

Dr Michael Rawling Submission to Commonwealth Senate Inquiry on the road transport industry

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Senate Rural and Regional Affairs and Transport References Committee
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16 October 2019

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A NEW FEDERAL LEGISLATIVE SCHEME FOR THE ROAD TRANSPORT INDUSTRY

1. INTRODUCTION

1.1 I am currently a Senior Lecturer at the Faculty of Law, University of Technology, Sydney with over 14 experience in research. I am a recognized academic expert in the legal regulation of supply chains and business networks in order to promote decent work standards with a track record of research, publication and government grants on regulating supply chains to promote decent standards for workers including road transport workers.¹ I appeared in the Road Safety Remuneration Tribunal as an expert witness on two separate occasions. I have also been a consultant to the Sectoral Policies Department, International Labour Office, International Labour Organisation (ILO) regarding best practices in road transport industry safety regulation.

1.2 This submission addresses (some but not all of) the Commonwealth Senate Rural and Regional Affairs and Transport References Committee inquiry terms of reference. In particular it addresses the importance of a viable, safe, sustainable and efficient road transport industry, with particular reference to:

- a) the importance of an enforceable minimum award rate and sustainable standards and conditions for all stakeholders in the road transport industry;
- c) the regulatory impact, including the appropriateness, relevance and adequacy of the legislative framework, on all stakeholders in the road transport industry;
- e) the social and economic impact of road-related injury, trauma and death;
- f) efficient cost-recovery measures for industry stakeholders, including subcontractors;

¹ See, for example:

- Rawling, M, Johnstone, J & Nossar, I 2017, 'Compromising Road Transport Regulation: The Abolition of the Road Safety Remuneration Tribunal', *Sydney Law Review*, vol. 39, no. 3, pp. 303-332
- Johnstone, R, Nossar, I & Rawling, M 2015, 'Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal', *Federal Law Review*, vol. 43, no. 3, pp. 397-421
- Rawling, M & Kaine, S 2012, 'Regulating supply chains to provide a safe rate for road transport workers', *Australian Journal of Labour Law*, vol. 25, pp. 237-257

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i) other related matters.

1.3 In particular, this submission focusses on demonstrating the need for, and essential design features of, a new national legislative scheme to regulate supply chains and contract networks in the Australian road transport industry to address low rates and poor safety in that industry.

1.4 This submission:

- Demonstrates that since the abolition of the Road Safety Remuneration Tribunal (RSRT) there is a current gap in Commonwealth legislative regulation of pay and safety in the road transport industry giving rise to the need for a new national scheme regulating the Australian road transport industry (which would make the industry viable and safer for all stakeholders).
- develops essential design features of an effective national legislative scheme of road transport industry legislation in light of:
 - previous legislative innovations [including the now repealed Road Safety Remuneration Act (2012)] and
 - the need for a certain level of agreement amongst industry stakeholders (including employers, road transport drivers, the relevant trade union and government) about the nature of proposed legislative regulation (see below comments on preventing a political backlash).

1.5 The submission will also demonstrate that it is feasible and necessary to apply any such new national legislative scheme to digitally-mediated 'gig economy' arrangements within the road transport industry.

2. BACKGROUND TO THE SUBMISSION AND SIGNIFICANCE OF THE AUSTRALIAN ROAD TRANSPORT INDUSTRY

SIGNIFICANCE

2.1 The issue of low pay and poor safety in the road transport industry (and the viability and sustainability of the industry as a whole) has national and international significance.

