



employment studies centre

**NCP Review
of
Chapter 6 of the
*NSW Industrial Relations Act***

Consultant's Report

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Introduction

Chapter 6 of the *Industrial Relations Act 1996* of New South Wales establishes machinery that regulates the rates and conditions contained in specified contracts for services and contracts of bailment in the road transport industry. The distinctiveness of this legislation arises from the following features:

- the machinery is specific to the road transport industry.
- the machinery parallels, but is quite separate from, similar conciliation and arbitration machinery established in New South Wales to regulate the wages and working conditions of employees.
- despite the close parallels with the conciliation and arbitration machinery, the road transport operators covered by the legislation (ie. independent contractor owner-drivers and bailee taxi-drivers) are not ‘employees’ at common law.

Given the legal status of the contracts and contractors covered by Chapter 6, the legislation is prima face anti-competitive under National Competition Policy. Statutory amendments in late 2001 (*Industrial Relations (Public Vehicles and Carriers) Amendment Act 2001*) gave temporary protection to Chapter 6 from the anti-competitive provisions of the Commonwealth *Trade Practices Act 1974* and the *Competition Code of New South Wales*. However, in order to make that protection permanent, National Competition Policy required that a review be held to demonstrate the net public benefit of the legislation. More specifically, the review is needed to demonstrate that there are no other ways of achieving the objects of the legislation.

The Department of Industrial Relations (DIR), in consultation with the NSW Cabinet Office, established a Steering Committee to oversee the review. Under the chair of the Manager, Strategic Review, Department of Industrial Relations, this Steering Committee included representatives from the following bodies:

- Department of Industrial Relations
- The Cabinet Office
- Workcover
- Motor Accidents Authority

In conformity with National Competition Policy review procedures, the Steering Committee met on 28 March 2002 to seek expert advice in the form of a report on the operations of Chapter 6 by calling for tenders and issuing a Consultants Brief. In late April, the contract for the consultant’s report was awarded to the Employment Studies Centre at the University of Newcastle. A final report was originally due by the end of 7 June, but an extension was granted by mutual agreement until mid-July.

This report is submitted in completion of that contract. Given the time and budget restrictions, little original empirical research was undertaken for the report. Rather, the methodology involved a review of secondary literature (much of which came from

previous research by the authors of the report), the compilation of publicly available descriptive statistics (where they were relevant and accessible) and interviews with key informants from the industry and associated government authorities. The body of the report falls into six sections:

Section 1: Origins and Objectives of the Legislation – traces the origins of Chapter 6 back through Part VIIIA of the *Industrial Arbitration Act 1940* (the 1940 Act) introduced in 1979 and Section 88E of the *Industrial Arbitration Act* introduced in 1957 to amendments introduced as early as 1943. It also identifies the objectives of the legislation (by reference to both the government’s stated intentions and the arguments by various private interest groups in support of and in opposition to Chapter 6 and its legislative predecessors) as attempts to remedy market failure in the industry and to advance public benefits in industrial relations, occupational health and safety, road safety and quality of service.

Section 2: The Operation of the Legislation – describes the operation of the legislation in the form of Chapter 6, first introduced in 1991, through its legislative amendments, significant court cases over its interpretation and the many determinations and agreements that have been registered under its provisions. It also briefly addresses the issue of compliance and enforcement of the legislation.

Section 3: The Characteristics of Road Transport Product and Labour Markets – explores various structural features of the road transport industry that help to explain the highly competitive nature of the industry, the market failure discussed in Section 1 and the need for legislative intervention to protect industrial relations, occupational health and safety, road safety and quality of service.

Section 4: Costs and Benefits – examines through qualitative, ‘in-principle’ analysis the various costs and benefits of Chapter 6. The argument is that some economic costs can be identified as a result of the price regulation that is central to the legislation, but the quantum of these costs is impossible to calculate but likely to be less than might be expected. It is further argued that the likely benefits from the legislation – in terms of equity, quality of service and road safety – broadly outweigh the costs. The impact of the legislation on costs through restrictions on entry to and exit from the industry is also judged to be modest and largely outweighed by equity and quality benefits.

Section 5: Alternative Forms of Regulation – discusses regulatory regimes in the other states of Australia, the Commonwealth of Australia and some overseas countries (namely, Britain and New Zealand). While Chapter 6 is found to be unique, a clear trend is identified towards legislative intervention to regulate independent contractors and other forms of labour similar to owner-drivers and bailee-drivers. Alternative forms of road transport regulation – such as licensing, road and traffic regulation, and non-regulatory intervention – are also scrutinised. While some of these alternatives have advantages, they are seen as complements to Chapter 6 rather than substitutes.

Section 6: Conclusions and Recommendations – draws together the main arguments of the report and summarises its recommendations. It is argued that there is a net public benefit arising from Chapter 6 and, therefore, it is recommended that Chapter 6 should be granted permanent exemption from the *Trade Practices Act* and the *Competition Code of New South Wales*.

Professor Mark Bray, Dr Duncan Macdonald and Dr Peter Waring
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Section 1

Origins and Objectives of the Legislation

1.1 Introduction

Chapter 6 is just one of several forms of regulation that can be applied to road transport operators generally, and owner-drivers and bailee-drivers, more specifically. These other forms of regulation include (for more detail, see Bray 1990: pages 86-93):

- *collective unilateralism*: collective organisations of drivers or truck owners combining forces voluntarily, rather than with legal sanction, and unilaterally to regulate rates and conditions.
- *collective bargaining*: collective organisations acting on behalf of drivers to bargain with, and consummate collective agreements with, principal carriers to regulate rates and conditions.
- *economic regulation*: the use by governments of licensing or franchising systems to regulate the number of road transport operators and (either directly or indirectly) their rates and conditions.
- *traffic and driving regulations*: the use of traffic and other road use laws (eg. drivers' licences, speed limits, loading regulations etc) to regulate behaviour on the roads.

There are long histories of collective unilateralism and economic regulation in New South Wales, but they had largely disappeared by the end of the 1970s. Collective bargaining continues, but it has mostly become part of Chapter 6 itself. Traffic and driving regulation continues to play an important role in the industry that is complementary to Chapter 6.

The distinctive form of regulation that is embodied in Chapter 6 arises from the role played by industrial conciliation and arbitration tribunals, whose regulatory role is usually confined to employees, to regulate rates and working conditions of owner-drivers and bailee-drivers, who at common law are not employees. In this way, the tribunals develop regulatory instruments for these 'independent contractors' that closely parallel awards and collective agreements for employees.

Chapter 6 is the culmination of a long, and often bitter, struggle in New South Wales that goes back at least to the 1940s. This section of the report draws on that long history for three reasons. First, analysis of the legal and institutional origins of Chapter 6 helps to explain the peculiar legal form that regulation has assumed in New South Wales.

Second, the history of Chapter 6 brings into clear focus the issues surrounding the regulation of owner-drivers and bailee-drivers, especially the arguments used by the government and various private interest groups to support (and oppose) such regulation. These arguments, and the responses of governments to them, in turn illustrate *the objectives of the legislation*. Third, historical analysis demonstrates the perennial nature of debates over the regulation of owner-drivers and bailee-drivers, which in turn points to deep-seated features of production processes, product markets and labour markets inherent to the road transport industry that are central to the costs and benefits of the legislation. These market and social structures will be reviewed later in the report.

1.2 History of the Legislation

The main private interest groups involved in the long history of regulation of owner-drivers and bailee-drivers were the Transport Workers' Union (TWU), various employer associations (including the NSW Road Transport Association, the Taxi Owners' Association and the Long Distance Road Transport Association) and a succession of collective organizations of owner-drivers (see Bray 1990: Chapter 5).

At least as early as 1943, the TWU sought (and achieved) legislative amendments to the 1940 Act designed to more effectively bring owner-drivers and bailee taxi-drivers within the definition of "employees" embodied in section 5 of the Act. The same amending legislation introduced a new section 88B that established procedures for invalidating any contract for the performance of work in industries covered by awards that did not meet award standards (*ibid.*: 95-6).

The TWU attempted to use these amendments to achieve awards that regulated the rates and conditions of owner-drivers and bailee-drivers. The union met with some success through the insertion of owner-driver clauses in many state awards, although the real effect of these clauses was problematic (Bray 1990: 95-9). More significantly, taxi owners, who strongly opposed the union's campaign, won a court case in 1946 that rendered the 1943 amendments inoperable. They also won another court case in 1953 that destroyed the efficacy of further amendments passed in 1951 (*ibid.*: 99).

The union won further amendments to the Act in 1957 and 1959, which introduced stronger instruments in the form of sections 88E and 88F of the 1940 Act. Under section 88E, certain groups of workers who were not normally regarded at common law as 'employees' could be 'deemed' to be employees for the purposes of the *Industrial Arbitration, Annual Holidays and Long Service Leave Acts*. Section 88F empowered the Commission to declare void certain contracts (including those for the sale of trucks 'in-work') if those contracts were found to be 'unfair, harsh or unconscionable' (Bray 1990: 99-101).

These provisions again met strong opposition from employers – after 1963 extending from taxi owners to a wider range of the industry's employer groups – who mounted a persistent legal campaign throughout the 1960s against the operation of the legislation:

During the period between November 1963 and May 1969, the employers' legal campaign involved four separate cases before the New South Wales Supreme Court, two trips to the Privy Council in Britain, one case in the Commonwealth Industrial Court and innumerable appeals to the New South Wales Industrial Commission. (Bray 1990: 109)

In response to this extraordinary legal saga and related industrial disputes, the NSW government in 1968 requested the Industrial Commission to conduct an inquiry into the operation of section 88E. This inquiry ran for 2 years, its hearings extended over 102 sitting days, the evidence it received produced 4326 pages of transcript and over 500 exhibits and records, and its report ran to 929 pages (see Industrial Commission 1970: Chapter 1).

In its *Section 88E Report*, the Industrial Commission concluded that regulation of owner-drivers and bailee-drivers was unquestionably necessary:

We have no doubt that the public interest requires that there should be regulation in some form of some classes of owner-drivers. Broadly, we have in mind the man who owns and drives one vehicle and employs no other person in connection with his driving work and who is not in the common carrier category... If it were in isolated pockets that the need for industrial regulation was established, we would hesitate to make any recommendation for its introduction. But we cannot ignore the wide variety of operations covered in these sections and the findings independently reached in each instance that industrial regulation is desirable we regard as amounting overall to an overwhelming case. (Industrial Commission 1970: para. 30.8)

As to the particular form that the regulation should take, the Industrial Commission concluded that the 'deemed employee' method contained in section 88E was inappropriate. Instead, the industrial legislation '... should make provision for regulating them (ie. self-employed owner-drivers) in their true colours and not by deeming them to have a status which they do not truly have' (Industrial Commission 1970: page 761). Towards this end, the Commission recommended that a separate part of the 1940 Act be introduced that explicitly set out the institutional procedures by which self-employed owner-drivers and bailee taxi-drivers should be regulated.

The Industrial Commission's recommendations, however, were not introduced into legislation until April 1979, when the then Labor government under Premier Wran repealed the bulk of section 88E and replaced it with a new Part VIIIA of the 1940 Act. With the exception of some amendments that will be listed below, the current Chapter 6 is virtually the same as the original Part VIIIA.

Part VIIIA set up what was called the Contract Regulation Tribunal to be staffed by a judge from the Industrial Commission. The tribunal's role was to regulate contracts between self-employed owner-drivers (who were referred to as 'contract carriers') and

the companies purchasing their services (who were referred to as 'principal carriers'). It is important to recognise that not all owner-drivers were covered by the legislation. The definition of 'contract carrier' in the legislation contained a number of exemptions, including 'common carriers', who are owner-drivers who advertise their services widely and are engaged by two or more principal carriers. In effect, only owner-drivers who owned one truck and who worked regularly for the same principal carrier were covered (CCH 1980: 1207, 1210).

Under Part VIII A, contract carriers were to be represented by 'associations of contract carriers' and the principal carriers by 'associations of principal carriers', both of which had to be registered under the Act. As was the case for employees under the main provisions of the Act, the respective associations could negotiate collective agreements and have them registered with the Industrial Registrar or the tribunal could arbitrate, handing down legally-binding 'determinations' that could have 'common rule' coverage.

Since 1979, there have been six important developments relating to Part VIII A and its successor, Chapter 6:

- In 1991, the Greiner Liberal Party government reproduced the old Part VIII A as Chapter 6 of the new *Industrial Relations Act 1991*.
- In November 1992, the Minister of Industrial Relations Hannaford commissioned a review of Chapter 6 by Hylda Rolfe. This produced a report in July 1993, entitled *Driving Forward*, which was critical of many aspects of the Act, especially the sector-wide regulation delivered by contract determinations.
- In 1993, the *Industrial Relations (Public Vehicles and Carriers) Amendment Act 1993* (No. 82 of 1993) extended the scope of Chapter 6 to explicitly include drivers of motor cars and motor cycles as well as lorry drivers.
- In 1994, the *Industrial Relations (Contract of Carriage) Amendment Act 1994* (No. 40 of 1994) introduced provisions relating to unfair termination of Head Contracts of Carriage.
- In 1996, the Carr Labor government's new *Industrial Relations Act 1996* reproduced the previous Chapter 6 and, at the same time, extended its scope to include drivers of bicycles.
- In 2001, the *Industrial Relations (Public Vehicles and Carriers) Amendment Act* inserted section 310A of the principal Act, which temporarily protects Chapter 6 from the operation of Part 4 of the *Trade Practices Act 1974* (Cth) and the *Competition Code of New South Wales*.

There are three important features of the legislative developments since 1979 that are reinforced by the following account. First, they demonstrate remarkable stability in the legislative regime of regulation. The legislation has been largely unchanged for over two decades and the changes that have been introduced have served to expand the scope of the legislation in terms of both the types of drivers covered (ie. to include motor car drivers, motor cycle drivers and bicycle drivers) and the issues regulated (ie. to include provision for reinstatement of drivers whose contracts have been unfairly terminated).

Second, the legislative regime of regulation embodied in Part VIIIA/Chapter 6 came to enjoy widespread support within the industry. While some parties were critical of some aspects of the legislation, policy statements, actions and interviews conducted in the preparation of this report revealed no party that supported the repeal of the legislation. Third, they show that support for the legislation extended to both of the major political parties in New South Wales politics – the amendments listed above were variously introduced by governments of different political hues and passed both houses of parliament with no significant opposition.

1.3 Objectives of the Legislation

The long evolution of legislation to regulate owner-drivers and bailee-drivers in New South Wales, which is only briefly summarised in section 1.2 above, involved much debate over the role played by owner drivers (and bailee-drivers) in causing problems experienced by the various private interest groups in the road transport industry and over the potential regulatory solutions. These debates are reviewed in this section because they reveal the objectives that the various private interest groups hoped would be achieved by legislative intervention and especially the government's synthesis, especially as it was articulated by government ministers when they introduced the legislative predecessor of Chapter 6 (ie. Part VIIIA of the IA Act) in 1979.

Throughout this sub-section, the views of the government and various private interest groups will be presented in their own words. The next sub-section of this report, the Summary and Conclusions, will then go beyond these words to reinterpret the objectives in terms more familiar to NCP reviews.

1.3.1 The Government and the Public Interest

The broader public interest objectives of Chapter 6 can be gleaned from the stated objectives of the legislature. Given that Chapter 6 is largely based upon the *Industrial Arbitration (Amendment) Act* of 1979, which repealed the former section 88E and inserted a new Part VIIIA, the first step is to examine the parliamentary debates in April 1979 to identify the arguments used by the government to justify that legislation.

When introducing the 1979 legislation in his Second Reading speech, the Minister for Industrial Relations of the time began by stating that:

...the purpose of this bill is to implement the recommendations made by the Industrial Commission of New South Wales in its report dated 23rd February 1970, following an inquiry it conducted into the operations of sections 88B and 88E of the Industrial Arbitration Act. (Hansard, Legislative Assembly, 10 April 1979, p. 3926)

More specifically, the Minister recognised the need to remedy the exploitation of bailee taxi and hire car drivers:

Previous attempts to vary the legislation using the concepts of deemed employment failed to remedy these abuses. Taxi and hire car drivers gained nothing from the legislation and, in fact, the only people to gain from it were members of the legal profession with a long series of court actions. This Government, when it first came to office in 1976, was determined to sort out the fact from the fiction in the legislation, and to bring an end to abuses that have confronted the transport industry for so long. (Hansard, Legislative Assembly, 10 April 1979, p. 3927)

Moving on to owner-drivers, and again drawing extensively on the Industrial Commission's report, the Minister identified the main focus of the legislation as:

drivers who own and drive one vehicle only, and employ no other person in connection with the driving work. However, he may have another driver as a partner, or, if he is a corporation, as director or others with a controlling interest, including family. It is this class of lorry owner driver who is in need of industrial regulation in the public interest. (Hansard, Legislative Assembly, 10 April 1979, p. 3928)

The Minister then acknowledged the very similar industrial positions of these owner-drivers and employee-drivers, arguing that the lack of effective regulation of owner-drivers had led to significant exploitation. He quoted with approval the Industrial Commission's report:

It is illogical in every practical sense that, within the one section of the industry and often within the one establishment, work which is virtually identical, should be done by employees subject to industrial regulation and owner-drivers outside its scope.

The evidence in the Inquiry has established that in a number of sections owner-drivers have been in the past exploited as to rates and subjected to oppressive and unreasonable conditions. (ibid., p. 3929)

The object of the legislation, the Minister later summarised, was to 'bring justice to the people who are engaged in the industry.' (ibid., p. 3932). Such justice was necessary because of the exploitation experienced by owner-drivers and bailee-drivers which, according to the Minister, resulted from unequal bargaining power in the market:

There is no doubt that this owner-driver can be vulnerable by having a heavy commitment to hire-purchase debts and in his desperation to obtain work he is in no position to bargain with contractors, plenty of whom make full use of such weakness. (ibid., p. 3929)

The final two matters of public interest raised by the Minister were road safety and the role of the legislation in preventing industrial disputes:

The public suffers considerably in many ways from the existing situation. Quite apart from disputes over the years between these drivers and their employers, there is the effect of overloading and speeding for economic reasons, and there is the threat of disruption of a vital lifeline which transport represents to the public at large, a disruption which has severe toll on the domestic life of innocent citizens, as well as on industries and the workers who rely on industries. Over the years, attempts to resolve disputes involving lorry owner-drivers through the ordinary process of the law have proved too cumbersome and prolonged. We agree with the commission that industrial regulation will provide clear advantages not only for the owner-driver but also for the contractor. The rights and obligations of both sides may be known and accepted for a prescribed term. Through this bill, the opportunity will occur to obtain stability in an essential industry. (ibid., p. 3929)

As the Minister explicitly acknowledged, his arguments in support of the legislation (and, therefore, his articulation of the legislation's objectives) relied heavily on the conclusions of the Industrial Commission in its *Section 88E Report* (see Chapter 30). Perhaps the only significant area where he gave less emphasis than the Commission related to road safety. The Commission clearly saw improved safety as an important objective of the legislation:

Industrial regulation, although certainly not a panacea for the bad practices of overloading and speeding which are prevalent in some sections, must assist in reducing them. We say this because we have already found that they stem to an appreciable extent from depressed rates and adverse conditions. (Industrial Commission, 1970: paragraph 30.24)

The parliamentary opposition at the time, represented by the Liberal Party spokesman, Mr Shipp, largely supported the legislation, expressing concern mostly about the processes of consultation that produced the bill and its potential to force owner-drivers into membership of the TWU. He summarised his position (and that of the opposition) in these terms:

We do not oppose the bill in principle, but we oppose the way it has been brought into the House and the fact that many areas have not been explained. (Hansard, Legislative Assembly, 10 April 1979, p. 3928)

Parliamentary debates on subsequent amendments to the legislation demonstrated a similar political consensus in favour of the legislation and produced no obvious changes in the legislation's objective in the eyes of the legislature.

