

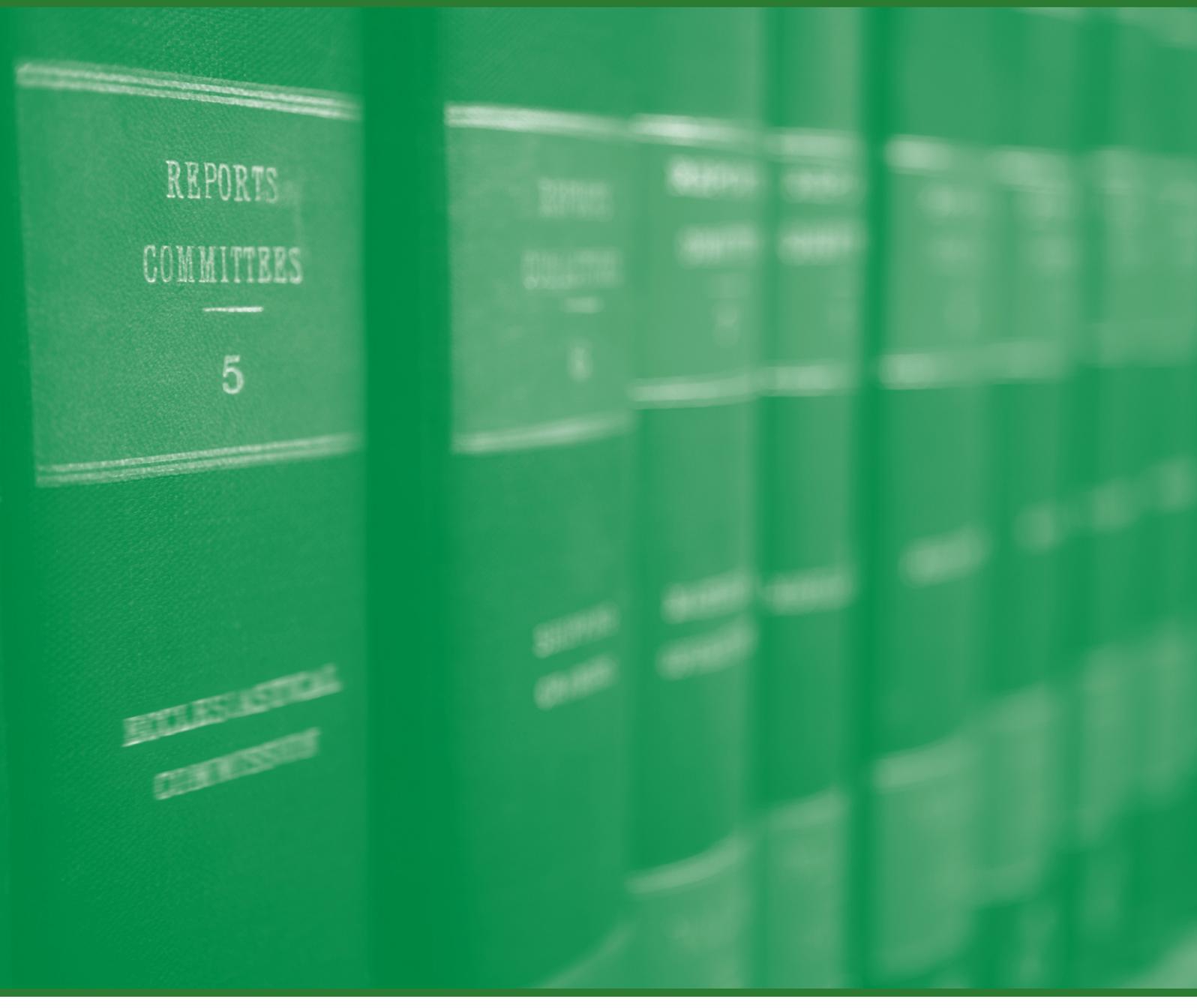


LEGISLATIVE ASSEMBLY OF NEW SOUTH WALES

Legislative Assembly Committee on Transport and Infrastructure

REPORT 1/56 – OCTOBER 2016

WORKPLACE ARRANGEMENTS IN THE POINT TO POINT TRANSPORT INDUSTRY





LEGISLATIVE ASSEMBLY

**LEGISLATIVE ASSEMBLY COMMITTEE ON TRANSPORT
AND INFRASTRUCTURE**

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TRANSPORT INDUSTRY**

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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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Membership

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Terms of Reference

That the Committee inquire into, and report on, workplace arrangements in the point to point transport industry, with particular reference to:

1. the operation and impact on the point to point transport industry of the relevant provisions of Chapter 6 of the *Industrial Relations Act 1996*, as well as the operation of any other state or federal laws that may affect driver remuneration and conditions, including the *Fair Work Act*, the *Independent Contractors Act 2006* and the general law of contract;
2. the effectiveness of the existing arrangements including the impact on:
 - a. driver remuneration and conditions;
 - b. competitiveness across the industry;
 - c. customer service (including fares); and
 - d. safety for passengers and drivers;
3. the uneven application of workplace arrangements across the point to point transport sector and nationally;
4. the evolution of the industry, which includes national and multinational service providers;
5. the impact of technology and customer demand on how drivers participate in the industry;
6. the sustainability of commercial passenger transport and economic productivity;
7. the intent of the Government's reforms to minimise the regulatory burden on the point to point industry; and
8. any other related matter.

Chair's Foreword

From the evidence which we have heard in this inquiry, the point to point transport market is one which is still finding equilibrium. Customers are still changing their preferences between taxis, hire cars and ride share providers like Uber. These changes have largely been driven by technological disruption from ride sharing platforms.

Historically the taxi industry has been heavily regulated. Not only in the sense of non-licensed carriers in the past having been excluded or limited from competing against taxis, but also because other anomalous industrial regulation was allowed to intrude into the sector.

With the freeing of competition in the market after Parliament passed the *Point to Point Transport (Taxi and Hire Vehicles) Act 2016* (NSW), this inquiry has investigated whether other reform is necessary to ensure competitive neutrality in this new market.

The recommendations which we have made are directed to the workplace issues within the terms of reference that have been raised with the Committee. We have tried to encourage all types of competition between different sectors in the market. It is important that they compete on an even playing field so that consumers enjoy the greatest benefits from competition but that no competitor is unreasonably put at a disadvantage.

I wish to thank the Minister for Transport and Infrastructure, the Honourable Andrew Constance MP, for requesting that the Committee examine this issue. We were given important work to do and I am grateful for his foresight on this issue.

I also wish to thank my fellow Committee members for their dedication and collegiality. It has been my pleasure to chair our meetings, to hear your contributions and to work with you to complete this report.

Finally, I wish to thank the Legislative Assembly Committee staff for the expertise and professionalism they applied to assisting the Committee and me in our work.



Alister Henskens SC MP

Chair

List of Recommendations

RECOMMENDATION 1 _____ **30**

The Committee recommends that the NSW Government gives consideration to amending section 307 of the *Industrial Relations Act 1996* (NSW) to remove contracts of bailment from Chapter 6 and thereby taking those contracts out of the jurisdiction of the Industrial Relations Commission.

RECOMMENDATION 2 _____ **34**

The Committee recommends that the Point to Point Transport Commissioner provide information to all drivers, as part of the driver authorisation process, on the services offered by the NSW Small Business Commissioner.

RECOMMENDATION 3 _____ **39**

The Committee recommends that the Point to Point Transport Commissioner work with the NSW Centre for Road Safety to provide information to point to point transport drivers on managing driver fatigue.

Chapter One – Introduction and key issues

POINT TO POINT TRANSPORT

- 1.1 Point to point transport includes all flexible transport services that can take customers on a route they choose, at a time that suits them. Point to point transport can include taxis, hire cars, tourist services, rideshare services and community transport.¹

EVOLUTION OF THE INDUSTRY

- 1.2 The point to point transport industry has undergone significant change since the first taxi cabs were registered in New South Wales in 1909. Most recently, the emergence of booking services that utilise mobile phone technology (ride share apps) have led to changes in the way point to point transport services may be delivered and to the transformation of the point to point transport industry for customers and operators, both here in Australia and overseas.
- 1.3 These advancements in technology have led to a disruptive new business model, which has highlighted the need for a review of government regulations governing the point to point transport industry.

INDUSTRY REFORM

- 1.4 In light of these changes, and recognising that the arrival of ride share services had raised a range of issues, particularly in relation to the safety of customers, in 2015 the Government established an independent Point to Point Taskforce (the Taskforce) to examine the future sustainability of taxis, hire cars and other emerging point to point transport providers in NSW, including ride share services.
- 1.5 The Point to Point Taskforce found that the traditional point to point industry had been challenged by the emergence of new technology and business models, and that overregulation and unnecessary costs had stifled innovation.²

Point to Point Taskforce recommendations

- 1.6 The Taskforce recommended the removal of unnecessary, burdensome regulation in the point to point industry. It recommended a new risk-based, outcome-focused regulatory framework, with the industry itself responsible for implementation, subject to audit and inspection.³
- 1.7 The point to point transport industry exists to serve customers and therefore, in making its recommendations, the Taskforce focused on the impact of technology, regulation and industry structures on the welfare of customers.⁴ The Taskforce made 57 recommendations for a new regulatory framework, regulation of drivers for safety, vehicle safety and security, insurance, fares, service quality and

¹ Transport for NSW, < <http://www.transport.nsw.gov.au/pointtopoint>>, accessed August 2016

² Submission 5, NSW Treasury and Transport for NSW, p 4

³ Point to Point Transport Taskforce, *Report to the Minister for Transport and Infrastructure*, November 2015, p 6

⁴ Point to Point Transport Taskforce, *Report to the Minister for Transport and Infrastructure*, November 2015, p 4

innovation, supply, transport disadvantage, compliance and enforcement, and transition.

- 1.8 The Point to Point Taskforce report may be found at:
www.transport.nsw.gov.au/pointtopoint/PointtoPointTransportTaskforce

Regulatory reform

- 1.9 Following the Government's acceptance of the recommendations made by the Point to Point Taskforce, ride share services became legal in New South Wales in December 2015 and a number of regulations relating to taxis and hire car operators were removed.
- 1.10 In 2016 the Government introduced the *Point to Point Transport (Taxis and Hire Vehicles) Bill 2016* to implement the Taskforce recommendations, with measures to encourage innovation, remove red tape, rationalise bureaucracy, and reduce compliance costs.⁵
- 1.11 The Bill was assented to in June 2016, with some but not all provisions having commenced.⁶ The *Point to Point Transport (Taxis and Hire Vehicles) Act* (the **Point to Point Transport Act**) applies to vehicles with 12 or fewer seats and does not apply to services that are free of charge or only available to defined groups, such as community transport.
- 1.12 The Point to Point Transport Act creates two authorised providers of point to point transport: providers of taxi services and providers of booking services. Booking services may be provided anywhere in New South Wales, whether in a taxi or hire car, and include hire car and ride share providers. Only taxis may undertake rank and hail work.
- 1.13 The Act establishes the Commissioner for Point to Point Transport, an independent regulator responsible for managing enforcement of industry regulations, accreditation of providers and making recommendations to improve safety and other standards.
- 1.14 Under section 160 of the Point to Point Transport Act, the Minister for Transport is required to review the Act after five years to determine its relevance and whether it is still meeting policy objectives.⁷

Industry assistance

- 1.15 In light of the difficulties facing the taxi industry as it adjusts to the changes in point to point transport, the Taskforce recommended an adjustment assistance package be offered to taxi licence holders and ongoing education and guidance be provided for all industry participants about their obligations.
- 1.16 A \$250 million fund will provide the following:

⁵ New South Wales, Legislative Assembly, *Debates*, 2 June 2016, p 1-7 (Andrew Constance, Minister for Transport and Infrastructure)

⁶ Provisions concerning the appointment of the Point to Point Transport Commissioner have commenced but all remaining provisions will commence on a day to be proclaimed.

⁷ *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*, section 160

- \$98 million for transition assistance of \$20,000 per perpetual licence, for up to two licences, for taxi licensees who obtained a licence before 1 July 2015;
- \$142 million for taxi licensees facing hardship as a result of the changes to be distributed by a transition assistance panel with representation including the chief executive officer of the NSW Taxi Council, and
- \$10 million buyback scheme for hire car licensees.⁸

INQUIRY BACKGROUND

1.17 The Point to Point Taskforce considered the future sustainability of taxis, hire cars and ride share providers, however it did not examine workplace arrangements across the point to point transport industry. The Transport Minister, The Hon. Andrew Constance MP, requested that the Committee consider workplace arrangements in the point to point transport industry in this inquiry.

Inquiry scope

1.18 The Point to Point Transport Act applies to vehicles with 12 or fewer seats and does not apply to services that are free of charge or only available to defined groups, such as community transport. As such, the Committee limited the scope of this inquiry to taxi, ride share and hire car operators. The following section provides a brief overview of each of these operators.

Taxi industry

1.19 Only 12 taxis in 1909 were registered to operate in the Metropolitan Transport District of Sydney. In New South Wales today there are approximately 4,000 taxi licence owners, over 5,000 taxi operators and over 23,000 authorised drivers.⁹

1.20 These numbers reveal an important feature of the taxi industry which distinguishes it from the booking services sector of the point to point transport market. Taxi services are predominantly operated by drivers who do not own their vehicle, whereas the booking services sector operates predominantly with owner operators (a large majority of the hire car sector and an overwhelming majority of Uber drivers).¹⁰

1.21 The relationship between an owner of a taxi on the one hand and a driver of that taxi who does not own the taxi on the other hand is called in law a bailment. It is not in law an employment relationship.¹¹ A bailment is usually a contractual relationship. A bailment occurs whenever one person takes possession of another person's goods with an obligation to return them.¹²

⁸ New South Wales, Legislative Assembly, *Debates*, 2 June 2016, p 6 (Andrew Constance, Minister for Transport and Infrastructure)

⁹ Submission 6, NSW Taxi Council, p 6

¹⁰ Mr John Bartolotta, Chairman, NSW Hire Car Association, transcript of evidence, 28 July 2016, p 19; Submission 5, NSW Treasury and Transport for NSW, p 2.