National Significance

2.2 In 2015-2016 total transport activity contributed \$122.3 billion dollars or 7.4% of Australia's gross domestic product (GDP). Around 1 million people (or 8.6% of employed persons) are engaged in that industry.² It is also one of the most dangerous industries to work in with 28% of all people killed at work in Australia

² Australian Bureau of Statistics *Australian Transport Economic Account: An Experimental Transport Satellite Account 2010-11 to 2015-2016* (31 October 2018). For-hire transport activity contributed \$77 billion dollars or 4.6% of GDP and in-house transport activity contributed a further \$45.3 billion dollars or 2.7% of GDP in 2015-2016. The road transport industry generates a significant proportion of this activity within the overall transport sector.

labouring in the transport, postal and warehousing industries.³ Heavy vehicle crashes are a major source of deaths with more than 564 people (including members of the road using public as well as drivers at work) killed in those crashes since the abolition of the RSRT in April 2016.⁴

Digitally-mediated gig economy arrangements within the road transport industry

2.3 At least in relation to the road transport industry, digitally-mediated gig economy arrangements are most accurately depicted as occurring within the industry in which they are embedded (rather than in a separate gig economy). This is because the service being delivered and the labour performed by workers within those more recent gig economy arrangements are almost identical to the parallel more traditional work arrangements in the road transport industry. [For example, an Uber driver delivers the same or similar service and performs the same labour as a conventional cab drivers.]

The Australian Taxation Office estimated in 2017 that 100,000 individuals have received a payment for a ride-sharing service since the Australian Taxation Office started collecting data in August 2015. Uber alone engages more than 13,000 drivers in Australia in 2016. There are 1 million Australians registered as Uber users.⁵ There are also a significant number of delivery riders.

Despite a Fair Work Commission ruling that a delivery rider was an employee of Foodora⁶ the vast majority of these workers working in digitally-mediated gig economy arrangements in the road transport industry are labouring in hazardous conditions for rates well below the minimum wage.⁷ Furthermore, certain large digital platform/app businesses who engage gig economy rideshare drivers and delivery riders (and subject them to considerable algorithmic controls) are currently not profitable and run at a large loss.⁸ This calls into question the viability and sustainability of the road transport industry in light of the fact that traditional, road transport companies are competing with these more recent, large, unprofitable, digital platforms/app businesses.

³ Safe Work Australia (2017) Work Related Traumatic Injury Fatalities, Australia 2017, 21 December 2018.

⁴ See Fatal Heavy Vehicle Crashes Australia – Quarterly Bulletins, Department of Infrastructure, regional development and cities; June 2016-June 2019

⁵ Nassim Khadem 'ATO writes to 60,000 Uber and other ride-sharing drivers asking them to get tax affairs in order' Sydney Morning Herald 29 June 2017; Craig Smith '110 Amazing Uber Stats and Facts' (2019) <https://expandedramblings.com/index.php/uber-statistics/3/>

⁶ *Klooger v Foodora* [2018] FWC 6836.

⁷ Select Committee on the Future of Work and Workers Report *Hope is not a Strategy – Our Shared Responsibility for the Future of Work and Workers*, Senate, Commonwealth of Australia, September 2018, pp73-81; Stanford J *Subsidising Billionaires Simulating the Net Incomes of UberX Drivers in Australia* Centre for Future Work at the Australia Institute March 2018.

⁸ Alexandria Sage, Vibhuti Sharma, "Uber loses \$5 billion, misses Wall Street targets despite easing price war", Reuters online, 9 August 2019: <https://www.reuters.com/article/us-uber-results/uber-loses-5-billion-misses-wall-street-targets-despite-easing-price-war-idUSKCN1UY2NG?feedType=RSS&feedName=technologyNews>

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International Significance

2.4 Legal developments in Australia have been influential in the law reform processes of a number of other countries, including South Korea, and/or have developed in conjunction with (and parallel to) innovative regulatory regimes across the Northern Hemisphere.⁹ Australian laws regulating road transport supply chains to protect workers including the RSRT have also been reported on by an International Labour Organisation (ILO) Report on the road transport sector.¹⁰

