NEW SOUTH WALES ROAD TRANSPORT ASSOCIATION INC

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SUBMISSIONS TO THE HOUSE OF REPRESENTATIVES EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION COMMITTEE

INQUIRY INTO INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS

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MAY 2005

1.0 The New South Wales Road Transport Association Inc

1.1 The New South Wales Road Transport Association Inc ("**the NSWRTA**") was established in 1890 and represents approximately 650 road transport employers with 35,000 trucks. The NSWRTA is registered as an organisation of employers pursuant to Part 3 of Chapter 5 of the *Industrial Relations Act 1996* (NSW)("**the IR Act**").

1.2 NSWRTA is also registered pursuant to Part 5 of Chapter 6 of the IR Act as an association of employing contractors. In its capacity as such, and amongst other functions, NSWRTA is charged under clause 3(b) of its Registered Rules with the following function:

"*The Association shall act as an association of principal contractors under the Act and shall pursue the industrial interests of principal contractors including but not limited to the representation of members in negotiations with contract carriers and their relevant unions and organisations, the provision of industrial advice to principal contractors and the representation of principal contractors in the Industrial Relations Commission of New South Wales*."

1.3 The extent of NSWRTA's representative rights are limited, broadly speaking, to those employers and principal contractors carrying on business in or related to the Transport Industry in the state of New South Wales.

1.4 NSWRTA's function is therefore to represent the industrial interests of both **employers** and **principal contractors** engaged in the Transport Industry in NSW. The NSWRTA has represented its members, both employers and principal contractors, before Industrial Courts and Tribunals for over 103 years.

1.5 In keeping with the industry specific scope of the NSWRTA's functions and experience, these submissions are confined to the incidence and regulation of contracting relationships within the NSW Transport Industry and in particular the transportation of freight by road.

2.0 The Road Transport Industry

2.1 The Road Transport Industry comprises 3.4 per cent of GDP and is growing 1.3 times faster than the national economy.

2.2 For approximately 80 per cent of the domestic freight task, there is no contestability between road and other modes of transport (that is, there is no substitute for road transport in these instances). For a proportion of the remainder, other modes of transport (principally rail and air transport) represent a substitute for road transport (that is, the specific transport task may be contestable).

2.3 The primacy of road transport over other modes of domestic transport is facilitated by a flexible network, a low critical mass requirement in order to achieve an economically viable load, wide use of a purpose built fleet, the relative absence of institutional and infrastructure barriers to efficient operation and a highly competitive environment.

2.4 There are no regulatory barriers to entry into road transport. This means the industry is flexible, innovative, customer focussed and, for many years, has applied world's best practice to its operations.

2.5 An efficient road transport industry facilitates an improved competitive environment for other sectors of the economy. These underlying social and economic forces mean all Australians have an increasing dependence on the road transport industry. Therefore, putting in place the right regulatory and institutional framework is becoming an increasingly important task in terms of public policy.

3.0 Sub-Contracting arrangements in the Road Transport Industry

3.1 The NSWRTA estimates that there are approximately 70,000 transport workers in NSW, with about one third of those workers being sub-contractors in single vehicle fleets or in companies with a few trucks.

3.2 Sub-contractors within the NSW Road Transport Industry are generally "Owner-Drivers", who own and drive their own vehicles in the provision of transport services, either to principal contractors or directly to consignors and consignees.

3.3 The majority of these Owner-Drivers provide transport services under cover of an incorporated structure, but not all Owner-Drivers do so. In the Association's experience, the estimate provided by the *Transport Workers Union* at paragraph 1 of its submissions is likely to be roughly accurate as an industry-wide estimate. That is, approximately 80-85% of Owner-Drivers within the industry would operate as corporations, whilst approximately 15-20% of Owner-Drivers would operate as sole traders or partnerships.

3.4 There is therefore a high incidence of contracting and sub-contracting arrangements within the NSW Road Transport Industry.

