Discussion paper

National Competition Policy Review of the Carriers Act 1891 *- Final Report*

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Government of South Australia

Office of Consumer and Business Affairs

TABLE OF CONTENTS

Executive Summary

The *Carriers Act 1891* ('the Act') applies to common carriers (those who do not discriminate between consignors) of certain valuable goods by land for hire. Two markets are affected by the Act - the market for the carriage of goods and the market for the reduction of liability or risk management for the carriage of goods.

The primary objective of the Act is to provide common carriers of certain precious goods by land with a means of limiting their liability for loss or damage to goods carried. It seeks to achieve this objective by limiting the liability of common carriers of certain types of goods to $20.00. The goods listed are goods which are rarely carried today, and reflect the priorities of a century ago rather than the circumstances of the modern carriage industry.

The Act has a number of theoretical effects, which may give rise to costs and benefits. In its fullest operation, the Act restricts the need for use of alternative forms of risk management strategies, and confers an advantage for common carriers in terms of reduced liability when compared to the rest of the carriage industry. The Act also potentially disadvantages consignors, private carriers, insurers and the risk management industry.

However, it is the finding of the Review Panel, based on research and consultation with industry, that these effects must be characterised as theoretical as there is no evidence that there are common carriers still operating today, and it certainly appears that the Act is never relied on.

Society has changed dramatically since the legislation was enacted, but the Act has never been amended to reflect changing circumstances. The policy priorities of government today differ from the priorities which led to the enactment of the Act. There are now other Acts which ensure that services must be performed with due care and skill. All of these Acts suggest that responsibility for the safe transport of goods lies with the parties to a buyer/seller relationship. This type of Act is no longer appropriate.

Given the changes which have occurred in society which render the content of the Act obsolete and the reality that there are few, if any, common carriers still operating in this State, the logical response is to repeal the Act. Consultation with industry and consumer groups has indicated that there are no objections to this course of action.

It is therefore the recommendation of the Review Panel that the *Carriers Act 1891* be repealed.

REVIEW OF THE *CARRIERS ACT 1891* (SA)

1. INTRODUCTION

THE *Carriers Act*[1] ("the Act") was passed in 1891. It was modelled on United Kingdom legislation that dealt with the rights and liabilities of common carriers. Following pressure by the Carriers' Association in South Australia, the government of the day decided to introduce its own carriers' legislation. All States have since enacted some form of carriers' legislation, although Queensland repealed its *Carriage of Goods by Land (Carriers' Liability) Act 1967* in 1993. The remaining States and Territories retain legislation that is fundamentally the same as the South Australian legislation, although Tasmania is in the process of repealing its *Common Carriers Act 1874*.

2. WHY REVIEW THE ACT?

On 11 April 1995, the Council of Australian Governments ("COAG") entered into three intergovernmental agreements to facilitate the implementation of national competition policy objectives. One of these agreements was the *Competition Principles Agreement*. As part of their obligations under this agreement, State governments undertook to review all existing legislation that restricts competition. The Office of Consumer and Business Affairs ("OCBA") is reviewing the *Carriers Act 1891* (SA) as part of this process.

The guiding principle is that legislation (including any Act, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and that
- the objects of the legislation can only be achieved by restricting competition.[2]

All existing legislation that restricts competition must be reviewed and, where appropriate, reforms implemented by the year 2000. Any new legislation that restricts competition should be accompanied by evidence that the legislation is consistent with the guiding principle outlined above. Legislation identified as restricting competition should be reviewed every ten years thereafter.

The procedure for reviewing the Act is that contained in clause 5(9) of the *Competition Principles Agreement*.

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1 No 525 of 1891.

2 Clause 5(1) of the *Competition Principles Agreement*.

A review should:

a) clarify the objectives of the legislation;

b) identify the nature of the restriction on competition;

c) analyse the likely effect of the restriction on competition and on the economy generally;

d) assess and balance the costs and benefits of the restriction; and

e) consider alternative means for achieving the same result including non-legislative approaches.

Where there is a requirement to balance the benefits of a policy or course of action against its costs, or to assess the most effective means of achieving a policy objective, the following matters shall be taken into account where relevant:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers or a class of consumers;
- the competitiveness of Australian business; and
- the efficient allocation of resources.

3. WHO DOES THE ACT AND THIS REVIEW APPLY TO?

The Act provides a framework for limiting the liability of common carriers, stagecoach proprietors and mail contractors.

3.1 Common carriers

The Act applies to common carriers carrying certain goods by land for hire. It relies on the common law definition of a 'common carrier', which is generally held to be:

> One who, by profession to the public, undertakes for hire to transport from place to place, either by land or water, the goods of such persons as may choose to employ him. He is bound to convey the goods of any person who offers to pay his hire, and he is an insurer of goods entrusted to him; that is, he is liable for their loss or injury, in the absence of a special agreement or statutory exemption, unless the loss or injury was caused by the act of God or the Queen's enemies.[3]

Under the law, common carriers are those who hold themselves out as ready, without discrimination, to carry the goods of all persons who choose to employ them or send goods to be carried.[4]

Common carriers should be distinguished from private carriers, to whom the Act does not apply. If a carrier reserves the right to choose from among those who send goods to be carried, then they are not a common carrier but a private carrier. Often a bill of lading or consignment note will contain a clause stating that "we are not common carriers and will accept no liability as such", and this may be enough to designate a person as a private carrier.

However, a carrier who rejects goods that are not suitable for their means of transportation or where they do not have room or space available may still be characterised as a common carrier.

Most carriers today are private carriers, and thus the Act does not apply to them. Warehouse operators,[5] wharfingers,[6] stevedores[7] and furniture removers[8] have all been held to be private carriers.[9]

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3 Burke, *Osborn's Concise Law Dictionary* (London, Sweet & Maxwell, 6th ed 1976).

4 *Jones v Commonwealth* (1939) 62 CLR 339; (1939) ALR 141; 13 ALJ 34. Emphasis added.

