.

Beyond the existing laws, measures to improve safety within the supply chain have been identified and developed by industry participants themselves. These measures are continually evolving to take into consideration the various circumstances which may exist as part of ensuring freight delivery. Such measures should not be through the development and imposition of prescriptive mandatory orders determined by a tribunal which deals with remuneration issues and not commercial ones. It is the supply chain itself that is most capable of developing appropriate and practical responses which accommodate the varied nature of tasks and arrangements that apply throughout industry.

The proposed imposition of prescriptive Road Safety Remuneration Orders as a measure to address safety is contrary to the Robens principles which have long underpinned the approach to the regulation of occupational health and safety throughout Australia and many other developed nations. Rather than implementing a new layer of external state regulation as contemplated in the Bill, the Government should support measures which facilitate road transport business, customers and drivers determining the best measures to achieve this.

The new national work health and safety laws, as well as the various State and Territory laws giving effect to chain of responsibility obligations, are consistent with such an approach. Such laws are capable of directly addressing unsafe practices throughout the supply chain. These initiatives should be given a genuine opportunity to work and their effectiveness should be reviewed and assessed before any decision is made to implement a new system which will potentially overlap and prevail over such laws.

We concur with the *Safe Rates; Safe Roads* Directions Paper's observation that:

> "*Effective voluntary industry codes have the potential to improve protection for consumers and industry participants and reduce the regulatory burden on business."*

We also recognise the paper's further observation that:

> "*While they have contributed to significant improvements in large sectors of the industry, the current codes do not address all issues in the Industry*."

There should be continued efforts to develop and implement effective codes of practice across the industry and supply chain. These measures can be effectively supported by voluntary accreditation systems such as that offered by *Truck Safe* which ensure that participating road transport operators have responsible work practices, well-maintained vehicles, healthy and trained drivers and management systems to meet their needs. Such accreditation schemes can enable participants in the supply chain to ensure they engage contractors which operate in a safe manner. Such initiatives should be further promoted by Government as they empower supply chain participants to take positive steps to approve safety in a manner that is consistent with their particular operational needs

The road transport industry is already one of the most heavily regulated Industries in Australia. By introducing a new layer of regulation the Bill raises the potential for orders issued by the RSR Tribunal to overlap and contradict existing legislative schemes aimed at addressing fatigue, chain of responsibility or safety issues more broadly. It would also significantly increase the compliance and cost burden upon businesses in the industry. This is a significant issue given that many are small operators who have limited capacity to grapple with an already very onerous regulatory burden. Ultimately there is a genuine risk that such operators will be unable to meet increased compliance requirements and will instead operate in breach of such provisions. Enforcement of industrial conditions within the industry is notoriously difficult. In contrast, those businesses which do achieve compliance will have their compliance costs significantly increased, rendering them less competitive with non-compliant businesses.

Views on specific provisions of the Bill – if Ai Group's primary position is rejected

If despite Ai Group's objections elements of the Bill are enacted, the following sections of this submission identify our views on specific sections of the Bill.

We have not sought to comment on every section of the Bill.

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
Part 1 – Division1		
2 Commencement This Act commences on 1 July 2012.	**Amendment needed**	The Government should make it explicitly clear, either by variation to the Bill or otherwise, that the Tribunal's power to make RSROs will not commence until 1 July 2013. Proposed subsection 18(1) of the Bill specifies that "*[b]efore the end of each year of its operation, the Tribunal must prepare a work program for the next year*". Proposed subsections 19(2) and (4) together specify that the Tribunal may make an RSRO on its own initiative if the order is in relation to a matter identified in the work program, or if the matter does not relate to the Tribunal's work plan, it is capable of relating to the Tribunal's work plan for the following year. It is not known how rapidly the Tribunal will consider and then publish its first work program following commencement of the legislation. Regardless of this, we submit that the commencement of the Tribunal's powers in relation to the making of RSROs should be no earlier than 1 July 2013. This will give the Tribunal time to prepare a work program in accordance with proposed section 18 of the Bill and to provide participants in the road transport industry and users of road transport services time to become familiar with the operation of the Tribunal and the provisions of the Bill. A similar delay in the functions of the Tribunal should also be articulated in relation to the Tribunal's dispute resolution function (which is capable of operating almost identically to

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		RSROs when the tribunal exercises arbitral powers) and the provisions relating to road transport collective agreements. In addition to understanding the operation of the Tribunal and the Bill, an operative date of 1 July 2013 would assist parties to understand how the Tribunal and Bill interact with other Commonwealth and State / Territory laws with overlapping coverage. It may also be necessary to develop transitional provisions to assist parties to understand and fully implement any changes arising from the Bill, including any enforceable instruments made under it.
3 Object The object of this Act is to promote safety and fairness in the road transport industry by doing the following: (a) ensuring that road transport drivers do not have remuneration related incentives to work in an unsafe manner; (b) removing remuneration related incentives, pressures and practices that contribute to unsafe work practices; (c) ensuring that road transport drivers are paid for their work, including loading or unloading their vehicles or waiting for someone else to load or unload their vehicles;	**Amendment needed**	The Object of the Bill is premised on the assumption that there is a proven casual connection between the way a person is remunerated and safety. Importantly, the Object imposes on the Tribunal a requirement to make an RSRO without any analysis as to whether the applicant in the matter before it has proven the existence of a link between the remuneration related conditions or level of remuneration of the road transport driver and a safety outcome. The RIS acknowledges that the link between remuneration and safety outcomes is uncertain: "*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*

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
(d) developing and applying reasonable and enforceable standards throughout the road transport industry supply chain to ensure the safety of road transport drivers; (e) ensuring that hirers of road transport drivers and participants in the supply chain take responsibility for implementing and maintaining those standards; (f) facilitating access to dispute resolution procedures relating to remuneration and related conditions for road transport drivers.		*crash but it is a much harder task to prove that drivers were speeding because of the manner or quantum of their remuneration.* *Despite the fact that studies and academic literature have not conclusively proven the extent to which rates and safe transport outcomes are related, there are a number of market failures or factors that would suggest that it is not unreasonable to expect that the manner in which owner drivers are remunerated will impact on safety."*[15] (Emphasis added) This is significant as the Object has direct relevance to the making of RSROs by the Tribunal. Given this interaction with s 19(1), the Object, particularly paragraphs (a), (b) and (c), appear to dictate that 'remuneration related incentives' and the manner in which road transport drivers are paid will always impact safety outcomes. As a result, this effectively removes the capacity of the Tribunal to determine whether or not it is necessary to make an RSRO. The Bill should be amended to enable the Tribunal to be the arbiter of whether the causal connection between remuneration and safety exists on the circumstances of each case. The Tribunal should only be empowered to make an RSRO if there is sufficient evidence to establish that the order would rectify a safety issue and result in improved safety outcomes.