1.3.2 *The Union*

The arguments advanced about owner-driver regulation by the Transport Workers' Union were remarkably consistent over the whole post-World War II period. The union's first main concern – and its first objective in owner-driver regulation – was *to protect the jobs, wages and working conditions of employee-drivers*, who constituted the bulk of the union's membership, especially in the earlier decades. In 1951, for example, the NSW State Secretary of the TWU recalled earlier years:

The Transport Union... was the first Union to become interested in Lorry Owners, due to the fact that during the depression period Lorry Owner Drivers became such a menace to the Industry and because of their activities in worsening the conditions of the employee drivers that the Union was forced to take some action to organize Lorry Owner Drivers. (internal union correspondence cited in Bray 1990: 94)

The problem from the union's perspective was that owner-drivers were a ready, and largely unregulated, substitute for the services of employee-drivers. Furthermore, as a result of the lack of regulation and the strong competitive forces in the industry, owner-drivers were frequently forced to accept cartage rates that undercut the rates of cartage contractors who employed employee-drivers. The ODs' capacity to engage in this rate-cutting behaviour was seen to derive from labour costs associated with employee-drivers – such as minimum hourly wage rates, penalty rates for overtime and work in unsocial hours, annual holidays, long service leave – that did not apply to ODs. For example, in May 1960, the new NSW State Secretary of the TWU stated:

LODs are taking the work normally done by employees and are cutting rates. The outside firm can get work done cheaper by rate-cutting. A lot of big companies which previously operated big fleets of trucks are gradually getting rid of their fleets and employing owner-drivers at a cut-rate. They are not getting overtime. They are not observing awards. (Transcript of hearing before Industrial Commission, cited in Bray 1990: 107)

Around the same time, the Newcastle Sub-Branch Secretary of the union made a similar statement:

One other troublesome feature that is becoming prevalent in our area is that of some companies sub-contracting to lorry owner drivers at a reduced rate and using them to the detriment of employee drivers... This is most noticeable in the transport between Sydney-Newcastle and interstate work where some of the rates that these sub-contractors are accepting are far below what would be needed to return even single time rates for the hours worked for employee drivers, not taking into account the fact that they are driving day and night and, in some cases, if stranded in other states, would bring a return load home for the cost of the fuel. (Voice of the Transport Worker, June 1962)

The regulation of ODs therefore promised to address this 'unfair competition'. Another union official in June 1968 explained the importance of unionising owner-drivers and regulating their rates in these terms:

... if the Union fails to represent these LODs, then they become an unorganised rabble working for what they can 'pick up', claiming when it suits 'it's a free country' and believe (sic) that freedom allows them to undercut prices and attack the reputable employer...

The fight is to unite all LODs... This fight is also the employee's fight, because if you allow the LOD rate to become law, then you will find the full employment at present in our industry will disappear and the boss will be forcing you to buy a truck from him, work for practically nothing or get out... (Voice of the Transport Worker, June 1968)

In 1971, after the Report of the *Section 88E Inquiry* was released, the TWU's Branch Committee of Management began its plea for the implementation of the Report's recommendations by stating:

The BCOM considers the continuing use of unregulated subcontractor owner drivers into the every day working operations of the transport industry is having the effect of eroding the general working conditions of employee drivers permanently engaged in the industry... (cited in Bray 1990: 121)

At the same time, a second concern of the union was *to improve the lot of owner-drivers themselves*, especially as increasing numbers of owner-drivers became members of the union. Commenting on an award handed down in 1945, following legislative measures introduced in 1943 (see above), the Secretary of the TWU's LOD Section wrote:

For many years the Lorry Owner Driver has been subjected to the worst conditions that have applied in any industry. He has been the target of Gangers, Foremen, Engineers, and any other person of authority. This was due mainly to the fact that he was unorganized and (that) the environment he lived and worked under was purely individualist.

However, today, the Transport Workers' union, through its Lorry Owner Driver' Sub-Branch, has installed the machinery whereby Lorry Owner Drivers are now an organized body to be reckoned with. Just recently Judge Ferguson made an award for our Sub-Branch and for the first time in the Industrial History of NSW, we are entitled to overtime rates, annual holidays and all conditions as apply to Employee Drivers. We are now classed similar to the carpenter and Plumber, who supply their own tools to work with. (Internal correspondence cited in Bray 1990: 97)

By 1967, when the union was expressing similar arguments before the Industrial Commission's *Section 88E Inquiry*, the union's NSW Branch had 4,239 owner-driver

members from a total membership of 21,928. The TWU's submission to the Rolfe Report claimed that 10,000 of its 30,000 members in 1993 were owner-drivers or bailee-drivers (TWU 1993), while a similar proportion of its current membership was quoted for 2002 (Interview).

A third objective of the TWU focused on *improving road safety*, including both the occupational health and safety of union members and the broader safety of the general public. The argument consistently advanced by the union was that many owner-drivers accepted low – indeed, economically inadequate – rates for the jobs they undertook and that this forced owner-drivers to work excessively long hours, to breach safety regulations and to neglect proper maintenance standards for their trucks; earlier quotations provide many examples of the union's claims. Another, in 1952, when the TWU's journal declared:

The 'Blitz Boys' in the road haulage game are a pariah-like crowd, when you come to sum it up. They run equipment that, to say the least of it, must barely scrape through the acceptable standards; they undercut recognised rates charged by fellow hauliers, and consequent upon this price warfare, they have to almost work 'around the clock' to make financial ends meet. And yet they keep it up, risking the lives and limbs of themselves and others and causing inconvenience and trouble to many. (Voice of the Transport Worker, December 1951)

More recent statements by the TWU reflect the same arguments, although the preoccupation with defending the wages and conditions of employee-drivers is given a lower priority. The union's submission to the Rolfe Inquiry, for example, supported the retention of the current system:

The TWU believes that the current system (ie. Chapter 6) allows for a productive and cost-efficient transport industry, while it gives a basic measure of protection for contract carriers. (TWU 1993: 15)

At the same time, the union vigorously opposed the abolition of the legislation:

The TWU believes that complete abolition of Chapter 6 regulation would lead to an immediate depression in rates paid to owner-drivers, with very little of this being passed on to customers. The depression of rates would increase substantially the rate of bankruptcies among owner-drivers, and over the longer term lead to a deterioration in safety and service standards in the transport industry. (TWU 1993: 16)

Interviews with the TWU's Chief Legal Advisor, Mr Andrew Metcalfe, confirmed this as the TWU's current position.

1.3.3 Employers

Employers have not been as consistent as the Transport Workers' Union in their analysis of the problems of the road transport industry or their support for legislative intervention as a solution to those problems. This greater inconsistency arises partly from greater fragmentation in employer organisation. There has always been a variety of associations representing employers in different segments of the industry and they often disagree with each other. As well, the policy positions of the same organisation can change over time, shifting according to the circumstances of the time, the issues in question and the personnel who occupied key policy-making positions within the organisation.

NSW Road Transport Association: The largest and most representative of the employer associations is the NSW Road Transport Association (hereafter the NSWRTA), which traces its history under the name of the Master Carriers' Association, back to the 1880s (see Bray & Rimmer 1987). For much of the period since the 1930s, the NSWRTA was concerned with similar problems as the TWU and diagnosed the unregulated operations of owner-drivers as a significant cause of these problems. The NSWRTA mostly supported legislative intervention as a remedy, although its policy position on particular regulatory instruments was often coloured by its organizational interests.

One of the earliest and clearest statements by the NSWRTA came in 1945 in a detailed and well considered paper entitled *Stabilisation of the Road Transport Industry in New South Wales*:

The term 'destructive competition' is defined as a general cutting of rates below costs. If affects the efficient and inefficient operator alike... The general unprofitability that results from destructive competition leads to financial demoralisation of carriers, low wages and impaired standards of service. The unprofitability of the industry prevents employers of labour from extending the best working conditions and rates of pay to employees and, to some extent, induces employers to pay employees for services rendered at rates below the minimum fixed by awards and judgments of the arbitration courts and industrial commissions. Further, there is a tendency for work performed by operators employing labour to be transferred to the owner driver who can operate at below cost rates by working longer hours without actually adding to his remuneration. The general unprofitability further results in operators risking the penalties for non-compliance with the standards of safety on the roads prescribed by the State and there is a tendency to neglect proper maintenance and service of equipment... The public gains temporarily from destructive competition because of the below cost rates but suffers ultimately from insufficient and poor quality carrier service and the impairment of the standards of industrial conditions, which have been laboriously built up. (cited in Bray 1990: 84)

In that same statement, the NSWRTA went further to advocate legislative regulation as a solution:

It is obvious that wide-spread destructive competition in the road transport industry cannot be brought to an end by voluntary discipline within the industry and intervention by the State will be required... (cited in Bray 1990: 89)

The association's support for legislative regulation in the immediate post-World War II period – which was repeated many times over subsequent decades – was partly motivated by *the need to protect haulage contracting companies*, which used employee-drivers. These companies were the main members of the association. Owner-drivers were often competitors who were not subject to the same regulatory constraints as carrying companies that used employee-drivers. By more effectively regulating owner-drivers, the association could ensure that its members' market positions were protected from what was considered as unfair competition emanating from owner-drivers. As well, to the extent that the NSWRTA had owner-drivers as members, effective regulation would improve the rates and conditions of the owner-drivers themselves.

The NSWRTA's policy position, however, was frequently qualified in two important ways. First, while it generally supported legislative regulation of owner-drivers, it was concerned that that regulation like section 88E (and, later, Chapter 6) might lead to increased owner-driver membership of and increased power for the Transport Workers' Union. It would appear that this was the main motivation behind the association's opposition to section 88E during the 1960s, when it claimed that: owner-drivers, especially those with more than one truck, were business men rather than workers, who should be joining an association of businessmen (like the NSWRTA!) rather than a trade union; the financial position of owner-drivers would be compromised if they were forced, by their membership of the union, to participate in strikes; and excessive interference by the union in managerial prerogative (see Bray 1990: 110-11).

By the end of the 1960s, however, the NSWRTA had reversed its opposition and, along with most other employer associations, came to support the recommendations of the *Section 88E Report* (see Industrial Commission 1970: paragraphs 30.3, 30.4 and 30.9). The reasons behind this change of heart are not completely transparent, but it would appear that the TWU's narrowing of ambitions to single-truck owner-drivers and the Commission's focus on the same group for its regulatory recommendations were important (see Bray 1990: 110-14).

Second, the association's position was sometimes compromised by the fact that many of its most influential members were large contracting companies that used owner-drivers as sub-contractors (see Bray 1990: 72-3). This meant that there were limits to the extent to which the association could speak on behalf of owner-driver interests because significant increases in owner-driver rates or especially in conditions could increase the cost structures of the association's major members. This dilemma was resolved after the passing of Part VIIIA in 1979, because the NSWRTA restricted its recruitment of owner-driver members to a small number of areas where it had traditionally represented owner-drivers (see Bray 1990: 73), but it was an issue during the 1960s.

The NSWRTA's strong support for the regulation of owner-drivers, but its ambivalence towards Chapter 6 and related regulatory forms, continues today. An interview with the Association's Industrial Officer, Ms Margaret Fulham, revealed recognition of the market failure that flowed from the activities of unregulated owner-drivers and the serious consequences for road safety. However, the interview also demonstrated the Association's less than full support for Chapter 6. The regulation of minimum rates and owner-driver conditions that were delivered by Chapter 6 were opposed in principle, but as well the Association also considered the determinations under Chapter 6 to be deficient because they:

- were inconsistently applied and enforcement continued to be a problem.
- only applied to the Sydney metropolitan area.
- established minimum rates that were too low.
- did not address the continuing fundamental problem of excessively easy access of owner-drivers to finance capital. (Interview with Fulham, 28/5/02)

The NSWRTA's preferred alternative form of regulation was a licensing system that limited entry to the road transport industry to owner-drivers who demonstrated some understanding of costing and business plans and who are not financially overcommitted. The Association, however, was pragmatic and until this preferred alternative was implemented, it was prepared not to support Chapter 6.

Courier and Taxi Truck Association: The CTTA was established in its present form as an association of principal contractors in 1991 and its present membership comprises around 20-30 of the largest courier companies, collectively engaging around 65 per cent of that segment's 3,500 couriers (Interview with Robertson). The association traditionally supported Chapter 6, lobbying parliamentarians in its favour and opposing the recommendations of the Rolfe Report. It also participated with the TWU in the negotiation of the *Courier and Taxi Truck Determination*, although it opposed many specific provisions in the determination and forced a number of disputes with the union to arbitration. The association's support for Chapter 6 – if not necessarily for the details of the determination – was based on the belief that minimum rates effectively enforced across the industry would both protect contract couriers from exploitation and provide a fair and common basis for competition between principal contractors.

The CTTA's support for the determination and, potentially, for Chapter 6 more broadly has recently been damaged by two main factors. First, the association is concerned with widespread non-compliance with the provisions of the determination, which it sees as undermining the position of association members who do comply. The CTTA sees the failure of the Department of Industrial Relations to effectively enforce the determination as a major factor in this non-compliance. Second, it considers the expanding scope of the legislation during the 1990, especially the insertion of superannuation provisions into the determination, as undermining the independent contractor status of couriers (Interview with Robertson).

NSW Taxi Council: The NSW Taxi Council is the peak industry body representing taxi companies, cooperatives and networks in NSW. Membership of the Council comprises the 12 greater Sydney metropolitan area taxi networks and 57 networks from rural and regional NSW. As the peak representative body, the Council gives leadership to the industry in NSW and is the industry's consultative body to the NSW Government. The body that is registered with the NSW Industrial Relations Commission (as a union of employers), however, is the NSW Taxi Industry Association. It is representative of individual taxi-cab operators in NSW and its membership is drawn from the whole state.

While the Taxi Council generally supports regulation of bailee taxi-drivers, it has some problems with the operation of Chapter 6 and especially the payment system under the Taxi Driver Determination. With respect to the latter, the determination includes a 'bailment fee' system, whereby all income earned by the taxi in a shift goes initially to the driver, who then pays a bailment, or 'buy-in', fee to the owner/operator of the taxi. The driver, in addition, is responsible for fuel and cleaning costs. The Taxi Council argues that adjustments to the quantum of the fee following increases in taxi fares are slow because of delays in application process and unfair to owners because they do not receive acceptable proportion of the fare increase.

The Taxi Council's concerns, however, go beyond complaints about delays and the quantum of increases granted. While still anxious to see protection of drivers' basic entitlements, the Council feels that the system disadvantages both drivers and operators. For example, if takings are down, drivers suffer because they still pay the same fee while, on the other hand, operators lose out when takings are high because their return remains the same. Fairer for all concerned, according to the Council, would be a system whereby takings, as measured by the meter, were divided evenly, or on some agreed basis, between the two parties. An associated objection to Chapter 6 concerns enforcement, or lack of, and the ease with which unscrupulous operators are able to attract drivers by offering them the opportunity to pay a lower bailment fee, often in return for agreeing to forego leave entitlements. Underpinning this concern is the ongoing shortage of drivers in the metropolitan region, which provides the incentive for operators to flout the regulations. In support of its position, the Council claims that Sydney is virtually the only place in the world where such a bailment fee system operates.

Commercial Motor Users' Association: Amongst the other employer associations, many recognised market vulnerability of owner-drivers and the unfair competition for larger contracting companies created by unregulated owner-drivers. As early as 1938, the Commercial Motor Users' Association objected to the ability of owner-drivers to avoid hours regulations:

One of the prolific causes of unfair competition not only with the railways, but also between truck operators, is the lack of legislation controlling the number of hours a man can work per day at the wheel of a vehicle. Any amendment of the present act must limit the hours of work behind the wheel of a commercial vehicle whether he be owner or employee. Sydney master carriers are forced to pay award rates and overtime, and are subject to continuous competition from free lance

truck owner driving their own vehicles for 16 or 18 hours per day, if necessary, to compensate for contract work done too cheaply during legitimate working hours. Not only is this competition unfair, but it is a danger to the public.

Long Distance Road Transport Association: In 1956, the Long Distance Road Transport Association, which was then an employer association (rather than an independent association of owner-drivers), highlighted the vulnerability of owner-drivers:

Tied with rate-cutting is the problem of stand-over tactics being used by some shippers. They beat carriers down to a ridiculous figure to haul their merchandise. They seem to be able to pick some chap who is battling with payments on his truck and has probably been looking around for days for a load. He is easy prey for those types, because they know he'll reckon that a few pounds is better than none at all. (Truck & Bus Transportation, September 1956)

Furniture Removalists: As early as 1956, a leading employer in the furniture removals segment of the industry lamented the impact of owner-drivers:

The biggest impact on the removal trade since the war has been the advent of the owner-driver. Much can be said for and against owner-drivers, but in my opinion they are, at present, largely detrimental to the industry, as their mode of operation enables them to cut prices and reduce the standard of service. The organization with employees is forced to accept award conditions which stimulate the payment of penalty rates, camp out fees etc, all of which the owner-driver avoids. Restrictions on working hours contained in awards and various State acts, severely curtail the operations of the contractors, but do not so owner-drivers; further owner-drivers escape payroll tax. (cited in Bray 1990: 85)

These sentiments correspond broadly with the current position of the Furniture Removalists' Association, the Secretary of which was interviewed for this report (Interview with Hanley). The association supports Chapter 6, its secretary arguing that:

Mechanisms such as minimum rates (and Chapter 6) that put a floor under the income of drivers, whether employees or contractors, and provides them with basic entitlements are necessary to prevent a return to the bad old days of the 1970s. (ibid.)

