

Industrial Relations and Other Legislation Amendment Bill 2022

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Industrial Relations and Other Legislation Amendment Bill 2022 Consideration by Education, Employment and Training Committee

Submission by Professor Emeritus David Peetz concerning regulation of independent courier drivers¹

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1. Introduction

This submission focuses entirely on those aspects of the IR Amendment bill ('the Bill') that relate to the provisions concerning independent courier drivers, and in particular the submissions by 'gig platform companies' and some employer organisations regarding those provisions. It is prompted by an article I read concerning those submissions, which said:

Gig platform companies are refusing to support proposals by Queensland's Palaszczuk Labor Government to empower the State IRC to set minimum pay and standards for independent contractor delivery workers and enable collective bargaining with principal contractors.²

The key issues address here are the key contentions expressed therein, expressed as follows:

The idea that there is no need for regulation

- existing Commonwealth legislation already offers a high standard of protection for workers (Menulog, p5)
- there is no evidence (that we are aware of) showing a systemic deployment of unfair contracts to platform workers (Menulog, p6)
- Gig economy drivers 'always earn more than the federal national minimum wage plus costs during time on order' (Deliveroo, p8)

The idea that the Bill would force contractors into employment relationships or employment-like relationships, or does not take account of the individual circumstances of courier drivers

- a hybrid model is needed, allowing couriers to choose from both employment and independent contracting to suit their needs, to preserve the principles of fairness, safety, flexibility, choice, transparency, certainty and continuing viability (Menulog, p6)
- The Bill forces those who 'overwhelmingly choose this form of work' into an employment-like relationship that removes 'all the flexibility we know riders enjoy, and result in significant lost productivity and efficiency for riders, Deliveroo and our restaurant partners' (Deliveroo, pp5-6)
- The Bill 'appears to assume the form of work undertaken by riders is the same as that of road transport drivers, such as truck drivers delivering goods from point A to point B on a fixed schedule and route' (Deliveroo, p5)

The idea that there would be adverse employment effects from the Bill

- The Bill 'would most likely lead to thousands of owner drivers losing their livelihoods' (AiGroup, p12)

The idea that the Bill would discourage bargaining

- 'The existence of an industry level industrial instrument determining actual rates of pay is antithetical to the existence of a collective bargaining system which assumes

² 'Platforms rail against Queensland gig regulation plans', *Workplace Express*, 14 July 2022, https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=12&selkey=61342

parties will have room to negotiate for higher minimum rates of pay that are more suitable to an enterprise' (AiGroup, p12)

- 'A contract determination which reflects actual rates of pay in an industry discourages bargaining for agreements covering an individual principal contractor' (AiGroup, p12).

The idea that a state government should not regulate in this area as it would fracture or pre-empt a national system

- Different regulation across different platforms is 'cumbersome, adds administrative burden, operational complexity and cost to food delivery platform businesses' (MenuLog, p5)
- the Bill represents 'a backwards step ultimately leading to greater duplication and regulatory burdens for platforms' (Uber, p4)³
- the Bill 'risks creating a patchwork of inconsistent standards, rather than a unified, national approach' (Doordash, p1)
- 'national legislation at the federal level should instead be pursued' (BCA, p4)
- 'efforts to legislate prior to' the Jobs Summit 'will undermine the integrity and intent of the national summit to provide a harmonised approach' (Uber, p5)
- It is 'inappropriate and redundant for the Queensland Government to introduce the Bill in circumstances where it will be constitutionally inoperative from the outset and dependent on the Australian Government' (Uber, p4)

The idea that previous regulation in this area was a disaster

- The Bill would lead to 'a re-creation of the disaster that was looming before the RSRT was abolished' (AiGroup, pp12,3)

This submission addresses each of those concerns in turn. It then considers the impact that the NSW Chapter 6 legislation, on which the relevant part of the Bill is modelled, had on safety.

2. The idea that there is no need for regulation

There is ample international evidence of low payments amongst gig economy workers. There is nothing special about independent courier drivers that makes them exempt from such low rates of pay in the absence of appropriate legislation.

'Gig economy' work provides essential income for a minority of participants. Amongst the international studies, a Chartered Institute of Personnel and Development (CIPD) survey in the UK, only 25 per cent of 'gig' workers said it was their main job.⁴ In a Pew survey, 29 per cent of platform workers said that the income they earned from it was essential for meeting basic household needs, while 27 per cent said it was 'important' and 42 per cent 'nice to have, but not essential'.⁵ In a survey by the UK Department for Business, Energy & Industrial Strategy (BIES), only 14 per cent of gig workers earned half or more of their total

³ Page numbers here refer to the committee's numbering system, not the authors'.

⁴ Chartered Institute of Personnel and Development, *To Gig or Not to Gig? Stories from the Modern Economy* London: CIPD, March 2017.

⁵ Aaron Smith, *Gig Work, Online Selling and Home Sharing*, Pew Research Center, 17 November 2016.

income from gig work.⁶ In Australia, a survey specifically of 160 on-demand food delivery riders, undertaken by the Youth Workers Centre, found around a quarter worked full time,⁷ while another survey of around 1100 rideshare drivers, by the Transport Workers Union (TWU) and the Rideshare Driver Co-operative, found even higher incidence of full time work, which might reflect differences in the survey composition or in the patterns of behaviour in those groups.⁸

Expressed as an hourly rate, pay in the gig economy is low and often below minimum wages. In the CIPD survey, median earnings for transport or delivery was £6 per hour, and for short-term jobs was £7 per hour, below the then living wage of £7.20 per hour and the minimum wage for 21–24 year olds of £6.95 per hour.⁹ In the BIES survey, only 36 per cent of those who disclosed earnings received less than £7.50 per hour but 85 per cent of those who were involved in gig work from one to three times a week in the gig economy had earned less than £5,000 from their work in the preceding 12 months.¹⁰ In a survey by the International Labour Organisation (ILO), median pay for Amazon Mechanical Turk (AMT) workers was US\$4.65 per hour, well below the minimum wage.¹¹ A separate analysis of 3.8 million tasks on AMT found that the median pay was closer to US\$2 per hour, much less than requestors paid, due in part to time between tasks (e.g. time spent searching for tasks) and tasks ‘returned’ (not completed, perhaps because the requestor’s description was inaccurate).¹² In Australia, Unions NSW calculated that rates received via Airtasker for data entry, cleaning and sales were between \$3 and \$9 below the relevant minimum award rates.¹³ Hence the Twitter user named ‘Fair Gig for all’, on a regular basis, tweeted about vacancies on Airtasker for jobs paying below the minimum wage.¹⁴ Most relevant to this Bill, Bright and Fitzgerald calculated that 77% of food delivery riders they surveyed in Australia were receiving less than the equivalent of the minimum hourly wage for casual workers.¹⁵

Although platform economy workers are doing it tough, they also seem surprisingly optimistic, perhaps reflecting an optimism bias identified by Kahneman,¹⁶ related to ‘adaptive preferences’.¹⁷ In the CIPD survey, only 49 per cent of ‘gig workers’ (compared to 56 per

⁶ Lep Katriina Lapanjuuri, Robert Wishart, and Peter Cornick, *The Characteristics of Those in the Gig Economy*, London: Department for Business, Energy & Industrial Strategy, 2018.