5 *Consolidated Tea and Lands Co v Oliver's Wharf* (1910) 2 KB 395.

6 *Chattock & Co v Bellamy & Co* (1895) 64 LJQB 250.

7 *Scruttons Ltd v Midland Silicones Ltd* (1962) AC 446; (1962) 1 All ER 1; (1962) 2 WLR 186 HL.

8 *Fogan v Green & Edwards Ltd* (1926) 1 KB 102.

Alternatively, some carriers avoid liability by the terms of their contract. Often the bill of lading or the consignment note will contain a clause stating something similar to the following:

> Unless otherwise expressly agreed in writing, no responsibility will be accepted by the carrier for any loss, damage, mis-delivery or non-delivery of goods, parcels, packages, crates or cases, etc, or the contents thereof either in transit or in storage for any reason whatsoever.

In such a case, the Act applies to such common carriers but is ineffective due to the contractual limitation of liability.[10] In this situation, the liability has been shifted from the carrier to the consignor (the sender).

The Act only applies to the carriage of certain goods by common carriers. These goods are outlined below on pages 7-8 and refer mostly to valuables such as gold, jewellery, precious stones, bank notes, artwork, etc.

3.2 Stagecoach proprietors

Stagecoach proprietors no longer operate in South Australia. Therefore the Act no longer serves a purpose to the extent that it applies to them.

3.3 Mail contractors

Currently the Australian Postal Corporation ("Australia Post") has a monopoly on the carriage of mail. Australia Post is excluded from the provisions of the Act by the operation of section 30 of the *Australian Postal Corporation Act 1989* (Cth) which provides its own limitation of liability.

However, there is a possibility that the carriage of mail may be opened up to other carriers following the review of Australia Post currently being conducted by the National Competition Council. Were this to occur, the Act may apply to these other contractors, depending on the terms of any legislation that introduced them.

3.4 Carriage by rail

Carriage of goods by rail is not covered by the Act. Railways in South Australia are controlled by the Commonwealth, by agreement between the

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9 Although in the case of furniture removers and wharfingers there remains some doubt. In *Geering v Stewart Transport Ltd* (1967) NZLR 802, the Court held that a furniture remover may or may not be a common carrier - it depends upon the particular circumstances of the case; and in *Boston v Dalgety & Co* (1905) 7 WALR 195 the Court held a wharfinger to be a common carrier.

10 See section 7 of the Act. However, such clauses stand or fall on their construction; clear words are necessary to escape the consequences of one's own wrongdoing: *Rick Cobby Haulage v Simsmetal Pty Ltd* (1986) 43 SASR 533.

State and the Commonwealth.[11] They are controlled by the Australian National Railways Commission. Section 72 of the *Australian National Railways Commission Act 1983* (Cth) provides that the Commission is not a common carrier. The Commission undertakes liability similar to that of a common carrier when it carries goods at the Commission's risk. However, such dealings fall outside the scope of the Act. Moreover, railway operators are deemed not to be common carriers under section 17 of the *Railways (Operations and Access) Act 1997* (SA).

Conclusion 1

The Act and this Review apply to common carriers (those who do not discriminate between consignors) of certain valuable goods by land for hire.

No submissions were received on this conclusion. It is therefore the final conclusion of the Review Panel that the Act and this Review apply to common carriers (those who do not discriminate between consignors) of certain valuable goods by land for hire.

[11] As outlined in the *Railways Agreement (South Australia) Act 1975* (Cth) and the *Railways (Transfer Agreement) Act 1975* (SA).

4. WHAT ARE THE OBJECTIVES OF THE ACT?

The primary objective of the Act is to provide common carriers of certain precious goods with a means of limiting their liability for loss or damage to the goods carried. At common law, common carriers have a very wide liability. This liability may be limited by contract, however. The Act offers carriers protection where there is no contractual limitation of liability. By relying on the Act, common carriers are able to diminish the liability imposed upon them for loss or damage to valuable goods of which they are not aware they are carrying and for which their charges are disproportionately low.[12] The Act impacts on the market for the limitation of liability in the carriage of goods.

4.1 The history of the Act

The Act was enacted after pressure was brought to bear on the government of the day by the Carriers' Association, which wanted protection for its members. There are three instances cited in the 1891 Parliamentary debates in which carriers had been unfairly prejudiced:

- A package was delivered and externally seemed alright. A receipt was given for the package. Some days later a claim was made for £30 in damages.

- A package was lost and a claim was made for £40. Before the claim was settled, the package was found. The package turned out to be worth only £5.

- A new driver was employed by a firm of carriers. He delivered some parcels, but the consignee claimed he was one short. The firm offered to pay the claim if he would declare before a Justice of the Peace that there was one package short, but he did not do so.

The Carriers' Association wanted to prevent these situations from recurring, and therefore lobbied the government to provide a legislative solution.

In the late nineteenth century, carriers played an important role in the developing economies of the various colonies. Although in the earlier part of the century carriage was predominantly by ship or other vessels (as this was by far the cheapest mode of transportation), by the late nineteenth century roads and rail had become more widespread and were being increasingly used to transport both goods and passengers. The burgeoning stagecoach industry was providing a cheaper form of transportation of goods, and was becoming vital in the transportation of

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12 *Penn Elastic Co Pty Ltd v Sadleirs Transport Co (Vic) Pty Ltd* (1976) 136 CLR 28.

goods to the interior of the continent, where ships and other vessels were unable to go. As the colonies sought to expand beyond the coastline, a relatively cheap and accessible form of transportation was vital. Thus by 1891, when the Act was enacted, carriers by land were playing an important role in the economy.