BACKGROUND

2.5 The road transport industry is one of the most dangerous industries to work in with truck drivers 13 times more likely to die at work than ordinary Australian workers.¹¹ In addition to a large workforce of employee drivers, there is also a large workforce of owner-drivers who are engaged as contractors and thus largely fall outside the employment protection regime of the *Fair Work Act 2009* (Cth). The Road Safety Remuneration Tribunal ("RSRT") which was established by the *Road Safety Remuneration Act 2012* (Cth) ("RSR Act") was a national workplace relations tribunal designed to regulate supply chains to address low pay and poor safety for all workers (both employee and contractors) in the road transport industry.¹² It was established after numerous governmental reports and publications found that there was an urgent need to address commercial pressures on the road transport industry¹³ – including those supply chain pressures emanating from off-road clients – and that there was a close link between low pay and poor safety in the road transport industry.¹⁴

2.6 In April 2016 the federal Turnbull Coalition government abolished the RSRT (by repealing the RSR Act). This means that much of the workforce of owner-drivers

⁹ Igor Nossar and Luigi Amoresano 'Delivering "Safe Rates" in Today's Road Transport Supply chains', Working Paper, International Transport Workers' Federation (ITF) 20 September 2019, pp11-19 (copy on file with author).

¹⁰ 'Priority safety and health issues in the road transport sector' *Report for discussion at the Tripartite Sectoral Meeting on Safety and Health in the Road Transport Sector* (Geneva, 12–16 October 2015) International Labour Office, Geneva, 2015, p60.

¹¹ Xia, T., Iles, R., Newnam, S., Lubman, D., & Collie, A. Driving Health Report No 2: Work-related injury and disease in Australian truck drivers. Insurance Work and Health Group, Faculty of Medicine Nursing and Health Sciences, Monash University (2018) 5.

¹² Rawling M and Kaine S (2012), 'Regulating supply chains to provide a safe rate for road transport workers', *Australian Journal of Labour Law*, vol. 25, pp. 237-257

¹³ Quinlan M, 'Report of Inquiry into Safety in the Long Haul Trucking Industry' (Motor Accidents Authority of New South Wales, November 2001); Michael Quinlan and Lance Wright, 'Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission' (National Transport Commission, October 2008).

¹⁴ Quinlan, above n 13; Quinlan and Wright, above n 13, 49-50; Claire Mayhew and Michael Quinlan, 'Economic Pressure, Multi-Tiered Subcontracting and Occupational Health and Safety in Australian Long-Haul Trucking' (2006) 28(3) *Employee Relations* 212; David A Hensher and Helen C Battellino, 'Long-Distance Trucking: Why Do Truckies Speed?' (1990) 15 *Papers of the Australasian Transport Research Forum* 537, 553; Michael H Belzer, 'The Economics of Safety: How Compensation Affects Commercial Motor Vehicle Driver Safety' (Paper presented at Safe Rates Summit, Canberra, 21 November 2011); Daniel A Rodríguez, Felipe Targa and M Belzer, 'Pay Incentives and Truck Driver Safety: A Case Study' (2006) 59(2) *Industrial and Labor Relations Review* 205.

engaged as contractors are now labouring without any enforceable minimum rates or other standards. A typical pay arrangement is for a per kilometre or per load piece rate¹⁵ to be applied to owner-drivers who then have the incentive to driver faster and longer to earn a decent wage. This is the nub of the link between low pay and poor safety (which was beginning to be systematically addressed by the RSRT). Prior peer-reviewed research¹⁶ concluded that the abolition of the tribunal occurred mainly due to political reasons rather than an absence of evidence regarding the necessity of the tribunal. However, a significant backlash to the second order made by the tribunal (which established minimum pay rates for owner-drivers working as contractors) preceded the abolition of the tribunal. This backlash, largely lead by right wing and conservative journalists and politicians, also involved some industry participants and some owner-drivers.

