

**Submission  
No 72**

## **INQUIRY INTO OPPORTUNITIES TO CONSOLIDATE TRIBUNALS IN NSW**

**Organisation:** Australian Road Transport Industrial Organisation NSW  
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**ARTIO**

Australian Road Transport  
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2 December 2011

The Director  
Standing Committee on Law and Justice  
Parliament House  
Macquarie St  
SYDNEY NSW 2000

By email: [lawandjustice@parliament.nsw.gov.au](mailto:lawandjustice@parliament.nsw.gov.au)

Dear Sir/Madam

The Australian Road Transport Industrial Organisation NSW Branch (ARTIO NSW) welcomes the opportunity to make a submission to the Standing Committee on Law and Justice's (Standing Committee) Inquiry into Opportunities to Consolidate Tribunals in NSW. ARTIO NSW's interest is to highlight a further possible area of reform to the role, function and workload of NSW Government and Tribunals in areas related to workplace relations, and in particular in industrial relations through the NSW Industrial Relations Commission (NSW IRC).

**1. Background**

ARTIO NSW represents road transport operators in NSW in areas related to workplace relations. ARTIO NSW is a registered organisation of employing contractors under the *Industrial Relations Act 1996* (the Act). This enables the NSW IRC to recognise ARTIO NSW as a party to proceedings related to contract determinations which are considered and adjudicated by the NSW IRC under Chapter 6 of the Act. ARTIO NSW is also the NSW Branch of the Australian Road Transport Industrial Organisation which in turn is recognised as the peak body representing road transport operators at the federal level.

**2. Current and Future Workload of the NSW Industrial Relations Commission**

**a. Overview**

ARTIO NSW believes the Issues Paper prepared for this Inquiry accurately highlights the impact of reforms and the flow-on effect causing the demise of the role of the NSW IRC. In particular, we note the narrowing of the role and function of the NSW IRC caused by:

- the introduction of national work health and safety laws as at 1 January 2012, disputes of which will be heard in the Chief Magistrate, District and County Courts;

- the introduction and development of Modern Awards as at 1 July 2010 which has lead to the demise of State based awards for the private sector; and
- the powers given to Fair Work Australia as at the introduction of the *Fair Work Act (Cth) 2009*.

The impact of these developments on the workload of Commissioners has lead to a diminution of the role of the NSW IRC.

Further, the recent introduction of the *Road Safety Remuneration Bill 2011* into Federal Parliament is another important consideration in determining the relevance and future role and function of the NSW IRC and the workload of its Commissioners.

The proposed Bill which had its second reading in Federal Parliament on 23 November 2011, will govern the remuneration of owner drivers who as sub-contractors (or independent contractors) are engaged by principal contractors as well as employee drivers. ARTIO NSW is of the view that the Tribunal, should the Bill be passed and the legislation enacted, would be capable of handling the residual matters currently being dealt with by the NSW IRC, in particular, the work that it is currently being performed in relation to Contracts of Carriage.

**b. Outline of the Current Workload of the NSW Industrial Relations Commission in Relation to Contracts of Carriage**

The current workload of the NSW IRC in relation to Contracts of Carriage is determined by Chapter 6 of the Act.

The scope of Chapter 6 of the Act includes Contracts of Carriage which are defined in Section 309 as follows:

*'(1) For the purposes of this Chapter, a contract of carriage is a contract (whether written or oral or partly written and partly oral) for the transportation of goods by means of a motor vehicle or bicycle in the course of a business of transporting goods of that kind by motor vehicle or bicycle, but only:*

*(a) where the carrier is not a partnership or body corporate—if no person except the carrier is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the carrier or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business, or*

*(b) where the carrier is a partnership—if no person other than a partner is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the partnership or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business, or*

*(c) where the carrier is a body corporate—if no person is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the body corporate or*

*not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business unless the person is:*

*(i) a director of the body corporate or a member of the family of a director of the body corporate, or*

*(ii) a person who, together with the members of his or her family, has a controlling interest in the body corporate, or*

*(iii) a member of the family of a person who, together with the members of his or her family, has a controlling interest in the body corporate.*

*(2) For the purposes of subsection (1), a reference to a carrier includes a carrier carrying on business under a franchise or other arrangement.*

*(3) A contract of carriage includes any contract that the Commission declares, after inquiry, to be such a contract. The Commission may make such a declaration if, in its opinion:*

*(a) the contract was entered into for the purpose of defeating, evading or avoiding the provisions of this Act relating to contracts of carriage, and*

*(b) but for being entered into for that purpose, the contract would have been a contract of carriage.*

*(4) A contract of carriage does not include a contract:*

*(a) that is, if the carrier is a common carrier, made in the ordinary course of the business of the carrier as a common carrier, or*

*(b) that is made in the ordinary course of business for the carriage of packaged goods for different principal contractors by the use of the same motor vehicle or bicycle, or*

*(c) for the carriage of mail by or on behalf of Australia Post, or*

*(d) for the carriage of bread, milk or cream for sale or delivery for sale, or*

*(e) for the carriage of goods that are to be sold pursuant to orders solicited during the carriage of the goods, or*

*(f) for the carriage of livestock, or*

*(g) if the principal contractor is a primary producer or a member of the family of a primary producer and the contract is for the transportation of primary produce (other than timber), or*

(h) for the transportation of primary produce (other than timber) from or to land used for primary production, or

(i) for the delivery of meals by couriers to homes or other premises for consumption.'