1.3.4 Independent Associations of Owner-Drivers and Bailee-Drivers

During the post-World War II period, a large number of collective organizations were formed by owner-drivers in various segments of the industry that sought to retain their independence from both the Transport Workers' Union and employer associations. The late 1970s and the early 1980s were years when these organizations enjoyed great popularity (see Bray 1990: 75-80). The history of these organizations, however, is a most unhappy one – they almost universally displayed great organizational instability, rarely

continuing for more than a handful of years, and they were frequently racked by personality conflicts amongst their leaders and great inconsistency in their policies.

As a result of this fragmentation and organizational instability, it is difficult to generalize about the attitudes and policies of independent owner-driver associations towards regulation generally and Chapter 6 specifically. Recognising these difficulties, it appears that most such associations:

- were often hostile towards the role of unions and employer associations in representing the interests of owner-drivers.
- supported some form of regulation, although the most popular seems to have been economic regulation through licensing.
- were more concerned with improving the lot of owner-drivers than with protecting the wages and working conditions of employee-drivers, which is hardly surprising given the memberships of these organizations.

1.4 Summary and Conclusions

Chapter 6 of the *Industrial Relations Act 1996* is the culmination of legal and institutional evolution that stretches back over 55 years. The historical approach taken in this section of the report showed that the problems identified in the NSW road transport market, the diagnosis developed and the legislative solutions proposed by all parties to the industry have not varied substantially since World War II. This not only suggests that the peculiar form that regulation has taken in New South Wales is the result of long-running and context-specific historical forces, but also that the evolution of the regulation has been influenced by deep and enduring structural features of the industry's product markets, production processes and labour markets – features that will be explored in more detail in later sections of this report.

The main task of this section of the report was to identify the objectives of the Chapter 6 legislation. Again, a historical approach was taken that separated the arguments and action of private interest groups from the arguments and actions of governments and industrial tribunals. With respect to the former, it is clear that the various private interests groups were motivated to protect the interests of constituent members – which is, after all, the reason for existence of representative organisations like trade unions and employer associations. The latter were charged with protecting the public interest.

The evidence presented in this section demonstrates considerable consistency in the views of private interest groups and governments. They agree – and have agreed over a very long period of time – that there are problems in the road transport markets that require legislative intervention. In other words, they almost uniformly believe that regulation is necessary. The precise form that the regulation should take has been more controversial.

However, the problems and solutions that have been canvassed in this section – and therefore, the analysis of the objectives of the legislation – have been presented mostly in the words of the parties themselves. The task is now to locate the evidence more solidly in the concepts and language of National Competition Policy, as set out in Centre for International Economics (1999) and COAG Committee on Regulatory Reform (1999).

There is little doubt that most private interest groups consider (and governments agree) that *market failure* occurs when the market for owner-drivers and bailee-drivers is left unregulated. There are several sources of this market failure (which will be discussed in more detail in sections 3 and 4 of this report):

- *irrational behaviour* by owner-drivers, motivated by their preoccupation with ‘being their own boss’ and ‘driving the open road’ rather than observing proper business principles, which means that prices in the market do not reflect costs.
- *information asymmetry*, in that many owner-drivers are poorly informed about business principles and even their own cost structures, and therefore fail to charge appropriate prices.
- *unequal bargaining power*, produced by the owners of goods (ie. consignors), who are often large corporations in manufacturing or large freight forwarding companies, being confronted in an unregulated market with a ready supply of individual owner-drivers who are poorly informed about business principles and who are financially vulnerable because of high debt levels.
- *spillover effects*, especially with respect to road safety, in that the market fails to accommodate within prices the public cost of private behaviours, such as speeding, excessive driving hours, overloading and poor maintenance of trucks.

These market failures have significant and unacceptable consequences (for many owner-drivers, for employee-drivers, for employers and for the general public) that are considered contrary to the public interest:

- *industrial relations*: the ready substitutability of employee-drivers and owner-drivers means that market failure for owner-drivers leads to the undermining of the market for employee-drivers, in terms of their employment opportunities, their wage levels and their conditions of employment. As well, the government considered it important to ensure that there was a legislative mechanism for dealing with industrial disputes involving owner-drivers and bailee-drivers.
- *occupational health & safety*: the failure of owner-driver markets encourages poor driving and road behaviour which increases the health and safety risks for employee-drivers and owner-drivers themselves.
- *road safety*: the safety of the general public who use the roads alongside owner-drivers and employee-drivers is also jeopardised by the failure of owner-driver markets.
- *poor quality of service*: the excessive economic pressures on owner-drivers in an unregulated market and the resulting high turnover as owner-drivers (and bailee-drivers) leave and enter the market reduces their capacity to provide a quality service to consumers.

In this context, the objectives of the NSW government in establishing Part VIIIA of the *Industrial Arbitration Act* in 1979, and of subsequent NSW governments in reproducing Part VIIIA in Chapter 6 of the *Industrial Relations Act*, were to address market failure through regulation. The particular form of the regulation involves the registration of collective agreements and the arbitration by the Industrial Relations Commission of 'common rule' determinations that provide minimum rates and working conditions for owner-drivers and bailee-drivers.

There was considerable support revealed in this section of the report amongst the private interest groups for this form of regulation. Clearly, the Transport Workers Union supports Chapter 6 and advocates its expansion. Most employer associations also support it, although they often see it as a 'second best' solution or they are critical of certain aspects of the operation of the legislation. The NSWRTA, for example, would have preferred an alternative form of regulation such as licencing and restricted entry to the industry. The CTTA historically supported Chapter 6, but they are becoming concerned about increasing scope of their determination and the rate formula used. The Taxi Council is probably the most critical of the employer associations. Independent associations representing owner-drivers have been fragmented and somewhat ephemeral, with some opposing regulation, but most desperately seeking some sort of intervention that would improve the working lives of owner-drivers themselves.

Section 2

The Operation of the Legislation

2.1 Introduction

As noted in the previous section, the regulation of contracts of bailment and carriage found in Chapter 6 of the *Industrial Relations Act of 1996 (NSW)* is but the latest evolutionary form of the regulation that was first introduced in 1979. The first section of this report traced the history of the legislation since 1979 and, in particular, noted the various legislative amendments to the regulation since that time. It was observed that each amendment to the legislation resulted in an expansion of its scope and jurisdiction. It was also observed that the broad intent of the regulation has received bipartisan political support. The latest incarnation of the regulation was introduced by the then Minister for Industrial Relations, Hon Jeff Shaw QC MP, who stated that:

Chapter 6 of the bill carries forward, with some variations and streamlining, the provisions of the 1991 Act

and furthermore stated that:

Although a number of the provisions in the revised Chapter 6 of the bill incorporate words or phrases used in other parts of the bill in relation to employees, it is nonetheless, the legislative intention to retain the chapter as a discrete system of regulation. (Hansard, Legislative Council, 23 November 1995, p. 3855)

This section of the report provides a detailed analysis and commentary on each dimension of Chapter Six. Following the organisation of Chapter 6 itself, the discussion and analysis is organised into seven parts. Each part is further segmented into discussion of the regulation and analysis of case law that is relevant to each distinct part. The parts of Chapter 6 pertaining to contract determinations and agreements also present descriptive statistical data on the number and type of contract determinations and agreements. Unfortunately, the data are limited but they do provide some insight into the experience of these parts of Chapter 6. Finally, there is a discussion of compliance and enforcement, before the main points are summarised and conclusions are drawn.

2.2 Part One – Application and Definitions

Part One of Chapter 6, entitled ‘Application and Definitions’, provides definitions of contracts of bailment and contracts of carriage and, importantly, charts the boundaries of the Chapter’s application.

For the purposes of Chapter 6, a ‘contract of bailment’ under section 307 is a contract created when a taxi-cab is bailed to a person to enable that person to carry passengers in a transport district or when a private hire vehicle is bailed to a person to transport passengers. Subsection 307(2) also covers those persons in possession of a private hire vehicle who ply for trade other than as a bailee or employee.

Part One also defines a ‘contract of carriage’ as one ‘for the transportation of goods by means of a motor vehicle or bicycle in the course of a business of transporting goods of that kind by motor vehicle or bicycle’ (section 309(1)). Importantly though, this section excludes carriers that are a body corporate (or directors of a body corporate) or partnerships. Aside from these carrier exclusions, section 309 (4) also states that a contract of carriage does not include a contract:

- (a) that is, if the carrier is a common carrier, made in the ordinary course of the business of the carrier as a common carrier, or
- (b) that is made in the ordinary course of business for the carriage of packaged goods for different principal contractors by the use of the same motor vehicle or bicycle, or
- (c) for the carriage of mail by or on behalf of Australia Post, or
- (d) for the carriage of bread, milk or cream for sale or delivery for sale, or
- (e) for the carriage of goods that are to be sold pursuant to orders solicited during the carriage of the goods, or
- (f) for the carriage of livestock, or
- (g) if the principal contractor is a primary producer or a member of the family of a primary producer and the contract is for the transportation of primary produce (other than timber), or
- (h) for the transportation of primary produce (other than timber) from or to land used for primary production, or
- (i) for the delivery of meals by couriers to homes or other premises for consumption.

The legislative intent of these exclusions (which is consistent with the Minister’s Second Reading speech quoted in section 1 above) appears to be to narrowly confine the application of the regulation to individual carriers who are judged to have the least bargaining power. Such carriers, usually owner-drivers, are often referred to as ‘dependent’ contractors because they work regularly for the same principal contractor and the services they supply are, in reality, very similar to those provided by employee-drivers.

These provisions have largely gone uncontested with the exception of the case of *Transport Workers' Union of Australia (NSW Branch) v Walkers Civil Engineering Pty Ltd* 1986 IR 240. In this case the question of whether excavated material came within the meaning of 'goods' in section 309(1) was raised. This case arose due to allegations made by the TWU that Walker Civil Engineering was operating in breach of the *Transport Industry – Excavated Materials Contract Determination* (301 NSW IG 1082) in respect to the payment of contract carriers engaged by Walkers to cart excavated material.

In determining that excavated material fell within the meaning of 'goods' as expressed in s.309(1), Justice Peterson drew upon the history of regulation of common carriers since the Industrial Commission's 1970 report (referred to in the first section) in addition to the then Minister for Industrial Relations, the Hon Jeff Shaw's second reading speech of the *Industrial Relations Bill 1995*, to state that there was no intention to 'diminish the range of work coming within the scope of the statutory definition' (Peterson J. p. 244). In significant obiter, Justice Peterson also observed that the amendments to Chapter 6, introduced by the *Industrial Relations Act 1996* (NSW), 'were to essentially to clarify and to enlarge the Commission's discretion' (p. 244).

2.3 Part Two - Contract Determinations

Part Two is perhaps the most significant part of Chapter 6 as it empowers the Commission to regulate contracts of bailment and carriage in much the same way as the Commission determines employment conditions through its arbitral powers. Under sections 312 and 313, the Commission is granted broad powers to investigate any matter arising under contracts of bailment and contracts of carriage. More specifically, under section 312, the Commission is permitted to determine the remuneration of bailees, amounts paid by bailors to bailees for attendance, leave entitlements, minimum and maximum hours of work and any other conditions. As Ms Margaret Fulham, Industrial Officer with the Road Transport Association stated:

Determinations set out obligations of principal contractors and set out obligations of owner drivers and that, from one view, means that there are mutual expectations in terms of standards on the main players in the industry....

Aside from these substantive issues, the Commission may also order that the bailor maintain certain records in relation to the contract of bailment. The Commission has similar powers in respect to contracts of carriage under section 313.

The broad scope of the Commission's powers to determine the content of contract determinations is highlighted in two recent cases, one involving a variation to the *Principal Transport Industry-Courier and Taxi Truck Determination* (239 IG 248) IRC No. 00/2138. In this 1998 decision, (*Dec in IRC Nos 3252, 7101, 1872, Variation of the Transport Industry-Courier and Taxi Truck Contract Determination – Coram*), Commissioner Connor, *inter alia*, agreed with the TWU's submission for the inclusion of induction training for couriers in the principal contract determination. The Commission

agreed that this training should cover occupational health safety issues, vocational skills, professional training and industrial rights.

In the second case, Commissioner Connor was asked by the TWU to consider the inclusion of superannuation entitlements into the principal determination. Commissioner Connor subsequently determined in (*Dec in IRC No. 98/5280 – Application by the TWU for a Transport Industry-Courier and Taxi Truck (Superannuation) Contract Determination*) that the Commission's authority to make contract determinations including superannuation determinations for contract couriers relies on section 313(1) of Chapter 6 which permits the Commission to make a contract determination 'with respect to remuneration of the carrier, and any other condition'. These decisions not only indicate the Commission's broad discretion to make contract determinations but also the significant discretion and flexibility the Commission has to ensure that conditions of determinations are kept in line with broader community standards and expectations.

According to the most recently published edition of the NSW Industrial Gazette (January 2002, Vol. 330) there are eleven common rule contract determinations. However, Mr Andrew Metcalfe, Legal Officer with the TWU, also made the authors of this report aware of a further contract determination – 'Transport Industry – Waste Collection and Recycling Contract Determination' made on the 9th of May 2002 which brings the total number of common rule contract determinations to twelve. Volume 330 of the NSW Industrial Gazette also records that there are eight enterprise-specific contract determinations in effect (please see Appendix 2-A for a complete record of contract determinations and agreements).

It is also important to note that the area and application of 'common rule' contract determinations varies from one determination to another. For instance, the *Taxi Industry (Contract Drivers) Determination* only applies to taxi drivers within metropolitan Sydney whilst the *Courier and Taxi Truck Determination* applies to the County of Cumberland or elsewhere in NSW excluding the County of Yancowinna. Other 'common rule' determinations such as the *General Carriers Determination* and the *Concrete Haulage Determination* apply throughout NSW.

Aside from determining remuneration and other contractual conditions, the Commission is also empowered to reinstate contracts of bailment or carriage under section 314. The legislative intention of section 314 is to provide similar protection to bailees and carriers as that afforded to dismissed employees. As the then Minister for Industrial Relations, Hon Jeff Shaw QC MP, stated in his second reading speech of the bill in relation to this section:

...the Government considers that it is appropriate to clothe the Commission with greater discretionary jurisdiction akin to that exercisable in relation to dismissed employees (Hansard, Legislative Council 23 November, 1995, p3855)

Similarly, in *Decision in IRC Nos 5230 and 5231 of 1996 – Russell Kingsford Rolfe and Dolores Verell Rolfe v Mayne Nickless Coram*: Commissioner Connor described section 314 as ‘the exclusive code for any claim of the unfair termination of the services of an owner driver...’ Moreover, in *Cherry v Allied Express Transport Re Termination of Contract Carrier* 1973 IR 305, Justice Peterson stated at p309 that:

it seems appropriate to interpret the power as one which is to be applied, at least if not solely, in circumstances where there has been an unfair termination of a contract of carriage. This means that it is may be applied in the same circumstances as apply to employees. Here that involves considerations of resignation or constructive dismissal, reinstatement and compensation.

Like the regulation that protects employees from procedural and substantive unfairness, the Commission may order reinstatement of a terminated contract, re-engagement under a similar contract, or compensation if the Commission believes that restoration of the contract is impracticable. Similar to those provisions regulating unfair dismissal, the orders for compensation may not exceed remuneration earned by the carrier or bailee in the six month period preceding the contract termination. Moreover, the Commission, in assessing any compensation payable must take into account whether the driver or carrier made a reasonable attempt to find alternative arrangements and the remuneration that was received or that would have been payable had they succeeded in finding alternative contracts.

The amendments made in 1996 to the reinstatement jurisdiction in Chapter 6 of the *Industrial Relations Act* tend to reflect matters determined in two important termination cases under the former legislation. Firstly, in *Re Transport Industry (General Carriers) Contract Determination – Appeal by Transport Workers Union of Australia NSW Branch* (1993) 46 IR 154, a Full Bench of the Commission was asked to consider whether the Commission only had jurisdiction to reinstate a contract for a single load. The Full Bench of the Commission stated that such an interpretation of the Commission’s power would result in a ‘manifestly absurd’ result and confirmed the Commission’s power to reinstate the general relationship between principal and contract carrier.

Secondly, in a further test of the general reinstatement regime under section 680(3) the *Industrial Relations Act* 1991, the Commission was asked to determine in *Deltec International Courier Pty Ltd v Transport Workers Union of Australia, NSW Branch* (1993) 50 IR 341 whether the reinstatement power could include an order for compensation for lost remuneration. The Full Bench of the Commission agreed that such an order was comprehended with the general concept of reinstatement and this was later upheld by the Full Court of the Industrial Court. The significance of this decision is that it influenced the inclusion of section 314(3) in Chapter 6 to clarify the legality of orders for lost remuneration.

According to Andrew Metcalfe, Chief Legal Advisor of the TWU, there have been only sixteen applications made pursuant to the reinstatement regime over the last three years and the majority of these were settled either prior to or during conciliation proceedings. However, Mr Metcalfe also stated that a small number of applications are made by solicitors acting on behalf of their client bailees and contract carriers.

The balance of Part Two – sections 315 to 321 – deals mainly with the procedural issues of making and varying contract determinations. Under section 315, the Commission must hold a conference of the parties to determine the matters in dispute and, similar to a conciliation, take all reasonable steps to reach an amicable settlement of the matters in dispute. If an amicable settlement is not reached the Commission may (under section 316) either dismiss the application or make a determination with respect to the determination.

A contract determination is binding on all bailors/bailees and principal contractors and carriers (section 317) and comes into effect on a date specified by the Commission but cannot be enforced until seven days after it is published in the Industrial Gazette (section 318). Contract determinations apply for a nominal term that cannot be longer than 3 years (section 319) and the Commission has the power to vary or rescind a contract determination (section 320) or grant exemptions to determinations (section 321).

2.4 Part Three - Contract Agreements

Part Three of Chapter 6 provides jurisdiction for the making of contract agreements. Once again, the provisions here broadly reflect the regulation that applies to the making of enterprise agreements for employees. Under Part 3, section 322, an association of contract drivers or carriers or simply a group of carriers is permitted to enter into an agreement with bailors, principal contractors or an association representing bailors or principal contractors. Such contract agreements must comply with relevant legislation including the *Anti-Discrimination Act 1977* and must pass a ‘no net detriment test’. This test ensures that contract agreements do not provide a no ‘net detriment to drivers or carriers when compared with the aggregate conditions under relevant contract determinations. Contract agreements, once they are approved by the Commission, prevail over contract determinations (section 327) and have a nominal term of between 12 months and 3 years. Contract agreements can be varied by further agreement (section 329) or they can be terminated with the agreement of all the parties or after the end of its nominal term by one party giving at least three months notice (section 330). Under section 331, the Industrial Registrar must keep a public record of all contract agreements.

According the Industrial Registry’s records, there are approximately 173 contract agreements currently in force. The Transport Workers Union is a party to all but one of these contract agreements.

