Submission to Standing Committee of Employment, Workplace Relations and Workforce Participation

Transport Workers' Union (Victorian/Tasmanian Branch)

Inquiry into Independent Contracting and Labour Hire arrangements

VIC/TAS BRANCH
TWU
OUR MEMBERS COME FIRST

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Introduction and background

1. The Transport Workers' Union (Victorian/Tasmanian Branch) welcomes this opportunity to provide a submission to this inquiry into independent contracting and labour hire arrangements as these are areas in which the Union has strong representation and involvement.

2. This review has been established by the Federal Government to examine the use of independent contracting and labour hire arrangements in anticipation of legislation bringing into effect the policies of the Liberal Party released in the 2004 Federal Election.

3. The Liberal Party policy is framed in terms of making it easier for individuals to operate as independent contractors without 'unnecessary' regulation or interference by third parties such as trade unions, and claims the independent contracting system is under attack by unions and union officials "seeking to strip these enterprising Australians of the right to choose how they live and work". Nothing could be further from the truth as the TWU is a trade union which does not proscribe the form in which independent contractors (owner drivers) work, but rather seeks to provide representation and encourage safe and sustainable remuneration and conditions.

Role and history of TWU

4. The representative role played by the TWU is analogous to the role played by professional associations such as employer associations, the Australian Medical Association, the Australian Dentists' Association or indeed the Australian Football League Players' Association. Each organisation has a legitimate and accepted role is representing their respective memberships in their income earning activities, just as the TWU has a legitimate role in representing owner drivers who in many cases would have similar or greater debts and investments in their own small business.

5. Another analogy in terms of such representation is the role of an employer organisation representing small businesses such as the Australian Industry Group, or the Victorian Employers' Chamber of Commerce and Industry. Those organisations are registered under the *Workplace Relations Act 1996 (Cth)* to provide representation to their eligible membership which includes small businesses. They are not prevented in this role by the Government because of the fact they are employer organisations, but are in fact recognised as performing this role with status before the AIRC. Similarly trade unions such as the TWU are registered to represent its eligible membership.

6. The capacity of the TWU to represent members of the Union is governed by the union's registered rules. Annexure B of the Union's registered rules identifies the conditions of eligibility for membership of the Union. Relevantly in respect of owner drivers, sub-paragraph D of Annexure B provides:

> *"The Union shall also consist of such independent contractors who, if they were employees performing work of the kind which they usually perform as independent contractors, would be employees eligible for membership of the Union".*

7. As such, whether a particular owner driver is at law an employee or independent contractor, the Union has eligibility to represent him/her.

8. The current proposal by the Federal Government in the *Trade Practices Legislation Amendment Bill (No. 1) 2005 ("TPA Bill")* would declare notices of collective bargaining made by unions invalid. This is an ideological attack on the proper functioning of trade unions in the representation of members and undermines the principles of freedom of association of which this Government so loudly proclaims its support. A similar attack by a Government on the AMA, the ADA, the AFLPA or indeed an employer organisation such as AIG or VECCI would not be countenanced. Arguably such a move represents the first steps in the dismantling of democratic representation and rights to participate in the economic benefits of the Australian economy and society by denying a class of people the

right to representation of their choice. For a Government that espouses "liberalism" the denial of choice should be anathema to its fundamental values, and should not be applied to any body regardless of political persuasion.

9. Consistency of independent contracting across state and federal jurisdictions will not be achieved by lessening the representative capacity of trade unions or through the removal of regulation in the area of independent contracting. Legitimate independent contracting plays an important and valued role in the Australian economy and is supported by the TWU, but not at the expense of maintaining incomes and conditions that are at least equivalent to that enjoyed by employees performing the same work.

10. Whilst the decisions of Courts and the Australian Industrial Relations Commission indicate that independent contractors can often be found to fulfill the common law definition of 'employee', most owner drivers do not enjoy the benefits and entitlements that attach to that definition. Our experience sits at odds with the notion that owner drivers in the transport industry require less regulation or representation. Owner drivers have historically had their direct economic interests advanced by the TWU which has represented them as eligible members of a trade union.

11. In Victoria and Tasmania the position of independent contractors in the transport industry is best represented by owner drivers who work for hire or reward and provide private transport generally owned by themselves or their own company. Owner drivers predominantly act as "price takers" in the market-place, and are generally not 'informed' market participants. As a result owner drivers often have no real alternative but to engage in a 'race to the bottom' in terms of remuneration and safety, often compromising maintenance of vehicles and working whilst fatigued. This is a prime example of market failure.

12. The Union understands the thrust of this review to be the examination of the interaction between the differing definitions of 'employee' between state and federal jurisdictions and the treatment of workers as legitimate 'independent

contractors' in light of such definitions. Employees have accrued rights that are able to be pursued in low cost, easily accessible systems. They can also have a trade union represent their interests without question or debate. Independent contractors in the form of owner drivers do not enjoy those same rights, except the right to be represented by a trade union such as the TWU. Where an individual is able to be characterised as an employee because they legitimately meet the common law tests of employment, they should be entitled to the full benefits such a status confers. Where an individual is identified through those same tests as an independent contractor, that person should be entitled to benefits no less than those enjoyed by an employee performing similar work. Currently many owner drivers receive remuneration significantly lower than employees performing similar work.

