Road Safety Remuneration Amendment (Protecting Owner Drivers) Bill 2016 [and] Road Safety Remuneration Repeal Bill 2016

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Contents

Purpose of the Bill ............................................................... 3
Background ................................................................. 3
  RSR Act ........................................................................ 3
  2000—Managing fatigue in transport ................................ 3
  2008—National Transport Commission research ................. 3
  Link to the Fair Work Act .............................................. 4
Contractor Driver Minimum Payments Safety
  Remuneration Order .......................................................... 5
  Who the Order applies to ............................................... 5
  Meaning of contractor driver ........................................... 5
  What the Order does ...................................................... 6
  Comment ......................................................................... 6
Making the Order ............................................................... 7
Court action ....................................................................... 7
Reviews of the Tribunal ..................................................... 8
Discussion paper ............................................................... 8
Committee consideration .................................................. 9
  Selection of Bills Committee .......................................... 9
  Senate Standing Committee for the Scrutiny of Bills .......... 9
Policy position of non-government parties/independents ..... 9
  Australian Labor Party .................................................. 9
  Australian Greens .......................................................... 9
  Independents .................................................................. 9
Position of major interest groups .................................... 10

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House: House of Representatives
Portfolio: Employment
Commencement: as set out in the body of the Bills Digest.

Links: The links to the Bills, their Explanatory Memoranda and second reading speeches can be found on the homepages for the Road Safety Remuneration Repeal Bill 2016 and the Road Safety Remuneration Amendment (Protecting Owner Drivers) Bill 2016 or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at April 2016.
For the Order ................................................................. 10
Against the Order .......................................................... 10
Financial implications ......................................................... 10
Statement of Compatibility with Human Rights .............. 10
Parliamentary Joint Committee on Human Rights ........... 10
Key issues and provisions ................................................... 10
Repeal Bill ........................................................................ 10
Commencement ................................................................. 10
Provisions ...................................................................... 10
Order Bill ................................................................... 11
Commencement ................................................................. 11
Provisions ...................................................................... 11
Concluding comments ....................................................... 11
Purpose of the Bill

This Bills Digest deals with two Bills.

The purpose of the Road Safety Remuneration Repeal Bill 2016 (Repeal Bill) is to repeal the Road Safety Remuneration Act 2012 and to make consequential amendments to other statutes to reflect that repeal.

The purpose of the Road Safety Remuneration Amendment (Protecting Owner Drivers) Bill 2016 (Order Bill) is to suspend the operation of the Contractor Driver Minimum Payments Order 2016 (the Order) and any subsequent orders that may be made by the Road Safety Remuneration Tribunal (the Tribunal) until 1 January 2017 and to allow the Minister to make rules dealing with transitional and other matters. According to the Minister for Industry, Innovation and Science, Christopher Pyne, the Government’s preferred option is the passage of the Repeal Bill. The Order Bill was introduced to ensure that, if the Repeal Bill is not passed, the Order will not have any immediate effect on owner drivers.1

Background

RSR Act

The Road Safety Remuneration Act was enacted in 2012 and commenced on 1 July 2012.2

2000—Managing fatigue in transport

Previous Parliamentary reports raised concerns with aspects of the road transport sector. The House of Representatives Standing Committee on Communications, Transport and the Arts (the Committee) conducted an inquiry into fatigue in transport in 2000.3 The Committee’s report, entitled Beyond the Midnight Oil: Managing Fatigue in Transport, found that the Australian road transport industry had reduced its freight rates (charges to consumers for delivery) as a result of competition, but that this had come at a price:

... the combination of low freight rates and the increasing cost of overheads (such as fuel and tyres) means that many operators are being forced to driver longer, faster and further in order to make even a small profit. As one long distance truck driver told (the Committee), he has ‘never ever worked harder to try and make nothing’.4

The Committee also found that there was an increased need to raise utilisation levels of equipment, which, when tied to low freight rates, created pressure to drive long hours to make ends meet. Pressure on transport companies to remain competitive is one of the most prominent causes of driver fatigue.5 Nevertheless, the Committee concluded that there was little governments could do to intervene in commercial matters in respect of setting freight rates.6

