

"A"

Submission

*Department of Employment and
Workplace Relations Discussion Paper:*

Proposals for Legislative Reforms in Independent
Contracting and Labour Hire Arrangements

20 MAY 2005

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

The logo consists of a yellow square with a thick black border. Inside the square, the text "TWU" is at the top, "Carrying" is in the middle, and "Australia" is at the bottom, all in a black serif font.

TWU
Carrying
Australia

**SUBMISSION IN RESPONSE TO THE DEPARTMENT OF
WORKPLACE RELATIONS DISCUSSION PAPER:**

***PROPOSALS FOR LEGISLATIVE REFORMS IN
INDEPENDENT CONTRACTING AND LABOUR HIRE
ARRANGEMENTS***

TRANSPORT WORKERS' UNION

1. The Transport Workers' Union of New South Wales ("TWU") represents the interests of thousands of small businesses in the form of owner-drivers. This representation has a history stretching back to the 1920s. Around 80-85% of these owner-drivers operate as corporations, the remaining 15-20% as sole traders or partnerships.

**OWNER-DRIVER EVIDENCE OVERLOOKED IN THE FORMULATION OF
DISCUSSION PAPER**

2. On 16 March 2005, the TWU provided a written submission to the Inquiry into Independent Contractors and Labour Hire Arrangements. The submission provided a comprehensive description of the status of owner-drivers in NSW. In particular, it detailed the dependent (as opposed to independent) nature of owner-drivers' relationships with the entities engaging them and noted the industry-wide and bipartisan political support in the state over decades for the regulatory protections provided in the NSW Industrial Relations Act. It was hoped that the House of Representatives Inquiry would give genuine consideration to the issues raised. A copy of that submission is attached (marked "A") and forms part of this submission.

3. On 30 March 2005 a large delegation of owner-drivers gave evidence before the Inquiry. The transcript of the owner-drivers' evidence is attached (marked "B") and forms part of this submission (see p50 ff). The owner-driver witnesses gave evidence of the settled arrangements that they work under and the potentially devastating effects on their families of removal of those arrangements and protections.
4. At the conclusion of the owner-driver's evidence, the Chair of the Committee informed the owner-drivers that on that very day the Department of Employment and Workplace Relations had released the Discussion Paper this submission addresses. This came as a great shock to the truckies who had exposed themselves to the daunting task of giving evidence before a Parliamentary Committee. The owner-drivers gave that evidence with a reasonable expectation that their evidence was to be properly examined and assessed by the Government controlled Committee before the *formulation* (let alone release) of a Government discussion paper on the same subject matter. Quite obviously this examination and assessment did not occur prior to the Discussion Paper's release.
5. Not surprisingly therefore, the Discussion Paper ignores the unique status of owner-drivers. It makes assertions and asks questions designed solely to achieve Government policy. That policy is clearly directed towards moving as many Australian workers as possible beyond the reach of necessary and balanced industrial protections in order to weaken their bargaining position, deny them the right to choose to be collectively represented by their Union and, in the result,

leave them totally exposed to the commercial imperatives of the companies that engage them. In the transport industry, such a free-kick for big business will result in financial ruin of and hardship for many families who have made honest and substantial investments in vehicles and goodwill, and it will worsen the already tragic road death and injury statistics by forcing drivers to work faster and /or longer to make ends-meet.

6. Attached (marked "C") and forming part of this submission are statements from 91 NSW owner-drivers. The statements give personal accounts of dire consequences of removal of the proportionate, well-balanced protections and existing arrangements in the State. Some of the issues raised include:

- Loss of (in some cases) hundreds of thousands of dollars worth of goodwill and no realistic avenue to recover it (because of the prohibitive costs involved in the normal court system);
- Incapacity to properly maintain the vehicle if rates are cut (leading to shortcuts on safety and increased danger to road users);
- Inability to meet mortgage and finance repayments (resulting in family stress and breakdown);
- The need to work longer hours to earn a decent living for the family (and consequently increasing the risk of fatigue-related accidents and placing further stress on the family unit);

- Exposure to arbitrary termination of contract and loss of significant investment in truck and goodwill; and
- Lack of a low-cost expert body to deal with disputes or through which to recover compensation for large investments unfairly extinguished.

It is to be hoped that unlike the Committee evidence, these real-life implications will not be ignored and will be directly addressed and responded to by the Department.

CURRENT OWNER-DRIVER PROTECTIONS ARE REASONABLE BECAUSE THEY ARE NECESSARY AND WELL-BALANCED AND IMPACT POSITIVELY ON CONTRACTING ARRANGEMENTS IN THE TRANSPORT INDUSTRY.