Status of owner drivers

13. There is no legal or technical definition of the term "owner driver." The term does however, have a well established and accepted meaning within the transport industry and more generally, which is consistent with its ordinary meaning. An owner driver is a person who primarily performs driving work for reward and who provides their own vehicle in performing such work.

14. Owner drivers either own their vehicle outright or, more commonly, the vehicle is subject to established finance arrangements such as personal loans, leases or hire purchase arrangements. In many cases, owner drivers have borrowed substantial sums to purchase their vehicle. Further, unlike traditional employees, owner drivers are responsible for payment of the operating or variable costs (i.e.; petrol, tyres, repairs and maintenance etc) and fixed costs (i.e.; loan repayments) associated with their vehicles.

15. Owner drivers operate either as sole traders, partnerships or as incorporated companies. In the past 10 years there has been a very rapid increase in the number of owner drivers operating as incorporated companies.

16. The Union dedicates considerable resources to the representation of the industrial interests of owner drivers generally and specifically those who are members. This occurs through a variety of means, including the representation of owner drivers in their dealings with the persons for whom they work, the handling of industrial disputes and the conduct of negotiations for agreements on behalf of owner drivers. In this way, the Union and its officers have developed a detailed understanding of, not only the work performed by owner drivers, but the array of industrial and other issues which they confront in their work.

Owner Drivers – Employees or Independent Contractors?

17. The traditional approach of Australian courts has been to characterise owner drivers as independent contractors engaged pursuant to contracts for services: see for example *Humberstone v Northern Timber Mills* (1949) 79 CLR 389; *Wright v Attorney-General (Tas)* (1954) 94 CLR 409.

18. The primary basis upon which the courts have favoured this characterisation is the fact that owner drivers own or provide their own vehicle in the work they perform.

19. In more recent years, the consistency and certainty of this characterisation has been brought into question. As is detailed further below, this change in approach reflected a greater recognition by the courts of the important similarities between the work and position of many owner drivers and that of traditional employees. Particular emphasis has been given to the following factors:

    (a) There is typically no difference in the actual work performed by an owner driver and the work performed by an employee understood in the traditional common law sense. The work tasks, necessary skills and competencies are the same.

    (b) Like employees, many owner drivers work for only one entity on an ongoing basis, sometimes for very lengthy periods of time.

(c) The work of owner drivers is typically subject to the same level of control and direction to which an employee is subject. That is, like employees, most owner drivers are subject to specific directions as to when, how and what work they perform.

(d) In many instances, owner drivers are closely integrated into the overall business structure of the person or entity for whom they work.

20. In practical terms, the above similarities between owner drivers and employees are made manifest by the application of work arrangements in respect of owner drivers which are the same as employees. These include the following:

(a) In many instances, an owner driver's vehicle is painted in the colours of the entity for whom he/she works and fixed with that entity's livery.

(b) In many cases, an owner driver wears a uniform provided by the entity for whom he/she works.

(c) Like employees, owner drivers are typically required to work in accordance with established business structures and processes established by the entity for whom they work, including invoicing methods, work allocation systems and the operation of radio systems.

(d) Owner drivers often work alongside employees engaged by the same entity and perform exactly the same work.

21. The main differentiating factor in treatment between the two classes of workers is the remuneration received by each worker. One is entitled to an award safety net, and the other is subject entirely to market forces.

22. The shift from the traditional approach which saw owner drivers as being independent contractors rather than employees, can perhaps most significantly be traced to the decision of Gray J in *Re Porter* (1989) 34 IR 179.

23. In *Re Porter*, Gray J revisited the older cases referred to above and the approach they set out to the question of the legal status of owner drivers. His Honour applied a more multi-faceted approach to the correct characterisation of the legal status of owner drivers, in line with the then recent decision of the High Court on the test for distinguishing between the existence of a contract of service and a contract for services (see *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16). Gray J observed (p.184):

> *"A Court determining whether a particular relationship is that of employment or of some other kind can therefore only resort to the process of balancing all of the factors, or as they are called in Stevens and other cases, the 'indicia'. In truth, the result may be a matter of impression".*

His Honour also identified that (p.184):

> *"The level of economic dependence of one party upon another, and the manner in which that economic dependence may be exploited, will always be relevant factors in the determination whether a particular contract is one of employment".*

24. In line with the above approach, Gray J rejected the submission that, consistent with the traditional approach for the determination of the legal status of owner drivers referred to above, primary emphasis should be given to the fact that owner drivers own capital in the form of their vehicle (p.185-186).

25. In applying the correct legal approach to the characterisation of the status of the owner drivers in the case before him, Gray J determined that each of the individuals concerned were employees working pursuant to contracts of service. This was so, notwithstanding the fact that they each provided their own vehicle in working for another party. Gray J found that the fact of ownership of part of the means required for the transportation of goods, was outweighed heavily by other factors indicating an employment relationship, most particularly the level of control exercised over the owner drivers by the entities which engaged them. This is consistent with the numerous factors referred to above which identify substantial similarities in the work and position of owner drivers and employees.

26. In *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, the High Court dealt with the question of whether bicycle couriers were employees or independent contractors. The bicycle couriers provided their own bicycles and were engaged under contracts which purported to characterise them as independent couriers. Bicycle couriers are one specific type of owner driver commonly working in Victoria.

