

---

Submission to Senate Employment, Workplace Relations and  
Education Legislation Committee

***INQUIRY INTO THE PROVISIONS OF THE  
INDEPENDENT CONTRACTORS BILL 2006  
AND WORKPLACE RELATIONS AMENDMENT  
(INDEPENDENT CONTRACTORS) BILL 2006***

25 July 2006  
The Transport Workers Union of Australia

---



NSW/ACT State Secretary  
Tony Sheldon



Vic/Tas State Secretary  
Bill Noonan



Qld State Secretary  
Hughie Williams



WA State Secretary  
Jim McGiveron



SA/NT State Secretary  
Alex Gallacher

**Submitted by:** Transport Workers' Union of Australia

**Organisation:** Transport Workers' Union of Australia

**Address:** Quinn House  
31 Cowper Street  
Parramatta NSW 2150

**Phone:** 02 9912 0788

**Fax:** 02 9689 1844

**Email:** [tony.sheldon@nsw.twu.com.au](mailto:tony.sheldon@nsw.twu.com.au)

---

**Emailed to:** John Carter  
Secretary  
Senate Employment, Workplace Relations and Education Committee  
Department of the Senate  
[eet.sen@aph.gov.au](mailto:eet.sen@aph.gov.au)

**Submission to Senate Employment, Workplace Relations and  
Education Legislation Committee**

***INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT  
CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS  
AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006***

**Contents**

<b>A.</b>	<b>EXECUTIVE SUMMARY</b> -----	<b>5</b>
<b>B.</b>	<b>TWU REPRESENTATION OF OWNER-DRIVERS</b> -----	<b>10</b>
<b>C.</b>	<b>THE UNIQUE STATUS OF OWNER-DRIVER SMALL BUSINESSES</b> -----	<b>11</b>
<b>D.</b>	<b>ADDRESSING VULNERABILITY - MINIMUM STANDARDS AND PROTECTIONS</b> -----	<b>12</b>
	<b>Current Arrangements for Owner-Drivers in New South Wales</b> -----	<b>13</b>
	Chapter 6 of the Industrial Relations Act 1996 (NSW) -----	13
	Contract Determinations -----	17
	Contract Agreements -----	17
	Settled Transport Industry Arrangements in NSW -----	18
	<b>Current arrangements for owner-drivers in Victoria</b> -----	<b>19</b>
	Owner Drivers and Forestry Contractors Act 2005 (VIC) -----	19
	Addressing the information imbalance -----	20
	Joint Negotiations -----	21
	Code of Practice -----	21
	Preventing unfair business practices and unconscionable conduct -----	22
	Dispute Resolution -----	22
	<b>Proposed arrangements for owner-drivers in Western Australia</b> -----	<b>23</b>
	Road Freight Transport Industry (Contracts and Disputes Bill) 2006 (WA) -----	23
	<b>Queensland and the Australian Capital Territory</b> -----	<b>25</b>
	<b>D: COST RECOVERY, STABILITY AND SAFETY</b> -----	<b>26</b>
	<b>Cost Recovery and Stability</b> -----	<b>26</b>
	<b>Safety</b> -----	<b>28</b>



NSW/ACT State Secretary  
Tony Sheldon



Vic/Tas State Secretary  
Bill Noonan



Qld State Secretary  
Hughie Williams



WA State Secretary  
Jim McGiveron



SA/NT State Secretary  
Alex Gallacher

<b>E: PRODUCTIVITY AND COMPETITION REMAIN STRONG</b>	<b>31</b>
<b>G: UNFAIR CONTRACTS THE REGULATION MAKING POWER</b>	<b>32</b>
Unfair Contracts	32
Regulation Making Power	33
<b>G: CONCLUSION</b>	<b>33</b>
<b>ATTACHMENT “A”</b>	<b>35</b>
Details of Owner-Driver Minimum Standards in NSW	35
Current Arrangements for Owner-Drivers in NSW	36
Contract Determinations	36
Contract Agreements	36
Dispute Resolution	37
Associations of Employing Contractors and Associations of Drivers & Carriers	37
Remedies	37
Case Studies Illustrating Value of the Scheme	38
<b>ATTACHMENT “B”</b>	<b>46</b>
<b><u>STATEMENT OF JAMES MCGIVERON</u></b>	<b>47</b>