⁷ Sarah Bright and Amy Fitzgerald, *Snapshot: On-demand food delivery drivers*, Young Workers Centre and Victorian Trades Hall Council, Melbourne, January 2018, https://d3n8a8pro7v7hmx.cloudfront.net/victorianunions/pages/1411/attachments/original/1517351126/ODFDR_Snapshot.pdf?1517351126

⁸ Rideshare Driver Co-Operative and Transport Workers Union, *Rideshare Driver survey*, Sydney, March 2019, <https://www.twu.com.au/ride-share/were-building-power/>

⁹ Chartered Institute of Personnel and Development, *To Gig*.

¹⁰ Lapanjuuri, Wishart, and Cornick, *Characteristics*.

¹¹ Janine Berg, *Income Security in the on-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, Geneva: Inclusive Labour Markets, Labour Relations and Working Conditions Branch, International Labour Office, 2016.

¹² Kotaro Hara, Abi Adams, Kristy Milland, Saiph Savage, Chris Callison-Burch and Jeffrey P. Bigham, ‘A Data-Driven Analysis of Workers’ Earnings on Amazon Mechanical Turk’, paper presented to CHI 2018 conference, Montreal, 21–26 April 2018, <https://arxiv.org/pdf/1712.05796.pdf>.

¹³ Unions NSW, *Innovation or Exploitation: Busting the Airtasker Myth* (Sydney: Unions NSW, 2016).

¹⁴ twitter.com/FairGigForAll.

¹⁵ Bright & Fitzgerald, *Snapshot*.

¹⁶ Daniel Kahneman, *Thinking, Fast and Slow*.

¹⁷ Steven Lukes, *Power: A Radical View*, 2nd Edition (London: Palgrave, 2005), 124.

cent of other workers) said they were ‘living comfortably’ or ‘doing alright’. However, 46 per cent of platform workers (compared to 26 per cent of other workers) expected their economic situation to improve over the coming year. And while only 57 per cent of platform workers (compared to 67 per cent of other workers) were saving for retirement through a pension plan, fully 33 per cent of platform workers (compared to 21 per cent of other workers) were confident they could live comfortably when they stopped working.¹⁸ Still, in the Australian rideshare drivers survey, 62 per cent considered their pay was not high enough to save for superannuation or leave,¹⁹ perhaps reflecting a higher incidence of reliance on gig-work income in that survey than in the broader overseas surveys.

The issue with many gig workers is not just pay and condition. It is also safety. The food delivery drivers’ survey estimated that 46 per cent of respondents said they or someone they knew had been hurt on the job: ‘Some reported near accidents or minor injuries such as grazes. Others reported significant accidents that rendered riders unable to work due to injury or damage inflicted to their bikes’.²⁰ The rideshare drivers survey also found evidence of safety issues, with 37 per cent of respondents reporting a threat, 10 per cent physical assaults and 6 per cent sexual assaults.²¹ Whatever the representativeness of individual surveys, it is clear from empirical evidence that there are serious issues to be resolved with pay, conditions and safety.

Safety was a major factor behind the introduction of the chapter 6 reforms in NSW. And it is a major motivating factor behind the reforms proposed for courier drivers in Queensland. As observed by the Independent Review into the Act,²²

One major reason for the interest in NSW’s IR Act Chapter 6 as a model for regulation of gig economy workers is the health and safety implications for such workers. In Sydney, for example, five independent courier riders (not subject to Chapter 6 regulation) died at work within three months in 2020.²³ A further two died in Melbourne within two months in late 2020.²⁴

As explained later in this submission, the Chapter 6 reforms have had a concrete effect on safety.

The independent review also noted that other similarities between the situation in heavy vehicle road transport (prompting Chapter 6) and the circumstances of independent courier drivers included:

- a concentration of power amongst corporate entities at the top supply chains setting rates;

¹⁸ Chartered Institute of Personnel and Development, *To Gig*.

¹⁹ Rideshare Driver Co-Operative and TWU, *Rideshare Driver survey*.

²⁰ Bright & Fitzgerald, *Snapshot*.

²¹ Rideshare Driver Co-Operative and TWU, *Rideshare Driver survey*.

²² John Thompson and Linda Lavarch, *Five-year Review of Queensland’s Industrial Relations Act 2016 – Final Report*, Brisbane, October 2021, p71.

²³ Kamilia Palu, ‘Food delivery rider hit by truck becomes fifth death in three months’, *Yahoo News*, 23 November 2020, <https://au.finance.yahoo.com/news/food-delivery-rider-hit-by-truck-becomes-fifth-death-in-three-months-122924369.html>.

²⁴ Nick Bonyhady, ‘DoorDash reveals second courier died in two-month span’, *Sydney Morning Herald*, 10 September 2021, <https://www.smh.com.au/national/door-dash-reveals-second-courier-died-in-two-month-span-20210910-p58qhf.html>.

- terms and conditions through tendering cycles but with little accountability for pressures on workers to cut safety corners and develop fatigue; and
- the failure of the existing industrial relations framework fails to provide workers with stable minimum standards and entitlements.

3. The idea that the Bill would force contractors into employment relationships or employment-like relationships, or does not take account of the individual circumstances of courier drivers

There is little point in governments trying to force contractors into employment relationships or employment-like relationships.

While contractors' relationship with the firm often looks like an employment relationship, experience tells us that the outcome of trying to define them as employees is uncertain. Around the world, when attempts have been made to classify gig workers as employees, sometimes it succeeds,²⁵ and sometimes it fails.²⁶ Moreover, quite a number of gig workers like to imagine themselves as independent, self-employed people. This makes them easy to mobilise politically.

