
Submission

***INQUIRY INTO INDEPENDENT CONTRACTORS
AND LABOUR HIRE ARRANGEMENTS***

16 MARCH 2005

**The Transport Workers Union
Of New South Wales**



TWU
Carrying
Australia

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**SUBMISSION TO STANDING COMMITTEE ON EMPLOYMENT,
WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION:**

***INQUIRY INTO INDEPENDENT CONTRACTORS AND LABOUR HIRE
ARRANGEMENTS***

A. EXECUTIVE SUMMARY

1. The Transport Workers' Union of New South Wales ("TWU") represents the interests of thousands of small businesses in the form of owner-drivers. This representation has a history stretching back to the 1920s. Around 80-85% of these owner-drivers operate as corporations, the remaining 20-25% as sole traders or partnerships.
2. Owner-drivers are single vehicle operations the vast majority of which perform work exclusively for a single transport operator (principal contractor). Owner-drivers are highly dependent upon those with whom they contract. This dependence leads to inequality of bargaining power and the associated potential for exploitation.
3. In NSW there is a degree of regulatory protection for owner-drivers which minimises exploitation in a manner which does not hinder competition and which, in fact, contributes tangible productivity and efficiency benefits to transport companies and the transport sector as a whole.
4. Importantly, the protections include provisions ensuring that owner-drivers are at least able to cover their costs. This is in the public interest not only as it contributes to a stable, sustainable and

productive industry but because it operates against the now well established link between inadequate systems of remuneration and road safety concerns such as driver fatigue and the use of artificial stimulants. Government commissioned inquiries at both state and federal levels have called for additional regulatory protections to address road safety in the transport industry.

5. Benefits are delivered, in large measure, through the many and settled enterprise and industry sector arrangements established through the NSW system, arrangements which have the support of the industry. There are over 170 enterprise specific arrangements relating to owner-drivers. The regulatory protections in NSW have received consistent industry-wide and bipartisan political support. Indeed, the only significant additions to the protections since their inception were enacted by a Liberal government.
6. Productivity, stability and the lack of dissenting voices all support a conclusion that, no matter what approach the Committee might take to independent contractors, the NSW protections should remain undisturbed. In fact, far from being disturbed, as a best practice model, the NSW system could confidently be implemented in other states and territories.
7. The TWU supports the submission to this Committee of the NSW Government and in particular supports that part of the submission regarding owner-driver and contract of bailment arrangements.

B. TWU REPRESENTATION OF OWNER-DRIVERS

8. The TWU represents small businesses in the form of owner-drivers. Unlike most other unions, a significant number of TWU members (around 12 000 in NSW) operate as small businesses. Around 80-85% of these businesses are corporations, the remainder operate as sole traders partnerships. The TWU's representation of these small businesses stretches back to the 1920s. Indeed the late senator Jack Kane was, before entering politics, a truck owner-driver working for the then Department of Main Roads, chairman of the owner-driver section and a member of the TWU.
9. By virtue of this long representational history the TWU has established a unique understanding of the commercial and operational realities within which these small businesses operate and has taken on the corresponding unique responsibility of assisting truckies to become and/or remain viable small business entities. It follows that the TWU supports the right of people to choose to constitute their work arrangements in the form of businesses contracting their services rather than performing work pursuant to a contract of service (that is, a contract of employment) - provided that such arrangements are genuine and legitimate and are not employment contracts dressed up as something else to avoid the payment of standard minimum industrial entitlements.
10. The TWU is committed to protecting the important benefits which flow from appropriately maintained small business structures in the

transport industry. Examples of such benefits can be broadly categorised and illustrated as follows:

Benefits for owner-drivers - like all small businesses, owner-drivers are able to access flexible taxation arrangements which recognise the risk attached to the often substantial initial capital investment in the vehicle (and associated depreciation), the purchase of contracts or goodwill and ongoing servicing of associated debt;

Benefits for transport companies – By engaging owner-drivers transport companies streamline and/or reduce their administrative, financial and legal burdens and avoid the capital costs of the vehicle. The transport company in reality is able to aggregate the responsibilities associated with the trucking function in a simple compensation package. Under these arrangements the owner-driver provides the vehicle and thus provides the capital and bears the running and standing costs of the vehicle, including the costs of the owner-driver's labour and labour on-costs such as annual leave, sick leave and workers compensation.