At the same time, the carriage of goods by land was fraught with difficulty. Travel to the interior of the continent was hazardous, with uncertain weather conditions and the potential for highway robbery. Under the common law, carriers would be liable for loss of or damage to goods, even where that loss or damage was not caused by their deliberate act or negligence.[13]

It may have been reasonable to expect the carrier, rather than the consignor, to bear the risk of loss, since the carrier was the one that had the better means to protect itself. This was only reasonable, however, where the carrier had some idea of the value of the goods it was carrying. Where the carrier was unknowingly carrying goods of considerable value, it may not have taken the extra precautions that might ordinarily be expected in the carriage of valuable and/or fragile goods. The carrier would be vulnerable to paying considerable damages.

Additionally, where the goods were lost, the carrier would have no opportunity to get the goods valued, and would therefore be vulnerable to false claims or overestimation of value. Carriers needed protection in these circumstances and, given their importance to the economy, such protection was considered warranted.

The United Kingdom Act of 1830 (which was in force in South Australia) may have been called upon to provide carriers with the protection they needed. However, the Carriers' Association clearly did not feel that its members were adequately protected by that Act, and therefore it pressured the government to enact its own legislation.

4.2 Overview of the provisions of the Act

Section 2 provides that common carriers, mail contractors and stagecoach proprietors (called carriers as a whole) shall bear no liability for the loss of or damage to certain types of goods where the value of those goods is greater than $20, unless their value has been declared to the carrier. These goods are specified within the section and comprise:

[13] Although there were some exceptions to this, discussed below, these were very limited and would not apply in many of the situations which carriers faced.

- gold or silver coin
- any gold or silver in a manufactured or unmanufactured state
- any precious stones
- jewellery
- watches, clocks or timepieces of any description
- trinkets
- bills
- notes of any bank of Australia or foreign bank
- orders, notes or securities for payment of money, whether foreign or otherwise
- stamps
- maps
- writings
- title deeds
- paintings
- engravings
- pictures
- gold or silver plate or plated articles
- glass
- china
- silks in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials
- furs
- lace

Section 3 provides that carriers may charge an increased rate for the carriage of such goods whose value is greater than $20, provided that notice is given of the increased charge. This notice should be in the form of legible characters in some public and conspicuous part of the office, warehouse or receiving house where parcels are received. It should state the increased rate of charge. The section provides that the increased charge is intended as compensation for the greater risk and care to be taken in safe conveyance of valuable articles.

Section 4 provides that where there has been an increased price under section 3, the consignor (the sender) should be given a receipt acknowledging the increase and accepting responsibility for the articles. If the carrier fails to give the receipt, then the carrier will lose the protection of the Act and be liable as at common law. They will also be liable to refund the increase in the charge.

Section 5 provides that a mere public notice or declaration will not suffice to give protection under the Act.

Section 6 provides that every office, warehouse or receiving house used by the carrier for receiving parcels will be deemed to be the office, warehouse or receiving house of the carrier. It further provides that carriers are liable

to be sued in their name or names only, but that any partner or co-proprietor may be joined in the action.

Section 7 provides that a special contract can be made between the consignor and the carrier. Such a contract will not be affected by the provisions of the Act.

Section 8 provides that where an increased charge has been paid and the goods are lost, then the carrier will be liable to refund the increased charge, in addition to the carrier's liability for damages.

Section 9 provides that the carrier will not be protected from liability arising from damage to or loss of goods that is the result of unlawful acts of the carrier's servants. The servant will further be personally liable for such loss or damage resulting from their unlawful act or negligence.

Section 10 provides that where goods have been damaged or lost, the carrier is entitled to have the goods valued. If the value of the goods is less than the declared value, the carrier is only liable to pay the actual value. However, if the value of the goods is greater than the declared value, the carrier of the goods is only liable to pay the declared value along with any increased charge if the goods are lost.

Section 11 provides that the carrier's agents are to be liable as common carriers unless certain conditions in relation to notice are fulfilled.

Section 12 provides that where a receipt has been given by the person receiving the goods, acknowledging that the goods have been delivered in good order and condition, that receipt will exonerate the carrier from liability unless there is evidence to show that the goods were damaged while in the possession of the carrier.

Sections 13 and 14 are administrative in nature.

4.3 Objectives of the Act

The common law liability of common carriers is considerably broader than that of private carriers. The liability of private carriers is always determined by reference to the contract of carriage. In the absence of any legislative intervention, private carriers could potentially develop a monopoly over the carriage of goods.

In the case of common carriers, contracts of carriage were not widely used at the time the legislation was enacted. The provisions of the Act provide a limitation on the liability of common carriers in lieu of that which may have been provided for in a contract of carriage. This is designed to offer some protection to common carriers and thereby enable them to continue to operate.

Conclusion 2

The primary objective of the Act is to provide common carriers of certain precious goods by land with a means of limiting their liability for loss or damage to goods carried. Do you agree with this conclusion? If not, what other objectives do you believe the Act to have?

No submissions were received on this conclusion. It is therefore the final conclusion of the Review Panel that the primary objective of the Act is to provide common carriers of certain precious goods with a means of limiting their liability for loss or damage to goods carried.

5. COMPETITION AND MARKETS

5.1 What is competition?[14]

Competition expresses itself as rivalrous market behaviour. Rivalry can take a number of forms, whether it be over price, service, technology, quality or even consistency of product. Effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers.

Competition is a process rather than a situation. However, whether firms compete is very much a matter of the structure of the market in which they operate. A market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long term, if given a sufficient price incentive.

The structure of the market is characterised by a number of other factors, such as the number and size of competitors, the barriers to entry into the market, the ability for different products to be substituted, the extent of vertical integration, and the presence of co-operative arrangements between competitors which detracts from their independence. However, of all the elements making up a market structure, ease of entry into the market is probably the most important. It is the difficulty which firms experience in entering a market which establishes the possibility of market concentration over time; and it is the threat of the entry of a new player into a market which operates as the best regulator of competitive conduct.

5.2 What is the relevant market?

There are two markets which are potentially affected by the Act's operation.

5.2.1 Carriage of goods by land

The first market is the market for the carriage of goods by land. There are many carriers, some private and some common, operating today. These carriers carry a wide range of goods of varying value. The items listed within the provisions of the Act are carried relatively infrequently. Electrical goods, foodstuffs and building materials constitute the bulk of the work in the industry today.

