

**Submission
No 6**

WORKPLACE ARRANGEMENTS IN THE POINT TO POINT TRANSPORT INDUSTRY

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Please note: This submission refers to a number of appendices. The appendices are a large file and therefore are not available for download. To request a copy please contact the Secretariat.



This submission is provided to the
NSW Parliament Legislative Assembly
Transport and Infrastructure
Committee in support of its inquiry into
workplace relations in the point to
point transport sector

NSW Taxi Council Submission

Workplace Relations in the
NSW Point to Point
Transport (Taxi and Hire
Vehicle) Industry

8 July 2016

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1. Executive Summary

- 1.1 The NSW Taxi Council welcomes the opportunity to provide a submission to the NSW Parliament’s Legislative Assembly’s Transport and Infrastructure Committee’s Inquiry (Committee of Inquiry) into Workplace relations in the point to point transport industry.
- 1.2 Despite the passage of the *Point to Point Transport (Taxis & Hire Vehicles) Act 2016* there remain significant structural inequalities between taxis and private hire vehicles (including ridesharing providers). This is particularly the case in the area of workplace relations where 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.
- 1.3 These inequities were repeatedly highlighted during the debate on the *Point to Point Transport (Taxis & Hire Vehicles) Act, -2016* which led to these concerns being referred to the Committee of Inquiry. This decision by the NSW Parliament is considered appropriate and is welcomed by the NSW Taxi Council.
- 1.4 In this context, it is also considered important that the Committee of Inquiry review the clauses in the *Point to Point Transport (Taxis & Hire Vehicles) Act, 2016* that have removed obligations on the hire car industry in respect of its obligations under the IR Act
- 1.5 Clear evidence is emerging that ridesharing services are a direct substitute for taxi services. Whilst taxis have exclusive rights to rank and hail (for sound public safety reasons), the NSW Taxi Industry must meet a higher regulatory burden (safety cameras, alarm systems etc). Furthermore the lines between hailing and e-hailing (rideshare platforms) are becoming increasingly blurred and therefore the operating environments for drivers are very similar. It is therefore considered that this similarity in operating environments between taxis and ridesharing is highly inconsistent with the significant disparity in the industrial arrangements between the two service providers.
- 1.6 In its Report, the Point to Point Transport Taskforce identified that the high level of regulation of the taxi industry comes at a significant cost to the stakeholders which, in turn, is ultimately borne by the consumer.
- 1.7 The Government’s response to the Report included a raft of reforms aimed at creating “*a more level playing field by stripping back unnecessary red tape which has been adding to costs and stifling innovation.*”
- 1.8 However, while the changes to certain regulations affecting the taxi industry have been reduced or removed, Ch 6 of the IR Act and the associated Determination continue to impose prescriptive industrial obligations that fall on taxi operators but on no other participants in the point to point transport industry.
- 1.9 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.
- 1.10 The obligations placed on operators in metropolitan Sydney by the Determination made under Ch 6, including to provide paid leave and pay for downtime, do not exist elsewhere in NSW or Australia. In addition, Ch 6 of the IR Act provides taxi drivers with a right unique

to NSW to challenge the termination of a bailment contract, and does so on terms more favourable than unfair dismissal rights.

- 1.11 The breadth and scope of this legislation is particularly significant given that no comparable legislation applies to competitors in the point to point transport industry, notwithstanding that Uber in particular is a large multinational organisation whereas the vast bulk of operators in the taxi industry are very small businesses.
- 1.12 The obligations imposed on the operators of taxi cabs and drivers in the Sydney Metropolitan Transport District by this legislation:
- (a) are inconsistent with the changes otherwise being introduced by the Government;
 - (b) prevent the taxi industry in this region from competing fairly with its competitors;
 - (c) significantly increase the cost of delivering taxi services thereby limiting the ability of the taxi industry participants to innovate in response to customer demand;
 - (d) are unique to Sydney, and so are inconsistent with the lower regulatory burden enjoyed by the taxi industry elsewhere in NSW and across Australia;
 - (e) are not appropriate having regard to the significant changes affecting the taxi industry; and
 - (f) do not promote compliance, efficiency and productivity.
- 1.13 The NSW Taxi Council therefore considers that the most appropriate course of action to address the above concerns is for Chapter 6 of the IR Act to be amended to remove reference to bailment of taxi cabs. It is critical to the establishment of a competitively neutral regulatory framework for point to point transport providers that legislation should as far as possible treat all drivers in the same manner to avoid advantages being enjoyed by any particular method of service of another.

2. Definitions

Term	Meaning
1940 Act	<i>Industrial Arbitration Act 1940 (NSW)</i>
Commission	NSW Industrial Relations Commission
Contract Determination	The Taxi Industry (Contract Drivers) Contract Determination 1984.
IR Act	<i>Industrial Relations Act 1996 (NSW).</i>
Report	The Point to Point Transport Taskforce Report to the Minister for Transport and Infrastructure dated November 2015 .
Taxi Council	The NSW Taxi Council Limited.
TIA	Taxi Industry Association
TWU	Transport Workers Union