3.5 From a Transport Operator's perspective, the engagement of contractors (and sub-contractors) may be advantageous for one or more of the following reasons:

i. Sub-contracting offers principals more flexibility in terms of equipment and labour utilisation;

ii. Principals can focus on client relationships and the allocation of transport tasks rather than concerning themselves with fleet management and employee relations;

iii. There is greater flexibility in terms of labour and capital utilisation and greater opportunities to enter into additional / niche markets without necessitating significant capital expenditure in order to enter those markets;

iv. Transport Operators are not bound by industrial awards in respect of their contractors and sub-contractors (although, in NSW, the remuneration and conditions of contract drivers are governed by Contract Determinations pursuant to Chapter 6 of the IR Act, discussed below);

v. Many transport tasks are seasonal in nature and can be characterised by erratic and unpredictable demand. The employment relationship is not flexible enough to accommodate fluctuating and/or seasonal demand;

vi. Many transport tasks are one way. This means there is no possibility of back-loading within an operator's client network;

vii. Freight imbalances exist in aggregate and in specialised industry sectors, between a defined origin and a defined destination, including between mainland capital cities.

3.6 Just as employment relationships take on many and varied forms, so too do contractor relationships. These relationships basically fall into two broad categories:

i. "**Tied sub-contracting**". A tied sub-contractor works exclusively for a principal. Tied sub-contracting is favoured where the work is regular and predictable. Examples include civil contracting, especially excavated material, bulk materials and concrete agitating, couriers, postal services, newspapers and line haul transport. (Line haul transport involves regular work between a starting point and a finishing point with the possibility of specified pick up and delivery points in between.);

ii. "**Independent sub-contracting**". An independent sub-contractor would usually have several clients and may be involved in a mix of regular and irregular work. Independent sub-contractors tend to rely more on a partner (usually the married or de-facto partner), to assist in running the business.

3.7 In some circumstances, a Transport Operator who in the ordinary course of events operates as a Principal Contractor can also act as a sub-contractor. This is a result of the unpredictable nature of the transport industry. For instance, a Transport Operator may occasionally be called upon by a competitor to undertake a transport task which for whatever reason the competitor is unable to perform.

4.0 Brief History of Regulation of Contractors within the NSW Road Transport Industry

4.1 On 21 November 1967, the then Minister for Labour and Industry, The Hon Eric Willis, commissioned a report from the Industrial Commission of New South Wales ("**the Industrial Commission**") into the operation of section 88E of the *Industrial Arbitration Act 1940* ("**the Section 88E Report**").

4.2 Section 88E operated so as to deem certain contractors within the transport industry to be employees. The purpose of these deeming provisions was said to be to pick up "*all classes of 'bogus contractors', including persons who call themselves partners in a business, in order to evade the payment of award rates and the observance of award conditions*".[1]

4.3 The Industrial Commission's Terms of Reference in the Section 88E Report also included consideration as to whether, having regard to (amongst other things) "*the desirability of maintaining the system of conciliation and arbitration established by the said Industrial Relations Act, it is in the public interest that those sections should be continued in force or be amended in any respect and, if so, in what respect.*"[2]

4.4 Amongst other things, the Industrial Commission recommended in its Section 88E Report, in relation to motor lorry owner-drivers who are not employees (but who under section 88E were deemed to be employees), that:

> "*The motor lorry owner-drivers to be covered by industrial regulation should not be deemed to be employees but should be treated as self-employed persons. They and their principals should be subject to industrial regulation as such and in a separate Part of the Industrial Arbitration Act…It follows from this recommendation that s.88E(1)(c) of the Act and Regulation 91D should be repealed as their subject matter would be covered in the new Part of the Act.*"[3]

4.5 In April 1979, the NSW Labor Government (under The Hon Mr Neville Wran) repealed much of section 88E and in its stead enacted Part VIIIA of the *Industrial Arbitration Act 1940*.

4.6 In a document titled "*NCP Review of Chapter 6 of the NSW Industrial Relations Act, Consultant's Report*" commissioned by the Department of Industrial Relations and published in July 2002, the following major developments were set out in relation to the regulation of motor lorry owner-drivers:

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[1] *Report to The Honourable E.A. Willis, B.A., M.L.A., Minister for Labour and Industry, on Section 88E of the Industrial Arbitration Act 1940-1968, in so far as it concerns Drivers of Taxi-cabs, Private Hire Cars, Motor Omnibuses, Public Motor Vehicles and Lorry Owner-Drivers*", ("**the Section 88E Report**"), Volume I, paragraph 3.4

[2] Ibid at para 1.1

[3] Ibid at p 20

- In 1991, the Greiner Coalition Government reproduced the old Part VIIIA as Chapter 6 of the new *Industrial Relations Act 1991*;