[15] Regulatory Impact Statement, *Road Safety Remuneration Bill 2011*, p.xxvii.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		'Remuneration related incentives' Further, we are of the view that the reference to 'remuneration related incentives' in the Object should be removed as it is imprecise. The use of the phrase 'remuneration related incentives' is capable of a broad interpretation and may lead the Tribunal to conclude that any mechanism by which drivers can increase their remuneration is a remuneration related incentive. Indeed, the payment of such penalties as overtime or shift loadings could be categorised as remuneration related incentives which encourage the working of additional hours or at unsocial times. **Inclusion of 'fairness' in the Bill confuses the purpose of the Bill** The reference to 'fairness' in the Bill potentially broadens the scope of the Bill beyond safety considerations. This was not foreshadowed as an objective of the *Safe Rates, Safe Roads* Directions Paper. Such a broad objective raises a risk that the mechanisms established under the Bill could be used to pursue industrial or commercial outcomes under the guise of safety considerations. The Bill should be amended to place a genuine emphasis on safety. Further, the reference to 'fairness' is unnecessary given that issues of fairness in the workplace are dealt with by the FW Act, the IC Act and various State based statutes pertaining to owner drivers.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Economic efficiency of the industry The Object also fails to consider the relevance of ensuring a system that does not undermine the economic efficiency of the road transport industry. This is an important factor that the Tribunal must be required to turn its mind to when making an RSRO, a road transport collective agreement or a determination under Part 4 of the Bill. This was acknowledged by the RIS when outlining the objects of the safe rates proposal: "*A further consideration around the safe rates proposal is to ensure that it does not undermine the economic efficiency of the industry. This implies that the proposal outcomes need to be proportional to the safety issues it is seeking to address."*[16] The RIS also identified that: "*In establishing mandatory rates and/or conditions the tribunal could be required to take into account a number of considerations including the likely impact on owner drivers and businesses in the supply chain, competition in the road transport industry, the special circumstances of rural, regional and other isolated areas, and the likely impact on the national economy.*"[17]

[16] Regulatory Impact Statement, *Road Safety Remuneration Bill 2011*, page xxviii
[17] Regulatory Impact Statement, *Road Safety Remuneration Bill 2011*, page xl

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
		The proposed Object should be deleted and replaced with the following: *"The object of this Act is to promote safety in the road transport industry by doing the following:* *(a) establishing of a system that enables remuneration related practices within the road transport industry to be reviewed and addressed in order to improve safely outcomes;* *(b) developing and applying reasonable and enforceable standards throughout the road transport industry to ensure the safety of road transport drivers;* *(c) ensuring that both road transport drivers and their hirers take responsibility for implementing and maintaining those standards;* *(d) facilitating access to dispute resolution procedures relating to the remuneration related conditions determined in road safety remuneration orders and road transport collective agreements;* *(e) establishing a system that ensures a productive and viable road transport industry that is economically sustainable and recognises the different needs of small business and the diverse nature of Australia's freight task.*

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
Part 1 – Division 2—Definitions		
4 Definitions *road transport industry* road transport industry means any of the following: (a) the road transport and distribution industry within the meaning of the Road Transport and Distribution Award 2010 as in force on 1 July 2012; (b) long distance operations in the private transport industry within the meaning of the Road Transport (Long Distance Operations) Award 2010 as in force on 1 July 2012; (c) the cash in transit industry within the meaning of the Transport (Cash in Transit) Award 2010 as in force on 1 July 2012; (d) the waste management industry within the meaning of the Waste Management Award 2010 as in force on 1 July 2012;	**Opposed**	The definition of *road transport industry* must be amended to exclude paragraphs (a), (c), (d) and (e). Research referred to in the National Transport Commission Report, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry (October 2008)* ('NTC Report'), on which the Directions Paper was based, reveals that fatigue and the manner in which road transport drivers are remunerated, (i.e. per kilometre rates), are likely influential factors on safety outcomes in the industry.[18] These factors are mostly concentrated in the long haul sector. In fact, the *Road Transport (Long Distance Operations) Award 2010* is the only private non-passenger transport award that allows employees to be remunerated on a per kilometre basis. The other private non-passenger transport awards, i.e. the *Road Transport and Distribution Award 2010* and *Transport (Cash in Transit) Award 2010*, do not permit payment on this basis. Accordingly, it is invalid to use an argument for Government intervention based on the nature of driving undertaken by long haul drivers, to apply onerous new Regulations to those performing non-long haul work.

[18] For example Figure 3 in the National Transport Commission Report, *Safe Payments: Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry (October 2008)*, reveals that the majority of drivers surveyed indicated that they were, at the time, paid on a per kilometre basis (56% of employee drivers and 85% owner drivers). Of the owner drivers paid on a per kilometre basis, 77% were working mainly long haul. See also pages 15-17.

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
(e) the meaning prescribed by the regulations by reference to a modern award specified in the regulations.		The coverage of the *Road Transport and Distribution Award 2010* extends to businesses which operate outside of the road transport industry but which have ancillary transport and distribution functions. This extremely broad coverage means that most non-transport businesses which employ a driver would be covered by this award. In addition, the *Waste Management Award 2010* was not an award made within the transport industry for the purpose of the award modernisation process. This award was made as part of the modernisation of awards in the sanitary and garbage disposal services industry. This award does not allow for per kilometre rates and given the nature of the sanitary and garbage disposal services industry, one would assume that driver fatigue is not in the same way prevalent as it is in the long haul transport sector. It is misconceived for the proposed definition of *road transport industry* in the Bill to include this award. Furthermore, it is inappropriate and inconsistent with the Object of the Bill for the definition of '*road transport industry*' to be able to be extended by regulation to include the coverage of any other award. This regulation-making power would give the Government of the day a sweeping power to extend the coverage of the Bill without the extension being approved by Parliament. We envisage that, given the very generous nature of the legislative provisions, the TWU and many other unions would press the Government of the day to extend the coverage of the legislation through Regulation.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
6 Meaning of road transport driver—individual (1) This section applies to an individual (for the purposes of paragraph 5(a)) if: (a) the individual engages in the road transport industry by driving a vehicle to transport things by road; and (b) the individual does so: (i) as an employee of a constitutional corporation, the Commonwealth, a Commonwealth authority, a Territory or a Territory authority; or (ii) under a road transport contract the other party to which is a constitutional corporation, the Commonwealth, a Commonwealth authority, a Territory or a Territory authority; or (iii) under a contract entered into in a Territory; or (iv) under a contract at least one of the parties to which is an individual who is resident in, or a body corporate that has its principal place of business in, a Territory; or	**Amendment needed**	We oppose the regulation of the remuneration and remuneration related conditions of direct employees under the Bill. As explained above, it is inappropriate for the Tribunal to determine, and thereby regulate, the remuneration and remuneration related conditions of employees, when these aspects of an employee driver's employment are adequately dealt with under the NES, modern awards and enterprise agreements. If the Bill proceeds, despite our opposition, we propose that subsection 6(b) be amended to specify that the meaning of *Road Transport Driver – individual* refers only to drivers not engaged pursuant to a contract or employment: *(b) the individual does so, <u>other than pursuant to a contract of employment</u>:* Consistent with the above proposed amendment, paragraph 6(b)(i) needs to be deleted.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
(v) for the purposes of a business undertaking of a constitutional corporation; or (vi) for the purposes of the Commonwealth, a Commonwealth authority, a Territory or a Territory authority; or (vii) in the course of or in relation to constitutional trade or commerce. (2) Without limiting its effect apart from this subsection, subparagraph (1)(b)(ii) also has the effect it would have if the reference to a constitutional corporation were, by express provision, confined to a corporation that has entered into the contract for the purposes of the business of that corporation.		