3. Introduction

- 3.1 The NSW Taxi Council is the peak body for the NSW Taxi Industry. It represents taxi networks, owners and operators, and it also advocates for better outcomes for NSW taxi drivers.
- 3.2 In NSW there are approximately 4,000 licence owners, in excess of a 100 networks, over 5,000 taxi operators and more than 23,000 authorised drivers. The industry is therefore the industry is the livelihood for over 30,000 people and their families.
- 3.3 The NSW taxi industry is a major contributor to the State's public transport system. It provides approximately 170 million passenger journeys each year and it meets customer travel needs right across NSW. It functions as a door to door transport service that operates 24 hours a day 7 days a week. The NSW taxi industry also provides services at times when other forms of public transport either significantly reduce service levels or cease operations altogether. Taxis are often the only form of public transport for some members of the community, and they provide essential transport services to some of the most disadvantaged people in the State.
- 3.4 The NSW taxi industry is also a significant contributor to the State's economy, providing employment opportunities for tens of thousands of drivers, operators, and network management staff as well as for other industries which rely on economic activity that the NSW taxi industry generates. The taxi industry contributes to the economic generation of the State by connecting people efficiently and effectively for business, education, tourism and essential lifestyle activities. The highly respected international accounting firm Deloitte Access Economics has undertaken an independent assessment of the economic contribution of the NSW Taxi Industry and has estimated the annual contribution of the industry to the NSW economy to be in the order of \$1.15 billion per annum.
- 3.5 The NSW Taxi Industry is made up of a complex array of providers, ranging from the licence owners (the licence being the principal legal instrument to provide a taxi service), through to operators and drivers. A licence owner may own, operate and drive a taxi, where as some elect only to own and be the operator of the vehicle. Some licence owners have chosen to invest in a licence and then subsequently lease the licence to an operator. Authorised taxi networks are the principal means through which taxi services are coordinated. They provide direct booking services to the public and a range of safety and other services to operators and drivers.
- 3.6 The NSW Government does not, unlike other forms of public transport, procure taxi services from the NSW Taxi Industry. Whilst some financial support is provided to assist disadvantaged members of the community to access taxi services, on the whole the taxi transport system has been created and continues to operate as a consequence of the many people and organisations that have committed capital to invest in the industry. The NSW Taxi Industry also generates revenue for the NSW Government through the sale of licences and stamp duty on third party licence sales. It also generates other revenue through authorisation fees and indirect taxes.
- 3.7 The point to point transport sector consists of a wide range of services providers including the taxi industry, the hire car industry, tourist vehicles as well as the community and

courtesy transport sector. It is regulated by the *NSW Passenger Transport Act, 2014* and supporting regulations¹.

- 3.8 The taxi industry is the most highly regulated industry within the point to point transport sector with community and courtesy transport having little regulatory oversight by comparison.
- 3.9 In April 2014, an international company, Uber, launched a new point to point transport service in Australia known as ridesharing (Uber X). Ridesharing, the provision of public passenger transport services for fare or consideration is illegal² and is not governed by any laws or regulations in NSW. Despite the declaration of the NSW Government and the compliance action by the NSW Roads & Maritime Services (RMS), Uber has continued to operate Uber X services in NSW.
- 3.10 Ridesharing is in effect a form of fully deregulated taxi services where the market alone determines standards in respect of quality and safety.
- 3.11 In its submission to the NSW Government’s Point to Point Transport Taskforce, the NSW Taxi Council highlighted the need for reform to the NSW Contract Determination in order to rebalance the inequities between taxis and ridesharing for industrial relations. This proposal was based on an assessment that the reforms arising from the Point to Point Taskforce’s deliberations would result in a level playing field being established for all providers.
- 3.12 This has not occurred.
- 3.13 As a consequence of the NSW Government’s point to point transport reforms ridesharing services are only subject to minimal regulations, including no licence fee, whereas the taxi industry is required to continue to meet high levels of regulatory overheads. In this context, the NSW Taxi Council considers that more substantial reform to the industrial framework is required in order to address the uneconomic disparity between taxi operators and ridesharing providers.

¹ It should be noted that the *NSW Passenger Transport Act, 1990* has not yet been repealed and the *Passenger Transport Regulation, 2007* is yet to be replaced by new regulations that will underpin the new Act. This is the issue of separate submissions.

² Transport for NSW Media Statement, *Statement Regarding Ridesharing Apps*, 30 April 2014

4. Hire Vehicles/Ridesharing Services

- 4.1 It is clear that the relationship between taxis, hire cars and ridesharing vehicles is becoming less distinguishable. The recently introduced reforms for the point to point transport sector have further broken down these vehicle categorisations, particularly between hire cars and ridesharing, and there is strong evidence that ridesharing vehicles are operating in a manner that is essentially identical to taxis.
- 4.2 It has also been recently reported that there are ridesharing (Uber) ‘fleet operators’ entering the market.
- 4.3 Recent media reports and other public material (**Appendix 1**) clearly outline that some ridesharing ‘fleet operators’ were operating fleets in excess of 30 vehicles and leasing these vehicles out on a weekly basis. Furthermore, there were admissions from these fleet operators that vehicles were operating 24/7 and that sub-leasing was common practice.
- 4.4 Uber’s operating profile is similar to that of taxi operators and drivers. Uber’s own public information clearly sets out that they operate in the same high risk environments, at the same periods as what taxis do. Furthermore, the publicly stated remuneration figures for Uber drivers is clearly at odds with the statements made at the roundtable by Uber representatives that the vast majority of its drivers operate less than 20 hours a week.
- 4.5 It is also worth noting that in the recent judgement by the Western Australian Supreme Court, His Honour, Justice Paul Tottle observed that Uber X (ridesharing service) is the functional equivalent of a taxi service³. Justice Tottle also noted that:

*Uber Australia’s financial statements for the year ended 30 June 2013 recorded its principal activity as **the provision of taxi cab services**⁴ (our emphasis)*

- 4.6 Given the similarity in operating environments between taxis and ridesharing, the disparity between workplace arrangements is not justified. In addition to the basic entitlements regarding leave and termination arrangements, taxi operators are also required to provide workers compensation cover and third party property insurance arrangements for drivers. There is no such obligation on private hire/ridesharing providers and whilst some providers may claim to have appropriate insurance arrangements for drivers, the lack of any regulatory compulsion to do so leaves these drivers exposed to potential loss and damages claims. In some cases, these claims could lead to individual bankruptcy and life-long financial hardship.
- 4.7 The importance of workers compensation cover in the operating environment of the point to point transport sector cannot be overstated. Drivers of taxis, hire cars and ridesharing services are all exposed to risks arising from the accidents and can be subjected to anti-social and criminal behaviour including racial abuse and assaults. Workers compensation cover provider drivers with appropriate cover and it is considered appropriate that all point to point transport providers must be obligated under law to meet this important requirement.