27. In finding that the bicycle couriers in question were employees and not independent contractors, the Court emphasised the following matters (at p.42-44):

    (a) Notwithstanding that the couriers provided their own bicycles, the Court rejected as intuitively unsound, the proposition that they were running their own enterprise;

    (b) The couriers had little independent control over the manner of performing their work;

    (c) The couriers were presented to the public and to those using the courier service as emanations of the entity which engage them, for example, by way of the wearing of company uniforms and the carrying of the company's livery;

    (d) There was no scope for the couriers to bargain for the rate of their remuneration and the overall system of remuneration was akin to that of employees;

    (e) Aside from the actual practical exercise of control, the company which engaged the couriers, retained considerable scope for the actual exercise of control in respect of the allocation of work and the manner in which goods were to be delivered.

28. In relation to the fact that the couriers were responsible for and provided their own bicycle (a consideration formerly given primary significance in the traditional approach outlined above), the High Court stated as follows:

> *"The fact that the couriers were responsible for their own bicycles reflects only that they were in a situation of employment more favourable than not to the employer; it does not indicate the existence of a relationship of independent contractor in principle".*

This extract indicates that it is now abundantly clear that the fact that an owner driver owns and provides their own vehicle is in no way significant, let alone decisive, in determining his/her true legal status.

29. The above cases demonstrate the evolution in the legal approach to the characterisation of the correct legal status of owner drivers since the 1950s. As such, it is now unsound to proceed on the basis that owner drivers are universally or consistently independent contractors.

30. The conclusion which emerges from this analysis is that, subject to the specific circumstances and conditions upon which particular owner drivers work, some owner drivers are in fact employees at law. A further example of this is the finding of the Full Bench of the Australian Industrial Relations Commission ("AIRC") that an owner driver engaged in Victoria, in circumstances very typical of certain aspects of the transport industry, was an "employee" for the purposes of the WRA: *Sammartino v Mayne Nickless* (2000) 98 IR 168.

31. Whilst many owner drivers share the attributes of employees in the traditional common law sense, and may be properly legally characterised as employees, owner drivers generally are not afforded similar protections and rights to those enjoyed by employees and suffer disadvantage as a result. This would normally lead to representation of such a class of people being encouraged, but it appears the current proposals by the Government indicate a preference for increasing disadvantage and economic disparities in remuneration and conditions of work.

Nature of Industries in Which Engaged

32. The diverse range of areas and industries in which owner drivers are engaged include:

- General freight hire and reward
- Express Freight
- Courier, parcel & messenger work
- Concrete Carting
- Car Carrying
- Taxi Trucks
- Tip Truck work
- Refrigerated Transport
- Furniture removal
- Livestock
- Patient Care
- Oil & Petroleum
- Tow Truck
- Waste Disposal
- Building and construction

33. The particular circumstances in which owner drivers are engaged will vary to some extent across the above industry segments. Most particularly, this occurs in relation to the types of vehicles provided by owner drivers. These vehicles may range from bicycles in the courier industry, large prime movers in the general hire and reward industry (including interstate services), vehicles fixed with concrete agitators (building and construction), small vans (courier services) and 4-5 tonne vans or flat bed trucks (express services and taxi trucks).

Numbers of persons

34. The Australian Bureau of Statistics records that freight vehicles in Australia travelled an estimated 152,777 million tonne-kilometres in the 12 months ended 31 October 2003 (which includes owner drivers). This is an increase of 22,903 million tonne-kilometres travelled since the 12 months ended 31 July 1999, an average annual increase of 4.1%. An increase in tonne-kilometres was reported in all freight vehicle types (9208.0 *Survey of Motor Vehicle Use, Australia*, 21/10/2004**)**. Articulated trucks accounted for 75.7% of the total freight vehicle tonne-kilometres travelled in the 12 months ended 31 October 2003. Rigid trucks accounted for 19.9% and light commercial vehicles for 4.4%.

35. A research paper prepared for the Productivity Commission entitled, *Self-Employed Contractors in Australia: Incidence and Characteristics*, provides some insight into the number of owner drivers. It identified that in the Transport and Storage Industry, self employed contractors (defined as persons operating their own businesses, with no employees and predominantly providing labour services to their clients[1]) represented 12.1 per cent of the industry, with 3.9 per cent of these people working as dependent contractors and 8.2 per cent working as independent contractors. Transport and Storage has one of the highest levels of dependent contract arrangements (at 3.9 per cent) and is only second to Construction and Mining in this regard (4.1 per cent).

36. Using estimates based on ABS data from August 1998, the above report indicated that the number of self-employed contractors generally (not confined to the transport industry) grew by at least 15% in the last two decades.

37. An indicator of the economic contribution and importance of owner drivers emerges from an assessment of the *Victorian Transport, Distribution and Logistics Industry Action Plan- August 2002*. This publication reported that, as a conservative estimate for 1999-2000, the 'hire and reward' component of the transport and storage sector (which includes owner drivers) contributed over

[1] M Waite and L Will, *Self-Employed Contractors in Australia: Incidence and Characteristics*, Productivity Commission Staff Research Paper, Melbourne, 2001

$11.5 billion, or around 7 per cent to Victoria's Gross State Product. As at February 2001 the 'hire and reward' component of the Transport Distribution and Logistics sector employed 106,500 people, representing 4.5 per cent of total employment in Victoria.

