

**Submission
No 7**

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.

INQUIRY INTO WORKPLACE ARRANGEMENTS IN THE POINT TO POINT PASSENGER TRANSPORT INDUSTRY

Legislative Assembly – Committee on Transport and Infrastructure

SUBMISSION OF THE TRANSPORT WORKERS' UNION OF NSW

A. Background

1. The Transport Workers' Union of New South Wales (**TWU**) represents the interests of the bailee taxi and hire car driver in the NSW. The TWU is the only registered organisation pursuant to s.335 of the *Industrial Relations Act 1996* (**the IR Act**) with the ability to represent such drivers.
2. On 21 November 1967, the then Minister for Labour and Industry commissioned a report under the *Industrial Arbitration Act 1940* (**IA Act**) into, *inter alia*, the industrial regulation of Taxi-cabs and Private Hire Cars.¹ The report is commonly referred to as the "Beattie Report". As a response to the Beattie Report, NSW Parliament saw it fit to legislate the predecessor to Chapter 6 of the IR Act. The relevant parts of the Beattie Report are attached at "**Appendix 1**".
3. On 22 February 1984, after a lengthy series of consultation and conferences, by consent between the TWU and the NSW Taxi Industry Association, the Industrial Commission of NSW (as it then was) made a contract determination under the applicable provision of the IA Act. That contract determination is known as the *Taxi Industry (Contract Drivers) Contract Determination 1984* (**the Determination**). The Determination is attached at "**Appendix 2**".
4. The Determination continues in operation to this day and provides taxi drivers with terms and conditions of engagement such as sick leave, annual leave, long service leave, and basic industrial rights such as provision of uniforms and notice in the event of a termination of contract.
5. The NSW Industrial Relations Commission (**IRC**) has the power to vary the Determination pursuant to s.320 of the Act. Any variation to the Determination is dictated by the test of whether the variation would be "*fair and reasonable*".²
6. The TWU has always been a strong advocate for the interests of bailee taxi drivers. Examples of TWU advocacy in this area are plentiful, but in more recent days, the TWU has sought to take action to remedy the vital issue of drivers pay. In July 2014, the TWU made an application to the IRC for a variation to the Determination to provide a "safety net" payment to taxi drivers. This safety net is designed to allow drivers the right to recover their costs. The application also includes a suite of amendments to ensure drivers get access to their leave

¹ *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 Motor Vehicles and Lorry Owner-Driver*, 23rd February 1970

² *Transport Industry – General Carriers Contract Determination* [2016] NSWIRComm 3.

enticements and superannuation. In addition, the TWU sought enhanced record keeping obligations. The application is attached at “**Appendix 3**”.

7. Rights contained under Chapter 6 of the IR Act are vital to the well-being and prosperity of bailee taxi drivers. Without Chapter 6, drivers would lose:
 - a. recourse to the IRC in circumstances where their contracts have been unfairly terminated;
 - b. the right to collectively bargain to improve conditions in local enterprises and more broadly;
 - c. the Determination which sets out the workplace arrangements on which the industry is based in the Sydney area; and
 - d. the right to have a dispute heard in relation to an industrial matter.
8. The TWU submits that the current system is astute to handling the affairs of bailee taxi drivers and their bailors. The issues faced by the industry are not with the workplace arrangements in place, they relate almost entirely to failures in enforcement. 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.
9. The TWU also contends that such a system could be easily transposed onto the ride share industry, and that doing so would be good public policy and lead to equitable outcomes.
- B. 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
10. The impact of Chapter 6 of the IR Act on the current point to point transport industry is overwhelmingly positive and provides protections, safeguards, and a mechanisms for participants in the industry to consult, confer and reach mutually desirable outcomes. An issue remains though when it comes to enforcement.
11. Chapter 6 of the IR Act operates to govern the relationship between bailee taxi drivers and bailor taxi operators. It also covers private hire vehicles.³ Chapter 6 establishes a system of award-style regulation into the industry and adopts an enterprise bargaining style framework to supplement minimum terms of engagement. Under s.312 of the IR Act, the operation of Chapter 6 is limited to workplace matters and include the following:

³ *Industrial Relations Act 1996* (NSW), s.307(1)(b)