2008—National Transport Commission research

As part of the ongoing concern about the pressures on drivers to drive for long hours in return for low pay, in 2008 the National Transport Commission (NTC) was asked to identify and assess options for implementing a system of safe rates for both employees and owner-drivers, recognising the special vulnerabilities of independent contractors in the transport industry.7

The NTC report, entitled Safe Payments—Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry, concluded that there was ‘sufficient evidence which points to a link between rates and

3. Details of the terms of reference, submissions to the inquiry and the final report are available on the inquiry homepage.
4. Standing Committee on Communications, Transport and the Arts, Beyond the midnight oil: managing fatigue in transport, House of Representatives, Canberra, 9 October 2000, p. 94.
5. Ibid., p. 96.
6. Ibid.
methods of payments and a variety of on-road behaviours’ including speeding, working long hours and using illicit substances, ‘which are acknowledged contributors to truck crashes’.  

As part of its report, the NTC considered a number of options for regulatory reform including a national framework for employee and owner-drivers. It proposed a specialised body under federal transport legislation to:

- establish and maintain enforceable safe payments for employees
- establish and maintain enforceable safe payments for owner-drivers
- settle disputes in a low-cost, accessible manner
- consider and, if necessary, impose obligations regarding safe payments on parties in the transport supply chain, and
- consider and, if necessary, impose obligations with respect to enforcement of safe payments.

The Regulation Impact Statement which accompanied the originating Bill was prepared by PricewaterhouseCoopers (PwC) at the request of the then Department of Education, Employment and Workplace Relations. It was commissioned to assist the Government to formulate its response to the 2008 National Transport Commission research. PwC explored three possible options, the third of which was to establish the Road Safety Remuneration Tribunal. It was considered:

There are valid economic grounds for establishing a tribunal, which is expected to cost about $5 million per annum. The tribunal’s approach to setting pay and pay related conditions would be research focused and evidence based. The tribunal would have discretion to set rates of pay and/or pay related conditions for drivers operating in sectors of the road transport industry, if there was evidence these rates and/or conditions would improve safety outcomes.

Amongst other things the Road Safety Remuneration Act:

- establishes the Tribunal
- empowers the Full Bench of the Tribunal to make road safety remuneration orders
- sets out the method to be followed by the Tribunal for making an order, including industry consultation and
- provides that the Road Safety Remuneration Act is a workplace law under the Fair Work Act 2009.

The Road Safety Remuneration Act was intended to apply to:

... all employee and contractor drivers in the road transport industry, to the fullest extent possible under the Constitution. The road transport industry is defined by reference to the coverage of the existing 4 modern awards that apply in the industry. [The Act] will allow for the Tribunal to make [road safety remuneration orders] for the benefit of all drivers. These [road safety remuneration orders] will apply to employers and hirers of drivers, as well as other parties in the road transport supply chain.

Link to the Fair Work Act

The Road Safety Remuneration Act interacts with other instruments that are made under the Fair Work Act. It provides that road safety remuneration orders must be made by a Full Bench of the Tribunal. The Full Bench is to consist of either:

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9. Ibid., pp. 29–45.
10. Ibid., pp. 40 and 46.
12. Ibid., p. viii.
13. Ibid., p. vii.
14. Road Safety Remuneration Act, section 118.
16. Road Safety Remuneration Act, section 12.
17. Road Safety Remuneration Act, section 30.
three members of the Tribunal, being the President, one dual Fair Work Commission member and one industry member or

five members of the Tribunal, being the President, two dual Fair Work Commission members and two industry members.\(^{18}\)

Under the *Road Safety Remuneration Act* industry members must have knowledge of, or experience in, one or more of the following fields:

- transport and logistics
- driving in the road transport industry
- business, industry or commerce
- work health and safety in the road transport industry.\(^{19}\)

**Contractor Driver Minimum Payments Safety Remuneration Order**

Consistent with its statutory functions, the Tribunal made the Order which was published on 18 December 2015 and was to commence on 4 April 2016.\(^{20}\)

**Who the Order applies to**

Clause 4 of the Order sets out its application as follows:

... subject to subclause 4.3, this order applies to a *contractor driver* engaged in:

- (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, in respect of the provision by the contractor driver of a road transport service wholly or substantially in relation to goods, wares, merchandise, material or anything whatsoever destined for sale or hire by a supermarket chain; or

- (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.