Benefits for the transport industry and trade – In NSW the owner-driver model provides a balanced mix of flexibility (in allowing companies to engage workers to perform the transport function without having to provide the start up capital), certainty of contract (through the capacity to reach collective arrangements specifically tailored to enterprises or sectors of the industry), and sustainable competition (by

ensuring that the intensely competitive market operates in the context of sustainable, certain rate structures fostered by minimalist industrial protections).

11. On behalf of the owner-drivers that are a core component of its constituency, the TWU makes this submission addressing the two terms of reference relating to independent contracting:

- The status and range of independent contracting [and labour hire arrangements]; and
- Ways independent contracting can be pursued consistently across state and federal jurisdictions.

C. THE STATUS AND RANGE OF INDEPENDENT CONTRACTING ARRANGEMENTS

12. This term of reference reveals at least tacit acknowledgment that the range of independent contracting arrangements is diverse. A primary contributor to (or at least an indicator of) that diversity is the widely varying degree of independence that attaches to the different incarnations of arrangements to which the label “independent contractor” is applied.

The Unique Status of Owner-Driver Small Businesses

13. In most cases the title “independent contractor” when applied to an owner-driver’s small businesses is somewhat of a misnomer.

Owner-drivers are a discrete category of small business, vulnerable to exploitation because of the dependent nature of the contractual relationships pursuant to which they perform work.

14. The very real efficiencies attaching to the owner-driver – principal contractor model flow not from the independence of the relationship but from precisely the opposite. Ease of entry via financing arrangements leading to high levels of debt encourage owner-drivers to establish and/or maintain highly dependent relationships with principals for whom they work necessarily hard in order to service debt and make a living for themselves and their families.

15. The degree of practical independence that most owner-drivers exercise in the day-to-day operation of their businesses is minimal. For example, the overwhelming majority of owner-drivers - almost without exception:
 - perform work for a single transport operator;

 - perform work at the behest of that operator in accordance with very specific priorities (including specific delivery/pick-up priorities) set by the directors and management of that operator;

 - are usually required to hold themselves available to perform work for a single contractor thus rendering them unavailable for anyone else;

- take direction from that operator on a day to day basis as if they were employees of the operator;
- are required to paint or otherwise mark the vehicles they provide with the operator's colours and/or insignia; and
- have little or no power to set price, rather they take the price they are given.

These are indicators not of independence but of dependency and reliance.

16. This dependence brings with it vulnerability. The necessity for owner-drivers to receive a steady stream of work to meet their financial commitment on their truck and, in addition, earn a decent living for themselves and their families places the principal contractor in a very powerful position. This inequality of bargaining power has long been recognised, and on-going support for this successful and productive small business model must offset this inequality in balanced, appropriate and well-directed ways.
17. Given the Government's frequently stated intention to support small business, which it labels the "backbone of the economy," it is to be hoped that its approach to independent contracting will reflect the statement of the chair of this committee (*Media Alert* – House of Representatives Employment, Workplace Relations and Workforce Participation Committee, 24 January 2005):

“Entrepreneurship is an important part of the Australian culture and many Australians choose to work as independent contractors. It’s vital to support that flexibility, but also *to ensure that proper protections are in place that clarify obligations such as health and safety, tax arrangements and other entitlements* for both contractors and those employed through labour hire agencies.”

18. The statement acknowledges the need for flexibility with appropriate protection. As mentioned, owner-drivers are in a uniquely vulnerable position as independent contractors. No stroke of a legislative pen can extinguish the fact of that dependency/vulnerability. In NSW that vulnerability has been acknowledged and addressed in a manner that provides appropriate, well-directed protections with minimal intrusion upon productivity, resulting in a net positive result for the public interest in terms of road safety and the maintenance of around 12 000 owner-driver businesses.

Current Arrangements for Owner-Drivers in NSW

Chapter 6 of the Industrial Relations Act 1996 (NSW)

19. The New South Wales model flowed out of a Commission of inquiry set up by the state Liberal government in the late 1960s. The inquiry concluded that there was “an overwhelming case” for the regulation of owner-drivers, not as deemed employees but as independent contractors (Industrial Relations Commission of New

South Wales Report to the Honourable EA Willis 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 23 February 1970, Chapters 2 and 30). That is, the section 88E inquiry recognised that owner-drivers were contractors but their dependent nature nevertheless justified a minimal form of industrial regulation. It was overwhelming because,

“owner-drivers have been in the past exploited as to rates and subjected to oppressive and unreasonable working conditions. The truth is that an owner-driver with one vehicle (on which there is a heavy debt load) and no certainty of work is in a weak bargaining position and the transport industry is not lacking in operators prepared to take the fullest advantage of his vulnerability” (Industrial Relations Commission of NSW 1970 at paragraph 30.17).