¹¹ *Commissioner of Taxation of the Cth of Australia v De Luxe Red and Yellow Cabs Co-Operative (Trading) Society Ltd and ors* [1998] FCA 361 (Full Federal Court)

¹² See generally *Helmore Commercial Law and Property Law in NSW*, 10th Ed (1992), Carter, Lane, Tolhurst and Peden, Law Book Company, Chapter 9, pp 75 - 85

- 1.22 A bailment can occur in each of the taxi, hire car or ride share sectors of the point to point transport industry but a bailment is not unique to them. For example, when a builder hires a bob cat from Kennards plant hire, a bailment occurs. However, there is no regulation of the relationship between Kennards as plant owner, and the builder who is the hirer or bailee. There is not deeming provisions for workers compensation, no long service leave or annual leave which Kennards is required to pay to the builder even though the builder may hire plant from Kennards every day of the week and every week of the year. Kennards and the builder are independent contractors and their relationship is therefore one of bailment.
- 1.23 A taxi owner is, like Kennards, a plant owner. The taxi owner hires its vehicle to a taxi driver under a bailment. However, for completely anomalous and historical reasons, the relationship between Taxi owner and driver in New South Wales is regulated by provisions in the *Industrial Relations Act 1996* (NSW) (the **IR ACT**), giving the driver long service and annual leave rights. These are rights which other bailment relationships (like the builder in the Kennards example above) do not confer.
- 1.24 Furthermore, the IR Act provisions, which are discussed in detail in Chapters Four and Five, that apply to taxi and hire car bailments do not currently apply to bailments in the ride share sector of the point to point transport industry. The IR Act provisions will apply to ride share sector bailments when the 2016 Point to Point Transport Act comes into full operation.
- 1.25 There are also deeming provisions for contracts of bailment for the purposes of Workers Compensation legislation. Persons who drive vehicles or vessels for hire are taken to be employed by the person from whom the use of the vehicle or vessel is obtained.¹³ This legislation is so broadly expressed that it would probably equally apply to persons who are not owner drivers of taxis, hire cars or ride share vehicles.
- 1.26 However, none of these provisions of the IR Act or Workers Compensation legislation which apply to drivers under a bailment also apply to owner/drivers of taxis, hire cars or ride share vehicles. This has a significant consequence for the competitiveness of the taxi sector against the owner operator dominated hire car or ride share sectors. They constitute an effective cost to the taxi industry because of its large proportion of bailment relationships which inhibits its equal competition with the other sectors of the point to point transport industry dominated by owner drivers.
- 1.27 Under the new Point to Point Transport Act, the taxi industry is the only participant that may offer both booking services and ply or stand for hire. This is a competitive advantage as taxis can at the same time source work from an Uber or GoCatch hire or a rank and hail hire. But for taxi rank and hail work, customers cannot easily negotiate a fare. As such, the taxi industry is subject to both more and less regulation than other providers of point to point transport.

¹³ *Workplace Injury Management and Workers Compensation Act 1998* (NSW), section 5 and schedule 1, clause 10

Hire car industry

- 1.28 The NSW hire car industry is smaller than the taxi industry and is considered a booking service provider under the new Point to Point Transport Act. Traditionally, the hire car industry has been seen as the provider of a premium service. Approximately sixty to seventy percent of participants in the hire car industry are owner-operators, with the remaining thirty percent of drivers working on contracts of bailment or commission-based contracts.¹⁴
- 1.29 Traditionally, people booked hire car journeys by telephoning the hire car operator and make a booking over the phone. In recent years the industry has introduced online bookings and it is open to the hire car industry to develop ride share apps for use by clients to book journeys or use Uber or GoCatch hires.
- 1.30 Until recently hire car licence owners were issued with special HC registration plates. However, following the introduction of the Point to Point Transport Act, the regulatory arrangements for hire car operators will be indistinguishable from those for ride share operators and no new hire car licences are being issued. Vehicles with HC plates can continue to use bus lanes in the Sydney region until 1 July 2020 while the Government considers whether to continue to allow bus lane access to hire car operators.

Ride share industry

- 1.31 Under the Point to Point Transport Act, ride share operators are providers of a booking service. At the present time there are two ride share operators in New South Wales – GoCatch and Uber. Uber presently has 13,500 people registered in New South Wales as drivers to provide journeys through the Uber app.¹⁵ The controllers of the vehicles which provide the service to customers, the drivers, are almost overwhelmingly owner operators.¹⁶
- 1.32 Rideshare operators use their vehicles as a means of generating extra income either as students or after other work. Typically, the ride share industry operates at peak times. They typically choose the most lucrative times to operate and do not operate in quiet times, instead leaving the market at those times to taxis or hire cars. How many taxis and hire cars can profitably operate in a combination of the competitive busy times and their operation in quiet times is part of the transition that the industry is going through with the advent of ride share operators.
- 1.33 Customers wishing to book a journey with a rideshare provider must download an app to their mobile phone and use the app to book a journey. Under the Point to Point Transport Act, booking service providers may only provide pre-booked journeys, that is customers may not flag cars on the street and cars may not tout for business.¹⁷ Booking service providers must also provide a fare estimate before the customer accepts the journey.¹⁸

¹⁴ Mr John Bartolotta, Chairman, NSW Hire Car Association, transcript of evidence, 28 July 2016, p 19

¹⁵ Submission 4, Uber, p 1

¹⁶ Mr David Rohrsheim, General Manager, Uber ANZ, transcript of evidence, 28 July 2016, p 68

¹⁷ Section 5 of the Point to Point (Taxis and Hire Vehicles) Act 2016 (NSW) defines a taxi service as a passenger service that can ply or stand for hire and is authorised to do so. Section 7 defines a booking service as one that can

- 1.34 Rideshare providers may offer their customers a choice of vehicle. For example Uber offers standard sedans, assisted vehicles for people with a disability, taxis, luxury cars and SUVs.¹⁹

KEY INQUIRY ISSUES AND RECOMMENDATIONS

- 1.35 In examining existing workplace arrangements in the point to point transport industry, the Committee found that, while a new regulatory framework has been established with the Point to Point Transport Act, the taxi industry, and to a lesser extent, the hire car industry, have in theory, but as we will see not widely in reality, significant workplace obligations under Chapter 6 of the IR Act.
- 1.36 Chapter 6 of the IR Act provides an industrial tribunal jurisdiction over contracts of bailment and service providers. The ride share industry is not presently included in the IR Act.
- 1.37 A number of other workplace issues across the point to point industry arose throughout the course of the inquiry and the Committee discusses the following issues in Chapter Six:
- Dispute resolution procedures
 - Workers compensation insurance
 - Driver fatigue

REPORT STRUCTURE

- 1.38 The report has been organised into six chapters:
- Chapter Two** examines workplace arrangements in the point to point transport industry for other Australian jurisdictions;
- Chapter Three** provides a brief history of the taxi industry in New South Wales and the origins of Chapter 6 of the IR Act;
- Chapter Four** explains the legislative framework currently governing the point to point transport industry;
- Chapter Five** considers the operation of Chapter 6 of the IR Act, given recent changes to the point to point transport industry; and
- Chapter Six** focuses on workplace issues in the point to point transport industry that were raised throughout the inquiry.

only take bookings to provide passenger services. Section 47 provides an offence for providing a taxi service without the appropriate taxi licence.

¹⁸ *Point to Point (Taxis and Hire Vehicles) Act 2016 (NSW)*, section 79

¹⁹ Uber, Sydney, <<https://www.uber.com/cities/sydney/>>, accessed August 2016

Chapter Two – Workplace arrangements in other jurisdictions

INTRODUCTION

- 2.1 The Committee examined workplace arrangements for the taxi, hire car and ride share industries in other Australian states and territories as part of this inquiry. New South Wales is unique among Australian jurisdictions in terms of its regulation of workplace arrangements for the taxi industry, and to a lesser extent, the hire car industry.
- 2.2 In New South Wales the Industrial Relations Commission has jurisdiction to resolve workplace disputes and cases of unfair dismissal in both the taxi and hire car industries. It must also ensure taxi operators meet their obligation to provide leave for permanent taxi drivers in the Sydney Metropolitan Transport District.
- 2.3 The only other state to provide for regulation of dispute resolution procedures is Victoria. In Victoria taxi and hire car industries are regulated by an independent statutory body, the Taxi Services Commission. Taxi drivers in Victoria are not entitled to paid leave, however they do have access to up to four weeks of unpaid leave and access to dispute resolution assistance provided by the Taxi Services Commission.
- 2.4 New South Wales is also unique among Australian jurisdictions in the distinction between workplace arrangements for the taxi industry in regional New South Wales and the Sydney metropolitan region. Permanent taxi drivers in the Sydney Metropolitan Transport District are entitled to four weeks annual leave, sick leave and long service leave. However only a small proportion of taxi drivers are permanent.
- 2.5 In terms of uniformity across jurisdictions, all states and territories around Australia provide for the accreditation and authorisation schemes of point to point drivers and accreditation and authorisation schemes for point to point service providers. Regulation across states and territories is fairly consistent in this regard. For example, to be authorised as a point to point driver in any state or territory in Australia, drivers must pass criminal background checks and medical checks.
- 2.6 All states and territories in Australia provide for the authorisation and accreditation of point to point service providers and regulation of safety standards for point to point vehicles. Features of note for each of the taxi, hire car and ride share industries are outlined later in this Chapter.
- 2.7 Ride share services have been legalised across all Australian states and territories other than the Northern Territory, however the Northern Territory Government has not ruled out legalising ride share services at a later date.

Reviews of the point to point transport industry

- 2.8 Most States have conducted reviews of their point to point transport industries to determine how best to provide: an even playing field for all industry participants, safety for passengers, drivers and vehicles, and reducing regulation to encourage greater innovation by older industry participants. A link to the reviews is provided below:

Queensland

A new framework for the personalised transport industry

<http://personalisedtransport.tmr.qld.gov.au/a-new-framework-for-the-personalised-transport-industry>

Western Australia

On-demand transport reform

<http://www.transport.wa.gov.au/taxis/on-demand-transport-reform.asp>

Victoria

Changes to taxi and hire car regulations

http://economicdevelopment.vic.gov.au/transport/legislation/ride-share#utm_source=transport-vic-gov-au&utm_medium=vanity-url-301ssredirect&utm_content=ride-share&utm_campaign=transport

Australian Capital Territory

2015 Taxi industry reforms

<http://www.cmd.act.gov.au/policystrategic/regreform/2015-taxi-industry-innovation-reforms>

South Australia

Taxi and chauffeur vehicle industry review

<https://www.dpti.sa.gov.au/TaxiHireCarReview>

Tasmania

The Tasmanian Government intends to conduct a review of the regulatory regime for passenger transport services in Tasmania within the next two years.²⁰

TAXI INDUSTRY

- 2.9 The following paragraphs highlight the main points of difference between the taxi industry in New South Wales and other states and territories.

Regulator

- 2.10 In New South Wales the Industrial Relations Commission, RMS and the new Point to Point Transport Commissioner each have a role in regulating the taxi industry. The Industrial Relations Commission is responsible for ensuring workplace conditions are met, RMS is responsible for driver accreditation and the Point to

²⁰Tasmanian Government, *Taxi Newsletter*, August 2016
http://www.transport.tas.gov.au/_data/assets/pdf_file/0009/137718/TAXI_NEWS_-_Issue_74_-_August_2016.pdf, accessed September 2016

Point Transport Commissioner regulates safety standards and accreditation of taxi providers.

- 2.11 In Victoria the Taxi Services Commission, an independent statutory agency, regulates the taxi industry. In all other states and territories, agencies within departments of planning are responsible for driver and operator accreditation.

Contracts between drivers and operators

- 2.12 Taxi drivers across Australia enter into contracts of bailment with an owner to take (or bail) a vehicle and driver the vehicle under conditions set out in the contract. New South Wales, Victoria and Queensland have legislative provisions in place to govern the contracts between drivers and owners.

2.13 **New South Wales**

In New South Wales, taxi drivers and operators in the Sydney Metropolitan Transport District must enter into a bailment agreement with clauses as set down in the 1984 Determination.

2.14 **Victoria**

In Victoria, taxi drivers and operators must comply with certain conditions, even if the conditions are not included in a written agreement. Implied conditions in driver contracts include:

- a 'safety net' income for the driver that is at least 55 per cent of the gross fares earned during a shift;
- up to four weeks of unpaid leave where a driver has worked, on average, three or more shifts per week for 12 months or longer for the same operator;
- a requirement for operators to provide monthly records to drivers of payments made between the parties, shifts worked and fares earned during a shift; and
- a requirement for operators to pay all vehicle maintenance costs (including fuel).

2.15 **Queensland**

In Queensland, it is illegal for taxi drivers to drive a taxi unless a bailment agreement has been entered into. Operators and drivers may create their own bailment agreement, provided that the agreement contains certain conditions outlined in the *Transport Operations (Passenger Transport) Act 1994* (QLD).

2.16 **Model bailment agreements**

Other states and territories do not have legislative provisions for contracts of bailment, however the Australian Capital Territory (ACT), Queensland and South Australia have developed standard or model bailment agreements that may be used by operators and drivers as a template for their own agreement.

Driver remuneration

- 2.17 No state or territory has a minimum hourly rate or wage in place for taxi drivers. In the Sydney Metropolitan Transport District, South Australia and Queensland, drivers may choose to pay the operator a set pay-in amount each shift, or take a fixed percentage of shift revenue.
- 2.18 In Victoria, a driver must receive at least 55 percent of the gross fares earned while they bail the taxi. In Western Australia, drivers pay shift lease fees to operators for each shift. The maximum payable fee is set by the Department of Transport and varies for peak and off-peak shifts. West Australian drivers also pay weekly rank fees to the Taxi Dispatch Service to access jobs via radio.
- 2.19 The Northern Territory, ACT and Tasmanian Governments do not regulate driver remuneration.

Leave entitlements

- 2.20 In New South Wales, permanent drivers within the Sydney Metropolitan Transport District are entitled to four weeks of paid annual leave and sick leave. No other region in Australia has any legislative provision for paid leave. In Victoria regular drivers may take up to four weeks unpaid leave on dates agreed with the operator.

HIRE CAR INDUSTRY

- 2.21 The hire car industry (or limousine or omnibus industry in some states) is regulated in a similar fashion across Australia. Hire car providers and hire car drivers must be authorised and accredited and hire car vehicles must meet certain safety standards.
- 2.22 No state or territory provides for the regulation of workplace arrangements such as driver remuneration, leave, or hours of work for hire car drivers in legislation.
- 2.23 New South Wales is the only state to provide for dispute resolution procedures; hire car drivers who work under contracts of bailment in New South Wales may seek assistance from the Industrial Relations Commission for dispute resolution.
- 2.24 With the introduction of ride share services, the regulatory framework for hire car providers is changing, and in many states hire car providers will be regulated in the same manner as ride share providers. For example, in Queensland, by early 2017 limousine operators will operate under a new booked hire service licence and the Queensland Government will review the existing requirement for all limousines to have a special 'L' registration plate.
- 2.25 Consistent with previous minimal regulation, there will be no change to the regulation of workplace arrangements for hire car drivers in any state or territory.

RIDE SHARE INDUSTRY

- 2.26 Ride share services are now legal across all Australian states and territories, other than the Northern Territory. No state or territory has chosen to regulate

workplace arrangements such as driver remuneration, leave, or hours of work for ride share drivers through legislation.

