Transport Workers' Union of NSW
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Inquiry Into Workplace Arrangements in the Point to Point Transport Industry

Questions Taken on Notice

Question 1 - How many New South Wales taxi drivers are members of your union?

As a matter of policy, the Transport Workers' Union of NSW (**TWU**) does not divulge membership numbers other than where legally necessary.

We can report that we have a reasonable amount of members in Sydney, Wollongong, Newcastle, Wagga Wagga, Albury and small numbers in other regional centres.

We do concede that our overall density in the taxi and point to point passenger transport industry is low and this reality, consistent with the reality in many low union density industries, explains why wage outcomes and conditions in this industry is what we would consider to be far below a reasonable standard.

As The Chair Mr Alister Henskins SC MP (**The Chair**) pointed out at page 51 of the Transcript, he has been in taxis driven by foreign qualified veterinarians or doctors. Ms Jodi McKay MP then pointed out that this was often because they cannot get a job they are actually qualified to perform. These are correct observations with regards to the taxi industry as many drivers are new immigrants to the country who are yet to find another job and are often intending to only remain in the industry for a short amount of time. There is a very high turnover in the taxi industry and generally industries with high turnover have much lower levels of union density, making them extremely difficult to organise and achieve positive outcomes for.

The overarching point we would make to all of this is that the regulation 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. Once one operator reduced rates, others would be forced to do the same to compete, creating a race to the bottom due to the transport industry essentially being a price-taking industry.

Question 2 - What other jurisdictions around the world have arrangements similar to Chapter 6 of the Industrial Relations Act 1996 and the determination?

In relation to the latter part of the question we are unsure as to exactly how the taxi and point to point passenger industries are legally regulated around the world(although Uber is either highly regulated

or illegal in different jurisdictions both foreign and within Australia). There is no doubt that some arrangements would be akin to a more traditional 'employee/ employer' relationship and in Australia the relationship has often been contested (for the latest example, see *Voros v Dick [2013] FWCFB 9339* where a Full Bench of the Fair Work Commission overturned the decision of a single Commissioner who originally found that the relationship was not one of bailor/ bailee but of employer/ employee. As a side note, the fact that this case emanated out of Victoria meant that the taxi driver would have been left with no simple access to unfair termination of contract which he would have had in NSW thanks to the protections of Chapter 6 to which Mr Hatrick referred to at various points in the Transcript which has assisted him in the past).

The issue in relation to Chapter 6 generally will be further addressed in question 4 below.

Additional Questions

Question 3 – In response to issues concerning enforcement of the determination under Chapter 6, NSW Industrial Relations indicated that they do undertake enforcement activities and have pursued a number of strategies over the years to educate taxi owners and operators about their legal entitlements and obligations.

a. *What are your thoughts on the enforcement activities of NSW Industrial Relations?*

Unfortunately NSW Industrial Relations is chronically underfunded and under-resourced and as such their ability to enforce and educate is significantly limited.

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.

Once again, and as was pointed out by Mr Hatrick on page 44 of the Transcript, even those drivers who understand their industrial rights in relation to how they are entitled to be paid are often effectively left with no choice due to the power imbalance inherent in the contractual relationship.

b. *What areas need to be better enforced and how would you suggest this enforcement be achieved?*

We would first point out that enforcement will be made harder by the NSW Government's recent proposal to absorb the Industrial Court into the Supreme Court in accordance with the *Industrial Relations Amendment (Industrial Court) Bill 2016*. No doubt Unions NSW and unions more generally will make substantive submissions on the related issues but suffice to say this will make access to enforcement harder.

In an ideal world enforcement would be unnecessary and more work in relation to training and education needs to occur with both bailors and bailees so as both parties in the contractual relationship are aware of their rights and obligations. Such education and training needs to take into account the vulnerabilities of new entrants in particular and the difficulties they often have with English along with the inherent power imbalance in this relationship.

In our original submissions in paragraphs 56-58 we made the point that the union's resources in relation to enforcement are limited. We have suggested that a dedicated ombudsman should oversee this industry which could deal generally with issues of enforcement as well as look at broader issues of education and training. In much the same way as the Fair Work Ombudsman is able to assist employees with enquiries regarding their pay, so too could an ombudsman in this industry as many issues could then potentially be resolved without having to use a stronger enforcement mechanism, such as the Industrial (or potentially Supreme) Court.