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[14] Partly drawn from *re Queensland Co-op Milling Association Ltd & Defiance Holdings Ltd* [1976] ATPR ¶40-012 at 17,246.

There are still instances where a carrier is unaware of the nature of the goods that they are carrying. Sometimes a person wishing to send an item to a certain place simply brings the item to the receiving house, already packaged. Due to the volume of items handled by these carriers each day, there is not time to inquire as to the nature of each individual package. Generally, however, these will be consumer contracts, to which the Act has very limited operation due to other laws.

Some carriers place restrictions on the type of goods they will carry, but the majority of common carriers will carry anything. Some require notification if the goods are above a certain value. This value is usually set far above the $20 limit set by the Act. In some cases the onus is placed upon the consignor to insure (via the terms on the consignment note), while in others the carrier insures itself.

The Act therefore offers protection to common carriers that is not offered to private carriers in the form of a limitation of liability. This has the potential to enable common carriers to provide their services for a lower price than private carriers. In doing so, it may create an advantage for common carriers in the market of carrying goods by land.

5.2.2 Risk-management

The second market on which the Act impacts is that for the reduction of liability or risk management for the carriage of goods. The provisions of the Act provide a system of liability reduction for common carriers. This may prevent either the carrier or the consignor from investigating other liability reduction or risk management possibilities and impinges upon the market for the provision of those services.

Conclusion 3

The relevant markets are those for the carriage of goods and for risk management of the carriage of goods. Do you agree? Are there any other markets which are affected by the Act? If so, which markets?

No submissions were received on this conclusion. It is therefore the final conclusion of the Review Panel that there are two relevant markets: the market for the carriage of goods and the market for the risk management of the carriage of goods.

6. WHAT ARE THE NATURE OF THE RESTRICTIONS ON COMPETITION?

There are two forms of restriction generated by the Act:

- an advantage for common carriers in terms of reduced liability *vis-a-vis* the rest of the carriage industry; and
- a restriction on the use for alternative forms of risk management strategies in the carriage industry.

6.1 Discrimination between competitors

Legislative interventions in markets populated by private firms are generally intended to be neutral in their impact. Any discrimination is generally based on considered policy grounds.[15] For example, a special tax provision favouring activities with a high research and development component may be discriminatory but reflect government policy that encouragement of innovation is desirable.

The Act offers protection to common carriers that is not offered to private carriers in the form of a limitation of liability; it gives common carriers an advantage over private carriers who have to organise their own forms of protection. *Prima facie* , the Act is an intermediate restriction on a form of competitive conduct in which all carriers within the market may or may not engage. However, all carriers (whether common or private) are most likely to engage in some form of liability protection, whether it be reliance on the Act, contractual limitation, or separate insurance cover.

No explicit policy justification remains as to why only common carriers should benefit from a legislated limitation of liability. Carriage of goods by common carriers is not a practice that requires special advancement for the protection of consumers, nor for the economic or social development of this State.

6.2 Alternative risk management

Due to the presence of the Act, there is no need for common carriers to seek out other forms of risk management, such as:

- contractual limitation;
- insurance cover for damage to the goods;

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[15] Independent Committee of Inquiry, *National Competition Policy* (The Hilmer Report) (Canberra, AGPS 1993) pp303-304.

- insurance cover for potential litigation; and
- employment of risk management professionals (eg, accountants, actuaries, lawyers).

By providing that common carriers may self-insure, via an increased charge when carrying goods valued at over $20, the Act may restrict competition between insurers. In effect, the common carrier gets a monopoly on the insurance of goods carried by common carriers. It is likely that a consumer will not pay an extra fee to the carrier to ensure the protection of the goods and then pay an additional insurance premium to an insurance agency.

The decision as to what to do with any increased charge belongs to the carrier. Some may choose to pool the surplus and invest in safer carriage systems. Others may use the money to pay the premium for their own insurance; thus an insurance company may get the flow-on benefit.

The Act may also be seen as limiting the necessity for other forms of insurance, eg, litigation insurance.

Further, the Act limits the necessity for the employment of risk management professionals such as accountants, actuaries and lawyers.

However, while the provisions of the Act do interfere with competition amongst providers of alternative risk management strategies, there is little interference with competition in practice since the provisions of the Act are apparently not being used.

Conclusion 4

The Act restricts the need for use of alternative forms of risk management strategies, and confers an advantage for common carriers in terms of reduced liability when compared to the rest of the carriage industry. Do you agree with this conclusion? In what other ways, if any, does the Act restrict competition?

No submissions were received on this conclusion It is therefore the final conclusion of the Review Panel that the Act restricts the need for the use of alternative forms of risk management strategies and confers an advantage for common carriers in terms of reduced liability when compared to the rest of the carriage industry.

7. A COST/BENEFIT ANALYSIS

In engaging in a cost/benefit analysis of the effect of the Act it is necessary to distinguish between the actual and potential effects of the Act's operation.

7.1 Actual effect of the Act

Research into the current market for the carriage of goods appears to indicate that the provisions of the Act are not being used. It follows that on a pure cost/benefit analysis of the actual market, the Act has neither cost nor benefit. However, the Act may be potentially anti-competitive.

The exception to this are the administrative costs which flow from the existence of any legislation. The Act requires no active administration of its provisions, but incurs slight administrative costs by its existence.

7.2 Who potentially benefits from the Act?

The primary beneficiaries of the Act are common carriers. They are afforded extra protection from liability where they were not informed of the value of goods, provided those goods are of greater value than $20. This is so even if they are negligent in the course of providing the service.[16] Additionally, common carriers are given the opportunity to increase their charges where the goods' value is above $20. The Act places the common carrier at an advantage, since they do not need to negotiate the terms of the contract or secure additional insurance to protect themselves.