20. The predecessor to Chapter 6 was first enacted in 1979. Consistent with the evidence to the inquiry about the unique position of owner-drivers, the Chapter 6 scheme does not apply to genuinely independent transport companies that trade with a variety of clients and that have the power to set the price of the services they provide. Rather it applies to owner-drivers of the type mentioned in this submission - single vehicle operations - who are tied to and dependent upon one company.
21. Chapter 6 of the *Industrial Relations Act 1996 (NSW)* is a model of proven sustainable balance between freedom to contract and encouragement of “entrepreneurship” on the one hand, and, on

the other, proper protection for those choosing to contribute to Australian working life through independent contracting arrangements. Accordingly, it has, for nearly 30 years, had the support of workers, transport operators, industry bodies and both Labor and Liberal governments.

22. Transport operators (principal contractors) and their industry representatives have supported the current system as it provides transport operators, some of whom engage hundreds of owner-drivers, with logistical and economic certainty. The NSW Road Transport Association ('NSWRTA') is the main transport employer body in the state. For decades it has represented the principal contractors who engage owner-drivers. The NSWRTA is on the record as supporting the NSW system regarding owner-drivers.
23. And the broad industry support has flowed through to effect bipartisan political support. For example the owner-driver scheme was examined by the Liberal government in the early 1990s and retained. In retaining the system, the Liberal government expanded it by the introduction of non-union collective bargaining for owner-drivers and the plugging of the Motor Lorry Loophole through amendment of the Act's definition of 'contract of carriage'. The system was thereby greatly broadened under the Liberals from coverage of only those contracts of carriage performed by motor lorries to all those performed by means of motor vehicle or bicycle. The system was further expanded by the same government in 1994 to include the capacity to recover, in appropriate circumstances, the often significant goodwill payments made upon entry into businesses.

24. A summary of the measures enjoying this broad support base is as follows.

Contract determinations

25. Part 2 of Chapter 6 allows for the creation and protection of minimum standards through contract determinations. Contract determinations create a set of minimum contracting standards established most often in consultation with industry groups and most commonly with the NSW Road Transport Association (NSWRTA).
26. Contract determinations regulate only the basic conditions of engagement. They do not, for example, contain employee-like entitlements such as overtime, penalty rates or minimum hours of work, and there is no entitlement to leave (maximising the availability of the truck) compensation for which is contained in the minimum rate structure. Rather determinations are incentive and mode-based and aim to guarantee the basic minima upon which parties can negotiate viable contracting arrangements.
27. This minimalist approach ensures that the measures are not of such a nature as to unduly hinder the efficiency and productivity of the independent contract arrangements while providing the framework necessary to sustain the owner-driver small business model. In other words contract determinations promote stability by establishing industry agreed parameters for sustainability of the owner-driver – principal contractor model but above which competition is free to flourish.

Contract Agreements

28. Transport operators and groups of owner-drivers (whether or not represented by the Union) may enter into arrangements as to the terms and conditions best suited to their particular enterprise ('contract agreements'). These agreements set the desired agreed provisions for a given term, thereby allowing both operator and owner-drivers greater commercial certainty and operational efficiency.

Dispute Resolution

29. The scheme provides for a dispute resolution mechanism focused on preventing any disruption to the transport function and ensuring that business productivity and efficiency is not injured by any disagreements between the parties. By allowing parties to bring disputes immediately before an independent member of the Commission with relevant industry knowledge and expertise, the system facilitates fast and fair resolution of disputes.

Associations of Employing Contractors and Associations of Drivers & Carriers

30. The provisions allow for the registration of associations of employing contractors and associations of drivers & carriers, to mirror employer/employee associations.

31. The TWU has bargained on a collective basis for owner-drivers since the 1920s. Similarly, employer associations have represented the interests of transport operators engaging independent contractors for decades. The formalisation of this representation in Chapter 6 merely recognises these historical roles of unions and employer associations and at the same time imposes obligations, safeguards and standards of behaviour to ensure proper behaviour by representative groups in accordance with community standards.

