

Courier and Taxi Truck Association

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**Submission to the House of Representatives Standing
Committee on Employment, Workplace Relations and
Workforce Participation.**

**Inquiry into Independent Contractors
and Labour Hire Arrangements**

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The Courier and Taxi Truck Association - Background.

CTTA is a registered industrial organisation of employers/principal contractor's representing the *Courier and Taxi Truck* industry. It is the only industry specific organisation of its type that represents the interests of principal contractor's and consideration of their independent contractors.

This registration is listed by the *Industrial Relations Commission of New South Wales* and allows the Association on behalf of its members to have direct input to industrial relations matters that affect the courier and taxi truck industry.

CTTA has been registered since 1991 and was previously registered in another form with the Industrial Relations Commission as the Australian Courier and Taxi Truck Operators Association (ACTTOA).

The objects and purposes of the CTTA are:

- ❖ To promote the development of the industry;
- ❖ To foster the adoption and retention of laws promoting and encouraging the industry in Australia;
- ❖ To promote, encourage and represent the interests of participants within the industry;
- ❖ To promote and encourage free enterprise activities and lawful business opportunities in the industry;
- ❖ To promote fair and just competition between all persons engaged in the industry;
- ❖ Acting within the law, to establish a code of conduct which shall be developed into accreditation of persons in the industry;
- ❖ To take an active part in assisting or opposing by all lawful and proper means such public or private movements as may be likely to affect the interest of members or potential members in the carrying on of their business or industry generally;
- ❖ To prepare and disseminate information on industry matters in a lawful manner;
- ❖ To subscribe to, become a member of and co-operate with any other association or organisation whose objects are altogether or in part similar to those of the Association or are deemed to be of benefit to the industry;

- ✧ To encourage the development of industrial harmony within the industry wherever possible and to develop and improve the industrial relations of members and their employees (if any) and the registered organisations or unions of such employees.
- ✧ To comply with and act as an organisation and/or industrial union under the laws of the Commonwealth of Australia and/or the States and Territories thereof.
- ✧ To promptly bring any industrial dispute or claim relating to industrial matters before the appropriate tribunal established by a State or Commonwealth law and to represent the interest of members in all sections of the industry before courts, commissions, boards, committees, tribunals or other bodies, and at conferences with organisations of employers or employees and other bodies of employers and/or principal contractors or employees and/or contract carriers.
- ✧ To negotiate and/or enter into awards, determinations or agreements with members, contractors, contract carriers or employees and/or their representatives relative to the terms and/or conditions of engagement or employment.
- ✧ To enter into any arrangement with any Government or authority, municipal, local or otherwise, that may be deemed conducive to the Association's objects or purposes or any of them, and to obtain from any such Government or authority and rights, privileges and concessions which the Association may think is desirable to obtain, and to carry out, exercise and comply with any such arrangements, rights, privileges and concessions.
- ✧ To do all such other things as are incidental or conducive to the attainment of the objects and purposes of the Association.

Section A – The Status and Range of Independent Contracting and Labour Hire Arrangements.

The status of the independent contractor is no longer clear and uncontested.

Whilst the Australian workforce has increasingly embraced the notion of an individual entering into contract(s) *for* service and as such establishing a business as an independent contractor outside forces continue to seek to make the enterprise of independent contracting complex.

There are basically two types of independent contractors, there are:

1. The individual who has been a true employee enters into an arrangement to become an independent contractor. The nature of the work, the payer of remuneration and the workplace itself does not change. This type of arrangement can be termed as 'the Friday employee becomes the Monday independent contractor.

The arrangement, although agreed to by both the individual and the principal, is generally speaking an attempt to free the employer from a range of costs and obligations eg workers' compensation and superannuation costs.

2. Then there is the factual independent contractor who as an individual enters into an arrangement with one or more parties and takes on contract(s) *for* service in a commercial environment. The individual may operate as a sole trader or may enter into a partnership or be incorporated. The major difference is that this independent contractor can be recognised as offering services and providing equipment. Key elements of their business structure are:
 - (a) the ability to offer goods and services;
 - (b) the knowledge of legal requirements for the operation of a business concern. Eg ABN and GST registration and obligations;
 - (c) the acknowledgement that there is a desire and intent to make a profit from the business;
 - (d) the acknowledgement that there is a potential for losses from the business that they are responsible for;
 - (e) the obligation to rectify any faults in the delivery of goods or services at no cost to any other party.

The independence or otherwise of a contractor has been determined by the Courts many times. Common law tests are there to distinguish between a factual independent contractor who is involved in a commercial contract and an individual who is really in a master/servant relationship.

A major difficulty is the continuing inclusion of independent contractors in certain industrial relations and associated laws which challenge their independence or at the very least create an impression that an independent contractor is similar to an employee.

There is a very distinct difference between an independent contractor and an employee. An employee is dependent and subject to control by others where as an independent contractor has no such dependence nor are they under control from others.

