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**NEW SOUTH WALES ROAD TRANSPORT
ASSOCIATION**

**FINDINGS FROM A SURVEY OF MEMBERS OF THE NEW
SOUTH WALES ROAD TRANSPORT ASSOCIATION
REGARDING THE PROPOSED INDEPENDENT
CONTRACTORS LEGISLATION**

MAY 2006

1. Executive Summary

The following are conclusions reached based on interviews with principal contractors operating in the road transport industry.

1.1 *Principal Contractor/Sub-Contractor Relationships*

Principal contractor/sub-contractor relationships have evolved because:

- There is an irregular and unreliable volume of work for road transport operators. This reflects:
 - The differing business cycles that affect particular industry sectors as well as the economy; and
 - The manner in which transport tasks may be sought by clients of the industry.
- Contracts to provide a transport service are often subject to tender, meaning they can be won or lost. Such contracts are on commercial terms, which may include provisions which do not allow for any adjustment in the face of cost variations;
- Some road transport operators prefer to specialise in the procurement and management of transport tasks rather than their execution.

This market environment encourages the emergence of principal contractor/ sub-contractor relationships because they offer greater flexibility to both parties and enhance the quality and reliability of the transport service.

There is strong support amongst principal contractors for the relationship they have with sub-contractors to be based on commercial terms and not influenced by the determinations of industrial tribunals.

1.2 *Goodwill*

From the perspective of principal contractors, sub-contractors in the road transport industry generally do not have any goodwill in their business because:

- The principal has the sales and marketing resources and expertise which is used to acquire the work;
- The principal delegates business acquired to the sub-contractor. The sub-contractor does not acquire the work of his/her own initiative;
- Principal contractor/sub-contractor agreements can be terminated at short notice;

- Some principal contractor/sub-contractor agreements expressly provide that there is no goodwill in their business relationship;
- There is a trend in some industry sectors away from trucks/prime movers painted in principal's corporate livery towards:
 - A requirement for the sub-contractor's name to be shown on the vehicle; or
 - For the vehicle to remain plain; or
 - To use decals on the truck/prime mover showing the principal's corporate livery.
- Goodwill appears to exist in a very small minority of contracts because there has been a purchase of a business in the form of an exclusive delivery area for a client or a principal contractor. However, this is unclear because it may not be contained in the terms and conditions of a contract. Notwithstanding this, it may have a market value and, if so, it should be determined by the market;

1.3 Driving Hours/Fatigue

Claims that sub-contractors would have to work longer hours to remain viable if the contract determination system ceased and was replaced by legislation that facilitated a more commercial relationship are unfounded because:

- Most principal contractor/sub-contractor relationships recognise the need for contract terms to ensure commercial viability for both parties;
- In many sectors of the road freight industry, principal contractors already 'undercut' each other rather than pay sub-contractors in accordance with the relevant contract determination;
- Neither the NSW Office of Industrial Relations nor the Transport Workers Union New South Wales Branch (TWU) seems sufficiently willing to take action against principal contractors who fail to have regard to the relevant contract determination in remunerating sub-contractors.

2. Background

This report was compiled by the New South Wales Road Transport Association (NSWRTA), which has represented road transport operators in NSW since 1890, based on a summary of the results of interviews with owners and senior managers in medium and large trucking companies on the likely impact of proposals to introduce independent contractors legislation.

Most participants in these interviews engage sub-contractors based in NSW, where contract determinations are the subject of conciliation and arbitration, as well as in other jurisdictions. However, interviews were also held with principal contractors who engage sub-contractors to carry out work solely within NSW.

These interviews were undertaken to assist in policy development and the framing of proposed independent contractors legislation to govern principal contractor/sub-contractor relationships.

The focus in these interviews in particular was on:

- How relationships between principal contractors and sub-contractors in the road freight industry would change as a result the introduction of this legislation; and
- Whether there is any validity to claims that owner driver sub-contractors would:
 - Suffer a loss of goodwill; and/or
 - Need to work longer hours to maintain viability in the business.