Remedies

32. Two important remedies exist in the Chapter 6 scheme which go to the heart of redressing inequality of bargaining power by creating disincentives for the principal contractor to terminate the contractual relationship without adequate reference to the risk undertaken by the owner-driver.
33. The first is the capacity of the Commission to order reinstatement of contracts of carriage. This gives statutory recognition to the fact that the relationship between independent contractor and operator is often long-term, stable and exclusive, with large capital investments required of the owner-driver, and therefore deserving of protection against arbitrary termination.
34. The second provides a mechanism for the recovery of goodwill paid by owner-drivers for entry to particular work. Goodwill transactions for owner-driver businesses usually occurs in the circumstances where a prospective owner-driver makes a payment to an existing

owner driver consisting of the market value of the vehicle used to perform the work plus an additional amount as a premium or fee (the goodwill) for entry into an ongoing arrangement with the existing owner-driver's principal contractor.

35. The capacity to claim compensation for goodwill was introduced with bipartisan political support under a Liberal state government in 1994 to enable owner-drivers to protect their goodwill investment when it has been unreasonably and unfairly stripped from them. It is important to note that the goodwill compensation scheme is one that involves numerous and significant hurdles for the applicant. The hurdles ensure that the principal is not the target of frivolous, readily proven claims.
36. Hurdles notwithstanding, the provisions provide the capacity to recover investments heavily relied upon by owner-drivers for financial security in retirement and for the repayment of loans. Without the provisions the drivers are left only with an ordinary civil claim which is usually untenable because the financial risks associated with such a claim in terms of costs far outweigh the potential benefits of succeeding.
37. The second reading speech recounted the story of Mr Davey, an owner driver whose contract was sold by the head contractor to TNT in 1984. In an attempt to recover the ensuing loss to his business, he brought a common law suit against the Egg Corporation and TNT but, faced with a far larger legal team than he could afford, Davey lost the case and was ordered to pay costs. These totalled \$190,000, with the Respondents' bill being \$160,000 and his own \$30,000

(Hansard, Industrial Relations (Contracts of Carriage) Amendment Bill, Second Reading per Mr Nagle (the Honourable Member for Auburn), 14 April 1994, Assembly at 1171). As recognised by the government of the time, this type of risk is unacceptable in order to simply pursue fairness of bargain and works as a great deterrent to entrepreneurial pursuit.

Taxi Drivers

38. In addition to independent contractors, Chapter 6 applies to taxi drivers to ensure that drivers (bailees) and operators (bailors) receive a fair return from the fixed rate charged to consumers. The rate charged is set not by the industry but by the Independent Pricing and Regulatory Tribunal, denying both drivers and operators any control over price in the industry.

Section 106 of the Industrial Relations Act (NSW): Unfair Contracts

39. These provisions have been consistently used in to protect the investments made by owner-drivers. Although exercised in a costs jurisdiction, the provision is important because it covers a wider variety of factual situations than the goodwill compensation provisions. (See examples below).

Settled Transport Industry Arrangements in NSW

40. Through the NSW system owner-drivers and transport operators currently enjoy (and for much of the last 30 years have enjoyed) settled arrangements that have led to productive, efficient and harmonious execution of the transportation function. These

arrangements have industry-wide acceptance and are contained in a variety of industrial instruments at both the industry sector (contract determinations) and enterprise level (contract agreements).

41. At present there are over 170 contract agreements between groups of owner-drivers and specific enterprises and over 25 contract determinations, covering industry sectors including:

- General transport/freight forwarding;
- Couriers;
- Concrete;
- Quarries;
- Waterfront;
- Excavated Materials;
- Waste Collection;
- Breweries;
- Taxis; and
- Car Carriers.

Cost Recovery, Stability and Safety

42. The primary purpose of these collective arrangements is the payment of rates which, as a minimum, allow drivers to recover all costs of the truck and labour. That is, they operate to prevent exploitation to the extent of not even recovering everyday costs thereby fostering: sustainability of the owner-driver; the stability of

the transport operator and industry; and the safety of industry participants and general road-using public.