The benefit of the Act is that the liability of common carriers is limited. Without the protection of the Act, common carriers may be especially vulnerable because of their strict liability at common law. The presence of a statutory limitation of liability enables the carrier to enter into a contract for the carriage of goods without fear that the carrier may later be held liable for damage to valuable goods where the value of those goods was undeclared.

7.3 Who is potentially disadvantaged by the Act?

7.3.1 Consignors

Consignors bear the cost of the Act's operation. If a carrier were to choose to rely on the provisions of the Act, then an unwitting consignor may be caught unawares. Although consumers are protected in part by the provisions of the *Consumer Transactions Act 1972* (SA) and the *Trade*

[16] Except as limited by the *Consumer Transactions Act 1972* (SA) and the *Trade Practices Act 1974* (Cth).

Practices Act 1974 (Cth), anyone who brings goods for carriage in the course of a business or trade will have no protection. Even if the carrier is negligent, the consignor will have to bear the loss, unless there has been specific provision in a contract to the contrary or notice has been given of the cost of the goods.

It may be argued that a cautious business person would make inquiries as to who was responsible in the event of loss of or damage to goods, but this does not always occur, and such transactions may place the consignor at risk of significant loss. Most consignors would be unaware of the provisions of the Act, and although ignorance of the law has never been excused, it seems unjust in a modern marketplace to give the carrier such extensive protection.

Further, the limitations which the Act potentially places on competition may deprive the consignor of the benefits that a more competitive marketplace would offer.

The limitations on liability may discourage the implementation of risk management procedures which could have flow on benefits to the consumer. A carrier which is aware of a potentially substantial liability is likely to undertake more significant risk prevention and management procedures than one which knows that its liability is limited to $20.

7.3.2 Insurance industry

The insurance industry also pays an indirect cost of the Act's operation. The premiums that it may have received from consignors wishing to insure their goods for carriage are lost under the limitation of liability scheme of section 4 of the Act. However, the industry would generally recoup this loss through the premiums that carriers themselves would pay if they were to bear the risk of loss of or damage to the goods.

7.3.3 Risk management industry

The growing industry advising on alternative risk management strategies also bears the potential cost of the Act's operation. Were it not for the Act, both private and common carriers may have to employ professionals to devise and implement strategies to limit their liability for damage occurring to goods in the course of transit.

7.3.4 Private carriers

Although private carriers are free to negotiate their terms to give themselves the same protection as common carriers, they may have to reduce their price to make this acceptable to the consumer. On the other hand, if contractual limitation is not employed, they may also increase their charges being levied and consequently pass them on to consumers.

Conclusion 5

The Act potentially confers a benefit on common carriers. Do you agree with this conclusion? Which other people or groups, if any, benefit from the Act's operation?

Conclusion 6

The Act potentially disadvantages consignors, private carriers, insurers and the risk management industry. Do you agree with this conclusion? Which other people or groups, if any, potentially bear the costs of the Act's operation?

Conclusion 7

In practice, the costs of the Act are purely administrative, while it seems to have no beneficial effect, since it is apparently not relied on. Do you agree with this conclusion? Do carriers rely on the Act? If so, which sections of the Act do they rely on? How do they use the provisions of the Act in practice?

The only submission which related to the beneficiaries of the Act came from the Victorian Department of Justice, which agreed with the conclusion. This submission pointed out that the current provisions of the Act give an unfair advantage to common carriers over private carriers and is also unfair to their users. It was the opinion of that agency that there was no justification for such a regime.

No submissions were received relating to the issue of whether insurers and the risk management industry were potentially disadvantaged.

Other submissions confirmed that it is unlikely that there are common carriers still operating. Both the Country Carriers Association and the South Australian Road Transport Association indicated that they were unaware of any common carriers - all carriers now operate as private carriers.

It is therefore the final conclusion of the Review Panel that the Act potentially confers a benefit on common carriers and potentially disadvantages consumers, private carriers, insurers and the risk management industry. However, as there appear to be no common carriers operating, these benefits and costs must be considered as potential rather than actual.

8. WHAT IS THE EFFECT OF OTHER LAWS?

8.1 *Trade Practices Act 1974* (Cth)

The *Trade Practices Act 1974* (Cth) implies certain terms into all contracts between corporations and consumers. Where there is a contract for the supply of services, such as the carriage of goods, section 74 of this Act requires that those services will be rendered with due care and skill. Such terms cannot be excluded or modified by agreement.[17]

It would appear that these implied terms take precedence over the limitation of liability in the *Carriers Act*. In a recent High Court decision,[18] it was held that a Queensland limitation of liability for carriers, similar to that in section 2 of the *Carriers Act*, was invalid in its application to consumers because it was inconsistent with section 74 of the *Trade Practices Act*. To this extent the *Carriers Act* limitation of liability is rendered redundant because the Commonwealth law prevails over the State law.[19]

However, the *Trade Practices Act* only implies terms into contracts between a corporation and a consumer; where damage to goods occurs in a situation falling outside the scope of the *Trade Practices Act*, the *Carriers Act* will remain operable. Contracts for the transportation of goods for the purpose of a business, trade, profession or other occupation carried on or engaged in by the person for whom the goods were transported or stored are excluded from the provisions of the *Trade Practices Act.*[20] These transactions will continue to be governed by the *Carriers Act*.

The *Trade Practices Act* will not apply to situations where the carrier, while neither wilful nor negligent, would be held liable at common law. The common law liability of common carriers is very broad and goes beyond a basic duty of care. Carriers have been held liable where the goods were

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17 *Trade Practices Act 1974* (Cth) section 68. They may be modified in a very limited way as provided for by section 68A of the Act.

18 *Wallis v Downard Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388; (1994) 120 ALR 440; (1994) 68 ALJR 395; (1994) ATPR 41-300. The Court found that the *Carriage of Goods by Land (Carriers' Liability) Act 1967* (Qld) was inconsistent with sections 68 and 74 of the *Trade Practices Act 1974* (Cth) and therefore the limitation of liability contained within the former was rendered invalid by the operation of section 109 of the *Constitution*. This limitation bore the same character as the limitation contained in section 2 of the *Carriers Act 1891* (SA). In that case, it was argued that the provisions of the *Trade Practices Act 1974* (Cth) only apply to contractual agreements between the parties and not to any legislative limitation of liability. The High Court rejected this argument.