That is what gig economy firms take advantage of, along with consumers' preference for cheap services. Gig firms will spend millions campaigning against efforts to classify their workers as employees.²⁷ The best, but not only, example was Uber's substantial outlays spend to overturn California's AB5 legislation doing that.²⁸ Then, if a rule is devised to interpret the contracts gig workers sign as employment contracts, the gig firms amend them, to get around that. In the end, a firm like Uber will adhere, grudgingly, to most standards that are imposed upon it — other than defining its workers as employees. So, it has accepted training requirements in Quebec, fare regulation in Massachusetts and driver accreditation requirements in several jurisdictions.²⁹

Regulation without redefinition is politically easier and hence more sustainable. It is also more effective policy, because it can be tailored to the circumstances of the workers

²⁵ Jamie Grierson and Rob Davies, 'Pimlico Plumbers Loses Appeal against Selfemployed Status', *Guardian*, 11 February 2017

²⁶ eg *Razak v. Uber Technologies Inc.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:16-cv-00573; *Lawson v. Grubhub, Inc.* 302 F. Supp. 3d 1071 (N.D. Cal. 2018)

²⁷ eg Cherri Murphy, 'Uber bought itself a law. Here's why that's dangerous for struggling drivers like me', *Guardian*, 12 November 2020, <https://www.theguardian.com/commentisfree/2020/nov/12/uber-prop-22-law-drivers-ab5-gig-workers>; Noam Scheiber, Is Gig Work a Job? Uber and Others Are Maneuvering to Shape the Answer, *New York Times*, 26 March 2019.

²⁸ Veena Dubal, 'AB5: Regulating the Gig Economy is Good for Workers and Democracy', *ACS Law*, American Constitution Society, 24 September 2019, <https://www.acslaw.org/expertforum/ab5-regulating-the-gig-economy-is-good-for-workers-and-democracy/>; Kate Conger, 'Uber and Lyft Drivers in California Will Remain Contractors', *New York Times*, 7 November 2020.

²⁹ Andrew Liptak, 'Uber will remain in Quebec after new rules go into effect', *The Verge*, 14 October 2017; <https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter187>; 'Uber reaches agreement with the Czech government', *BNE Intellinews*, 12 March 2018; <https://www.intellinews.com/uber-reaches-agreement-with-the-czech-government-138071/>

concerned. The form that should be taken by gig economy regulation may differ between, or even within, sectors. It might be an hourly wage rate, or it might be a piece rate of some sort. For example, when New York set up an inquiry into how to regulate passenger transport, it came up with an amount expressed like taxi charges, that is as dollars per kilometre travelled. They used detailed research to work out what rate would be needed to give an amount equivalent to the New York minimum wage³⁰ — once account is taken of waiting times, average speeds and other relevant factors.

The people in the best position to make a call on that are the people with the most knowledge of the industry. That is what happens in NSW, and it could also happen in Queensland.³¹

As the Independent Review of the Act noted:

Chapter 6 regulation does not seek to redefine contractors as employees. Rather, it aims to find a suitable form of regulation for people who do not have employee status (and sometimes do not want employee status).

As explained in the latter part of this submission, chapter 6 has been shown to make the roads in NSW safer for truck drivers and other road users. This Bill works in a similar fashion.

It is one of the great virtues of Chapter 6 of the NSW IR Act, and of the Bill, that they very much allow for the specific circumstances of courier drivers to be taken into account, and in doing so they do not aim to reclassify contractors as employees.

The ‘statement of principles’³² agreed between Uber and the Transport Workers Union was quickly followed by a media release³³ by Workplace Relations Minister Tony Burke, welcoming the agreement and promising to legislate to give the Fair Work Commission new powers to set minimum standards for gig workers. Uber would not have made this agreement if it did not allow specific account to be taken of the circumstances of its drivers.

³⁰ AFP News, ‘Judge rules Lyft must follow New York rules for driver minimum wage’, *Yahoo News*, 2 May 2019. <https://news.yahoo.com/judge-rules-lyft-must-york-rules-driver-minimum-010416081.html>

³¹ The theoretical principles underpinning this approach to setting minimum standards in a particular sector, consistent with national standards but taking account of light of the circumstances that apply in a particular sector, are set out in David Peetz, ‘Institutional experimentation, directed devolution and the search for policy innovation’, *Relations Industrielles*, 76(1), 2021, 69-89.

³² Uber and Transport Workers Union of Australia, ‘Statement of Principles and Future Commitments for Workers in the On-Demand Economy’, 28 June 2022, <https://www.twu.com.au/wp-content/uploads/2022/06/Statement-of-Principles-28-June-2022.pdf>

³³ Hon Tony Burke MP, Important step on rights for gig workers, Minister for Employment and Workplace Relations, 29 June 2022.

4. The idea that a state government should not regulate in this area as it would fracture or pre-empt a national system

This appears to be the most common shared idea in the ‘gig company’ and employer body submissions.

It is critical to note that the Bill could not fragment or pre-empt a national system as the constitutional pre-eminence of the Commonwealth in this area prevents it from happening. Were the Commonwealth to legislate to introduce national standards, any Queensland-specific provisions would be overridden. Indeed, the Bill explicitly requires Commonwealth exemption in order to operate.

So, should the Albanese Commonwealth government wish to legislate in this area, it can easily overcome any inconsistencies with state legislation by denying or qualifying such exemptions.

However, if the Queensland Parliament were to resile from action in this area, by withdrawing the provisions in this Bill relating to courier drivers, this would send an immediate signal to the Commonwealth government that it should not act. The greatest danger to effective national action in this area would be for the Queensland Parliament to withdraw these provisions, because doing so would raise doubts about the appropriateness of any action.

It is particularly curious and unfortunate that Uber’s submission encourages the Queensland Parliament to step back from action in this area when it has itself signed its ‘Statement of Principles’³⁴ with the Transport Workers Union that supports action in this direction, and which is seen by the Federal Minister as consistent with such action.

It is not possible to be certain of the reason for this inconsistent position. It is noteworthy that recent disclosures from internal Uber sources suggest that it has a history of engaging in a wide range of both legal and illegal activities in attempts to achieve favourable regulatory environments,³⁵ though how and whether this inconsistency in approaches fits into that framework is difficult to tell from the publicly available material.