³ WASC\CIV\2016WASC0138, dated 3 May 2016, p.5

⁴ *Ibid*

- 4.8 In this context, Schedule 7.2 of the *Point to Point Transport (Taxi and Hire Vehicles) Act, 2016*, which amends the IR Act to remove the description of the relationship of an arrangement between a hire car vehicle owner and a hire car driver to be one of bailment (unless otherwise specified) is instructive. This removes any capacity of the State to regulate the hire vehicle/ridesharing sector under Chapter 6 of the IR Act.
- 4.9 Furthermore, on 18 December 2015, the NSW Government repealed a significant number of regulations under the *Passenger Transport Regulation, 2007*. This included the requirement for a hire vehicle to hold a licence. The consequence of this is that it is no longer a statutory requirement for a hire vehicle owner to hold third party property insurance, leaving drivers potentially exposed to claims as outlined in 4.6 above.
- 4.10 The consequence of these regulatory changes intended or otherwise, has exposed drivers of hire vehicles/ridesharing services in NSW to market based workplace arrangements with little or no protections. Current ridesharing service providers have contractual arrangements that include clauses where the driver agrees to be bound by the laws of a foreign country, where the price of fares (driver remuneration) can be changed at any time, and they can be removed from the service platform with no recourse.
- 4.11 Specific examples of these workplace practices are contained at **Appendix 2**.

5. NSW Taxi Industry Industrial Arrangements

- 5.1 Taxi operators do not employ drivers. Rather drivers and operators enter into bailment contracts under which the operator (bailor) agrees that the driver (bailee) can use their taxi cab in return for either a fixed payment (a “pay-in”) or a share of the fares. It is a commercial relationship that the authorities describe as a “joint enterprise” or a “joint venture” rather than an employment relationship: *Yellow Cabs of Australia Ltd v Colgan* [1930] AR (NSW) 137; *Dillon v Gange* (1941) 64 CLR 253; *Northern District Radio Taxicab Co-operative Ltd v Commissioner of Stamp Duties* [1975] 1 NSWLR 346; *Commissioner of Taxation v De Luxe Red and Yellow Cabs Co-operative (Trading) Society Ltd* (1998) 82 FCR 507; *2001 Taxi Industry (Contract Drivers) Contract Determination Case* [2001] NSWIRComm 320 at [25].
- 5.2 This has even been highlighted in recent cases under current Commonwealth Statutes. Note the Full Bench of Fair Work in *Voros and Dick* *Voros v Dick* (2013) 237 IR 248
- 5.3 Bailment has long been recognised as the only practicable and economical system on which the taxi business might successfully be conducted and one entered into without any ulterior purpose to avoid the operation of industrial regulation: *Green Cab Service Pty Ltd v Platt* [1953] AR (NSW) 642.
- 5.4 The *Report on Section 88E of the Industrial Arbitration Act 1940-1968* led by Beattie J at [8.33] made an observation that is equally applicable today:

There is nothing inherent in the bailment system which makes it less advantageous to drivers than employment. Whether a driver is as well-off as a bailee as he would be as an employee depends entirely upon the terms of the respective contracts. A bailment contract has some attractions for a driver which a contract of employment lacks. Under it the driver is a completely free agent not subject to the dictates of a boss. We think that is a real attraction for many drivers.

5.5 In theory a taxi operator could employ one or more drivers. If that occurred in NSW (or elsewhere in Australia) the provisions of the *Fair Work Act 2009* (Cth) would apply and the operator would need to provide the minimum employment standards mandated by that Act and by the *Passenger Vehicle Transportation Award 2010*. Chapter 6 of the IR Act would not apply to that relationship.

6. Chapter 6 of IR Act

6.1 Ch 6 of the IR Act is unique in Australia in conferring on an industrial tribunal, namely the Commission, jurisdiction to regulate the taxi industry.

6.2 Specifically, by ss 307 and 312 of the IR Act, the Commission has jurisdiction to inquire into and make ‘contract determinations’ with respect to contracts of bailment under which a taxi-cab is bailed to a person to enable the person to ply for hire.

6.3 A ‘contract determination’ is akin to an award and is binding on all bailors and bailees that fall into a class determined by the Commission.

6.4 By s 312, the matters about which the Commission may make contract determinations are:

- (a) the remuneration of bailees under those contracts;
- (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, and payments in lieu thereof;
- (d) the minimum number of hours per day, per week or for any longer period during which the bailor is to bail the vehicle to the bailee;
- (e) the maximum number of hours per day, per week or for any longer period that a bailee may drive a public vehicle (where regulation thereof is imperative); and
- (f) other conditions.

6.5 While Ch 6 applies to contracts of bailment it does not apply to other contractual arrangements whereby a person might undertake point to point passenger transport work. Not only does the Determination, described below, not apply to Uber currently the Commission does not have power to extend it to apply to them. Unless the bailment provisions in Ch 6 are removed the current inequitable approach will continue, pursuant to which different and higher regulatory obligations fall on the taxi operators (made up predominantly of small business owners) as against the rest of the point to point transport industry.

7. The Determination

7.1 The Determination (**Appendix 3**) was made in 1984 and has been varied only in minor ways since then. It applies to all bailee taxi drivers and bailor taxi operators in the Sydney Metropolitan Transport District. No separate determination has been made for other taxi drivers and operators in NSW.