Labour Hire Arrangements

CTTA notes that most labour hire most likely involves employment.

This is a system where the hire of a person for labour only is outsourced to a labour hire company. An arms length arrangement then exists where in fact the individual is hired by the labour hire company yet works for a third party.

The third party is relieved of costs such as workers' compensation and superannuation however the individual should still receive such benefits through the labour hire company.

Section B – Ways Independent Contracting can be pursued consistently across State and Federal Jurisdictions.

CTTA views this term of reference with the highest of importance as the degree of State legislation covering independent contractors and providing ‘deeming’ provisions have added to this complexity facing independent contractors and principal contractors.

In particular CTTA comments on the *New South Wales Industrial Relations Act 1996* and to Chapter 6 of the Act *Public Vehicles and Carriers* and its affect on independent contractors in the transport industry. This chapter of the Act is unique and does not apply in any other State or under Federal law.

Initially the former *Industrial Arbitration Act* was amended in 1979 to introduce a chapter to cover independent contractors and to provide set rates and conditions that must be followed by principal contractors.

In 1991 under a new Government the Act was overhauled however the inclusion of the chapter remained. Again in 1996 when the current *New South Wales Industrial Relations Act 1996* can into affect the chapter remained and was amended further with the introduction of applied provisions and the interpretation of those applied provisions.

Since 1979 there has been approximately eight (8) contract determinations made by the Industrial Relations Commission. The first of these determinations was the *Transport Industry – Interstate Carriers Contract Determination* which set rates and conditions for independent contractors supplying and operating their own vehicles on interstate transport.

The courier and taxi truck industry was first included in a determination in 1984 when the Industrial Relations Commission granted a Transport Workers’ Union application for the *Transport Industry – General Carriers Contract Determination*.

An appeal saw the courier and taxi truck section removed.

In 1986 the employing contractors lodged an application for the *Transport Industry – Courier and Taxi Truck Contract Determination*.

This document was negotiated between the principal contractors and the independent contractors and was made by the *Industrial Relations Commission* in 1987.

These contract determinations regulate what is a commercial contract into an award type document. As such independent contractors in the transport industry in New South Wales have the same entitlements as employees. This is highly confusing to participants in the industry who struggle to come to terms with independent contractors being transformed into employees by virtue of a State Act.

The ‘applied provisions’ and the ‘interpretation of those applied provisions’ appear in sections 343 and 344 of the said Act and state:

343 Application of certain provisions for the purposes of this Chapter

- (1) The following provisions of this Act apply to and for the purposes of this Chapter (*the applied provisions*):
- (a) Section 27 (Prohibition on cashing-in of accumulated sick leave),
 - (b) Part 3 of Chapter 2 (National and State decisions),
 - (c) Part 10 of Chapter 2 (Payment of remuneration),
 - (d) Part 3 of Chapter 3 (Common law actions during conciliation of industrial disputes),
 - (e) Section 143 (Strike pay prohibited),
 - (f) Section 172 (Power to order secret ballot),
 - (g) Part 8 of Chapter 4 (Industrial Committees),
 - (h) Part 1 of Chapter 5 (Principles of association),
 - (i) Part 7 of Chapter 5 (Entry and inspection by officers of industrial organisations),
 - (j) Chapter 7 (Enforcement).
- (2) The applied provisions have effect subject to such modifications as are prescribed by this Part or the regulations.

344 Interpretation of applied provisions

For the purposes of the application of the applied provisions:

- (a) a reference to employment is to be read as a reference to engagement under a contract of bailment or carriage, and
- (b) a reference to an employer is to be read as a reference to a bailor of public vehicles or principal contractor, and
- (c) a reference to employees is to be read as a reference to bailees of public vehicles or carriers, and
- (d) a reference to remuneration of an employee (however expressed) is to be read as a reference to amounts payable to a bailee under the contract of bailment or amounts payable to a carrier under the contract of carriage, and
- (e) a reference to an award is to be read as a reference to a contract determination, and
- (f) a reference to an enterprise agreement is to be read as a reference to a contract agreement, and
- (g) a reference to an industrial organisation is to be read as a reference to an association of employing contractors, an association of contract drivers or an association of contract carriers, and

- (h) a reference to an industrial organisation of employers is to be read as a reference to an association of employing contractors, and
- (i) a reference to an industrial organisation of employees is to be read as a reference to an association of contract drivers or an association of contract carriers, and
- (j) a reference (in Part 7 of Chapter 5) to relevant employees in relation to an organisation is to be read as a reference to persons who are or are eligible to be members of an association.

In addition Part 7 of Chapter 6 includes the following structure for compensation for termination of certain contracts of carriage.

Part 7 Compensation for termination of certain contracts of carriage

345 Definitions

In this Part:

Carrier means an individual, partnership or body corporate who or which supplies services under contracts of carriage.

Head contract of carriage means an agreement, arrangement or practice under which a principal contractor and carrier agree that the carrier is to provide services exclusively and on an agreed regular basis for the principal contractor.