The Order therefore applies to *contractor drivers* either engaged in the transport of retail goods and other material destined for sale or hire by a supermarket chain (a business operating five or more supermarkets) or in long distance operations, defined as interstate journeys exceeding 200km or return journeys exceeding 500km.\(^{21}\)

Subclause 4.3 of the Order sets out exceptions, providing that it does not apply to contractor drivers engaged in:

- the cash in transit industry (within the meaning of the *Transport (Cash in Transit) Award 2010*)
- the waste management industry (within the meaning of the *Waste Management Award 2010*)
- the sector of the road transport industry directly related to wharf and port container work and
- the oil, fuel and gas sectors of the road transport industry.

**Meaning of contractor driver**

*Contractor driver* is defined in the Order as a *road transport driver* who is an *independent contractor*. Under the Order, an *independent contractor* is not confined to an individual.\(^{22}\) A *road transport driver* is defined as:

- an individual who engages in the road transport industry by driving a vehicle to transport things by road, providing the individual does so:

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i. as an employee of a constitutional corporation, the Commonwealth, a Commonwealth authority, a Territory or Territory authority

ii. under a road transport contract the other party to which is a constitutional corporation, the Commonwealth, a Commonwealth authority, a Territory or Territory authority

iii. under a contract entered into in a Territory

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

v. for the purposes of the Commonwealth, a Commonwealth authority, a Territory or a Territory authority

vi. in the course of or in relation to constitutional trade or commerce or

vii. under a road transport contract the other party to which is a corporation that has entered into the contract for the purposes of the business of that corporation or

b) a constitutional corporation that engages in the road transport industry by transporting things by road using one or more vehicles supplied by the corporation or related individual, where each vehicle is mainly driven by a director of the corporation, a member of the immediate family of a director, an individual with a controlling interest in the corporation or a member of the immediate family of such individual.23

What the Order does
The Order creates obligations for hirers and certain participants in the supply chain in relation to contractor drivers. Specifically, it does the following:

• specifies minimum payments for drivers involved in ‘distribution operations’ (Schedule A) and ‘long distance operations’ (Schedule B)—these will automatically increase by two percent per year commencing on 4 April 2017

• requires the prescribed hourly rate to be paid ‘for each hour or part thereof that a contractor driver necessarily spends in providing road transport services’,24 which includes time spent while the contractor is required by the hirer to be at its disposal or direction,25 during each 30 minute rest break (as required by law)26 and for activities including loading and unloading, cleaning, refuelling and inspecting or attending to a load on a vehicle or trailer27

• requires hirers to permit a contractor driver to take up to four weeks of unpaid leave, if engaged over a 12 month period28 and

• requires participants in a supply chain, including consignors, consignees, intermediaries and operators of premises for loading or unloading, to take all reasonable steps to ensure that any contract they have with another party in the supply chain does not prevent or impede compliance by a hirer with the requirements imposed by the Order.29

Comment
It is clear that the Order was originally intended to apply broadly. However, its drafting has led to concerns by stakeholders about who is covered and who is not.

24. Contractor Driver Minimum Payments Safety Remuneration Order, paragraphs 9.1(a) and 10.1(a).
27. Contractor Driver Minimum Payments Safety Remuneration Order, paragraph 11.1(c).
29. Contractor Driver Minimum Payments Safety Remuneration Order, clause 8.2.
The application provision of the Order provides that it applies to a contractor driver who is engaged in certain activities. The Order defines a *contractor driver* as a road transport driver who is an *independent contractor*.

The definition of *road transport driver* is set out in two parts, a) and b). Part b) of the definition clearly captures owner-drivers where their business venture is a constitutional corporation.

What is unclear to many stakeholders is the breadth of the application of part a) of the definition. According to the Fair Work Ombudsman the Order:

> ... affects contractor (owner) drivers, hirers and supply chain participants. It has effect from 4.15 pm on 7 April 2016 and expires on 3 April 2020. Given ongoing confusion and concern surrounding the introduction of the 2016 Order, we will not be seeking enforcement outcomes to early contraventions that may be identified.30

Given the confusion which the Fair Work Ombudsman acknowledges, the Tribunal would need to issue guidance on the practical effects of the Order within a range of scenarios.