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 1 – Division 3—Application of this Act Subdivision A—Interaction with other laws		
10 Concurrent operation generally intended	**Amendment needed**	Ai Group opposes the concurrent nature of the law's operation and its interaction with overlapping legislation. The proposed 'concurrent nature' of the Bill's operation is very concerning as it will: • Increase the burden and complexity of regulation in the already highly regulated road transport industry; • Create significant uncertainty and ambiguity regarding the applicability of laws within the road transport industry; • Undermine the integrity and operation of existing relevant Commonwealth, State and Territory laws, including the FW Act; • Create the opportunity for individuals and unions to forum shop, by selecting the jurisdiction in which they will likely receive a more favourable outcome; and • Significantly increase the cost of engaging road transport drivers, thereby indirectly increasing costs for the end user of the transported goods. Some problems associated with the concurrent operation of the Bill in relation to employee drivers and owner drivers and other Commonwealth, State and Territory laws is separately discussed below.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Employee Drivers It is inappropriate for the Bill to cover employee drivers and they should be excluded from the operation of the legislation, if made. As explained earlier in this submission, it is inappropriate for the Tribunal to determine, and thereby regulate, the remuneration and remuneration related conditions of employees. These aspects of an employee driver's employment are adequately dealt with under the FW Act, modern awards and enterprise agreements. **Contractors** If the Bill is to be passed, it must be amended so as to exclude the operation of State and Territory laws relating to rates and conditions for owner drivers. This can be achieved by amending subsection 10(1) so that the Bill will 'cover the field' as it relates to remuneration and remuneration related conditions of owner drivers. By 'covering the field', the Bill will achieve national consistency and will avoid the unnecessary increase in red-tape and regulatory burden for businesses associated with a duplication of systems across some jurisdictions. The notion of national consistency was identified in the *Safe Rates, Safe Roads Directions Paper* as one of the five principles for the development of a framework of safe payments for employees and owners drivers.[19] These principles were also agreed to by the Safe Rates Advisory Group.[20]

[19] Safe Rates, Safe Roads Directions paper 2010,p.11.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		The Bill, in its current form, fails to deliver on this key principle thereby subjecting drivers in the road transport industry and their hirers to a raft of differing Commonwealth, State and Territory laws. The subject area covered by this Bill is already highly regulated. If Section 10 was to remain unamended, hirers of owner drivers would potentially need to be compliant with at least five separate pieces of overlapping legislation pertaining to the terms and conditions for owner drivers, plus workplace health and safety laws, chain of responsibility laws, and fatigue management laws at the Commonwealth, State and Territory level. This would be in addition to the array of industrial instruments created under both Commonwealth laws, and State laws, such as Chapter 6 of the *Industrial Relations Act 1996* (NSW), the *Owner Drivers and Forestry Contractors Act 2005* (Vic), and the *Owner-Drivers (Contractors and Disputes) Act 2007* (WA). In respect of Commonwealth, State and Territory workplace health and safety laws, the Bill will open the doors for workplace health and safety grievances to be pursued on the basis of remuneration, particularly if the Tribunal finds a link to pay and safety in particular circumstances and makes an RSRO on this basis. This development is very concerning as it blurs the line between remuneration and related conditions and an employer's obligation to ensure a safe workplace as far as reasonably practicable.

[20] Ibid.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		The Bill also adversely impacts upon the responsibility of workers to take reasonable care for their own health and safety while at work. This duty arises under the model work health and safety law but under the Bill the focus is shifted to whether the hirer/employer is paying the appropriate level of remuneration so as to ensure a safe workplace. Further, the Tribunal's dispute resolution powers, in their current form, are so broad that they will overlap with the General Protections provisions of the FW Act, that operate to protect contractors against adverse action. This will increase the opportunity for forum shopping by enabling employees and unions to select the best jurisdiction for their claim. It must be noted that many operators are very small businesses with limited capacity to deal with such matters. Such has been experience in NSW under Chapter 6 of the *Industrial Relations Act 1996* (NSW) with non-compliance with Contract Determination under the Act being widespread. This problem was acknowledged in a review of the operation of the New South Wales system in 2002: *"…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*."[21]

[21] NCP Review of Chapter 6 of the NSW *Industrial Relations Act* - Consultant's Report, Professor M. Barry, Dr D.Macdonald and Dr P,Waring, Employment Studies Centre, University of Newcastle, 2002.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Ultimately the level of complexity and cost to business that will be created through the 'concurrent' nature of the Bill's interaction with existing laws will render the Bill less effective in achieving its stated objectives. It is likely that businesses, particularly the large proportion of small businesses that operate in the road transport sector, will struggle to come to terms with the complicated provisions setting out the interaction between enforceable instruments and existing laws.
11 Interaction of enforceable instruments with State and Territory laws	**Amendment needed**	Section 11 proposes to regulate the nature of the interaction between the enforceable instruments under State laws and those that would be created under the Bill. As explained in our comments on section 10 (above), the Bill should be amended to exclude all State laws regulating the remuneration and remuneration related conditions of owner drivers. The problems are demonstrated by the Bill's potential impact on the operation of Chapter 6 of the *Industrial Relations Act 1996* in NSW: **Impact in NSW** In NSW, the Industrial Relations Commission of NSW has the power to create industrial instruments known as 'Contract Determinations'. These instruments determine the remuneration and remuneration related conditions for owner drivers in different road transport sectors. Contract Determinations have been developed over a period of time exceeding 30 years and are determined to closely address the needs of each individual sector in the industry. Generally,

