
Submission

***SENATE INQUIRY INTO WORKPLACE
AGREEMENT MAKING***

23 AUGUST 2005

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



**TWU
Carrying
Australia**

**SUBMISSION TO SENATE INQUIRY INTO WORKPLACE
AGREEMENT MAKING:**

A. Background and summary

1. The Transport Workers' Union of New South Wales ("TWU") seeks to highlight the fact that for the past 30 years owner-drivers in NSW have been able to collectively bargain with the companies engaging them to reach agreement as to terms and conditions of engagement and have such agreement registered as an industrial instrument under the *Industrial Relations Act 1996 NSW*. **There are over 170 registered enterprise or workplace agreements covering owner-drivers in NSW.** The need for and value of owner-drivers' capacity to collectively bargain at the workplace level within the framework of an industrial relations regime is summarised below.
2. The Transport Workers' Union of New South Wales ("TWU") represents the interests of thousands of small businesses in the form of owner-drivers. This representation has a history stretching back to the 1920s. Around 80-85% of these owner-drivers operate as corporations, the remaining 15-20% as sole traders or partnerships.
3. Owner-drivers are single vehicle operations the vast majority of which perform work exclusively for a single transport operator (principal contractor). Owner-drivers are highly dependent upon those with whom they contract. This dependence leads to inequality of bargaining power and the associated potential for exploitation.

4. In NSW there is a degree of regulatory protection for owner-drivers which minimises exploitation in a manner which does not hinder competition and which, in fact, contributes tangible productivity and efficiency benefits to transport companies and the transport sector as a whole.
5. Importantly, the protections include provisions ensuring that owner-drivers are at least able to cover their costs. This is in the public interest not only as it contributes to a stable, sustainable and productive industry but because it operates against the now well established link between inadequate systems of remuneration and road safety concerns such as driver fatigue and the use of artificial stimulants. Government commissioned inquiries at both state and federal levels have called for additional regulatory protections to address road safety in the transport industry.
6. Benefits are delivered, in large measure, through the many and settled enterprise and industry sector arrangements established through the NSW system, arrangements which have the support of the industry. As mentioned, there are over 170 workplace agreements relating to owner-drivers. The regulatory protections in NSW have received consistent industry-wide and bipartisan political support. Indeed, the only significant additions to the protections since their inception were enacted by a Liberal government.
7. Productivity, stability and the lack of dissenting voices all support a conclusion that, no matter what approach the Federal Government might take to independent contractors and/or workplace agreement making, the NSW protections (and in particular the

capacity of owner-drivers to collectively bargain to achieve enforceable workplace agreements within an industrial relations framework) should remain undisturbed.

8. By virtue of its long representational history of owner-drivers the TWU has established a unique understanding of the commercial and operational realities within which these small businesses operate and has taken on the corresponding unique responsibility of assisting truckies to become and/or remain viable small business entities. It follows that the TWU supports the right of people to choose to constitute their work arrangements in the form of businesses contracting their services rather than performing work pursuant to a contract of service (that is, a contract of employment) - provided that such arrangements are genuine and legitimate and are not employment contracts dressed up as something else to avoid the payment of standard minimum industrial entitlements.
9. The TWU is committed to protecting the important benefits which flow from appropriately maintained small business structures in the transport industry. Examples of such benefits can be broadly categorised and illustrated as follows:

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

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

Benefits for the transport industry and trade – In NSW the owner-driver model provides a balanced mix of flexibility (in allowing companies to engage workers to perform the transport function without having to provide the start up capital), certainty of contract (through the capacity to reach collective arrangements specifically tailored to enterprises or sectors of the industry), and sustainable competition (by ensuring that the intensely competitive market operates in the context of sustainable, certain rate structures fostered by minimalist industrial protections).

10. Attached and marked "A" and forming part of this submission is the TWU's written submission in response to the Department of Workplace Relations Discussion Paper: *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements*. Attached and marked "B" and forming part of this submission is the TWU's written submission to the *Inquiry into*

Independent Contractors and Labour Hire Arrangements. Attached and marked "C" and forming part of this submission are statements from 91 owner-drivers giving personal accounts of dire consequences of removal of the proportionate, well-balanced protections and existing arrangements in the State.

B. The parties' ability to genuinely bargain [particular reference (c)].

11. In most cases the title "independent contractor" when applied to an owner-driver's small businesses is somewhat of a misnomer. Owner-drivers are a discrete category of small business, vulnerable to exploitation because of the dependent nature of the contractual relationships pursuant to which they perform work.
12. 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.
13. The degree of practical independence that most owner-drivers exercise in the day-to-day operation of their businesses is minimal. For example, the overwhelming majority of owner-drivers - almost without exception:
 - perform work for a single transport operator;

- perform work at the behest of that operator in accordance with very specific priorities (including specific delivery/pick-up priorities) set by the directors and management of that operator;
- are usually required to hold themselves available to perform work for a single contractor thus rendering them unavailable for anyone else;
- take direction from that operator on a day to day basis as if they were employees of the operator;
- are required to paint or otherwise mark the vehicles they provide with the operator's colours and/or insignia; and
- have little or no power to set price, rather they take the price they are given.