2.5 Part Four - Dispute Resolution

Part Four of Chapter 6 provides a mechanism for the resolution of disputes where one of the parties believes there is a dispute which might lead to or has led to parties to a contract of bailment or a contract of carriage being in breach of those contracts or where persons are refusing to enter into such contracts. In these situations, the Commission is empowered to call a compulsory conference in order to settle the matters in dispute. If the dispute remains, despite all reasonable attempts to conciliate the matter, the Commission may make an interim determination 'to restore or maintain conditions existing between the parties immediately before the occurrence of all the events giving rise to the industrial dispute' (section 333 (6a)).

According to advice received from the Transport Workers Union (TWU), the union had lodged approximately 97 dispute notifications in the last three years. This figure represents a little less than half of all disputes notified under Chapter 6.

2.6 Part Five - Associations of Contractors, Drivers and Carriers

In parallel with the mainstream industrial relations system for employees in NSW, Part Five of Chapter 6 seeks to register associations of employing contractors, drivers and carriers. The only requirement for the registration of employing contractors is that they must be able to demonstrate that in the 6 months prior to making the application for registration, the members were either:

- (a) bailors with contracts with not fewer than 25 bailees; or
- (b) principal contractors under contracts of carriage with no fewer than 25 different carriers.

Section 335 contains similar provisions for the registration of associations of contract drivers and contract carriers, although the Act requires prospective associations to have no fewer than 50 bailees or 50 carriers as members before being registered.

Under section 336, objections may be raised to the registration of associations and the Commission in Court Session may also order cancellation of the registration of an association (section 338 (2)). The Commission is also empowered to deal with any demarcation questions between associations under section 339.

2.7 Part Six - Applied Provisions

Part Six specifies other provisions of the *Industrial Relations Act 1996* which expressly apply to Chapter 6. These are:

- (a) Section 27 (Prohibition on cashing-in of accumulated sick leave),
- (b) Part 3 of Chapter 2 (National and State decisions),
- (c) Part 10 of Chapter 2 (Payment of remuneration),
- (d) Part 3 of Chapter 3 (Common law actions during conciliation of industrial disputes),
- (e) Section 143 (Strike pay prohibited),
- (f) Section 172 (Power to order secret ballot),
- (g) Part 8 of Chapter 4 (Industrial Committees),
- (h) Part 1 of Chapter 5 (Principles of association),
- (i) Part 7 of Chapter 5 (Entry and inspection by officers of industrial organisations),
- (j) Chapter 7 (Enforcement).

Section 334 guides the interpretation of these applied provisions in the context of Chapter 6. For instance, references to awards are to be read as a reference to contract determination, whilst a reference to an enterprise agreement is to be read as a reference to a contract agreement. References to employees and employers are to be read as either bailees or carriers and bailors and principal contractors respectively.

2.8 Part Seven – Compensations

Part Seven of Chapter 6 deals with questions of any compensation that might be payable after the termination of certain contracts of carriage. With the exception of certain minor procedural matters, the regulation found in Part 7 mirrors that found in the former *Industrial Relations Act 1991*. In essence, this part is designed to protect carriers from suffering financial disadvantage arising from the loss of goodwill when a principal contractor terminates a ‘head’ contract of carriage. A head contract of carriage refers to an agreement between a principal contractor and carrier under which the carrier provides services exclusively and on a regular basis for the principal contractor.

Under section 346, a carrier may make a claim for compensation so long as the following conditions are satisfied:

- (a) the carrier entered into the head contract of carriage by arrangement with a previous carrier whose provision of services to the principal contractor under contracts of carriage was replaced by the carrier, and
- (b) under the terms of the arrangement between the previous carrier and the carrier, a sum of money was paid by the carrier to the previous carrier as a premium or fee in connection with the entry into the head contract of carriage by the carrier, and
- (c) it is a custom and practice in the relevant section of the industry or business of the principal contractor that such a premium or fee be paid, and

- (d) the principal contractor knew or ought reasonably to have known that such a premium or fee had been paid to the previous carrier, and
- (e) the principal contractor failed to take reasonable steps to advise the carrier that it was not a requirement of the principal contractor that such a payment be made or requested.

Any such claims arising under section 346 are dealt with, firstly, by way of a compulsory conference (section 348) and, if the matter is not resolved, by way of arbitration (section 349) by a specially convened Contract of Carriage Tribunal (section 347). Section 349(1) holds that the Tribunal may only order that compensation is payable where it is satisfied that the termination of the head contract of carriage was 'unfair, harsh or unconscionable'. The Tribunal is also empowered (section 349(3)) to order that a carrier, previous carrier, principal contractor or previous principal contractor is liable to pay solely or jointly with another party or parties, compensation.

In determining the quantum of compensation payable the Tribunal is to have regard to:

- (a) the amount of the premium or fee paid by the carrier as referred to in section 346,
- (b) any amount paid to the carrier by the principal contractor (including but not limited to redundancy payments) in respect of the termination of the head contract of carriage, whether or not such payment was made expressly on account of the payment of that premium or fee,
- (c) the duration of the head contract of carriage,
- (d) the likelihood of the carrier being able to use the motor vehicle required by the head contract of carriage for other types of work, and the availability of any such work,
- (e) the re-sale value of the motor vehicle,
- (f) the preparedness of the principal contractor to guarantee a flow of work to the carrier for a specified period in the future.

The balance of Part Seven – sections 350 to 355 – deals mainly with procedural issues connected to claims for compensation. For instance, appeals from the tribunal are made to the Full Bench of the Commission (section 350); general procedures and powers of the Tribunal (section 351); voting arrangements by members of the Tribunal (section 352); orders for costs if claimants are considered to be vexatious (section 353); representation of the parties before the Tribunal (section 354); and, finally, prohibitions on contracting to annul, vary or exclude any provision of Part Seven (section 355).

There have been a number of important decisions that have tested this part of the regulation, although most of these were made under parallel provisions in the previous *Industrial Relations Act 1991* (NSW). Five of the most instructive decisions are discussed here.

In *Rumsey & Anor v R Clifford & Sons Holdings Pty Ltd* (1996) 68 IR 75, the question of whether a 'head contract of carriage' had been terminated was investigated by a Full Bench of the Contract Carriage Tribunal. The facts of this case were that the principal

contractor 'Clifford' had operated a transport business carting newsprint for Nationwide News Ltd (News). In 1965, Clifford sold its fleet of trucks to its employee drivers on the basis that they would become contract carriers for Clifford. The price paid for each truck included a premium which the parties described as 'goodwill'. The Full Bench heard that since 1965, trucks had been sold 'in work' and hence with a goodwill premium. News altered its newsprint supply in 1994, effectively reducing Clifford's business, despite Clifford having a contractual right to transport newsprint for News. A number of carriers, including Rumsey, alleged that their contracts were subsequently unfairly terminated and applied to the Tribunal for compensation.

The Tribunal found that the contracts had been unfairly terminated because although Clifford had a contractual right to conduct work for News, this was not enforced when News decided to switch some of its work to a different contractor. Moreover, the Tribunal also found that a 'head contract of carriage' existed because of the demands Clifford placed on its contract carriers including the demand to be exclusively available for Clifford. Additionally, the Tribunal found that Clifford knew about the practice of paying premiums for goodwill and knew that the drivers would suffer financial loss greater than they would have suffered if they had been employees. The Tribunal ordered that compensation be paid but the compensation ordered was limited by the Tribunal's consideration of the declining value of the premiums originally paid by the applicants. Moreover, the decision of News to alter its transport arrangements, the Tribunal stated, 'requires a determination which pays regard principally to concepts of compensation for loss of employment rather than the reflection of premiums for truck in work' (p. 83).

In *Galea & Anor v Amatek* (1996) 41 AILR at para 5-111, the Tribunal dismissed a claim for compensation for the termination of a contract of carriage under section 697B of the *Industrial Relations Act 1991* (section 346 of the *Industrial Relations Act 1996*). The applicant's case turned on the question of whether it was custom and practice to pay a premium for goodwill. On the basis of the evidence before it, the Tribunal found that there did not exist a 'custom and practice' within the meaning of section 346(1)(c) and so dismissed the claim.

In another case under the present legislation, *Profilio v Monier PGH Holdings* (1996) 41 AILR at para 5-122, the Tribunal found that a principal contractor (Monier) had encouraged the expectation that trucks could be sold with goodwill, but then unilaterally decided to no longer recognise sales with goodwill despite the fact that it knew such sales would continue. The tribunal stated that:

In our opinion the unfairness which arose in these circumstances was that, Monier by its conduct, encouraged the drivers in each case to participate in its fleet with a perception of security and in particular an expectation that a right to sell would be retained with value.

Justice Peterson, who presided in the matter, claimed that this was just the type of unfair situation to which the legislation was directed and found in favour of the applicants.

Compensation was also ordered after the Tribunal found that the termination of head contracts of carriage was ‘unfair, harsh or unconscionable’ in *Beck & Ors v Incitec t/as Chemtrans* (1996) AILR at para 5-123. In this case, the Tribunal found that although the principal contractor had a legitimate reason for terminating the contracts of carriage (after the loss of a major contract), the dismissals were unfair because of the failure of the principal to consult drivers, heightened by the significant investment made by carriers.

Finally, in *Monier Roofing Pty Ltd v Quintrell & Belprana Pty Ltd* (1997) 43 AILR at para 5-158, a Full Bench of the Tribunal was asked to consider what steps a principal contractor should take in reasonably advising a contract carrier that the payment of a premium for goodwill was not necessary and hence avoid an adverse finding under section 697B(1) (e) of the *Industrial Relations Act 1991* (section 346(e) of the *Industrial Relations Act 1996*). It was held that it was not sufficient simply for the principal (Monier) to make comments to the effect that ‘Monier did not recognise goodwill’ and ‘what they (carriers) paid was their own business’. Such statements, it was held, in no way related to whether there was no requirement that a premium be paid, but simply that Monier did not recognise such a payment. The appeal was subsequently dismissed.

These decisions indicate that there are significant statutory obstacles for applicants to overcome before the Tribunal may order compensation for ‘unfair, harsh or unconscionable’ termination of a head contract of carriage. Moreover, the extent of compensation that may be payable is significantly limited by the issues contained in section 349, which the Tribunal is required to consider before making any such orders. Nevertheless, there have been a number of cases where these statutory conditions have been satisfied, and where the Tribunal has ordered that compensation be paid because of contract carriers financial loss as a result of the wrongdoing of the principal contractor.

2.9 Compliance and Enforcement

An examination of the operation of any piece of regulation would be incomplete without discussing the associated issues of compliance and enforcement. Unfortunately, though, these are often the most difficult questions to answer without conducting a large-scale empirical investigation – a task that is clearly beyond the scope of this review.

In the course of this review, and the interviews conducted with industry stakeholders, it became clear that the level of compliance with the rates and conditions specified in contract determinations and agreements varies from industry segment to industry segment. Moreover, a number of interviewees from the TWU, various employer associations and other industry stakeholders agreed that contract determinations and agreements need to be more effectively enforced to ensure that the public benefit provided by the legislation is not weakened. These concerns were also identified in the Rolfe Report *Driving Forward* which observed at 6.5 that ‘enforcement of Chapter 6 contract determinations is largely crisis-driven, spasmodic and uneven.’

According to some interviewees, the courier industry is one example of a market segment where compliance with contract determinations is 'patchy' and where enforcement is particularly problematic. For instance, a representative of the Courier and Taxi Drivers Association stated that:

A fundamental problem with many determinations, but especially the courier determination, is evasion by principal carriers (and contract carrier couriers) and the inability (so far) of the system to enforce effectively the provisions of the determination.

These concerns are also shared by the Transport Workers Union which claimed that the high level of labour turnover in the courier industry, combined with the dependence of couriers on principal contractors for work, means that couriers are often reluctant to advise the union of underpayment or other forms of non-compliance. Moreover, other stakeholders argued that even when carriers or bailees advise the TWU of non-compliance, the union does not always have the resources to enforce compliance. Similarly, some interviewees observed that the Department of Industrial Relations' inspectorate also lacks appropriate resources to adequately enforce contract determinations and agreements.

It seems that the problem of compliance and enforcement is one that needs to be quickly addressed if the objectives of Chapter 6 are to be fully realised. This requires a concerted effort on behalf of employer associations, unions and the Department of Industrial Relations to ensure that compliance with contract determinations and agreements improves beyond its current level.

2.10 Summary and Conclusions

This section has provided detailed commentary and analysis of the statutory provisions of Chapter 6 and relevant case law. Additionally, this section has presented limited empirical data on the nature and extent of contract determinations, agreements and reinstatement cases.

There are a number of observations on the operation of Chapter 6 that flow from this discussion and analysis. Firstly, with the exception of some minor amendments, the broad thrust of the 1996 legislation reflects the regulation of contracts of bailment and carriage under the former *Industrial Relations Act 1991*. Secondly, case law under the present regulation dealing with contract determinations has confirmed the Commission's broad powers to deal with any matter arising under contracts of bailment and carriage. Thirdly, the discussion of Part Seven of Chapter 6 demonstrates the capacity of the regulation to reduce potentially anti-competitive practices such as the payment of premiums for goodwill. Finally, it was noted that a number of industry stakeholders were concerned with the level of enforcement of contract determinations. Indeed it was the common view of industry employer associations and the TWU that contract determinations needed to be more rigorously enforced to improve the effect of the legislation.

Appendix 2-1

Current Determinations under Chapter 6

Serial No.	Date	Nature	I.G. Vol	I.G. Page
Boral GST Protocol (Facilitation and Compliance) Contract Determination				
B9502	1.12.00	CD	320	831
Boral Transport Limited Quarried Materials Minimum Load Contract Determination				
B2563	11.2.94	CD	278	440
Monier Roofing Limited and Reliance Roof Tiles Pty Ltd Contract Determination				
B1877	14.5.93	CD	275	57
Superior Premix Contract Determination – Blacktown City Council Project				
B6265	7.8.98	CD	306	144
Superior Premix Contract Determination No. 2				
B6813	28.5.99	CD	309	557
Taxi Industry (Contract Drivers) Contract Determination, 1984				
B0235	2.8.91	CD	264	456
B4755	13.12.96	VCD	295	1420
B5527	29.8.97	VCD	300	1016
B5528	29.8.97	VCD	300	1018
B7322	28.1.00	VCD	313	224
C0407	24.8.01	VCD	327	236
TNT Domestic & International Express Ancillary Contract Determination, The				
B9343	15.9.00	CD	318	711
Transport Industry – Car Carriers (NSW) Contract Determination				
B9481	22.12.00	CD	321	264
B9510	22.12.00	VCD	321	442
Transport Industry – Concrete Haulage Contract Determination				
A7353	30.11.90	CD	260	608
A8335	15.3.91	VCD	261	692
A8069	17.5.91	VCD	262	725
B1444	7.8.92	VCD	270	1108
B2733	20.5.94	VCD	279	1257
B3403	31.3.95	VCD	284	1225
B3410	31.3.95	VCD	284	1226
B3975	2.2.96	VCD	290	473
B5379	27.3.97	VCD	297	509
B6032	9.4.98	VCD	304	262
B6504	18.12.98	VCD	307	627
B9212	8.9.00	VCD	318	614
B9471	24.11.00	VCD	320	782
C0109	29.6.01	VCD	325	970

**Transport Industry – Concrete Haulage – Mini Trucks
Contract Determination**

A1161	30.7.86	CD	242	352
A2417	19.11.86	ERR	243	936
A2419	3.6.87	VCD	245	576
A3857	6.7.88	VCD	249	53
A7652	30.11.90	VCD	260	684

**Transport Industry – Courier and Taxi Truck Contract
Determination**

C0609	9.11.01	CD	329	248
B1507	18.12.92	VCD	272	1181
B1655	12.2.93	VCD	273	463
B1988	28.5.93	VCD	275	275
B2313	12.11.93	VCD	277	230
B3112	29.7.94	VCD	281	238
B2976	29.7.94	VCD	281	240
B4261	28.10.94	VCD	282	545
B3261	27.1.95	VCD	283	603
B3348	17.2.95	VCD	283	1352
B3945	25.1.96	VCD	290	395
B3904	2.2.96	VCD	290	475
B3785	14.11.97	VCD	302	241
B5758	19.12.97	VCD	302	1019
B5949	27.2.98	VCD	303	697
B6060	17.4.98	VCD	304	551
B6061	17.4.98	VCD	304	558
B6784	9.4.99	ERR	308	932
B9947	30.3.01	VCD	323	637

**Transport Industry – Courier and Taxi Truck
(Superannuation) Contract Determination**

B8880	20.4.00	CD	315	1
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**Transport Industry – Excavated Materials, Contract
Determination**

B4643	24.10.97	CD	301	1082
B6568	12.2.99	VCD	308	334
B8908	30.6.00	VCD	316	1066
B9945	30.3.01	VCD	323	635

**Transport Industry – General Carriers Contract
Determination**

81876	19.12.84	CD	235	1611
82854	19.12.84	VCD	235	1625
83434	13.11.85	VCD	239	632
83466	13.11.85	VCD	239	645
84063	12.2.86	VCD	240	744
A1710	12.11.86	VCD	243	777
A1906	12.11.86	VCD	243	787
A2459	3.6.87	VCD	245	581
A3155	16.12.87	VCD	246	1177
A2632	3.2.88	VCD	247	502
A3856	29.6.88	VCD	248	1341
A3430	17.8.88	VCD	249	685
A5729	7.6.89	VCD	252	761
A6931	27.4.90	VCD	255	1185
A7354	31.8.90	VCD	258	856
A7484	28.12.90	VCD	260	1340
A7831	15.2.91	VCD	261	250
A7827	1.3.91	VCD	261	624
A8261	3.5.91	VCD	262	528
A7653	17.5.91	VCD	262	583
B0376	23.8.91	VCD	264	1408
B1431	2.10.92	VCD	271	1136
B3005	2.8.94	VCD	281	459
B3461	28.4.95	VCD	285	682

B3532	23.6.95	VCD	286	415
B3553	4.8.95	VCD	287	203
B5372	4.4.97	VCD	297	782
B6325	14.8.98	VCD	306	260
B9379	15.9.00	VCD	318	911
B9942	30.3.01	VCD	323	630

Transport Industry – General Carriers (The Smith Family) Contract Determination

B3550	23.6.95	CD	286	400
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Transport Industry (GST Protocol) Contract Determination

B9501	1.12.00	CD	320	826
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Transport Industry – Interstate Carriers Contract Determination

75246	6.5.81	CD	221	813
75626	10.6.81	VCD	221	2026
77819	22.9.82	VCD	226	2392
84214	5.3.86	VCD	240	1041
A1019	10.9.86	VCD	242	931
A1907	29.10.86	VCD	243	526
A2273	28.1.87	VCD	244	257
A3961	12.10.88	VCD	250	236
A6853	9.3.90	VCD	255	105
A7880	2.11.90	VCD	259	1005
A8260	15.3.91	VCD	261	698
B1449	14.8.92	VCD	271	177

Transport Industry – Penrith City Council Contract Determination

B9891	23.3.01	CD	323	336
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Transport Industry – Quarried Materials, &c., Carriers Contract Determination

B1322	14.8.92	CD	271	78
B4398	14.6.96	VCD	293	344
B9910	9.3.01	VCD	322	1163

Source: NSW Industrial Gazette, Volume 330 - Supplement

Section 3

The Characteristics of the Road Transport Product and Labour Markets

3.1 Introduction

The main task of this section of the report is to describe the main characteristics of road transport product and labour markets and to explore their implications for competition and regulation. An understanding of product and labour markets in road transport, however, must begin with the nature of the production process. A number of features of the production process (including the simple and highly divisible nature of the production process, the low capital investment involved in entering the market, the absence of economies of scale and the low level of necessary skills and training) mean that the owners of goods have many choices about how to transport those goods from one place to another. This means that there is not only very strong competition between the various forms of transport (ie. road versus rail versus air), but competitive pressures are extreme within the road transport industry, with prices often so low as to make long-term operation for a significant number unsustainable. The result is a continual churning on the supply side of the market, with a steady inward stream of new entrants at one end and a corresponding outflow of failed operators on the other. There is then an almost permanent state of over-supply in much of the industry and this has resulted, in turn, in many serious problems that were identified in Section 1 of this report.