## Submission to Senate Employment, Workplace Relations and Education Legislation Committee

### ***INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006***

---

#### A. EXECUTIVE SUMMARY

1. The Transport Workers' Union of Australia ("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, and it is estimated that the remaining 15-20% are 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 often highly dependent upon those with whom they contract. Owner-drivers are price takers in the market place. This dependence leads to inequality of bargaining power and the associated potential for exploitation.
3. The Minister's announcement of 3 May 2006 and his second reading speech regarding the Bill recognises that owner-drivers, like outworkers, have particular vulnerabilities which merit specific protection. In his second reading speech the Minister said this about the Owner-Driver exemptions:

"The Principal Bill will maintain existing legislation in NSW and Victoria with respect to owner-drivers in the road transport industry.

While the Victorian legislation has only recently been passed, in NSW there has been bi-partisan support for special arrangements for owner-

drivers. These arrangements include allowing owner-drivers to bargain collectively with transport operators, and have minimum rates of pay and goodwill compensation set by a tribunal. These provisions in State legislation will remain, given the special circumstances of owner-drivers in having to operate within very tight business margins because of the large loans they have to take out to pay for their vehicles.”

Accordingly, the Bill expressly preserves owner-driver provisions in NSW and Victorian Legislation which help make the owner-driver small business model economically viable and safe.

4. In New South Wales and Victoria there is a degree of basic 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.
5. Importantly, the protections include provisions aimed at 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.
6. In New South Wales benefits are delivered, in large measure, through the many and settled enterprise and industry sector arrangements established through the New South Wales system, arrangements which have the support of the industry. There are over 170 enterprise specific arrangements relating to owner-drivers. The regulatory protections in New South Wales 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.

7. The Victorian system is based on a small business model that establishes a framework of protection for owner-drivers to prevent unconscionable conduct and the use of unjust terms in contracts. This legislation draws on the consumer protection provisions in Part V of the *Trade Practices Act 1974 (Cth)*, the *Fair Trading Act 1999 (Vic)* and the *Retail Leases Act 2003 (Vic)*. This model is supported by the Victorian Transport Association (the main peak body for transport operators in the state), and is currently being implemented by a Transport Industry Council comprising amongst others, representatives of the Victorian Employers' Chamber of Commerce and Industry (VECCI) and the Australian Industry Group.
8. In Western Australian and the Australian Capital Territory the broad nationwide base of industry support is again seen in the industry consultation processes that have led to legislation of the same character imminent in Western Australia and tabled in the ACT. The Bill as presently drafted will override the operation of those pending State laws. In Queensland there are currently legislative provisions utilised by owner-drivers.<sup>1</sup>
9. The TWU notes with concern that section 10 of the Independent Contractors Bill confers a broad regulation making power which makes express reference to the NSW and Victorian exemption provision.<sup>2</sup>
10. The Unfair Contracts provision of the Independent Contractors Bill envisages a system which in a number of key respects is inferior to the current NSW and Queensland provisions which it will override.<sup>3</sup>

---

<sup>1</sup> See paragraphs 23-59, below, for detail.

<sup>2</sup> See paragraph 81, below, for detail.

<sup>3</sup> See paragraph 80, below, for detail.

11. The Workplace Relations Amendment (Independent Contractors) Bill contains provisions relating to sham independent contracting arrangements. The Union is concerned that the provisions guarding against misrepresentation of the nature of the relationship are undermined by a defence which operates as an “out clause.” In addition it is concerned that those supposedly protective provisions are too narrowly confined when they refer to representations made to an “individual.”

12. Accordingly, the TWU calls upon the Committee to recommend the following in relation to the Bills:

- (i) Retention of the exemption provisions preserving the operation of the NSW and Victorian schemes, contained in subsection (2) of section 7 of the Independent Contractors Bill;
- (ii) Expansion of the exemption provisions of the Independent Contractors Bill to permit the continued operation of Queensland laws and to permit future State and Territory Laws to provide protections for owner-drivers against the vulnerabilities identified by the Minister in his 3 May press release and second reading speech. In this regard the Union in particular notes the pending enactment in Western Australia and the tabled legislation in the ACT.
- (iii) Amendment of the Unfair Contracts provisions of the Independent Contractors Bill to:
  - (a) Permit the unfair contracts provisions of the NSW and Queensland Acts to continue to apply to actions brought by or on behalf of owner-drivers; and/or
  - (b) Provide the Court with the **express** power to do the following:



- Make an order for compensation;
- Make an order with respect to a contract which has come to an end; and
- Examine and make an order with respect to a contract that has become unfair through the conduct of a party or parties to the contract or through the operation of the contract for some other reason.