2.27 **Australian Capital Territory**

The ACT Government was the first government in Australia to legalise ride sharing. The Government has established regulation for: accreditation of drivers, mandatory vehicle standards, and insurance provisions including compulsory third-party and property insurance. All other point to point service providers are regulated as Transport Booking Services (TBS's) in the ACT. Drivers can drive with multiple TBS's, subject to their TBS contract. Those TBS's who require that their drivers work exclusively for them must cover their drivers for workers compensation insurance.²¹

2.28 **Victoria**

In Victoria, ride share drivers must obtain accreditation from the Victorian Taxi Services Commissioner and from early 2017, ride share vehicles will need to obtain a hire car licence, permitting them to undertake booked work. The Government intends to introduce a final legislative framework for the ride share industry in early 2018.²²

2.29 **Queensland**

The ride share industry was legalised in Queensland from September 2016, following an independent review of the personalised passenger transport industry. The Government intends to establish new licencing requirements and industry chains of responsibility in early 2017.²³

2.30 **Tasmania**

In Tasmania, legislation introduced to legalise ride sharing services was passed in August 2016. Ride share drivers will have to meet the same accreditation requirements as hire car drivers. Within the next two years the Government intends to undertake a review of the regulatory regime for passenger transport services in Tasmania.²⁴

2.31 **Western Australia**

In July 2016 the West Australian Government introduced a new 'on-demand' licence category for ride share drivers and provided an adjustment compensation package for taxi operators.

²¹ ACT Government, *Rideshare driving in the ACT*, http://www.cmd.act.gov.au/_data/assets/pdf_file/0005/778568/160215_ACT-TaxiIndustryReforms_Rideshare.pdf, accessed September 2016

²² Victorian Government, *Ride-share drivers*, http://economicdevelopment.vic.gov.au/_data/assets/pdf_file/0017/1358000/Information-for-ride-share-drivers.pdf, accessed September 2016

²³ Queensland Government, *Information for ride-booking*, <http://personalisedtransport.tmr.qld.gov.au/ride-booking-changes>, accessed September 2016

²⁴ Tasmanian Government, *Taxi Newsletter, August 2016*, http://www.transport.tas.gov.au/_data/assets/pdf_file/0009/137718/TAXI_NEWS_-_Issue_74_-_August_2016.pdf, accessed September 2016

Chapter Three – History of workplace arrangements in the NSW Taxi Industry

INTRODUCTION

- 3.1 This Chapter provides a summary of the origins of the current workplace arrangements in the NSW taxi industry. It begins by detailing the adoption of the bailment system and legislative attempts to deem taxi drivers as employees. It concludes with outlining the main recommendations which led to the introduction of the predecessor to Chapter 6 of the IR Act.

The history of workplace arrangements in the NSW taxi industry

- 3.2 The first taxi-cabs in New South Wales were registered in 1909. Most cabs were driven by their owners, but there were some relief drivers employed by owners. The industry grew, and by 1920, 420 taxi-cabs were registered and an industrial union known as the Motor Drivers and Conductors' Association of New South Wales obtained the first award for drivers under the Industrial Arbitration Act, to provide that drivers employed by owners received a wage equal to the then living wage for a working week of 60 hours.
- 3.3 By 1923 the Motor Drivers and Conductors' Association had gone out of existence and the Transport Workers' Union of Australia obtained a second award which reduced the ordinary hours of work to 54 and fixed a weekly wage that was above the living wage.²⁵
- 3.4 Until 1925 taxi-cabs were owned by individuals but from 1925 onwards the taxi industry expanded considerably and fleets with up to 99 cars began operating in Sydney. By 1926 the award provided for a minimum weekly wage and a working week of 44 hours for taxi drivers. However taxi fleets began to find it difficult to operate profitably when employing drivers under award rates and conditions, and a number of fleets ceased operating.

Adoption of the bailment system by the taxi industry

- 3.5 In 1929 the Yellow Cab Company dismissed all its drivers as employees and entered into a lease arrangement with drivers, whereby drivers would receive fifty percent of the gross takings. In doing so the Yellow Cab Company could avoid meeting award conditions for employee drivers.
- 3.6 One of the Yellow Cab Company drivers, Mr Edward Colgan, sued the company claiming that he had been employed to do the work of a taxi-cab driver for which a rate had been fixed by an award but had not been paid the full balance of wages fixed by the award for such work.
- 3.7 In a landmark ruling, a majority of the full bench of the Industrial Commission concluded that Yellow Cab Company drivers were not employees but the relationship between Yellow Cab Company and its drivers was that of co-

²⁵ Industrial Commission, *Report on Section 88E of the Industrial Arbitration Act 1940-1968*, para 8.1

adventurers in a joint enterprise which would result in their mutual benefit. The Industrial Commission further characterised the relationship between an owner and driver as one of bailor and bailee. The ruling allowed Yellow Cab Company to continue to operate outside the award, and within a short period the bailment system was adopted universally by taxi operators in the Sydney and Newcastle regions.²⁶

Taxi drivers deemed as employees

- 3.8 In 1940 the Industrial Commission of NSW inquired into the taxi-cab industry and found that the bailment system between owners and drivers should be controlled to protect the weaker of the two from unconscionable bargaining or exploitation by the stronger, while otherwise ensuring each the freedom both to contract and to carry out their contract without further restriction.²⁷
- 3.9 Following the 1940 report a number of attempts were made to provide industrial protections by deeming non-employee taxi-cab and hire car drivers as employees. Amendments were made in 1943, 1951, 1957 and 1959 to deem drivers as employees for the purposes of the Industrial Arbitration Act, the Annual Holidays Act and the Long Service Leave Act.²⁸

Chapter 6 of the Industrial Relations Act

- 3.10 In 1970 the Industrial Commission of New South Wales examined and reported on industrial conditions in the taxi-cab and hire car industries. The report, widely referred to as the Beattie Report (the Report), found that deeming drivers as employees in order to provide for protections in relation to remuneration and conditions had been a 'singularly unsuccessful legislative device'.²⁹
- 3.11 The Report did not propose winding back the bailment system, noting that irrespective of whether a driver was a bailee or employee, their wellbeing and financial security depended entirely upon the terms of the respective contracts. The Report noted that 'just as an employee's rights under his contract of employment may be supplemented by provisions made by a statute such as the Annual Holidays Act, so the contractual rights of a bailee driver could be supplemented by rights conferred pursuant to legislation.'³⁰
- 3.12 However the Report found evidence of many failures in the bailment system of that time, including owners driving very hard bargains with individual bailees. There were instances of bailee arrangements being only verbal agreements. Leave practices varied broadly with drivers working very long hours, frequently seven days per week. The industry in general was described as being in an 'unsettled, and indeed chaotic' state.³¹

²⁶ Industrial Commission, *Report on Section 88E of the Industrial Arbitration Act 1940-1968*, para 8.9

²⁷ Industrial Commission, *Report on Section 88E of the Industrial Arbitration Act 1940-1968*, para 8.10-8.11

²⁸ Industrial Commission, *Report on Section 88E of the Industrial Arbitration Act 1940-1968*, para 8.30

²⁹ Industrial Commission, *Report on Section 88E of the Industrial Arbitration Act 1940-1968*, para 8.31

³⁰ Industrial Commission, *Report on Section 88E of the Industrial Arbitration Act 1940-1968*, para 8.33

³¹ Industrial Commission, *Report on Section 88E of the Industrial Arbitration Act 1940-1968*, para 9.43-9.45

- 3.13 The Report concluded that because of ample evidence of the inadequacy of conditions and remuneration for drivers that supervision of the bailment system by industrial tribunals was needed. A vital function of industrial regulation was to offer reasonable protection for those whose remuneration and conditions were below average as was the experience of bailee drivers at the time.
- 3.14 In coming to this conclusion, the Report strongly supported affording drivers the protection of regulation because of the following factors:
- a) these drivers bring to their task only their own labour and no capital investment. In this respect they differ from lorry owner-drivers. They are in essence even closer to ordinary workers;
 - b) although they are to an extent co-adventurers, they are so much the weaker party in the contract that they need the protection of industrial tribunals;
 - c) their actual work, driving, is in many of its features similar to that of employees who work under industrial awards in many sections of the transport industry;
 - d) unless their remuneration and basic conditions are subject to industrial control in many cases they will fall below a decent standard;
 - e) a substantial amount of work is done out of ordinary hours, i.e. at night and at week-ends. This is a necessary feature of the industry but it points to the need for a controlling hand, however sparingly used;
 - f) the evidence of the owners themselves suggests that there is - and has been for years - a real industry problem as to the remuneration and conditions of drivers and they advocate the provision of some benefits normally given to employees; and
 - g) regulation of this industry was in accordance with community thinking of the time.³²
- 3.15 The Report made a number of recommendations to regulate driver conditions and remuneration, including that there be a set minimum commission (or percentage of earnings) for each shift. Further, any decision of a tribunal in respect of industrial relations should be given effect to in a 'determination.' Lastly, and that, recognising that the bailment system was inherently different to the employer/employee relationship, industrial regulation for taxi-cab and hire car drivers should be contained be in a separate part of the Industrial Arbitration Act.³³
- 3.16 Following the tabling of the Report, a new Part VIIIA was inserted into the Industrial Arbitration Act to provide specifically for the industrial regulation of contracts of bailment of public vehicles. Part VIIIA was the predecessor to the current Chapter 6 of the IR Act.

³² Industrial Commission, *Report on Section 88E of the Industrial Arbitration Act 1940-1968*, para 9.47

³³ Industrial Commission, *Report on Section 88E of the Industrial Arbitration Act 1940-1968*, para 9.46

Chapter Four – Current workplace arrangements

INTRODUCTION

- 4.1 There are numerous state and federal laws which govern the workplaces of Australia. The application of such laws depends on a variety of factors including the type of work arrangements which are in place.
- 4.2 Up until the Federal Work Choices legislation was enacted in 2005, which was shortly followed by an Independent Contractors Act in 2006 (both statutes based on the Commonwealth Constitution's corporations power), most labour relations were regulated by a combination of state awards governed by State industrial relations commissions and federal awards governed by the Federal industrial relations commission. In 2005, the labour laws in Australia became heavily centralised under the Federal system. This remained the case after the Work Choices legislation was repealed and replaced with the Fair Work legislation in 2009.
- 4.3 As already stated, the point to point transport industry is a complex and inconsistent regulatory environment due to the variety of working arrangements that may exist. For example, there may exist bailee/bailor arrangements with different regulation depending upon the sector of the market and unregulated owner/operator arrangements.

INDUSTRIAL RELATIONS ACT 1996 (NSW)

- 4.4 The IR Act provides the employment regulatory framework in New South Wales for the now small number of employees who are not covered by Federal industrial legislation. Of relevance to this inquiry is the operation of Chapter 6 of the IR Act which applies to contracts of bailment and contracts of carriage.
- 4.5 A discussion of the history of the NSW taxi industry, and in particular the origins of Chapter 6 of the IR Act, has been outlined in Chapter Three. In short, Chapter 6 historically complemented the now heavily changed system of the regulation of taxi licenses. This inquiry is to determine, whether in the context of re-regulating taxi licences through the Point to Point Transport Act, Chapter 6 should also be modified or repealed for drivers in the point to point industry not covered by Federal Laws.

Operation of Chapter 6

- 4.6 Prior to the 2016 amendments, section 307(1) of the IR Act provided that Chapter 6 applies to contracts of bailment defined as a contract under which:
- (a) a public vehicle that is a taxi-cab is bailed to a person to enable the person to play for hire; or
 - (b) a public vehicle that is a private hire vehicle is bailed to a person to transport passengers.

- 4.7 This means that currently Chapter 6 of the IR Act applies to contracts of bailment for taxis and hire cars but not ride share vehicles.
- 4.8 However, under amendments to Chapter 6 brought about by the Point to Point Transport Act, it is intended that bailment arrangements for taxis, hire cars and ride share vehicles would all fall under Chapter 6 of the IR Act.³⁴ Schedule 7 of the Point to Point Transport Act has not yet come into operation. However, when it does, Chapter 6 of the IR Act will for the first time apply to bailment arrangements concerning Uber and like services if somebody other than an owner driver is operating the vehicle.
- 4.9 The reason for this conclusion is that Schedule 7 of the Point to Point Transport Act amends the IR Act to provide that a “public vehicle” is a taxi or hire vehicle as defined in the Point to Point Transport Act.³⁵ “Hire vehicle” is defined under section 6 of the Point to Point Transport Act to mean ‘a motor vehicle that is used to provide a passenger service that is not a taxi service’ and under section 4 of that same Act, a “passenger service” means ‘the transport, by motor vehicle (other than a bus), of passengers within, or partly within, this State for a fare.’ The word “fare” is defined very broadly to mean ‘any consideration paid whether paid to the provider of a booking service or the passenger service.’
- 4.10 Taxi drivers and a percentage of hire car drivers³⁶ typically enter into contracts of bailment and in doing so are covered by the provisions within Chapter 6. Ride share drivers and approximately 70 per cent of hire car drivers use their own vehicle and do not have a contract of bailment in place with the owner and are thus not covered by Chapter 6 of the IR Act.³⁷
- 4.11 Under Chapter 6 the NSW Industrial Relations Commission (the **IRC**) is empowered to make contract determinations for drivers under a bailment (but not for owner drivers) in respect of driver remuneration, annual, sick and long service leave, the minimum and maximum number of bailment hours and other matters it considers necessary. The IRC may also approve contract agreements between parties and resolve disputes.
- 4.12 Chapter 6 also provides for the registration of associations of contract drivers and associations of employing contractors.³⁸ The NSW Taxi Industry Association³⁹ is the registered industrial organisation for employers, whilst the Transport Workers Union is the registered organisation representing bailee drivers.

³⁴ Schedule 7.2 of the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* amends section 307(1)(b) by omitting “private hire vehicle” and inserting “hire vehicle” instead. The term “hire vehicle” under the *Point to Point Transport (Taxis and Hire Vehicle) Act 2016* is defined as a motor vehicle that is used to provide a passenger service that is not a taxi service.