This section of the report will begin with a brief consideration of the data limitations and will move on to look at the production process in road transport. This will be followed by an examination of the product and labour markets, tracing the growth of the industry in the post-World War II period, the changing role of owner-drivers and then aspects of competition. The final section will summarise the main points and draw conclusions relevant to the larger arguments of the report.

3.2 Data Limitations

The gathering of quantitative data on road transport generally and on the specific market segments from the Australian Bureau of Statistics and the Bureau of Transport & Regional Economics has been fraught with difficulties. ABS data, for example, are rarely capable of sufficient disaggregation to state and industry segments and the measurement of the number of owner-drivers is notoriously difficult. The complex and often changing contracting and subcontracting relationships in this industry also make statistical analysis unreliable. Moreover there is a lack of data on many important aspects such as the fluctuations in demand for road transport services. This makes it very difficult to determine the actual factors that have affected demand and supply in the industry. It was found that more partial and qualitative data gathered from interviews with involved organisations proved to be more revealing.

3.3 The Production Process in Road Transport

The transport task – or the production process in road transport – can be divided into relatively separate steps or stages. At its most simple, it involves three stages:

- (i) *Loading*: the collection of the goods (from an office or warehouse or storage centre) and their loading onto or into the vehicle;
- (ii) *Line-haulage*: the driving of the vehicle from collection point to the destination; and
- (iii) *Unloading*: the transfer of the goods from the vehicle to the receiver at the destination.

These steps broadly describe the production process in the long distance full-truckload freight sector and in much of the short distance sector. The process is a little more complicated when the task involves less-than-full truck loads of goods, especially over long distances. In these latter cases, ‘consolidation’ and ‘deconsolidation’ are required, resulting in at least seven steps:

- (i) *Loading*: the collection of the goods (from an office or warehouse or storage centre) and their loading onto or into the vehicle;
- (ii) *Short-distance line-haul*: driving the vehicle from the point of collection to the nearest terminal;
- (iii) *Consolidation*: unloading the short distance vehicle, consolidating the less-than-full truck loads into full truck loads, and loading the long distance vehicle;
- (iv) *Long distance line-haulage*: the driving of the vehicle from that terminal to the terminal nearest to the destination;
- (v) *Deconsolidation*: unloading the long distance vehicle, sorting the less-than-full truck loads according to local destination and loading the short distance vehicle;
- (vi) *Short distance line-haul*: driving the vehicle from the terminal to the destination;
- (vii) *Unloading*: the transfer of the goods from the vehicle to the receiver at the destination.

There are, of course, many variations on this theme and they result in some segmentation of the road transport industry. The transport of some goods, for example, requires specialist equipment (either as part of the vehicle or part of the loading/unloading process) or specialist skills, while most goods (ie. general freight) can be transported on almost any type of vehicle. As already mentioned, the distance the goods are to be transported affects the production process with long-distance and short-haul transport being seen as distinct sub-sectors within the industry.

Despite these variations, however, the road transport production process is almost always readily *divisible*; in other words, each step of production can easily be separated from the others and performed by different workers, different vehicles and even different enterprises. In particular, line-haul tasks are easily separated from storage, loading and consolidation/deconsolidation.

As a result of the divisibility of the road transport production process, the owners of goods have a choice between a number of alternative organisational arrangements by which they complete their transport tasks. At its simplest, this choice is three-fold between:

- (i) using the owner's internal resources to transport the good (ie. purchasing the vehicle and engaging an employee-driver), thereby becoming an *ancillary carrier*; and
- (ii) engaging the services of a *contracting company*, which performs the transport tasks on the owner's behalf by purchasing vehicles and engaging employee-drivers;
- (iii) engaging the services of an *owner-driver*, who owns and drives the vehicle that performs the transport tasks on the owner's behalf.

A further complication can occur in the case of the contracting company because it may own multiple vehicles and engage employee-drivers or it may engage the services of a *sub-contractor*, who may in turn be either a smaller contracting company or an owner-driver.

To restate the situation in terms relevant to this report, owner-drivers can be engaged directly by the owners of goods as *contractors* or they may be engaged by contracting companies as *sub-contractors*. Owner-drivers have become a significantly larger section of the industry during the post-war period and some details of their relative growth are provided in the following section.

3.4 Road Transport Product and Labour Markets

This sub-section of the report will explore, firstly, the growth of the road transport industry. There will then be a closer examination of the role of owner-drivers in the industry's labour markets, followed by some observations about the underlying forces of competition in the industry's product and labour markets.

3.4.1 *The Post-World War II Growth of the Road Transport Industry*

The growth of the road transport industry in the post-war era is not well charted in terms of quantitative data, but a number of commentators have discussed it at length (see Bray, 1990: 15). As a result of the war effort, roads were greatly improved, vehicles were larger, more powerful and more readily available and there were many more now trained in driving them. Thus, road transport began to seriously challenge rail and sea transport and this was greatly stimulated by the further advances in motor vehicle technology and the growth in manufacturing industry in the immediate post-war decades. Some of the quantitative data relating to employment patterns shows just how the growth in road transport compares to that in other modes over the period 1947 to 1996 (Table 3.1). While there have been some fluctuations over the period, the rise in the road transport labour force has been significant and much greater than that in rail or water (which actually declined significantly). Growth in air transport has been dramatic, and above the rate of road transport, but that high rate came off a very low base compared with road transport.

Table 3.1 Labour Force in Transport by Transport Mode, New South Wales, 1947 - 1996

Year	Road	Rail	Water (000s)	Air ¹	Other	TOTAL
1947	30.0	30.7	20.3	2.4	2.2	85.6
1954	40.4	32.3	20.5	5.9	0.6	99.8
1961	45.8	30.9	21.0	7.8	0.6	106.1
1966	50.0	26.0	19.0	10.9	0.9	106.8
1971	48.1	22.6	13.2	11.3	8.5	104.0
1976	47.5	27.8	10.5	13.1	10.1	108.9
1981	52.4	32.7	10.8	15.8	12.2	123.9
1986	51.1	33.2	10.4	14.9	15.3	124.8
1991	52.0	20.2	7.4	18.5	16.7	114.4
1996	53.9	15.2	6.5	19.6	18.1	114.6

Notes: ¹ Air transport includes Space transport as of 1996 Census.

² The 1947 figures exclude Motor Engineering, Motor Garages and Storage which were originally included in Road Transport.

³ All figures before 1971 are 'total population' (i.e. including unemployed), while those for 1971 and after are 'employed population'.

Source: Australian Bureau of Statistics, Census of Population and Dwellings.

Table 3.2 Labour Force in Road Transport by Industry Class, New South Wales, 1947 - 1996

Industry Class	1947	1954	1961	1966	1971	1976	1981	1986	1991	1996
					(000s)					
Car Parking Services to Road Transport	1.0	0.1	0.2	0.3	0.8	1.0	1.3	1.2	1.1	1.1
Taxi and Hire Car Services	4.3	6.7	7.8	7.9	6.9	6.2	6.7	6.7	8.6	10.1
Road Passenger Transport										
Carrying and Cartage	13.9	19.1	24.8	28.8	30.3	30.6	34.6	32.2	31.7	31.2
Road Freight Transport										
Tramway and Trolley Bus	4.9	4.4	0.1	0.0						
Motor Bus & Car Services	4.6	8.0	11.7	11.2						
Bus & Tramway Transport					9.5	9.3	9.2	10.2	7.3	6.7
Other	1.2	2.2	1.3	1.8						
Road Transport Undefined					0.5	0.4	0.6	0.8	0.8	3.1
TOTAL ROAD TRANSPORT	30.0	40.4	45.8	50.0	48.1	47.5	52.4	51.1	52.0	54.4
TOTAL TRANSPORT & STORAGE	100.2	99.8	106.1	106.8	104.0	108.9	123.9	124.8	115.1	115.5

Notes: ¹ There were changes to the industry classifications after 1971. These changes did not drastically affect road transport and the corresponding categories have been grouped together.

² The 1947 figures exclude Motor Engineering, Motor Garages and Storage which were originally included in Road Transport.

Source: Australian Bureau of Statistics, Census of Population and Dwellings.

When the labour force in road transport is disaggregated in terms of industry class (Table 3.2), 'road freight transport' (which was known in earlier decades as 'carrying and cartage') accounts for well over half of the total employment and exhibits the highest rate of growth over the period.

3.4.2 Owner-Drivers in the Road Transport Labour Market

Along with the growth in road transport product and labour markets over the post-World War II period, there have been considerable changes in the organisation of the industry. A particularly important one has been the increasing role of owner-drivers, as both contractors and sub-contractors. Some basic data about these trends are presented in Tables 3.3 and 3.4.

Table 3.3 Employed Population in Road Freight Transport by Occupational Status, New South Wales, 1947 - 1996

Year	Occupational Status				TOTAL
	Employer	Self-Employed	Employee	Unpaid Helper	
			(000s)		
1947	2.0	5.2	6.2	0.1	13.4
1954	2.4	6.6	9.7	0.1	18.8
1961	2.8	6.6	14.1	0.0	23.5
1966	*	*	*	*	*
1971	*	*	*	*	*
1976	*	*	*	*	*
1981	*	*	*	*	*
1986	2.6	9.9	19.3	0.4	32.2
1991	2.9	8.5	20.1	0.2	31.7
1996	0.8 ⁺	3.7 ⁺	26.3 ⁺	0.2	31.0

* Not available

⁺ The dramatic drop from the levels in 1991 are a result, very largely, it seems of a change to the relevant question (ie. the Job Last Week question) to differentiate between self-employed people in limited liability companies and those not in limited liability companies. The result, according to the ABS (*1996 Census of Population and Housing, Fact Sheet 16 - Labour Force Status*), is that 'the 1996 Census now overstates the number of employees and understates the number of employers and self-employed. More importantly for users of Census labour force data, movements between 1991 and 1996 Censuses have been distorted.'

Source: Australian Bureau of Statistics, *Census of Population and Dwellings*.

Table 3.4 Incidence of Self - Employed Compared to Total Employment and Total Employees in Road Transport and Road Freight Transport, New South Wales, 1947 - 1996

Year	Self-Employed/Total Employment		Self-Employed/Employees	
	Road Transport	Freight Transport	Road Transport	Freight Transport
	%	%	%	%
1947	23	39	35	84
1954	22	35	32	68
1961	19	28	28	47
1966	18	*	26	*
1971	18	*	26	*
1976	23	*	34	*
1981	25	*	37	*
1986	28	31	44	51
1991	25	27	39	42
1996	12 ⁺	12 ⁺	14 ⁺	14 ⁺

*Not available

⁺ see note to Table 3.3.

Source: Australian Bureau of Statistics, *Census of Population and Dwellings*.

Table 3.3 shows the employed population in road freight transport by occupational status in NSW for the period 1947 to 1996, while Table 3.4 shows the percentages of self-employed relative to total employment and to the numbers of employees in both road transport and road freight transport. Apart from the statistical problems with the most recent data, the two tables show significant growth over the decades in self-employment, they also show self-employed owner-drivers to represent about one quarter of employment in the industry.

The picture presented in Tables 3.3 and 3.4 is confirmed by figures presented in the Quinlan Report. Quinlan reports that while 80 per cent of the industry is made up of not-for-hire fleets, he found that the vast majority of these are one vehicle or 2-4 vehicle fleets (over 90 per cent in agriculture/forestry, building construction, manufacturing and wholesale retail industries). Moreover he found that:

small fleets are also the dominant business type among for-hire operators, there being 21,762 single truck operators (all owner-drivers) or just over two-thirds the total, and another 7,803 truck operators with 2-4 trucks (including some owner-drivers) which together account for over 90% of all operators.' (Quinlan Report, 2001: 37. Note that these figures apply to road transport generally, even though the report focused on the long-haul industry).

3.4.3 Owner-Drivers and Competition in Road Transport Markets

An important factor behind these dramatic growth rates in road transport is the very high degree of competition that is a characteristic of the industry Australia-wide and almost everywhere in the world. The sources of this competition are several and owner-drivers are central to them. First, the choice between organisational arrangements available to the owner of goods (and to contracting companies) is one of the essential sources of competition in the road transport industry. Both the owners of goods (and contracting companies) have the choice of whether to complete their transport tasks (especially the line-haul step of their transport task) using employee-drivers driving company-owned vehicles or owner-drivers. There is, then, a potential to switch from one option to another should either prove too expensive or too difficult or unreliable or inconvenient. *This is a fundamental component of competition within road transport product and labour markets.*

At the same time, the ability to choose so readily between employee-drivers and contractors, especially owner-driver contractors, lies at the heart of the justification for legislation like Chapter 6. It means that *employee-drivers and owner-drivers are ready substitutes for each other since they perform very similar roles within the production process.*

There are several other structural features of the road transport that produce highly competitive markets (for early accounts of these features, see Kolsen 1956, Felton 1978, and Bray 1990: 26-29):

- The technology of road transport, for example, is generally simple, homogenous and relatively inexpensive, especially with the rise, over recent decades, of expanded credit finance.
- This means that, in the absence of state regulation, there are few barriers to entry into the industry.
- There are relatively few economies of scale to be gained by large companies, especially with respect to the line-haul step in the production process.
- It is difficult to differentiate the services offered by different road transport contractors.

While there are some variations across the market segments of road transport, these features produce an industry where small firms and owner-drivers operate alongside large companies as competitors. This has certainly been the case in the NSW and Australian road transport industries throughout the post-World War II period despite the rise to prominence of the large freight forwarding companies. Indeed, these large freight forwarders came to rely heavily on smaller companies and owner-drivers to perform the line-haul steps of their operations.

Section 1 of this report is replete with statements from industry participants on the competitive pressures created by unregulated owner-drivers. Their sentiment is well captured by one employer from the NSW road transport industry in 1963, who described the competitive pressures arising from small operators and unregulated owner-drivers in the following terms:

The motor industry is, by its nature, competitive. There is no need for the owner of a vehicle to invest more than a small proportion of the capital cost of his vehicle. He does not need to garage his vehicle at night. The owner-driver has no overheads. He does not need a lot of credit. He does not look to be paid for the overtime he often works. He is satisfied if he can meet the hire purchase payments on his vehicle current. But the result is that over-capacity in the industry very readily develops and over-capacity leads to intense competition. (Master Carriers' Journal, November 1963)

One interpretation of this argument – and the many similar arguments presented in Section 1 of this report – is that the *demand* for owner-drivers is high because of their capacity to avoid industrial regulation and thereby offer their services at costs below those incurred by their competitors who use employee-drivers. In this context, a market in which owner-drivers remain unregulated is unfairly biased against one group of operators (namely, those using employee-drivers) and regulation (like that under Chapter 6) is needed in order to 'level the playing field' between different forms of labour.

Another argument about the strong (if not excessive) competition provided by owner-drivers and the failure of market mechanisms in road transport focuses on an excess *supply* of owner-drivers. In particular, it is argued that many owner-drivers do not make rational economic decisions when entering the industry and when negotiating their rates

and working conditions. It is often argued, for example, that many owner-drivers have an almost obsessive desire to 'be their own boss' or to drive a truck 'on the open road', and that these attitudes lead those affected to either enter the industry or refuse to leave it when it is not economically viable to do so. For example, in the 1970, the NSW Industrial Commission summarised the pitfalls of becoming an owner-driver in the interstate sector in the following terms:

...there is no dearth of those willing to put their heads into what proves to be a noose. Interstate transport has many magnets among which are the open road, the wild areas covered, the challenge of mastering a large vehicle under testing conditions, the freedom from the constant supervision of 'big brother' factories... and all this with the ingenuous belief in money ahead for those willing to endure the privations such as regularly sleeping on the road and waiting for a day or two for the change of clothes and a bath. These days with the meticulous assistance of hire purchase what seems a promising venture is within the reach of even the relatively indigent... The pity of it all is that so often the grand adventure ends in frustration, disillusionment, impoverishment and even bankruptcy. (Industrial Commission 1970, paragraph 18.4)

Sir Peter Abeles, then Managing Director of TNT, expressed much the same sentiments in 1981:

I have said long and loud that there is no money in owning a truck. It is only the business you can build around the truck which is important. While this may sound like stating the obvious, you would be amazed how many jump into being owner-drivers in Australia, neglecting to look before they leap – neglecting to gain even the most basic idea of the costs they might face, even determinedly ignoring the warnings. If they did look first they might walk away before they start, or perhaps eventually walk away with some profit. As it is today, too many walk away empty-handed and bitter – but it is their own fault for too readily believing wild stories about big profits from trucks, and neglecting to do even the most simple sums for themselves. We certainly cannot afford to pay them more because of the long queues of freelance owner-drivers ready to snap up any consignment at the lowest of rates if we raise ours. (Australian Transport, April 1981, p. 8)

More recently, submissions to the Quinlan Report expressed similar sentiments:

A large percentage of this sector (long haul) of the industry are owner-drivers or small companies that don't have the financial ability or resources to identify their costs and rates. With no entry standards for either drivers or companies the only option to gain customers or market share is to cut rates or agree to unrealistic times or schedules. Low rates mean longer hours and shorter time frames to achieve demands imposed. This group is subject to abuse by unscrupulous customers, freight forwarders and users of transport, particularly in the area of backloading. Anecdotal evidence indicates that even larger companies suffer from the effects created by these issues as they have to compete in an artificially

competitive price market. In Australia there are 42,000 42.5 tonne GVM trucks competing for the freight dollar. Clearly the lack of entry controls makes it too easy to get into the transport business and be unable to maintain the safe standards that should be demanded (written submission Transport Management Australia and the Victorian Road Transport Association, Quinlan Report, 2001: 119)

3.4 Summary and Conclusions

Despite the data limitations, this section of the report clearly demonstrates that since World War II the road transport industry has experienced rapid growth in both capacity and employment, becoming the dominant mode of transport. This growth was largely due to the advances in motor vehicle technology, the improvement in roads and the growth in manufacturing industry. However, road transport is highly fragmented to the point where it can be visualised as a series of separate sub-industries or sectors. Fragmentation occurs in terms of the type of operator involved, the distance goods are carried and the nature of the goods themselves.