(iv) Amend the Workplace Relations Amendment (Independent Contractors) Bill to:

- Clarify the meaning and effect of the reference to “individual” in section 900 (1) and 901(1) to ensure that the provision is not circumvented simply by the person making the representation to another person or entity as opposed to an “individual”; and
- Delete subsections (2) of both section 900 and section 901 or Amend paragraphs (a) of each of those subsections to ensure that the belief held by a person when making the representation was reasonable in all of the circumstances and by deleting paragraphs (b) of both of those subsections.

## B. TWU REPRESENTATION OF OWNER-DRIVERS

13. The TWU has been the subject of some uninformed and therefore unjustified criticism in respect of its representation of owner-drivers. Owner-drivers have been choosing the TWU to represent their interests since the 1920s. Nationally, a significant number of TWU members (around 30%) operate as small businesses in the form of owner-drivers. Around 80-85% of these businesses are corporations; the remainder operate as sole traders or partnerships.
14. 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 owner-drivers 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.
15. The TWU is committed to protecting the important benefits which flow from appropriately maintained small business structures in the transport industry. The TWU has, with the widespread support of industry, most recently sought that owner-driver vulnerabilities be addressed through legislation in Victoria, and substantially similar pending legislation in Western Australia and tabled in the ACT.
16. On behalf of the owner-drivers that are a core component of its constituency, the TWU makes this submission regarding the *Independent Contractors Bill*

**C. THE UNIQUE STATUS OF OWNER-DRIVER SMALL BUSINESSES**

17. It is important for the committee to acknowledge at the outset 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. 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.
18. 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.
19. 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;
- have little or no power to set price, rather they take the price they are given; and
- operate with very tight margins

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

20. 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.

#### **D. ADDRESSING VULNERABILITY - MINIMUM STANDARDS AND PROTECTIONS**

21. On 24 January 2005, the Workplace Relations and Workforce Participation Committee stated:

“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.”

22.The statement acknowledges the need for flexibility with appropriate protection acknowledging owner-drivers are in a uniquely vulnerable position. In New South Wales and Victoria (with legislation pending in Western Australia and the ACT) 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 maintenance of thousands of owner-driver businesses.

### **Current Arrangements for Owner-Drivers in New South Wales**

#### *Chapter 6 of the Industrial Relations Act 1996 (NSW)*

23.Chapter 6 of the *Industrial Relations Act 1996 (NSW)* is characterised by the following:

- Enforceable, minimum standards providing he certainty of at least cost recovery;
- The prevention of unfair or destructive competition by preventing undercutting (below the cost recovery minima) across a site or industry sector;
- The capacity for incentive systems to flourish above the minima, either on an individual or enterprise level;

- Protection against arbitrary termination of the contract;
- Quick, no cost access to the Industrial Relations Commission for the resolution of disputes about goodwill (amongst other matters), including the frequent successful oversight of contract transfer upon changeover of head contract to which the work relates;
- The capacity to recover goodwill where termination of the contract has resulted in that goodwill being unfairly extinguished (a provision enacted under a state liberal government).

24. 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. (*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).*

25. Chapter 6 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 single vehicle owner-drivers who are tied to and dependent upon one company.
26. 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.
27. Transport operators (principal contractors) and their industry representatives have traditionally 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 consistently on the record as supporting the NSW system regarding owner-drivers. NSWRTA opposition to the owner-driver protections is very recent. It is at odds with its Victorian and West Australian equivalents and it coincides with recent and pending prosecutions of NSWRTA members, particularly in the long distance sector, for breaches of OH&S standards and underpayment of wages.
28. The traditionally 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.