³⁵ *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*, schedule 7.2 clause 4

³⁶ In evidence before the Committee, the NSW Hire Car Association, commented that with respect to their membership, approximately 60 to 70 per cent of drivers are owner/operators and the remaining 30 percent work on contracts of bailment or commissions. See: Mr John Bartolotta, Chairman of the NSW Hire Car Association, transcript of evidence, 28 July 2016, p 19

³⁷ Submission 5, NSW Treasury and Transport for NSW, p 2

³⁸ Submission 5, NSW Treasury and Transport for NSW, p 2

³⁹ The NSW Taxi Council serves as the operating arm of the NSW Taxi Industry Association. See: <https://www.nswtaxi.org.au/structure-peak-bodies>, accessed September 2016

The 1984 Determination

- 4.13 Section 312 of the IR Act provides that the IRC may inquire into any matter arising under contracts of bailment and may make a contract determination with respect to:
- a) the remuneration of bailees (including by way of a minimum rate of commission expressed as a percentage of the chargeable fares earned);
 - b) the amounts (if any) to be paid by the bailor to the bailee as attendance money and for special duties;
 - c) annual or other holidays, sick leave and long service leave for the bailee or payments to the bailee instead of any such leave;
 - d) the minimum number of hours per day, per week or for any longer period during which the bailor is to bail the vehicle, if drivable, to the bailee;
 - e) if satisfied that it is imperative to do so in the interest of bailors, bailees and the public—the maximum number of hours per day, per week or for any longer period that a bailee may drive a public vehicle; and
 - f) other conditions.
- 4.14 In 1984, following lengthy consultations with the Transport Workers Union and the Taxi Industry Association, the then Industrial Commission made a contract determination that applied to all taxi owners and drivers in the Sydney Metropolitan Transport District, the *Taxi Industry (Contract Drivers) Contract Determination 1984* (the Determination).
- 4.15 The Determination is still in place today and regulates a number of aspects of the bailor/bailee arrangement. One aspect is the method of payment for the bailee driver. Under the Determination the driver has a right to choose one of two options for payment:
- Method One – Commission:** under this method a driver must pay the operator 50 per cent of their fare earnings (55 per cent in the first year) and the operator pays for the fuel;⁴⁰ or
- Method Two – Set pay-in:** under this method the driver retains from the fares received, the balance left after deducting a set daily pay-in amount. The driver is also liable to pay for fuel and car wash. The current maximum pay-in amounts range from \$175.01 for a day shift, to \$266.55 for a Friday or Saturday night shift.⁴¹
- 4.16 The Determination also provides:
- obligations for operators to provide annual, sick and long service leave to permanent bailees. Permanent bailees are those drivers who take a taxi

⁴⁰ Submission 5, NSW Treasury and Transport for NSW, pp 2-3

⁴¹ Submission 5, NSW Treasury and Transport for NSW, pp 2-3

- from the same operator for five shifts per week or at least 220 night shifts per year; and
- various driver requirements, including that the driver keep a log of journeys taken.
- 4.17 The vast majority of drivers in the Sydney region have elected to be paid according to Method 2 where the driver retains from the fares received, the balance left after deducting a set daily pay-in amount.⁴²
- 4.18 For drivers within the Sydney region, the evidence before the Committee was that taxi vehicle owners widely and easily avoided the benefits given to drivers under the Determination by not giving a single driver more than 4 shifts per week.⁴³
- 4.19 Another method of attempting to avoid the operation of the Determination in the Sydney region was that owners would agree with drivers to more advantageous arrangements in return for the driver agreeing to give up any claim to long service or annual leave entitlements under the Determination. Such arrangements are unenforceable. There was evidence that at the conclusion of the bailment, drivers may then seek to recover the annual leave or long service entitlements which they had previously agreed to abandon.⁴⁴ The Determination in these circumstances can operate as a sting in the tail for the taxi owner, as the arrangements meant that the owner received less advantageous remuneration during the course of the contract in the belief that an unenforceable trade off was in place.
- 4.20 The Determination does not apply to drivers outside of the Sydney region, and so in regional and rural areas of New South Wales taxi operators are not obliged to provide annual, sick and long service leave to their permanent bailees. In regional and rural New South Wales taxi drivers have bailee arrangements in place that are similar to Method 1 arrangements under the Determination.⁴⁵
- 4.21 Chapter Five provides commentary on the continued operation of Chapter 6 of the IR Act given recent changes to the industry.

OTHER INDUSTRIAL LEGISLATION

Fair Work Act 2009 (Cth)

- 4.22 The *Fair Work Act 2009* (Cth) regulates most but not all employee/employer relationships in Australia.
- 4.23 The Fair Work Ombudsman provides advice and education on pay rates and workplace conditions.
- 4.24 The Fair Work Commission is the independent national workplace relations tribunal. It is responsible for enforcement of the Fair Work Act, maintaining a

⁴² Submission 5, NSW Treasury and Transport for NSW, pp 2-3

⁴³ Mr Michael Jools, President, Australian Taxi Drivers Association and NSW Point to Point Transport Association, transcript of evidence, 28 July 2016, p 13

⁴⁴ Ms Leonie Kyriacou, Legal Counsel, NSW Taxi Council, transcript of evidence, 28 July 2016, p 5

⁴⁵ Submission 5, NSW Treasury and Transport for NSW, p 3

safety net of minimum wages and employment conditions, as well as a range of other workplace functions and regulation.

Application to point to point transport industry

4.25 Evidence received during the course of the inquiry indicated that the application of the Fair Work Act to the point to point industry is limited.⁴⁶ The Fair Work Commission decision in *Voros v Dick* [2013] FWCFB 9339 determined that while it is possible for a taxi owner to engage a person as an employee to drive his or her taxi, taxi drivers usually enter into a bailment arrangement with taxi owners so are not employees. As such they are not covered by the provisions of the Fair Work Act.

4.26 Ms Vicki Telfer, Executive Director, NSW Industrial Relations, commented that according to advice received, the legal relationship between an operator and a driver would not fall within the Fair Work Act:

Our advice is that, depending on the particular facts, generally, no, it is not something that would come under the Fair Work Act because these are not contracts of employment, which is what the Fair Work Act is interested in.⁴⁷

4.27 Whether ride share drivers are employees or independent contractors has not yet been tested in the courts in New South Wales or Federally.

4.28 In their submission, Uber commented on the relationship between an Uber partner and the Uber platform. As detailed in Uber's submission partners:

- generally use an existing personal vehicle that they own and/or insure;
- obtain a Driver Authority from the regulator and a vehicle inspection;
- enter into a service agreement for access to the Uber technology platform;
- deliver riders to their destination;
- control when, where and how often they drive at the touch of a button; and
- are free to partner with any ridesharing or transport platform.⁴⁸

4.29 Uber concluded:

In short, ridesharing drivers are autonomous, depend on their own equipment and skills, and non-exclusive to any particular platform. These characteristics are consistent with their status as partners of Uber and independent contractors of the riders.⁴⁹

⁴⁶ Submission 6 NSW Taxi Council, p 9; NSW Taxi Council, response to further questions, p 1

⁴⁷ Ms Vicki Telfer, Executive Director, NSW Industrial Relations Commission, transcript of evidence, 28 July 2016, p 57

⁴⁸ Submission 4, Uber, pp 4-5

⁴⁹ Submission 4, Uber, p 5

Independent Contractors Act 2006 (Cth)

- 4.30 The *Independent Contractors Act 2006 (Cth)* protects the rights of independent contractors to enter into a contract for services and prevents interference by any other party. Where a business relationship is defined as a contract for services rather than an employer/employee relationship, it may be covered under the Independent Contractors Act.
- 4.31 There are a number of differences between independent contractors and employees. Generally, independent contractors run their own business. They usually negotiate their own fees and working arrangements and can work for more than one client at a time. Employees will receive entitlements under the Fair Work Act including leave, minimum rates of pay and meal breaks. However they will have little control over the work they perform, their place of work, and their work hours.
- 4.32 Independent contractors receive some protections under the Fair Work Act, including protection from adverse action, coercion and abuses of freedom of association.⁵⁰
- 4.33 Under the Independent Contractors Act, the Federal Court of Australia has jurisdiction to review a services contract on the grounds that the contract is either unfair and/or harsh.⁵¹ If the Court determines that the contract is unfair or harsh, the Court may make an order setting aside the whole or a part of the contract or make an order varying the contract.⁵²

Application to the point to point transport industry

- 4.34 The Independent Contractors Act does not apply to certain categories of workers. Section 7(2) of the Act expressly preserves the operation of Chapter 6 of the IR Act. Thus, bailee taxi drivers and hire car drivers will fall under Chapter 6 rather than the Independent Contractors Act. NSW Industrial Relations provided the following advice on this issue:

Section 7(2)(b)(i) of the *Independent Contractors Act 2006 (Cth)* expressly provides that the provisions of s7(1) affecting the rights of independent contractors under relevant State laws does not apply to Chapter 6 of the *Industrial Relations Act 1996*.

Section 7 of the Independent Contractors Act evinces an intention not to cover the field regarding the matters covered by Chapter 6 so that the latter is not invalidated under s109 of the Constitution and to ensure there is no operative inconsistency.⁵³

- 4.35 If, however, as this report recommends to be considered, bailee drivers whether of taxis, hire cars or ride share vehicles, are removed from the operation of Chapter 6 of the IR Act, their bailment relationship is likely to be governed by the Independent Contractors Act.

⁵⁰ See: <https://www.fairwork.gov.au/find-help-for/independent-contractors>, accessed September 2016

⁵¹ Independent Contractors Act 2006, section 12

⁵² Independent Contractors Act 2006, section 16

⁵³ NSW Industrial Relations, Transport for NSW, response to further questions, p 1

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- 4.36 It is also strongly arguable that the relationship between Uber (even as a foreign corporation) and its owner/ drivers is also covered by the Independent Contractors Act.⁵⁴

⁵⁴ See section 5 of the Independent Contractors Act and section 51(xx) of the Commonwealth Constitution which includes foreign corporations within the legislative power of the Commonwealth.

Chapter Five – Operation of Chapter 6 of the Industrial Relations Act

INTRODUCTION

- 5.1 A range of arguments were presented by inquiry participants concerning the operation of Chapter 6 of the IR Act. The NSW Taxi Council was the main proponent for reform in this area, recommending that Chapter 6 be amended to remove its jurisdiction over the taxi industry. The NSW Taxi Council is the peak body for the NSW Taxi Industry and is the registered industrial organisation for employers under the IR Act.
- 5.2 Other inquiry participants argued that Chapter 6 is an important mechanism to enhance and protect the employment conditions of drivers. The Transport Workers Union of New South Wales (the TWU) is the registered industrial organisation representing the interests of bailee taxi drivers and hire car drivers under the IR Act. The TWU submitted that rights contained under Chapter 6 of the IR Act are ‘vital to the well-being and prosperity of bailee taxi drivers.’⁵⁵
- 5.3 This section explores the above arguments and others before considering the ongoing operation of Chapter 6.

NO LEVEL PLAYING FIELD BETWEEN PARTICIPANTS

- 5.4 The NSW Taxi Council submitted that despite the passage of the Point to Point Transport Act, there remain inequalities between taxis, private hire vehicles and ride share providers.⁵⁶ These inequalities are particularly acute in the area of workplace relations. The NSW Taxi Council submitted:

... the NSW taxi industry is required to comply with significant obligations under the NSW Industrial Relations Act, 1996 (IR Act) yet other providers, notably Uber, have no such requirements. This leads to inequitable cost burdens on the respective sectors of the point to point transport industry which, if not properly addressed, will lead to uneconomic outcomes for the NSW Taxi Industry.⁵⁷

- 5.5 As already noted, bailment arrangements in the ride share sector will come under Chapter 6 of the IR Act when the 2016 Point to Point Transport Act comes into force.⁵⁸ The NSW Taxi Council argued that, due to its obligations under Chapter 6 of the IR Act, the taxi industry remains at a significant disadvantage to other participants in the point to point industry. Other participants, such as the ride share industry, have limited regulation placed upon them in terms of workplace arrangements. Mr Roy Wakelin-King stated:

We are held to a high standard in terms of workplace relations and there are many aspects of those workplace relations obligations which are sound. However, our

⁵⁵ Submission 7, Transport Workers’ Union of NSW, p 2

⁵⁶ Submission 6, NSW Taxi Council, p 3

⁵⁷ Submission 6, NSW Taxi Council, p 3

⁵⁸ See paragraphs 4.8 and 4.9

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competitors – particularly those in the ride sharing space – are not held to any standard and in some cases, with respect to those entities, seek to offshore their accountabilities in those respects.⁵⁹

5.6 The uneven application occurs because of the high incidence of bailment arrangements in the taxi industry (where Chapter 6 of the IR Act applies) and the low incidence of these arrangements in the ride share and hire car sectors of the point to point transport market. The NSW Taxi Council contended that the unequal playing field is at odds with the government's recent reforms to the industry which are aimed at creating a level playing field.⁶⁰

5.7 The TWU suggested that Chapter 6 could easily be applied to the ride sharing industry. Indeed, the TWU reflected that doing so would represent 'good public policy and lead to equitable outcomes.'⁶¹ Mr Richard Olsen, A/Secretary, Transport Worker Union of NSW, stated:

...the TWU is calling on the inquiry to recommend the extension of Chapter 6 to the entire point to point transport industry in order to level the playing field and at the same time ensure that vulnerable [drivers] are not ruthlessly exploited.⁶²

5.8 In contrast, Uber submitted that the existing regulatory settings are adequate for the point to point industry and regulators 'should refrain from action that would erode the value and benefits of the ridesharing model.'⁶³

5.9 In evidence before the Committee, Mr David Rohrsheim, General Manager, Uber (Australia and New Zealand), commented that he did not see Chapter 6 applying today:

My understanding is that describes the bailee-bailor arrangements specifically for the taxi industry. The New South Wales reforms have clearly articulated that prebooked transport, including hire cars and ride share, is different to taxis and the regulations have gone in that direction.⁶⁴

5.10 Uber asserted that the ridesharing model relies upon drivers having the flexibility to drive at times suitable to them using their personal vehicles.⁶⁵

5.11 However, the Ride Share Drivers' Association of Australia considered that workplace protections were needed in the ride share industry, particularly in relation to contract termination processes.⁶⁶ If the view expressed previously is correct, that ride share contracts are covered by the Independent Contractors Act, then remedies for termination processes may already be available under that Act.

⁵⁹ Mr Roy Wakelin-King, Chief Executive Officer, NSW Taxi Council, transcript of evidence, 28 July 2016, p 2

⁶⁰ Submission 6, NSW Taxi Council, p 15

⁶¹ Submission 7, Transport Workers' Union of NSW, p 2

⁶² Mr Richard Olsen, A/Secretary, Transport Workers' Union of NSW, transcript of evidence, 28 July 2016, p 42

⁶³ Submission 4, Uber, p 12

⁶⁴ Mr David Rohrsheim, General Manager, Uber (Australia and New Zealand), transcript of evidence, 28 July 2016, p 69

⁶⁵ Submission 4, Uber, p 12

⁶⁶ Mr Troy Lake, Treasurer, Ride Share Drivers' Association of Australia, transcript of evidence, 28 July 2016, p 29

HIGH COST TO THE TAXI INDUSTRY

5.12 The NSW Taxi Council submitted that compliance with Chapter 6 has had a negative effect on the industry. They argued that the majority of taxi operators are now small businesses comprised of owner/operators and one or two bailee drivers and the numerous obligations under the IR Act impose a heavy burden on these small businesses.⁶⁷

5.13 They further submitted that the deregulation of fares intended by the reforms to the point to point industry will have little impact on the taxi industry whilst the current Determination is in place:

... the deregulation of fares to be charged in the point to point transport industry is largely meaningless for the taxi industry unless it is accompanied by a removal of Ch. 6 of the IR Act and the Determination. Without such a change taxi fares will still need to be set at a rate which covers the cost of providing each of the entitlements included in the Determination.⁶⁸

UNIFORMITY

5.14 The NSW Taxi Council asserted that Chapter 6 of the IR Act is unique in its operation and is not replicated in other Australian jurisdictions or internationally:

Chapter 6 is considered an oddity in Australia and internationally. No other State or Territory has legislation that provides that an industrial tribunal is to regulate the commercial relationship whereby taxi drivers bail an operator's taxi to earn fare income. Nor is it a model replicated elsewhere in the world.⁶⁹

5.15 They further contended that not only do similar provisions not appear in other Australian jurisdictions; the Determination made under Chapter 6 does not operate uniformly across New South Wales. The Determination only applies to bailor operators in the Sydney Transport District:⁷⁰

Bailor operators in the Sydney Transport District are in the extraordinary circumstance of being required to offer drivers conditions akin to an employee whilst being recognised as being engaged in a joint venture with those drivers. No other part of NSW or indeed any other State, Territory or Transport District in Australia has this level of regulation.⁷¹

5.16 The application of the current Determination to taxi drivers outside Sydney was a matter for discussion at the public hearing. The Transport Workers Union explained that, whilst taxi drivers outside the Sydney Transport District are not covered by the current Determination, they are still protected by the provisions of Chapter 6. Such protections include protection from unfair termination and victimisation.⁷²

⁶⁷ Submission 6, NSW Taxi Council, p 16

⁶⁸ Submission 6, NSW Taxi Council, p 16

⁶⁹ Submission 6, NSW Taxi Council, p 3

⁷⁰ Submission 6, NSW Taxi Council, p 17

⁷¹ Submission 6, NSW Taxi Council, p 17

⁷² Mr Toby Warnes, Head of Legal and Governance, Transport Workers' Union, transcript of evidence, 28 July 2016, p 46

- 5.17 With specific reference to the uneven application of the Determination in New South Wales, Mr Warnes indicated this wasn't a reflection of the system not working but rather an example of unique issues affecting different areas:

It is not a problem with the system per se. The system allows for that to be remedied, but at the current time there are no contract determinations that extend outside the Sydney metropolitan area. I suppose it is not a problem with the system, it is an industrial problem.⁷³

- 5.18 Chapter Two outlines the workplace arrangements for the point to point transport industry in other Australian jurisdictions.