7. At page 5 the Discussion Paper reads as follows:

“This discussion paper canvasses some options for legislative reform to prevent unreasonable workplace regulation of independent contractors...” (TWU emphasis)

To appreciate why current owner-driver protections are not unreasonable it is important for the Department to be adequately informed of the true status of owner-drivers. The Department should refer to Part C of the TWU submission to the House of Representatives Inquiry (attachment “A”).

8. The reasons that regulatory protections are, for owner-drivers, necessary, reasonable and a positive influence on contracting

arrangements in the transport industry can be summarised as follows (refer to Part C of attachment "A" for detail on each point):

- 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.
- 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 undisputed and tangible productivity and efficiency benefits to transport companies and the transport sector as a whole.
- 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. In 2004 in NSW alone, 103 people lost their lives in heavy vehicle accidents. Far from suggesting the removal of regulatory protections in the industry, Government commissioned inquiries at both state and federal levels have called for additional regulatory protections to address road safety in the transport industry.

- Benefits are delivered, in large measure, through the many and settled enterprise and industry sector arrangements established through the NSW system, arrangements which have the support of the industry. There are over 170 enterprise specific arrangements relating to owner-drivers. The regulatory protections in NSW have received consistent industry-wide and bipartisan political support. Indeed, the only significant additions to the protections since their inception were enacted by a Liberal government.
 - 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.
9. What the above summary illustrates is that some degree of regulatory protection for owner-drivers is appropriate even though the contractual arrangement for most owner-drivers falls on the independent contractor side of the employee/independent contractor divide. In other words, using the language of the Discussion Paper, regulatory protection of an independent contracting arrangement is not unreasonable simply by virtue of its status as an independent contracting arrangement. Such inflexibility would result in a “one size fits all” approach for independent

contracting arrangements, an approach the Discussion Paper criticises (at page 5).

OWNER-DRIVERS ARE INDIVIDUAL WORKERS AND SHOULD BE PROTECTED FROM EXPLOITATION

10. The Discussion Paper recognises that different statutory regimes have different policy objectives. As the paper says in its discussion of a taxation based definition of independent contractor:

“Taxation policy objectives are driven by issues of equity and revenue collection. Workplace relations policy objectives are driven by notions of flexibility, productivity, and choice, and ensuring individual workers are afforded appropriate entitlements and protections in their working life.” (TWU emphasis).

Owner-drivers are individual workers. They are subject to the same vulnerabilities and deficit in commercial power as employees. They work in almost all cases for only one company and under the day-to-day control of that company in accordance with predetermined priorities of the directors of that company. They become independent contractors by virtue of providing their own vehicle for the task. The provision of that vehicle makes them less independent by making them more reliant on a steady flow of work to service the debt of the capital cost of the vehicle and any goodwill and to provide a decent living for their families.

11. The current regulatory environment in NSW for owner-drivers is directed at affording appropriate entitlements and protections to these individual workers who have chosen to contribute to Australian working life as legitimate independent contractors and in doing so provides commercial certainty for this vulnerable small business model, a certainty which has widely accepted flow-on benefits to the industry and community as a whole.

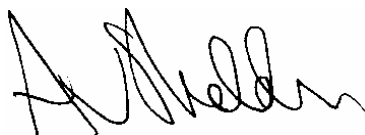
QUESTIONS THE DISCUSSION PAPER SHOULD HAVE ASKED

12. Given that, as explained above and in attachment A, the assumptions underlying the questions posed in the Discussion Paper are not applicable to the owner-driver small business model and have not been formulated by reference to the evidence the Government sought from owner-drivers, it is not logical for the TWU to offer an itemised response. (The TWU has however, read the submission of the ACTU and broadly supports it). From the TWU's perspective the series of questions which ought be asked, if the Government is serious about its stated intentions of consulting and avoiding a "one size fits all" approach, is as follows:
 - I. What is the status and range of independent contracting arrangements? (one of the terms of reference of the Parliamentary Inquiry which has no parallel in the Discussion Paper)
 - II. What will be the effects of wiping out the rights of owner-drivers on those small businesses and their families?

- III. What will be the effects of wiping out the rights of owner-drivers on road safety for transport drivers and the community as a whole?
- IV. What will be the effects of wiping out the rights of owner-drivers on the financial and operational stability of the 170 or so enterprises that have settled arrangements covering the engagement of thousands of owner-drivers?
- V. What will be the effects of wiping out the rights of owner-drivers on the financial and operational viability of the transport industry as a whole when cost-recovery protections are abolished for tens of thousands of owner-driver?
- VI. What will be the effects on industrial harmony when the rights of owner-drivers and the companies engaging them to resolve disputes in a speedy, cost effective way are abolished?

The answers to these questions are found in this submission (and attachments) and in particular within the 91 attached owner-driver accounts (attachment "C"). Nothing in the Discussion Paper even hints at how the serious implications there outlined would be overcome.

We look forward to the Government's response to the issues raised.



Tony Sheldon
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