7.2 As a consequence taxi drivers and operators in metropolitan Sydney are subject to different and greater regulatory obligations than those that apply elsewhere across Australia.

7.3 A detailed history of the circumstances which gave rise to the Determination is attached as **Appendix 4**.

- 7.4 The terms of the Determination can be conveniently grouped into three categories.
- 7.5 First, the Determination regulates the payments made by the taxi driver to the operator. Drivers can choose to either:
- (a) pay the operator 50% of their fare earnings (55% in the first year), with the operator paying for fuel (Method 1); or
 - (b) pay the operator an agreed pay-in and the driver pays for fuel (Method 2).
- 7.6 For those who choose Method 2 (which is virtually all drivers) the Determination sets maximum pay-ins for the various shifts. However, in practice the market dictates that drivers invariably pay less than the maximum permitted. Payments by taxi drivers in all other jurisdictions are either not regulated, or regulated directly by legislation, as detailed below.
- 7.7 Second, the Determination imposes obligations on operators, principally to provide to “permanent bailees” (those who take a taxi cab for five shifts a week or if on night shift at a rate per week that would equal 220 shifts a year and who are not casual bailees) certain entitlements, namely:
- (a) 5 weeks annual leave (clause 19);
 - (b) 8 days sick leave, 5 in the first year (clause 20); and
 - (c) long service leave (clause 22);
- with such leave paid at specific rates set out in the Determination (the rates are referred to separately below). In practice these obligations are often ignored, the parties instead agreeing on a lower pay-in, in return for not pressing the right to such entitlements. Yet, since they are obligations that cannot be legally avoided, they impose unnecessary red tape which adds to costs and stifles innovation.
- 7.8 Third, the Determination imposes numerous requirements on drivers, including: obligations to require “the log” and taxi to be inspected by the operator (clause 7); not to permit others to drive the taxi (clause 8); not to use the taxi to do anything other than transport passengers and their luggage (clause 9), which would prevent drivers using the taxi to courier goods; to comply with other specified laws (clause 11); to deal with accidents in a particular manner (clause 13); to not operate the taxi outside the area it is licensed to operate (clause 14); to clean, prepare and drive the taxi for presentation at the Department of Transport (clause 15); as to the time to report for duty (clause 16); and to pay a bond to an operator (clause 21).
- 7.9 These are requirements not imposed on non-taxi point to point drivers and are requirements that are inconsistent with other regulatory changes being introduced. They are also matters which impose unnecessary red tape which add to costs.
- 7.10 For example, the deregulation of fares in the point to point industry has limited impact for the taxi industry while there remains an obligation imposed on taxi operators to provide certain monetary benefits to taxi drivers. Under the current rates in the Determination, the following sums must be paid to permanent taxi drivers:

Table 1 – Wages Rates Summary

Shift	Maximum Pay-in Including GST \$	Km	Excess per Km
Day Shifts - all days	175.01	260	0.72 cents
Night shifts – Monday	189.89	300	0.72 cents
Night shifts – Tuesday	193.18	320	0.72 cents
Night shifts - Wednesday	208.30	320	0.72 cents
Night shifts - Thursday	235.03	350	0.72 cents
Night shifts – Friday	266.55	400	0.72 cents
Night shifts – Saturday	266.55	400	0.72 cents
Night shifts – Sunday	206.63	320	0.72 cents

Table 2 – Other Rates and Allowances (exclusive of GST)

Clause No.	Brief Description	Amount \$
2(j)	Excess fee amount	0.72 cents
19(b)(i)	Annual leave pay (bailee - 12 months) - per week	833.28
19(b)(ii)	Annual leave pay – (bailee- 3 to 12 months)	833.28 x 4/48 x no. of weeks
20	Sick Leave	167.22
21	Bond	139.79
23(ii)	Incomplete shift - per hour	20.91

- 7.11 The legislative requirement to pay these sums to taxi drivers necessarily increases fares that must be charged to passengers to cover these expenses. In practice, it leaves other stakeholders in the point to point industry (most notably Uber) free to set fares as the market dictates whilst forcing taxi operators (who are mainly small business owners) to hold their fares above a certain level to cover their costs. The end result is that the taxi industry in Sydney will be less competitive when compared to the ride-sharing industry.
- 7.12 In addition, it is worth noting that the Determination is not only antiquated and out of date in imposing on the taxi industry a series of regulations that do not fall on others. It is out of date on its face. For example: in clause 4 it requires a written log to be maintained for those under Method 1, “in duplicate”, in a required format recording every trip, its start and finish point and the fare, despite advances in technology which would allow such records to be kept automatically in a format that best suits the particular enterprise; in clause 18 it requires drivers to dress as required by “Department of Transport regulations”; and in clause 24 it gives “absolute preference of employment” to members of the TWU, NSW Branch and persons who “have been members of the Forces during the war”.
- 7.13 Beyond providing the maximum pay-in amounts (something that could readily be done by direct legislative instrument or another method) the Determination is rarely applied in practice. That is notwithstanding subsection 317(1) of the IR Act, which provides:

Subject to such exemptions and conditions as the Commission may direct, a contract determination is binding on all bailors and bailees or all principal contractors and carriers who are parties to contracts of the class to which the determination relates as

the Commission may direct.