43. The ease of entry into the independent contract driver market has caused a prevalence of owner-drivers with little unencumbered financial backing and a high level of financial vulnerability. The low start-up costs, but quick acquisition of large debts in the form of hire-purchase agreements or bank loans, means that there is a prevalence of owner-drivers relying on the current guarantee of at least cost recovery to support themselves and their families.
44. Further to, and flowing from this financial vulnerability of owner-drivers, is a practice known as 'destructive competition'. In transport this occurs where competing transport operators win commercial contracts by charging prices that are below actual cost. Without at least minimal protections operators are able to force upon owner drivers rates that do not even cover vehicle and labour costs. This has flow-on effects for employee drivers, whose employers are then encouraged to cut their terms and conditions in order to compete. As Bray succinctly concluded in his 2002 report,

"There was market failure in road transport when contract carrier rates were unregulated because the price mechanism did not effectively regulate the supply and demand of contract carriers. Furthermore, this market failure had significant and adverse consequences for industrial relations, occupational health and safety, road safety and quality of service" (Bray et al 2002, p49)

45. Harking back to the prevalence of destructive competition practices prior to the scheme's introduction in 1979, the Secretary of the Furniture Removalists' Association said in 2002,

"Mechanisms such as minimum rates (and Chapter 6) that put a floor under the income of drivers, whether employees or contractors, and provides them with basic entitlements which are necessary to prevent a return to the bad old days of the 1970s" (cited Bray, Macdonald and Waring *NCP Review of Chapter 6 of Industrial Relations Act* Employment Studies Centre, University of Newcastle 2002 p20).

46. Failure to ensure at least cost recovery leads not only to jeopardising the owner-driver business model and a stable market within which operators can compete fairly, but leads to the proliferation of unsafe systems of remuneration by putting downward pressure on pay rates in the transport industry as a whole. This is not in the public interest because inadequate systems of remuneration lead drivers to work faster and/or longer in order to survive.

47. In NSW, there has been judicial (*Inspector Campbell v. James Gordon Hitchcock* [2004] NSW IR Comm 87, Walton J, hereafter "*Hitchcock*") and coronial recognition that low rates of pay and poor conditions lead to speeding, other unsafe practices and fatigue and thereby contribute to road fatalities.

48. In *Hitchcock* His Honour the Vice President found "beyond reasonable doubt that driving whilst fatigued is a risk to health and safety" since "Fatigued drivers have a higher risk of crashing": (para

42, page 29). His Honour also found that “driving whilst fatigued” was clearly exacerbated by requirements of “directed delivery and pick up times” for truck journeys “*in the context of a clear monetary incentive to drive for excessive hours*” in combination with “excessive workloads” (para 20, page 12) – [TWU emphasis].

49. In January 2003 the Deputy State Coroner, Magistrate Dorelle Pinch, conducted an inquest and made findings in respect of the deaths of Barry Supple, Timothy Walsh and Anthony Forsyth. Amongst other relevant matters, the Deputy State Coroner found, that fatigue was the underlying factor in all three fatalities, that all three drivers had been consistently driving in excess of the legal hours and that they had been encouraged to do so by the system of remuneration in place at the company in question.
50. This recognition by the courts is supported by government-commissioned inquiries. At the state level is the substantial and wide-ranging *Quinlan Inquiry Report: Professor Michael Quinlan Report of Inquiry Into Safety in the Long Haul Trucking Industry 2001*. At the federal level, the October 2000 federal parliamentary inquiry by the House of Representatives Standing Committee on Communication, Transport and the Arts - *Beyond the Midnight Oil* commissioned by the Deputy Prime Minister, the Hon John Anderson, then Minister for Transport and Regional Services.
51. What these reports strongly suggest is that safety in the transport industry is inextricably linked with the financial and commercial arrangements pursuant to which work is performed. Accordingly, both reports support calls for more guidance and regulation.

52. The Quinlan report for instance finds that:

“Customer and consignor requirements on price, schedules and loading/unloading and freight contracts more generally, in conjunction with the atomistic and intensely competitive nature of the industry, encourage problematic tendering practices, unsustainable freight rates and dangerous work practices.

These practices along with the ease of entry into the industry, pressure from customers in a strong bargaining position to demand cheaper rates as well as poor business practices of a number of operators all lead to safety being sacrificed first to compensate for these demands.”

53. *Beyond the Midnight Oil* states:

“Unreasonable or ill-informed demands from those who use the transport industry or from agents who organise the movement of freight, have been cited as one of the greatest contributing factors to fatigue in the road transport industry (page xxxvii). Identification of the practice of “fining” drivers for being late “We were quite shocked by some of the stories told to us by drivers of their experiences of having to wait many hours to unload, unable to leave their vehicle or get proper rest, and then being expected to still be on time at their next destination.....The practice of penalising drivers for being late, while customers are not penalised for making drivers wait is not an acceptable or equitable practice” (p 133);

Productivity and Competition Remain Strong

54. No evidence exists to suggest that the transport industry in NSW is less competitive, productive or efficient than in other states which do not have industrial regulation of independent contractors. In interviewing a wide spectrum of industry participants in 2002, Bray, Waring and MacDonald found interviewees to be universally adamant that Chapter 6 “did little to reduce the intensity of competition in the industry” (Bray et al, 2002 at 75). Indeed research shows that far from extinguishing market forces, the regulation prevents market failure in the transport industry and fosters maximum market efficiency and competition.