³⁴ Uber and Transport Workers Union of Australia, ‘Statement of Principles and Future Commitments for Workers in the On-Demand Economy’, 28 June 2022, <https://www.twu.com.au/wp-content/uploads/2022/06/Statement-of-Principles-28-June-2022.pdf>

³⁵ Ben Butler, ‘The Uber files: Firm knew it acted illegally in Australia, then leaned on governments to change the law’, *Guardian*, 15 July 2022; Harry Davies, Simon Goodley, Felicity Lawrence, Paul Lewis & Lisa O’Carroll, ‘Uber broke laws, duped police and secretly lobbied governments, leak reveals’, *Guardian*, 10 July 2022; Emily O’Reilly, ‘The Uber files – a wake-up call for EU Institutions’, *Social Europe*, 17 July 2022; Paul Lewis, Harry Davies, Lisa O’Carroll Simon Goodley & Felicity Lawrence, ‘The Uber whistleblower: I’m exposing a system that sold people a lie’, *Guardian*, 11 July 2022.

5. The idea that there would be adverse employment effects from the Bill

There is no evidence that Chapter 6 of the NSW Industrial Relations Act has led to thousands of owner drivers losing their livelihoods. The fact that owner-drivers in NSW continue to be involved in the Chapter 6 process also suggests that it has not had these effects. The prospect that massive job losses would happen in Queensland is merely rhetoric without any evidentiary base in the AiGroup submission or anywhere else.

6. The idea that the Bill would discourage bargaining

The AiGroup claim that ‘the existence of an industry level industrial instrument determining actual rates of pay is antithetical to the existence of a collective bargaining system which assumes parties will have room to negotiate for higher minimum rates of pay that are more suitable to an enterprise’ is irrelevant because there is nothing in the Bill that requires the QIRC to determine actual rates of pay at a rate above the equivalent of comparable minimum award rates after allowing for costs. As the AiGroup does not claim that the existence of minimum award rates is antithetical to existence of collective bargaining amongst employees, it cannot legitimately claim that minimum rates for owner-drivers would be antithetical to the existence of collective bargaining amongst them.

Likewise, ‘a contract determination which reflects actual rates of pay in an industry’ is not required by the Bill and so it cannot discourage ‘bargaining for agreements covering an individual principal contractor’.

7. The idea that previous regulation in this area was a disaster

The actual background to the rise and fall of the Road Safety Remuneration Tribunal (RSRT) is as follows. Using the corporations power in the Australian Constitution, and following examples in the apparel industry in Australia and internationally,³⁶ the RSRT was established by the federal parliament in 2012 to set minimum pay rates for designated distances and hours of owner-drivers. This tribunal was an attempt to apply what were in effect minimum wage standards to contractors, specifically owner-drivers of trucks. The RSRT sought to establish minimum piece rates for long-distance truck drivers delivering freight between varying locations. The rates took into account the time normally taken to drive such distances, thereby seeking both to achieve the equivalent of minimum hourly pay for contractor truck drivers and to increase incentives for safe practices (the rates of pay being described by unions as ‘safe rates’). It heard evidence from competing parties over a long period.

In 2012, when legislation establishing the RSRT was introduced, it was opposed by the Liberal and National Party coalition, their portfolio spokesman Senator Eric Abetz describing it as ‘another grab for power by trade union bosses’ that was based on ‘flawed and unsubstantiated thinking’ as there was ‘no logical basis to link remuneration with road

³⁶ I. Nossar, R. Johnstone, A. Macklin and M. Rawling, ‘Union responses to regulatory change: Strategies of protective layering’, *Economic and Labour Relations Review*, vol. 26, December 2015, pp. 614-630; J. Reinecke and J. Donaghey, ‘After Rana Plaza: Building coalitional power for labour rights between unions and (consumption-based) social movement organisations’, *Organization*, vol. 22, no. 5, 2015, pp. 720-740.

safety'.³⁷ The Coalition's opposition was also reported in the media at the time.³⁸ In their 2013 election policies, the Liberal and National Parties promised to 'urgently review' the RSRT as there was 'no evidence' that it was necessary.³⁹

In 2013, after winning the election, Minister Abetz announced the review, referring to industry claims of 'onerous and unnecessary compliance burdens'.⁴⁰ He commissioned a report on the Road Safety Remuneration System (RSRS) from 'Jaguar Consulting', a firm whose web page featured an image of scissors cutting through red tape.⁴¹ On 26 March 2014 the government then held a 'Repeal Day', with a website www.cuttingredtape.gov.au, celebrating the 'Coalition's deregulation initiatives' and listing the RSRT Review as a one of the 'Government reviews with a deregulation focus'.⁴² As expected, Jaguar Consulting reported in 2014 that 'the safety record of the Australian heavy vehicle industry is...relatively good', that 'there must be significant doubt as to the potential for regulation along the lines of the RSRS to yield substantial safety benefits in any context', that 'there is not an industry-wide issue of low remuneration' and that there was 'no evidence of the effectiveness of a model consistent with the RSRS in improving safety in other jurisdictions'.⁴³

A follow-up report was then sought from management consultants PwC. It generated a cost-benefit analysis favourable to the Government's opposition to the RSRT.⁴⁴ Errors in the PwC report were then heavily critiqued by Michael H Belzer, whose research had been cited in the PwC report.⁴⁵ This critique argued, amongst other things, that the PwC report greatly inflated the cost of the RSRT system. (PwC, unlike Jaguar Consulting, accepted the existence of safety gains from it.) Despite their shortcomings, these reports were an integral part of the new government's strategy to abolish the RSRT: as former Minister Abetz later disclosed, 'Given the Senate with which we were blessed after the 2013 election, nothing could be rushed...when Senators Lazarus, Muir and Lambie were absolutely opposed to the abolition of the Road Safety Remuneration Tribunal, we decided not to advance legislation to abolish it and instead developed two reports in anticipation that the RSRT would ultimately over reach (which it did) and present the evidence needed.'⁴⁶

The RSRT faced a concerted campaign by a conservative national government and by the core corporations that benefited from low-cost owner-driving. It met resistance from the top of the supply chain, where profits were threatened, small fleet owners (for whom many owner-drivers worked, and who reportedly threatened to withhold work from owner drivers if

³⁷E. Abetz, *Second Reading debate, 'Road Safety Remuneration Bill 2012, Road Safety Remuneration (Consequential Amendments and Related Provisions) Bill 2012'*, Hansard, Senate, Canberra, 2012.

³⁸P. Freebairn, 'Business wants say on truckers', *Austrakian Financial Review*, 20 March 2012, p. 7,

³⁹Liberal Party of Australia, *Improving the Fair Work Laws*, Canberra, 2013.