29. Liberal/Coalition support for such owner-driver protections was not equivocal, for example:

“The Government appreciates the financial predicament of lorry owner-drivers who have made a large investment in such premiums and then find their contracts terminated without compensation.”

*[The Hon Virginia Chadwick. Hansard 12/05/94. Industrial Relations (Contracts of Carriage) Amendment Bill.]*

“When I was an engineer I had a great deal to do with lorry owner drivers and grew to understand and have affection for them. They are salt of the earth, very hard working people, who often find themselves in extraordinarily difficult commercial circumstances. That is a longstanding facet of the industry.”

“I took the time to meet some of the wives of the lorry owner drivers. Once could only be absolutely struck by the terrible circumstances in which they found themselves. Whilst one could take the view that in a hard, commercial, laissez faire world it is “buyer beware” and they should have known better, I took the view that the circumstances were unjust and unfair. This Parliament ought to be able to help them.”

*[The Hon E.P Pickering. Hansard 12/05/94. Industrial Relations (Contracts of Carriage) Amendment Bill.]*

“Lorry Owner Drivers make this country work.”

*[The Hon D. J Gay. Hansard 12/05/94. Industrial Relations (Contracts of Carriage) Amendment Bill.]*

“New South Wales has engaged in industrial regulation of contracts of bailment and carriage for many years. The reasons have been mainly social and have reflected concerns to prevent exploitation of individual drivers who have been regarded as having little bargaining power.”

*[The Hon K. Chikarovski. Hansard 21/05/1993. Industrial Relations (Contracts of Carriage) Amendment Bill.]*



*"I have every sympathy for the hard working drivers. I know that the Minister for Industrial Relations and Employment and all members of the Government share that degree of sympathy."*

*[Mr Malcolm Kerr MP (Member for Cronulla). Hansard 21/04/1994. Industrial Relations (Contracts of Carriage) Amendment Bill.]*

30. The following is a sample of the measures which enjoy broad support and are aimed specifically at mitigating the vulnerabilities owner drivers<sup>4</sup>:

#### *Contract Determinations*

31. 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 NSWRTA.

32. 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 provide basic minima upon which parties can negotiate *viable* contracting arrangements.

33. 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.

#### *Contract Agreements*

---

<sup>4</sup> For a detailed summary of the each of the provisions and their rationale see attachment A to this submission.

34. 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.

*Settled Transport Industry Arrangements in NSW*

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

36. 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

## Current arrangements for owner-drivers in Victoria

### *Owner Drivers and Forestry Contractors Act 2005 (VIC)*

37. In February 2003 the Victorian State Government established an Inquiry to be conducted by Industrial Relations Victoria into the Owner Driver and Forestry Contractor sectors. The terms of reference required an examination of the nature of the industry, how laws applying in Victoria compare to other relevant laws in Australian jurisdictions, and whether there is any disadvantage incurred by owner drivers employed under a contract for services, as compared to drivers engaged under a contract of service. The terms of reference therefore covered very similar territory to that covered by the Federal Inquiry into independent contracting and labour hire arrangements which resulted in the report, *Making it Work*.<sup>5</sup> The notable difference between the two inquiries was the focus on owner-drivers in the Victorian inquiry and the analysis of the relative disadvantage experienced by owner-drivers in Victoria vis-à-vis employee drivers.

38. The Victorian *Report of Inquiry, Owner Drivers and Forestry Contractors* found significant disadvantage exists amongst owner-drivers, and that legislative intervention was necessary to remedy this disadvantage. The *Report of Inquiry* noted that owner drivers:

- are price-takers;
- have experienced declining rates over the last decade, and increasing business overhead costs;

---

<sup>5</sup> *Making it Work*, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, August 2005, AGPS, Canberra.