3. Overview of Principal Contractor Sub-Contractor Relationships

Principal contractor sub-contractor relationships arise in the road transport industry where:

- A client wants to deal with one road transport operator for the provision of a service;
- This operator has the discretion to act as a principal having regard to:
 - Existing capability to execute transport tasks under the contract through either employees or sub-contractors;
 - Capacity to outsource part of all of the transport task to sub-contractors;
 - Volatility in work available due to factors such as:
 - Client needs;
 - Third party needs;
 - Cyclical conditions;
 - Seasonal conditions; and
 - Imbalance in freight volumes/types between two locations.

Relationships may exist with:

- Tied owner driver sub-contractors (ie sub-contractors who work solely for one principal);
- Tow operators (where the sub-contractor supplies the prime mover and the principal contractor supplies the trailer/s);
- ‘Freelance’ sub-contractors, ie those who work for more than one principal;
- Fleet owners, ie 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.

A relationship hierarchy may exist such that work is distributed in the following priority:

- Employees;
- Tied sub-contractors/fleet owners;
- ‘Freelance’ sub-contractors/fleet owners;

There may also be hierarchies within these groups based on seniority or other variables.

Contracts once entered into between principals and their clients often do not have provisions to enable the principal to ask for a freight rate adjustment due to unforeseen cost variations, such as the sharp hike in fuel prices mid to late last year. These contracts are based on commercial terms. Similar terms need to govern contracts between principals and their sub-contractors.

4. Sectors of the Road Transport Industry Covered by this Survey

Interviews were conducted with principal contractors who are involved in a wide variety of types of road transport task. Collectively, those interviewed are involved in the movement of the following types of freight:

- Beverages;
- Bricks/Tiles;
- Bulk Tanker – Non Dangerous Goods;
- Bulk Tanker – Dangerous Goods;

- Coal;
- Containers;
- Couriers;
- Dangerous Goods – Non-Bulk;
- Express – Air;
- Express – Local Pick Up and Delivery;
- Express – Intrastate;
- Extractive Materials – Sand, Gravel, Soil;
- Fertiliser/Agricultural By-Products;
- Forest Products/Timber;
- General Freight;
- Grain;
- Horticulture;
- Metalliferrous Minerals;
- Newspapers/Magazines;
- Refrigerated/Perishable Products;
- Retail – Clothing, Hardware, Whitegoods; IT Products, etc;
- Steel/Steel Products;
- Waste Collection/Recycling.

In geographic terms, the scope of the survey includes local and interstate transport. In terms of company size, this survey covered major as well as second tier national companies and other companies with a significant intrastate presence in one or more of the business areas referred to above. In terms of sub-contractor type, this survey covered all types of relationships referred to earlier. In terms of vehicle type, this survey covered everything from bicycles to B-doubles.

5. Scope of Application of the NSW Contract Determination System

The NSW contract determination system applies to owner drivers who own and drive a truck, a semi-trailer 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 in NSW. The NSW contract determination system does not apply to sub-contractors who are fleet (two or more truck) owners.

6. Level of Compliance with the NSW Contract Determination System

The level of compliance with the existing NSW contract determination system was difficult to gauge with responses varying from participant to participant, even within specific sectors. NSWRTA's assessment is that many principal contractors pay rates to sub-contractors which have regard to but do not accord with to the relevant contract determination.

- Those more likely to pay a rate to sub-contractors that is either consistent with or has regard for the relevant contract determination are:
 - Larger operators;
 - Medium sized operators with a significant presence in a particular market;
 - Sydney based operators (as opposed to operators based in rural and regional areas); and/or
 - Operators with a heavily unionised membership amongst sub-contractors.

It is clear that notwithstanding the contract determination system, market forces influence actual rates paid.

Although the TWU and the NSW Office of Industrial Relations have certain powers to act against principals who do not remunerate sub-contractors in accordance with a contract determination, such action is quite rare. This leads NSWRTA to the conclusion that neither organisation appears willing to take action against principal contractors who fail to have regard to the relevant contract determination in remunerating sub-contractors.