19 Under section 109 of the *Constitution*.

20 *Trade Practices Act 1974* (Cth) section 74(3).

lost or damaged by the wrongful acts of third parties,[21] including robbery[22] and riots,[23] accidental fire,[24] activities of rats[25] and other inevitable accidents.[26] The limitation of liability under the *Carriers Act* would apply to both consumers and business persons in these situations.

8.2 *Consumer Transactions Act 1972* (SA)

Section 9 of the *Consumer Transactions Act 1972* (SA) implies similar terms into consumer contracts - ie, that services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied. "Services" is defined as including "the removal, transportation or storage of goods".[27] These terms cannot be excluded, limited or modified by agreement either.

Section 11 provides that the Act does not affect the operation of other Acts in relation to consumer contracts except to the extent that those other Acts are inconsistent with the provisions of the *Consumer Transactions Act*. Insofar as the *Carriers Act* purports to limit the liability of carriers where the goods are of a value greater than $20 (unless that value is declared), it conflicts with the provisions of the *Consumer Transactions Act*.[28] The warranties implied by section 9 will therefore limit the operation of the *Carriers Act*.

It should also be noted that, like the *Trade Practices Act*, the *Consumer Transactions Act* only applies to consumer contracts. Consumer contract is defined in the *Consumer Transactions Act* as a contract or agreement—

> *(a)* under which a person (other than a body corporate)—
>
> (i) purchases goods or contracts for the performance of services; or

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21 *Gosling v Higgins* (1808) 1 Camp 451; 170 ER 1018.

22 *Gibbon v Paynton* (1769) 4 Burr 2298; 98 ER 199; and *Siohn v RH Hagland (Transport) Ltd* (1976) 2 Lloyd's Rep 428.

23 *Hyde v Trent & Mersey Navigation Co* (1793) 5 TR 389; 101 ER 218.

24 *Forward v Pittard* (1785) 1 TR 27; 99 ER 953.

25 *Laveroni v Drury* (1852) 8 Ex 166; 155 ER 1304; *White v Humphery* (1847) 11 QB 43; 116 ER 391; *Dale v Hall* (1750) 1 Wils KB 281; 95 ER 619.

26 *Forward v Pittard* op cit.

27 *Consumer Transactions Act 1972* (SA) section 5; *Consumer Transactions Regulations (No 2) 1996* regulation 6; schedule 1, paragraph (n).

28 This argument is strengthened by the High Court decision *in Wallis v Downard Pickford (North Queensland) Pty Ltd* outlined above. Although that case involved the *Trade Practices Act*, the provisions of the two Acts are virtually identical, and an analogy can be drawn between the two situations.

(ii) takes goods on hire (whether or not the contract purports to confer a right or option on the consumer to purchase the goods); or

(iii) acquires by other means the use or benefit of goods or services; and

(b) under which the consideration to be paid or provided by or on behalf of the consumer in money or money's worth does not exceed $40 000 (excluding any interest or fees or charges payable because credit is or is to be provided for the transaction).

Therefore the *Carriers Act* may still apply to contracts between business or tradespersons and carriers, where the value of the contract is greater than $40,000 or where the business is incorporated. For example, it could still apply to contracts where a jeweller contracts with a carrier for the delivery of goods in the course of the jeweller's business. It will also apply to consumer contracts in those situations where the common law imposes stricter liability than the *Consumer Transactions Act* does.

8.3 *Sale of Goods Act 1895* (SA)

Under section 32 of the *Sale of Goods Act 1895* (SA), when a buyer authorises or requires a seller to send goods to them, property in the goods passes from the seller to the buyer when the goods are delivered to a carrier. In this situation, the seller must make a contract for the delivery of the goods with the carrier on behalf of the buyer, and that contract must be a reasonable one, having regard to the nature of the goods, etc. If the seller does not do so, and the goods are lost or damaged in the course of transit, the buyer may decline to treat the delivery of the goods to the carrier as delivery to themselves, or they may hold the seller responsible for damages.

This section does not provide absolute exemption from liability for the carrier. However, although there are no reported cases on point, the section suggests that provision for the safe carriage of goods under a contract for the sale of goods is the responsibility of the parties to that contract, not the carrier.

8.4 *Industrial Relations Act 1972* (SA)

Under the *Industrial Relations Act 1972* (SA), contracts with common carriers cannot be conciliated.[29] This is another protection that is enjoyed

[29] Under section 37 of the *Industrial Relations Act 1972* (SA).

by common carriers: where other carriers of goods and their customers may conciliate their disagreements before a tribunal, disputes between common carriers and their customers must be taken to the appropriate court. Customers of common carriers thereby occasion an increase in the time and expense of having to resolve their disputes within the mainstream legal system.

Conclusion 8

Other Acts exist which ensure that services must be performed with due care and skill, and suggesting that responsibility for the safe transport of goods lies with the parties to a buyer/seller relationship. Do you agree with this conclusion? Which other Acts, if any, affect the carriage of goods by land?

The only submission which related to this conclusion was received from the Victorian Department of Justice, which agreed that the warranties under the Trade Practices Act 1974 limit significantly any practical effect of the Act in relation to negligence. Neither this submission nor any others commented on the relationship between the development of consumer protection and contract law.

It is therefore the final conclusion of the Review Panel that other Acts exist which ensure that services must be performed with due care and skill, and suggesting that the responsibility for the safe transport of goods lies with the parties to a buyer/seller relationship.

9. WHAT ARE THE OPTIONS?

9.1 Retain the Act in its current form

Currently the Act is not having a significant effect on competition. It is not, in practice, placing consumers at a disadvantage. The industry seems to be running relatively smoothly at the moment. It may be tempting to maintain the status quo, keeping the Act in place as a safety net for carriers.