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		Contract Determinations entitle owner drivers to a minimum level of remuneration intended to be sufficient to afford the driver with award rates and recovery of their operating costs. There are also a large number of industrial instruments operating under the NSW legislation which, in effect, reflect collective agreements between single principal contractors (hirers) and the owner drivers they engage. An enforceable instrument made under the Bill would undermine these Contract Determinations and Contractor Agreements by allowing the remuneration and remuneration related conditions of owner drivers to be determined by the RSR Tribunal, using a different and potentially inconsistent methodology to arrive at remuneration outcomes. Not only would this create significant ambiguity and complexity around which provisions were actually applicable, it would likely result in additional unforseen costs for hirers and undermine the integrity of the NSW System. Similar observations could also be made regarding the Bill's interaction with Victorian and Western Australian systems. In order to avoid such outcomes the Bill should be amended to completely exclude the operation of State laws pertaining to independent contractors in the road transport sector.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
12 Interaction of enforceable instruments with other Commonwealth instruments (employees)	**Opposed**	It is inappropriate for the Bill to cover employee drivers and they should thereby be excluded from the operation of the Act. As explained above, it is inappropriate for the Tribunal to determine, and thereby regulate, the remuneration and remuneration related conditions of employees, when these aspects of an employee driver's employment are adequately dealt with under the FW Act, modern awards and enterprise agreements. If the Government accepts Ai Group's position that employee drivers be excluded from the operation of the Bill, section 12 will need to be deleted.
13 Interaction of enforceable instruments with road transport contracts (independent contractors)	**Amendment needed**	Any increases in remuneration or remuneration related conditions awarded to a driver under an enforceable instrument under the Bill should be absorbed, as far as possible, by the driver's existing road transport contract. If section 13 is not amended to provide for the absorption of any increase in remuneration or remuneration related conditions of a driver, the Bill must be amended to allow the Tribunal to implement transitional provisions when making of any enforceable instrument under the legislation.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 2—Road safety remuneration orders ***Division 1—Preparation of annual work program***		
18 Tribunal must prepare and publish a work program each year (1) Before the end of each year of itsoperation, the Tribunal must prepare a work program for the next year. (2) The work program must identify the matters the Tribunal proposes to inquire into in the next year of its operation, with a view to making a road safety remuneration order in relation to any or all of those matters. The matters identified may be any or all of the following: (a) a sector or sectors of the road transport industry; (b) issues for the road transport industry or a sector of the industry; (c) practices affecting the road transport industry or a sector of the industry. (3) In preparing its work program for a year, the Tribunal must consult with industry. (4) The Tribunal must publish its work program on the Tribunal's website and by any other means the Tribunal considers appropriate. (5) A work program prepared under	**Amendment needed**	If the Bill is to be passed, Ai Group supports the proposition that the Tribunal should identify the matters which it intends to inquire into in the following year and publish a work program for the following year. Section 18(2) of the Bill however is drafted in terms that arguably require the making of a road safety remuneration order in relation to the matters identified in the work program as it states: *"18(2) The work program must identify the matters the Tribunal proposes to inquire into in the next year of its operation, with a view to making a road safety remuneration order in relation to any or all of those matters."* (our emphasis) Road safety remuneration orders should be issued at the discretion of the Tribunal and only in circumstances where: • The Tribunal is satisfied that the making of the order **will improve** safety in the road transport industry; and • If the Tribunal is satisfied that **there is an unsafe practice** in the road transport industry **which is caused** by the remuneration paid to the road transport driver These matters are discussed in greater detail in relation to the operation of section 20 of the Bill.

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
subsection (1) is not a legislative instrument.		Section 18(2) of the Bill should be amended as follows to delete the inference that RSROs are mandatory in relation to any matters identified in the Tribunal's work programs. *"(2) The work program must identify the matters the Tribunal proposes to inquire into in the next year of its operation. The matters identified may be any or all of the following:"*
Part 2—Road safety remuneration orders ***Division 2—Power to make a road safety remuneration order***		
19 Power to make a road safety remuneration order (1) The Tribunal may make a road safety remuneration order under this Part consistent with the object of this Act. Note: See section 27 for what the order may deal with. *Tribunal may make order on its own initiative* (2) The Tribunal may make the order on its own initiative if the order is in relation to a matter identified in its work program. *Tribunal may make order on application* (3) The Tribunal may make the order on application by any of the following whether	**Amendment needed**	Ai Group strongly opposes the inequitable restriction imposed under section 19(3)(e) of the Bill on the rights of industrial associations (other than employee associations which are dealt with by 19(3)(d)) to make applications in relation RSROs. The legislation should provide all registered industrial associations with the same rights to apply for an RSRO. While under 19(3)(d) unions have an almost unfettered right to seek RSROs, 19(3)(e) operates to unfairly limit the capacity of representatives of employers/hirers to make comparable applications. The requirement imposed by section 3(e)(i) are unworkable given that: • Employer organisations would be representing the interests of hundreds or even thousands of members and are required to obtain the consent of each of their members with an interest in the application before the

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
or not the order is in relation to a matter identified in its work program: (a) a road transport driver; (b) an employer or hirer of a road transport driver; (c) a participant in the supply chain in relation to a road transport driver; (d) a registered employee association that is entitled to represent the interests of a road transport driver to whom the order will apply; (e) an industrial association that is entitled to represent the interests of a road transport driver, employer or hirer of a road transport driver or participant in the supply chain in relation to a road transport driver, if: (i) the person or each person whose interests the industrial association claims to be representing by making the application has consented to the making of the application; and (ii) the Tribunal has permitted the application to be made. (4) An application that relates to a matter not identified in the Tribunal's work program must relate to a matter that is capable of being included in the Tribunal's work program under subsection 18(2).		application can be made; • The provisions would likely lead to industrial retribution as a result of the requirement for an industrial association to identify all of their members that support their application for an RSRO. This is not an academic point as in NSW the TWU has previously threatened to engage in industrial campaigns against members of associations who pursue proceedings to vary Contract Determinations to the perceived detriment of owner drivers. • The provisions would reduce the likelihood that applications would be brought to address legitimate safety concerns of employers, hirers or other supply chain participants. • The provisions ignore the historical role that industrial associations, including those that represent the interests of employers, play within the workplace relations system. The terms of section 3(e)(ii) are also unfair in that leave to even make an application is essentially required. An industrial association should have the right to make an application which it believes is in the interests of its members and should then have the opportunity to prosecute its case. The unfettered ability for the Tribunal to refuse to hear an application from an industrial association (other than one that represents employees) is extremely unfair. Unbalanced and unfair provisions of this type will damage the legitimacy of the Tribunal. It is appropriate that the Tribunal however be provided with the power to refuse to hear an application if a causal

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
Tribunal may refuse to consider application (5) The Tribunal may refuse to consider an application under subsection (3): (a) if the application relates to a matter not identified in the Tribunal's work program—because the Tribunal considers that it is not appropriate to deal with the matter at the time; or (b) for any other reason. (6) The Tribunal must notify the applicant of any refusal by the Tribunal to consider an application.		connection between remuneration and safety is not established. Accordingly, we propose the following important amendments to section 19(5): *"Tribunal may refuse to consider application* *(5) The Tribunal may refuse to consider an application under subsection (3):* *(a) if the application relates to a matter not identified in the Tribunal's work program—because the Tribunal considers that it is not appropriate to deal with the matter at the time; or* *(b) <u>if the Tribunal is not satisfied that there is an unsafe practice which is caused by the remuneration or remunerated related practice applicable to a road transport driver</u>; or* *(c) <u>if the remedy sought in the application could more appropriately be dealt with under this Act or a provisions of the Fair Work Act 2009."</u>* (<u>our proposed amendments</u>)