55. The chapter 6 provisions have not extinguished the power of market forces in the transport industry. The high level of competition between owner-drivers caused by relative ease of entry and oversupply, the financial instability/dependency of drivers and the isolation of drivers from colleagues (because the nature of the driving function) means that market individualism has remained high notwithstanding the existence of the chapter 6 scheme. Further, owner-driver conditions and rates are forever capped by the operators’ choice as to the form of labour engaged. Should contractor prices increase too much, transport operators can turn to employed labour.

Case Studies Illustrating Value of the Scheme

Category 1 – Contract Agreements

56. The Union, on behalf of owner-drivers has negotiated long-term enterprise specific contract agreements with many operators in the general transport/freight forwarding/waterfront sector including the major operators such as:

- Toll;
- TNT;
- Linfox;
- Startrack; and
- Westgate.

57. In the courier sector also, enterprise arrangements exist (Toll, Allied, and Yellow Express). These agreements influence the terms and conditions of engagement of owner-drivers tied to these entities for periods of 3 years and more.

58. In the readymix concrete industry the financial investment of owner-driver small businesses is at a very high level because of the expenses involved with the purchase and running of specialised vehicles. Enterprise specific arrangements involving quite complex costing provisions taking account of the level of investment and risk have been negotiated. These deals are long-term - between eight and ten years and have been settled in major companies including:

- Boral;
- Metromix;
- Pioneer (Hanson); and
- CSR;

59. Other sectors involving similarly large investments in vehicle and/or goodwill and lengthy settled arrangements include:
- breweries (Linfox & Toll);
 - waste collection (eg. Sita & Collex); and
 - quarries (Boral & CSR)
 - car carriers (TNT).
60. Importantly, from the perspective of both owner-driver and principal contractor alike, these arrangements have been negotiated, and the relevant commercial risks assessed, within the context of and by reference to the provisions in the NSW system. There are currently over 170 such agreements covering all sectors of the transport industry.

Category 2 – Contract Determinations

GST Contract Determination - an outcome facilitating the government's legislative agenda

61. In 2000 the Coalition government introduced the GST. Leading up to the commencement date of 1 July 2000, there was great industry uncertainty as to how the new tax would interact with owner-driver rates of pay. The TWU on behalf of **all owner-drivers in NSW** made application for the *Transport Industry – GST Facilitation Contract Determination*. The determination specified the way in which the GST would be applied to owner-driver rates. The determination was made by consent on an industry wide basis. It avoided what was promising to be great uncertainty and disputation surrounding the

issue. The NSW approach was then used as a model around the country.

The Courier Determination

62. There is a large and growing number of people seeking an easily accessible avenue for self-employment by the use of their own car or small van in the courier industry in Sydney. The *Transport Industry – Courier and Taxi Truck Contract Determination* applies to courier work performed by owner-drivers. It establishes minimum contracting provisions which allow principal contractors to freely implement incentive systems of remuneration while at the same time providing a basic cost recovery safety net.
63. This determination therefore gives new entrants unfamiliar with the work a fair go at establishing themselves without the pressure of being unable to recover costs, while rewarding more experienced couriers by facilitating higher earnings for more work performed through the incentive system. The benefits for courier companies are important and include the retention of owner-drivers that they train and the promotion of efficient execution of the courier task through the rewards available in the incentive scheme.
64. Other primary industry tailored contract determinations:
 - Taxi Industry (Contract Drivers) Contract Determination;
 - Transport Industry – Car Carriers Contract Determination;
 - Transport Industry – Concrete Haulage Contract Determination;

- Transport Industry – Concrete Haulage (Mini Trucks) Contract Determination;
- Transport Industry – Excavated Materials Contract Determination;
- Transport Industry – General Carriers Contract Determination;
- Transport Industry (GST Facilitation) Contract Determination;
- Transport Industry – Quarried Materials &c., Carriers Contract Determination; and
- Transport Industry – Waste Collection & Recycling Contract Determination

Category 3 – Dispute Processes

65. In NSW the Industrial Relations Act provides for cheap, quick and efficient conciliation of disputes relating to owner-drivers.