This definition underpins the scope of contracts for the pick up and delivery of freight which may be considered by the NSW IRC. This definition also sheds some light on the powers conferred on the NSW IRC in circumstances where one party or another may seek to circumvent the Act. As a result of this definition, and of the powers conferred upon the NSW IRC, including those related to its jurisdiction, the manner in which applications before it must consider, as well as other powers normally associated with an industrial tribunal, approximately 20 separate Contract Determinations which have been established and adjudicated upon by the NSW IRC and which govern the terms and conditions of parties for the transportation of goods. This in turn determines the large proportion of the current workload of the NSW IRC.

**c. An Outline of Proposed Federal Reforms and their Impact on the Future Workload of the NSW Industrial Relations Commission**

In 2009, the then Rudd Government established the Safe Rates Advisory Group (SRAG) to advise on options for establishing a tribunal to review payment methods and safety in the road transport industry based on a detailed policy paper setting out practical national strategies and options for national legislation covering employees and independent contractors working in the road transport industry.

SRAG was re-established by the Federal Minister for Tertiary Education, Skills, Jobs and Workplace Relations in October 2011 to '....assist with key policy, legislation and implementation of issues related to the Government's proposed response to the National Transport Commission Report *Safe Payments: Addressing the underlying causes of unsafe practices in the road transport industry*'.

The position of the Gillard Government on this issue was outlined by the Minister for Infrastructure and Transport (Minister Albanese) at the annual conference of the Transport Workers Union NSW on 26 August 2011 when he said:

'...Another important piece of work underway is the move towards safe rates for drivers.

I know it is an issue that the TWU is committed to and has campaigned strongly on.

I share your commitment to safe rates.

The Government acknowledges the need to tackle the problems of speed and fatigue in the road transport industry and to remove economic incentives for drivers to engage in unsafe work practices.

We know this is an important issue to truck drivers, their families, the transport industry and the wider community.

As you know, the Government has been carefully considering the results of the consultation on the options canvassed in the Safe Rates, Safe Roads Directions Paper to determine a practical strategy to address these issues....

...The Government intends to introduce legislation if required, by the end of this year.'

Based on Minister Albanese's commitment on behalf of the Gillard Government, and the introduction of the Bill to Parliament, it is expected that federal legislation will soon be in place to enable the review and determination of rates and remuneration for truck drivers, whether they be owner-drivers or employee drivers, to be determined by the proposed Road Safety Remuneration Tribunal (tribunal).

**d. The nature and form of the tribunal**

As per the Bill, the tribunal will be empowered to inquire into sectors, issues and practices within the road transport industry, and where appropriate determine mandatory minimum rates of pay and related conditions for employed and self-employed drivers (to be known as Road Safety Remuneration Orders - RSROs).

The tribunal will also have the power to grant 'safe remuneration approvals' in relation to the remuneration and remuneration-related conditions contained in a road transport collective agreement between a hirer and all self-employed (independent contractor) drivers with whom the hirer proposes to contract.

The tribunal will also be able to resolve disputes between drivers, their hirers or employers and participants in the road transport industry supply chain about remuneration and related conditions in so far as they provide incentives to work in an unsafe manner.

It is important to note that the tribunal will be made up of a mixture of Fair Work Australia members and expert members with qualifications relevant to the road transport industry.

Whilst the Bill is not intended to over-ride the relevant State laws dealing with owner-driver contracts, including Chapter 6 of the Act, the Bill provides that any benefit arising for a driver under a RSRO or safe remuneration approval granted by the tribunal, will not be reduced because of the operation of any existing law of the Commonwealth or any State or Territory Law.

Because of the proposed nature of the tribunal and its powers, we see no reason why the functions of the NSW IRC could not be effectively transferred to the tribunal, and indeed we are of the view that in a practical sense it will be almost impossible for the governing bodies to act independently of each other given that both bodies govern the remuneration of those involved in the transportation of goods.

We would suggest that the role of the NSW IRC in relation to the governing of contract determinations would be better dealt with by the proposed tribunal. Such a consolidation of tribunals in NSW would benefit all parties operating within the industry, and provide for greater consistency, clarity and certainty to those within the sector.

We also acknowledge that a separate inquiry may also be prudent if the Government is to contemplate a repeal or transfer of the powers of Chapter 6 of the Act. ARTIO NSW would welcome such an inquiry.

ARTIO NSW would be happy to elaborate on matters raised in this submission or any other matter which may assist the Committee in its deliberations.

Yours sincerely

Hugh McMaster  
for and on behalf of  
Laurie D'Apice  
**President**