However, there are many arguments against this:

- The Act in its current form is outdated. The monetary limit is low, and the items specified within the provisions of the Act do not reflect the majority of items carried by common carriers today. If it were to be retained, it would have to be amended to bring it into accordance with the modern marketplace.

- The Act is apparently not being used by the industry. Most carriers appear to be either unaware of the existence of the Act or have never used its provisions. If the Act is never used, there seems little justification in maintaining it.

- Since the Act was enacted, there has been a rise in the emphasis on consumer protection and a corresponding decrease in industry protection. This has led, among other things, to the enactment of Acts that significantly limit the operation of the *Carriers Act*. The Act now operates in very few circumstances.

- There are good policy reasons for not maintaining the Act. It creates a situation whereby carriers can potentially escape liability even where they are negligent, and without having contracted out of that liability. It is thus out of step with the various consumer protection Acts that suggest that the responsibility for the safe transport of goods lies with the parties to a buyer/seller relationship.

- The Act is also out of step with competition policy principles in that it bestows an advantage on one section the carriage industry and therefore discriminates between competitors.

- The policy considerations that led to the enactment of the Act are no longer relevant. The hazards of one hundred years ago no longer exist or have diminished. The insurance industry has developed so that carriers are now able to, and regularly do, insure themselves against loss of or damage to goods within their charge. Provided carriers can either limit their liability via the contract with the

consignor or else insure themselves against potential liability, a legislative scheme seems of little benefit.

9.2 Amend the Act

There is a second option, which is to amend the Act to bring it into line with the current marketplace. The objects covered by the Act could be expanded to include electrical goods, and any other valuable items necessary to reflect the goods carried within the industry today. The monetary ceiling could be raised to a more realistic level, and obsolete references[30] could be removed.

It is suggested that this is both unnecessary and undesirable. The policy reasons which militate against the retention of the Act in its present form are equally applicable to any amendment of the Act, with the exception of those which relate to the obsoleteness of the Act.

9.3 Repeal the Act

The most obvious alternative is to repeal the Act completely and return to the common law position. Under this proposal, common carriers will be absolutely responsible for the safety of goods entrusted to them for carriage.[31] This goes beyond a basic duty of care. Carriers have been held liable where the goods were lost or damaged by the wrongful acts of third parties,[32] including robbery[33] and riots,[34] accidental fire,[35] activities of rats[36] and other inevitable accidents.[37]

There are four exemptions from liability at common law. The carrier will not be held liable if damage to the goods occurred by means of an act of God,[38] an act of the Sovereign's enemies,[39] the fault or fraud of the

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30 For example, to stagecoach proprietors.

31 See for example *Hobbs v Petersham Transport Company* (1971) 124 CLR 220.

32 *Gosling v Higgins* (1808) 1 Camp 451; 170 ER 1018.

33 *Gibbon v Paynton* (1769) 4 Burr 2298; 98 ER 199; and *Siohn v RH Hagland (Transport) Ltd* (1976) 2 Lloyd's Rep 428.

34 *Hyde v Trent & Mersey Navigation Co* (1793) 5 TR 389; 101 ER 218.

35 *Forward v Pittard* (1785) 1 TR 27; 99 ER 953.

36 *Laveroni v Drury* (1852) 8 Ex 166; 155 ER 1304; *White v Humphery* (1847) 11 QB 43; 116 ER 391; *Dale v Hall* (1750) 1 Wils KB 281; 95 ER 619.

37 *Forward v Pittard* op cit.

38 Examples of this are found in *Forward v Pittard* op cit (lightning); *Ryan v Youngs* (1938) 1 All ER 522 (heart attack); *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781; 156 ER 1047 (frost); *Nugent v Smith* (1876) 1 CPD 423 (storm); and *Makins v London & North East Railway* (1943) KB 467 (flood).

39 This is restricted to armed forces with which the country is at war: see *Marshall of Marshalsea's Case* (1455) YB 33 Hen IV 1, p3.

consignor, and an inherent vice or defect in the goods carried. There will be few instances where these exceptions will apply; thus the carrier's liability at common law is very broad.

However, the carrier can limit its liability by special contract[40]. This will be subject to the warranties implied by the *Consumer Transactions Act* and the *Trade Practices Act*. The carrier also cannot contract out of its liability for loss or damage caused by the wilful act of the carrier or its servants, including conversion or wilful misdelivery.

This leaves the liability of the carrier as a matter to be determined by reference to the contract.[41] The carrier may choose to limit its liability via the contract. If it chooses not to do so, however, it will be absolutely liable for loss of or damage to the goods, subject to the exceptions outlined above. This arrangement is preferable in the modern marketplace. It leaves the relationship with the consignor on a purely contractual basis, and both parties will be aware of the terms. The parties to the contract will then be on an equal footing, rather than the carrier having an unfair advantage.

Moreover, there is nothing to prevent the carrier from taking out insurance cover to protect itself. Further, there is the prospect of employing alternative risk management strategies to limit liability.

If South Australia were to repeal the *Carriers Act*, it would be following the example set by Queensland and Tasmania. In 1993, Queensland repealed its *Carriage of Goods by Land (Carriers' Liability) Act*. The primary motivation for repealing the Act was the unfair advantage that the Act gave carriers over consignors. This was felt to be undesirable in an open marketplace. Consignors were being caught unwittingly by the provisions of the Act. While this Act applied to all carriers, the reasons for its repeal are equally applicable to this State's *Carriers Act*.

Tasmania is also in the process of repealing its *Common Carriers Act 1874*.

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40 The validity of such special contracts was confirmed in *Peek v North Staffordshire Railway Company* (1863) 10 HLC 473; 11 ER 1109. Such contracts will stand or fall on their own terms, subject to the normal principles of contract. In general, it may be said that special contracts are valid provided their terms are reasonable. Clauses excluding the common carrier's liability for neglect and default will usually be considered unreasonable unless it can be shown that the carrier offered alternate reasonable rates for carriage at the carrier's risk.