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

14. 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. In NSW this inequality of bargaining power has been acknowledged and addressed in a manner that provides appropriate, well-directed protections with minimal intrusion upon

productivity, resulting in a net positive result for the public interest in terms of road safety and the maintenance of around 12 000 owner-driver businesses. The submissions contained in attachment B provide a comprehensive overview of the current arrangements for owner-drivers in NSW. What follows focuses on the scope and coverage of collective workplace arrangements for owner-drivers in NSW and their contribution to productivity, efficiency, flexibility, fairness, public safety and maintenance of decent standards of living for workers in the transport industry.

C. The scope and coverage of workplace agreements for owner-drivers [particular reference (a)];

the capacity for employers and employees to choose the form of agreement-making which best suits their needs [particular reference (b)]; and

the capacity of such agreements to contribute to productivity improvements, efficiency, competitiveness, flexibility, fairness and growing living standard [particular reference (e)].

15. Under Chapter 6 of the *Industrial Relations Act NSW 1996* owner-drivers and transport operators currently enjoy (and for much of the last 30 years have enjoyed) settled arrangements that have led to productive, efficient and harmonious execution of the transportation function. These arrangements have industry-wide acceptance and are contained in a variety of industrial instruments

including enterprise level workplace agreements called contract agreements.

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

17. At present there are over 170 contract agreements between groups of owner-drivers and specific enterprises within the following industry sectors:
 - General transport/freight forwarding;
 - Couriers;
 - Concrete;
 - Quarries;
 - Waterfront;
 - Excavated Materials;
 - Waste Collection;
 - Breweries; and
 - Car Carriers.

18. The primary purpose of these collective workplace arrangements is the payment of rates which, as a minimum, allow drivers to recover all costs of the truck and labour while at the same time recognising and accounting for the operational peculiarities of specific enterprises. 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.

19. No evidence exists to suggest that the transport industry in NSW is less competitive, productive or efficient than in other states which do not have this type of industrial regulation of independent contractors. In interviewing a wide spectrum of industry participants in 2002, Bray, Waring and MacDonald found interviewees to be universally adamant that Chapter 6 “did little to reduce the intensity of competition in the industry” (Bray et al, 2002 at 75). Indeed research shows that far from extinguishing market forces, the regulation prevents market failure in the transport industry and fosters maximum market efficiency and competition.
20. The Union, on behalf of owner-drivers has negotiated long-term enterprise specific contract agreements with many operators in the general transport/freight forwarding/waterfront sector including the major operators such as:
 - Toll;
 - TNT;
 - Linfox;
 - Startrack; and
 - Westgate.
21. In the courier sector also, enterprise arrangements exist (Toll, Allied, Yellow Express, Couriers Please, TNT). These agreements influence

the terms and conditions of engagement of owner-drivers tied to these entities for periods of 3 years and more.

22. 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;

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

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

24. 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.

25. These workplace arrangements have played an integral part in providing at least cost recovery for owner-drivers. 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.
26. 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.
27. 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.
28. This recognition by the courts is supported by government-commissioned inquiries. At the state level is the substantial and wide-ranging *Quinlan Inquiry Report: Professor Michael Quinlan Report of Inquiry Into Safety in the Long Haul Trucking Industry 2001*.

At the federal level, the October 2000 federal parliamentary inquiry by the House of Representatives Standing Committee on Communication, Transport and the Arts - *Beyond the Midnight Oil* commissioned by the Deputy Prime Minister, the Hon John Anderson, then Minister for Transport and Regional Services.

29. 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.

D. Whether proposed federal government changes meet the social and economic needs of owner-drivers

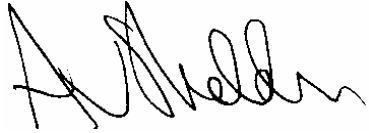
30. On the face of the Department of Workplace Relations Discussion Paper: *Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements* it would seem that the system of workplace agreement making outlined above is set to be overridden by the Federal Government through the use of the corporations power in a new *Independent Contractors Act*. In addition there are proposals to amend the *Trade Practices Act* to prevent unions from representing owner-drivers – a step that would abolish the free choice that owner-drivers have exercised for nearly a century to be represented by the TWU.

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

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

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

players in the industry and it is a system about which no-one complains.

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

Tony Sheldon

State Secretary – NSW Transport Workers Union