While enforcement and enforcement mechanisms will always be necessary because rogue operators will always exist, if education, training and an ombudsman which is easy to access and use is created we believe that this will resolve a number of issues. It will result in most operators adhering to the relevant industrial instrument, in this case the *Taxi Industry (Contract Drivers) Contract Determination 1984*, which does not provide onerous obligations on either party but is rather misunderstood in most cases.

Question 4 – You comment in your submission that cost recovery for independent contractors is vital for safe and sustainable operations and that driver remuneration and conations (sic) ought not to be a factor when taking into account competitiveness. Can you elaborate on this?

It is now an accepted fact, backed up by a plethora of evidence including academic studies, coroners' reports, Parliamentary Inquiries at State and Federal levels of Government, Court Decisions and most recently the International Labour Organization that there is a link between rates and methods of pay on the one hand and safety on the other. This can, and unfortunately all too often does, have tragic consequences for owner-drivers and all road users.

Some of the above evidence includes the following:

- Report to the Honourable E.A. Willis, Minister for Labour and Industry on Section 88E of the *Industrial Arbitration Act*, 1940-1968 in so far as it concerns Drivers of taxi-cabs, private hire cars, motor omnibuses, public vehicles and lorry owner-drivers (referred to as the "Beattie Report" in our earlier submissions);
- *Safe Payments Addressing the Underlying Causes of Unsafe Practices in the Road Transport Industry*, the National Transport Commission with the Honourable Lance Wright QC and Professor Michael Quinlan, October 2008;
- *R v Randall John Harm*, District Court of New South Wales, per Graham J, 26th August 2005;
- *Long Distance Truck Drivers: On road performance and economic reward*, December 1991, Federal Department of Transport and Communications;
- In *Re Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No 2)* [2006] NSWIRComm 328 the Full Bench of the Industrial Relations Commission of NSW said: "we consider that the evidence in the proceedings establishes that there is a direct link between methods of payment and/ or rates of pay and safety outcome";
- *National Road Freight Industry Inquiry*, *Report of Inquiry* to the Minister for Transport, Commonwealth of Australia, (1984), Canberra;
- *Beyond the Midnight Oil*, An Inquiry into the Managing of Fatigue in Transport, House of Representatives Standing Committee on Communication, Transport and the Arts, October 2000, Canberra;

- C. Jones, J. Dorrian and D. Dawson, 'Legal Implications of Fatigue in the Australian Transportation Industries', 45 *JIR* 344 at 351;
- Professor Michael Quinlan, *Report into Safety in the Long Haul Trucking Industry,* A report Commissioned by the Motor Accidents Authority of New South Wales, 2001, Sydney;
- R Johnstone, 'The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement', March 2002, National Research Centre for OHS Regulation, the ANU;
- *WorkCover Authority of NSW v Hitchcock* (2005), 139 IR 439; and
- International Labour Organization, Tripartite Sectoral Meeting on Safety and Health in the Road Transport Sector, TSMRTS/2015/15: *Resolution concerning best practices in road transport safety,* Geneva, 12-16 October 2015.

In fact, Chapter 6 and the basis for it has enjoyed bi-partisan support in NSW and at a Federal level for many years. Without going through an exhaustive history, this includes:

- In 1968 the Coalition Askin Government commissioned the Beattie Report as referred to above and in our earlier submissions;
- In 1979 the Labor Wran Government strengthened protections for owner-drivers by introducing conciliation and arbitration of disputes, the ability to make contract determinations providing for minimum rates of pay and introducing unfair dismissal rights in the *Industrial Arbitration (Amendment) Act 1979;*
- In 1991 the Coalition Greiner Government reproduced the 1979 provisions in the *Industrial Relations Act 1991;*
- In 1993 the Coalition Fahey Government introduced the *Industrial Relations (Public Vehicles and Carriers) Amendment Act 1993* to extend the definition of owner-drivers to include motor cycles and bicycles to Chapter 6 in order to adapt and regulate the new wave of courier work being performed by these vehicles;
- In 1994 all parties supported the *Industrial Relations (Contracts of Carriage) Amendment Act 1994* which protected owner-drivers from losing large amounts of goodwill that they were required to pay when entering into a contract;
- In 1996 the Carr Labor Government reproduced the above owner-driver protections into what is now known as Chapter 6 of the *Industrial Relations Act 1996*; and
- In 2006 the Federal Howard Government specifically exempted Chapter 6 from its *Independent Contractors Act 2006* when most other State legislative systems were replaced, with the Minister for Employment and Workplace Relations, The Honourable Kevin Andrews MP, stating during the second reading of the Bill that '*…in New South Wales there has been long – indeed, almost 30-year – bipartisan support for special arrangements for owner-drivers. These arrangements include allowing owner-drivers to bargain collectively with transport operators and have minimum rates of pay and goodwill compensation set by a tribunal. These provisions in state legislation will remain, given the special circumstances of owner-drivers in having to operate within very tight business margins because of the large loans they have taken out to pay for their vehicles.'*