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
20 Matters the Tribunal must have regard to (1) In deciding whether to make a road safety remuneration order, the Tribunal must have regard to the following matters: (a) the need to apply fair, reasonable and enforceable standards in the road transport industry to ensure the safety and fair treatment of road transport drivers; (b) the likely impact of any order on the viability of businesses in the road transport industry; (c) the special circumstances of areas that are particularly reliant on the road transport industry, such as rural, regional and other isolated areas; (d) the likely impact of any order on the national economy and on the movement of freight across the nation; (e) orders and determinations made by the Minimum Wage Panel of Fair Work Australia in annual wage reviews and the reasons for those orders and determinations; (f) any modern awards relevant to the road transport industry (see subsection (2)) and the reasons for those awards; (f) any modern awards relevant to the	**Amendment needed**	The *Safe Rates, Safe Roads* directions paper identifies that safety is the purpose which underlies the Bill and the creation of the Tribunal. It is inappropriate to empower the Tribunal to have regard to whether conditions are fair or reasonable if a causal connection to safety is not established. In addition, the concept of 'fair and reasonable' standards are not notions that apply only to the benefit of those who perform work. The FW Act acknowledges that fair and reasonable conditions include considering the effects that conditions have on businesses. The Bill appears to approach these concepts exclusively from the perspective of employee drivers and owner drivers. Such an approach is unfair and inconsistent with a balanced and consistent approach to workplace regulation. A relevant concern for the Tribunal is to have regard for the effect that any order may have on businesses which are users of the road transport industry given the expansive interaction between the road transport industry and virtually all other industries including manufacturing, construction and retail. The Tribunal should also recognise the diversity of the road freight task in Australia. The Bill should be amended to reflect these matters. The criteria in section 20 should also be amended to ensure that RSROs operate as a genuine safety net and, as far as possible, do not create an artificial disincentive to the engagement of owner drivers. This concept is broader than that which is currently reflected in section 20(1)(b) of the Bill and is crucial to the livelihood of owner drivers who have made significant financial investments into their business and

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
road transport industry (see subsection (2)) and the reasons for those awards; (g) the need to avoid unnecessary overlap with the *Fair Work Act 2009* and any other laws prescribed for the purposes of this paragraph; (h) the need to reduce complexity and for any order to be simple and easy to understand; (i) the need to minimise the compliance burden on the road transport industry; (j) any other matter prescribed by the regulations for the purposes of this paragraph. (2) For the purposes of paragraph (1)(f), each of the awards referred to in the definition of road transport industry (including an award referred to in regulations made for the purposes of paragraph (e) of the definition) is taken to be relevant to the road transport industry.		who could suffer dramatically if remuneration related conditions for owner drivers are artificially inflated beyond those that would be payable if those drivers were employees. Accordingly, there should be an express requirement that an RSRO not provide owner drivers with remuneration which exceeds an appropriate amount of compensation for the labour component of their service and costs necessarily incurred in the conduct of their business. If the Bill is passed, Ai Group supports the requirement under paragraph 20(1)(g) aimed at limiting the unnecessary overlap with the FW Act and '*other laws'*. It is uncertain however what constitutes "*any other laws prescribed for the purposes of this paragraph."* It is presumed that such prescription will be provided under the regulations which are yet to be released (although this is currently unclear). It is important that the array of relevant laws that already apply to the Road Transport Industry, such as those specified in section 10 of the Bill, workplace health and safety laws and State based laws addressing chain of responsibility obligations, are expressly contemplated. In addition to the above, an RSRO should not be available unless: • The Tribunal is satisfied that **there is an unsafe practice** in the road transport industry **which is caused** by the remuneration paid to the road transport driver; and • The Tribunal is satisfied that the making of the order **will improve** safety in the road transport industry.

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
		Inclusion of a provision which requires satisfaction of these criteria as a jurisdictional prerequisite to the issuing of an order should not be controversial when the expressed purpose of the order is to address safety in the road transport industry. Such an approach is also consistent with the manner in which provisions in the FW Act confer additional powers on FWA to address specific remuneration related issues. For example Part 2-7 of the FW Act which relates to equal remuneration restricts FWA's power to make an equal remuneration order only in circumstances where: • FWA *"is satisfied that, for the employees to whom the order will apply, <u>there is not equal remuneration for work of equal or comparable value</u>" (*section 302(5)); and • The order will *"<u>ensure that</u>, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value"* (section 302(1)). (<u>our emphasis</u>) We propose the following amendments to section 20 of the Bill: ***20 Matters the Tribunal must have regard to*** *(1) In deciding whether to make a road safety remuneration order, the Tribunal must have regard to the following matters:*

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		(a) the need to apply enforceable standards in the road transport industry to ensure the safety of road transport drivers; *(b) the likely impact of any order on productivity, flexibility or viability of businesses in the road transport industry and business which are users of the road transport industry;* *(c) the special circumstances of areas that are particularly reliant on the road transport industry, such as rural, regional and other isolated areas;* *(d) the likely impact of any order on the national economy and on the movement of freight across the nation;* *(e) orders and determinations made by the Minimum Wage Panel of Fair Work Australia in annual wage reviews and the reasons for those orders and determinations;* *(f) any modern awards relevant to the road transport industry (see subsection (2)) and the reasons for those awards;* *(g) the creation of a safety net which is based upon the amount necessary for owner drivers to recover costs necessarily incurred in their operations and the labour component associated with the provision of services;* *(h) the need to avoid unnecessary overlap with the Fair Work Act 2009, laws referred to within section 10, and any other laws prescribed for the purposes of this paragraph;* *(i) the need to reduce complexity and for any order to be simple and easy to understand;*

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
		(j) the diverse nature of the road transport industry; *(k) the need to minimise the compliance burden on the road transport industry;* *(l) any other matter prescribed by the regulations for the purposes of this paragraph.* *(2) For the purposes of paragraph (1)(f), each of the awards referred to in the definition of road transport industry (including an award referred to in regulations made for the purposes of paragraph (e) of the definition) is taken to be relevant to the road transport industry.* *(3) The Tribunal may only make a road safety remuneration order if the Tribunal is satisfied:* *(a) that there is an unsafe practice which is caused by the remuneration related condition provided to the road transport driver; and* *(b) the Tribunal is satisfied that the road safety remuneration order will improve safety in the road transport industry.* (our proposed amendments)