3. THE NEED FOR A NEW LEGISLATIVE SCHEME

3.1 There is an urgent need for a new federal scheme of regulation for the road transport industry. Since the abolition of the RSRT the Commonwealth legislative framework has been inadequate especially in light of the fact that many owner-drivers/sub-contractors are labouring in conditions where there is no enforceable minimum rates or other standards. Consequently many of those subcontractors are unable to earn enough to recover costs¹⁷ and insolvency is more frequent in the Australian road transport industry than many other Australian industries. Indeed the transport, postal and warehousing industry was one of the top industries for the highest number of business insolvencies in 2018.¹⁸

Gap in regulation and the need for a new scheme

3.2 Prior research concluded that after the abolition of the RSRT there is a lack of effective regulation of pressures on, and in, the road transport industry.¹⁹ Competitive supply chain and contractual network pressures are evident in a number of industries but particularly evident in the road transport industry.²⁰ Specifically, commercial pressures passed down road transport supply chains or through business networks

¹⁵ Thornthwaite, L and O'Neill S *Evaluating Approaches to Regulating WHS in the Australian Road Freight Industry: Summary Report to the Transport Education, Audit and Compliance Health Organisation Ltd (TEACHO)* January 2017 p11.

¹⁶ Rawling M, Johnstone, R & Nossar, I (2017), 'Compromising Road Transport Regulation: The Abolition of the Road Safety Remuneration Tribunal', *Sydney Law Review*, vol. 39, no. 3, pp. 303-332.

¹⁷ See Thornthwaite, L and O'Neill S *Evaluating Approaches to Regulating WHS in the Australian Road Freight Industry: Summary Report to the Transport Education, Audit and Compliance Health Organisation Ltd (TEACHO)* January 2017, p16

¹⁸ Australian Securities and Investment Commission (2018) *Corporate insolvencies: December quarter 2018* Table 4 p3.

¹⁹ See Thornthwaite, L and O'Neill S *Evaluating Approaches to Regulating WHS in the Australian Road Freight Industry: Summary Report to the Transport Education, Audit and Compliance Health Organisation Ltd (TEACHO)* January 2017, p16; Rawling Johnstone Nossar above n 16.

²⁰ Rawling johnstone Nossar above n 16.

can lead to reduction in driver pay which in turn can encourage hazardous practices. Thus these commercial pressures can lead to poor safety outcomes.²¹

3.3 It is in undermining pay and related conditions of road transport workers that the effects of supply chain/contract network pressures are most evident.²² Particularly, in some sectors of the road transport industry (such as the supermarket sector) economically powerful clients of the road transport industry have the influence to set the price for transport services and other key parameters such as time taken to deliver goods by road. Since the 1980s the influence of large clients at the apex of the road transport supply chain has consolidated while road transport companies including some large employers of truck drivers have experienced a significant dilution of their bargaining power vis-à-vis off-road clients.²³ In these circumstances road transport companies have at times struggled to make a profit if they wish to provide fair and safe conditions to drivers whilst they are simultaneously subject to inferior terms and conditions under freight contracts with clients.²⁴ Thus the parameters set by clients “shape practical outcomes for truck drivers at the base of the chain.”²⁵ As has been explained recently:

The weight of this cumulative contractual pressure induces intense competition in the local market between readily substitutable employee drivers and contractor drivers who have become ‘price takers’ and frequently must accept pay rates and conditions dictated to them or else fail to receive the work. Contractor drivers’ inferior bargaining capacity, the weight of supply chain pressures and the competitive nature of the transport industry have produced a steady decline in pay rates in real terms over the last 30 years. Compounding the problem is the fact that drivers continue to be unpaid for time spent queuing and loading and unloading. Rates for some contractor drivers have become so unsustainably low that some transport providers and contractor drivers cut corners on matters such as essential truck maintenance, and use rest breaks to load and unload, causing drivers to become fatigued and creating unsafe conditions for drivers and the public on the road.²⁶

²¹ Department of Education Employment and Workplace Relations (Cth) Safe Rates Safe Roads Directions Paper, Commonwealth of Australia (2010) at 15-16; Tripartite Sectoral Meeting on Safety and Health in the Road Transport Sector *Conclusions on Safety and Health in the Road Transport Sector* International Labour Organization, Geneva 12-16 October 2015.

²² Australian Trucking Association, Submission to the National Transport Commission, Safe Payments Inquiry, September 2008, 8.

²³ Quinlan above n 13, 180.