More importantly, this section has examined in some detail the structural characteristics of road transport markets that underlie the market failure identified in Section 1 of this report. The divisibility of the production process, and the consequent ready substitutability of employee-drivers and owner-drivers in the line-haul step of production, is one such characteristic – it is a foundation for the choice available to the owners of goods as to how those goods will be transported and, in turn, to the competitive pressures within the industry.

The ease with which individuals can enter the industry as owner-drivers is another vital characteristic. This ease of entry – which stems from the relative lack of requisite qualifications, the small capital required, the ready availability of finance, the lack of economies of scale and the homogeneous service provided – creates the conditions necessary for ready supply, and often the over-supply, of owner-drivers, which is so central to competitive pressures.

Adding to this situation is the irrational behaviour of many owner-drivers and the situation of information asymmetry. Many of the entrants to the industry fail to appreciate the full extent of their long run costs of production. This, in combination with intrinsic rewards (such as ‘being your own boss’ and driving on ‘the open road’) perceived as compensation for loss of income, sees prices fall to levels that prove to be economically unsustainable. In the absence of regulation, over-supply and untenably low prices produces high demand for the services of owner-drivers. They also encourage owner-drivers to engage in the road behaviour that challenges both health and safety standards and road safety for the wider community.

Section 4

Costs and Benefits

4.1 Introduction

It is clear from the materials presented in sections 1 and 3 of this report that the Chapter 6 legislation owes its very origins to (i) problems identified by both private and public interests in the operation of a free market for the services of owner-drivers and bailee-drivers in the NSW road transport industry, and (ii) a long series of attempts to remedy those problems by legislative regulation. In this way, the legislative regulation embodied in Chapter 6 is designed to restrict competition because it was the unsatisfactory outcomes of unregulated competition that caused the problems in the first place. More specifically, Sections 1 and 3 concluded that there was *market failure* in road transport when contract carrier rates were unregulated because the price mechanism did not effectively regulate the supply and demand of contract carriers. Furthermore, this market failure had significant and adverse consequences for industrial relations, occupational health and safety, road safety and quality of service.

The tasks of this section are to identify the specific mechanisms by which the legislation restricts competition and to explore the costs and benefits of those restrictions. Drawing on the categories used in the *Guidelines for NCP Legislation Reviews*, there are two main restrictive mechanisms by which Chapter 6 affects competition:

- By regulating the *price* for some road transport services; and
- by regulating the *entry to or exit from* the market for road transport services.

The costs and benefits of these mechanisms will be explored qualitatively rather than quantitatively; in other words, using the *Guideline's* terminology, we are examining the 'theoretical' or 'in-principle' impacts of the legislation. As Appendix 4-1 shows, reliance on this form of qualitative analysis is the inevitable result of the industry's complex organizational structures and the inadequacy of quantitative data on the road transport industry.

4.2 Regulating the Price of Contract Carrier Services

By far the most important effect of Chapter 6 is its potential impact on contract carrier rates and thereby on the price of road transport services. This can generally be considered a cost because it increases the price of input costs to many businesses that will ultimately flow onto consumer prices. However, the quantum of this cost may not be as great as it might appear and it is important to examine closely the process by which this impact occurs, first, on price of road transport services and then on consumer prices. Furthermore, this cost must be balanced against the equity benefits that flow to contract carriers who might have suffered from market failure in the absence of Chapter 6. Finally, there are also other benefits that flow from price regulation through Chapter 6 – this section focuses on the benefits for industrial relations, the quality of service, occupational health and safety, and road safety.

4.2.1 Impact on Contract Carrier Rates

The main mechanism by which Chapter 6 operates is to set minimum contract carrier rates (ie. minimum prices) for the owner-drivers and bailee-drivers who are covered by the legislation. More specifically, the contract determinations and/or contract agreements (described in Section 2 above) establish ‘minimum’ contract rates that legally cannot be reduced. If it is assumed that the operation of unregulated market forces would normally produce fluctuations in carrier rates according to shifts in the demand for and supply of services, then logic suggests that the effect of these minimum rates would to *increase* carrier rates above market rates during those periods when demand is low or supply is high. On the other hand, to the extent that the rates established in the contract determinations and/or agreements are also ‘actual’ rates or ‘maximum rates’, then their effect will be to *reduce* rates at times when demand is high or supply is low.

The taxi industry is somewhat different in that, under the relevant contract determination, it is the operators or taxi owners who receive a minimum payment, in the form of a fixed bailment or rental fee which the driver pays each shift for the use of the cab. The driver then receives the takings for the shift less the bailment fee and less the costs of fuel and cleaning. The contract determination also provides drivers with entitlements to sick leave, recreational leave and long-service leave, which are paid by the operator.

As well as increasing (or decreasing) rates, contract determinations and/or agreements also *standardise* contract carrier rates; in the case of determinations, standardization is across the industry segment, while most contract agreements standardize within a single enterprise that they cover. In other words, logic suggests that to the extent that pure market forces would actually produce differential rates according to each individual job or truck or driver involved, regulation restricts market forces by ensuring that the rates that all contract carriers receive are calculated on the same basis and will therefore be the same for the same carrying job.

Beyond this ‘in-principle’ analysis of the regulation, the ‘actual’ effect of the regulation of rates (ie. prices) is difficult to assess. First, there is the question of enforcement – as discussed in section 2 above, there is reason to believe that the rates specified in the contracts determinations and agreements are often not actually paid in practice. Certainly, compliance with the determination rates varies from market segment to market segment. Second, the possibility that regulation may actually reduce rates in some circumstances is rarely acknowledged. Third, and more common, especially given the origins of the legislation and the objectives behind it, it is usually assumed that the regulated rates are *higher* than they would be if they had been left unregulated – that is, the minimum rates and their standardization are thought to prevent the rate-cutting that was the source of so much protest from most of the industry’s interest groups (see Section 1 above).

More systematic and quantitative analysis comparing the rates in New South Wales under Chapter 6 with those that would be the hypothetical case if Chapter 6 did not exist is not possible – the data do not exist. One problem in developing such data is that the payment of rates less than those specified in the determinations is illegal, and neither drivers nor principal carriers are likely to report rates accurately. There is also the problem of identifying the market rate with which the regulated rates should be compared. Any estimate would be purely arbitrary. Benchmarking of rates in the same market segment between NSW and other states might be possible, provided that the analysis was sensitive to the peculiarities of each context, but this is a significant research task that could not be undertaken within the time constraints of the present report.

In summary, ‘in principle’ analysis and the limited available empirical data suggest that Chapter 6 has increased the rates paid to contract carriers, although the extent of that increase is not known and there are significant confounding factors that must be taken into account.

4.2.2 The Impact on the Price of Road Transport Services

If Chapter 6 has produced an increase in contract carrier rates, then what effect will this have on the price of road transport services?

The situation with the taxi industry is very different from the remainder of road transport. Prices paid by the consumer of taxi services (ie. the passenger) are fixed under different legislation; namely, section 34 of the *NSW Passenger Transport Act 1990*. According to this legislation, it is the responsibility of the Director General of the NSW Department of Transport to determine fares. In 2001, fares were set on the basis of a recommendation from the Independent Pricing and Regulatory Tribunal of NSW. Thus, Chapter 6 has no impact on the prices actually paid by the consumer of taxi services.

Turning to owner-driver contract carriers, it is important firstly to recognise the limited coverage of Chapter 6. As discussed in Section 2 above, Chapter 6 does not apply to all owner-drivers in NSW. Rather, it covers only owner-drivers who do not provide road transport services directly to retail consumers. Contract carriers are engaged only by other businesses, whether those businesses be the owners of the goods being transported or other transport contracting companies who engage them as sub-contractors.

In the former situation, where owner-drivers are engaged as contractors directly by the owners of goods, an increase in contract carrier rates will directly impact upon the price of road transport services and thereby increase the costs of those businesses. The amount of the increase will depend on the difference between the rates determined by Chapter 6 and 'market rates' and on the proportion of transport costs to total costs. This will vary considerably across industries and this report has no empirical data on such issues.

It must also be acknowledged that the owners of goods continue to have a choice about how they transport their goods to their customers. Apart from using owner-drivers, these businesses can either choose to acquire trucks and engage employee-drivers (thus becoming ancillary carriers) or they can engage the services of a carrying company, which uses employee-drivers. In this way, contract carriers are subject to competition from these alternative transport options and any excessive increase in contract carrier rates will threaten to turn the business into the arms of competitors.

In the latter situation, where owner-drivers are engaged as sub-contractors to a contract carrying company, the prices charged by that carrying company will increase if contract carrier rates increase. If regulation produces contract carrier rates that are significantly above 'market rates', then the effect on the prices charged by the carrying company will virtually correspond to the increase in contract rates because contract rates represent a high proportion of total costs. It must be acknowledged, however, that the prices charged by carrying companies are affected by factors other than contract carrier rates. Freight forwarding companies, for example, usually maintain storage and docking facilities, sales and marketing networks, and information systems. Furthermore, there are again competitive forces at work here. The carrying company has a choice as to whether to provide its services using owner-driver subcontractors or employee-drivers in company-owned trucks. Excessive increases in the cost of sub-contract carrier rates will presumably produce a switch to company-owned trucks.

4.2.3 The Broader Economic Costs

If it is assumed that Chapter 6 has produced an increase in contract carrier rates and that this has a significant effect on the cost of road transport services, then this has potentially broad economic consequences because it would produce an increase in the costs to many businesses and, ultimately, an increase in the prices paid by the consumers of a great many products. Road transport is a vital and strategic industry because almost all goods are at some time transported by road – a significant increase in prices in this industry would increase costs in other industries. Unfortunately, as discussed in more detail in

Appendix 4.1, the quantification of the any such cost impact is beyond the capacity of this report and more than likely impossible.

There are, however, some grounds to believe that the actual cost increases resulting from Chapter 6 are far more limited than it might appear. First, as argued above, contract carriers are only one of several transport options available for the delivery of goods by road and an increase in the cost of contract carriers therefore accounts for only a (unknown) proportion of all road transport costs. Second, despite the operation of Chapter 6, there is still considerable competition in the road transport industry because of the choice available to the owners of goods between contract carrying companies, owner-driver contract carriers and the operation of company-owned trucks driven by employee-drivers.

4.2.4 The Equity Benefits

Balanced against the economic costs of Chapter 6, described above, are the benefits of Chapter 6 in advancing equity. The increased level and standardisation of contract carrier rates were, as revealed in Section 1 of this report, explicitly designed to protect owner-drivers from the exploitation that was observed over many years in various segments of the NSW road transport industry.

4.2.5 The Benefits for Quality of Service

There is a potential quality benefit flowing from the Chapter 6 legislation through an increase in contract carrier rates. At a fairly generalised level, the logic behind this argument – which, as Section 1 above shows, has been rehearsed over many years in public debates – has several elements. It is argued, for example, that unregulated markets produce competition based purely on price and the resulting excessively low contract carrier rates lead to high turnover (ie. the exit of experienced drivers and the entry of the inexperienced) and force owner-drivers to ‘cut corners’ and adopt unprofessional behaviour. The corollary is that a regulated market reduces price competition and encourages competition based on quality of service. As well, more realistic (regulated) rates will ease the economic pressure on owner-driver, leading to lower turnover, more experienced drivers who have higher skills and an incentive to focus on providing a quality service to their principal carriers.

This generalised argument about quality is plausible, but there are no empirical data that can be used to assess its accuracy. Moreover, it is not entirely clear how or why higher prices necessarily lead to better quality. Taxi owners certainly believe that the *Taxi Contract Determination* made under Chapter 6 does not presently produce quality amongst bailee taxi-drivers. Their criticisms, however, seem to be focused more on the ‘payment system’ embodied in the determination formula rather than in the broader concept of Chapter 6 (see Section 1.3.2 above).

Both these weaknesses in the quality argument, however, can be addressed by a brief account of developments in the courier and taxi truck industry (which derives mostly from interview data from the Transport Workers' Union, see Interview with Metcalf). The union argues that its recent efforts to introduce superannuation and induction training into this industry were explicitly designed to overcome the high turnover amongst contract couriers and the poor quality of service that many provided. By inserting these provisions into the *Courier and Taxi Truck Determination*, the union sought to provide contractors with greater skills on entry and with incentives for them to remain in the industry, with the aim to produce a more stable and experienced workforce. In this way, the regulation of contract carrier rates in this market segment delivered by Chapter 6 was considered to be just one part – albeit a vital part – of a larger package of measures. It must be acknowledged, however, that principal contractors in this industry segment do not necessarily agree with the union's argument and that there is as yet no empirical evidence as to whether the union's ambitions have been realised.

4.2.6 The Benefits for Occupational Health & Safety and Road Safety

Section 1 of this report showed that the industry players have for decades argued that a lack of regulation of contract carrier rates and conditions contributed to increased poor road safety and, consequently, that an objective of Chapter 6 was to contribute towards improved road safety. The links between low contract rates and road safety problems associated with the trucking industry have been established by inquiries both in Australia and overseas. The latest of these in Australia was conducted into safety in the long haul trucking industry by Professor Michael Quinlan from the University of New South Wales. Further reference will be made to his report below, but it identifies low freight rates 'as a direct threat to safe operations because they encouraged pushing the margins (cuts to maintenance, more trips in given period, speeding etc).'

(Quinlan 2001: 21). Thus, there is strong support in the report for the proposition that ensuring adequate minimum rates for freight haulage would contribute to improved road safety.

There are two types of benefits that could flow from improved road safety. First, since the roads are to a major extent the workplace of truck drivers, then improved road safety corresponds with better *occupational health and safety* for truck drivers – contract carriers and employee-drivers alike. Given that improved occupational health and safety is a significant public policy goal, then the realisation of this goal is a public benefit. Second, unlike workers in many other industries, truck drivers share their workplace (ie. roads) with other members of the general community. Consequently, *improved road safety promises a wider public benefit*.

As mentioned, the traditional arguments advanced in the road transport industry about road safety received considerable support in the Quinlan Report into safety in the long haul trucking industry. Three of Professor Quinlan's main conclusions are relevant. First, he found evidence of major safety problems associated with the industry with some indicators of these problems being:

- about one tenth of road fatalities in Australia in 1999 involved articulated trucks, with this pattern being virtually unchanged for at least 10 years;
- in comparison to the USA, the UK and Finland, Australians face twice the risk of dying in a crash involving a heavy vehicle; and
- of 1595 persons killed or injured in NSW in heavy truck crashes in 1999, truck driver speeding was seen to contribute to 170 casualties, truck driver fatigue to 98 casualties and insecure loads to 25 casualties.

Second, commercial practices, including the undercutting of rates, were considered to 'play a direct and significant role in fomenting hazardous practices. (Moreover...) Until such time as these issues are addressed there is unlikely to be any significant improvement in safety performance across the industry.' (Quinlan 2001: 22)

Third, proper enforcement of driving hours, speeding, drug use and other breaches of the relevant laws and regulations appeared, despite current efforts and practices, to be sadly deficient.

Professor Quinlan drew on a substantial body of research both in Australia and overseas and produced considerable empirical evidence to support these conclusions. There were some 50 written submissions, public hearings in various locations and an extensive representative survey of 300 long distance truck drivers in NSW. In addition, an American researcher into safety issues and the road transport industry, based at the University of Michigan, was brought to Australia from the US to give evidence to the inquiry. The report from the inquiry, a substantial document of some 500 pages, has provoked widespread comment and a number of the relevant authorities are involved in a taskforce that is investigating the implementation of the recommendations.

Some qualifications to Professor Quinlan's analysis, and particularly its relevance to this report on Chapter 6, must be acknowledged:

- it focused mostly upon long-distance road transport and, according to the report itself, the long-distance component of the industry accounts for only approximately 20 per cent of road freight movements in Australia, with the remaining 80 per cent involving trips of less than 100 kilometres. In other words, it was not concerned directly with those areas of the road transport industry that are most commonly regulated under Chapter 6.
- the focus was very much on safety, so that its treatment of other aspects such as commercial practices was limited to its relevance to safety.
- associated with the above, the Quinlan inquiry did not have to consider, in any depth, the economic impact of changes to the regulation of the industry, although it did give full recognition to the role played by long-distance road transport in the Australian economy.

4.3 Regulating the Entry and Exit of Contract Carriers

During the post-World War II period, the practice developed in a number of segments of the NSW road transport industry of buying and selling of trucks ‘with goodwill’; this has also been referred to as ‘trucks-in-work’ or the ‘premium’. The essence of the practice is that a truck is bought/sold with an expectation of continuing carrying work with a particular principal carrier, with the result that the price paid for that truck is higher than the market value of the vehicle itself, the difference – the goodwill or premium – being the value attributed to the returns from that future work. The best known example of this practice is in ready-mixed concrete (see Bray 1984, and Rolfe 1993: 36), but there was evidence in the early 1990s of similar practices in the car carrying, freight forwarding, quarried materials, tiles, egg, brewery, milk, brick, bread and newspapers segments of the industry (Rolfe 1993: 36).

The practice of goodwill can be seen as anti-competitive because it restricts the ease of entry into, and exit from, the industry. The Rolfe Report’s highly negative assessment of what it called ‘access restrictions’, for example, was that:

In economic terms, such access restrictions are anti-competitive and inefficient when they impede the flexible movement of labour and capital. (Rolfe 1993: 44)

Most particularly, there are at least two potential *economic costs* associated with this type of restriction on entry and exit. First, it potentially impedes the capacity of ‘principal carriers’ to move flexibly from one transport option to another (eg. from use of owner-drivers to a carrying company or employee-drivers) because there are considerable transaction costs associated with the decision. Second, by increasing the financial pressures on contract carriers (ie. by increasing their investment, and often the loan they must repay), it potentially provides strong motivation for contract carriers to seek higher contract carrier rates, thereby increasing the cost of road transport services, and seek to influence a range of management decisions relating to the allocation of jobs amongst carriers.

Consequently, to the extent that Chapter 6 helps to encourage or preserve the sale of trucks with goodwill, it could be held to be restricting competition and imposing an economic cost.