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
Part 2—Road safety remuneration orders ***Division 4—Making road safety remuneration order***		
27 Making road safety remuneration order *What the order may deal with* (1) If the Tribunal decides to make a road safety remuneration order, the Tribunal may make any provision in the order that the Tribunal considers appropriate in relation to remuneration and related conditions for road transport drivers to whom the order applies. (2) Without limiting subsection (1), the Tribunal may make provision in the order in relation to any of the following: (a) conditions about minimum remuneration and other entitlements for road transport drivers who are employees, additional to those set out in any modern award relevant to the road transport industry (see subsection 20(2)); (b) conditions about minimum rates of remuneration and related conditions of engagement for road transport drivers who are independent contractors;	**Amendment needed**	Section 27(1) of the Bill is extremely broad and empowers the Tribunal not only to make orders in relation to *"remuneration"* but also *"related conditions"*. The *Safe Rates, Safe Roads* Directions Paper provided the assurance that the power of any Tribunal: "*…would not include the power to set prices paid to customers*." This limitation was identified in the interest of maintaining competition within the industry. Similarly, the directions paper also provided the assurance that the Tribunal; • "…*would not apply employment specific entitlements to owner drivers* "; and that • "…*the NES applicable to employees will not apply to owner drivers*" (pg 95). The Bill should be amended to reflect these commitments, as follows: *"(1) If the Tribunal decides to make a road safety remuneration order the Tribunal may make any provision in the order that the Tribunal considers appropriate in relation to remuneration and related conditions for road transport drivers to whom the order*

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
(c) conditions for loading and unloading vehicles, waiting times, working hours, load limits, payment methods and payment periods; (d) ways of reducing or removing remuneration-related incentives, pressures and practices that contribute to unsafe work practices. (3) The order may impose requirements, in relation to a matter for which provision is made, on any or all of the following: (a) an employer or hirer of a road transport driver to whom the order applies; (b) a participant in the supply chain in relation to a road transport driver to whom the order applies. *Content of the order* (4) The order must specify: (a) the road transport drivers to whom the order applies; and (b) the persons on whom any requirements in the order are imposed; and (c) a commencement date for the order or a series of commencement dates (see subsection (5)); and		*applies, <u>provided that the Tribunal does not set employment like conditions for those who are not employees</u>.* *<u>[Note: Road safety remuneration orders cannot prescribe conditions relating to matters in the National Employment Standards of the Fair Work Act 2009 to road transport drivers who are not employees.]</u>* Additionally, there should be an expressed prohibition against RSROs containing terms which restrict the ability for a user of road transport services to choose the method by which they obtain those services, be it under a contract for services or employment arrangement. It would be inappropriate if under the concept of *"related conditions"* of road transport drivers the form of contractual arrangement could be limited or dictated by the Tribunal. A provision in the following terms would be appropriate: *"The order must not restrict or prohibit the form of arrangement between a road transport driver and the person using the road transport driver's services."* Section 27(3) empowers the Tribunal to make orders both upon hirers and other supply chain participants. This is opposed by Ai Group on the basis of our previously stated concern that a causal connection between remuneration and remuneration related conditions and safety outcomes has not been proven so as to justify such a sweeping intervention into commercial arrangements within the road transport industry and the broader supply chain.

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
(d) an expiry date for the order (which must not be later than 4 years after the commencement date). (5) The order may take effect in stages (as provided in the order) if the Tribunal considers that it is not feasible for the order to take effect on a single date. *Publication of order* (6) The Tribunal must publish the order on the Tribunal's website and by any other means the Tribunal considers appropriate.		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, <u>where appropriate</u>, 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 observations 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 that mischief has arisen are accepted. Courts which are "preoccupied with*

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
		special problems", like tribunals or administrative bodies of that kind, are "likely to develop distorted positions."[22] If contrary to our submissions a Tribunal is empowered to make binding orders, we contend that the Bill must be amended to ensure that it is not empowered to do so unless it is established that it will directly improve safety. The system established by the Bill should not be capable of being used as a mechanism for merely redressing the commercial agreements reached between the parties independent of safety considerations. Further, it would be very unfair for a party to be subject to an order placing an obligation upon it in relation to the remuneration or related conditions of a road transport driver where the amount to be paid to the transport driver or the practice engaged in by the driver is not within the direct control of that entity. Issues such as unproductive waiting time can have a variety of causes and it should not be open to a Tribunal to require a particular party within the supply chain to be liable for such matters on the basis that they may be perceived as having the greatest capacity to bear the associated costs. Put simply, it would be very unfair for the Bill to permit the Tribunal to impose obligations on parties for matters which are beyond their control.

[22] *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 February 2010).

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
		The power of the Tribunal to make RSROs binding on other participants within the supply chain is so broad as to enable the granting of RSROs facilitating the recovery of underpayments up the supply chain. This objective has not been identified within the Explanatory Memorandum. The imposition of legal liability on entities that are not the employer or hirer of a particular road transport driver, or directly responsible for the engagement, is manifestly unfair**.** It is crucial that amendments be made to exclude such unjust outcomes.
Part 2—Road safety remuneration orders ***Division 5—Variation and review of road safety remuneration order***		
32 Variation of road safety remuneration order (1) At any time before the expiry date specified in a road safety remuneration order, the Tribunal may vary the order: (a) on its own initiative; or (b) on application by a person referred to in subsection (2). (2) The Tribunal may vary the order on application by any of the following: (a) hirer of a road transport driver to whom the order applies;	**Amendment needed**	Section 32(2)(d) of the Bill should be amended so that the rights of industrial associations representing businesses are expanded to be equivalent to the rights afforded to employee associations under section 32(2)(c). Our concerns raised in relation to section 19(3)(e) are equally applicable to 32(2)(d).

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
(b) a participant in the supply chain in relation to a driver to whom the order applies; (c) a registered employee association that is entitled to represent the interests of a road transport driver to whom the order applies; (d) an industrial association that is entitled to represent the interests of a road transport driver, employer or hirer of a road transport driver or participant in the supply chain. (3) In deciding whether to vary the order, the Tribunal must have regard to the matters in section 20. (4) Before varying the order, the Tribunal must prepare and consult on a draft of the variation in accordance with Division 3, as if references in that Division to making an order were references to varying an order. (5) Subsection (4) does not apply if the Tribunal considers that the variation is minor or technical.		