7. Payment Terms to Owner Driver Sub-Contractors

Amongst the respondents interviewed:

- Some remunerated sub-contractors according to the relevant contract determination;

- Some used the relevant contract determination as a basis for remuneration on more commercial terms and as a ‘safety net’ but paid above the determination (even if specific provisions were ignored). Payment terms in these situations include:
 - Piece rates, ie per container, per pallet;
 - Labour according to a more commercial remuneration system and other costs according to the relevant determination;
 - As stipulated in any contract between the principal and the client less any costs and profit margin for the principal;
 - Kilometre rates while driving and hourly rates while waiting.

All principal contractor representatives interviewed were conscious of the contract determination conditions and their obligations under the relevant determination.

8. Weaknesses with the Contract Determination System

Criticism of the contract determination system included:

- Lack of relevance to the market;
- Inadequate recognition of major variables, ie type of truck, age of truck, treatment of depreciation and kilometres travelled;
- Widespread abuse of specific provisions;
- Ineffective enforcement.

9. Use of Principal’s Livery on Vehicles

The following variations applied to the use of principal’s corporate livery on the sub-contractor’s vehicle:

- Some principals insist on painted vehicles in their corporate livery for all owner driver sub-contractors;
- Some principals supply decals instead of resorting to spray painting, (an increasing trend in some companies);
- One principal paid for the spray painting; another split the cost with the sub-contractor;
- Some principals relied on the semi-trailer/s they supplied to identify their business;

- Some clients of the principal insist their corporate colours/logo appeared on the trailer/s;
- Some principals insist the sub-contractor's name appear on the truck/prime mover;
- Some principals insist the truck/prime mover be plain (also an increasing trend).

Where a fleet owner is used as a sub-contractor, the fleet owner's corporate livery is usually on the vehicle or, alternatively, the vehicle is plain.

10. Contract Terms

With few exceptions, written contracts exist for relationships between principal contractors and tied owner driver sub-contractors. However, in some instances, there is no written contract and the relationship is based on a 'gentlemen's agreement' using normal commercial terms. Less formal arrangements tend to apply where sub-contractors are engaged on an ad hoc basis.

There are no provisions in the formal contracts for any 'notice', nor do they stipulate a time period in which a contract applies. Principal contractors generally have the discretion to terminate a contract at no more than 24 hours' notice and to give the work to another sub-contractor/s.

11. Goodwill

Historically, goodwill was recognised in contracts executed by large transport operators when acting as a principal contractor. However, goodwill provisions disappeared from most contracts during the 1970's, 1980's and early 1990's. This means there are rarely circumstances where goodwill can be said to exist in the business of a sub-contractor.

There is also a view amongst most principals that the principal invests in the client relationship, is responsible for sales as well as marketing and, on that basis it is they that should attract any goodwill. Further, contracts between a principal and client cannot be assigned to a third party such as a sub-contractor. Such contracts do not necessarily guarantee the volume of work required by the client which in turn has an impact on the principal contractor/sub-contractor relationship. Clients may in some circumstances exercise a right of veto over a sub-contractor.

NSWRTA's advice is they remain in specific industry sectors, notably concrete agitating and in some contracts involving the cartage of beer. NSWRTA is aware that in relation to the cartage of beer there are circumstances where a principal contractor has purchased as a going concern the business of carting beer for a particular brewery to specific hotels and clubs within a specific geographic area. Further NSWRTA is aware of tied sub-contractors to that principal who have purchased as a going concern the business of delivering beer to a part of that principal contractor's delivery area.

As stated previously, while tied sub-contractors may sell their business, there is in normal circumstances no guarantee that the principal will give work to the purchaser. This means the sale of a 'truck with work' by a sub-contractor is rare as is the sale of a delivery run as a going concern without a truck. Where there is an understanding that the sale includes work which involves the delivery of goods on a regular and ongoing basis and that becomes an exclusive delivery contract, it seems to NSWRTA reasonable that this is an issue for consideration in any sale or purchase. However, in the absence of a contract with a specified time period, it also seems reasonable for the client (in this case the brewery) and/or the principal contractor to renegotiate terms.