It is Part Seven of the Chapter 6 (ie. sections 346-355), inserted in 1994, that is most relevant to this ‘goodwill’ issue. The provisions contained in Part Seven, which are discussed in some detail in Section 2.8 of this report, give contract carriers a right to claim compensation if they have suffered financial disadvantage because of a principal contractor ‘unfairly, harshly or unconscionably’ terminating their ‘head’ contract of carriage.

Despite appearances, however, the operation of Part Seven of Chapter 6 does not seem to have encouraged or preserved the practice of goodwill, nor would the abolition of Chapter 6 necessarily serve to eliminate restrictions on entry and exit arising from goodwill. With respect to the former, the specifics of the Chapter regulation have worked to actually reduce the incidence of goodwill. Under section 346 of Chapter 6 in the *Industrial Relations Act*, a contract carrier can only be successful in a claim for compensation if a series of conditions have been met, including that ‘the principal contractor failed to take reasonable steps to advise the carrier that it was not a requirement of the principal contractor that such a payment (ie. goodwill) be made or requested’. In other words, principal contractors have an opportunity through this provision to regulate or even gradually to eliminate goodwill, if they so choose. Indeed, interviewees from employer and union organisations claimed that the legislation had ensured that goodwill ‘is no longer a problem’.

Even if Part Seven of Chapter 6 did encourage and preserve goodwill – and the evidence is that it has not – there are further reasons to believe that abolishing regulation would not eliminate the practice. These reasons arise from two key assumptions that underlie the critics’ arguments. First, they assume that restrictions on entry and exit would be eliminated if the legislation were rescinded. Second, they assume that once these ‘market distortions’ were abolished, the ideal of pure competition would be achieved, resulting in more efficient allocation of resources.

Systematic empirical evidence to support (or deny) these assumptions is very difficult to find, but both ‘in principle’ analysis and historical experience suggest that they are questionable. There are, for example, structural features of the markets themselves – as opposed to institutional regulation – that encourage these restrictions. They are most common in market segments that use specialised equipment. This equipment is often expensive and difficult to transfer to the carriage of other products, which increases the risks for contract carriers associated with losing their carrying contracts. It also ensures that, to use the Rolfe Report’s terminology, the markets are ‘narrow’ and highly ‘volatile’ (page 34). These structural forces produced ‘goodwill-type’ practices as far back as the 1940s – long before there was effective regulation of contract carrier rates and conditions. It is therefore unlikely that elimination of the legislation will end the practices in question. Indeed, the Rolfe Report feared that attempts at abolition would simply send the practices onto a ‘black market’ (page 45).

There are also *equity* reasons why goodwill should not be arbitrarily eliminated. On the one hand, it can be argued that the restrictions on entry and exit described in this report strongly advantage some contract carriers, especially those in the early stages in the development of these practices when goodwill prices are new or growing. These individuals receive ‘windfall profits’. On the other hand, contract carriers entering the industry in later stages are potentially disadvantaged if goodwill prices decline after they enter the industry. Both the denial of potential advantage and the fear of potential disadvantage produced a large number of disputes – individual and collective – across

many segments of road transport from the 1960s onwards, and ultimately led to legislative amendments during the 1990s (see Section 2).

These equity issues focus attention on the capacity of markets or regulatory regimes to manage disputes over entry and exit. Hypothetically, a pure market would leave decisions about entry and exit solely to the contract carriers and principal carriers on the basis of ‘buyer beware’ – new entrants would be taking risks based on their assessments of the potential gains and losses. However, there are significant market impurities that are likely to produce unacceptable inequities. There are, for example, asymmetries of information in these markets – sellers have much more information than buyers. Given the substantial investment required and the lack of equipment substitutability in these specialised markets (see above), and left to their own devices, individual contract carriers lack sufficient bargaining power compared to the larger corporations make the decisions about which transport option to adopt. Even the strongly anti-regulationist Rolfe Report accepted that some legislative regulation was necessary to ensure equity and that there was a need for transition arrangements if regulation is to change (see Rolfe 1993, pages 45-6).

There are *quality* issues. It could certainly be argued that despite the economic costs identified above principal carriers benefit from the goodwill that is paid by owner-drivers entering some segments of road transport. The higher investment that these owner-drivers have made in order to enter the industry means that they have a greater stake in the continued success of the principal enterprise. They are, then, likely to provide a better quality service on behalf of that enterprise to retail customers.

4.4 Conclusions

Clearly, this section relies substantially on qualitative, ‘in principle’ analysis because of the major limitations on quantitative data and analysis. Within this limitation, there are four main conclusions drawn in this section.

First, there is some economic cost associated with the regulation of price regulation under Chapter 6. To the extent that Chapter 6 produces an aggregate increase in contract carrier rates, then an increase in the price of road transport services can be expected and this will, in turn, produce some increase in consumer prices.

Second, the quantum of the economic cost is impossible to calculate, but several factors suggest that it may be considerably less than might be expected:

- the coverage of Chapter 6 (in terms of the range and number of contract carriers who fall within its scope) is limited.
- there will be considerable variation in the cost across road transport market segments, not only because of markets differences between contract carriers in those segments, but also because of differences in the proportion of total costs accounted for by transport costs.

- despite the regulation of contract carrier rates by Chapter 6, there continues to be significant competition in road transport because of the structural characteristics of the industry identified in Section 3 of this report.

Third, irrespective of the economic costs associated with Chapter 6, the regulation of prices brings a number of likely benefits, including:

- equity benefits flowing from reduced exploitation of bailee-drivers and owner-drivers.
- improved quality of service.
- improved occupational health and safety and road safety.

Fourth, the provisions of Chapter 6 regulating entry to and exit from the industry do not appear to have reduced competition. Indeed, the particular form of the legislative provisions seems to have actually reduced the incidence of goodwill, or at least disputes over goodwill. Furthermore, the Chapter 6 provisions regulating entry and exit can also be justified on equity and quality grounds.

Appendix 4-1

The Problems of Quantitative Analysis

The analysis contained in this report is mostly qualitative in nature - in the words of the *Guidelines for NCP Legislation Reviews* (2nd Edition, 1999), it relies for its assessment of the benefits and costs of the legislation on theoretical or 'in principle' arguments (page 37) based largely on 'the subjective assessments of key stakeholders' and basic descriptive statistics where they were available. The reason for this qualitative approach is the absence of an alternative because of the impossibility of accurate and reliable quantitative analysis.

The most significant problem confronting quantitative analysis of the costs and benefits of Chapter 6 is the lack of relevant, reliable and specific data, caused both by the way that official statistical data are gathered and by the complex and shifting organizational arrangements in the road transport industry. A number of examples well illustrate the difficulties.

1. The industry classifications used by the Australian Bureau of Statistics make it very difficult to identify the relevant numbers of employees and/or self-employed owner-drivers, let alone corresponding data on output or rates. While employment data are available on the category 'Transport and Communications' and its sub-categories of 'Road Transport' and 'Road Freight Transport' (see, for example, Tables 3.2, 3.3 and 3.4 in this report), these categories only capture those employees/self-employed who work for professional road transport carriers. Many employee-drivers and owner-drivers are classified under the industry of the products they carry, such as manufacturing or retail. The same problem applies to other types of data.
2. Chapter 6 only covers owner-drivers who work regularly for the same principal contractor, but statistical data cannot separate this type of self-employed driver from 'common carriers' who offer their services to a range of retail customers and carrying companies.
3. Many owner-drivers covered by Chapter 6, especially those engaged in short-distance and inter-state general freight, frequently switch between different carrying jobs and between different organizational arrangements. Sometimes they work as contractors directly engaged by the owners of goods, while sometimes they work as sub-contractors for carrying companies or freight forwarders. This means that the rates they receive for some of their work will be regulated by Chapter 6, while others will not.
4. Many drivers in road transport frequently switch between work as employees and work (in which they use their own truck) as owner-drivers, (see *Section 88E Report*)
5. It is extremely difficult to get accurate and reliable data (on employment patterns, on output, on the cost of road transport services) at a sufficiently disaggregated level.

Given the nature of Chapter 6, we are only interested in data for New South Wales and much of the statistical data – at least the published data – are national. The various determinations and agreements made under Chapter 6 are mostly industry-specific, but it is difficult to get data at the highly disaggregated level of industry segments like ready-mixed concrete or quarried products or car carrying.

6. There are virtually no data on demand for road transport services.
7. Many of the companies who engage owner-drivers (either the owners of goods, who engage owner-drivers as contractors or principal contractors who engage owner-drivers as sub-contractors) also employ employee-drivers. Consequently, it is impossible to separate the output of these companies or their transport costs attributable to owner-drivers, who are covered by Chapter 6, and employee-drivers.
8. There are no systematic data on cartage rates, either aggregated or disaggregated.

These weaknesses in the data make it impossible to produce meaningful quantitative analysis through techniques like input-output at the level of the road transport industry generally and especially at the more disaggregated level of industry segments. The multiple and highly unrealistic assumptions that would need to be made – because of the segmented nature of the road transport market, the partial application of the regulation (ie. it applies only to bailees and owner-drivers, not to firms employing drivers), the need to estimate the impact of existing regulation on prices, the complexities produced by contracting-subcontracting relationships and the (already mentioned) data problems – would render such quantitative analysis both inaccurate and unreliable.

Even the question of the impact of Chapter 6 on cartage rates is difficult to assess with any exactitude. As discussed in sections 4.2.1 and 4.2.2 of this report, this question requires a comparison between the actual rates paid and those that would be paid if Chapter 6 were not operating. The former (ie. actual rates) presents problems because there are no publicly-available data; as discussed in section 2.9 of this report, compliance is likely to be problematic; and there is likely to be great resistance in revealing actual rates if they breach legal minima set out in Chapter 6 determinations. The latter (ie. ‘market rates’ that would apply in the absence of Chapter 6) are purely hypothetical and would require pure guesswork.

The only possible substitute for pure quantitative analysis would be ‘benchmarking’ of data (like cartage rates or road accidents) in New South Wales with those in other states or other countries that do not have regulation like Chapter 6. Examples of this type of analysis would be a comparison of rates for the delivery of ready-mixed concrete or bricks or a parcel of 2 kilograms in New South Wales versus those in Victoria or Queensland. This type of benchmarking, however, requires considerable original empirical research that is both time-consuming and resource-rich. Unfortunately, the time and budget constraints for this report made benchmarking exercises like this impossible.

Section 5

Alternative Forms of Regulation

5.1 Introduction

This chapter reviews industrial relations regulation in state, national and international jurisdictions to examine how other legislatures have dealt or not dealt with the problem of contracts for carriage and contracts for bailment. From the outset it should be acknowledged that the NSW regulations imbued in Chapter 6 of the *Industrial Relations Act 1996* appear to be unique in the national and international context. However, there have been a number of developments, most notably in Queensland, South Australia, Victoria and at the Commonwealth level, which indicate that the broad problems associated with contracts for services have, at the very least, been considered by policy makers in those jurisdictions. In this chapter, these developments and trends are reviewed before turning to an examination of possible regulatory alternatives to Chapter 6.

5.2 Regulatory Regimes in Other States of Australia

5.2.1 Queensland

In the state of Queensland, industrial relations are regulated through the *Industrial Relations Act 1999 (Qld)*. This statute seeks to regulate ‘contracts for services’ in addition to ‘contracts of service’ by permitting the Queensland Industrial Relations Commission (QIRC) to amend or declare void ‘unfair’ contracts for services – provisions which have similar scope and effect to section 106 of the *Industrial Relations Act 1996*. However, unlike the NSW legislation, there are no provisions in the Queensland statute that seek to regulate specifically contracts for bailment or contracts of carriage in the road transport industry.

The absence of regulation for contracts of bailment and carriage in Queensland has recently been identified as a significant problem in that state. This problem was identified during the conduct of a National Competition Policy Review of Queensland public transport legislation in 2000, where a number of contributors to the review referred to the poor working conditions of Queensland taxi-drivers and the implications of this for driver safety.

In December 2000, at the request of the Queensland Minister for Employment, Training and Industrial Relations and the Minister for Transport, terms of reference were established for a Review of Taxi Driver Remuneration and Conditions of Work to be conducted by the Interdepartmental Review Committee. After extensive consultation with taxi drivers and other industry stakeholders, in addition to a comprehensive investigation

of regulatory regimes for taxi drivers in other states and other countries, the review and its recommendations were published in August 2001.

The Queensland Review of Taxi Driver Remuneration and Conditions of Work's key recommendation is to give the Queensland Industrial Relations Commission the power to amend or declare void unfair contracts for bailment under section 276 of the *Industrial Relations Act 1999*. The QIRC would amend or declare such contracts void where taxi drivers are found to be receiving less remuneration than another person would receive if they were doing the same work as an employee. This would be practically achieved by amending section 276 (7) of the *Industrial Relations Act 1999* to include contracts for bailment in the definition of 'contracts for services'. In addition to the key recommendation, a subsidiary recommendation of the Review suggested that Section 276 of the *Industrial Relations Act (1999)* be amended for collective applications to have contracts amended or declared void to be made by an organisation of employees or employers to the QIRC.

Prior to reaching these recommendations, the Interdepartmental Review Committee considered the regulatory approach of NSW. Although the committee observed that introducing legislative provisions similar to those provided in Chapter 6 of the *Industrial Relations Act (1996)* NSW would provide 'blanket protection' to all drivers and provide them with similar conditions to employees, it also suggested that significant changes would be required to the *Industrial Relations Act 1999*. Moreover, the committee pointed to concerns that contract determinations were regularly disregarded as reason for not preferring the NSW approach.

Nevertheless, the recommendation to regulate contracts of bailment is a clear acknowledgment of the need to regulate this industry for equity and efficiency reasons. It is unclear at this stage as to whether contracts of carriage will also be included in the definition of 'contracts for services' in section 276 of the *Industrial Relations Act 1999* and hence fall under the 'unfair contracts' jurisdiction of the Queensland Industrial Relations Commission.

5.2.2 Western Australia

In Western Australia, the Gallop Labor Government was in the process of progressing its *Labour Relations Reform Bill 2002* (no.100) through the Western Australian Legislative Council at the time of writing. Unlike NSW and Queensland, the prospective legislation does not provide for an unfair contracts jurisdiction, nor does it seek to regulate contracts for bailment or contracts for carriage.

The problem of regulating 'contracts for services', though, has recently emerged in that state with concerns that contracting musicians are receiving far less remuneration than employees performing similar work. Informal advice received from the Western Australian Department of Consumer and Employment Protection revealed that amendments to the Act would be sought to ensure that the level of remuneration of contracting musicians did not fall below that of musicians who are considered to be

employees. Although it was suggested that there were no similar plans at this stage to regulate contracts of bailment and carriage, the department informally acknowledged that this was a possibility for the future.

5.2.3 *South Australia*

In South Australia, the *Industrial and Employee Relations Act 1994* and the *Industrial and Employee Relations (General Regulations) Act 1994* regulate industrial relations in that state. These instruments do not presently seek to regulate contracts of bailment and carriage. However, there have been some recent developments in South Australia that strongly indicate the South Australian Government's desire to deal with similar issues to those already dealt with by Chapter 6.

In 2002, the Minister for Industrial Relations, the Hon Michael Wright MP, appointed Mr Greg Stevens, a former Deputy President of the South Australian Industrial Relations Commission, to conduct a wide-ranging review of industrial relations in South Australia. The terms of reference for the review are broad, but importantly include issues such as:

the desirability of ensuring that all workers in South Australia have an award safety net, and what barriers (if any) presently exists to providing a safety net for all worker'

and

what mechanisms or strategies could be used to ameliorate any inequities and/or recognise changes arising from precarious employment and the shift away from 'lifetime employment.

Whilst it is too early to determine whether Mr Steven's review will touch on the issues of contracts for bailment and carriage, the terms of reference indicate a strong preference for ensuring that all workers in South Australia are covered by safety net conditions. Moreover, the terms of reference acknowledge the growing problems associated with the shift from full-time employment to other 'precarious' working relationships. In essence, the terms of reference demonstrate a desire to deal with some of the issues already dealt with by Chapter 6. Mr Stevens is due to release his recommendations by 15 October 2002.

5.2.4 Tasmania

In Tasmania, industrial relations are regulated by the *Industrial Relations Act 1984* (No. 21 of 1984) (as amended to 13 May 2002). This Act does not provide regulation for contracts of bailment or carriage.

5.2.5 Victoria

In 1996, the then Victorian government referred most of its industrial relations powers to the federal government, which means that the Victorian system now relies mainly on federal legislation to set out minimum terms and conditions of employment for Victorian employees. Victoria, however, retains responsibility for some industrial relations issues. Victoria, for instance, has its own legislation covering long service leave, occupational health and safety and equal opportunity. Most other workplace issues are dealt with under the federal *Workplace Relations Act 1996* (see 5.3).

Yet, it is worth noting for the purpose of this review, the provisions of the *Fair Employment Bill 2000* (the Bill) – a bill created by the Bracks Labor Government in 2000 after extensive consultation and the publication of a comprehensive report by the Victorian Industrial Relations Taskforce. Although the Bill failed to pass through the Victorian Legislative Council and into law, its novel approach to regulating ‘contracts for services’ is worth discussing here.

The Bill provided a revised and extremely broad definition as to who may be considered an employee for the purposes of the proposed *Fair Employment Act* and further provided power for a Full Bench of the proposed Fair Employment Tribunal to declare certain workers to be employees. An ‘employee’ was defined by section 5 of the Bill as follows.

"(1) In this Act, "employee" means:

- (a) a person employed in any industry on wages, piecework rates, commission or other remuneration; or*
- (b) a person whose usual occupation is that of an employee in an industry; or*
- (c) a person who is a member of a class of persons declared to be employees under section 6; or*
- (d) each person, being 1 of 4 or more persons who are, or claim to be, partners working in association in an industry; or*
- (e) an outworker; or*
- (f) an apprentice or trainee.*

(2) A person is not prevented from being an employee only because:

- (a) the person is working under a contract for labour only, or substantially for labour only; or*
- (b) the person works part-time or on a casual basis; or*
- (c) the person is a lessee of tools or other implements of production, or of a vehicle used to deliver goods; or*

- (d) *the person owns, wholly or partly, a vehicle used to transport goods or passengers."*

These provisions, particularly 2(d), may have regulated owner-drivers and other transport workers previously not considered to have been employees. Moreover, under the Bill, the proposed Fair Employment Tribunal could have declared a person to be an employee for the purposes of the legislation as provided by section 6 of the Bill as follows:

6. Power to declare persons to be employees

- (1) *A Full Bench may, on application by a recognised organisation, a peak body or the Minister, make an order declaring a class of persons who perform work in an industry under a contract for services to be employees.*
- (2) *The Full Bench may make an order only if it considers the class of persons would be more appropriately regarded as employees.*
- (3) *In considering whether to make an order, the Full Bench may consider:*
 - (a) *the relative bargaining power of the class of persons;*
 - (b) *the economic dependency of the class of persons on the contract;*
 - (c) *the particular circumstances and needs of low-paid employees;*
 - (d) *whether the contract is designed to, or does, avoid the provisions of this Act, an industry sector order or an industrial instrument;*
 - (e) *the particular circumstances and needs of employees including women, persons from a non-English speaking background, young persons and outworkers;*
 - (f) *the consequences of not making an order for the class of persons."*

This bill was defeated by the opposition parties in the Victorian Legislative Council on 4 April 2001. In response, Premier Steve Bracks referred all relevant industrial relations powers of the Commonwealth in exchange for guarantees that the Commonwealth would legislate to improve wages and conditions for Victorian workers not covered by federal awards. Notwithstanding the failure of the bill for political reasons, it again demonstrates the desire of a state legislature to extend 'mainstream' industrial relations legislation to those persons formerly considered to be contractors.