- experience significant periods of unpaid waiting time;
- often experience flat or ‘all-in’ rates that do not compensate for labour, let alone delivering any profit on significant capital investment or reward for risk;
- experience a significant information imbalance compared with those who engage them;
- are able to be terminated with no or minimal notice, but are unable to effectively challenge termination of their contracts on the basis of harshness or unfairness.<sup>6</sup>

39. As a result of the *Report of Inquiry*, the Victorian Parliament passed the *Owner Driver and Forestry Contractors Act 2005 (Vic)*. The main elements of the Victorian Act are as follows:

*Addressing the information imbalance*

40. The Victorian Act seeks to address the information imbalance found to exist between owner drivers and hirers by implementing several requirements:

- a. The provision of an information booklet to the owner driver prior to the entering of a contract;
- b. The provision of a published rates and costs schedule to the owner-driver prior to the entering of a contract. The rates and cost schedule identifies the typical fixed and variable overhead costs for that class of contractor and the base hourly and casual rate that would typically

---

<sup>6</sup> *Report of Inquiry, Owner Drivers and Forestry Contractors*, Industrial Relations Victoria, Department of Innovation, Industry and Regional Development, Chapter E.

apply to that class of contractor if they were performing substantially similar work as an employee;

- c. contracts must be recorded in writing and state the guaranteed number of minimum hours of work or income the owner-driver will receive (if any), the rates to be paid and the minimum period of notice applicable.

41. These requirements are directed at establishing or promoting full disclosure of information to market participants in order to allow rational decision making to occur. This is an essential pre-requisite in order for a market to function effectively, and also represents a touchstone of the neo-classical economic system.

#### *Joint Negotiations*

42. An important provision of the Victorian legislation is the creation of the capacity for owner-drivers to appoint a negotiating agent to negotiate on behalf of an owner-driver or group of owner-drivers for the purposes of making, varying or terminating a contract. This provision enables owner-drivers to more efficiently negotiate contracts with a mutual hirer, and utilise the services of representative organisations such as the TWU in order to achieve fair contractual outcomes.

#### *Code of Practice*

43. The Victorian Act provides for the establishment of Codes of Practice in relation to owner-drivers and hirers. The Code of Practice for the transport industry is being developed by the Transport Industry Council which includes representatives of the TWU, the Victorian Trades Hall Council, and representatives from the Victorian Transport Association (VTA), Victorian Employers' Chamber of Commerce and Industry (VECCI) and the Australian Industry Group.

44. This industry-based consensus approach is yet more evidence of the widespread support for measures which ensure the viability of owner-drivers and the owner-driver small business model. The TWU has always been of the view that a consensus industry approach is bound to foster more productive and representative arrangements in the industry.

#### *Preventing unfair business practices and unconscionable conduct*

45. The prevention of unfair business practices is central to the purpose of the Victorian Act. The Act adopts many of the well-understood tests enunciated in the *Trade Practices Act 1974 (Cth)* and the *Fair Trading Act 1999 (Vic)* in relation to unconscionable conduct. It also introduces several new tests relating directly to owner-drivers' contracts, namely a comparison of the amount for which the owner driver could have supplied the services as an employee, and whether or not the contract allows for increases in fixed and variable overhead costs on a regular and systematic basis.

46. These additional tests provide a framework in which both hires and owner-drivers can understand whether or not their conduct in relation to a contract represents unfair business practices. A good example would be a contract that provides for no review of fixed and variable costs, such as fuel, on a regular and systematic basis.

#### *Dispute Resolution*

47. One of the key foundations of the Victorian Act is the establishment of a low-cost, easily accessible dispute resolution procedure under the auspices of the Victorian Small Business Commissioner. The Act provides for parties with a dispute to make an application to the VSBC for a mediation over the dispute, and to date the VSBC has experienced a settlement rate of around 85 to 90%

of disputes through this process. Previously, parties in dispute needed to either 'create' a jurisdiction in the Australian Industrial Relations Commission by involving employees, or seek remedy in a Court over a breach of contract which invariably resulted in excessive costs to both parties with unpredictable outcomes.

48. In the event a dispute is not resolved in the VSBC, either party may obtain a certificate to proceed to the Victorian Civil and Administrative Tribunal in order to have the dispute arbitrated.

49. It is significant that the Standing Committee on Employment, Workplace Relations and Workforce Participation that produced the *Making it Work* Report in 2005 considered that there were advantages to the approach taken under the Victorian Bill, and went on to make Recommendations that picked up many elements of the now Victorian *Owner Drivers and Forestry Contractors Act 2005 (Vic)*.

50. Accordingly, the TWU submits that the Victorian legislation provides important and necessary legislative protection for owner drivers tailored to the circumstances and practices in Victoria, and that the exemption from the *Independent Contractor's Bill 2006 (Cth)* for the Victorian legislation is appropriate and well-founded, particularly considering the broad-based employer and Union support for the legislation.