Where there is a possibility that goodwill exists but is subject to dispute, affected principal contractors believe the matter may require resolution through the courts. Ideally, there should be provisions and procedures to ensure any dispute resolution process involving a principal contractor and a sub-contractor should be as simple as possible without constraining the rights of one or other party to pursue a legal remedy.

One respondent advised that in a certain company division:

- Goodwill has been bought out;
- Modest payments are made either as a lump sum or as periodic payments on termination;
- Respraying of the truck to remove the principal's corporate livery is paid for;

Another respondent advised that one month's notice normally applies to either the principal contractor or the sub-contractor should either party want a contract to terminate.

NSWRTA was advised that one courier company (not interviewed) operated on a franchisor/franchisee basis while another operated on a territorial basis with these conditions having some value to the contract relationship.

12. How Contract Terms would Change if the Contract Determination System Ceased

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.

13. Insurance/OHS

There was agreement that:

- Common carrier provisions should be used as a basis for determining who is responsible for the provision of insurance, ie the principal, the sub-contractor or the client;
- The sub-contractor should be responsible for vehicle, workers compensation and public liability insurance;
- The principal contractor should be responsible for goods in transit insurance where appropriate having regard to risk principles. This is often a condition imposed by clients. Many principals thought sub-contractors should also have cover for this class of insurance which can be arranged either through the principal or independently. However, many sub-contractors do not acquire this insurance, meaning liability rests solely with the principal;
- To the extent that deeming provisions exist which place additional responsibilities on principal contractors regarding insurance and OHS, they should be overridden so that the party responsible takes out insurance and manages the risk;
- National reform to override existing State/Territory legislation in workers compensation/OHS is an urgent priority.

In some circumstances, sub-contractors may take part in OHS training alongside employee drivers, for example in the transport of dangerous goods.

14. Incorporation

Increasingly, principals are insisting that sub-contractors become incorporated as a condition of engagement. There was general agreement that:

- Incorporation as opposed to being a sole trader is the preferred business model for owner driver sub-contractors;

- Government policy should favour or even mandate incorporation.

Attitudes to incorporation varied slightly from one principal to another due to:

- The long history of some business relationships with individual sub-contractors;
- The level of insistence on incorporation. Some principals insist on incorporation as a condition and others insist on incorporation for all newly engaged sub-contractors.

15. Contract Negotiations

There were differing views on how contract negotiations should take place under the proposed legislation and accompanying policy framework.

Most principals agreed that where contract negotiations involve a significant number of tied sub-contractors, these negotiations should take place on a collective basis because:

- Of the number of owner driver sub-contractors engaged;
- It was possible to include provisions in any agreement to provide an incentive to operate more efficiently;

Clearly, collective negotiations have no place where 'freelance' arrangements govern the principal contractor/sub-contractor relationship.

16. Road Safety/Fatigue Concerns

There was no support for claims that there would be heightened road safety/fatigue risks on the basis that it would not be in the interests of either party for this to occur.

17. Definition of Sub-Contractor and Taxation Reform

There is support for more consistency in the treatment and definition of sub-contractors in terms of deeming provisions and in terms of treatment under taxation laws. There is also support for reform of the personal services test under the *Income Tax Assessment Act* to:

- Recognise that many owner drivers are tied to and rely solely on one principal for their income;
- Ensure consistency in moving from a contract relationship based on industrial relations considerations to a relationship based on commercial considerations.

18. Training

Most principals agreed:

- Owner driver sub-contractors would have access to financial advice via their accountant;
- Training would be desirable for owner driver sub-contractors in areas such as:
 - Contract negotiations;
 - Understanding commercial contracts;
 - Financial management – budgeting, cash flow, financial statements, bookkeeping, etc;
 - Obtaining legal advice;
 - Insurance;
 - Finance.

19. 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. 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, the extent of union coverage in transport yards and other factors 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.

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