²⁴ Johnstone, R, Nossar, I & Rawling, M 2015, 'Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal', *Federal Law Review*, vol. 43, no. 3, pp. 397-421 at p404.

²⁵ Rawling Johnstone Nossar above n 16, p308.

²⁶ Rawling Johnstone Nossar above n 16 p308-309. Thornthwaite and O'Neill above n 15 p16 state that since the abolition of the RSRT rates for owner drivers have been “below cost recovery.” See also Thornthwaite L. ‘Evaluating the Regulation of WHS through Supply Chain Codes of Conduct in the Retail Transport and Logistics

3.4 Since the abolition of the RSRT, these commercial pressures on pay and safety in the road transport industry are not adequately being addressed by Commonwealth legislation even though there is extensive, existing, empirical evidence justifying re-regulation of the road transport industry at a federal level.²⁷ A key starting point of this evidence is that there is currently major safety risks not only for those working in the industry but also for everyday road users with more than 564 people killed in heavy vehicle crashes since the abolition of the tribunal in April 2016.²⁸ Many of those deaths were preventable. A cost benefit analysis found that there would be a 28% reduction in heavy vehicle crashes from the first two orders made by the RSRT.²⁹ This is a very significant finding especially given that it was one made by Price Waterhouse Coopers who were commissioned by the Coalition government (that abolished the tribunal). Notably, the RSRT was able to tailor orders to address commercial pressures to particular sectors of the road transport industry and it had done so by making an order that specifically applied to the supermarket (and long distance) sector.³⁰ Also the tribunal was in the process of making more orders that would have applied to additional dangerous sectors that would have further reduced deaths in the industry.

3.5 The current gap in legislative regulation is now even more significant due to the expansion of digitally-mediated 'gig' economy arrangements³¹ within the road transport industry that are placing further downward pressure on rates and safety in the road transport industry. Rideshare drivers and delivery riders are being engaged as (purported) contractors and earning below the minimum wage.³² A major survey of over 1,100 Ride-Share Drivers found that drivers working for Uber and other ride

Industry' Report to the Transport Education, Audit and Compliance Health Organisation Ltd (TEACHO) January 2019 p4.

²⁷ This includes the research establishing and confirming the link between pay and safety and the need to address commercial pressures in the Australian road transport industry. See research in above n 14. On the link between pay and safety in the road transport industry see further research since the abolition of the RSRT including Belzer M 'Work-stress factors associated with truck crashes: An exploratory analysis' (2018) 29(3) *The Economic and Labour Relations Review* 289; Belzer MH and Sedo SA. (2018) "Why Do Long Distance Truck Drivers Work Extremely Long Hours?" *The Economic and Labour Relations Review* 29:1. 59–79; Faulkner MR and Belzer MH. (2019) Returns to compensation in trucking: Does safety pay? *The Economic and Labour Relations Review* 30:2. 262-284; Kudo T and Belzer MH. (2019) "The association between truck driver compensation and safety performance." *Safety Science* 120: 447-455.

²⁸ See Fatal Heavy Vehicle Crashes Australia – Quarterly Bulletins, Department of Infrastructure, regional development and cities June 2016-June 2019.

²⁹ Price Waterhouse Coopers 'Review of the Road Safety remuneration system: Final Report' (Departmental document No EM16, Department of Employment (Cth) January 2016, p83, p86.

³⁰ *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014*, Road Safety Remuneration Tribunal, 2014.

³¹ The distinctive feature of recent gig work from prior forms of precarious work is that workers are hired through digital platforms/apps such as the Uber phone app.

³² See Select Committee on the Future of Work and Workers Report *Hope is not a Strategy – Our Shared Responsibility for the Future of Work and Workers*, Senate, Commonwealth of Australia, September 2018, pp73-81; Stanford J *Subsidising Billionaires Simulating the Net Incomes of UberX Drivers in Australia* Centre for Future Work at the Australia Institute March 2018.

share companies were earning well below \$16 per hour before costs.³³ This gives rise to an incentive for those low paid drivers to engage in hazardous practices so that they can get more work done faster at a lower cost. According to the same major survey over 60% of ride-share drivers say they cannot save for superannuation and annual leave. In the survey there were 969 reports of harassment and assault. 10% of drivers say they were physically assaulted and 6% of drivers say they were sexually assaulted.³⁴ These abuses of pay and safety standards in digitally-mediated, gig economy arrangements within the road transport industry reinforce the need for an industry specific legislative scheme of regulation for that industry (which could include coverage of digitally-mediated, road transport, gig economy arrangements).

