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hm1678/06
21 July 2006

Mr John Carter
Committee Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Carter

Thank you for the opportunity to lodge a submission to the Senate Employment, Workplace Relations and Education Legislation Committee's inquiry into the provisions of the Independent Contractors Bill 2006.

The New South Wales Road Transport Association (NSWRTA) has represented road transport operators in New South Wales since 1890. Included in NSWRTA's membership are companies that engage sub-contractors who perform a range of road freight tasks.

There are approximately 70,000 truck drivers in New South Wales. About 35 per cent are owner driver sub-contractors. The road freight task is set to double between 2000 and 2020. (Source: National Transport Commission).

For about 25 years, many principal contractor/sub-contractor relationships have been governed by contract determinations which are now determined through the Industrial Relations Commission of New South Wales (NSWIRC) under Chapter 6 of the New South Wales *Industrial Relations Act 1996*.

The NSW contract determination system applies to owner drivers who own and drive a truck, a semi-trailer or other prime mover/trailer combination, or a prime mover (ie a tow operator) within the County of Cumberland (essentially greater metropolitan Sydney). However, it can be used as a benchmark to determine rates and conditions elsewhere. The NSW contract determination system does not apply to sub-contractors who are fleet (two or more truck) owners or to interstate road freight operations.

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Until recently, NSWRTA has supported the role of the NSWIRC in setting rates and conditions for sub-contractors. However, an extensive survey across 23 different types of road freight operation has demonstrated a notable drop in support for any role for the NSWIRC and instead a clear preference for principal contractor/sub-contractor relationships that are based on commercial principles.

A copy of NSWRTA's findings is **attached**.

Based on these findings, NSWRTA supports a move towards a policy framework which encourages principal contractor/sub-contractor relationships which are based on commercial terms and, therefore, a cessation of any role for the NSWIRC for the following reasons:

1. Principal Contractor/Sub-Contractor Relationships in Road Transport

1.1 Types of Relationship

Principal contractors may have relationships with:

- Tied owner driver sub-contractors (sub-contractors working for one principal);
- Tow operators (where the sub-contractor supplies the prime mover and the principal contractor supplies the trailer/s);
- 'Freelance' sub-contractors, (sub-contractors who work for more than one principal);
- Fleet owners, (companies that act as sub-contractors but in turn either):
 - Contract out to other sub-contractors; or
 - Ensure the transport task is undertaken by employees of the sub-contractor.

These relationships are driven by the market and have evolved in all States and Territories, despite different policy and regulatory regimes applying in the jurisdictions concerned.

1.2 Market Drivers

Principal contractor/sub-contractor relationships have evolved because:

- Of an irregular and unreliable work volume for road transport operators;
- Contracts are often subject to tender and are on commercial terms which can be won or lost;
- Some road transport operators prefer to specialise in procuring and managing transport tasks rather than their execution.

Volatility in work available arises due to factors such as:

- Client needs;
- Third party needs;
- Cyclical conditions;
- Seasonal conditions; and
- Imbalance in freight volumes/types between two locations.

These market drivers determine principal contractor/sub-contractor relationships.

2. Goodwill in Road Transport

Sub-contractors generally do not have any goodwill in their business because:

- The principal has the sales/marketing resources/expertise to acquire work;
- The principal delegates business acquired to the sub-contractor;
- Agreements with sub-contractors can be terminated at short notice because a principal can win or lose work at short notice;
- Some agreements expressly state there is no goodwill in the relationship;
- Of a trend away from vehicles painted in the principal's corporate livery.

There is a view that goodwill is tied directly to the contract determination system. NSWRTA cannot see how goodwill can be tied to a system of rates and conditions determined by an industrial tribunal given the nature of contract relationships in the industry.

Goodwill appears to exist in a very small minority of contracts where a business has been purchased in the form of an exclusive delivery area.

Where goodwill may exist it should be determined by the market.