- a. Remuneration;
 - b. Attendance money;
 - c. Leave entitlements;
 - d. Hours of work; and
 - e. Other conditions of engagement.⁴
12. Currently, associations of contract drivers and associations of employing contractors can apply to the IRC for a contract determination to establish or alter the terms and conditions that apply specifically, or in general, to contracts of bailment.⁵ This allows all interested parties in the industry to consult with each other under the supervision of a quasi-judicial body with broad powers. Absent agreement between the parties, a case may be put forward to the IRC to ensure fair and just engagement conditions.
13. Chapter 6 does not cover services in the ride sharing industry. As these submissions will later urge, the system of regulation currently in place for the taxi and private hire car industry should be extended to include ride sharing services and is properly placed to regulate that industry.
14. Currently, the Determination provides taxi drivers with base level entitlements giving them enhanced protection and conditions over drivers in other states not subject to the same regulation. The Determination provides for:
- a. Annual leave;⁶
 - b. Sick leave;⁷
 - c. Long service leave;⁸
 - d. Capped pay-in levels for drivers under method 2;⁹
 - e. Mandates levels of commission payments under method 1;¹⁰
 - f. Requirement to provide uniforms;¹¹
 - g. Payment for time rostered, but not able to be driven;¹²
 - h. Requirement to make a notice board available to drivers;¹³
 - i. Disputes resolution procedure;¹⁴ and
 - j. Record keeping obligations.¹⁵
15. Chapter 6 provides additional protections to drivers outside of the system of contract determinations and contract agreements. Associations of contract drivers are able to apply for a “contract determination of reinstatement” in the event that a contract of bailment is terminated.¹⁶ These provisions provide

⁴ *Industrial Relations Act 1996* (NSW), s.312 (1)(a)-(f)

⁵ *Industrial Relations Act 1996* (NSW), s.312

⁶ *Taxi Industry (Contract Drivers) Contract Determination 1984*, cl 19

⁷ *Ibid*, cl 20

⁸ *Ibid*, cl 22

⁹ *Ibid*, cl 3

¹⁰ *Ibid*, cl 3

¹¹ *Ibid*, cl 18

¹² *Ibid*, cl 23

¹³ *Ibid*, cl 26

¹⁴ *Ibid*, cl 29A

¹⁵ *Ibid*, cl 30

¹⁶ *Industrial Relations Act 1996* (NSW), s.314

protection to drivers from unfair termination of their contracts with remedies of reinstatement and compensation available.

16. Further, requirements are placed on bailors which ensure that contracts of bailment operate fairly and in accordance with established workplace standards in the state of NSW. For example:

- a. Bailors must pay drivers remuneration in full without deductions authorised by the driver;¹⁷
- b. Drivers are protected from victimisation arising from the exercise of their rights;¹⁸
- c. Bailors are subjected to entry rights of union officials in the case of suspected contraventions of workplace laws;¹⁹ and
- d. Drivers have the ability to have non-payment and other issues arising under the IR Act or Determination heard by the Industrial Court of NSW or the IRC.²⁰

17. 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 exists 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. With greater enforcement mechanisms in place, Chapter 6 has the potential to turn the industry around for drivers. This is why the TWU will call later in this document for an independent workplace ombudsman to oversee the entire industry.

C. The effectiveness of the existing arrangements including the impact on driver remuneration and conditions

18. As stated earlier, Chapter 6 allows representatives from across the industry to make applications to the IRC to alter conditions under contracts of bailment. The quasi-judicial process involved in making such an application ensures that natural justice is observed and fair outcomes are reached.

19. When the Determination was made in 1984, the parties to that case before the IRC agreed that it was in appropriate terms to ensure that the terms of contracts of bailment in the Sydney area were fair and just. However over time, the effect of the Determination on ensuring a drivers remuneration remained at a sustainable level eroded.

20. In an attempt to improve the remuneration of drivers, in 2005 the TWU made an application to the IRC to introduce compulsory superannuation to the

¹⁷ *Industrial Relations Act 1996* (NSW), s.343(1)(c)

¹⁸ *Industrial Relations Act 1996* (NSW), s.343(1)(h)

¹⁹ *Industrial Relations Act 1996* (NSW), s.343(1)(i)

²⁰ *Industrial Relations Act 1996* (NSW), s.343(1)(j)

industry. In that decision, the IRC granted the TWU's application and stated that it was appropriate to do so given the state of the industry at the time.²¹