APPROPRIATENESS TO CURRENT CIRCUMSTANCES

- 5.19 The NSW Taxi Council commented that the point to point transport industry has undergone considerable change since Chapter 6 of the IR Act and the Determination were introduced. Such change has left both Chapter 6 and the Determination outdated.⁷⁴

- 5.20 The Taxi Council argued that the Determination was developed at a time when the point to point transport industry consisted primarily of taxi operators and drivers. At that time, taxi drivers relied on taxi networks to provide them with pre-booked trips and passengers had limited methods of payment.⁷⁵

- 5.21 The Taxi Council submitted that over recent years the industry has changed with a number of new participants and developments in technology which have rendered the Determination unsuitable.⁷⁶

- 5.22 The desirability of having an up to date regulatory framework was raised by Ms Vicki Telfer, Executive Director, NSW Industrial Relations. In response to questioning concerning whether Chapter 6 and the Determination were specifically introduced to protect vulnerable workers, Ms Telfer stated:

I understand that there was commentary about that at the time, though what we also know is in the last 30 to 40 years the nature of employment and the nature of work has changed quite considerably. One of the reasons why I am always cautious about coming out in a black-and-white way about these types of things is that as circumstances change and evolve we need to make sure that we are keeping regulations up to date and contemporary.⁷⁷

THE DETERMINATION IN PRACTICE

- 5.23 As highlighted earlier in Chapter Four, the Committee received evidence that in practice the annual and long service leave obligations imposed on the taxi industry under the Determination are often ignored. The Taxi Council submitted

⁷³ Mr Toby Warnes, transcript of evidence, 28 July 2016, p 46

⁷⁴ Submission 6, NSW Taxi Council, p20

⁷⁵ Submission 6, NSW Taxi Council, p 20

⁷⁶ Submission 6, NSW Taxi Council, p 20

⁷⁷ Ms Vicki Telfer, Executive Director, NSW Industrial Relations, transcript of evidence, 28 July 2016, p 54

that in return for a lower pay in, bailee drivers agree not to pursue their leave entitlements.⁷⁸ The Taxi Council submitted:

It has been held that a bailor and bailee cannot “contract out” of the Determination and those that do so expose themselves to the potential for prosecution for breach. Yet, despite extensive training for taxi operators and drivers on the Contract Determination (since removed by the NSW Government’s Point to Point Transport reforms) it is widespread practice within the taxi industry for operators and drivers to enter into arrangements which contravene the provisions of the Determination.⁷⁹

- 5.24 The practice of avoiding the entitlements provided for by the Determination was highlighted in the submission from the Australian Taxi Drivers Association (ATDA). The ATDA submitted that bailors can lawfully limit the number of shifts provided to a bailee driver so that they fall under the required number of shifts to claim entitlements to annual leave:

... bailing a taxi for four shifts a week (still 40 hours), I cannot increase the shifts from the same Bailor because he is then exposed to my legal claim to Annual Leave. It remains an anachronism that at 40 hours a week I am still a “casual driver”, with no entitlements.⁸⁰

- 5.25 Ms Kyriacou, Legal Counsel, NSW Taxi Council, explained that this practice has important implications for the taxi industry. It is common for the parties to a bailment to try and agree conditions which are more advantageous to the driver in return for the driver agreeing to not be paid annual leave. Due to the strict no-contracting out provision in the Determination, when parties make an arrangement between themselves (where they unlawfully agree to opt out of the annual leave entitlements granted by the Determination), the driver can lawfully ignore the agreement struck with the owner and bring a claim against the taxi operator for annual leave at the end of their bailment. This has led to claims of back pay made against taxi operators:⁸¹

It gives you a sense of the draconian nature of this arrangement because it affects two commercial parties, not an employer and an employee, who make arrangements between themselves, but it gives an enormous power to the driver at the end of that arrangement.⁸²

- 5.26 In these circumstances the taxi driver takes the benefit of a better arrangement during the course of the bailment because of the driver’s agreement to forego annual leave entitlements but then claims annual leave as a lump sum anyway at the end of the bailment arrangement. These back claims at the end of the bailment are a cost to the taxi sector which the hire car and ride share sectors are less likely to face due to the low incidence of bailments. It is also a strong incentive for taxi owners to enter into casual and not permanent bailments with their drivers.

⁷⁸ Submission 6, NSW Taxi Council, p 11

⁷⁹ Submission 6, NSW Taxi Council, p 13

⁸⁰ Submission 3, Australian Taxi Drivers Association, p 5

⁸¹ Ms Leonie Kyriacou, Legal Counsel, NSW Taxi Council, transcript of evidence, 28 July 2016, p 5

⁸² Ms Leonie Kyriacou, transcript of evidence, 28 July 2016, p 6

WORKPLACE ARRANGEMENTS IN THE POINT TO POINT TRANSPORT INDUSTRY
OPERATION OF CHAPTER 6 OF THE INDUSTRIAL RELATIONS ACT

5.27 Enforcement of Chapter 6 was a concern raised by the Transport Workers' Union. The TWU emphasised that Chapter 6 is capable of looking after the workplace arrangements of bailee taxi drivers and their bailors, however enforcement is a problem. The TWU submitted:

Over the years, many taxi drivers, union members and non-union members alike, have successfully utilised Chapter 6. Nevertheless, without adequate enforcement mechanisms, many in this high turnover industry fail to recognise and benefit from its protections and opportunities.⁸³

5.28 The issue of enforcement was considered during the public hearing. In response to questioning concerning the number of cases the TWU has brought on behalf of individual taxi drivers in relation to their entitlements, Mr Toby Warnes, Head of Legal and Governance, indicated that in the last five years there may have been between 10 and 15 cases.⁸⁴

5.29 Mr Warnes asserted that although it is not the job of the TWU to enforce the Determination, the TWU acknowledged that one of the biggest problems is awareness. Mr Warnes commented:

I think the vast majority of the industry would not even know that the determination exists.⁸⁵

5.30 The TWU argued that NSW Industrial Relations is underfunded and under resourced; as such their ability to enforce Chapter 6 is limited.⁸⁶ The TWU questioned whether sufficient time and explanation was given to new taxi drivers on their industrial rights:

The union regularly attends inductions for new taxi drivers, however is generally only provided with twenty minutes over the two day induction program. This does not provide new drivers with much of an opportunity to absorb information on their industrial rights nor ask any questions, and this problem is exacerbated by the fact that English is a second language to many new drivers.⁸⁷

5.31 The TWU suggested that a dedicated ombudsman should oversee the point to point industry. An ombudsman could deal with issues of enforcement as well as education and training. They further submitted that, similar to the role of the Fair Work Ombudsman, the new dedicated ombudsman could assist workers who have enquiries about their entitlements and obligations.⁸⁸

5.32 In response to claims that Chapter 6 is not adequately enforced, Ms Vicki Telfer, indicated surprise that this view was held and emphasised the ongoing education and awareness campaigns that are undertaken:

I am quite surprised to hear from the TWU those comments. NSW Industrial Relations is the regulator and does do enforcement activities. They have never

⁸³ Submission 7, Transport Workers' Union of NSW, p 2

⁸⁴ Mr Toby Warnes, transcript of evidence, 28 July, pp 42-3

⁸⁵ Mr Toby Warnes, transcript of evidence, 28 July, pp 43

⁸⁶ Transport Workers Union of NSW, response to further questions, p 2

⁸⁷ Transport Workers Union of NSW, response to further questions, p 2

⁸⁸ Transport Workers Union of NSW, response to further questions, p 2

contacted me to say that more needs to be done. In fact, we have pursued a number of strategies over the years to educate taxi owners and operators about their legal entitlements and obligations. The education campaigns include direct engagement with peak industry stakeholders, information sessions, webinars, fact sheets and other resource materials.⁸⁹

VULNERABLE DRIVERS

- 5.33 The issue of vulnerable drivers within the taxi industry was raised as an important area of discussion concerning Chapter 6. The TWU submitted that without Chapter 6 vulnerable workers would be open to exploitation. The TWU submitted:

Without Chapter 6 of the IR Act, drivers currently covered would be left to fend for themselves in a labour market heavily weighed against them. Chapter 6 provides a mechanism that helps address the imbalance in bargaining positions that exist between drivers and bailors in an industry with a high concentration of non-English speaking background individuals. The theme of exploitation in the industry is as relevant now as it was when the Beattie Report was released down in 1970.⁹⁰

- 5.34 The TWU contended that the judicial process offered by the Industrial Relations Commission 'ensures natural justice is observed and fair outcomes are reached.'⁹¹

- 5.35 The TWU expanded on the vulnerability of drivers within the taxi industry in their response to questions taken on notice. The TWU asserted that many drivers are new immigrants to the country. They contend that Chapter 6 is the only mechanism which ensures vulnerable workers are not exploited:

...Chapter 6 of the *Industrial Relations Act 1996* (Chapter 6) is the only mechanism which ensures that drivers are able to earn some form of minimum remuneration. If this safeguard were not in place, new immigrants who enter the industry, some of the most vulnerable workers in the community with little knowledge of their legal rights or legal protections, would be easily exploited and could essentially be provided with an unregulated 'take it or leave it' option with regards to the amount of remuneration they receive.⁹²

DRIVER REMUNERATION

- 5.36 The ability of Chapter 6 to adequately address driver remuneration was questioned by inquiry participants. In their submission to the inquiry taxi driver body, the ATDA stated:

The current, existing, arrangements fail to provide drivers with appropriate, let alone adequate remuneration or conditions.⁹³

- 5.37 The ATDA provided further information on the minimum wage they submit a driver would expect to receive under existing arrangements:

⁸⁹ Ms Vicki Telfer, transcript of evidence, 28 July 2016, p 54

⁹⁰ Submission 7, Transport Workers' Union of NSW, p 4

⁹¹ Submission 7, Transport Workers' Union of NSW, p 4

⁹² Transport Workers Union of NSW, response to further questions, p 1

⁹³ Submission 3, Australian Taxi Drivers Association, p 8

... should the Driver pay as bailment the maximum pay-in amount under the Taxi Contract Determination, on current average fare revenue, he would earn less than \$3.00 an hour after GST. On current market data he earns, gross after GST, less than \$9 an hour.⁹⁴

- 5.38 In evidence before the Committee, Ms Kyriacou commented that the Determination doesn't operate to ensure drivers receive a minimum wage:

Nothing in the contract bailment creates a minimum wage for taxi drivers; that is not how it works.

It may be possible if we are dealing with a large multinational like Uber to say, "Hey, you have got to pay each driver this amount of money", but in our case you are dealing with approximately 30,000 small businesses. There has never been any suggestion in the contract determination that you can set a minimum wage.⁹⁵

- 5.39 The TWU indicated that in July 2014, an application to the Industrial Relations Commission for a variation to the Determination was submitted. The application contained, amongst other things, a variation to provide a "safety net" payment to taxi drivers.⁹⁶ The application is currently before the Industrial Relations Commission.

Committee comment

- 5.40 The Committee is sensitive to the challenges facing drivers in the point to point transport industry. New participants and new technology has altered the environment in which some drivers have been operating in for a considerable time. The disruption to traditional methods of delivering point to point services requires participants to adapt and change. The Committee considers it is incumbent upon the Government to ensure any regulatory framework also reflects this changed environment.
- 5.41 Chapter 6 is a unique provision providing an industrial tribunal jurisdiction over contracts of bailment and service providers. Such arrangements are inconsistent with what occurs in other jurisdictions. The Committee notes the history of Chapter 6 and its objectives of improving driver remuneration and conditions, however it is the Committee's view that these objectives remain unmet.
- 5.42 The Committee notes the evidence referring to bailors and bailees entering into agreements that allow the bailee a smaller pay-in in exchange for not pressing the right to leave and other entitlements. In addition the Committee notes the practice of bailors not providing bailee drivers the required number of shifts to reach the threshold where leave entitlements are owed.
- 5.43 Such practices indicate that the benefits of Chapter 6 are not being utilised and are easily avoided. In addition, the Committee is concerned that such practices may give rise to industrial claims at the end of the agreement.

⁹⁴ Supplementary Submission 3a, Australian Taxi Drivers Association, p 1

⁹⁵ Ms Leonie Kyriacou, transcript of evidence, 28 July 2016, p 10

⁹⁶ Submission 7, Transport Workers Union, p 1

- 5.44 With regard to the potential for drivers to be exploited, the Committee notes that an owner driver can hardly exploit themselves. Owner drivers are not regulated in any sector of the industry. It is the preponderance of owner drivers in the ride share sector not the regulation which is creating uneven competition.
- 5.45 In addition, whether the Determination applies or not, Chapter 6 does not bestow a guaranteed level of income upon drivers. If the owner is unfair with regard to the bailment arrangements, drivers will not be willing to drive the vehicle and the owner will be without income or a return on his or her investment in the taxi plate and vehicle. There is little incentive for the owner to exploit drivers in the manner suggested.
- 5.46 The Committee also highlights that not only is Chapter 6 a unique provision to New South Wales, its reach in practice mainly only extends to one sector of the point to point transport industry, the taxi sector, because of its high proportion of bailment contracts. This creates an unevenly regulated environment which leaves those that are captured by Chapter 6 uncompetitive. The Committee is not persuaded that retaining Chapter 6 is justified.
- 5.47 From the evidence received the Committee also notes that there are other consequences of taking the point to point industry outside of Chapter 6. Such an amendment will bring the contractual arrangements between taxi owners and drivers under the Federal Independent Contractors Act. That legislation will possibly create a different uncertainty for taxi owners than the current Chapter 6 because drivers can take proceedings in the Federal Court alleging that the contracts are unjust.
- 5.48 In conclusion, for the reasons outlined throughout this Chapter, the Committee recommends that the NSW Government consider if the IR Act should be amended to remove contracts of bailment, as they are defined in Chapter 6, from the jurisdiction of the Industrial Relations Commission. The Committee notes that Chapter 6 also applies to contracts of carriage. The Committee has not investigated the issues associated with contracts of carriage and does not make a recommendation with respect to their removal or retention from the IR Act.