38. In the road transport area the National Road Transport Commission Information Paper, *Driver Fatigue: A Survey of Long Distance Heavy Vehicle Drivers in Australia*, September 2001 found that 30.9 per cent of drivers surveyed were owner drivers. This group was comprised of independent owners (14 per cent) and contracted (or dependent) owners (16.1 per cent).

39. Using the above data, the Union conservatively estimates there are approximately 15,000 people working as self-employed contractors in the Victorian Transport and Storage sector. This figure is likely to increase with the expansion of the transport industry and the increased use of owner drivers. [2]

40. ACIL Tasman consultants researched the nature of the owner-driver industry in Australia in 2003 as part of the Australian Transport Council study *Heavy Vehicle Safety and Safe Sustainable Rates for Owner-Drivers, May* 2003. Unpublished data from the Australian Bureau of Statistics using taxation data and the ABS Economic Activity survey was included in this report which indicated (on a national basis) that:

- 60 per cent of businesses operating in the Road freight transport industry have no employees;

- the bulk of the employing Road freight transport industry businesses were also very small businesses;

- Own-account, non-employing businesses only accounted for 11 per cent of the income earned in the industry, yet represent the majority of businesses;

[2] Productivity Commission estimates derived from unpublished data from ABS Cat no. 6359.0 cited by Waite & Will (see Note 1)

- The average profit before tax in 1999-2000 of these businesses was $20,637 which was lower than the average earnings paid to employees in the lowest paid segment of the employed business group.

- In order to earn this income, own-account workers (owner drivers) averaged 51 working hours a week, with small employers working an average of 58 hours a week.[3]

41. These findings have a strong correlation with data presented to the McCallum Inquiry under the Victorian Industrial Relations Taskforce and the findings of the Taskforce. The Taskforce recognised the increase in the number of self-employed workers and the growth in the number of independent contractors and the likelihood that the numbers of these categories of workers would increase in the future (page 152).

42. The above material also confirms that the level of participation in the economy by people who would classify themselves as owner drivers has increased significantly in the last decade. In general terms, this growth has been in part due to the shift in employment patterns by employers away from traditional notions of "employee-employer" relationships, towards labour hire arrangements and contracting arrangements.[4]

43. The above reports and following material provide a basis to conclude that:

    (a) There are significant numbers of owner drivers operating in the Victorian and Tasmanian road transport industries. In broad terms the Union estimates that there are in excess of 15,000 owner-drivers;

[3] Standing Committee on Transport Working Group, *Discussion Paper: Heavy Vehicle Safety and Safe Sustainable Rates for Owner-Drivers, May 2003*
[4] Stewart, A., *Redefining Employment*, ALLA Conference 4/10/02

(b) The number and proportion of owner drivers in the Victorian and Tasmanian transport industries has increased in recent years, and is unlikely to abate in coming years; and

(c) This class of workers needs to be able to acquire representation such as that provided by the TWU in order to successfully negotiate remuneration and conditions.

Absence of Minimum Standards – Inferior Wages and Conditions.

44. The defining aspect of the disadvantage suffered by owner drivers is that the terms and conditions of engagement of owner drivers are not subject to any minimum prescription or minimum standards in respect of fair agreement making. The award safety net established and maintained by the AIRC has no application to owner drivers as they are not regarded as employees within the common law tests. As such, their terms and conditions of engagement are purely the subject of market forces. In simple terms, the terms and conditions of owner drivers are the product of the "law of the jungle" as established by the demand and supply for transport services.

45. This is not dissimilar to other market structures in the Australian economy, however the TWU cannot identify one other market where a class of people or businesses or precluded from representation by an organisation because that organisation is a trade union.

46. In recent years there has been a substantial increase in the number of owner drivers entering into particular segments of the transport industry. In particular, the number of owner drivers working as couriers in the Melbourne metropolitan area has increased very substantially. This reflects a number of factors, not least of which is the minimal barriers to entry for individuals seeking to enter that market. A common experience reported to officials of the Union involves individuals formerly engaged as employees, but made redundant from those positions, deciding to establish themselves as owner drivers by simply purchasing

a 1 tonne van on the basis of a redundancy payment. Stories of this kind are legion.

47. The *Driver Fatigue* study by the then NRTC found that 17.2 per cent of drivers negotiated pay rates for each load, and 43.3 per cent had ongoing contracts for some or all of their loads[5]. In the area of long distance driving owner drivers were more likely to do long trips (>1500km) whereas contracted owner drivers and large company employees were most likely to do short trips (<700km). This study found that 17.1 per cent of the drivers surveyed were paid less than the award and 19.7% did not know how their pay compared with the award.

48. The study also found that owner drivers, especially independent contractors were more likely to negotiate pay rates for all or some of their loads and were more likely than employees to be paid a flat rate per load than an hourly rate. This is significant as it indicates a high level of bargaining in the contracting process which leaves smaller operators open to misuse of power by larger companies or prime contractors in the absence of representation by someone such as a trade union official.

49. The result is that there has been a massive increase in the supply of owner drivers in particular segments of the transport industry, without any commensurate increase in the demand for such services. This has resulted in very real downward pressures on wages and conditions paid to owner drivers. As a consequence, it is common place to identify owner drivers receiving remuneration which is substantially less than what they would receive if they were employed under safety net award provisions.