#### **Proposed arrangements for owner-drivers in Western Australia**

##### *Road Freight Transport Industry (Contracts and Disputes Bill) 2006 (WA)*

51. In 2004, the Western Australia road freight industry faced enormous financial strain. Principal contractors were struggling to stay afloat in an open market where rates had been driven down. These rates were considered unsafe and unsustainable by many owner-drivers increasingly facing bankruptcy.

52. In 2004 the WA government recognised the dire circumstances facing the owner-drivers and established a working group to address the formulation of safe sustainable rates. In addition the Western Australian government committed to the drafting of the Road Freight Transport Industry (Contracts and Disputes) Bill. That Bill is now in the final stages. The TWU understands that the Minister for Planning & Infrastructure has instructed her department to have the Bill ready for tabling in August 2006.

53. The state government has informed the TWU it will make a submission to the Senate Inquiry into the Independent Contractors Act (ICA). This submission will alert the Committee to its concern that the Independent Contractors Act could render ineffective, the Road Freight Bill's (RFB) ability to deal with unfair contracts, dispute resolution and the setting of guideline safe and sustainable rates.

54. The RFB is part of a suite of imminent legislation aimed at improving the safety and viability of the WA road freight transport industry. The Bill is partly based on Victoria's Owner-Drivers and Forestry Contractors Act 2005 which the Independent Contractor Act does not override.

55. In summary the RFB would:

- Provide owner-drivers with security of payment.
- Require principal contractors to pay owner-drivers a sustainable rate enabling them to operate safely.
- Establish a Road Freight Transport Industry Council which would establish a Code of Conduct including guideline rates and other provisions regulating the relationship between the parties.



- Create a low-cost, conciliation focused, Road Freight Transport Industry Tribunal to hear disputes between the parties regarding breaches of contracts, the code of conduct and payments.
- Allow owner-drivers to appoint bargaining agents (Union or Non-Union, including an industry body).

56. The RFB is not deeming legislation – It is set to be cast in the commercial context and is aimed at resolving contractual disputes and minimising them by ensuring the application of sustainable, viable minimum conditions.

57. In summary, the WA laws aim to:

- Help avoid disputation and disruption to commerce in Western Australia.
- Together with other laws about to be introduced in WA, such as Change of Responsibility legislation, will reduce road trauma and the WA road toll which is currently being impacted upon by road crashes involving heavy vehicles.
- Enable thousands of struggling WA small owner-driver businesses to become financially sustainable, viable and safe operations
- Improve the health and well-being of WA truck drivers who currently suffer poorer health than community standards.<sup>7</sup>

### Queensland and the Australian Capital Territory

58. In Queensland, the industry has sought to address vulnerability through legislative provisions allowing owner-drivers in certain circumstances, after an appropriate determination of the matter, to access protections under the

---

<sup>7</sup> See also the statement of James McGiveron, TWU National President, which is attachment B to this submission.

*Industrial Relations Act 1999 (QLD)* and also through the unfair contracts provisions of that Act.

59. Tabled in the ACT parliament is the *Fair Work Contracts Bill*. This bill, like the Victorian legislation and the WA bill is set in the commercial context and adopts a similar approach.

## **D: COST RECOVERY, STABILITY AND SAFETY**

### **Cost Recovery and Stability**

60. The primary purpose of these legislative and pending legislative 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.

61. 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.

62. In the absence of minimum standards, the defining aspect of the vulnerability suffered by owner-drivers, being inequality of bargaining power, dominates resulting in unsustainable terms and conditions of engagement.

63. The Victorian *Report of Inquiry* found that road and rail transport drivers had the fourth highest rate of business related bankruptcies.<sup>8</sup> Business related bankruptcies were defined as being one in which an individual's bankruptcy is directly related to his or her proprietary interest in a business. This statistic reveals both the high level of financial insecurity experienced by owner-drivers as well as the impact on safety that the financial stress of a small business produces.

64. 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 regarding the NSW scheme,

*"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)*

65. 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*

---

<sup>8</sup> Note 2, 60.

*provides them with basic entitlements 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).*

66. 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.

