

Submission to the Senate Inquiry into Small Business Employment

1. The Transport Workers' Union of Australia ("the TWU") is a registered organisation pursuant to the Workplace Relations Act 1996.
2. The TWU represents approximately 80,000 members. The membership of the union is predominantly in the road and air transport sectors.
3. Up to one quarter of the TWU membership are regarded at law as independent contractors. Most are involved in general freight delivery contracting to major companies in the road transport sector such as TNT, Mayne Nickless and Toll. However significant numbers of member owner-drivers are found in the courier industry, building industry, tipper trucks and long distance freight.
4. As such the TWU is in a unique position as being able to represent employees who work for small businesses, and also numerous independent contractors who predominantly use their own truck and labour and are running their own business.
5. The TWU believes that there are some significant areas where Government policy is causing small businesses and our membership in the transport industry substantial difficulties.

Wage rates and Employee Safety in the Transport Industry

6. It is vitally important in the road transport sector that wage rates are maintained at a secure and relevant level.
7. Most small businesses are "price-takers" in the market place. Indeed most businesses in the road transport sector are price-takers. This is because the company seeking that its goods be transported often has a significant number of companies who could cart its material.
8. Accordingly, competition is often fierce. This means that downward pressure is exerted on the rates that companies tender at in the industry. However there are relatively few areas where costs can be moved downwards. Indeed most costs in the industry are common. For example the cost of capital in terms of interest rates is common. The cost

of fuel is common across the industry. Most of the vehicle types used in the industry are common, and the roads used are virtually identical, even within city driving. Finally as a result of uniform speed laws, fortunately, it should not be possible to require employees to drive faster to gain a competitive edge.

9. Accordingly, there is extensive pressure on wage rates to be the basis of competition in the road transport industry. This means that the downward pressure exerted on delivery rates is translated into downward pressure on wage rates.
10. However decreasing wage rates is not a socially optimal solution. Downward pressure on wage rates leads to increased risks for employees in the industry and the travelling public generally. This is because it creates an impetus for drivers to work longer and harder to maintain their purchasing power. The need for drivers to drive longer and faster for static real wages has been well documented. Even more readily accessible is the impact this is having on the safety of drivers.
11. In the Truck Safety Benchmarking Study which was commissioned by the National Road Transport Commission Australia's heavy vehicle fatal crash rate per kilometre traveled was found to be 47% higher than the USA and 39% higher than the UK. The simple fact is that Australia has a long way to go on road safety to reach international best practice. Policies should be designed to help Australia achieve such a status, not detract from it.
12. The nexus between wage rates and safety of employees in the industry and the public generally must be recognised as a crucial element in the road transport industry and an element which must be confronted by all policy-makers in road transport.
13. In effect drivers are required to work longer and drive harder to maintain their wage. In such circumstances they become increasingly fatigued and the risks of accident and serious accident in many circumstances correspondingly increases.
14. The TWU believes that Government policy on wage rates has increased the risks which employees are exposed to in this area. Government policy has ensured that competition in the sector has been concentrated on wage rates. Numerous examples

exist of enterprise or individual agreements which require drivers to work longer and harder to maintain their purchasing power.

15. The TWU submits that the Government's policies on workplace relations and small businesses serve to increase the risks to the travelling public and the pressure felt by many owner-drivers and operators in the road transport sector.
16. An alternative which would lead to increased safety and a recognition of the nature of risks within road transport would be one where bargaining over wages and conditions should be allowed to occur on an industry basis.

Head Contractor Powers

17. Many of the members we represent work as small businesses sub-contracting as independent contractors to substantial businesses ("the head contractors"). These businesses operate in areas as diverse as courier work, concrete cartage, delivery of bread, and general freight.
18. Over the past decade there has been a substantial increase in the proportion of the workforce who are involved in contracting to companies.¹
19. At the same time there has been an increasing recognition that there is a proportion of the workforce who are neither genuine employees nor genuinely independent contractors. They are said to be "dependent contractors". They are self-employed for legal purposes but are dependent upon the hiring organisation to whom they provide their services. In most cases they do all their work to the one contracting entity. In the transport industry this occurs where courier drivers work to the one courier company, concrete carters work to the one concrete company and many longhaul drivers contract to the one long distance organisation.
20. The single hiring organisation provides the work and the pay and the "dependent contractor" is in a position very similar to that of an employee.²

¹ See for example Morehead A, Steel M, Alexander M, Stephen K & Duffin L (1997) *Changes at Work; The 1995 Australian Workplace Industrial Relations Survey*, Longman Cheshire, pp46 and following and *National Institute of Labour Studies Survey (1994)* in Australian Centre for Industrial Relations Research and Teaching (1998) *Australia at Work: Just Managing ?* Prentice Hall

21. In virtually all cases the dependent contractor is a small business contracting to the larger organisation. However unlike a genuinely independent small business the company is often completely at the whim of the head contractor.
22. The contracts which are standard form contracts which no dependent contractor is given the opportunity to vary, and the contracts advise the dependent contractor what the rate of pay will be for all components of the work.
23. Indeed in many cases the head contractor specify the type of truck to be used, what decals are to be exhibited, uniforms to be worn, starting and finishing times and the method by which the work is to be performed.
24. Ultimately in many cases while the dependent contractor is bringing their own vehicle and often their own tools they also bring their own labour. They are frequently unable to contract to any other company through restraint of trade clauses in their contracts. In many respects they exhibit many characteristics of an employee.
25. The difficulty that exists is that the means of the independent contractor protecting themselves are becoming less accessible.
26. Dependent contractors, while sharing many characteristics of employees cannot undertake protected industrial action to negotiate changes to their wages and conditions. If the dependent contractor engages in any form of industrial action they leave themselves open to breach of contract and loss of work, common law torts and Trade Practices Act claims.
27. The dependent contractor is exposed to massive financial penalties should they seek to act in the manner that an employee would act.
28. Further, many head contractors are requiring that their contractors incorporate. We presume that this is required for two reasons. Firstly it makes the contractor less likely to be found to be an employee at common law.