50. Remuneration of owner-drivers is generally broken down to three components – labour, fixed costs and variable costs. Each component may be grouped together to arrive at an annual rate which may then be broken down to an hourly rate inclusive for all purposes. Situations where no rate increases or rate decreases

[5]Williamson, AM., Feyer, A-M., Friwell, R., & Sadural, S. (2001), *'Driver fatigue: A survey of professional heavy vehicle drivers in Australia'*, Australian Transportation Safety Bureau, CR198.

lead to a pushing down of the remuneration in real terms creates a significant impact on the operator's capacity to maintain their vehicle to a safe and legal standard. This practice has been previously examined in the Quinlan Report and the McCallum Inquiry, but has not yet been remedied.

51. An NRTC report on *Driver Fatigue* in 2001 found that independent owner drivers were more likely to report the need to do more trips to earn a living as the reason for breaking road rules (46.6 per cent), while large company drivers were least likely to do so (25.6 per cent).[6] When examined in the context of the low profit margins previously identified from ABS data this represents an alarming characteristic in the owner-driver area. This study also found a relationship between fatigue and hours worked, remuneration, and night work. This is significant because the lack of a structure that provides adequate remuneration and dispute resolution procedures compound any safety issues, as discussed by the Quinlan Inquiry report (2001).

52. The Auditor-General has recently released a report detailing some of the characteristics of independent contractors in relation to the payment of superannuation and the confusion surrounding obligations for payment of superannuation to independent contractors.[7] This report identified that of twenty-five contracts reviewed by the Auditor-General only ten had been calculated correctly, and that there was a general lack of awareness regarding the requirement to pay superannuation to independent contractors principally providing labour. This creates enormous problems in when considered in light of an ageing workforce and a shrinking tax base, particularly when the demographics of the transport industry are considered. The retirement savings gap is the gap between the retirement living standard people expect to have, and the standards that will result from compulsory and voluntary superannuation and the age pension. For men aged between 45 and 49 this gap is the amongst the worst, and reflects the demographics of the owner drivers we represent.

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[6] See Note 6

[7] The Auditor-General Audit Report No.13 2004-05, Business Support Process Audit Superannuation Process Audit Superannuation Payments for Independent Contractors working for the Australian Government, October 2004.

Operation of the *Trade Practices Act 1974 (Cth)*

53. To the extent that the Union is able to represent owner drivers and assist them in agreement making, the Union's ability to undertake such a role will become increasingly difficult and problematic if the proposed reforms to the TPA are enacted, namely ss93AB(9) of the *Trade Practices Legislation Amendment Bill (No. 1) 2005 ("TPA Bill")*. In order the TWU to negotiate collectively and within the legal limits set by Part IV of the *Trade Practices Act* 1974 ("the TPA") it is necessary for the TWU to obtain dispensation from these provisions of the TPA in the form of authorisations which may be granted by the Australian Competition and Consumer Commission ("ACCC").

54. This process has recently been the subject of review by the Dawson Review into the TPA, which led to the current Bill. One outcome of the Dawson Review which is included in the Bill is the capacity for a corporation to notify the ACCC that it has made or proposes to make a contract in the form of a collective bargain. A provision of this Bill that is particularly objectionable is the condition that such a notice is "invalid if given by a union etc. on behalf of the corporation". The section specifically says in s93AB:

> *(9) A notice given by a corporation under subsection (1) is not a valid collective bargaining notice if it is given, on behalf of the corporation, by:*
>
> *a. a trade union; or*
> *b. an officer of a trade union; or*
> *c. a person acting on the direction of a trade union.*

55. To declare notices of collective bargaining in such circumstances invalid on the sole ground that the application is made by or under the direction of a trade union or official is reprehensible. The Government has previously recognised this particular disadvantage of owner drivers by granting authorisations for collective bargaining to occur by the TWU in the concrete industry and in the interstate road freight industry. Owner drivers in other areas of the economy are similarly disadvantaged in terms of negotiations with prime contractors. This Bill is an

ideological attack on the proper functioning of trade unions in the representation of members and undermines the principles of freedom of association of which this Government so loudly proclaims its support.

56. The impediments to negotiating terms and conditions for owner drivers on a collective basis can usefully be contrasted with the position of employees under the WRA. That Act establishes a comprehensive regime by which employees may bargain collectively in respect of their terms and conditions of employment and the means by which such matters can be recorded in legally enforceable instruments (certified agreements). Unlike their co-workers employed under contracts of service, owner drivers have no such rights.

57. The status of owner-drivers as "price-takers" is evidenced by Bureau of Transport and Regional Economics (BRTE) figures that estimate the road freight rates for interstate haulage in Australia as having decreased by 46% in "real" terms since the mid 1960's. These same figures estimate a real decrease of interstate haulage rates of 4% over the last decade. This is representative of a significant lack of bargaining power for owner-drivers, and if anything creates a compelling argument in support of the capacity for trade Unions to negotiate collectively on behalf of individual owner drivers.