## **Safety**

67. It might seem an obvious statement to make but the remuneration of owner-drivers must be inclusive of and adequately compensate for the fixed and variable costs of running the business. The legislative schemes outlined above each have mechanisms for ensuring that this occurs. Where it does not occur there is a significant impact on the operator's capacity to maintain vehicle to a safe and legal standard and there is pressure for drivers to work too fast or too long in pursuit of an adequate return. This is a scenario which afflicts owner-drivers in the long-distance sector.

68. Owner-drivers operate as a significant component of that sector. The Australian Transport Council Study *Heavy Vehicle Safety and Safe Sustainable Rates for Owner Drivers*, May 2003 indicated that:

- a. 60% of businesses operating in the road freight transport industry have no employees;

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

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.

69. The National Transport Commission Information Paper *Driver Fatigue – A Survey of Long Distance Heavy Vehicle Drivers in Australia, September 2001* found that 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%).

70. 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.

71. 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].

72. 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.

73. 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 then Deputy Prime Minister, the Hon John Anderson, then Minister for Transport and Regional Services.

74. 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.

75. The Quinlan report for instance found 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.”*

76. *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);*

#### **E: PRODUCTIVITY AND COMPETITION REMAIN STRONG**

77.No evidence exists to suggest that the transport industry in NSW or Victoria is less competitive, productive or efficient than in other states which do not have yet have protections for owner-drivers. 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.

78.This is supported by the *Report of Inquiry* in Victoria which analysed all Australian legislative approaches, and found that, “regulation is justified where market failure occurs and the regulation provides a more efficient outcome than non-regulatory alternatives.”<sup>9</sup> The Report then considered the National Competition Council Guidelines for NCP Reviews, and found the issues of imperfect competition, the impact on health and safety, driver well-being and

---

<sup>9</sup> Note 2, 101.

family life, and impacts on investment all supported the establishment of appropriate legislative intervention.

79. Minimum protections for owner-drivers 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 owner-driver protections. 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.

## G: UNFAIR CONTRACTS THE REGULATION MAKING POWER

### Unfair Contracts

80. Unfortunately there are times when companies will arbitrarily and unfairly terminate owner-driver contracts; foreshadow such termination or engage in conduct which renders the contract unfair. The Independent Contractors Bill contains an "unfair contracts provision". That provision is set to override NSW and Queensland unfair contracts provisions. However, the provisions in the Bill do not contain the following characteristics of the state provisions which may have profound implications for owner-drivers seeking access to a remedy:

- (i) Unlike the State provisions there is no **express** power to order compensation directly. This means rather than simply order that an amount be paid as a consequence of the unfairness, the court will have to make an order to vary the contract to the require payment. This inserts an additional and costly step into the enforcement process if there is failure to pay in accordance with the reviewed contract. That is, first a breach of contract claim (for the non-payment) must be brought to seek an order for the payment of damages for breach of the varied contract and then any required enforcement proceedings relating to continued non-payment must be undertaken.



- (ii) The provision in the Bill precludes, on its face, the making of orders after the contract has come to an end – this has profound implications for goodwill claims. If there is no power to make a retrospective order then there may be no capacity for owner-drivers to claim goodwill after the contract has come to an end.
- (iii) There is no power in the Bill to make an order in circumstances where unfairness has arisen by virtue of the conduct of a party or parties or through the operation of the contract or some other reason. This leads to a purely legalistic review of the contract divorced from the reality which may be that unfairness exists because of the way in which or the context in which the contract is being applied.

### Regulation Making Power

81. Section 10 of the Independent Contractors Bill is a very broad regulation making power containing express references to the owner-driver legislation exemptions. This raises a concern that the regulations might be made which impinge upon the exemptions effected by subsection (2) of section 7 of the Bill. The TWU calls upon the Committee to provide owner-drivers and the industry in general with certainty by recommending that the section be amended to delete the regulation making power at least in as far as its express reference to subsection (2) of section 7.

### G: CONCLUSION

82. The Senate committee is considering the provisions contained within the *Independent Contractors Bill 2006* and the *Workplace Relations Amendment (Independent Contractors) Bill 2006*. The TWU welcomes the decision of the government to exclude NSW and Victorian legislative protections from the operation of the Bills. However, for the reasons outlined in this submission and on the basis of the information it contains, the TWU calls upon the Committee make recommendations as set out in the Executive Summary, above, at paragraph 12.