**Making the Order**

Consistent with the requirements of the *Road Safety Remuneration Act*, the Order was the subject of extensive consultation before it was made.31

On 26 August 2015 the Tribunal issued the draft Contractor Driver Minimum Payments Road Safety Remuneration Order 2016 (draft Order) and accompanying Statement.32 Importantly the accompanying statement contains the following information:

The draft Payments RSRO applies to a road transport driver employed or engaged in:

- the road transport and distribution industry within the meaning of the *Road Transport and Distribution Award 2010* as in force on 1 July 2012, in respect of the provision by the road transport driver of a road transport service wholly or substantially in relation to goods, wares, merchandise, material or anything whatsoever destined for sale or hire by a supermarket chain; or

- 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 2012.33 [emphasis added]

Extensive submissions were received.34 The Tribunal issued amended Directions on 23 November 2015 and provided the opportunity for further written submissions to be made in relation to the value that should be given to the individual inputs in the KPMG cost model and/or particular rates, if any, that the Tribunal should order as minimum payments for those covered by the draft Order.35

When the final form of the Order was published in December 2015, its application was narrowed to *contractor drivers*—being a road contractor driver who was an independent contractor.

**Court action**

In the weeks leading up to the proposed commencement of the Order (that is, 4 April 2016), the Tribunal received submissions from stakeholders seeking a variation of the Order so that it did not commence until 1 January 2017.36 This was based on concerns that ‘the industry had not had sufficient time to prepare for the Order’ and ‘significant concern and confusion about the impacts of the order, particularly on the viability and livelihoods of owner-drivers and small road transport businesses’.37

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34. Road Safety Remuneration Tribunal (RSRT), *Submissions—payments for road transport drivers*, RSRT website.
35. Road Safety Remuneration Tribunal (RSRT), *Timetable—payments for road transport drivers*, RSRT website.
36. Australian Industry Group (AIG), *AIG group applies to vary road safety remuneration order given major adverse effects on industry and contractor drivers*, media release, 9 March 2016.
When the Tribunal did not agree to such a variation, an application was brought to the Federal Court to stay the Order.\(^{38}\) Whilst that action was successful at first instance,\(^{39}\) the Transport Workers Union lodged an appeal against the stay and the Full Court of the Federal Court declined to extend the stay.\(^{40}\) As a result the Order has effect from 4.15 pm on 7 April 2016.

On the same day it was reported that a High Court challenge would be prepared against the Road Safety Remuneration Tribunal by Independent Contractors Australia on the grounds that the order is unconstitutional because it amounts to price fixing.\(^{41}\)

**Reviews of the Tribunal**

Prior to the proposed commencement of the Order, on 1 April 2016 the Minister for Employment, Michaelia Cash, released the report of two reviews which had been conducted into the operation of the Tribunal.\(^{42}\)

The 2014 review stated:

... the Review has instead focused on attempting to assess the **likely future impact** of the Road Safety Remuneration System in terms of the imposition of regulatory and economic burdens on the industry and the economy more generally. While it has not been possible to quantify these expected future burdens in any meaningful sense, the Review concludes that they **are substantial in size**. At a fundamental level, this reflects the potential for the Tribunal to exercise its powers to undertake minimum price-setting and give rise to significant economic distortions if mandatory minimum rates are set at inappropriate levels. The difficulties involved in setting rates at or near socially optimal levels in a large and multi-faceted industry are necessarily substantial, as numerous stakeholder submissions have underlined. The removal of previous price regulation regimes in this industry in numerous OECD countries arguably reflects recognition of this problem, as well as the general move away from the use of price regulation in market economies in recent decades. Thus, the **potential regulatory and economic burden resulting from the continuation of the Road Safety Remuneration System is significant.**\(^{43}\)

The 2016 review concluded that:

... our analysis of the costs and benefits of the System suggest that there will be a significant cost to the economy when both Road Safety Remuneration Orders are in effect, with any potential safety benefits significantly outweighed by the associated costs.