- In November 1992, the then Minister for Industrial Relations The Hon John Hannaford commissioned a review of Chapter 6 by Hylda Rolfe. This produced a report in July 1993 entitled *Driving Forward*, which was critical of many aspects of the Act, especially the sector-wide regulation delivered by contract determinations;

- In 1993, the *Industrial Relations (Public Vehicles and Carriers) Amendment Act 1993* (No. 82 of 1993) extended the scope of Chapter 6 to explicitly include drivers of motor cars and motor cycles as well as lorry drivers;

- In 1994, the *Industrial Relations (Contract of Carriage) Amendment Act 1994* (No. 40 of 1994) introduced provisions relating to unfair termination of Head Contracts of Carriage;

- In 1996, the Carr Labor Government's new *Industrial Relations Act 1996* reproduced the previous Chapter 6 and, at the same time, extended its scope to include drivers of bicycles;

- In 2001, the *Industrial Relations (Public Vehicles and Carriers) Amendment Act* inserted section 310A of the Principal Act, which temporarily protects Chapter 6 from the operation of Part 4 of the *Trade Practices Act 1974* (Cth) and the *Competition Code of New South Wales*.

4.7 The purpose which Chapter 6 of the *Industrial Relations Act 1996* was intended to serve is illustrated by reference to the Parliamentary discussions on the Bill presented in respect of the *Industrial Arbitration Act 1940* and also the Section 88E Report which recommended the implementation of regulation in respect of contractors in the NSW Road Transport Industry.

4.8 For instance, the NCP Review of Chapter 6 contains the following extracts from the Second Reading Speech in relation to Part VIIIA of the *Industrial Arbitration Act 1940*:

> "*It is illogical in every practical sense that, within the one section of the industry and often within the one establishment, work which is virtually identical, should be done by employees subject to industrial regulation and owner-drivers outside its scope.*
>
> *The evidence in the Inquiry has established that in a number of sections owner-drivers have been in the past exploited as to rates and subjected to unreasonable conditions.*"

4.9 As to other issues such as road safety and industrial disputation, the then Minister for Industrial Relations, the Hon Pat Hills stated in 1979 that:

> "*The public suffers considerably in many ways from the existing situation. Quite apart from disputes over the years between these drivers and their employers, there is the effect of overloading and speeding for economic reasons and there is the threat of disruption of a vital lifeline which transport represents to the public at large, a disruption which has severe toll on the domestic life of innocent citizens, as well as on industries and the workers who rely on industries. Over the years, attempts to resolve disputes involving lorry owner-drivers through the ordinary process of the law have proved too cumbersome and prolonged. We agree with the Commission that industrial regulation will provide clear advantages not only for the owner-driver but also for the contractor. The rights and obligations of both sides may be known and accepted for a prescribed term. Through this bill, the opportunity will occur to obtain stability in an essential industry*…
>
> *Industrial regulation, although certainly not a panacea for the bad practices of overloading and speeding which are prevalent in some sections, must assist in reducing them. We say this because we have already found that they stem to an appreciable extent from depressed rates and adverse conditions*."

4.10 Accordingly, the objects of Chapter 6 may be said to include the following:

i. To regulate the remuneration and conditions of contract drivers within the NSW Road Transport Industry without establishing a fiction whereby contractors are deemed to be employees;

ii. In so regulating the rates and conditions of contractor drivers in the NSW Road Transport Industry, to minimise the adverse affects to the public of industrial disputation causing disruption to essential transport services upon which the public, industry and the economy rely;

iii. In so regulating the rates and conditions of contractor drivers in the NSW Road Transport Industry, to also reduce the incentive for contractors to create risks to their own and the public's safety by overloading vehicles, speeding and driving excessive and unsafe hours.

4.11 In the NSWRTA's view, whilst these objects are laudable, the actual extent of Chapter 6 goes some way further than necessary to achieve those objects.