RECOMMENDATION 1

The Committee recommends that the NSW Government gives consideration to amending section 307 of the *Industrial Relations Act 1996 (NSW)* to remove contracts of bailment from Chapter 6 and thereby taking those contracts out of the jurisdiction of the Industrial Relations Commission.

Chapter Six – Workplace issues

INTRODUCTION

- 6.1 This Chapter briefly considers a number of other workplace issues raised by inquiry participants. These issues include dispute resolution procedures, workers compensation insurance and driver fatigue.
- 6.2 The Committee has not reported on all of the issues raised in the submissions. For example, issues to do with third party property damage insurance (the remit of the State Insurance Regulatory Authority), access to bus lanes and whether hire cars are able to retain their HC registration plates all fall outside of the Inquiry terms of reference.

Dispute resolution

- 6.3 In this section the Committee examines existing dispute resolution procedures for the taxi and hire car industries and considers whether they should be extended to include the ride share sector.
- 6.4 Taxi and hire car drivers who work under contracts of bailment in New South Wales can seek assistance from the Industrial Relations Commission to resolve disputes or seek redress for unfair termination of their contract.⁹⁷ As already noted, bailment arrangement in the ride share sector will come under Chapter 6 of the IR Act when schedule 7 of the Point to Point Transport Act comes into force.⁹⁸ The provisions of Chapter 6 of the IR Act provide for remedies of reinstatement and compensation and apply to all bailee drivers, including those drivers outside the Sydney Metropolitan Transport District.⁹⁹
- 6.5 The RSDAA submitted that Uber had a policy relating to the termination of driver contracts known as a ‘deactivation policy.’ However, the policy did not contain details of the dispute resolution process nor investigative procedures, and did not demonstrate a commitment to fairness.¹⁰⁰ Speaking at the hearing, the RSDAA informed the Committee that the deactivation policy did not give drivers right of reply or the ability to find out the reason they had been deactivated:

The policy came about probably because of the pressure that we have been putting on them but it pretty much just lists the ways you can get deactivated, which everyone knew about. It is not really a policy as such. There is no right of reply, and that is our major concern. They do say that they will look at a driver’s case. We have not had one case in which they have allowed the driver back on the road. It is purely from a customer complaint.¹⁰¹

- 6.6 In terms of the operation of the deactivation policy, the RSDAA informed the Committee that drivers received no warning that they were to be deactivated,

⁹⁷ *Industrial Relations Act 1996*, section 314

⁹⁸ See paragraphs 4.8 – 4.9

⁹⁹ Submission 7, Transport Workers’ Union of NSW, p 3

¹⁰⁰ Submission 3, Ride Share Drivers’ Association of Australia, p 1

¹⁰¹ Mr Troy Lake, Treasurer, Ride Share Drivers’ Association of Australia, transcript of evidence, 28 July 2016, p 29

that reasons for deactivation were inconsistent and there was no right of appeal.¹⁰² Speaking at the hearing, Mr Troy Lake of the RSDAA explained drivers experiences of being deactivated:

... There is no disclosure. People are stunned when they get deactivated. They did not know that could happen and that there is no right of reply. The silent process is very basic. We do not get to negotiate a contract, it is take it or leave it. That is the same with all the ride share providers.¹⁰³

6.7 However Uber informed the Committee that there was a process in place for resolving complaints against drivers and that drivers were given the opportunity to respond:

That certainly does not describe the way we do business. In the event of a complaint, we will reach out. We have got a 24/7 support service that is going to contact both the rider and the driver.¹⁰⁴

6.8 The Committee heard from many inquiry participants that workplace protections currently in place for the taxi and hire car industries, such as dispute resolution procedures, should be extended to cover the ride share sector. For example, Suncorp Group submitted that regulatory oversight may be necessary for the ride share sector:

Uber Australia retains the right to remove individual drivers from its digital platform. There is no visibility, oversight or apparent right of appeal in respect of these decisions. Regulatory oversight may be required. Exercising that right may give rise to challenges under unfair dismissal laws.¹⁰⁵

6.9 In addition to concerns about driver deactivation, the RSDAA advised that Uber had changed driver contract terms and conditions without notice and drivers could not log on to work unless they accepted the new conditions. This could lead to drivers signing on to amended versions of their contract without reasonable time to review the changes:

They [Uber] change the contract fairly often and the only time you get to know is when you go to log on and it will say you need to accept this contract. No-one can read that contract before they go to work, it is huge.¹⁰⁶

6.10 As noted earlier in Chapter Two, ride share drivers are likely not to be employees but are probably independent contractors although this has not yet been tested in Australian courts. If ride share drivers are independent contractors, they are covered under the provisions of the Independent Contractors Act. Independent contractors are able to apply to the Federal Court to review an unfair contract and also receive some protections under the Fair Work Act, including protection from adverse action, coercion and abuses of freedom of association.

¹⁰² Mr Troy Lake, transcript of evidence, 28 July 2016, p 29

¹⁰³ Mr Troy Lake, transcript of evidence, 28 July 2016, p 31

¹⁰⁴ Mr David Rohrsheim, General Manager, Uber (Australia New Zealand), transcript of evidence, 28 July 2016, p 61

¹⁰⁵ Suncorp Group, response to further questions, p 4

¹⁰⁶ Mr Troy Lake, transcript of evidence, 28 July 2016, p 31

6.11 Uber has its headquarters in the Netherlands.¹⁰⁷ However, it is required to have an Australian presence that will facilitate any litigation under the Independent Contractors Act that a current or former driver wishes to take against Uber.¹⁰⁸

6.12 The Australian Taxi Drivers Association and NSW Point to Point Transport Association noted that:

The nature of the contract signed by the driver with Raisier BV, a company related to Uber BV and Uber Australia, and under which all disputes are actionable only in the Netherlands, may or may not make that an unfair contract under the Fair Work Act and the Independent Contractors Act.¹⁰⁹

Committee comment

6.13 The ride share industry is not currently but will shortly be included in the IR Act, and will therefore have dispute resolution procedures in place for those ride share drivers who enter into a bailment arrangement. Participants in the taxi and hire car industries have access to dispute resolution procedures governed by Chapter 6 of the IR Act. As discussed in Chapter Five of this report, the Committee considers that Chapter 6 of the IR Act is an outdated regulatory framework for the point to point transport industry and recommends the Government consider removing contracts of bailment from Chapter 6 of the IR Act.

6.14 If Chapter 6 of the IR Act no longer applies to the point to point industry, then the bailment arrangements in the industry will fall under the protections of the Independent Contractors Act.

6.15 The Committee is not satisfied with regard to the adequacy of current dispute resolution processes of ride share providers. The largest ride share provider in New South Wales, Uber, has a deactivation policy. However the Committee considers that the deactivation policy cannot be equated with dispute resolution. Deactivation is a determination made by Uber, while dispute resolution involves a discussion within a framework with recourse to reasonable and practicable legal remedies. Any concerns with the deactivation policy will be resolved by rights under the Independent Contractors Act or Chapter 6, to the extent, it will apply to the ride share sector.

New South Wales Small Business Commissioner

6.16 The Office of the NSW Small Business Commissioner was established in 2014 and offers a range of resources and programs to assist New South Wales small businesses, including: providing business, financial and legal advice, investigating allegations of unfair treatment or unfair contracts in a neutral and independent manner, and advocating on behalf of small business within government. The Commissioner's Dispute Resolution Unit assists parties in dispute with impartial advice and professional mediation.

¹⁰⁷ Mr David Rohrsheim, transcript of evidence, 28 July 2016, p 66

¹⁰⁸ *Point to Point Transport (Taxis and Hire Vehicles) Act 2016 (NSW)*, section 31(3)(c)

¹⁰⁹ Submission 3, Australian Taxi Drivers Association & NSW Point to Point Transport Association, p 4

- 6.17 Point to point transport drivers are required to hold an Australian Business Number and register for goods and services tax with the Australian Taxation Office.¹¹⁰ They are considered small businesses for taxation purposes and can therefore access the resources and advice of the NSW Small Business Commissioner.
- 6.18 In response to the recent reforms in the point to point transport industry, the NSW Small Business Commissioner has appointed five dedicated business advisors to assist point to point transport providers in managing change.¹¹¹

Committee comment

- 6.19 Where drivers, owners and providers in the point to point transport industry fail to reach agreement in their disputes, it is open to any party to seek resolution in the courts. However, litigation can be a costly and time consuming process. The Committee commends the work of the NSW Small Business Commissioner in providing impartial advice and mediation services to assist parties in resolving disputes without going to court.
- 6.20 The NSW Small Business Commissioner provides assistance at little or no cost and provides advice in a number of languages. The NSW Small Business Commissioner is a relatively new office and drivers in the point to point transport industry may not be aware of the help that the Commissioner can provide. The Committee therefore recommends that the Point to Point Transport Commissioner provide information to all drivers on the services offered by the NSW Small Business Commissioner.
- 6.21 The Committee considers that it would be best practice for providers of point to point transport to provide this information to drivers who are already authorised and have a contract with them.

RECOMMENDATION 2

The Committee recommends that the Point to Point Transport Commissioner provide information to all drivers, as part of the driver authorisation process, on the services offered by the NSW Small Business Commissioner.

WORKERS COMPENSATION INSURANCE

- 6.22 Workers compensation insurance is compulsory for employers in every state and territory in Australia and provides protection to workers if they suffer a work related injury or disease. The workers compensation insurance system in New South Wales is a 'no-fault' system, which means that workers who are injured in

¹¹⁰ The ATO advises that 'ride-sourcing' drivers must have an ABN and register for GST, however Uber has launched a legal challenge to this ruling, <<https://www.ato.gov.au/media-centre/articles/ride-sourcing--the-facts/>>, accessed September 2016

¹¹¹ NSW Small Business Commissioner, *Point to Point Transport*, <<http://www.smallbusiness.nsw.gov.au/news/smallbiz-connect/point-to-point-transport-support-package/>>, accessed September 2016

their workplace can pursue compensation regardless of whether the injury was their fault or not.¹¹²

- 6.23 As noted earlier in this report, people who drive but do not own a taxi, hire car, or ride share vehicle are not considered employees in New South Wales, however for the purposes of workers compensation insurance they are deemed workers employed by the person from whom they obtain their vehicle. Taxi and hire car providers in New South Wales have a legal obligation to hold a workers compensation insurance policy on behalf of their drivers for any injuries that their drivers might sustain in the workplace (including in the vehicle):

A person engaged in plying for hire with any vehicle or vessel, the use of which is obtained by that person under a contract of bailment (other than a hire purchase agreement), in consideration of the payment of a fixed sum, or a share in the earnings or otherwise, is, for the purposes of this Act, taken to be a worker employed by the person from whom the use of the vehicle or vessel is so obtained.¹¹³

- 6.24 These provisions provide no protection for the owner drivers of taxis, hire cars and ride share services. They need to obtain income protection or other insurance. The current position is therefore competitively neutral between different sectors of the point to point transport industry.
- 6.25 Compulsory Third Party (CTP) insurance is mandatory for all vehicle owners in New South Wales. CTP insurance protects the vehicle owner from being personally sued for any injuries their vehicle causes to passengers, the drivers and passengers of other vehicles, pedestrians and cyclists, who can make a claim on the vehicle owner's insurer to receive the support they need as a result of injuries incurred.¹¹⁴
- 6.26 Ride share drivers have the protection of CTP insurance while driving for a ride share operator, however CTP insurance does not provide protection for the driver if they are at fault, it only provides protection for those people who may be injured as a result of the driver's actions. Mr Matt Kayrooz of Suncorp Group explained the gap in coverage at the public hearing:
- The current scheme being fault based in New South Wales means the at-fault driver gets a no-fault benefit up to \$5,000 and then there is catastrophic cover under the lifetime care on the no-fault basis. But there is a huge gap. Basically the at-fault driver is not covered.¹¹⁵
- 6.27 That is why either workers compensation insurance or income protection insurance (for owner drivers) is important. There were some submissions which seemed to suggest that the onus should be on a ride share provider like Uber to provide this kind of insurance. However, it is the clear current obligation of the

¹¹² WorkCover NSW, Workers Compensation Guide for Employers, <www.workcover.nsw.gov.au/media/publications/workers-compensation-claims/workers-compensation-guide-for-employers>, accessed August 2016

¹¹³ *Workplace Injury Management and Workers Compensation Act 1998*, schedule 1, clause 10

¹¹⁴ State Insurance Regulatory Authority, *Review of CTP motor vehicle insurance for point-to-point transport vehicles*, Discussion Paper, p 2

¹¹⁵ Mr Matt Kayrooz, Head of Accident and Trauma, Suncorp Group, transcript of evidence, 28 July 2016, p 38

owner of the vehicle if there is a bailment to provide workers compensation insurance whether it is a ride share vehicle, taxi or hire car and not another party.

- 6.28 While the NSW Taxi Council advocates for a number of adjustments to the current regulatory framework for taxi operators, it considers that basic protections for workers, including workers compensation insurance, should remain:

We believe in workers compensation cover for taxi drivers as well. These are the sort of basic provisions that must exist. We believe that you cannot outsource your contractual obligations to an international jurisdiction. We think they must be compelled to the law of this country and not actually leave the worker or driver vulnerable in that context. I think they would be some of the fundamental provisions we would like to see, from a regulatory perspective, for drivers in our industry. I said earlier that that should be a Federal space.¹¹⁶

DRIVER FATIGUE

- 6.29 Driver fatigue is one of the three biggest killers on New South Wales roads¹¹⁷ and deaths caused by driver fatigue have been increasing.¹¹⁸ The Committee therefore wanted to hear inquiry participants' views on the adequacy of current regulation for driver fatigue in the point to point transport industry.

- 6.30 Section 312 of the IR Act provides that the Industrial Relations Commission may make a contract determination with respect to the maximum number of hours per day, per week or for any longer period that a bailee may drive a public vehicle. In the Sydney Metropolitan Transport District the Determination sets the duration of a taxi driver's shift to be at least nine hours but not more than twelve hours.¹¹⁹ There is no regulation to address driver fatigue in the hire car industry, ride share industry or for taxis outside of the Sydney Metropolitan Transport District.

- 6.31 There are no regulations governing when point to point drivers should take breaks or how long they should drive for. Drivers are responsible for the hours they work, which jobs they accept and when they take breaks. Further, drivers who own their own vehicle and are not subject to a bailment contract may, in theory, drive their vehicle for up to 24 hours each day.

- 6.32 Although there is no set regulation, the Committee understands that it is industry standard in the hire car industry to set the maximum shift length at twelve hours. The NSW Hire Car Association outlined the current approach within the hire car industry to manage driver fatigue:

There are currently no universal measures in place to monitor and manage fatigue.

Sole operators - obviously generally manage this on their own terms.