4. ESSENTIAL DESIGN FEATURES FOR LEGISLATIVE REGULATION OF THE ROAD TRANSPORT INDUSTRY

4.1 Given the urgent need for a new road transport industry scheme of legislative regulation, this submission will now evaluate potential legislative design components/features for such a new legislative scheme. There is little point in legislating a scheme that would not address the underlying causes of low pay and poor safety in the road transport industry or a scheme which is not sufficiently responsive to road transport workers' and industry needs. Accordingly, this submission will identify essential features of a proposed legislative scheme. Some of the considerations for evaluation of legislative design components are:

- what has been effective previously including key aspects of the RSRT;
- the alignment of regulatory features with the specific needs of workers covered and industry structures to be regulated;
- what is politically feasible and is more likely to prevent a political backlash with employer and driver support so that it provides the best basis for a scheme which can be embedded in the industry for the long term.

4.2 With that said, in my view, the crucial design features of an effective, new legislative scheme for the road transport industry are:

- 4.2.1 binding, enforceable regulation of whole road transport supply chains/contract networks³⁵ so that all businesses including key economic decision-makers such as off-road clients share responsibility for pay and conditions work standards in the road transport industry. The reason for inclusion of this feature, first and foremost, is that, as

³³ Survey conducted for Ride-share Drivers' Co-operative and Transport Workers Union, October 2018.

³⁴ Survey conducted for Ride-share Drivers' Co-operative and Transport Workers Union, October 2018.

³⁵ A supply chain is a type of contract network. See Hugh Collins *Regulating contracts* (Oxford University Press, Oxford 1999) and Igor Nossar, 'The Scope for Appropriate Cross-Jurisdictional Regulation of International Contract Networks (Such as Supply Chains): Recent Developments in Australia and their Supra-National Implications' (Keynote presentation to ILO Workshop on Better Health and Safety for Suppliers, Toronto, 17 April 2007)(copy on file with author). The reason for the inclusion of the term 'contract network' is that the gig economy has produced more complex business networks (influenced by digital platform controllers) that are not just traditional, hierarchical, supply chains.

demonstrated above in this submission, commercial pressures from economic-decision makers beyond the direct work provider are a major pressure on the road transport industry which lead to low pay and poor safety in the industry³⁶.

4.2.2 Enforceable minimum pay rates and related conditions for all road transport workers including owner drivers, rideshare drivers and delivery riders. This feature is included because the research clearly shows that low rates drive poor safety;³⁷ for gig economy workers (engaged by businesses controlling digital platforms/apps) the research has shown that they are earning below the minimum wage and have hazardous conditions at work.³⁸ Enforceable minimum standards is a key method to ensure efficient cost recovery for sub-contractor owner drivers.

4.2.3 Provision for pay and safety of road transport workers including owner drivers and rideshare drivers *no matter what their purported work status is*; that is need to go beyond the employee/independent contractor distinction and provide for pay and safety of both employees and contractors. This feature is included because the research has found that employees and owner-drivers are interchangeable and economic pressures can easily be shifted from one workforce to the other.³⁹ In addition, road transport, gig economy workers (engaged by large, digital platform/app businesses) including rideshare drivers (although routinely subject to algorithmic controls) frequently find themselves labelled as contractors so that they may not be able to easily access employment entitlements.

4.2.4 Provision for road transport workers to be paid for all working time including time spent loading and unloading and time spent waiting in queues to load and unload. If workers were paid for most or all time worked it would considerably decrease the pressure on them to drive faster and/or longer, preventing fatigue and hazardous practices and hence improving safety on the roads.