Boral

66. In 2001 owner-drivers performing work for Boral Country who had paid hundreds of thousands of dollars for runs on the agreed basis that they would have a right to sell those runs were the subject of a unilateral and arbitrary decision by the company to terminate those runs without compensation.

67. The TWU took the matter to the Industrial Relations Commission of NSW and, in conciliation, without the need for costly arbitrated proceedings, an outcome was quickly achieved that restored

drivers to their runs at the same time as delivering to the company more productivity.

68. In very recent times, the same approach through the dispute resolution procedures of the NSW Commission with the Union at the helm has led to settlement of new contractual arrangements for Boral's Sydney metropolitan fleet and for the owner-driver fleets of all of the other major concrete cartage companies.
69. By contrast when Boral made a decision to terminate its ACT fleet of concrete owner-drivers in the same arbitrary way, the avenues for addressing the dispute were few with the result that the matter dragged on for three years thereby extending the time and cost (both financial and personal) of resolution. Upon being interviewed about his experience of the ordeal, one former ACT Boral driver recounted the following:

"When the contracts were terminated by Boral the stress at home has been unbelievable for most of us, the emotional stress plus the financial stress.... Because we had lost our jobs and our goodwill money we had to go out and had to take whatever get jobs we could get, for some this meant a 40% drop in wages - we've had to reorganise our lives and for those with kids, their kids lives. We had to renegotiate our loans to make ends meet. In my case I had to sell my house because I couldn't make the payments with the new job that I have. For others, their wives had to go out and get a job.

“The Boral ACT concrete blokes were long term people and we felt like once you’ve paid it, goodwill is your portability so when you lose it you lose your options to do another things – for some they would have used it to buy into another business or it would have given them time to get another job – we didn’t have that option now -- this affects your life, your wife and your kids”

“There’s also been the disharmony at home with the uncertainty about if and when we would get the money – husbands and wives have been arguing about this. For the older blokes they looked at the goodwill as their superannuation and now that this is gone they have been left with nothing and have to go out, at their age, and now have to start over again which is hard.”

(Dave Morgan)

Network Distribution Company

70. A change of the overarching legal entity engaging 18 owner-drivers performing *Network Distribution Company* work (magazine deliveries including *Women’s Weekly*) resulted in potential loss of goodwill paid because assignment of the business was prohibited by the proposed new contract. Settlement was reached through conciliation proceedings resulting in a satisfactory financial outcome for the owner-drivers and on-going engagement performing the same work.

Category 4 – Recourse for Arbitrary Termination of Contracts

Australian Postal Corporation v Purcells Pty Ltd

71. Mr Purcell, the director and courier “owner-driver” of Purcells Pty Ltd was engaged by Federation Couriers. In February 2002, Federation couriers was sold to Australian Postal Corporation. Upon take-over Australia Post required all of the owner-drivers to sign contracts. As at the date that Australia Post required the contracts to be signed, rates that would apply to the work had not been finalised through negotiations between the drivers committee (which included union member Mr Purcell) and Australia Post. Despite this, the contract required owner-drivers to invest money in a new or near new vehicle. Mr Purcell refused to update the vehicle until he knew what he was going to be paid for the work. At that stage on his calculations he was being paid only \$8 per hour above the fixed and running costs of his vehicle. Australia Post terminated his engagement.

72. The TWU applied to the Industrial Relations Commission of New South Wales on behalf of Purcells Pty Ltd for his reinstatement on the basis that the termination of the engagement was unjust. The Commission ordered that his engagement be reinstated with backpay to the date of termination.

Category 5 – Protection of Goodwill Investments

73. Since enactment in 1994 by the state liberal government owner-drivers have consistently used the goodwill compensation provisions

where there investment has been arbitrarily extinguished. Some cases include:

74. *Truckbug v Blue Circle Southern Cement*: To insulate companies from unjustified claims, the goodwill provisions do not apply unless the termination be unfair, harsh or unconscionable (section 349(1)). In this case the company alleged that the owner-driver was guilty of serious misconduct and terminated his engagement and thereby denied him the capacity to recover the goodwill he had paid which was around \$90 000 - \$100 000. The tribunal found the termination unfair because the company, amongst other things had required "blind adherence [to policy] without regard for developing circumstances." The tribunal awarded \$70 000 payment for investment in goodwill paid upon entry to the business.
75. *Quintrell and Belprana v Monier Roofing Pty Ltd* – Goodwill investments of \$53 000 and \$42 000 respectively recovered by order of the Tribunal.
76. *7 TWU members v Visy* (Decision pending): Visy imposed 1 year contract on long standing owner-drivers who had paid goodwill for businesses. At the end of the year, contrary to any previous indication, the company terminated the long-standing engagement of each of the owner-drivers, without any compensation for the goodwill paid (claims of between \$60 000 and \$120 000), and engaged a fleet operator.