⁴⁰E. Abetz, *Review of the Road Safety Remuneration System*, Canberra, 2013.

⁴¹<http://www.jaguarconsulting.com.au/>, accessed 19 February 2022.

⁴²Australian Government, *Autumn Repeal Day*, Canberra, 2014.

⁴³R. D. Smith, *Review of the Road Safety Remuneration System*, Jaguar Consulting Pty Ltd, Melbourne, 2014, <https://apo.org.au/sites/default/files/resource-files/2014-04/apo-nid62461.pdf>. pp 161, 163-4.

⁴⁴PwC, *Review of the Road Safety Remuneration System: Final Report*, January 2016.

⁴⁵M. H. Belzer, *Evaluating the PwC "Review of the Road Safety Remuneration System"*, Wayne State University, Detroit, April 2016.

⁴⁶E. Abetz, *Address to the HR Nicholls Society Annual Dinner*, Melbourne, 2016.

the RSRT system was continued)⁴⁷ and some owner-drivers, who faced a loss of income from withheld fleet-work or empty ‘backloads’.⁴⁸ The campaign was assisted by opposition from many owner-drivers themselves, the intended beneficiaries. The ‘safe rates,’ while adequately compensating for the major long-distance hauls, did not allow for the situation of the much smaller ‘backloads’ that drivers would take back to their home base at cheaper rates, but which were important to their financial viability. It was essential for the RSRT to take these local circumstances fully into account, but it did not have time to correct early shortcomings and devise a system that would do so before it was disestablished.

Three months before the election, the government demonised the RSRT,⁴⁹ greeted and addressed protesters at a ‘convoy to Canberra’, and then abolished the RSRT.⁵⁰ Although the Labor Party opposed its abolition, the issue did not feature prominently in the subsequent election campaign itself, and the government won re-election anyway.

The RSRT only operated for a short time, too short for any proper evaluation of its impact to be made. This is especially the case given the substantial annual variation (shown later in Figures 1 and 2) in the fatality rate from road accidents involving heavy vehicles. Those evaluations that were undertaken were commissioned with a political focus (to facilitate the abolition of the scheme) and have serious weaknesses that render them of little value.⁵¹ A much clearer assessment can be made of the Chapter 6 provisions in the NSW IR which was established much earlier and remains in place. The findings of such an analysis are in the latter part of this submission.

Indeed, the RSRT is not the model for the Bill anyway. That model instead is provided by Chapter 6 of the NSW Industrial Relations Act.

The chapter 6 provisions of the NSW Industrial Relations Act are an attempt to regulate the pay and conditions of independent contractors — owner-drivers of large trucks — and have existed since 1979. The legislation enables the NSW IRC to issue ‘contract determinations’ that specify minimum standards for covered workers.⁵² These are analogous to ‘awards’ in labour regulation. For example: the ‘General Carriers Contract Determination 2017’ establishes, for various types of truck owner-drivers:

- minimum rates of remuneration, comprising per-kilometre and hourly rates (varying by truck size and type), allowances, a minimum earnings guarantee, and adjustment formulae
- entitlements to annual leave and rest breaks
- various minimum standards of work by the owner-driver and obligations on the ‘principal contractor’, including transparency of work allocation

⁴⁷ M. Rawling, R. Johnstone and I. Nossar, ‘Compromising Road Transport Supply Chain Regulation: The Abolition of the Road Safety Remuneration Tribunal’, *Sydney Law Review*, vol. 39, 2017, pp. 303-332.

⁴⁸ Backloads, on the return legs of trips, are usually considerably smaller than the main loads which generate most income for owner-drivers; these are important income supplements, but cannot attract the same compensation as full loads.

⁴⁹ R. Greenwood and M. Cash, ‘Convoy to Canberra’, 2GB, 2016.
<http://www.2gb.com/audioplayer/168316>

⁵⁰ Retail Council, *Statement on the abolition of the RSRT*, Sydney, 2016.

⁵¹ Belzer, *Evaluating the PwC “Review of the Road Safety Remuneration System”*.

⁵² Industrial Relations Act 1996 No 17 [NSW] s316

- specific arrangements for full-time full-year (50 hours per week x 50 weeks) workers
- union representation rights, where sought by workers

The ‘Car carriers contract determination’, of 2008, performs a related function for semi-trailers carrying cars. Rates vary according to size, distance, complexity and responsibility. The NSW IRC can also approve ‘contract agreements’,⁵³ which are analogous to ‘collective agreements’ in labour regulation, and between owner-drivers and firms. These contract agreements are exempt from competition law restrictions.

The legislation appealed to the ‘small business’ ethos of many policy makers. Hence the Chapter 6 system was augmented over time. In 1994, for example, its scope was extended beyond ‘motor lorries’ to encompass owner-drivers utilising other vehicles (including bicycles).⁵⁴ A Liberal government introduced the Contract of Carriage Tribunal.⁵⁵ Chapter 6 has persisted through changes of government and sustained periods of conservative rule — in NSW from 1998 to 1995, and again from 2011 until the present day.⁵⁶ It has also persisted through the conservative federal government’s takeover of industrial relations in 2006 and (via a formal exclusion) that government’s passage of the *Independent Contractors Act* that otherwise excluded independent contractors from most regulation by courts, tribunals and state parliaments.⁵⁷

For firms there is value in this approach, as they do not need to change business models when the relative costs of forms of engagement change, since the two systems over time have broadly comparable cost structures. This reduces the chance of a ‘race to the bottom’ and has also prevented existing operators from being substantially undercut by new entrants to the market.

The legislation catches entities who attempt to artificially move out of the system. For example, sections 309(2) and (3) of the IR Act specifically deal with situations where companies try to call something a franchise when it would otherwise fall under the section. The NSW IRC has a wide discretion to classify something to be a contract of carriage, to prevent avoidance of the Act’s intent.