² See Vandenhoevel A & Wooden M (1995) *Self-Employed Contractors in Australia: How Many and Who are they ?* 37 Journal of Industrial Relations.

29. Secondly and far more insidiously this is being pursued to avoid any possibility that the dependent contractor can seek to argue that the contract is harsh or unfair pursuant to sections 127A through to 127C of the *Workplace Relations Act*.
30. The inability of a dependent contractor to bring proceedings to review harsh or unfair contracts ensures that owner drivers have to accept the rates and other conditions which the head contractor proposes or they do not receive work. Further they have to accept the terms and conditions imposed upon them such as starting and finishing times, meal breaks and operating requirements.
31. After payment of vehicle and other running costs the rates of pay which many owner-drivers receive are in many instances far below equivalent award rates of pay.
32. The problem that this creates is magnified many times over because of the ability of businesses to ignore the existence of goodwill payments which may be paid by the owner operator to purchase their run.
33. In such circumstances owner operators are unable to ensure that they are in receipt of a reasonable, relevant and secure minimum income.
34. The TWU seeks, in the light of these experiences, a broader power for the Federal Court and/or the Australian Industrial Relations Commission ("the Commission") in dealing with dependent contractors to remedy these problems.
35. It is clearly the case that the meaning of "industrial dispute" within the Constitution has, at least since the decision of *R v Coldham; Ex parte The Australian Social Welfare Union* (1983) 153 CLR 297 been capable of dealing with disputes which are not just limited to disputes between employer and employees.
36. However the definition of industrial dispute as found in section 4 of the *Workplace Relations Act 1996* has artificially limited the meaning of industrial dispute by the existence of matters pertaining to the relationship between employer and employee.

37. The TWU believes that the Commission should be given the power to deal with disputes between dependent contractors and the head contractor. This would ensure that there were minimum terms and conditions which are enforceable for this form of contractor.
38. The TWU further believes that the proscription on incorporated entities seeking to use section 127A-127C of the *Workplace Relations Act* should be removed. The Court should be entitled to review harsh or unfair contracts between any dependent contractor and the head contractor.
39. These two changes would provide our small business members with a greater capacity to ensure the stability of their business and would also provide for increased protection in their position of disadvantage.

Trade Practices Act

40. As indicated above numerous contractors in the transport industry are dependent contractors. This means that notwithstanding the investment they have made (and in some cases the investment is very large indeed) in purchasing their truck they are essentially required to contract to just the one business.
41. A classic example is in relation to the concrete cartage business. In this business the head contractor often owns "the barrel" where the concrete is actually mixed. As such the concrete carter owns the truck and often purchases a "run" as a going concern paying goodwill for the run.
42. However they are often in a position of special disadvantage compared to the head contractor because their income is dependent upon the one source.
43. The TWU submits that the Trade Practices Act should recognise the circumstances and the position of dependence that many contractors in the transport industry are in.
44. One obvious way of remedying this is by the ACCC being more ready to provide exemptions in circumstances of collective bargaining by dependent contractors. At the present time the difficulty many such contractors have is that if they engage in

collective bargaining they are alleged to engage in an abuse of market power or price fixing and/or collusion.

45. However the truth is that they are acting in a manner that is identical to how employees act in that they are collectively seeking to balance the market power which is being exercised over them by the head contractor.

46. Accordingly the TWU submits that the Trade Practices Act should be amended to allow dependent contractors to access the protected action provisions of the Workplace Relations Act.

47. We further submit that the Trade Practices Act should be amended to include the circumstances of dependent contractors as being persons in a position of special disadvantage. We submit that only by this mechanism can such contractors be given the opportunity to avail themselves of the mechanisms in the Trade Practices Act.

Superannuation in the Transport Industry

48. The TWU believes that for employees in the transport industry the superannuation minimas are well recognised to be insufficient to provide for adequate retirement incomes.

49. However we are also crucially concerned with superannuation payments for dependent contractors. As indicated previously, the contractors in this industry in many respects perform a role which is extremely similar to that of an employee. However, unlike employees in the industry there is no entitlement to superannuation. Such contractors remain at a significant financial disadvantage by comparison to the employees in the industry and need to provide for their own superannuation.

50. Again the outcome of this is that there is a significant risk that adequate retirement income will not be properly provided for. The impact of this in a long term sense will be increased numbers of Australians who will not be able to adequately fund their retirement.

51. The TWU supports the idea that the superannuation percentage which is payable to employees should be payable to dependent contractors. This policy would ensure that the small businesses that we represent are not left behind for superannuation purposes and that the head contractors are not using contractors for the purposes of shifting risk from themselves to their dependent contractors. This policy would instead demonstrate that the decision to use contractors is based upon a genuine business model aimed at both the head contractor and the dependent contractor sharing in the benefits of the business model.