5.3 The Regulatory Regime in the Commonwealth Jurisdiction

Industrial relations in the Federal or Commonwealth jurisdiction are regulated by the *Workplace Relations Act of 1996*. This statute does not contain any regulatory provisions that could be considered to be the equivalent of Chapter 6. However, the Act does support a fairly narrow (in comparison with the NSW and Queensland legislation) unfair contracts jurisdiction at section 127A, B and C which has been infrequently used to provide judicial oversight of certain contracts of carriage. According to Creighton and Stewart (2000:274), the unfair contract provisions were first introduced by the Federal Labor Government in 1992 and carried over into the *Workplace Relations Act 1996*, although the Howard Government unsuccessfully sought to repeal the provisions in 1999.

The provisions permit the Federal Court to review contracts for services upon application from an independent contractor, who must be a 'natural person' rather than a corporation, that the contract is harsh and/or unfair. Similarly to the NSW legislation, the Federal Court in reviewing a contract may have regard to the relative bargaining strength of the parties; whether any undue influence or pressure was exerted on the applicant or whether any unfair tactics were used; whether the contract provides for remuneration which is consistent with that of an employee performing similar work; and any other matter the Court thinks relevant (see 127A(4)). If it believes that the contract is harsh or unfair, the Court may set aside the entire contract or part thereof, or vary the contract.

These powers are based on the Commonwealth's constitutional power over corporations, trade and commerce, the territories and its power to regulate Commonwealth authorities. This constitutional foundation imposes significant jurisdictional restrictions as one party must be either the Commonwealth, a Commonwealth authority or a financial, trading or foreign corporation for the Court to be empowered to review a contract (see Creighton and Stewart, 2000:273).

Despite the jurisdictional and legislative barriers, the provisions do provide some measure of protection for owner-drivers who are able to overcome these legal hurdles. Yet like the NSW and Queensland cases, the Commonwealth's limited unfair contracts jurisdiction does not seek to regulate contracts of carriage and bailment in anyway similar to that of Chapter 6.

5.4 Regulatory Developments in Britain and New Zealand

In this section, we review legal developments in two countries with a similar legal, political and cultural heritage and which have recently introduced new industrial relations legislation – namely Britain and New Zealand. Once again, it should be stated from the outset that neither Britain nor New Zealand have legislation like Chapter 6 that specifically regulates owner-drivers and bailee-drivers in road transport. However, the following discussion demonstrates a significant shift towards re-regulating industrial relations systems in these countries. More importantly for this review, the developments of these countries demonstrate a desire to regulate the growing number of independent contractors who would otherwise not enjoy the same legal protections as employees.

5.4.1 Britain

Contemporary British experience suggests a moderate attempt to re-regulate employment relations in that country. Nevertheless, the enactment of the *Employment Relations Act 1999* represents a significant re-balancing of the interests of labour and capital, imbued in the 'social partnership' philosophy, and a 'third way' shift towards the re-regulation of the British labour market.

An important precursor to the development of New Labour's 'industrial relations settlement' was its signing of the European Union's Social Chapter in 1997. The signing of the social chapter importantly committed the Blair government to introduce legislation consistent with EU directives on such issues as working time arrangements, parental leave and, more controversially, works councils. Besides signing the social chapter, the incoming Blair Government also established a Low Pay Commission that was charged with investigating issues associated with the establishment of a National Minimum Wage. The *National Minimum Wage Act* was subsequently introduced in 1998.

The significance of this new British regulation to this review is its novel use of the term 'worker' to cover both employees and those who do not have an employment relationship but who derive a high proportion of their income from a single employer. Burchell et al (1999) have argued that the use of the term 'worker' in employment law may prove to be an appropriate policy response to ensure that the large and growing number of independent contractors in the United Kingdom are not excluded from important employment protections and may access certain employment rights. This important statutory development, whilst it is yet to be tested in the courts, signals the intent of British policy makers to widen the scope of employment protections to independent contractors.

5.4.2 *New Zealand*

In November 1999, a Labour/Alliance coalition government, committed to repealing the *Employment Contracts Act 1991* was elected. In the first year of office, the new government repealed the ECA and enacted the *Employment Relations Act 2000* (ERA). This law set out a number of key objectives, including:

- to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment...,
- by recognising that employment relationships are built on good faith behaviour,
- by acknowledging and addressing the inherent inequality of bargaining power in the employment relationship, and
- by promoting collective bargaining.

The broad thrust and specific new institutional arrangements demonstrate the ERA represents a shift back to a more regulated, collectivised but not centralised system. Importantly, however, the *Employment Relations Act 2000* signals policy makers attempt to address the problem of 'independent contractor versus employee' status. Under section 6(2) of the ERA 2000, the statute states that:

6(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

- 6(3) For the purposes of subsection (2), the Court or the Authority—
- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

In other words, as Boxall (2001) states, the process for determining whether a person is employed under a contract of service or contract for services should relate to the real nature of the relationship (not simply the wording) and will depend greatly on the worker's preference (and ongoing preference). This suggests a broadening of the definition of employment status to ensure (consistent with the motives of British policy makers) that the scope of employment regulation is extended beyond narrow definitions of 'employee'.

5.5 Alternatives to Chapter Six

Having considered regulatory regimes and developments in other state, national and international jurisdictions, this section of the review turns to an examination of possible alternatives to the maintenance of Chapter 6 in its present form. It begins by positing potential regulatory alternatives to Chapter 6 before evaluating the costs and benefits of what is labelled as economic regulation. Finally, as it has already been noted that the Chapter 6 contributes to higher levels of road safety, this section will discuss some alternative means by which current road safety levels could be maintained if not improved if Chapter 6 were to be repealed.

5.5.1 Employment Law Alternatives to Chapter 6

The exploration of regulatory developments in other Australian states and in Britain and New Zealand suggests that policy makers are extremely conscious of the rising number of people who may not fall within the historically narrow definitions of 'employee'. This is because some employers may choose to engage people under contracts for services rather than as employees if they believe they can escape the perceived regulatory burden that accompanies 'employee' status. For policy makers this represents a dilemma as significant numbers of their citizens are excluded from the mainstream industrial relations systems and hence employment protections.

As discussed in earlier sections, some Australian states and Britain and New Zealand are confronting this dilemma by either: establishing or extending an unfair contracts jurisdiction; using the word 'worker' in employment law to capture those under contracts of service and those under contracts for services; or by extending the scope of employment legislation to cover non-standard employment arrangements. It may be possible to regulate contracts of bailment and carriage through any one of these mechanisms however the legal implications of doing so are difficult to determine. For example, extending the definition of employee to cover contracts of bailment and

carriage was attempted in 1943 via section 5 of the *Industrial Arbitration Act* and section 88B. However, as discussed in Section 1 of this review, these controversial legislative provisions led to decades of litigation and industrial instability. There is no reason to believe that deeming contract carriers and bailees as employees would not suffer the same difficulties. Moreover, deeming provisions would not capture, nor seek to regulate, the peculiarities of the transport industry such as the historical practice of paying premiums for vehicles ‘in work’

5.5.2 Economic Regulation

It might be argued, as indeed it has from time to time, that the particular problems of the industry are better addressed through economic rather than industrial relations regulation. For instance, the NSW Government could establish a rigorous licensing system for contract carriers which would impose limitations on entry and exit. This licensing system could be used to enforce training and safety standards as well as to ensure that contract rates would be artificially supported by the licensing barrier to entry. It is conceivable that licensing could also ensure that vehicles were appropriately road worthy and that carriers met certain prudential requirements to ensure their ongoing financial viability. In adding some support for consideration of such a licensing system, Mr McGuire - Manager, Heavy Vehicle Safety for the Roads and Traffic Authority (RTA) stated that:

Road transport is not in any way a steady state industry. It is faced with a situation approximating that of the theoretical model of perfect competition - no barriers to entry or exit and an oversupply situation that puts tremendous pressure on prices - this leads to poor safety outcomes and poor behaviour of members of the industry or at least some members of the industry.

Mr McGuire went on to say that although the RTA had no official position on the merits of a licensing scheme, improved safety was the overriding objective of the RTA.

The primary difficulty with this approach is that its imposition would be as anti-competitive if not more anti-competitive, than Chapter 6 in its current form. Imposing a significant barrier to entry, such as a licensing system, might replicate some of the positive functions currently performed by Chapter 6, but it would also potentially be in direct breach of National Competition Policy. A secondary, but no less important consideration, is that a licensing system would not be able to ensure that bailees and contract carriers receive conditions and access to certain rights consistent with employees.

5.5.3 *Safety Regulation*

It has been contended in a number of places in this review, that *inter alia*, Chapter 6 provides a regulatory mechanism for encouraging improved road safety. One possible rebuttal of the view that Chapter 6 should be retained because of its positive influence on road safety is that road safety is better regulated through existing or reinforced traffic, driving and occupational health and safety regulation. For instance, the Rolfe Report (1993:32) stated that:

The community as a whole has an interest in ensuring that work vehicles are presented and driven in a safe manner; this interest is pursued by means of the *Traffic Act 1909* and associated legislation. If there are shortcomings in the application of that Act to the contract driving sector, and specifically to carriers under contracts of carriage, they can be dealt with most directly, and most efficiently, if they are resolved in context – that is, within the terms of the *Traffic Act 1909*.

In the current context, strengthening safety regulation could include recent proposals from the National Road Transport Commission (NRTC) to strengthen ‘chain of responsibility’ provisions in relevant legislation to ensure that customers of road transport services do not place undue pressure and unreasonable demands on contract carriers to ignore safe working practices (eg. reasonable transportation time).

Strengthening safety regulation is clearly of utmost community benefit but it is contended here, that safety regulation alone is not an adequate replacement for Chapter 6. As the Quinlan (2001) report made clear, efforts to strengthen safety regulation will not address the commercial dynamics of the transport industry which are at least partly responsible for the safety concerns identified in that report.

5.5.4 *Non-Regulatory Alternatives*

Aside from alternative economic and safety regulation, it might be suggested that a range of non-regulatory alternatives exist to maintaining Chapter 6. For instance, it could be asserted that the public interest would be better served through the establishment of appropriate voluntary codes of practice or perhaps through improved education of carriers and bailees on safety and financial management issues. Alternatively, it could also be suggested that the industry is sufficiently capable of self-regulating.

The authors of this review would argue that whilst voluntary codes of practice and improved education of industry stakeholders are meritorious proposals in their own right, they are not adequate replacements for Chapter 6. It is possible that voluntary codes of practice could assist in ensuring higher compliance with contract determinations, but it would be unrealistic to suggest that they could ever support the public interest in the same way that Chapter 6 has been shown to. Moreover, whilst industry commitment to improved safety arrangements such as the National Road Transport Commission’s ‘chain

of responsibility' proposal should be encouraged, it would not address the balance of the public interest issues currently addressed by Chapter 6.

It is also necessary to consider the notion of improving the education of drivers as a possible non-regulatory alternative to Chapter 6. There was some evidence from industry stakeholders that introducing formal training for carriers and bailees on safety, customer service and financial management topics would encourage the 'professionalisation' of the road transport industry. However, stakeholders also agreed that improved education alone would not vouchsafe the various segments of the road transport industry from the possibility of market failure. Finally, the suggestion that the industry is capable of self-regulating is based on a series of assumptions which this review, especially section one, has demonstrated to simply not exist in the NSW road transport industry.

5.6 Summary and Conclusions

This section of the report has investigated the regulatory regimes of other Australian states and at the Commonwealth level, in addition to recent regulatory developments in Britain and New Zealand. This investigation highlighted that the regulation contained in Chapter 6 is unique, not only in the Australian context, but also the international arena. Despite Chapter 6's distinctive approach, a trend was identified amongst policy makers throughout Australian states, the Commonwealth and in Britain and New Zealand, towards regulation designed to ensure that the growing number of independent contractors who offer contracts for services are not excluded from the same employment rights and protections enjoyed by employees. This trend is somewhat tentative and manifest in a variety of forms, but importantly signals a willingness to approach similar problems as those addressed by Chapter 6.

Finally, this section has examined the merits of three broad alternatives to Chapter 6, namely, Employment Law Alternatives, Economic Regulation and Safety Regulation. It was observed that whilst each of these may provide an alternative mechanism for performing some of the functions presently realised by Chapter 6, they do not, in isolation, provide a satisfactory replacement for Chapter 6. For instance, in the case of employment law alternatives, it was argued that extending the unfair contracts jurisdiction or deeming bailee-drivers and owner-drivers as employees may produce the same deleterious results which gave rise to Chapter 6. Moreover, whilst economic regulation such as licensing schemes may be a device to improve training and safety, amongst other things, it is potentially more anti-competitive than Chapter 6. Finally, although enhancing safety regulation is meritorious, the absence of barriers to entry and the highly competitive nature of the road transport industry suggest that strengthening safety regulation alone will not solve the industry's problems.

Section 6

Conclusions and Recommendations

6.1 The Main Recommendation

This report has reached the conclusion that Chapter 6 has not had a substantial impact on the degree of competition in the road transport industry and that the public benefits of the legislation outweigh the public costs. Consequently, the report's principal recommendation is that Chapter 6 of the NSW *Industrial Relations Act* should receive permanent protection against the anti-competitive provisions of the *Trade Practices Act* and the *Competition Code of New South Wales*. This would require amendment to the Act.

The remainder of this brief concluding section will explain how the report's conclusions were reached and the main recommendation resolved, thereby summarising the arguments that were developed in each of the preceding sections of the report.

6.2 Reaching the Conclusion

The conclusion that Chapter 6 continue as part of the *Industrial Relations Act 1996* has been reached after:

- i) outlining the historical background to and objectives of the legislation,
- ii) examining the operation of the legislation,
- iii) outlining the characteristics of the relevant product and labour markets,
- iv) assessing the costs and benefits of the legislation, and
- v) examining potential alternatives, in particular systems operating elsewhere in Australia and overseas.

Throughout, the analysis was informed by information and opinion provided by a range of industry participants and stakeholders, secondary literature (including substantial earlier research by the authors of the report), case law and descriptive statistics.

The history of the legislation (Section 1) revealed that the Chapter 6 provisions owe their origins to (i) problems identified by both private and public interests in the operation of a free market for the services of owner-drivers and bailee-drivers in the NSW road transport industry and (ii) a long series of attempts to remedy those problems by legislative regulation. It also identifies the objectives of the legislation (by reference to both the government's stated intentions and the arguments by various private interest groups in support of and in opposition to Chapter 6 and its legislative predecessors) as an

attempt to remedy market failure in the industry and to advance public benefits in industrial relations, occupational health and safety, road safety and quality of service.

When the actual operation of the legislation was considered (Section 2) it was found that recent case law has confirmed the Commission's broad powers to deal with any matter arising under contracts of bailment and carriage and, combined with recent statutory amendments, has expanded the scope of the legislation. It was also found that a significant number of determinations and agreements had been made under the legislation, suggesting a robust jurisdiction.

Examination of road transport's product and labour markets (Section 3) revealed the critical role that owner-drivers have played in the rapid development of Australia's road transport industry in the post war period. The fragmented nature of the industry and its production process was found to be highly significant. Associated with this, to at least some extent, was the most critical feature of the industry, the high degree of competition, both between road and other forms of transport, but particularly within road transport itself. These competitive pressures were found frequently to result in prices so low, in parts of the industry, that long-term operation proved unsustainable for significant numbers of operators. The outcome was a continual churning on the supply side of the market, with a steady inward stream of new operators replacing a corresponding outflow of failed operators. To the fore in this situation of competition were the owner-drivers whose circumstances and behaviour were the focus of Chapter 6 and its legislative predecessors.

The actual costs and benefits of Chapter 6 were analysed in Section 4, with the focus being on the specific mechanisms by which the legislation potentially restricts competition and on the costs and benefits for the industry and the wider community. The argument was that some economic costs can be identified as a result of the price regulation that is central to the legislation. While the quantum of these costs was impossible to calculate, it was likely to be less than might be expected. It was further argued that the likely benefits from the legislation – in terms of equity, quality of service and road safety – broadly outweigh the costs. The impact of the legislation on costs through restrictions on entry to and exit from the industry was also judged to be modest and largely outweighed by equity and quality benefits.

Section 5 of the report reviewed regulatory regimes in the other states of Australia, the Commonwealth of Australia and some overseas countries (namely, Britain and New Zealand). While Chapter 6 was found to be unique, a clear trend was identified in these other jurisdictions towards legislative intervention to regulate independent contractors and other forms of labour similar to owner-drivers and bailee-drivers. Alternative forms of road transport regulation – such as licensing, road and traffic regulation, and non-regulatory intervention – are also scrutinised. While some of these alternatives have advantages, they are seen as complements to Chapter 6 rather than substitutes.

As stated earlier, the analysis in the report was informed by the contributions of a range of industry participants and stakeholder representatives. Some of those interviewed made

it clear that their organisations did not have any official position on the merits, or otherwise, of the legislation, while others indicated that their organisations were opposed to Chapter 6, or at least aspects thereof. Notwithstanding, both these groups, along with all others interviewed, were adamant that some regulation of the industry was required; and that it should be regulation that would ensure the existing pressures of financial survival were greatly alleviated. These pressures were recognised by all interviewees, without exception, as the most significant factor behind the problems associated with the industry.

Furthermore, it was recognised by many, if not all, interviewees that Chapter 6, even if objectionable ideologically, was better than nothing as a means of at least potentially alleviating the financial stresses currently plaguing the industry. Greater financial security would, in turn it was hoped, provide greater stability in the industry, better levels of service, improved occupational health and safety, and fewer external costs, such as road accidents.

In addition, all interviewees were adamant that Chapter 6, even if adequately enforced, did little to reduce the intensity of competition in the industry. According to some interviewees, prices fixed by contract determinations were barely adequate to sustain long term operation by owner-drivers. So, they further argued, unrestrained market forces would not yield longer-term price levels any lower than thus under Chapter 6, especially if there were to be stability in the industry. Finally, it was stressed that operators had demonstrated that they were very capable of competing fiercely on non-price grounds, including quality of service but, unfortunately, also speed of delivery.

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