Difficulties in Respect of the Enforceability of Agreements

58. To the extent that owner drivers are able to negotiate wages and conditions on a collective basis, such a capacity does not then eliminate the disadvantage to which they are subject as compared to employees. In particular, certified agreements are made legally enforceable under the WRA. Collective agreements negotiated for owner drivers are unable to be certified under the WRA and depend entirely on the common law for their enforceability. The courts have clearly recognised the numerous difficulties associated with ensuring the legal effectiveness of unregistered collective agreements (see for example *Ryan v TCFUA* [1996] 2 VR 235). Accordingly, even if owner drivers are able to negotiate their terms and conditions collectively in some manner, in many instances they can not be

confident that such agreements are legally enforceable. This makes it all the more important that ss93AB(9) be removed from the proposed amendment to the TPA.

59. The disadvantages experienced by owner drivers result in a wide range of exploitative and unfair practices in agreement making and patently unfair and unreasonable terms and conditions being "agreed" to by owner drivers. Examples of issues that commonly arise in contracts with owner-drivers include:

- bargaining on a "take it or leave it" basis;
- the inclusion of contractual terms which permit termination of an owner driver's services without any notice and for any reason;
- the inclusion of contractual terms which permit prime contractors to withhold for many weeks, after the termination of the contract, monies otherwise due and payable to an owner driver
- pressure and duress by prime contractor for owner driver to incorporate
- the imposition of low rates
- late payments of invoices
- late or non-payment of final invoices
- insurance liabilities being shifted to owner driver without adjustments to remuneration
- termination at short notice or without notice
- lack of redundancy pay
- lack of dispute resolution forum leading to capitulation by owner driver in respect of demands made by prime contractors
- non-observance of occupational health and safety standards
- workers' compensation costs being shifted to owner driver without adjustments to remuneration
- superannuation costs being shifted to owner driver without adjustments to remuneration
- increased costs of taxation compliance (particularly with the effects of the GST and the *New Business Tax System (Alienation of Personal Services Income) Act 2000*)
- inability to recover tolls from roads

- imposition of radio fees
- imposition of administration fees
- imposition of uniform fees
- costs of livery and removal of livery
- deductions from final payments for unknown extras
- prohibitions on post-engagement work with the prime contractor's customers
- contracts that attempt to exclude Union involvement and representation
- attempts to characterise contracts with owner-drivers as commercial contracts or franchise or distribution agreements rather than contracts of carriage or contracts of service
- attempts to pay a labour rate which is less than the award or agreement rate

Unsafe Work Practices

60. One aspect of unfairness in respect of the terms and conditions upon which owner drivers work concerns their hours of work. The issue of safe driving hours has been the subject of considerable public concern and legislative initiative by both Federal and State governments. Despite this, some owner drivers, particularly those in the long distance transport industry, are subject to very real pressures to work unduly long hours in contravention of various driving hours regulations in order to obtain and retain work.

61. This situation is able to develop in part due to the absence of fair standards of agreement making and other minimum working standards applicable to owner drivers. This view is supported by the expert recognition of the existence of a link between unfairness in agreement making and the extent of non-compliance with occupational health and safety standards. The *Report of Inquiry into Safety in the Long Haul Trucking Industry*, by Professor Michael Quinlan clearly identifies the effect of inadequate rates and an operator's capacity to maintain their vehicle to a safe and legal standard:

> *"Minimum payments made to owner/drivers are also a serious issue, since these drivers directly compete for work with employer/employee drivers and financial pressures occasioned by inadequate returns lead fairly directly to*

> *compromises in terms of vehicle maintenance, driving hours, drug use, and other critical safety issues. There is a serious imbalance in the present system which sets a minimum wage rate for one group of workers in an industry while another group undertaking precisely the same tasks and, indeed, competing, with the former for work, is exempted. It creates a strong inducement to use subcontracting and shifts in employment status as a means of gaining a competitive advantage. This might be acceptable in some industries but not in the highly competitive road transport industry where efforts to remain viable by owner/drivers and transport firms often lead to compromises on safety, that, in turn, pose a serious risk not only to drivers but other road users." (at p.222-223)*

Absence of "Employment" Security Provisions for Owner Drivers

62. A further disadvantage suffered by owner drivers is that, although they perform the same work as a driver engaged as an employee, they do not enjoy the range of employment security arrangements to which employees are entitled.

63. As the common law does not in general terms import into contracts a prohibition on the "unfair" termination of contracts, owner drivers in many circumstances are entirely vulnerable to termination of their services on spurious or non-existent grounds. Consequently, in many instances, the only remedy potentially available to some owner drivers who are aggrieved at a decision to terminate their services, is to challenge the decision by an action in the common law courts for breach of contract which again requires representation of that owner driver by a representative organisation such as the TWU.

64. Beyond the above disparity in the entitlements of owner drivers and employees, in many cases, owner drivers are in greater need of compensation for the loss of their "engagement" than employees. This arises from the fact that, unlike employees, owner drivers also provide the vehicle which they drive. Typically, the vehicle has been obtained via various finance arrangements which require regular payments, and in some circumstances, the vehicle has been updated or modified on the request of the prime contractor. The owner driver will typically be responsible for the additional costs incurred. In these circumstances, the vehicle servicing costs to which an owner driver is subject means that the loss of their engagement brings with it considerably greater adverse effect than those to

which employees are subject to. In addition, the purchase of the vehicle will often be by way of mortgage of the owner driver's own house. The result is an increased propensity for owner drivers to be "price-takers" in the market place and to agree to unfair terms or conditions which can cause significant problems for other market participants.