As outlined in the next section, the legislation has been associated with a positive impact on safety amongst truck drivers in NSW. The model has influenced policy makers elsewhere. As the Committee knows, the review of the Industrial Relations Act in Queensland in 2021 proposed to apply the Chapter 6 model to independent courier drivers in that state.⁵⁸ The Queensland government announced that it would adopt this recommendation, ultimately leading to legislation unless that intention is overruled by the Federal government. The then federal Opposition showed interest in applying something like this to road transport

⁵³ s325

⁵⁴ s305

⁵⁵ s347

⁵⁶ S. Kaine and M. Rawling, ‘Comprehensive Campaigning’ in the NSW Transport Industry: Bridging the Divide Between Regulation and Union Organizing’, *Journal of Industrial Relations*, vol. 52, no. 2, 2010, pp. 183-200. **Error! Bookmark not defined.**

⁵⁷ *ibid.*

⁵⁸ L. Lavarch and J. Thompson, *Five-year Review of Queensland’s Industrial Relations Act 2016: Final Report*, Office of Industrial Relations, Brisbane, 2021.

elsewhere.⁵⁹ There had already been iterations of owner-driver legislation in Victoria and Western Australia, but these are entirely different systems which have not created a capacity for owner-drivers to effectively bargain or provided for enforceable rates. The NSW framework is providing the model for policy elsewhere.

Chapter 6 of the NSW Act has, in effect, been in place since 1979, that is for over 40 years. There is no suggestion that it has been a disaster, indeed its effects have been beneficial, and so it has been kept in place by successive Liberal and National Party governments.

8. The impact of this form of regulation on safety

The Bill is modelled (with variations) on the Chapter 6 legislation in NSW.

It is thus important to understand the impact of Chapter 6 on safety in the sector which it covered.

The heavy vehicle road transport industry is characterised by serious health and safety problems. Low incomes for owner-drivers⁶⁰ have contributed to the industry having the longest working hours and the most deaths – especially bystander deaths – of any industry.⁶¹ Over the period 2016-2020, the road transport industry had the highest fatality rate per 100,000 workers of any Australian industry — higher even than agriculture, construction or mining.⁶² There was limited technological capacity to monitor and regulate safety.

Internationally, broadly two, non-exclusive types of approaches have emerged in response to this safety problem. One is to attempt to directly regulate the driving hours, vehicle speed or other factors that might directly influence truck crashes. Radar traps or speed-limiting devices on trucks are examples. In the European Union, regulations require trucks to carry monitors that transmit their GPS location and enable automatic calculations of whether implied speed limits are exceeded or driving and rest time regulations are violated. Yet there are limitations to how far this direct regulation can go, and they are not just technological. There are few successful attempts to prosecute firms when owner-drivers they were using became involved in fatal crashes. This is the case even though a lead firm may be creating conditions that encourage unsafe behaviour by workers — and even though, under Australian health and safety legislation, a person conducting a business or undertaking is responsible for the safety of the workers under their direction. It is easier to litigate a dangerous factory than a pay

⁵⁹ Queensland Government, *Five-year Review of Queensland's Industrial Relations Act 2016 – Final Report Recommendations and the Queensland Government's Response*, Office of Industrial Relations, Brisbane, 2022.

⁶⁰ M. Quinlan, *Report into Safety in the Long Haul Trucking Industry*, Motor Accidents Authority of New South Wales, Sydney, 2001.

⁶¹ M. Quinlan, 'FactCheck: do better pay rates for truck drivers improve safety?', *The Conversation*, 13 April 2016, <https://theconversation.com/factcheck-do-better-pay-rates-for-truck-drivers-improve-safety-57639>; Australian Bureau of Statistics, *Employee Earnings and Hours, Australia*, AGPS, Canberra, 6306.0; Safe Work Australia, *Notifiable Fatalities – Monthly Report*, 2015; Quinlan, *Report into Safety in the Long Haul Trucking Industry*.

⁶² Safe Work Australia, *Work-related Traumatic Injury Fatalities, Australia 2020*, Safe Work Australia, Canberra, 2021, www.safeworkaustralia.gov.au/.

structure and schedule that facilitates risk-taking.

The second type of approach, then, is to attempt to change the incentives drivers face through their payment systems. If drivers need to travel excess speeds over long distances to achieve acceptable pay (to cover family living costs and debt repayments), then changing those payment systems may change client and driver behaviour.⁶³ There are a number of studies, mostly involving drivers in the US, showing significant associations between pay rates or incentives and safety outcomes, supporting this approach.⁶⁴ In Australia, even amongst employees, truck drivers have the longest paid full-time working hours of the 97 occupations for which data were published by the Statistician, and one fifth higher than the average.⁶⁵ Yet hourly employee earnings were one fifth *below* the average.⁶⁶ This is matched by low owner-driver incomes, and hence there was high debt amongst the owner-drivers and insolvencies were common in the sector. Low pay rates create incentives on drivers to drive fast or skip breaks, as margins are generally low. They also encourage other risk-taking behaviour including use of drugs or stimulants, driving while fatigued, and overloading of trucks. Both the federal RSRT and Chapter 6 in NSW have focused on this second approach, attempting to regulate to alter the incentives facing drivers (and those for whom they work). This regulation is not done by a health and safety authority, but by an authority charged with regulating pay and conditions of workers — normally of employees, but in this case extending to independent contractors.

To assess the effects of the system on road safety, quantitative analysis of administrative data has been undertaken. It is possible to look at national road safety data to compare the experiences of NSW and the rest of Australia. For this purpose, the Australian Road Deaths Database on Fatal Crashes was accessed.⁶⁷ It provides data on each fatal vehicle accident since 1989. The Australian Road Deaths Database is collated by the federal Bureau of Infrastructure and Transport Research Economics and provides basic details of 47,419 road transport crash fatalities in Australia, as reported by the police each month to State and Territory road safety authorities. It contains data on the circumstances of each crash, for example the date, location and crash type, up until July 2021. This enables us to analyse crashes involving articulated trucks in NSW and the rest of Australia. Of course, changes in crash rates may reflect a number of factors, including changes in road conditions, road rules and traffic density. Rather than seeking to model the effects of each such factor, we proxy the impact of such changes through the crash rates for other vehicles (that is, other than articulated trucks). Two measures test for the potential effect of Chapter 6 on truck crashes:

⁶³ Quinlan, *Report into Safety in the Long Haul Trucking Industry*.

⁶⁴ M. Belzer, D. Rodruigez and S. Sedo, *Paying for Safety: An Economic Analysis of the Effect of Compensation on Truck Driver Safety*, Science Applications International Corporation and Federal Highway Transport Safety Administration, 2002; M. H. Belzer and S. A. Sedo, 'Why do long distance truck drivers work extremely long hours?', *Economic and Labour Relations Review*, vol. 29, no. 1, 2018, pp. 59-79; T. Kudo and M. H. Belzer, 'The association between truck driver compensation and safety performance', *Safety Science*, vol. 120, 2019, pp. 447-455; D. Rodriguez, F. Targa and B. MH, 'Pay Incentives and Truck Driver Safety: A Case Study', *Industrial and Labour Relations Review*, vol. 59, no. 2, January 2006.