Previous carrier means a previous carrier as referred to in section 346 (1) (a).

Previous principal contractor, in relation to a previous carrier, means the principal contractor immediately preceding the principal contractor referred to in section 346 (1) (a) to whom the previous carrier provided services under the relevant head contract of carriage.

Termination has its ordinary common law meaning, and includes conduct by a principal contractor, being conduct resulting from factors within the control of the principal contractor, the effect of which is to alter the head contract of carriage in a manner which imposes serious financial disadvantage on the carrier.

Tribunal means the Contract of Carriage Tribunal established by this Part.

Principal Contractor funded Superannuation for Independent Contractors.

A further factor that puts into question commercial relationships in the transport industry in New South Wales is the inclusion of principal contractor funded superannuation to independent contractors irrespective of how they trade i.e. sole trader, partnership or company.

A copy of the *Transport Industry – Courier and Taxi Truck (Superannuation) Contract Determination* is attached for the Committee’s information.

The most disturbing aspect of this superannuation contract determination is that the State Industrial Relations Commission accepted the application for principal contractor funded superannuation despite the Federal *Superannuation Guarantee Charge Act 1992* and the *Superannuation Guarantee (Administration) Act 1992*.

As a result of a High Court decision in *Vabu Pty Ltd –v- The Commissioner of Taxation* (an action brought about by a member of CTTA) it was clear that principal contractors were not responsible for the payment of superannuation for independent contractors. The superannuation laws relate to employers and employees.

Workers’ Compensation Laws.

The States and Territories continue to have workers’ compensation laws which fail to be harmonised.

In some State workers’ compensation laws an independent contractor is recognised and treated as responsible for their actions. However other States have long held to view that independent contractors are ‘workers’ for the purposes of workers compensation law and as such the principal contractor becomes liable for workers compensation premiums to cover these independent contractors as if they were employees.

Workers’ Compensation laws cover the worker and do not protect the owner of the policy.

The inclusion of independent contractors in workers’ compensation laws extends past the commercial arrangement and dictates that if there is only one common law test that likens an independent contractor to an employee then the independent contractor **is** a worker.

In some State jurisdictions independent contractors are excluded from the opportunity to insure for workers’ compensation on the basis that they operate as a sole trader. This is a discriminatory law.

In March 2005 the New South Wales WorkCover held an inquiry on the definition of a ‘worker’. The submissions were required by 4 March 2005 and a copy of the CTTA submission is attached for the Committee’s information.

Occupational Health and Safety Laws.

Pursuant to State OH&S laws independent contractors have clear obligations. There are two (2) fundamental problems with these laws, namely

1. That the laws are not consistent across jurisdictions; and

2. A large proportion of independent contractors are not aware of their responsibilities. There is a view that OH&S laws apply to large corporations and not to the level of the independent contractor.

Equal Opportunity and Anti Discrimination Laws.

CTTA submits that the same obligations and difficulties that apply to OH&S legislation also apply to Equal Opportunity and Anti Discrimination laws.

Commonwealth Taxation Law.

With the introduction of the new tax system on 1 July 2000 and the *New Business Tax System (Alienation of Personal Services Income) Act 2000* there has been a certain amount of clarification of personal services income and its treatment under taxation laws.

CTTA was a substantive stakeholder when the Federal Government introduced these changes and worked with Government to frame a more suitable definition to ensure that independent contractors were not cover by PSI laws.

Some States are currently reviewing their workers' compensation laws and are seeking to 'modify' the PSI definition to continue to capture the independent contractor as a 'worker'.

Section C – The Role of Labour Hire Arrangements in the modern Australian Economy.

CTTA limits its comments on this form of engagement and employment. There may well be legitimate reasons for businesses not wishes to deal with the workforce in a direct manner; however where labour hire arrangements are put in place in an attempt to circumvent genuine employment laws these arrangements need to be challenged.

In any event all labour hire laws need be to harmonised.

Section 4 – Strategies to ensure Independent Contractor Arrangements are Legitimate.

CTTA Recommendations.

The most challenging role for all stakeholders is to come to terms with one single definition for an independent contractor on an Australia wide basis.

There needs to be an acceptance that there are certain arrangements which will not pass the traditional common law tests. Where these factors reveal a master/servant relationship then such persons should be referred to as employers and employees.

From an industrial relations point of view there needs to be legislation – that over rules all other legislation – which defines an independent contractor. This needs to be reflective of a modern Australia and acknowledge the right of an individual to enter into a commercial relationship that is not any type of employment contract.

Any such action will be far reaching as it will need to express dominance over a variety of State laws the cover workplace activities.

CTTA looks forward to the opportunity to further advance the views expressed in this submission and is willingly to appear before the Committee.

Attachments:

1. *Transport Industry – Courier and Taxi Truck (Superannuation) Contract Determination.*
2. *CTTA Submission to WorkCover New South Wales on Definition of a Worker.*

Signed by:

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