Consistent with the direction set out in the Government’s Guide to Regulation it is hard to see how any system that results in a net cost to the economy could be aligned with government priorities and policies.\(^{44}\)

**Discussion paper**

Given the unfavourable comments made, Ms Cash circulated a discussion paper seeking public comments about possible options for reform. These include limiting the functions of the Tribunal and abolishing the *Road Safety Remuneration Act*.\(^{45}\)

However, the Repeal Bill and the Order Bill now render this consultation process nugatory.

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39. Federal Court of Australia, *National Road Transport Association Ltd v The Honourable J Acton, President of the Road Safety Remuneration Tribunal and Ors*, 1 April 2016.


42. M Cash (Minister for Employment), *Release of reviews of the road safety remuneration system and consultation process*, media release, 1 April 2016. The 2016 review was required to be conducted under section 120 of the *Road Safety Remuneration Act*.


Committee consideration

Selection of Bills Committee
At the time of writing this Bills Digest, neither of the Bills had been referred to Committee for inquiry and report.

Senate Standing Committee for the Scrutiny of Bills
At the time of writing this Bills Digest, the Standing Committee for the Scrutiny of Bills had not published comments in relation to either of the Bills.

Policy position of non-government parties/independents

Australian Labor Party
Australian Labor Party (ALP) Shadow Minister, Jim Chalmers has stated:

We do support the independent Tribunal. We think this is fundamentally about road safety. There is a link that has been established, independently, by experts, between remuneration for truck drivers and safety on our roads. We need to prevent people from cutting corners, from taking unnecessary risks -- whether it be with maintenance, whether it be with hours worked and the like.46

ALP Senator, Doug Cameron has stated:

I think these truckies have been misled. I think the truckies need to understand that what Labor is saying is that we will sit down and look at that decision. We will look at the decision in the context of how it can be implemented effectively and if there are problems with it, deal with those problems

The other issue that we are very concerned about is obviously road safety and it’s not just an issue for the safety of the truck drivers it’s the issue of safety for the Australian public. I drive up and down the Hume Highway every time I come to Parliament and you have always got to worry about how long some of these truckies have been on the road, whether some of them are fit and capable of doing their job.47

Australian Greens
Australian Greens (the Greens) Industrial Relations spokesperson Adam Bandt has stated that ‘the Greens will fight the government’s moves to override a Road Safety Remuneration Tribunal ruling on pay for truck drivers’.48

Independents
Independent Senator John Madigan has stated that he is ‘leaning towards supporting the move to abolish the RSRT, however, I still hold genuine concerns surrounding the capabilities of the existing bodies and whether those bodies are well equipped and well resourced to support the road transport industry’.49 To that end he arranged a private meeting with stakeholders for 16 April 2016 to ‘to examine whether we can go beyond simply abolishing the Road Safety Remuneration Tribunal’.50

Australia Motoring Enthusiast Party Senator Ricky Muir has stated:

Given that Fair Work appears to not be ready, the fact that the industry is not ready, and the amount of industry uncertainty and public concern around this Order, I will be supporting legislation to delay its date of effect. This will hopefully provide the time necessary for all parties to address the issues and concerns raised, especially the situation that allows for owner-drivers to be priced out of the various road transport markets. I would encourage all those who have issues with the Order to continue to provide submissions to have it varied. This includes those in farming and rural communities who it seems are particularly impacted.51

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47. D Cameron, Transcript of doorstop interview, Canberra, 18 April 2016.
48. A Bandt, Greens will fight government’s moves on road safety, media release, 4 April 2016.
49. J Madigan, Madigan leans towards abolishing the RSRT “but there may be a better solution”, media release, 14 April 2016.
51. R Muir, RSRT—Muir to call for Senate committee examination, media release, 14 April 2016.
Position of major interest groups

For the Order
The Transport Workers’ Union is strongly in favour of the Order on the grounds that it sets out the minimum payments to owner drivers which are likely to be more than they are currently paid.52

Against the Order
The Australian Industry Group argued initially for the Order to be delayed to give small-business owners more time to adapt to the change.53