65. In summary, owner drivers are subject to very real and far reaching disadvantage as compared to persons performing the same work as employees. In the Union's submission, these aspects of disadvantage establish a compelling basis for the Government to allow and encourage Unions to validly notify the ACCC of collective bargaining and actively engage in collective bargaining on behalf of independent contractors within the terms of the TPA. Further, the Government should ensure the characterisation of 'employees' and 'independent contractors' allows only legitimate independent contracting to occur, and not as a means of undercutting the comparable safety net rates of pay of employees in an unsafe and unsustainable manner.

Labour Hire

66. This submission addresses the areas of independent contracting and labour hire in separate sections, though similar issues arise in terms of the 'employment-like' circumstances and vulnerability to exploitative market behaviour of other parties.

67. Labour hire arrangements have proliferated over the last 10 years and have recently been the subject of an inquiry in Victoria. We do not object to labour hire *per se* but rather the manipulation of labour hire arrangements so as to avoid the payment and provision of minimum entitlements enjoyed by directly employed workers. This may be done by a variety of mechanisms, but it has significant safety implications for the worker concerned and the other parties.

68. The lack of proper safety inductions and auditing of compliance with occupational health and safety standards in the labour hire area compounds the

potential hazards for a worker engaged in precarious employment with little bargaining power.

69. Labour hire employment is inherently precarious in nature. Union concerns regarding labour hire centre on the provisions of substandard wages and employment conditions, the inadequate application of occupational health and safety and equal employment opportunity laws to labour hire employees, the polarisation of labour hire employees from the permanent workforce and income and job insecurity associated with labour hire employment.

70. In recent times, the growth in the freight industry has outstripped growth of the general economy. It is predicted that road freight is expected to increase from 20 per cent of Australian freight transport in 1971 to 51 per cent in 2015 (Bureau of Transport and Communications Economics).

71. This increase in the freight task will necessitate a corresponding increase in labour. The trend in recent times to satisfy the growth in the freight task has been an increase demand by employers for non-standard types of employment, or precarious employment, such as casual and labour hire workers.

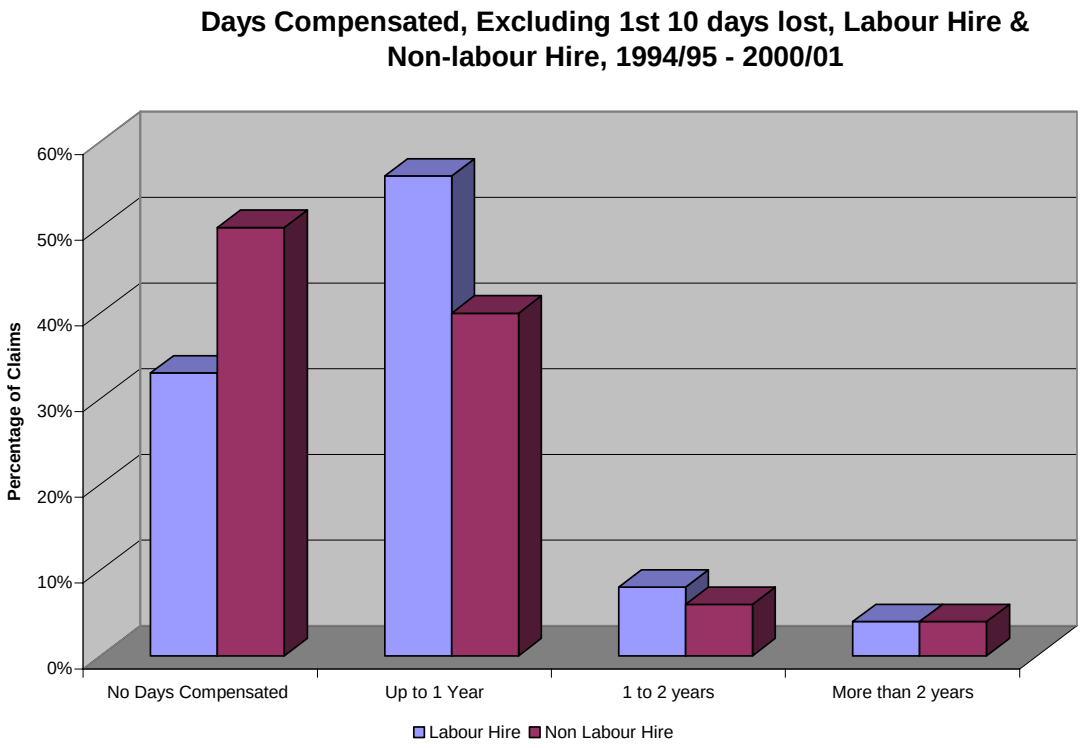
72. With the increased use of labour hire comes a greater examination of the relationships that exist between the host employer (the labour hirer), the labour hire firm (the labour acquirer) and the employee (the labour provider). The obligations and relationships between the parties are usually not made clear at the commencement of employment, and the employee may work for extended periods without knowing who his true employer is. Whilst day to day directions may be received by a manager from the host employer, the payroll function and 'engagement' of the employee will usually be performed by the labour hire firm. This can cause the employee significant anxiety, particularly in situations where disputation arises. In light of the ambiguous relationship, the employee will be reluctant to raise potentially serious issues for fear of being told by the labour hire firm that the host employer no longer wishes to have them work there. Serious issues such as occupational health and safety risks, sexual harassment,

discrimination, and bullying may fail to be brought to the attention of the host employer or the labour hire firm because of the insecurity of employment created by the labour hire relationship. This is of significant public policy concern and requires clarity in terms of the obligations that exist between the relative parties.