- 7.14 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.
- 7.15 The most common type of arrangement is where an operator agrees to charge a lower pay-in than what he or she ordinarily would, in return for the driver agreeing not to claim leave or other entitlements from the operator. In effect, it is an inverse of the casual employee arrangement, where the casual employee is entitled to a higher hourly rate in compensation for not receiving employment entitlements. This reflects a reality recognised by the Beattie Report, that drivers can obtain benefits that are preferred over those that could be obtained by employees through agreement with operators.
- 7.16 That such arrangements are entered into does not lead to a conclusion that there is a need to retain Ch 6 generally or the Determination in particular. That is because of the bargaining power held by drivers:
- (a) even before Uber, Taxi drivers had effective bargaining power, evidenced by the fact that although the Determination sets maximum pay-ins which an operator can charge a driver for bailing a taxi per shift, drivers were (and remain) routinely able to insist on pay-ins that were substantially below the maximum pay-in;
 - (b) the advent of Uber, even before its legalisation, saw a large number of taxi drivers cease bailing taxis and driving for Uber instead;
 - (c) this has led to increased competition for the remaining for drivers between operators, who must retain drivers in order to ensure profitability, and a correlative increase in the ability of drivers to insist on lower pay-ins and other conditions of benefit to the driver (for example, bailment of a taxi for a week at a time, with the driver then on-bailing the taxi to other drivers, even though that is contrary to cl 8 of the Determination);
 - (d) in an environment where the market power lays with the drivers, there is no reason why drivers cannot leverage that market power to insist on payment of entitlements, yet there is a persistence by drivers in entering into agreements with operators which involve foregoing entitlements.
- 7.17 As can be seen, the current regulatory regime established by Ch 6 is antiquated, out of date, largely ignored despite the legal risk of such conduct, and imposes obligations that fall only on the taxi industry and not others who compete with taxis for point to point services.
- 7.18 To the extent that the Determination or Ch. 6 of the IR Act does include matters that the legislature consider necessary to regulate, such matters can and should be regulated directly in a manner that does not distinguish between different forms of point to point service so that all stakeholders can access and be covered by these rules.

8. The proposed legislative change to Ch 6 of the IR Act

8.1 The Taxi Council proposes that Chapter 6 of the IR Act be amended to bring it into line with the rest of Australia by removing the jurisdiction of the Commission to regulate the taxi industry. Such regulation should instead be done, to the extent necessary, by direct legislative instruments that apply equally to all participants in the point to point transport industry.

8.2 That would be achieved by the cessation of the Determination and by removing the reference to “a contract of bailment” and associated references to bailors and bailees in Ch 6. Specifically sections 312 and 322(1) of the IR Act would be removed and consequential amendments made to other sections, including ss 311, 314(1) and (4), 317(1), and 326(1)(c) to remove the reference to contracts of bailment, bailee drivers or bailors.

9. Why is it necessary to change Chapter 6 of the IR Act?

9.1 No level playing field

- (a) The changes made in response to the Report to date do not remove a fundamental inequality in the level of regulation affecting the taxi industry when compared to other stakeholders in the point to point transport industry. That is, the taxi industry remains at a significant disadvantage when compared to the likes of the ride-sharing or hire car industry as it remains subject to prescriptive and crippling industrial legislation.
- (b) As noted already, the Determination obligates the bailor operator to provide bailee drivers with various leave entitlements. In addition it requires operators to provide:
 - (i) oil, maintenance and vehicle registration (clause 5 of the Determination);
 - (ii) fuel if the bailee is operating under method 1 (clause 5 of the Determination);
 - (iii) certain rights to notice on termination for the bailee (clause 10 of the Determination); and
 - (iv) payment for downtime (permanent drivers only) (clause 23 of the Determination).
- (c) Further, as a result of a successful application to vary the Determination (still to be implemented), bailee drivers are expected to become eligible to have superannuation contributions paid on their behalf by operators.
- (d) In addition to providing a mechanism by which leave and other entitlements must be provided, ch 6 includes rights for bailee drivers to seek reinstatement and compensation for termination of the bailment relationship. S 314(1) of the IR Act gives the Commission the power to order the reinstatement of a bailee taxi driver who has been terminated by a bailor taxi operator. Alternatively, the Commission can order compensation where it is impracticable to order reinstatement of a bailee driver up to an amount equal to the amount paid to that driver for the 6 months immediately before the termination.
- (e) Importantly, there are no restrictions on which drivers may seek redress under ch 6 of the IR Act. This makes it more generous than unfair dismissal rights

enjoyed by employees. Under the Fair Work Act there are important limits imposed on employees in respect of who may bring a claim seeking reinstatement or compensation for unfair dismissal. For example, employees are not eligible to make an unfair dismissal claim if their employer is a “small business employer” and has employed the employee for less than 12 months. In addition, for an employee to succeed in an unfair dismissal claim against a small business employer, the Fair Work Commission must be satisfied that the dismissal was not consistent with the “Small Business Fair Dismissal Code”. Employees must lodge an application for unfair dismissal within 21 days after the dismissal takes effect. None of these restrictions are included in the IR Act in respect to drivers and operators.

- (f) When these rights are compared to those afforded to ridesharing platforms such as Uber drivers, the comparison is stark. Uber drivers have no unfair dismissal or like right. At its highest they may be entitled to make claims pursuant to the Commonwealth *Independent Contractors Act*. That Act, however, provides no right to challenge a dismissal, nor provides for any minimum entitlements. Such rights that it does create (if they could be accessed) are limited to seeking to vary or declare void a contract that is “unfair” or “harsh”. There is no authority that establishes that a contractor can seek redress under that Act in circumstances where his or her contract has already been terminated. Given those differences there is an obvious unfairness between the rights of Uber drivers and taxi drivers (even if Uber drivers were to be classified as independent contractors). To an extent Uber drivers are treated no different to any other contractor seeking to challenge aspects of his or her commercial contract. To the extent that there is a view that simplified dispute resolution mechanisms should be available, then the rights contained in the IR Act do not provide an adequate model and a uniform national solution should be sought.
- (g) The broad range of entitlements owed to bailee taxi drivers in metropolitan Sydney is not found anywhere else in the point to point transport industry. Neither Uber nor the operators (Vehicle owners) of hire car services are required to make any provision for drivers irrespective of whether or not such drivers work on a permanent or casual basis.
- (h) There is no obvious reason why such a difference should exist between the entitlements of taxi drivers in the Sydney Metropolitan Transport District when compared to other drivers in the point to point transport industry. It is at odds with the Government’s stated purpose of creating a level playing field.
- (i) To the extent that the Government intends to reform the point to point transport industry to create a level playing field between different competitors, legislation which creates a significant inequality between those participants when compared to taxi operators must be reviewed.