Australian Livestock and Rural Transporters Association has reportedly lobbied Mr Turnbull to ‘abolish the Road Safety Remuneration Tribunal’. The National Road Transport Association has also said ‘the tribunal should be scrapped’ and warned its minimum rates order, applying to owner-drivers, would prevent them giving upfront quotes to potential customers.54

Financial implications
According to the Explanatory Memorandum for the Repeal Bill ‘any savings arising from the abolition of the Road Safety Remuneration Tribunal will be redirected to the National Heavy Vehicle Regulator’.55 It has been reported that ‘the Australian Government has expended $13.4 million over three years (2012-13 to 2014-15)’ on the Road Safety Remuneration System.56

There will be nil financial impact from the Order Bill.57

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bills’ compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bills are compatible.58

Parliamentary Joint Committee on Human Rights
At the time of writing this Bills Digest, the Parliamentary Joint Committee on Human Rights had not published comments in relation to either of the Bills.

Key issues and provisions

Repeal Bill

Commencement
The Repeal Bill commences two days after Royal Assent.

Provisions
Item 1 of the Repeal Bill repeals the whole of the Road Safety Remuneration Act.

Item 2 of the Repeal Bill provides that the Minister may, by legislative instrument make rules prescribing matters of a transitional nature relating to the repeals or amendment made by the Road Safety Remuneration Repeal Act 2016. According to the Explanatory Memorandum for the Repeal Bill, the rules could be used to ‘preserve the whole or part of the operation of the Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014’.

55. Explanatory Memorandum, Road Safety Remuneration Repeal Bill 2016, p. ii.
56. PricewaterhouseCoopers (PWC), Review of the road safety remuneration system, op. cit., p. iii.
57. Explanatory Memorandum, Road Safety Remuneration Amendment (Protecting Owner Drivers) Bill 2016, p. ii.
58. The Statement of Compatibility with Human Rights can be found at pages iv–v of the Explanatory Memorandum to the Road Safety Remuneration Repeal Bill 2016. The Statement of Compatibility with Human Rights can be found at pages iv–v of the Explanatory Memorandum to the Road Safety Remuneration Amendment (Protecting Owner Drivers) Bill 2016.
59. Explanatory Memorandum, Road Safety Remuneration Repeal Bill 2016, p. 3.
The rules would be disallowable instruments under the *Legislation Act 2003*, and so would be subject to the rules set out in that Act about publication on the Federal Register of Legislation and tabling in both Houses of the Parliament.

**Order Bill**

**Commencement**

The Order Bill commences on the day after Royal Assent.

**Provisions**

Item 2 of the Order Bill suspends the operation of the Order for the period starting on the commencement of the *Road Safety Remuneration Amendment (Protecting Owner Drivers) Act 2016* and ending on 31 December 2016. This is called the *suspension period*.

In addition, item 3 of the Order Bill provides that any Order made by the Tribunal after the Contractor Driver Minimum Payments Safety Remuneration Order 2016 was made has no effect during the *suspension period*. According to the Explanatory Memorandum for the Order Bill, ‘this item has no Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014’.

Item 4 of the Order Bill empowers the Minister, by legislative instrument, to make rules prescribing matters required or permitted by the Act to be prescribed by the rules or necessary or convenient to be prescribed for carrying out or giving effect to the Act. This includes matters of a transitional nature relating to the Order or a later order. Subitem 4(3) may be considered to be a ‘Henry VIII clause’ as it allows the Minister to make rules which modify the effect of the *Road Safety Remuneration Act*.

**Concluding comments**

What is clear from the above is that the publication of the Order in December 2015 has been met by confusion and concern amongst many of the stakeholders who are, or may be, subject to it. What is not clear is whether the dire predictions of other stakeholders about the effect of the Order on their businesses are based on fact or conjecture.

Whatever the case, the death knell for the Tribunal was delivered in the two review reports which were published by the Minister for Employment in April 2016. At a time when every statutory body must give value for money, it appears that the costs of the Tribunal have been found to outweigh its public benefit.

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60. *Legislation Act*, subsection 15G(1). Section 15K of the *Legislation Act* provides that a legislative instrument is not enforceable by or against any person (including the Commonwealth) unless the instrument is registered as a legislative instrument.

61. *Legislation Act*, section 3A.