73. For the individual worker, obtaining loans and meeting financial commitments can be extremely difficult in situations where no job security exists. Non-standard, or precarious types of employment, are generally associated with increased income and job insecurity. Labour hire workers often do not know whether they have work the following day. Job insecurity has a major economic, social and health and safety impact for labour hire workers.

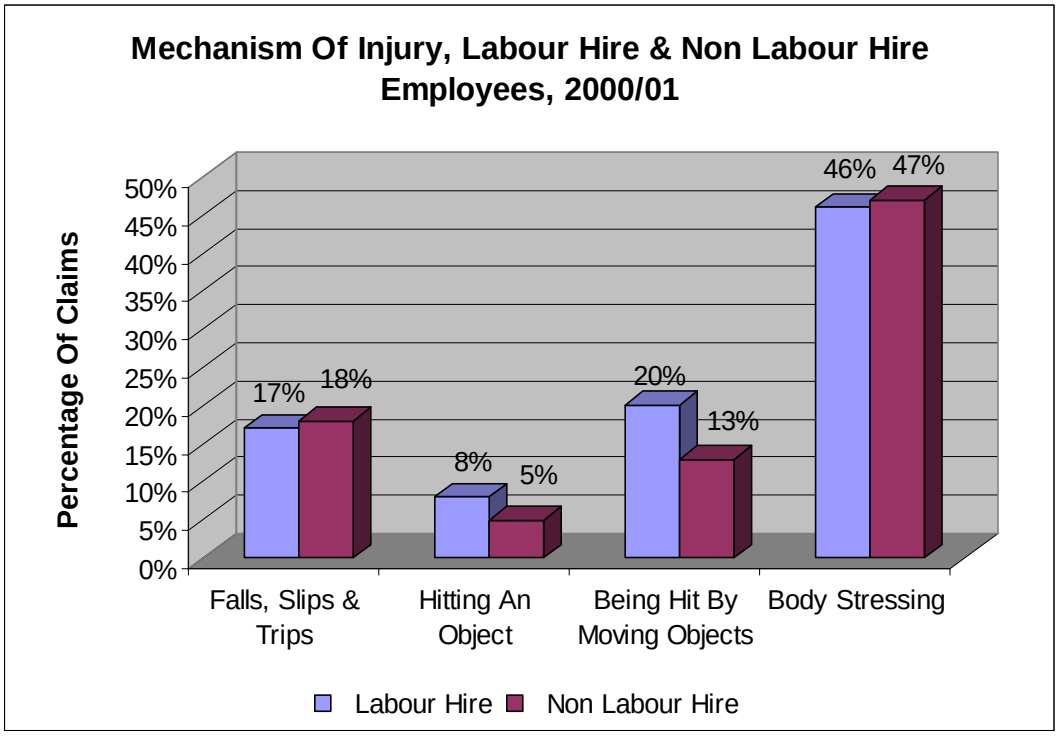
74. Labour hire employees have reduced access to training and therefore a diminished investment in skills. This reduced access to training has the potential to lead to deaths and injuries in the workplace, particularly where labour hire employees have not been appropriately inducted. Labour hire employees are often engaged in tasks they are unfamiliar with or using equipment that they have not previously used. Figure 1 illustrates the days compensated for labour hire and non labour hire workers. Labour hire workers are more susceptible to longer term injuries. In addition, Figure 2 suggests that labour hire workers are more susceptible to injuries where they are hit by an object or hit by a moving object.

Figure 1



Source: WorkSafe Victoria Action Data base

Figure 2



Source: WorkSafe Victoria Action Data base

75. Labour hire workers often do not receive penalty payments for overtime for work outside traditional working hours. Moreover, they often do not receive annual leave, sick leave, long service leave and other entitlements associated with permanent employment, in part because they may not stay in a workplace long enough to accrue the entitlement.

76. Labour hire employees are commonly polarised from the permanent workforce. The Union delegate and occupational health and safety representative are often denied coverage of labour hire workers engaged in the workplace, placing them at a distinct industrial disadvantage. The vulnerability of labour workers that voice their concerns regarding safety, harassment or working conditions is

evident. The fear of job loss is also an impediment to labour hire workers speaking out on other industrial issues.

77. The Union makes the following recommendations in relation to labour hire employment:

a. that labour hire workers should be required to be properly inducted into host workplaces by the company occupational health and safety representative and the Union delegate;
b. The benefits of the Enterprise Bargaining Agreement or Award of the host company should be passed onto labour hire workers in summary form at work commencement;
c. Labour hire workers should be employed as permanent employees by the labour hire company;
d. Maximum placement times should be adopted. At the expiry of the prescribed placement time, the labour hire employee should be transferred to a permanent employee of the host company;
e. Union delegates and occupational health and safety representatives should have coverage of labour hire employees as part of the entire workforce;
f. A labour hire employee should be entitled to 5 days paid industry and OHS training each year to enable them to maintain contact with industry trends and competency standards.