9.2 The high cost to the NSW taxi industry

- (a) The Government response to the Report linked the creation of a level playing field with the removal of prescriptive legislation which adds to the costs borne by the industry which are ultimately passed onto the consumer.

- (b) It has long been understood that the bailment relationship regulated by the Determination is fundamentally different to an employer-employee relationship. The goal of regulation has never been to set a minimum level of income for taxi drivers. In his Honour's reasons concerning the 2001 variation to the Determination, Marks J observed:⁵
- Although it is not necessary to characterise the relationship of bailor and bailee driver by reference to any relationship recognised by law, it seems to me that the relationship is in the nature of a joint venture whereby the bailor contributes the use of the taxicab and the bailee driver undertakes the operation of the taxicab on the basis and in the manner described in the contract determination.*
- (c) These comments echo observations made by the Industrial Commission as long ago as 1930 in the decision in *Yellow Cabs of Australia Ltd v Colgan* [1930] AR (NSW) 137. They reflect the consistent recognition by the Commission and its predecessors that the purpose of regulation of contracts of bailment is not to provide a minimum wage to drivers. To the contrary, because the commercial nature of the relationship between driver and owner/operator is one of interdependence and joint enterprise, it is critical that any industrial regulation not stifle the incentives of drivers and operators to conduct themselves in a manner consistent with the benefit of the joint enterprise as a whole.
- (d) Compliance with the Determination has had a crippling effect on the NSW taxi industry. Over the last 20 years almost all major taxi fleets have disappeared and the majority of taxi operators are now small businesses usually comprised of the owner/operator and one or two bailee drivers who share the driving of the cab. The obligations included in the Determination impose a heavy burden on these small business operators which is striking when one considers that other participants in the point to point transport industry operate large multi-national companies and are exempt from any comparable obligations.
- (e) As stated above, 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. Ultimately the taxi industry will be restrained in its ability to compete freely with other stakeholders who (despite their size) are not subject to the same obligations to their drivers.
- (f) In addition to costs that fall on operators and drivers, Ch 6 also adds a layer of additional costs on the taxi industry, that do not apply to others in the wider point to point transport industry:
- (i) the Determination is only updated through a process of an application to vary the Determination made to the Commission, which must hear evidence and submissions before it will vary the Determination; and

⁵ 2001 *Taxi Industry (Contract Drivers) Contract Determination Case* (Matters No IRC 3119 and 3282 of 2001) [2001] NSWIRComm 320 at [25].

- (ii) almost universally the applications are disputed by the parties to the Determination (notwithstanding that the drivers are represented by the TWU which only represents a minute percentage of drivers) giving rise to a contested hearing and in some cases significant legal costs and delay.
- (g) The Commission has expertise and experience in respect of employment relationships. It does not specialise in dealing with commercial relationships which are affected by competition regulation principles.
- (h) Fundamentally, the dynamics of the taxi industry and the commercial relationship between operators and drivers do not suit industrial regulation and yet the industry has imposed upon it prescriptive, costly and ineffective legislation.

9.3 Uniformity

- (a) 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.
- (b) In the rest of NSW, the almost universal arrangement is a 50/50 split between the operator and the driver of the revenue the driver earns from driving a taxi. There may be slight variations as to the percentage of the profit split; for example, an operator may be able to negotiate retaining 55% of the gross revenue as opposed to 50%.
- (c) Taxi operators in NSW who do not operate in the Sydney Metropolitan Transport District are not under any legal obligation to make any payments for leave or other entitlements to their drivers.
- (d) There is no other jurisdiction in Australia which has a contract determination or similar legislative instrument which regulates the relationship between driver and operator in the manner that the Determination does. There is no requirement in any other jurisdiction for operators to pay drivers' entitlements or superannuation.
- (e) A number of jurisdictions deal with the issue by way of a model industry agreement. To the extent that there is some level of regulation by legislation (for example as to the fare split) it is limited and addressed directly by the legislation.
- (f) We have summarised the arrangements which apply in other States and the Territories below in further detail. Each of the documents referred to in the following paragraphs is attached at **Appendix 5**.

Victoria

- (g) In Victoria, section 162L of the *Transport (Compliance and Miscellaneous) Act 1983* implies a condition into every agreement between driver and operator that at least 55% of the gross fares that accrue when a taxi cab is under the control of a driver are to be retained by or paid to the driver. A copy of that section appears in Appendix 3.

- (h) That section also allows the Victorian Taxi Services Commission (**TSC**) to specify further conditions that are to be implied in every driver agreement. There is no provision for set pay-ins.
- (i) The only condition which the TSC has sought to imply in driver agreements in Victoria with respect to leave entitlements for drivers is a condition that drivers are entitled to take up to four weeks *unpaid* leave after completing 12 months or more regular work with the operator. A copy of a webpage from the Taxi Services Commission website found at www.taxi.vic.gov.au which sets out the conditions which the TSC has implied into driver agreements in Victoria is included in Appendix 3.
- (j) The conditions imposed by the TSC also require the operator to reimburse the driver for fuel.
- (k) Taxi operators in Victoria are not legally obliged to make superannuation contributions on behalf of drivers.