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 3—Safe remuneration approvals in relation to certain collective agreements involving independent contractors		
33 Power to grant a safe remuneration approval The Tribunal may grant a safe remuneration approval for a road transport collective agreement if the Tribunal is satisfied of the matters in section 34. ***34 Matters about which the Tribunal must be satisfied*** The Tribunal must not grant a safe remuneration approval for a road transport collective agreement unless the Tribunal is satisfied that: (a) a road safety remuneration order that applies to the participating drivers is in effect; and (b) a majority of the participating drivers would be better off overall when providing applicable services if the agreement applied than if the order applied; and (c) a majority of the participating drivers have approved the agreement; and (d) if the agreement is to last for more than one year—the agreement contains an appropriate method for adjusting remuneration during the period of the agreement.	**Amendment needed**	The proposed test as specified in 34(b) inappropriately adopts the presumption that simply paying drivers more so as to make them '*better off*' will improve safety. Any consideration of whether or not to grant a SRA should relate to safety considerations rather than industrial notions of drivers being 'better off.' Rather than being satisfied that the majority of drivers are '*better off overall'* the Tribunal should be required to be satisfied that drivers are '*no less safe'* under the RTCA than under the RSRO.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
37 Relationship with road safety remuneration orders (1) A road safety remuneration order that is in effect at the time the Tribunal grants a safe remuneration approval has no effect in relation to a road transport driver who provides applicable services to the participating hirer. (2) If a road safety remuneration order takes effect after a safe remuneration approval is granted, the approval ceases to have effect in relation to a road transport driver who provides applicable services to the participating hirer, to the extent that the remuneration or related conditions specified in the approval are less beneficial to the driver than a term of the order that applies to the driver.	**Amendment needed**	The exemption from application of an RSRO to those who are subject to a SRA is logical. However, sub-section 37(2) effectively renders the SRA approval process meaningless. The Bill fails to provide any certainty as to the continued validity of any RTCA entered into given that the safe remuneration approval is overridden the moment that an RSRO provides for a greater benefit. The absence of a mechanism which provides genuine certainty as to the terms and conditions applicable to the drivers engaged by hirers is highly problematic. It is common practice for road transport businesses to base pricing arrangements within their contractual agreements with customers on an assessment of anticipated operational costs which is aligned to any agreement they have made with the drivers they engage. If this could be altered at any time through the unforeseen imposition of a new RSRO, significant hardship could be imposed on hirers. Many businesses within the industry operate on very small profit margins and their labour costs, be it employee or contractor derived, often represent a significant component of their cost structure. We propose that subsection 2 should be deleted and that subsection (1) be amended to provide; *"(1) A road safety remuneration order has no effect in relation to a road transport driver or hirer who is covered by a Road Transport Collective Agreement which has been granted a safe remuneration approval."*

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
38 Expiry of safe remuneration approval A safe remuneration approval ceases to have effect at the end of the nominal expiry date specified in the approval.	**Opposed**	The automatic termination of SRAs effectively creates an obligation on hirers to strike a new RTCA with contractors and to seek a new SRA or be subject to an RSRO providing for differing conditions. This creates a potentially unnecessary burden on hirers and contractors as well as the Tribunal in circumstances where the existing arrangements may continue to provide an adequate outcome. Of greater concern is the risk that the automatic termination of SRAs could give rise to a danger that drivers or unions may utilise such a provision to exert industrial or commercial pressure on a hirer to force them to provide benefits above that which would be necessary to ensure an adequate safety outcome in order to obtain the contractor's approval for a RTCA prior to the expiry of the SRA. Even if the parties are able to reach agreement as to the terms of the RTCA there is a real danger that if they are unable to achieve this within the term of the SRA or there is any delay in the Tribunal's processing of the application for an SRA the existing arrangement could become non-compliant with the terms of RSRO. Put simply, the automatic termination of SRAs risks rendering them unworkable. Unless amended it is unlikely that hirers would seek to structure their operations around a RTCA. We propose that the notion of nominal expiry dates similar to that adopted in the *Fair Work Act* in relation to Enterprise Agreement be implemented. Either party should have right to terminate the SRA (and the RTCA) following the nominal expiry date of the SRA in accordance with provisions similar

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
		to those in *FW Act* relating to termination of enterprise agreements under sections 222 and 223. Alternatively termination should be available with the mutual agreement of the hirer and drivers in a manner similar to section 219 of the *Fair Work Act*.
Part 4—Disputes about remuneration and related conditions		
40 Tribunal may deal with disputes about remuneration and related conditions (1) The Tribunal may deal with a dispute if: (a) section 41, 42 or 43 applies to the dispute; and (b) an application is made by: (i) a party to the dispute; or (ii) an industrial association that is entitled to represent the interests of a party to the dispute, if the party has consented to the making of an application by the association. (2) The Tribunal may choose to deal with 2 or more disputes together (regardless of which of sections 41, 42 and 43 applies to each dispute).	**Opposed**	This Tribunal power is discussed in relation to the specific sections to which it applies, as set out below

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
41 Disputes involving employee road transport drivers *Dispute between employee and employer* (1) The Tribunal may deal with a dispute between a road transport driver who is an employee and the employer of the driver if the dispute is about remuneration or related conditions provided by the employer that could affect whether the driver works in an unsafe manner. The parties to the dispute are the driver and the employer. (2) The Tribunal may deal with a dispute between a road transport driver and a former employer of the driver if: (a) the dispute is about the former employer dismissing the driver; and (b) the driver contends that the dismissal was mainly because the driver refused to work in an unsafe manner. The parties to the dispute are the driver and the former employer. *Interaction with Fair Work procedures* (3) A road transport driver who has applied to the Tribunal under section 40 in relation to	**Opposed**	The terms of this Bill should not apply to employees. The FW Act already contains a number of mechanisms for employees to seek the assistance of FWA should a dispute arise in relation to their conditions of employment either pursuant to: • a workplace agreement (section 738(a));, • a modern award (section 738(b)); or • their contract of employment, where their contract provides for a mechanism to resolve disputes and the dispute is over an NES entitlement (section 738(c)) It is unnecessary to create a second jurisdiction where disputes relating to employees could potentially be agitated. This would mean that employees could 'jurisdiction shop' for the best outcome, In addition, the dispute resolution provisions which apply in respect of termination of employment (section 41(2)) are also unnecessary as there not only exists unfair dismissal protections in the FW Act but additionally dismissal of an employee for reasons including an employee voicing concerns regarding safety would constitute a breach of the general protections provisions of the FW Act (section 340 and 341). If despite our opposition, provisions relating to termination of employees are retained within the Bill it is important that there be a time limit which is the same as that which applies under the FW Act for the making of an application (See section 394(2)).

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
a matter must not make an application or complaint under the FW Act in relation to the same matter, unless the application to the Tribunal has been withdrawn or has failed for want of jurisdiction. (4) A road transport driver who has made an application or complaint in relation to a matter under the FW Act must not apply to the Tribunal under section 40 in relation to the same matter, unless the application or complaint under the FW Act has been withdrawn or has failed for want of jurisdiction.		
42 Disputes involving independent contractor road transport drivers *Dispute between independent contractor and hirer* (1) The Tribunal may deal with a dispute between a road transport driver who is an independent contractor and the hirer of the driver if the dispute is about remuneration or related conditions in a road transport contract between the driver and hirer that could affect whether the driver works in an unsafe manner. The parties to the dispute are the driver and the hirer.	**Opposed**	It is not appropriate to vest in this newly formed Tribunal broad powers relating to remuneration or related conditions in the road transport industry. The terms of section 42(1) of the Bill are far too broad as they would allow virtually any dispute relating to remuneration or conditions of engagement come under the jurisdiction of the Tribunal as all that needs to be shown is that the matter in dispute *"could affect whether the driver works in an unsafe manner."* If despite our objections the Bill is passed, we propose that the Tribunal's power to resolve disputes should be limited to disputes over the application of those instruments which it is responsible for creating.