41 As in *Rick Cobby Haulage v Simsmetal Pty Ltd* (1986) 43 SASR 533.

9.4 Summary

There are three options:

- Retain the Act in its current form. This is not a preferred option. The Act is anachronistic. It is apparently not used by the industry today. It is anti-competitive.

- Amend the Act. This is not a preferred option. Given that the Act appears to serve no genuine purpose in today's marketplace, amending the Act would be of little use.

- Repeal the Act. This is the preferred option. The Act appears to serve no benefit in today's marketplace. It is apparently never used.

Conclusion 9

> **The preferred option is repeal of the Act. Do you agree that this option is to be preferred? If so, why? If not, why not? What issues could arise if the Act were repealed?**

The submissions were unanimous in preferring that the Act be repealed. The South Australian Road Transport Association noted that the Act in its current form 'serves little purpose for members of the Association and the industry in general'. The Department of Equity and Fair Trading in Queensland highlighted that its equivalent Act was repealed 'because it was perceived to work against the interests of consumers of carriers' services in that it limited the redress that a consumer might have against loss or damage to goods consigned to a carrier for transportation by land'. The Victorian Department of Justice agreed that the legislation is archaic and inappropriate as a means of regulating the modern carriage industry.

10. SUMMARY

The *Carriers Act 1891* (SA) is an outdated piece of legislation. The monetary ceiling is very low, the list of specified objects out of date and the types of carriage mentioned obsolete in two out of three cases. Further, the objectives of the legislation seem to be in conflict with today's emphasis on consumer protection and competition policy principles. The Act offers a protection to carriers that is unnecessary in a marketplace in which they are able to limit their liability contractually or insure themselves against risk. It is recommended that the Act be repealed.

10.1 Recommendation of the Review Panel

The evidence and arguments in favour of repeal are overwhelming. This is a piece of legislation which has outlived any usefulness it may once have had. Neither industry groups nor government departments interested in the protection of consumers have formed any objection to the repeal of this Act.

THE RECOMMENDATION OF THE REVIEW PANEL IS THAT THE CARRIERS ACT 1891 BE REPEALED.

10.2 Effect of Repeal

There are few implications of the repeal of the Act, except for the obvious benefit in removing an obsolete piece of legislation from the statute books. Consultation with industry has indicated that common carriers no longer operate. Even if there were some who are operating unbeknownst to the industry at large, there will be nothing to prevent such carriers from using contract to limit their liability, subject to the implied warranties of the Trade Practices Act and the Consumer Transactions Act, both of which affect this industry.

APPENDIX A - TERMS OF REFERENCE

The *Carriers Act* and associated regulations are referred to the Office of Consumer and Business Affairs for evaluation and report by March 1999. The review is to focus on those parts of the legislation which restrict competition or which impose costs or confer benefits on business.

Consistent with the Competition Principles Agreement, the review should assess whether any restrictions on competitive conduct represented by the *Carriers Act* are justified in the public interest by:

- identifying the nature and magnitude of the social, economic or other problems that the Act seeks to address;
- identifying the objectives of the Act;
- identifying the extent to which the Act restricts competition;
- identifying relevant alternatives to the Act, including less intrusive forms of regulation or alternatives to regulation;
- identifying which groups benefit from the Act and which groups pay the direct and indirect costs which flow from its operation; and
- determining whether the benefits of the Act's operation outweigh the costs.

METHODOLOGY AND TIMETABLE FOR REVIEW

The review should adopt the following procedures **(in accordance with the indicated timetable)**:

- Initial research identifying relevant resources and materials, including materials on any interstate and overseas equivalents **(by end-September 1998)**
- Preparation of a report and recommendations **(by end-October 1998)**
- Forward to CSO for comments **(mid-November 1998)**
- Discussion of report with interested parties **(until mid-December 1998)**
- Forward to CSO/DPC for comments **(end of December 1998)**
- Final report for Minister **(mid-February 1999)**

- Release of report

CONSULTATION

The review will consult widely with industry and consumer representatives, educational institutions and relevant government agencies.

THE REVIEW TEAM

The review will be conducted by a Review Panel consisting of the following persons:

- Mrs Margaret Cross, *Deputy Commissioner (Policy and Legal), Office of Consumer and Business Affairs;*
- Mr Matthew Bubb, *Senior Policy Officer (Competition Policy), Office of Consumer and Business Affairs;*
- Ms Kate Tretheway, *Policy Officer (Competition Policy), Office of Consumer and Business Affairs.*

CONTACT OFFICER

The contact officer for the review is:

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APPENDIX B - CONSULTATION LIST

The following list contains all individuals or organisations who were sent copies of the consultation draft

Name of individual/ organisation
ACT Consumer Affairs Bureau
Consumer Affairs Division, Cth
Consumers Association of SA Inc
Department of Fair Trading, NSW
Department of Transport, Tas
Department of Transport, WA
Insurance Council of Australia
Law Society of SA
Ministry of Fair Trading, WA
Office of Consumer Affairs and Fair Trading, NT
Office of Consumer Affairs and Fair Trading, Tas
Office of Consumer Affairs, Qld
Office of Energy Policy
Office of Fair Trading and Business Affairs, Vic
Queensland Transport
Refrigerated Warehousing Transport Association
SA Bus & Coach Association
SA Country Carriers Association
SA Farmers Federation
South Australian Employers' Chamber of Commerce and Industry Inc
South Australian Road Transport Association

The Truck Owners Association of SA Ltd
Transport SA

APPENDIX C - SUBMISSIONS RECEIVED

	Name of individual/ organisation
C1	Country Carriers Association
C2	Transport SA
C3	Department of Equity and Fair Trading, Queensland
C4	South Australian Road Transport Association
C5	Queensland Transport
C6	Department of Transport, WA
C7	Department of Fair Trading, NSW
C8	Department of Justice, Victoria