The brief timeline above shows that when circumstances have changed for owner-drivers in NSW over the last 50 years, the legislation has adapted with it and there has in fact been a bi-partisan approach to strengthening protections for owner-drivers (and in this specific case taxi drivers). With the advent of Uber and other point to point forms of passenger transport there is no reason that the

legislature should not adopt the same approach and strengthen Chapter 6 to ensure an even and fair playing field across the industry.

In addressing the part of the question regarding why drivers remuneration and conditions should not be a factor when looking at competitiveness, the TWU has long argued that opening up remuneration and conditions of drivers to competitive pressures will simply result in a race to the bottom in the transport industry due to the specialised factors at play within it.

The Chair drew an analogy between the situation of regulating a plumber and a taxi driver and described the protections in Chapter 6 as 'unusual' and 'an historical aberration' at page 49 of the transcript. The above answer to this question adequately (if succinctly) deals with the evolution of these protections as well as the necessity for them, however some other points regarding the nature of the industry should be made as to the differences between the transport industry and many others (noting that the TWU does not profess to understand the intricacies of the plumbing industry).

Firstly a plumber is not 'tied' to any particular client in the same way that a taxi driver (and owner-drivers generally) who fall within Chapter 6 is. A plumber will often have multiple, non-recurring clients at any given time. A taxi driver covered by Chapter 6 does all or the vast majority of their work for one bailor and is reliant on them for their income. The same rates are charged to different customers and the work is essentially the same in the taxi industry, there being little differential in the character of work performed in spite of different levels of experience and competency. This is a very different scenario to the situation involving an experienced plumber with multiple clients and different types of work that can be performed.

Like anything, the laws of supply and demand regulate much of how an industry operates. Currently there is a lack of supply and a lot of demand for plumbers and tradespeople generally. On top of this there are some barriers to entry (being qualifications requiring a number of years to obtain), meaning that this is more often than not a price-setting industry. In a price-setting industry cost recovery is built into the price of a service.

The transport industry is a cut-throat, highly competitive, privatised industry with low barriers to entry for drivers (in the case of taxi drivers often a driver license, some background checks and completion of a short course) and now with the advent of Uber and other like companies lower barriers to entry for competitors in what had traditionally been a more regulated and higher barrier to entry industry. It is the textbook example of a price-taking industry.

The above problem is exacerbated when looking at the wider transport industry, with companies competing for contracts and wages often being a defining factor in winning the tender. Owner-drivers are at the bottom of the supply chain and are the victims of cost-cutting by every link in the chain above them, with their wages and conditions falling victim to this. Without a floor in the form of minimum contract determinations that are based on cost recovery, owner-drivers would be pushed to the brink. Given the deregulation of the point to point industry more recently, there is no doubt that the same pressures that drivers face both have and will increase.

The answer to the above issues for both bailees and bailors in the point to point industry is not to remove all regulation and force a race to the bottom where taxi drivers are pushed to the limit and have to work more hours to make the same money, but rather to expand the coverage of Chapter 6 to

cover the rest of the point to point industry, such as Uber. As addressed in the legislative timeline above, this has always occurred when circumstances have changed.

In other words, rather than the legislature abolishing all regulation in the point to point industry, it instead needs to work with stakeholders in order to expand regulation to ensure that it provides a level playing field and that it is fair to all participants and we would be more than happy to work with all parts of the industry and with Government to ensure this occurs.

Question 5 – You comment in your submission that a portable leave entitlement scheme for taxi drivers should be introduced. Are you aware of any like schemes operating in other jurisdictions and, if so, could you provide the details of such schemes?

In paragraphs 52-55 of our original submissions we address the rationale for such a scheme to be introduced. We are unsure of any scheme that addresses the exact situation in relation to taxi drivers in NSW, which is not to say that they don't exist (for example, in jurisdictions where taxi drivers are classified as employees they would be protected by transfer of business provisions).

This is an issue which needs to be examined more broadly in a number of industries and we would welcome an inquiry into this issue.

Transport Workers' Union of NSW
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