21. Again in 2012, after the release of an independent report by the Centre for International Economics (CIE)²², which contained the first thoroughly researched indicator of driver earnings in the 21st Century, the TWU made an application to the IRC to reduce the level of pay-ins under method 2 of the Determination significantly to improve driver remuneration. That application failed due to an evidentiary issue, which demonstrates the integrity of the current system. This application is attached at "**Appendix 4**".
 22. In 2014, the TWU made another application to the IRC (Appendix 3), this time on different terms in order to improve remuneration of drivers. The application remains before the IRC and the hearing is pending. The application sought to introduce a "safety net" to ensure drivers earned at least minimum wage, as well as a raft of other changes designed to improve conditions of drivers in the industry.
 23. On the other side of the equation, the NSW Taxi Industry Association (**NSW TIA**) makes yearly application to the IRC to vary the pay-ins in the Determination, which impacts upon the remuneration available to drivers on any given shift.
 24. The existing system, apart from issues with enforcement, is adequate and effective in setting and varying driver remuneration and conditions and ought not to be changed in any significant way. To remove such a mechanism that the entire industry have used so effectively for such a long period of time would place considerable downward pressure on the remuneration and conditions of drivers and throw the industry into disarray.
- D. The effectiveness of the existing arrangements including the impact on competitiveness across the industry
25. The TWU believes that cost recovery for independent contractors in the point to point transport industry (and in general) is vital for safe and sustainable transport operations, and that remuneration and conditions ought to not be a factor when taking into account competitiveness. In fact if competition were applied to remuneration and conditions, appropriate policy formulation should be implemented to encourage a "race to the top" on workplace conditions.
 26. The current system, prior to the rise of ride share services, provided a mechanism which allowed taxi companies to be competitive, without a race to the bottom on bailee driver conditions. Chapter 6 and the Determination ensures that in Sydney, bailee drivers' conditions are protected, and the harmful effects of competition on vulnerable drivers is reduced.

²¹ *Transport Workers' Union of New South Wales v New South Wales Taxi Industry Association* [2005] NSWIRComm 1038 at [31].

²² The Centre for International Economics, *Reweighting of the taxi cost index*, April 2012, p38.

27. There is a necessity to extend existing arrangements to cover drivers in the ride-sharing sector of the point to point industry. Currently, drivers for Uber take home 75% of the fares charged in any given shift, down from 80% prior to April 2016.²³ Drivers for GoCatch take home 85% of the fares charged.²⁴ Comparatively, taxi drivers operating under Method 1 in the Determination earn a mere 45% of chargeable fares in their first year driving, and 50% for the years thereafter.²⁵ This figure for the taxi industry has remained unchanged since 1984.

28. The above figures demonstrate the need to have a protection in place to stop arbitrary decreases in the rate of commission for drivers, and the need to put in place a guiding force for the setting of minimum rates to allow the “race to the top” to attract drivers to a passenger transport business. This is akin to an award system for drivers.

E. The effectiveness of the existing arrangements including the impact on customer service (including fares)

29. The reality of current arrangements in relation to Chapter 6 of the IR Act is that the level of pay-ins follows the adjustments to fares recommended by the Independent Pricing and Regulatory Tribunal (**IPART**) on an annual basis. This comes about through applications being granted by the IRC at the request of the NSW TIA based on the IPART recommendation. This method have been accepted by the IRC as sound.²⁶

30. It is apparent that rather than the existing arrangements having an impact on fares, fares have an impact on the existing workplace arrangements. The TWU does not accept that this is a sustainable way of setting existing workplace arrangement, but this once again emphasises the integrity of the current system which takes into account the views of the entire industry.

31. In terms of general customer service, the TWU submits that the current arrangements improve customer service through increased job satisfaction of drivers as a result of improving conditions provided under their contracts of bailment. Drivers who are earning reasonable remuneration, and are able to access paid leave are better rested and under less pressure to earn a living. This results in a flow on effect to the mood and attitude of drivers and a corresponding improvement in customer service.

F. The effectiveness of the existing arrangements including the impact on safety for passengers and drivers

²³ <http://www.businessinsider.com.au/australian-uber-drivers-say-the-company-is-manipulating-their-ratings-to-boost-the-companys-fees-2016-5>

²⁴ <http://www.gocatch.com/gocar-driver-faqs>

²⁵ *Taxi Industry (Contract Drivers) Contract Determination 1984*, Schedule 1

²⁶ *Taxi Industry (Contract Drivers) Contract Determination 1984* [2012] NSWIRComm 80 at [23].

32. It has been conclusively established that there is a link between rates of pay and safety in road transport.²⁷ 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.

33. The TWU therefore submits that a system that allows drivers in the point to point transport industry to cover their costs (labour, fuel, maintenance etc.) encourages safe driving practices and relieves the pressures that would otherwise exist on drivers in the industry. The current workplace arrangements as contained in Chapter 6 allow for application to be made to alter terms of contracts of bailment to ensure cost recovery. In fact the current application by the TWU before the IRC aims to provide for just that.