4.12 Furthermore, other forms of highly prescriptive legislation and associated regulations already exist in NSW which address some of the fundamental issues highlighted above. For example:

i. The *Road Transport (Safety and Traffic Management) (Driver Fatigue) Regulation 1999* is subordinate legislation enacted under the *Road Transport (Safety and Traffic Management) Act 1999* (NSW). The Regulations impose a highly prescriptive regime in respect of maximum working and driving hours and minimum rest times;

ii. The *Road Transport (General) Bill 2005* was passed by both Houses of State Parliament and received the Royal Assent on 14 April 2005. The passing and assent to the Bill gave effect to the *Road Transport (General) Act 2005* (NSW), which provides for the implementation of a legislative scheme for the compliance and enforcement of mass, dimension and loading requirements for heavy vehicles based upon national model provisions approved by the Australian Transport Council;

iii. The NSW Government has recently released a Consultation Draft of its proposed *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005*. These regulations would impose specific obligations upon both employers and principal contractors (as well as some consignors and consignees) to assess then eliminate, minimise or control any risks to a driver's health, welfare or safety arising from driver fatigue. The primary means by which this is proposed to be achieved is by way of implementation and enforcement of Driver Fatigue Management Plans covering a range of prescribed considerations.

4.13 The three examples provided above form only a small part of the substantial body of Occupational Health and Safety, Road Transport and Industrial legislation and subordinate legislation which regulates the NSW Road Transport Industry.

4.14 Most, if not all, of the legislation referred to at paragraph 4.13 above has been enacted since the enactment of Part VIIIA of the *Industrial Arbitration Act 1940* in 1979. Accordingly, the objects sought to be achieved indirectly by way of industrial regulation under Chapter 6 and its antecedents has been achieved by the enactment of other legislation which is able to deal directly with the issues of occupational health and safety and road safety.

4.15 In the NSWRTA's view, at least some of the expressed objects of Chapter 6 and its antecedents are therefore diminished in significance. This may justify a review of Chapter 6 as its applies to contractors in the context of the highly regulated contemporary road transport industry.

5.0 Divergent Views

5.1 Historically, the NSWRTA has generally supported Chapter 6 and its antecedents. This has been in part because of the laudable objects sought to be achieved by the regulation of contractors in the NSW Road Transport Industry.

5.2 However, as indicated at 4.14 and 4.15 above, the NSW Road Transport Industry is now regulated to a greater degree than at any stage in its history. That regulation has gone a long way to achieving the objects of occupational health as well as road safety which were originally sought to be achieved indirectly by way of industrial regulation.

5.3 There is some concern within the NSWRTA's membership that the Road Transport Industry is now over-regulated both within NSW and also in respect of compliance with other States' (often inconsistent) legislation. The administrative burden of complying with several inconsistent legislative regimes across different states occurs as a result of the often interstate nature of the transport task.

5.4 In that regard, the NSWRTA notes that no state other than NSW has such a prescriptive regime in place in respect of the industrial regulation of contractors within the transport industry.

5.5 The arguable over-regulation of the NSW Road Transport Industry has led some members of the NSWRTA to question the necessity of maintaining Chapter 6 of the IR Act.

5.6 However, other members still support, if only tacitly, the maintenance of Chapter 6.

5.7 The NSWRTA considers that there is unlikely to be any industry-wide consensus able to be reached in respect of Chapter 6 of the IR Act. The NSWRTA, as a representative organisation, is therefore limited in the submissions it can make in relation to Chapter 6 of the IR Act.

5.8 However, the NSWRTA is aware that many members are willing to explore alternatives to the historical "conciliation and arbitration" system upon which Chapter 6 of the IR Act is based. In that regard, the NSWRTA notes that:

i. There is no system of conciliation and arbitration covering principal/sub-contractor relationships in any jurisdiction outside NSW.

ii. There is no system of conciliation and arbitration covering principal/sub-contractor relationships for interstate road transport.

iii. There is no system of conciliation and arbitration in any other sector of the economy involving principal/sub-contractor relationships, including in those sectors where contracting out is prevalent, such as building, civil construction and information technology.

iv. The existing system of conciliation and arbitration for sub-contractors contrasts with the more broadly based culture of deregulation and entrepreneurship that characterises the road transport industry.

v. Sub-contractors who are remunerated through contract determinations are less likely to consider business growth beyond one truck. Exposure of those sub-contractors to a deregulated relationship with a principal is more likely to lead a sub-contractor to consider expanding his/her business through acquisition of more trucks and/or clients.