Compulsory Conciliation of Goodwill Matters

77. A number of other cases have been decided by the tribunal in favour of owner-drivers and some (although it must be said, relatively few) in favour of principal contractors. Most cases initiated are settled because the goodwill provisions also require compulsory conciliation. Conciliation is usually conducted before the Chair of the Contract of Carriage Tribunal who has the benefit of the specific experience of the provisions and can guide the parties in realistic and persuasive ways.
78. One example of a conciliated outcome was in relation to 9 owner-drivers carting out of *Bowral Brickworks*. A new contract attempted to wipe-out goodwill investments of up to \$190 000. Settlement reached through conciliation of goodwill claim which included (as a non-confidential term) on-going contracts for 7 years.

Category 6 – Unfair Contracts

79. In *Stowar v Myer Stores Limited (t/as Grace Bros)* (50 IR 9) contracts between the first respondent (the principal contractor) and the second respondent purported to transfer the engagement of the owner-drivers to the second respondent complete with all entitlements attaching to the original contracts, including goodwill. The second respondent then sought to change the terms of engagement which would have had the effect of wiping out the goodwill entitlement. The court had express regard to the inequality of bargaining power in finding the contracts unfair.

80. In *Darren John Palmer v TNT Australia* [1995] NSWIRC 24, Justice Hungerford order \$90 000 compensation for loss of goodwill in circumstances where Mr Palmer, an owner-driver was forced by the company to change yards. There was not enough work at the new yard to sustain his business and there was therefore, no opportunity to sell the truck and goodwill to recover the investment.

**D. WAYS INDEPENDENT CONTRACTING CAN BE PURSUED
CONSISTENTLY ACROSS STATE AND FEDERAL JURISDICTIONS**

81. It is important for the committee to start its consideration of this term of reference with acknowledgement that independent contracting arrangements in fact are best viewed as a continuum of differing arrangements ranging from genuinely independent business arrangements which determine their own priorities and have some market power through to arrangements like the owner-driver model, which although providing tangible productivity and efficiency benefits has many of the hallmarks of exploitable dependency. Accordingly, some of these small businesses have attracted, and ought continue to attract, a degree of regulatory protection.

**Implications of Removing or Interfering with Chapter 6 Support
Mechanisms**

82. Lack of access of owner-drivers and the transport companies who engage them to a settled system which has provided economic certainty and industrial harmony for decades would not be in the

public interest. It would result, amongst other things, in the disruption of over 170 registered contract agreements freely entered into between owner-drivers and companies which strike an agreed, appropriate balance between fair risk/cost-recovery systems of remuneration and other essential conditions and productivity goals specific to the enterprise.

83. Absence of the Chapter 6 scheme would also jeopardise the safety of owner-drivers and the general public by enabling large multi-national companies (both consignors and freight forwarders) to exploit their naturally superior bargaining power to force unsafe systems of remuneration upon owner-drivers by requiring them to either work longer (leading to fatigue) or faster (leading to excessive road speed) in order to make a living.
84. Abolition of industrial regulation of owner-drivers would result in hardship and increased financial stress on independent contractors and exploitation of new entrants into the industry, meaning that many would fail to so much as recover their running and labour costs and threaten the financial sustainability of thousands of small businesses. Any revision of the current system must maintain the current protection of minimum standards, including a mechanism for guaranteeing remuneration rates do not fall below reasonable vehicle and labour costs.

Consistency Across State and Federal Jurisdictions

85. The committee is considering ways to approach consistency across state and federal jurisdictions. NSW is a best-practice model for

owner-drivers. The model could be confidently implemented in other states or territories. But whatever approach the committee decides upon, the NSW system ought be left alone. As this submission has shown, it works to the benefit of all players in the industry and it is a system about which no-one complains.

A handwritten signature in black ink, appearing to read 'Tony Sheldon', written in a cursive style.

Tony Sheldon

State Secretary – NSW Transport Workers Union