¹¹⁶ Mr Roy Wakelin-King, transcript of evidence, 28 July 2016, p 7

¹¹⁷ Transport for NSW, Centre for Road Safety, *Fatigue*, <<http://roadsafety.transport.nsw.gov.au/stayingsafe/fatigue/>>, accessed September 2016

¹¹⁸ Transport for NSW, *Drivers on notice to wake up to fatigue*, <<http://www.transport.nsw.gov.au/media-releases/drivers-notice-wake-fatigue>>, accessed September 2016

¹¹⁹ Taxi Industry (Contract Drivers) Contract Determination, 1984, clause 2 (g) and (h)

Larger operators - who operate multiple vehicles have a higher level of control and will manually manage this through the allocation of work daily to ensure that no one driver is stretched beyond the standard 12 hours of work.

Booking companies - who offload work have no way of monitoring or managing driver fatigue and they cannot know what each sole operators workload is.¹²⁰

6.33 The Ride Share Drivers' Association of Australia submitted that there should be regulation in place to manage driver fatigue.¹²¹

6.34 The Transport Workers' Union of NSW submitted that in the transport industry there was a strong link between rates of pay and road safety [including driver fatigue]:

It has been conclusively established that there is a link between rates of pay and safety in road transport. The less a driver is paid, the more incentive they have to drive in an unsafe manner endangering themselves and their passengers. Logically, the less a driver earns, the longer they have to drive to earn a decent living to put food on the table, or conversely, the quicker they have to do the work in order to earn more fares and therefore more money, putting themselves and their passengers in harm's way as a result. Both scenarios present significant safety risks. Therefore the better a driver is paid, the less the incentive to drive in a manner that causes them and other road users danger.¹²²

6.35 At the public hearing the Ride Share Drivers' Association of Australia explained the risks of driving for extended periods:

Uber will let you drive and they will let you drive. In the trucking industry a normal day is 12 hours, unless you have basic fatigue management, which is 13 hours, including your breaks, and then there is advanced fatigue management after that, which is 14 hours plus, including breaks. There is absolutely no chain of responsibility. Uber let drivers drive tired and drive longer because they are not earning enough at the moment.¹²³

6.36 In terms of whether point to point providers should be responsible for managing driver fatigue, Uber submitted that drivers themselves should be responsible for fatigue management:

Driver partners choose their own schedule, are able to take breaks whenever they want and there are no minimum hours or set shifts. Around half of Uber's rideshare partners drive for less than 10 hours per week.

Drivers are ultimately responsible for managing fatigue - as is the case for private drivers - since only drivers understand their total workload. Fatigue is a composite of all activities that occur across the day, and ridesharing driver-partners typically drive for only a few hours in the day.

¹²⁰ NSW Hire Car Association, response to further questions, p 2

¹²¹ Submission 2, Ride Share Drivers' Association of Australia, p 2

¹²² Submission 7, Transport Workers' Union of NSW, p 7

¹²³ Mr Troy Lake, transcript of evidence, 28 July 2016, p 29

Uber also monitors rider feedback through its rating system and can this way also actively identify if a driver is receiving feedback about driving behaviour that could be linked to fatigue issues.¹²⁴

- 6.37 Uber further added that fatigue could be caused not just from being on the road, but that a driver may be fatigued before getting into a vehicle:

Another thing that complicates this is in my reading one of the biggest issues in fatigued driving is not people doing a long period on the road but it might actually be their condition before they got into the car. Shift workers in particular who might work until midnight or so and then get in the car might be at risk more than anybody. The person who knows that best is the individual getting behind the wheel of the car.¹²⁵

- 6.38 Similarly, the NSW Hire Car Association submitted that it would be difficult for hire car operators to manage the fatigue of drivers who, being independent operators, may accept work from a number of providers:

Any measure to introduce standards in this area must carefully consider the working dynamics of the industry and not impose obligations on booking companies who cannot possibly manage this criteria for independent drivers/operators who accept work from such booking companies as they have no visibility or control over what over work that driver may be doing.¹²⁶

- 6.39 In Queensland it is illegal for 'personalised transport' [that is, point to point transport] drivers to drive while fatigued and taxi companies have a legal obligation to ensure they do not use fatigued drivers. In 2017, as part of its review of the personalised transport industry, the Queensland Government will consider the best approach for managing fatigue and develop a new chain of responsibility. The chain of responsibility will apply to all industry participants and will outline the safety and accessibility outcomes each participant will be held legally accountable for.¹²⁷

Committee comment

- 6.40 A maximum shift length of twelve hours is currently industry standard in the taxi and hire car industries, however this standard is not regulated except for taxi drivers in the Sydney Metropolitan Transport District. There is no regulation governing the maximum amount of time that a ride share driver may be logged on to a ride share app and there are no regulations governing the maximum length of time any point to point transport driver should drive before taking a break, or how long breaks should be.
- 6.41 The Transport Workers' Union of NSW submitted that there was a link between rates of pay and road safety in transport, and the Ride Share Drivers' Association of Australia was concerned that ride share drivers could spend too long behind

¹²⁴ Uber, response to further questions, p 5

¹²⁵ Mr David Rohrsheim, transcript of evidence, 28 July 2016, p 68

¹²⁶ NSW Hire Car Association, response to further questions, p 2

¹²⁷ Queensland Government, *Queensland's Personalised Transport Horizon – 5 year strategic plan for personalised transport services 2016-2021*, p 18

the wheel in an attempt to earn more money, putting themselves and their passengers at risk of an accident.

- 6.42 However hire car operators and ride share providers noted that drivers, as independent operators, may work across more than one mode of point to point transport, and although logged on to a ride share app or in possession of a vehicle under a contract of bailment, may not be on the road. Further, drivers may be fatigued before they even begin their shift or log on to a ride share app.
- 6.43 The Committee considers it appropriate that drivers themselves be responsible for managing fatigue, however the Committee observes with concern that accidents involving driver fatigue are on the rise in New South Wales. However, no statistics were available to the Committee with regard to the incidence of driver fatigue accidents in the point to point transport industry.
- 6.44 The Committee is concerned to ensure that the safety of passengers and drivers and other parties including pedestrians are not compromised by drivers who are fatigued and considers that this issue should be monitored.
- 6.45 The Committee notes that the NSW Centre for Road Safety conducts research and develops solutions for reducing deaths and serious injuries on New South Wales roads. Driver fatigue is one of the biggest contributors to the road toll, and a key focus of the NSW Centre for Road Safety's work is addressing driver fatigue.
- 6.46 The Committee therefore recommends that the Point to Point Transport Commissioner work with the NSW Centre for Road Safety to provide point to point transport drivers with information on managing driver fatigue.

RECOMMENDATION 3

The Committee recommends that the Point to Point Transport Commissioner work with the NSW Centre for Road Safety to provide information to point to point transport drivers on managing driver fatigue.

Appendix One – Conduct of the inquiry

Terms of reference

- 6.1 On 2 June 2016, the Minister for Transport, the Hon Andrew Constance MP, introduced the *Point to Point Transport (Taxi and Hire Vehicles) Bill 2016*, aimed at addressing the future sustainability of taxis, hire cars and other emerging point to point transport providers.
- 6.2 In the Second Reading Speech to the Bill, the Minister highlighted the need to investigate more thoroughly workplace arrangements across the point to point transport industry. Accordingly, the Minister referred this inquiry to the Committee. Terms of reference for the inquiry were adopted on 9 June 2016, and these are detailed on page iv.

Submissions

- 6.3 The Committee advertised the inquiry on the Committee website and wrote to relevant stakeholders seeking their contribution.
- 6.4 The Committee received nine submissions and one supplementary submission. Submissions were received from a range of stakeholders including government departments, point to point operators, and associated groups and organisations.
- 6.5 A list of submissions is included at Appendix Two and submissions are available to view on the Committee’s website.
- 6.6 The Committee thanks all inquiry participants who provided a submission to the inquiry.

Public hearing

- 6.7 The Committee held a public hearing on Thursday, 28 July 2016 at Parliament House. Seventeen witnesses appeared before the Committee.
- 6.8 A list of witnesses who appeared is included at Appendix Three and the transcript of the proceedings is available on the Committee’s website.
- 6.9 The Committee thanks all witnesses who appeared at the hearing for their contribution.

Appendix Two – List of submissions

1	Suncorp Group
2	Ride Share Drivers' Association of Australia
3	Australian Taxi Drivers Association & NSW Point to Point Transport Association
3a	Australian Taxi Drivers Association & NSW Point to Point Transport Association
4	Uber
5	NSW Treasury and Transport for NSW
6	NSW Taxi Council Ltd
7	Transport Workers' Union of NSW
8	NSW Hire Car Association
9	NSW Taxi Operators, Drivers & Owners Association

Appendix Three – List of witnesses

THURSDAY 28 JULY 2016, MACQUARIE ROOM, PARLIAMENT HOUSE

Witness	Position and Organisation
Mr Roy Wakelin-King AM	Chief Executive Officer NSW Taxi Council
Mr Fred Lukabyo	Director NSW Taxi Council
Ms Leonie Kyriacou	Legal Counsel NSW Taxi Council
Mr Michael Jools	President and Secretary Australian Taxi Drivers Association and NSW Point to Point Transport Association
Mr Peter Lubrano	Member Australian Taxi Drivers Association and NSW Point to Point Transport Association
Mr John Bartolotta	Chairman NSW Hire Car Association
Mr Simon Kalipciyan	Director NSW Hire Car Association
Mr Troy Lake	Treasurer Ride Share Drivers Association of Australia
Mr Matt Kayrooz	Head of Accident & Trauma Suncorp Group
Mr Paul Lawton	Executive Manager, Workers Compensation Suncorp Group
Ms Eva Urban	Policy & Regulation Advisor Suncorp Group
Mr Richard Olsen	A/Secretary Transport Workers Union of NSW

WORKPLACE ARRANGEMENTS IN THE POINT TO POINT TRANSPORT INDUSTRY
LIST OF WITNESSES

Mr Toby Warnes	Head of Legal and Governance Transport Workers Union of NSW
Mr Michael Hatrick	Taxi Driver
Ms Vicki Telfer	Executive Director NSW Industrial Relations
Ms Barbara Wise	Director, Point to Point Implementation, Freight, Strategy and Planning Transport for NSW
Mr David Rohrsheim	General Manager Uber (Australia and New Zealand)

Appendix Four – Extracts from Minutes

MINUTES OF MEETING NO 7

2:01 pm, Thursday 9 June 2016
Room 813, Parliament House and via teleconference

Members present

Mr Henskens (in person)
Mr Notley-Smith; Mrs Pavey; Ms McKay; and Mr Park (via teleconference)

Officers in attendance

Jason Ardit, Emma Wood, Jenny Whight and Jacqueline Linnane

1. Minutes of previous meeting

Resolved, on the motion of Mrs Pavey, seconded by Mr Notley-Smith: That the minutes of meeting no 6 held on 14 March 2016 be confirmed.

2. Proposed new inquiry into industrial arrangements in the point to point transport industry

a) Referral letter from the Hon Andrew Constance MP, Minister for Transport and Infrastructure

The Chair circulated draft terms of reference for the Committee's consideration.

Ms McKay raised for discussion whether Chapter 2, Part 9 of the *Industrial Relations Act 1996* be included in the first term of reference.

On the Chair's advice, the Committee agreed that the Committee secretariat would seek further advice about Chapter 2, Part 9 of the *Industrial Relations Act 1996*.

Resolved, on the motion of Mr Notley-Smith, seconded Ms McKay: That the Committee inquire into, and report on, workplace arrangements in the point to point transport industry, with particular reference to:

1. The operation and impact on the point to point passenger transport industry of the relevant provisions of Chapter 6 of the *Industrial Relations Act 1996*, as well as the operation of any other state or federal laws that may affect driver remuneration and conditions, including the *Fair Work Act*, the *Independent Contractors Act 2006* and the general law of contract
2. the effectiveness of the existing arrangements including the impact on:
 - a. driver remuneration and conditions;
 - b. competitiveness across the industry;

- c. customer service (including fares); and
 - d. safety for passengers and drivers;
3. the uneven application of workplace arrangements across the point to point transport sector and nationally;
 4. the evolution of the industry, which includes national and multinational service providers;
 5. the impact of technology and customer demand on how drivers participate in the industry;
 6. the sustainability of commercial passenger transport and economic productivity;
 7. the intent of the Government's reforms to minimise the regulatory burden on the point to point industry; and
 8. Any other related matter.

b) Inquiry timeline

Resolved, on the motion of Ms McKay, seconded Mr Notley-Smith: That the Committee adopt the indicative inquiry timeline.

c) Call for submissions and advertising

Resolved, on the motion of Mr Notley-Smith, seconded Ms McKay: That the Committee advertise the call for submissions to the inquiry on the Committee website and write to relevant stakeholders, as updated, with a closing date of 8 July 2016.

d) Media

Resolved, on the motion of Mr Notley-Smith, seconded Mrs Pavey: That the Chair issue a media release announcing the inquiry and it be placed on the Committee website.

3. ***

The Chair adjourned the meeting at 2:13pm to a time and date to be determined.

MINUTES OF MEETING NO 8

3.05pm, Monday 18 July 2016
Room 813, Parliament House

Members Present

Mr Henskens, Ms McKay – in person
Mrs Pavey, Mr Park – via teleconference

Apologies

Mr Bruce Notley-Smith

Officers in attendance

Jason Ardit, Emma Wood, Jenny Whight, Jacqueline Linnane, Abegail Turingan

1. Confirmation of minutes

Resolved on the motion of Mrs Pavey, seconded by Ms McKay: That the minutes of the deliberative meeting of 9 June be confirmed.

2. Inquiry into workplace arrangements in the point to point transport industry

a. Correspondence

The Committee noted correspondence from NSW Industrial Relations requesting an extension to providing advice on Chapter 2 of the *Industrial Relations Act 1996*.

b. Submissions

Resolved on the motion of Ms McKay, seconded Mr Park: That the Committee authorise the publication in full of submissions numbered 1 – 8.

c. Witnesses for public hearing on Thursday 28 July 2016

Resolved on the motion of Mrs Pavey, seconded Ms McKay: That the Committee conduct a public hearing on Thursday 28 July 2016 and invite the following witnesses and/or others to be circulated by email:

- Suncorp Group
- Ride Share Drivers Association
- NSW Point to Point Transport Association and Australian Taxi Drivers Association
- Uber
- NSW Government
- NSW Taxi Council
- Transport Workers Union
- NSW Hire Car Association

The meeting adjourned at 3.08pm until 9.15am, Thursday 28 July 2016.

MINUTES OF MEETING NO 9

9.24am, Thursday 28 July 2016
Macquarie Room, Parliament House

Members Present

Mr Henskens, Ms McKay, Mrs Pavey, Mr Park

Apologies

Mr Notley-Smith

Officers in attendance

Jason Ardit, Emma Wood, Jenny Whight, Jacqueline Linnane

1. Confirmation of minutes

Resolved on the motion of Mr Park, seconded by Ms McKay: That the minutes of the deliberative meeting of 18 July be confirmed.