These sub-contractors are also more likely to seek advice from accountants, lawyers and other professionals to assist in managing their business affairs. In the process, the deregulatory culture is likely to spread further throughout the industry with likely flow on benefits to the broader economy.

vi. Notwithstanding that no state other than NSW has implemented industrial regulation of principals/contractors as under Chapter 6 of the IR Act, the NSWRTA is not aware of any evidence which suggests that other states' transport industries are characterised by market failure or have a higher incidence of serious road accidents. Neither is the NSWRTA aware of any evidence to suggest that independent contractors in states other then NSW are more prone to bankruptcy or exploitation as to rates.

vii. The remuneration rates established under Contract Determinations are generally established by reference to costs incurred by contract drivers, as opposed to market forces of supply and demand. Consequently, the remuneration rates are not indicative of market forces.

viii. Contract Determinations apply only to certain types of intricately defined transport services. In respect of those transport services not covered by Contract Determinations, there is already widespread use of alternative contract relationships.

ix. Members who have responded to a NSWRTA survey have expressed interest in alternatives to the present system of conciliation and arbitration. There is particular interest in mediation as a method of dispute resolution and, in some instances, common law.

5.9 As noted at 5.6 above, the NSWRTA is aware that some members support the retention of Chapter 6 of the IR Act, or at least an analogous system of industrial regulation of sub-contractors. Some arguments in favour of this position include:

i. Chapter 6 has worked reasonably well in those parts of the industry where it is established.

ii. The system has the support of many principals and sub-contractors in those sectors of the industry where it prevails.

iii. Sub-contractors who depend on the contract determination system are not well prepared to conduct business in a deregulated environment.

iv. Sub-contractors remunerated under the contract determination system enjoy more practicable remuneration and the opportunity to better plan the replacement of trucks and other equipment.

v. Sub-contractors can focus on relationships with their principal and the principal's clients.

vi. Sub-contractors who depend on the contract determination system are likely to benefit from a regular, reliable income stream. To this extent they may be compared to farmers who received income from agricultural marketing boards.

6.0 Conclusion

6.1 The NSWRTA is cognisant that the retention of a regime of industrial regulation of sub-contractors such as that imposed under Chapter 6 of the IR Act is anathema to many, if not all, of the proposals set out in the Discussion Paper titled "Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements".

6.2 Chapter 6 of the IR Act is also inherently anti-competitive and accordingly requires legislative protection from the operation of the *Trade Practices Act 1974* (Cth). This legislative protection is in the form of section 310A of the IR Act.

6.3 Notwithstanding its anti-competitive nature, the industrial regulation of contractors in the NSW Road Transport Industry retains the support of some industry participants. This most notably includes the *Transport Workers' Union of Australia, NSW Branch*. However, some employers and principal contractors also support the retention of Chapter 6 to some degree.

6.4 However, the NSWRTA is aware that many of its members are ready to explore alternative means of regulation, or indeed, to explore some degree of deregulation in respect of contractors.

6.5 In light of the wide variety of views within its member base, the NSWRTA is limited in the submissions which it is able to contribute to this important discussion. What can be said with certainty is that any alternate regulation in lieu of Chapter 6 of the IR Act should acknowledge independent contractors for what they are, as opposed to constructing a fiction whereby they are deemed to be employees. In that regard, the NSWRTA is likely to have some reservations about the implementation of the "personal services business test" under the *Income Tax Assessment Act 1997* as the test by which employee/contractor status is determined.

6.6 To the extent that some NSWRTA members support a move away from the industrial regulation established under Chapter 6 of the IR Act, the NSWRTA is interested in exploring alternative means of regulation or, alternatively, some degree of deregulation. However, in the NSWRTA's view, a comprehensive Regulatory Impact Statement ought to be conducted prior to the implementation of such major legislative reforms as those presently under consideration. The RIS should consider the effects of the proposed reforms on specific industries within each state, such as the NSW Road Transport Industry so that the benefits and costs of the retention of the current system can be evaluated.

6.7 On the basis that there will be individual sub-contractors who will be adversely affected, consideration needs to be given to the retention of a conciliation and arbitration function for those operators as well as alternative remedial measures that can facilitate adjustment as well as avenues for delivery of adjustment. Alternative avenues that may offer adjustment assistance or advice include:

i. Competition regulation.

ii. Adjustment provisions in the taxation system.

iii. Grants for access to advice in areas such as contract and general negotiation skills, financial management and asset management.

iv. Ex-gratia payments to compensate for loss of goodwill.

Consideration should also be given to tailored solutions that recognise differences in terms of types of transport task, asset holdings and other variables that characterise particular types of transport operation.

6.8 The NSWRTA looks forward to engaging in more detailed discussion and correspondence with the Committee once more detailed proposals are released and the NSWRTA has had an opportunity to canvass the views of its members in relation to those proposals.