83. The TWU notes that the government has also announced a review to achieve national consistency of current legislative owner-driver protections. The TWU, on behalf of the thousands of owner-drivers it represents, looks forward to being an active participant in any such review.

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

Tony Sheldon

Acting Federal Secretary - Transport Workers Union

# Attachment "A"

---

## Submission to Senate Employment, Workplace Relations and Education Legislation Committee

*INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS  
AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006*

Details of Owner-Driver Minimum Standards in NSW

**25 JULY 2006**

**The Transport Workers Union  
Of Australia**

---

## Current Arrangements for Owner-Drivers in NSW

### ***Contract Determinations***

1. 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).
2. 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.
3. 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***

4. 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***

5. 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***

6. The provisions allow for the registration of associations of employing contractors and associations of drivers & carriers, to mirror employer/employee associations.
7. 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***

8. 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.
9. 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.

10. 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.
11. 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.
12. 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.
13. 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.

## ***Case Studies Illustrating Value of the Scheme***

### Category 1 – Contract Agreements

14. 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:

- a. Toll;
- b. TNT;
- c. Linfox;
- d. Startrack; and
- e. Westgate.

15. 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.

16. 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;

17. Other sectors involving similarly large investments in vehicle and/or goodwill and lengthy settled arrangements include:

breweries (Linfox & Toll);  
waste collection (e.g. Sita & Collex); and  
quarries (Boral & CSR)  
car carriers (TNT).

18. 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

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

20. 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

21. 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.

22. 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.



Other primary industry tailored contract determinations:

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

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

Boral

24. 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.

25. 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.

26. 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.

27. 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:

i. *"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.*

ii. *"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"*

iii. *"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."*

iv. (Dave Morgan)

Network Distribution Company

28. 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*

29. 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.
30. 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

31. Since enactment in 1994 by the state liberal government owner-drivers have consistently used the goodwill compensation provisions where their investment has been arbitrarily extinguished. Some cases include:
32. *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.

33. *Quintrell and Belprana v Monier Roofing Pty Ltd* – Goodwill investments of \$53 000 and \$42 000 respectively recovered by order of the Tribunal.

34. *7 TWU members v Visy*: 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. The Owner-drivers received an order for compensation from the Tribunal.

35. Compulsory Conciliation of Goodwill Matters

36. 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.

37. 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

38. 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.

39. 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.

# Attachment“B”

---

## Submission to Senate Employment, Workplace Relations and Education Legislation Committee

*INQUIRY INTO THE PROVISIONS OF THE INDEPENDENT CONTRACTORS BILL 2006 AND WORKPLACE RELATIONS  
AMENDMENT (INDEPENDENT CONTRACTORS) BILL 2006*

**Statement of Jim McGiveron  
TWU National President and WA Branch Secretary**

**26 JULY 2006**

**The Transport Workers Union  
Of Australia**

---

## STATEMENT OF JAMES MCGIVERON

Under no circumstances could anyone truthfully describe the vast majority of owner-drivers in Western Australia as 'independent contractors'

The TWU in WA has approximately 2000 owner-driver members and only a mere handful of them could be put under that heading.

Most owner-drivers in WA are 'dependent' upon a single prime contractor in the same way as they are in NSW and Victoria – in fact as they are in all states and territories. Our submission has fully canvassed the extensive nature of this dependence and there is ample evidence of it for all to see.

The industry in WA, owner-drivers and their families and the TWU anticipate the imminent tabling of the Road Freight Transport Industry (Contracts and Disputes) Bill. This Bill seeks to address the very vulnerabilities expressed by the Minister in his recent press releases media statements. To override its benefits, (which have the full support of the transport industry in WA) through the Independent Contractors Act would cut from under the feet of owner-drivers and the broader industry agreed solutions for fair, sustainable and therefore, safe minimum standards and derail the constructive basis upon which the industry has been tackling the problems facing owner-drivers.

We ask the Committee to recommend an amendment that will permit the imminent industry agreed WA provisions to have full operation.

James McGiveron  
**National President**  
**Transport workers Union of Australia**