34. The current workplace arrangements are effective in ensuring the safety of passengers and drivers in the point to point industry from factors affected by it.

G. The uneven application of workplace arrangements across the point to point transport sector and nationally

35. The TWU submits that the operation of Chapter 6 of the IR Act ought to be extended to cover the entire point to point passenger transport industry in NSW. As previously stated, Chapter 6 provides fair and equitable mechanisms for industry to consult and for an independent 3rd party to determine workplace matters. This accords with most workplace arrangements in place across the transport industry, and the workforce more generally on a national level.

36. It is inappropriate for the point to point passenger transport industry outside of the scope of Chapter 6 to remain unregulated when it comes to workplace arrangements regarding remuneration and conditions. This creates an unfair commercial advantage for the unregulated part of the industry, and subjects those without substantial bargaining power, i.e. drivers, to unfair and unconscionable pressure without recourse.

37. In order to ensure a safe, fair and sustainable point to point transport industry, it is necessary to have workplace regulation to ensure that the labour force remains committed to delivering the service that the public comes to expect from the industry.

H. The evolution of the industry, which includes national and multinational providers

²⁷ The Hon Lance Wright QC & Professor Michael Quinlan, *Safe Payments: Addressing the underlying causes of unsafe practices in the Road transport Industry*, October 2008.

38. Prior to, during, and post-World War Two, the taxi industry was organised into cooperatives that operated as a single business unit but ultimately maintained their autonomy as operators. As the industry evolved, companies began to emerge as an organisational model replacing most cooperatives. Today in Sydney, the market is dominated by two companies, Taxis Combined (owned by Cab-Charge) and Premier.
39. Recently, the market has been diluted by the entry of ride sharing companies such as Uber and GoCatch, but in essence the character of these companies operations are very similar to the traditional taxi conglomerate such as Taxis Combined. The phone application operated by the ride sharing entrants operates in a very similar fashion to the traditional taxi radio network in that it is a method used to organise and allocate work.
40. It is interesting to examine the evolution of Uber in the short time that it has been in Sydney. Uber was introduced and sold to the market as a way that people going to the same destination could connect and travel to the place in a mutually beneficial fashion (i.e. for a price). The reality is that Uber has simply evolved into a quasi-traditional taxi service. Of course the provision of a car to transport passengers from A to B is the most obvious common link between taxis and ride share, but the original differentiating characteristic of providing one's own car in ride sharing is being increasingly challenged.
41. Recently, Toyota introduced a new "hire purchase" style arrangement expressly aimed at drivers for Uber which essentially saw them as the new "bailors" of the ride sharing industry. There have also been instances of individuals buying fleets of Uber-acceptable cars which they lease (or bail) to Uber drivers to take out on shifts.
42. The upshot of the evolution, or devolution, of the new point to point transport industry is that there ought to be one constant on which drivers can rely, and that is a reliable and fair workplace relations system. The TWU sees no reason why the introduction of big multinationals into the industry ought to obviate the need for fair workplace arrangements, in fact it reinforces such a need.
- I. The impact of technology and customer demand on how driver participate in the industry
43. The obvious technological advance that affects customer demand and the way that drivers participate in the industry is the phone applications that organise allocate work and monitor a driver's whereabouts at any given time.
44. The rise of the smart phone application has meant that the traditional radio network used to allocate jobs to taxi drivers has diminished significantly. Today, taxi drivers largely confine themselves to jobs obtained from either cab ranks or from being hailed down in the street. The pre-booked taxi service has moved in a major way to online phone applications, of which the taxi industry is perhaps the newest entrant.

45. The TWU submits that the use of technology enhances the ability of a workplace relations system in the point to point transport industry to properly set conditions and remuneration. The reason for this position is that traditionally it has been difficult to obtain the hours worked and kilometres driven of drivers. Further, the opposition often put against the proposition of a minimum hourly rate for taxi drivers is that bailors are unable to monitor the driver's activity (i.e. how much work is actually being done). Although the TWU does not accept this, the existence of an application that traces a drivers movements almost entirely removes any of these concerns and allows bailors or principal contractors to control their drivers.

J. The sustainability of commercial passenger transport and economic productivity

46. A major question arising when considering sustainability is the source and reliability of the labour force required to operate the point to point transport industry. This was considered in detail in 2004 by a ministerial inquiry into to the Taxi Industry.²⁸ The report recommended that a "seniority register" be established to assist to establish the industry as a genuine career path for Australians to pursue.