3. Driving Hours/Fatigue

Claims sub-contractors would work longer hours to remain viable if contracts were based on commercial terms and not through industrial determinations are unfounded because:

- Most principal contractor/sub-contractor relationships recognise the need for commercially based contract terms;
- In many industry sectors, there are principals who already ‘undercut’ rather than pay sub-contractors in accordance with the relevant contract determination;
- There is little evidence of action against principal contractors who fail to have regard to the relevant contract determination in remunerating sub-contractors.

Road safety statistics suggest no link with an interventionist policy and the road toll. According to the Australian Transport Safety Bureau:

- 39.5 per cent of heavy vehicle fatalities in the five years ending 2004 occurred in New South Wales. (The 2001 Census showed New South Wales had 33.6 per cent of the population);
- Truck drivers are deemed to be at fault in only about 20 per cent of fatal crashes;
- Sleep/fatigue is the major factor accounting for about 10 per cent of such crashes.

This means more people per capita are killed on NSW roads in fatal crashes involving trucks than the national average. This suggests the existing role played by the NSW IRC in relation to owner driver freight rates and other conditions is not relevant to the industry’s road safety record.

Analysing road safety is complex. However, it boils down to three main factors, the road, the vehicle and the driver. Factors the ATSB says have an impact on fatality rates amongst truck drivers include:

- Fatigue;
- Drugs;
- Speed;
- Vehicle condition;
- Road condition.

NSWRTA’s contends that

- Owner drivers are with very few exceptions, an outstanding group of drivers who act responsibly in their relations with clients, employers, principals and other road users. This means principal contractors will want to maintain business relationships with sub-contractors that are mutually beneficial;

- Driver fatigue and other issues can continue to be dealt with by the Australian Transport Council, the National Transport Commission and responsible agencies in jurisdictions in collaboration with principal contractor and sub-contractor representatives, not through industrial courts.

4. Impact of the Cessation of the Contract Determination System on Contract Terms

There was general agreement that:

- Terms and conditions would be more commercially driven (assuming terms are not already commercially driven);
- Prevailing terms and conditions in other jurisdictions would influence future terms and conditions in NSW but not in circumstances where terms in NSW based contracts were essentially driven by commercial considerations;
- There may be a 'rush to the bottom', especially in some sectors of industry, however:
 - There would be a quick market correction;
 - Poor compliance with the contract determination system means this is already a feature of the market and the extent of its influence on market behaviour is not expected to change.

Some principals thought changing terms and conditions would be relatively easy while others believe it would be very difficult, eg couriers. Some principals saw no reason to change terms, reflecting the nature of the market, the more commercial basis of the existing contract relationship and the structure in their industry sector.

5. Summary

Principal contractor/sub-contractor relationships in the road transport industry are variable and are driven by the needs of the market through the clients of the principal.

Contract determinations are generally used as the basis of sub-contractor remuneration but only apply to owner driver sub-contractors, not fleet owners who act as sub-contractors. Notwithstanding this, there is widespread non-compliance with existing contract determination provisions by principal contractors and an ineffective enforcement regime.

National reforms to ensure principal contractors can have commercial relationships with sub-contractors unencumbered by industrial relations considerations will benefit both parties. These reforms should also cover issues such as deeming provisions and taxation.

Union concerns regarding goodwill are limited to a small minority of contract relationships. Principals have and will continue to adopt strategies to limit their exposure to goodwill. Where goodwill does exist in accordance with normal commercial principles, its value should be determined by the market. Union concerns regarding fatigue and road safety are unfounded.

Incorporation should be mandatory for all owner driver sub-contractors;

A phase out period is necessary for contract determinations which should have regard for existing contract conditions and any other factor which may adversely affect orderly change. There should be no phase out period where change can proceed in an orderly manner.

Some training is considered desirable to assist sub-contractors in adapting to a more commercial relationship with a principal and to assist in business growth. NSWRTA can offer training to improve the business skills of sub-contractors.

NSWRTA is happy to give oral evidence to the Committee.

Please contact me, telephone 02 9733 0200, should the Committee wish to hear further evidence from NSWRTA.

Yours sincerely

A handwritten signature in black ink, appearing to read 'H McMaster', with a long, sweeping horizontal stroke extending to the right.

Hugh McMaster
Corporate Relations Manager