Tasmania

- (l) The webpage from the Department of State Growth, Transport, Tasmania taken from the website www.transport.tas.gov.au (included in Appendix 3) states while bailment agreements between operators and drivers provide for fares collected by the driver to be shared, usually on a 50/50 basis, the Government does not regulate these agreements. Taxi operators are responsible for all maintenance costs of the taxi and fuel costs.
- (m) Taxi drivers in Tasmania are not entitled to take any paid leave. Taxi operators in Tasmania are not obliged to make superannuation contributions on behalf of drivers.

Queensland

- (n) The Queensland Taxi Industry Health and Safety Committee has prepared a “Model Taxi Service Bailment Agreement” (included in Appendix 3) which incorporates all conditions required by Queensland legislation that must apply to agreements between operators and drivers.
- (o) The model agreement allows for three options with respect to revenue:
 - (i) a profit split arrangement where the driver does not pay for fuel but must pay the operator 55% or less of the gross revenue earned from driving the taxi;
 - (ii) a profit split arrangement where the driver pays for fuel but must pay the operator 50% or less of the gross revenue earned from driving the taxi;
 - (iii) a set pay-in, however this option is only available to drivers who have held a Queensland Driver Authorisation for at least 12 months consecutively or cumulatively, within the five years before the agreement is entered into.
- (p) In a document titled ‘Taxi Service Bailment Agreements – Questions and Answers’ obtained from the Queensland Department of Transport and Main Roads website at www.tmr.qld.gov.au, the reason the Queensland government

ascribes to the restriction on set pay-ins is it “*provides protection for new or inexperienced drivers who may be vulnerable to set pay-in arrangements and who may not know whether the set pay-in amount being offered is reasonable.*” A copy of that document also appears in Appendix 3.

- (q) The model agreement does not include any requirements for paid leave or other entitlements under the *Transport Operations (Passenger Transport) Regulation 2005* (QLD). Regulation 146B of that regulation prescribes the information which must be included in a taxi service bailment agreement between an operator and a driver. It does not provide for paid leave or other entitlements.
- (r) Taxi operators in Queensland are not obliged to make superannuation contributions on behalf drivers.

Western Australia

- (s) There is no provision in Western Australia for drivers to receive paid leave or any other entitlements.
- (t) Taxi operators in Western Australia are not obliged to make superannuation contributions on behalf drivers.
- (u) A copy of a webpage from the Western Australian Department of Transport website, which appears to show that drivers pay “shift lease” payments which are fixed by the government is included in Appendix 3.

South Australia

- (v) There are no legislative provisions in South Australia which regulate the relationship between operator and driver.
- (w) The South Australian Taxi Council has developed a standard “Shift Agreement”, which allows for operators and drivers to agree on either a fixed pay-in or a percentage split of revenue. A copy of the Shift Agreement is included in Appendix 3.
- (x) Taxi operators in South Australia are not obliged to make superannuation contributions on behalf of drivers. Nor are they obliged to pay any leave entitlements.

Northern Territory

- (y) The Northern Territory does not have any taxi regulations which regulate in anyway the relationship between drivers and operators. A copy of the relevant sections of the Commercial Passenger (Road) Transport Act (2014) and the complete Taxis Regulations (2013) appear in regulations are included at Appendix 3.
- (z) Taxi operators in the Northern Territory are not obliged to make superannuation contributions on behalf of drivers. Nor are they obliged to pay any leave entitlements.

Australian Capital Territory

- (aa) The Australian Capital Territory does not have any regulations which regulate the relationship between the driver and operator.
- (bb) The Canberra Taxi Industry Association has developed a model agreement between operators and drivers, a copy of which is also included at Appendix 3. The agreement provides that drivers are responsible for fuel costs. The operator is responsible for maintenance costs.
- (cc) Taxi operators in the Australian Capital Territory are not obliged to make superannuation contributions on behalf of drivers. Nor are they obliged to pay any leave entitlements.

9.4 Changes to the circumstances affecting the taxi industry means Ch 6 is out-dated

- (a) Broadly speaking, the factual matrix used to justify the Determination no longer applies.
- (b) The Determination was developed at a time when point to point passenger transport was almost exclusively the domain of taxi operators and drivers. Taxi drivers relied upon authorised taxi networks to provide them with all of their pre-booked trips. Passengers had limited means by which to pay for their trips, with cash as the dominant method of payment.
- (c) The static nature of the industry was a dominant feature for many decades as Hill J observed in the decision of *De Luxe Red & Yellow Cabs Co-Operative (Trading) Society Ltd & Ors v Commissioner of Taxation* [1997] 840 FCA (28 August 1997):

“although there are some differences, the mode of operating cabs in NSW has not greatly changed in over sixty years”
- (d) However, the new century and in particular the events of recent years have heralded dramatic changes in the industry. For the first time the taxi industry now shares the point to point transport market with a myriad of other stakeholders including hire cars, community based transport operators and most recently ride-sharing services.
- (e) Traditional taxi networks compete with a range of internet based applications for passenger booking services. For example, taxi drivers are now likely to taking pre-booked fares from booking apps operated by third parties who are not authorised taxi networks, such as Uber, InGoGo and GoCatch.
- (f) Drivers also use and promote their own mobile phones and, in some cases, informal networks of drivers, to passengers.
- (g) Now, payments by cash have declined against the use of credit cards supported by new technologies involving mobile eftpos machines making commission based arrangements more complex. Furthermore, Taxi drivers often use more than one eftpos machine in a cab to reduce their own credit card charges and overheads.
- (h) Taxi operators have all but ceased to operate fleets of taxis with most operators operating no more than one or two taxi cabs as part of a very small business and yet the main competitor to taxi operators has ceased to be other small businesses but a large multinational company.