⁶⁵ Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2018: Table 13*, Cat No 6306.0, DO013_201805, ABS, Canberra, 2019.

⁶⁶ *ibid*

⁶⁷ www.bitre.gov.au/statistics/safety/fatal_road_crash_database.aspx

- changes in the proportion of fatal crashes in NSW that involve articulated trucks, compared to changes in the proportion of fatal crashes in the rest of Australia that involve articulated trucks; and
- changes in the share of NSW in Australian fatal crashes that involve articulated trucks, compared to changes in that state's share of Australian fatal crashes involving other vehicles.

These are imperfect measures of the safety effects of the Chapter 6 reforms. For one thing, many articulated trucks are driven by employees or other people not covered by Chapter 6 (which has quite a narrow definition of 'contract carriers' that it covers). For another thing, many truck drivers covered by Chapter 6 will be driving non-articulated trucks that thereby are defined as 'other vehicles' for the purposes of these data. Both these features will tend to mask any effect from the Chapter 6 provisions and reduce the chance that a significant difference will be found. In addition, there may be some factors that affect road safety for articulated trucks in NSW but not for other road users and not for articulated trucks in other states. Nonetheless, the data point to the potential relevance to user safety of Chapter 6.

Results regarding safety effects

Figure 1 shows, over the period 1989-2021, the proportion of fatal crashes each year that involved an articulated truck in NSW (in the heavy solid line) and the rest of Australia (in the heavy dashed line). Ordinary least squares (OLS) trend lines (thin dashed lines) are shown for each series. At the start of the period, a considerably higher proportion of fatal crashes involved articulated trucks in NSW than in the rest of Australia (about a third more); by the end of the period the shares were almost identical. Over the period, the proportion in NSW fell by close to 0.1 percentage points per annum (as indicated by the slope on the trend line); for the rest of Australia, there was no discernible, consistent change over time.

Over the period 1989-2021, there were 1,586 fatal crashes in NSW involving articulated trucks. Had the share of articulated trucks in total crashes remained unchanged over this period at 12.0% (the level indicated by the OLS trend equation for the beginning), there would have been 1,757 fatal crashes involving articulated trucks, 171 more than actually occurred. As an average of 1.2 people were killed per crash involving an articulated truck in NSW over this period, this difference would be equivalent on average to about 205 lives. As Chapter 6 commenced 10 years before the start of the series, this number likely underestimates the impact of the legislation in reducing loss of life.

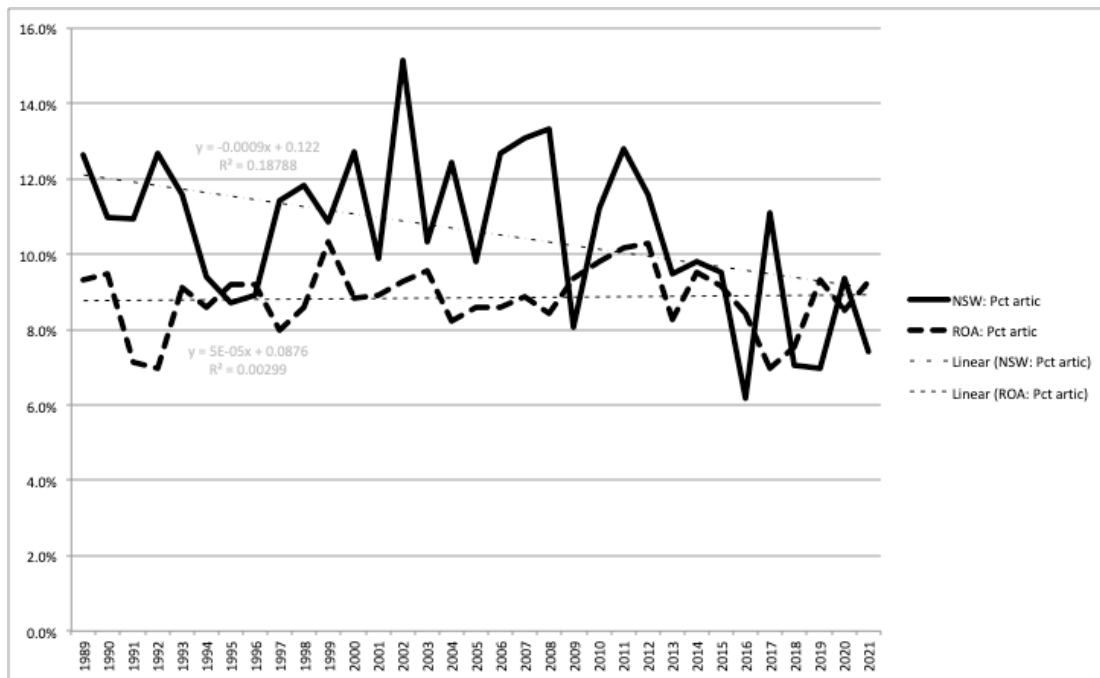


Figure 1: Proportion of fatal vehicle crashes involving articulated trucks, NSW and rest of Australia, 1989 -2021.

Figure 2 shows the data expressed in a different way: the proportion of fatal vehicle crashes accounted for by NSW vehicles, amongst articulated trucks and amongst other vehicles. In both series, the proportion of fatal crashes accounted for by NSW declines, but for articulated trucks the decline is quite large, about 0.38 percentage points a year according to the trend line, which is over three times the rate of decline for other vehicles, which is about 0.12 percentage points a year. At the beginning of the period, NSW accounts for nearly nine percentage points more of all fatal articulated vehicle crashes than its share in crashes of other vehicles; by the end of the period, the proportions are almost identical.

While these data cannot be conclusive, because of the presence of non-Chapter 6 drivers amongst articulated truck drivers, the fact that a small proportion of drivers of other vehicles would be covered by Chapter 6, and the possibility that other factors affected the safety performance of articulated truck drivers in NSW but not other road users in that state or drivers of articulated trucks in other states, the data are nonetheless suggestive of a prima facie case that, over time, Chapter 6 improved road safety for truck drivers in NSW.