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
Dispute between independent contractor and former hirer (2) The Tribunal may deal with a dispute between a road transport driver who is an independent contractor and a former hirer of the driver if: (a) the dispute is about the former hirer terminating the road transport contract; and (b) the driver contends that the termination was mainly because the driver refused to work in an unsafe manner. The parties to the dispute are the driver and the former hirer.		We propose that section 42(1) be amended in the following terms: *"(1) The Tribunal may deal with a dispute between a road transport driver who is an independent contractor and the hirer of the driver if the dispute <u>is in relation to the application of either an RSRO or SRA which regulates the engagement between the driver and the hirer</u>. The parties to the dispute are the driver and the hirer."* (<u>our proposed amendment</u>) Section 42(2) of the Bill creates a parallel jurisdiction to that which applies for employees by virtue of section 41(2) of the Bill, for disputes between drivers and hirer's where the dispute relates to termination of the driver's contract and the driver alleges it was due to a refusal of the driver to work in an unsafe manner. As with section 41(2), section 42(2) is unnecessary as the FW Act already provides protection from dismissal for reason of identifying safety concerns given that the general protections provisions of the *Fair Work Act* apply not only to employees but also contractors.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
43 Disputes involving participants in the supply chain The Tribunal may deal with a dispute that is about practices of one or more participants in the supply chain in relation to a road transport driver if: (a) the employer or hirer of the driver contends that the practices affect the employer's or hirer's ability to provide remuneration or related conditions to the driver that do not provide incentives to work in an unsafe manner; and (b) the driver and employer or hirer have applied to the Tribunal under section 40. The parties to the dispute are the driver, the employer or hirer and the participant or participants in the supply chain whose practices the dispute relates to.	**Opposed**	These provisions are unnecessary, inappropriate and unworkable is unworkable Our views in respect of the application of the legislation to the supply chain are set out in earlier sections of this submission.
44 How Tribunal may deal with disputes (1) If the Tribunal decides to deal with the dispute, it may deal with it as the Tribunal considers appropriate, including in the following ways: (a) by mediation or conciliation; (b) by making a recommendation or expressing an opinion; (c) if the parties to the dispute agree—by arbitrating (however described) the dispute.	**Opposed**	The scope of orders available under arbitration of a dispute (section 44(2) and 44(3)) of the Bill are extremely broad and operate are capable of operating almost identically to RSROs. If despite our objections the Bill is passed, the Tribunal's functions in relation to dispute resolution should be confined to disputes over the application of the terms of either RSROs or SRAs. Should this proposal be adopted section 44(2) and 44(3) can be deleted as they are unnecessary. In the event that our proposal is not adopted and the Tribunal is vested with broad powers to resolve remuneration and

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
(2) If the Tribunal arbitrates the dispute, the Tribunal may make any order (an ***arbitration order***) that the Tribunal considers appropriate to ensure that the driver does not have remuneration-related incentives to work in an unsafe manner. (3) An arbitration order may impose the requirements specified in the order on any or all of the following: (a) a party to the dispute; (b) if there is a participant in the supply chain in relation to the road transport driver who is not a party to the dispute but who has agreed to be bound by the outcome of the arbitration—that participant. (4) A person on whom an arbitration order imposes a requirement must not contravene the requirement. Note: This subsection is a civil remedy provision (see Division 1 of Part 5).		related conditions disputes with arbitrated orders pursuant to section 44(2) it is important that the limitations proposed by Ai Group in relation to the granting of RSROs are replicated in relation to arbitration orders. Arbitration orders should only be issued: • in circumstances where the Tribunal is certain that there is an unsafe practice caused by the remuneration paid to the employee and that the order will rectify the issue; and • otherwise consistent with the criteria proposed by Ai Group in relation to the operation of section 19.

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 5—Compliance ***Division 1—Civil remedy provisions and orders*** ***Subdivision A—Applications for orders***		
47 Limitations on who may apply for orders etc. (1) The following persons may apply for an order under this Division, in relation to a contravention or a proposed contravention of a civil remedy provision, only if the person is affected by the contravention, or will be affected by the proposed contravention: (a) a road transport driver; (b) an employer of a road transport driver; (c) a hirer of a road transport driver; (d) a participant in the supply chain in relation to a road transport driver. (2) A registered employee association may apply for an order under this Division, in relation to a contravention or a proposed contravention of a civil remedy provision, only if: (a) the contravention affects a person or the proposed contravention will affect a person; and	**Amendment needed**	The provisions are unfair and unbalanced. Again, the capacity for industrial associations representing business operators to apply for orders should mirror those of employee associations.

Provisions of the Bill	***Ai Group's Position***	***Basis of Ai Group's Position***
(b) the association is entitled to represent the interests of the person. (3) An industrial association may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if: (a) the contravention affects a person or the proposed contravention will affect a person; and (b) the association is entitled to represent the Interests of the person; and (c) the person has consented to the association making the application. (4) The regulations may prescribe a person for the purposes of an item in column 2 of the table in subsection 46(2). The regulations may provide that the person is prescribed only in relation to circumstances specified in the regulations.		

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Part 6—Road Safety Remuneration Tribunal Division 2—Performance of functions of Tribunal Subdivision C—Performance of functions		
90 Confidential evidence (1) The Tribunal may make an order prohibiting or restricting the publication of the following in relation to a matter before the Tribunal (whether or not the Tribunal holds a hearing in relation to the matter) if the Tribunal is satisfied that it is desirable to do so because of the confidential nature of the evidence, or for any other reason: (a) evidence given to the Tribunal in relation to the matter; (b) the names and addresses of persons making submissions to the Tribunal in relation to the matter; (c) matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal in relation to the matter; (d) the whole or any part of its decisions or reasons in relation to the matter. (2) Subsection (1) does not apply to the publication of a submission made to the Tribunal for consideration in determining	**Supported, if Bill is passed**	

Provisions of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
whether to make a road safety remuneration order or take a proposed action under subsection 31(2) (see subsections 24(3) and 31(4)).		
Part 7—Miscellaneous		
120 Review of this Act (1) The Minister must cause a review of the operation of this Act to be started by 1 July 2015. (2) The review must be completed by 31 December 2015. (3) The persons who undertake the review must give the Minister a written report of the review. (4) The report must be published on the website of the Department and by any other means the Minister considers appropriate.	**Supported, if Bill is passed**	