- (i) Taxi operators have found a shortage of taxi drivers and drivers opt to use private vehicles and participate in ride-sharing services instead of bailing taxis. In turn, this has placed more pressure on operators to reduce pay-ins to low levels to attract taxi drivers notwithstanding the risk that those drivers will later claim benefits in accordance with the Determination.
- (j) The cost to operators of compulsory third party insurance has also dramatically increased, creating more pressure on the viability of many taxi businesses.
- (k) Legislative reforms in terms of Ch 6 of the IR Act and the Determination have not kept pace with the changes outlined above. Indeed recent applications made to the Commission by the TWU to amend the Determination ignore the realities of the industry and seek to increase (not reduce) the level of regulation to apply to taxi operators.
- (l) The TWU has a current application before the Commission to create a safety net wage entitlement for bailee drivers (in short, a minimum amount drivers must receive for every hour worked) which, if allowed, would further disadvantage the taxi industry as it seeks to compete with the likes of Uber and others.
- (m) Clearly the bailee/bailor relationship is no longer conducive to industrial regulation in the form of Ch 6 of the IR Act. It does not apply anywhere other than the Sydney region and it represents a significant point of difference between the level of regulation that applies to various stakeholders in the point to point passenger transport industry.
- (n) The passage of the *Point to Point Transport (Taxi and Hire Vehicle), Act 2016* shifts the focus from the relationship between bailor taxi operators and bailee taxi drivers instead imposing certain safety obligations on those who control the booking services and drivers. In practical terms these new obligations will fall primarily on accredited taxi networks and taxi drivers with little focus on taxi operators. The imposition of significant regulatory and financial burden on taxi operators is wholly inconsistent with this new paradigm for responsibility.
- (o) Other reforms arising from the *Point to Point Transport (Taxi and Hire Vehicle), Act 2016* involve the introduction of deregulated pricing for taxi bookings, including dynamic pricing. The Determination limits the taxi operator to fixed pay-ins meaning that up-side benefits from any peak pricing will only accrue to the drivers. Lower fares will however put downward pressure on bailment rates (the comments above on the market power of drivers refer) and operators will carry significant risk in this environment. More flexibility than what is available in the Determination is therefore required.

10. Other Considerations

- 10.1 The introduction of the legislative changes proposed in this paper is likely to be disruptive. However, any transitional provisions must be carefully considered to avoid unintended consequences to the taxi industry. At a time when the industry is changing its long term business models and commercial arrangements to cope with major changes to legislation and business environment is the appropriate time for this reform
- 10.2 As stated, the current Determination imposes a strict liability on taxi operators to comply with obligations including in respect to driver entitlements. However, as explained at paragraphs 7.14 and 7.15 above for various reasons operators and drivers regularly enter

into commercial arrangements which contravene the provisions of the Determination. The most common arrangement is for operators to agree to charge a lower pay-in than the “maximum pay-in” prescribed in the Determination in exchange for the driver agreeing not to claim leave and other entitlements.

- 10.3 There is a risk that any transitional provisions may lead to some drivers ignoring their prior (informal) arrangements and making claims for past entitlements. In such circumstances, the taxi operator would not be afforded any protection under the current Determination notwithstanding the fact that that the driver had agreed to forgo his or her entitlements in exchange for bailing the operator’s taxi cab for a lower pay-in than the prescribed maximum.
- 10.4 If any change to the legislation was to lead to widespread claims by drivers for past entitlements, most taxi operators would simply be unable to make such payments and would go out of business.

11. Conclusion

- 11.1 Taxi cab drivers enter into a commercial relationship with operators to bail their taxi cab to earn fare income. It is a relationship that has been repeatedly recognised as a “joint enterprise” or a “joint venture” and not an employment relationship.
- 11.2 Ch 6 of the IR Act and the Determination, which currently regulate that relationship, were created at a different time, when other forms of point to point transport and booking services were not available.
- 11.3 They impose on drivers and operators a series of obligations that add to costs and impede the capacity of the taxi industry to compete in an open market and to innovate. For operators the Determination imposes significant additional costs in the form of obligations to provide paid leave entitlements and (prospectively) superannuation, and creates exposure to unfair dismissal claims.
- 11.4 The regulatory regime created by Ch 6 and the Determination must now be regarded as an inappropriate and costly anachronism. Indeed, in many ways it is the antithesis of the Government’s desire to strip away regulation to support business development and drive down industry costs.
- 11.5 That the Determination is no longer suited to the industry is demonstrated by the fact that drivers and operators routinely ignore it, despite it creating strict legal obligations for operators.
- 11.6 The regulatory burdens imposed by Ch 6 do not apply to other forms of point to point transport (including large multinational companies such as Uber), creating a significant competitive disadvantage for the taxi industry.
- 11.7 It would be consistent with the changes otherwise introduced by the Government to amend Ch 6 to remove reference to bailment of taxi cabs to create a level playing field between different forms of point to point transport.
- 11.8 It should be noted that should Ch 6 of the IR Act be amended in line with this submission, taxi operators would still be required under law to provide workers compensation cover and third party property insurance for drivers. This is considered appropriate and it is important for good public policy and competitive neutrality purposes that this statutory requirement be extended to hire vehicle/ridesharing operators as well.
- 11.9 As occurs elsewhere, the relationship between taxi drivers and operators could instead be regulated, to the minimum extent necessary, directly by provisions contained in a legislative instrument.
- 11.10 This would reduce costs, increase flexibility, permit innovation and remove the current significant competitive disadvantage between the taxi industry and the rest of the point to point transport industry.
- 11.11 It would bring the regulation of the taxi industry in NSW into line with the rest of Australia.

- 11.12 Any regulation going forward should as far as possible treat all drivers of point to point transport services in the same manner to avoid competitive advantages being enjoyed by any particular method of service particularly as the current differences favour a large multinational corporation over small business owners.