2. Inquiry into workplace arrangements for the point to point transport industry

2.1 Correspondence

The Committee noted correspondence from NSW Industrial Relations regarding Part 9 of Chapter 2 of the *Industrial Relations Act 1996*.

2.2 Submission

Resolved on the motion of Ms McKay, seconded Mr Park: That the Committee authorise the publication in full of supplementary submission 3a.

2.3 Pre-hearing orders

2.3.1 Media Orders

Resolved on the motion of Mrs Pavey, seconded by Ms McKay: That the Committee authorises the audio-visual recording, photography and broadcasting of the public hearing on 28 July 2016, in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for parliamentary committees administered by the Legislative Assembly.

2.3.2 Answers to questions taken on notice

Resolved on the motion of Mr Park, seconded by Ms McKay: That witnesses be requested to return answers to questions taken on notice and supplementary questions within one week of the date on which the questions are forwarded to the witnesses.

2.3.3 Publication orders

Resolved on the motion by Mrs Pavey, seconded by Mr Park: That the corrected transcript of evidence given today be authorised for publication and uploaded on the Committee's website.

2.4 Public hearing

Witnesses and the public were admitted. The Chair opened the public hearing at 9:30am and after welcoming the witnesses made a short opening statement.

Mr Roy Wakelin-King AM, Chief Executive Officer, and Mr Fred Lukabyo, Director, NSW Taxi Council, both sworn and examined. Ms Leoni Kyriacou, Legal Counsel, NSW Taxi Council, affirmed and examined.

Mr Wakelin-King made a brief opening statement.

The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

Mr Michael Jools, President, and Mr Peter Lubrano, Member, Australian Taxi Drivers Association and NSW Point to Point Transport Association, sworn and examined.
Mr Jools made a brief opening statement.

The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

The Committee took a short adjournment at 11:17am and resumed the public hearing at 11:23am.

Mr John Bartolotta, Chairman, and Mr Simon Kalipciyan, Director, NSW Hire Car Association, both sworn and examined.

Mr Bartolotta made a brief opening statement.
The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

Mr Troy Lake, Treasurer, Ride Share Drivers Association of Australia, affirmed and examined.
Mr Lake made a brief opening statement.

The Committee commenced questioning the witness. Evidence concluded and the witness withdrew.

The Committee took a lunch adjournment at 12:36pm and resumed the public hearing at 1:51pm.

Mr Matt Kayrooz, Head of Accident and Trauma, and Ms Eva Urban, Policy and Regulation Advisor, Suncorp Group, both affirmed and examined. Mr Paul Lawton, Executive Manager, Workers Compensation, Suncorp Group, sworn and examined.

Mr Kayrooz made a brief opening statement.
The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

Mr Richard Olsen, Acting Secretary, and Mr Michael Hatrick, Taxi driver and member, Transport Workers Union, sworn and examined. Mr Toby Warnes, Head of Legal and Governance, Transport Workers Union, affirmed and examined.

Mr Olsen made a brief opening statement.
The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.
The Committee took a short adjournment at 3:16pm and resumed the public hearing at 3:31pm.

Ms Vicki Telfer, Executive Director, NSW Industrial Relations, affirmed and examined. Ms Barbara Wise, Director, Point to Point Implementation Freight, Strategy and Planning, Transport for NSW, affirmed and examined.

The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

Mr David Rohrsheim, General Manager, Uber Australia and New Zealand, sworn and examined.

Mr Rohrsheim made a brief opening statement.
The Committee commenced questioning the witness. Evidence concluded and the witness withdrew.

The public hearing concluded at 5:07pm.

The Committee adjourned at 5:07pm to a date and time to be determined.

MINUTES OF MEETING NO 10

11.38 am, Tuesday 23 August 2016
Room 1254, Parliament House

Members Present

Mr Henskens, Mr Notley-Smith, Mrs Pavey

Apologies

Ms McKay, Mr Park

Officers in attendance

Jason Ardit, Emma Wood, Jenny Whight

1. Confirmation of minutes

Resolved on the motion of Ms Pavey: That the minutes of the deliberative meeting of 28 July 2016 be confirmed.

2. Inquiry into workplace arrangements for the point to point transport industry

2.5 Submission

Resolved on the motion of Mr Notley-Smith, seconded Ms Pavey: That the Committee accept the late submission from the NSW Taxi Operators, Drivers and Owners Association and authorise its publication in full.

2.6 Answers to questions on notice and additional questions

Resolved on the motion of Ms Pavey, seconded Mr Notley-Smith: That the Committee authorise the publication in full of the following responses to questions taken on notice and additional questions:

- 8 August 2016, Ms Ritta Khoury, Director, Government Relations and Strategic Planning, NSW Hire Car Association
- 9 August 2016, Ms Eva Urban, Policy & Regulation Advisor, Suncorp Group
- 9 August 2016, Ms Jessika Loefstedt, Manager, Public Policy and Government Relations, Uber
- 16 August 2016, Ms Vicki Telfer, Executive Director, NSW Industrial Relations
- 22 August 2016, Mr Roy Wakelin-King, Chief Executive Officer, NSW Taxi Council

And the part publication of the following response:

- 12 August 2016, Mr Troy Lake, Treasurer, Ride Share Drivers Association of Australia

The Committee adjourned at 11.42 am to a date and time to be determined.

UNCONFIRMED MINUTES OF MEETING NO 11

4.01 pm, Tuesday 18 October 2016
Room 1043, Parliament House

Members Present

Mr Henskens, Mr Notley-Smith, Ms McKay, Mr Park, Mrs Pavey

Officers in attendance

Jason Arditi, Emma Wood, Jacqueline Linnane, Jenny Whight, Abigail Turingan

1. Confirmation of minutes

Resolved on the motion of Ms McKay, seconded Mr Park: That the minutes of the deliberative meeting of 23 August 2016 be confirmed.

2. Inquiry into workplace arrangements in the point to point transport industry

2.7 Answers to questions on notice and additional questions

Resolved on the motion of Ms McKay, seconded Mr Park: That the Committee authorise the publication in full of the following response to questions taken on notice and additional questions:

- 31 August 2016, Mr Richard Olsen, Transport Workers' Union of NSW

2.8 Consideration of Chair's draft report

The Chair tabled his draft report, which have being previously circulated, was taken as being read. Discussion ensued. The Committee agreed to consider the report chapter by chapter.

Chapter One read.

Resolved on the motion of Mr Notley-Smith, seconded Ms Pavey: That Chapter One be adopted.

Chapter Two read.

Resolved on the motion of Ms Pavey, seconded Mr Notley-Smith: That Chapter Two be adopted.

Chapter Three read.

Resolved on the motion of Ms Pavey, seconded Mr Notley-Smith: That Chapter Three be adopted.

Chapter Four read.

Resolved on the motion of Ms Pavey, seconded Mr Notley-Smith: That Chapter Four be adopted.

Chapter Five read.

Ms McKay moved, seconded Mr Park:

“That paragraph 5.41 be amended by:

- omitting the words ‘inconsistent with’ and inserting instead ‘different to’
- omitting the words ‘objectives remain unmet’ and inserting instead ‘provisions can be improved upon’

That paragraph 5.43 be amended by omitting the words ‘not being utilised and are easily’ and inserting instead ‘able to be’.

That paragraph 5.44 be omitted.

That paragraph 5.45 be amended by omitting the words:

‘If the owner is unfair with regard to the bailment arrangements, drivers will not be willing to drive the vehicle and the owner will be without income or a return on his or her investment in the taxi plate and vehicle. There is little incentive for the owner to exploit drivers in the manner suggested’,

and inserting instead:

‘Where the owner is unfair with regard to the bailment arrangements, drivers may be exposed to exploitation.’

That paragraph 5.46 be amended by omitting the words:

‘The Committee also highlights that not only is Chapter 6 a unique provision to New South Wales, its reach in practice mainly only extends to one sector of the point to point transport industry, the taxi sector, because of its high proportion of bailment contracts. This creates an unevenly regulated environment which leaves those that are captured by Chapter 6 uncompetitive. The Committee is not persuaded that retaining Chapter 6 is justified.’

and inserting instead:

‘The Committee is persuaded that retaining Chapter 6 is justified, but also believes that additional provisions such as those put forward by the Opposition during debate on the *Point to Point Transport (Taxis and Hire Vehicles) Bill 2016* should also be enacted. The proposed new s150 of the IR Act would certainly address the issue of setting minimum remuneration for all participants in the Point to Point transport industry.

[Footnote: See Opposition amendments on sheet c2016.057B.02 moved in the Legislative Council on 22 June 2016; see, in particular proposed s150 contained in amendment no. 3]’

That the following words be inserted at the end of Paragraph 5.47:

‘The Committee considers that the rights and remedies potentially available under the *Independent Contractors Act* are both weak and uncertain, and definitely inferior to those potentially available under s106 of the *Industrial Relations Act 1996* (NSW) which provides a regime to review unfair work contracts. Due to changes in Commonwealth laws, s106 remedies may not always be available to those in the point to point transport industry. In any case, litigation under any of these provisions can be lengthy and expensive. Accordingly, a more flexible and accessible regime of the kind proposed by the Opposition would be preferable.’

That paragraph 5.48 be amended by:

- omitting the words ‘consider if’ and inserting instead ‘should not seek to amend’
- omitting the words ‘should be amended’
- inserting at the end: ‘In addition, the Committee recommends that the NSW Government should propose that Parliament enacts additional measures of the kind provided for by the Opposition during debate on the *Point to Point Transport (Taxis and Hire Vehicles) Bill 2016*.’

That Recommendation 1 be amended by:

- omitting the word ‘gives’ and inserting instead ‘should not give’
- inserting at the end: ‘Furthermore the Committee recommends that the NSW Government should propose that Parliament enacts additional measures of the kind provided for by the Opposition during debate on the *Point to Point Transport (Taxis and Hire Vehicles) Bill 2016*.’

Question put.

The Committee divided.

Ayes 2 [Ms McKay, Mr Park] Noes 3 [Mr Henskens, Mr Notley-Smith, Mrs Pavey].

Question resolved in the negative.

Mr Notley-Smith moved, Ms Pavey seconded: That Chapter Five be adopted as circulated.

Question put.

The Committee divided.

Ayes 3 [Mr Henskens, Mr Notley-Smith, Mrs Pavey] Noes 2 [Ms McKay, Mr Park]

Question resolved in the affirmative.

Chapter Six read.

Mr Park moved, Ms McKay seconded:

“That paragraph 6.4 be amended by inserting:

‘However, this is of limited value as bailment arrangements do not appear to be part of the Point to Point transport industry outside of the taxi sector.’ after ‘when schedule 7 of the Point to Point Transport Act comes into force.’

That paragraph 6.10 be amended by inserting at the end:

‘However, the provisions of the Independent Contractors Act are difficult to access, weak and uncertain.’

That paragraph 6.13 be amended by omitting the following words:

‘The ride share industry is not currently but will shortly be included in the IR Act, and will therefore have dispute resolution procedures in place for those ride share drivers who enter into a bailment arrangement. Participants in the taxi and hire car industries have access to dispute resolution procedures governed by Chapter 6 of the IR Act. As discussed in Chapter Five of this report, the Committee considers that Chapter 6 of the IR Act is an outdated regulatory framework for the point to point transport industry and does not propose including the ride share sector in Chapter 6 of the IR Act.’

and inserting instead:

‘The ride share industry is not currently but will shortly be included in the IR Act, and will therefore have dispute resolution procedures in place for those ride share drivers who enter into a bailment arrangement. However, as discussed above, this is a very limited category of those who work in the Point to Point transport industry. Participants in the taxi and hire car industries already have access to dispute resolution procedures governed by Chapter 6 of the IR Act. As discussed in Chapter Five of this report, the Committee considers that Chapter 6 of the IR Act should be bolstered by provisions of the kind proposed by the Opposition during debate on the *Point to Point Transport (Taxis and Hire Vehicles) Bill 2016*.’

That paragraph 6.14 be amended by inserting at the end:

‘As discussed earlier in this report, that would be a wholly inadequate outcome, given the limitations and weaknesses of the Independent Contractors Act.’

That paragraph 6.15 be amended by omitting the words:

‘Any concerns with the deactivation policy will be resolved by rights under the Independent Contractors Act or Chapter 6, to the extent, it will apply to the ride share sector.’,

and inserting instead:

‘The Committee considers that if Parliament enacted provisions of the kind proposed by the Opposition during debate on the *Point to Point Transport (Taxis and Hire Vehicles) Bill 2016*, particularly proposed s151 of the IR Act contained amendment no. 3, then all those who work in the Point to Point transport industry would be afforded a fair, flexible and accessible dispute resolution mechanism that would be easy and inexpensive to use. The Committee recommends that the NSW Government seeks an amendment to the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* in this form.’

That paragraph 6.19 be amended by inserting at the end:

‘But recognises the very limited powers given to her office to undertake this work.’

That the following new paragraph be inserted after paragraph 6.21:

‘The Committee powers conferred upon the Small Business Commissioner are considerable narrower than those proposed by the NSW Opposition in its *Small Business Commissioner and Small Business Protection Bill 2012*, which were also advanced in amendments during debate on the Government’s *Small Business Commissioner Bill 2013* which became law. These would have afforded the Commissioner a wide range of compulsory conciliation powers, that would have ensure all larger businesses came to the table to negotiate with the small businesses they are in dispute with, as well as the capacity to facilitate fair dealing across and within industries through codes of practice, among other provisions. The Committee recommends that the NSW Government revisits the issue of the powers to be conferred upon the Small Business Commissioner.’

That recommendation 2 be amended by:

- Inserting at the beginning: ‘The Committee recommends that the NSW Government proposes an amendment to the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* to create a dispute resolution mechanism of the kind proposed by the Opposition during debate on the legislation.’
- Inserting at the end: ‘The Committee also recommends that the NSW Government seeks to widen the powers and functions conferred upon the Small Business Commissioner in light of the role proposed by the Opposition during debate on the Small Business Commissioner legislation.’

Question put.

The Committee divided.

Ayes 2 [Ms McKay, Mr Park] Noes 3 [Mr Henskens, Mr Notley-Smith, Ms Pavey].

Question resolved in the negative.

Moved Ms Pavey, seconded Mr Notley-Smith: That Chapter Six be adopted as circulated.

Question put.

The Committee divided.

Ayes 3 [Mr Henskens, Ms Pavey, Mr Notley-Smith] Noes 2 [Ms McKay, Mr Park]

Question resolved in the affirmative.

Moved Ms Pavey, seconded Mr Notley-Smith: That the draft report be the report of the Committee, and that it be signed by the Chair and presented to the House.

Question put.

The Committee divided.

Ayes 3 [Mr Henskens, Ms Pavey, Mr Notley-Smith] Noes 2 [Ms McKay, Mr Park]

Question resolved in the affirmative.

Resolved on the motion of Ms Pavey, seconded Mr Notley-Smith: That the Chair and Committee staff be permitted to correct stylistic, typographical and grammatical errors and that, once tabled, the report be posted on the Committee's website.

3. ***

The Committee adjourned at 4.07 pm to a date and time to be determined.