Additional regression analyses were undertaken to examine the apparent decline in NSW articulated vehicle fatal accidents in greater detail. For these, the total number of fatal accidents was the key dependent variable. At the outset, it should be noted that fatal accidents have been in long term decline in Australia, by slightly over 2% per year since the data were first collected in 1989. So, first, the long-term declines in fatal accident rates were calculated for NSW and the rest of Australia, by whether the accident involved an articulated truck, using OLS regression. The unit of analysis was the month, and the period covered was from January 1989 to December 2020, generating a total of 384 observations. In each equation, time (measured in years) was the explanatory variable and the natural logarithm of the type of accident was the dependent variable. (For zero values, a proxy estimate of 0.01 was substituted to allow the observation to be included.)

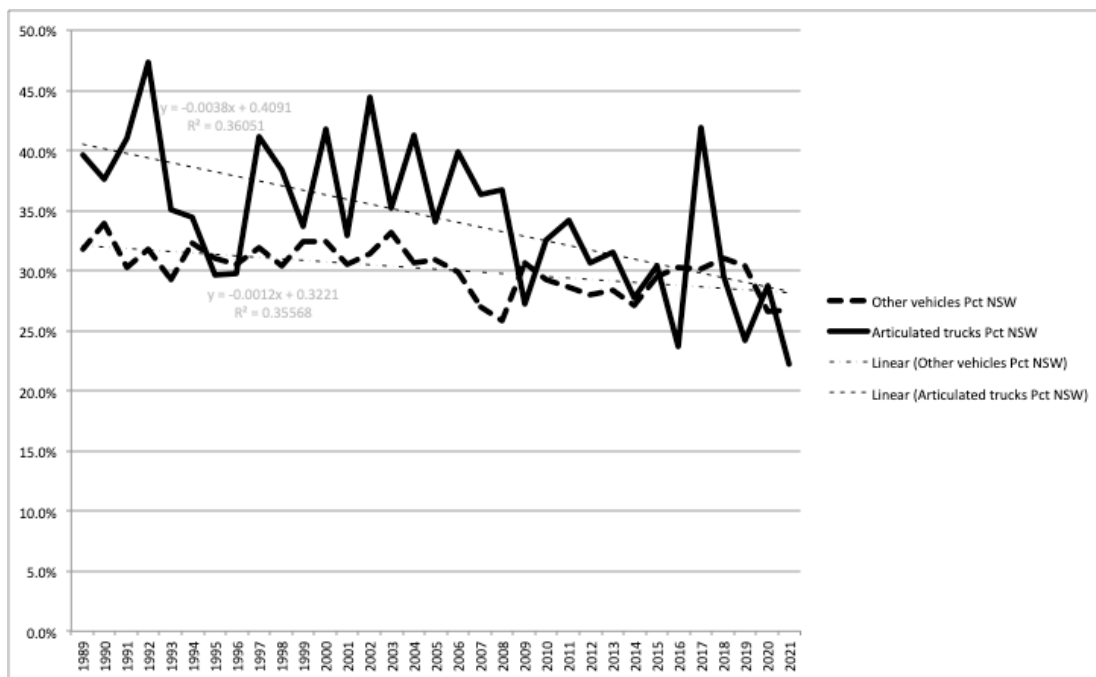


Figure 2: Proportion of fatal crashes accounted for by NSW, articulated trucks and other vehicles, 1989-2021.

The resultant estimates of average annual decline are shown in Table 1. They show that the average annual decline in fatal accidents involving articulated trucks in NSW was 5.0%, around double the average annual decline in other fatal accidents in NSW or in fatal accidents in other states.

Table 1 Average annual decline in fatal accidents, 1989-2020.

Type of fatal accident	Location	Average annual change
Involved articulated trucks	NSW	-5.0%
Other vehicles only	NSW	-2.6%
Involved articulated trucks	Rest of Australia	-2.0%
Other vehicles only	Rest of Australia	-2.1%

In Table 2, I predict the number of fatal vehicle accidents involving articulated trucks in NSW over the period 1989-2020. The dependent variable is the number of accidents (not its logarithm) as the number of accidents on one quarter does not build on the number in the previous quarter (unlike in, say, a regression predicting wages or unemployment), and the numbers can vary substantially between months. Equation (1) shows that there is a significant negative trend over time (confirming the finding in Table 1), while equation (2) includes other variables representing the number of other fatal accidents in NSW, and the number of accidents in other states. It shows that, while articulated vehicle accidents in NSW tend to go down when other accidents in NSW do (reflecting the common effect of some road safety measures), the decline in articulated vehicle accidents is substantial even after this is controlled for in the equation. That is, the long-term decline in articulated truck accidents in NSW cannot be explained by any factors that influence general road safety in NSW or across the rest of Australia.

Table 2: Regressions predicting number of fatal vehicle accidents involving articulated trucks, NSW, 1989-2020

	Equation (1)	Equation (2)
Constant	6.291 (0.210)	4.74 (1.150)
Time	-0.137** (0.011)	-0.108** (0.022)
Fatal accidents, other vehicles, NSW		0.037* (0.016)
Fatal accidents, rest of Australia		-0.002 (0.010)
N	384	384
adj r2	0.273	0.280
F	144.808	50.639
F significance	0.000	0.000

(Standard errors in brackets)

* Significant at 5% level

** Significant at 0.01% level

9. Conclusions

Contrary to submission made by various gig platform companies and employer groups, there is a need for regulation in this area. The Bill would not force contractors into employment relationships or employment-like relationships, and takes account of the individual circumstances of courier drivers. There would be no adverse employment effects from the Bill. The Bill would not discourage bargaining. Legislating in this area would not fracture or pre-empt a national system. Previous regulation in this area was far from a disaster — rather it showed substantial safety gains from regulation. It seems likely that that occupational safety in heavy vehicle road transport improved with the entrenchment of Chapter 6 regulation in NSW. Since 1989, the average annual decline in fatal accidents involving articulated trucks in NSW was around double the declines in other fatal road accidents in NSW or in fatal road accidents in other states. Articulated vehicle accidents accounted for a declining share of road deaths in NSW but not for the rest of Australia. NSW accounted for a steadily declining share of fatal heavy vehicle crashes, far more than the decline in its share in other fatal crashes. The long-term decline in articulated truck accidents in NSW cannot be explained by any factors that influence general road safety in NSW or across the rest of Australia. It is likely that over 205 lives have been saved as a result of Chapter 6. It is also apparent that the consultants hired by the Abbott government were premature in claiming that there was ‘no evidence of the effectiveness of a model consistent with the RSRS in improving safety in other jurisdictions’.⁶⁸

⁶⁸ R D Smith, *Review*.