47. This issue of careers in the industry is one that transgresses the evolution of the industry to ride sharing. The concept that the point to point transport industry is a "half way" style job is one that still resonates. It is very rare that a taxi driver performs the job as a career option. Unlike the taxi industry, Uber does not pretend to hold itself out as a career option, rather it says that it is a way to earn extra money on the side. This does not assist in ensuring the sustainability of the industry.

48. The TWU submits that this is a major issue in the industry which effects its sustainability and has a significant effect on productivity. If existing workplace arrangements contained in Chapter 6 were equally applied to the entirety of the point to point transport industry, given the wide discretion and power of the IRC in this respect, this issue may be dealt with through rigorous industry consultation. Further, the availability of fair remuneration and conditions is a major factor in the consideration of a career path for any given individual which of course is achievable within the Chapter 6 style regulatory system.

K. The intent of the Government's reforms to minimise the regulatory burden on the point to point industry

49. In an industry rife with problems, many arising out of the exploitation of labour, the TWU submits that it would be a ludicrous to consider reducing regulation designed to ensure that drivers in the industry are able to obtain fair and equitable remuneration and conditions.

²⁸ Alan Cook, *Ministerial Inquiry into the Taxi Industry*, September 2004, <http://www.transport.nsw.gov.au/operators/taxis/taxi-reports>

50. There should be no minimisation of regulation in respect to the workplace arrangements in the taxi industry, in fact there should be an increase to extend existing arrangements to the entire point to point transport industry.

L. Any other related matter

51. The TWU urges the inquiry to consider the need for the following reforms to the workplace arrangements applying to the point to point passenger transport industry:

- a. A portable leave entitlement scheme;
- b. A fully resourced workplace ombudsman to oversee the industry; and
- c. The extension of Chapter 6 to the entire industry.

A portable leave entitlement scheme

52. As submitted earlier in these submissions, there is an issue with the provision of leave entitlements that arise under industrial instruments applying to taxi drivers, particularly under the Determination. This is caused by the fluid nature of driver engagement between different bailors. The lack of provision of leave has detrimental effects that range from driver attrition from the industry to safety concerns when drivers are forced to forgo leave periods due to financial pressure arising from unpaid leave.

53. This is not a problem peculiar to the taxi industry, it occurs in other industries operating on a contract tendering basis.

54. The TWU submits that an independent body should be established to administer leave entitlements for taxi drivers and superannuation payments. This would operate through bailors remitting the relevant amount of money to the independent body for the purpose of providing a driver with leave when they require it. This would address the problem of drivers being shared between bailors and solve the systematic roting of driver leave entitlements in the industry.

55. It would have a further beneficial impact on driver retention in the industry and create a potential avenue to promote the industry as a career path.

A fully resourced workplace ombudsman to oversee the industry

56. While Chapter 6 of the IR Act provides a sound system to establish a sustainable workplace, there is significant questions that should be raised about enforcement practicalities. Whilst the TWU consistently enforces the rights of drivers under the Determination in the IRC, there is only so far its resources stretch. Every week the TWU hears reports of drivers being forced to drive under a particular method (an unlawful practice under the terms of the Determination²⁹), drivers being terminated for claiming leave entitlements, and

²⁹ *Taxi Industry (Contract Drivers) Contract Determination 1984*, cl 3(v)

drivers being forced to drive long hours to the point of sleeping in side streets inside their cabs.

57. A body akin to the Fair Work Ombudsman federally should oversee the point to point transport industry. This would allow drivers to make complaints about their workplace arrangements, be they a member of a union or not, and have those complaints assessed, investigated, and resolved. Such a body would also encourage greater compliance within the industry.
58. The TWU notes that under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* (NSW), a new office was created known as the Point to Point Commissioner to oversee the implementation and compliance with that particular piece of legislation. The TWU sees this as a good start and urges the continuation of this line of policy making by the Government to workplace arrangements under Chapter 6 of the IR Act.

The extension of Chapter 6 to the entire industry

59. As submitted throughout this document, the TWU submits that it is appropriate to expand the coverage of Chapter 6 of the IR Act to the entire point to point passenger transport industry. The conclusions and recommendations made by the Beattie Report are as relevant today as they were in 1970. The industry cannot operate in a way that provides drivers with fair and equitable conditions unless it is regulated appropriately.
60. The model that Chapter 6 establishes remains the appropriate way to regulate the point to point passenger transport industry. It allows the entire industry to sit down and discuss the state of the industry and the best way to ensure that economic productivity is achieved at the same time as drivers are treated in a fair and equitable manner.
61. The Government should immediately move to extend the scope of Chapter 6 to the entire point to point transport industry.

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