³⁶ Meeting of Experts to Adopt Guidelines on the Promotion of Decent Work and Road Safety in the Transport Sector, *Draft Guidelines on the Promotion of Decent Work and Road Safety in the Transport Sector* International Labour Organisation, Geneva, 23-27 September 2019 p6;Quinlan above n 13; Quinlan and Wright above n 13. There is now a substantial body of research on the adverse effects of supply chain dynamics on workers labouring in supply chains: see for example, Michael Quinlan, *Supply Chains and Networks* (Safe Work Australia, July 2011); David Walters and Phil James, 'What Motivates Employers to Establish Preventive Management Arrangements within Supply Chains?' (2011) 49(7) *Safety Science* 988; Phil James et al 'Regulating Supply Chains to Improve Health and Safety' (2007) 36(2) *Industrial Law Journal* 163, 166–170; Chris Wright and John Lund, 'Supply Chain Rationalization: Retailer Dominance and Labour Flexibility in the Australian Food and Grocery Industry' (2003) 17(1) *Work, Employment and Society* 137, 142–151. Phil James et al., 'Regulating the Employment Dynamics of Domestic Supply Chains' (2015) 57(4) *Journal of Industrial Relations* 526.

³⁷ See references in above n 14; references in above n 27.

³⁸ See references above note 7.

³⁹ rawling and kaine above n 12.

- 4.2.5 An easily accessible dispute resolution mechanism for transport supply chain/contract network disputes (including where necessary the ability to make binding decisions).
- 4.2.6 An appropriate and adequate enforcement regime. For over a century now a gap between the ‘law in the books’ and the ‘law in action’ has been identified as a (potentially faulty) feature of legal systems.⁴⁰ Thus the necessity for formal legal and structural arrangements for the proposed road transport industry scheme to be adequately enforced to reduce that gap (and ensure that road transport workers actually receive their lawful entitlements) is an essential feature of an effective scheme. Components of an adequate enforcement regime include enforceable legal obligations upon all participants in the road transport supply chain/contract network (see above) to assist regulators to track the flow and location of road transport work; and enforceable powers of regulators to inspect all relevant work locations and the relevant records of all participants in the road transport supply chain/contract network.⁴¹
- 4.2.7 National application of the scheme;
- 4.2.8 The responsiveness of the scheme to the specific vulnerabilities of road transport workers and industry needs. The RSRT took the form of a workplace tribunal which prior research had found was a responsive form of regulation which was able to tailor orders to industry needs and address the specific vulnerabilities of road transport workers in different sectors of the industry.⁴² However, the RSRT arguably failed to respond adequately to industry calls to delay its second order, which then snowballed into a political backlash against the existence of the tribunal resulting in the abolition of the tribunal.

Despite these prior events, this submission argues that the tribunal form of regulation is still a responsive and appropriate form of regulation for the road transport industry. However, to address the type of eventualities highlighted above in the previous paragraph (which go to the responsiveness and perceived legitimacy of the prior RSRT), the federal Parliament might consider further responsive tribunal features including ‘boards of reference’ or ‘industrial committees’ through the Fair Work Commission (or through a separate, independent,

⁴⁰ R Pound ‘Law in Books and Law in Action (1910) 44 *American Law Review* 12; Jean-Louis Halperin ‘Law in Books and Law in Action: The Problem of Legal Change (2011) 64 *Maine Law Review* 46

⁴¹ Igor Nossar and Luigi Amoresano ‘Delivering “Safe Rates” in Today’s Road Transport Supply chains’, Working Paper, International Transport Workers’ Federation (ITF) 20 September 2019, pp11-19 (copy on file with author).p7.

⁴² Rawling Johnstone Nossar above n 16; see further on the responsiveness of tribunal regulation, Sean Cooney, John Howe and Jill Murray, ‘Time and Money under WorkChoices: Understanding the New *Workplace Relations Act* as a Scheme of Regulation’ (2006) 29(1) *University of New South Wales Law Journal* 215, 226–8.

Commonwealth tribunal). Examples of boards of reference and industrial committees either still exist or have previously existed under state and federal tribunals.⁴³ Boards of reference/industrial committees may increase the responsiveness and legitimacy of tribunal decision-making because the industrial committees/boards of reference themselves are a tripartite structure made up of industry participants (for example a chairperson appointed by the tribunal and an equal number of employee and employer representatives). Thus industry participants become decision-makers, potentially increasing the responsiveness of the tribunal decisions to industry and possibly assisting to insulate the scheme from a political backlash. (If industrial committees/boards of reference become primary decision-makers in the arrangement, full-time tribunal members would form the function of making decisions in the event of a deadlocked industrial committee/boards of reference.)

4.2.9 Finally, it is feasible to extend the proposed industry specific scheme to digitally mediated, road transport industry, gig economy arrangements. Indeed it is vitally *necessary* to subject business controllers of online digital platforms (and associated apps) engaging road transport workers to the same, similar or a parallel level of regulation as conventional road transport industry businesses to ensure a level playing field and the viability of road transport businesses.⁴⁴ This is a critical point given that these large digital platform/app businesses involved in the delivery of road transport industry services are currently not even close to being profitable but operate at a massive loss.⁴⁵

If the new scheme took the form of a tribunal, then orders could be produced for specific sectors within which digitally-mediated gig economy arrangements are proliferating. Specifically, an important additional focus of the new scheme could be these gig economy arrangements as another group of sector-specific issues to inquire into and make orders about, alongside inquiries and orders relating to the heavy vehicle sector. This would mean that the regulatory scheme could be tailored to the specific contractual network structures of these gig economy arrangements (as well as maintaining the ability to tailor

⁴³ Previously a Board of Reference could be appointed under s50 of the Conciliation and Arbitration Act 1904 (Cth). Currently an industrial Committee can be formed under Part 8 of the Industrial Relations Act 1996 (NSW); Currently a Board of Reference can be constituted under s48 of the Industrial Relations Act WA.

⁴⁴ See Resolution on transport network companies – “Transporting tomorrow”, International Labour organization Tripartite Sectoral Meeting on Safety and Health in the Road Transport Sector, Geneva, 12-15 October 2015, TSMRTS/2015/14.

⁴⁵ Alexandria Sage, Vibhuti Sharma, “Uber loses \$5 billion, misses Wall Street targets despite easing price war”, Reuters online, 9 August 2019: <https://www.reuters.com/article/us-uber-results/uber-loses-5-billion-misses-wall-street-targets-despite-easing-price-war-idUSKCN1UY2NG?feedType=RSS&feedName=technologyNews>

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standards to road transport industry supply chains in the trucking sector). In this way the new scheme could embed enforceable and sustainable minimum standards across all road transport sectors including sectors within which these digitally-mediated gig economy arrangements proliferate. There would also be capacity to effectively regulate hybrid business network/supply chain structures involving both elements of more traditional supply chains and more recent business structures utilising digital platforms/apps.⁴⁶ Thus, this could maximise both the effectiveness and responsiveness of regulation arising out of the one industry-specific scheme.

5. CONCLUSION

5.1 Regulating to ensure the viability and safety of all stakeholders in the road transport industry including workers and the road using public is a crucial policy issue that has become more pressing with time. After the abolition of the RSRT there has been a large gap in the mandatory regulation of pay and safety in the industry. A new federal legislative scheme for the road transport industry must be established. Such a federal legislative scheme could create rules tailored to the specific business structures of the various road transport sectors in order to embed enforceable standards. This regulation is vital to the sustainability of the Australian road transport industry. This submission has aimed to provide the inquiry with some of the requisite knowledge about the need for, and design of, a new mandatory scheme of road transport industry supply chain and contract network regulation in a changed business environment.

Yours faithfully

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⁴⁶ See for example the arrangements regulated by the Coles-TWU MOU Principles to Ensure the Safety and Fairness of On Demand Workers 23 May 2018.