# SUBMISSION TO THE REVIEW OF THE TRADE PRACTICES ACT BY THE DEPARTMENT OF TREASURY


## TRANSPORT WORKERS' UNION (VICTORIAN/TASMANIAN BRANCH)


## JULY 2002

## Executive Summary

The Transport Workers' Union (Victorian/Tasmanian Branch) welcomes the opportunity to contribute to this review.

The primary issues we see affecting our members in relation to the *Trade Practices Act 1974 (Cth)* are:

a) The lack of **minimum enforceable rates** for owner-drivers and bailees;

b) The effect of unsustainably low rates for owner-drivers and bailees on road safety and public interest;

c) The lack of an appropriate forum for the resolution of what are effectively industrial disputes between owner-drivers, bailees and other market participants; and

d) The abuse of market power by organisations against the interests of owner-drivers, bailees and the general public.

The TWU proposes the following resolutions to the problems identified:

1. The ACCC should conduct a full review of the rates and remuneration earned by owner-drivers and bailees and report on its findings;

2. The *Trade Practices Act 1974 (Cth)* should be amended to allow the ACCC to set or allow to be set **minimum enforceable rates** for owner-drivers and bailees in different sectors of the economy, and to establish procedures for resolving disputes between owner-drivers, bailees and other relevant parties;

3. A new panel should be established in the Australian Industrial Relations Commission specifically for dealing with disputes relating to owner-drivers and bailees, which could operate under powers of the *Trade Practices Act 1974 (Cth)* and/or the *Workplace Relations Act 1996 (Cth)*.

## Introduction

The Transport Workers' Union (Victorian/Tasmanian Branch) welcomes this opportunity to contribute to the review of the *Trade Practices Act 1974 (Cth)*. The TWU represents the industrial interests of transport and storage workers and has over 24,000 members in Victoria and Tasmania. The membership of the TWU includes workers involved in transport and other work in connexion with driving and transport.

The industrial relations system in Victoria is effectively a two-tiered system as a result of the Victorian Government handing over the industrial relations powers to the Commonwealth Government in 1996. This has resulted in some employees' conditions being governed by Federal Awards, Enterprise Agreements or other industrial instruments, and other employees' conditions being covered by what is termed the 'Schedule 1A' conditions of the *Workplace Relations Act 1996 (Cth)*. In Tasmania a State Industrial Relations System exists which also provides protections to 'employees', but which fails workers in other forms of employment.

The TWU represents classifications of workers who do not fit the traditional or legal definition of 'employee', but are more appropriately described as 'independent contractors' and 'bailees'. These workers have become increasingly common, particularly in the 1980s and 1990s, but their industrial interests have suffered at the hands of anti-competitive behaviour by dominant market participants because they have not been afforded proper protection by legislation. The over-lapping areas of coverage for the *Workplace Relations Act 1996 (Cth)* and the *Trade Practices Act 1974 (Cth)* in relation to these types of workers does not appear to be fully resolved. These workers are ineligible to notify an industrial dispute to the Australian Industrial Relations Commission and do not have any other appropriate forum in which to resolve what are effectively industrial disputes.

This has resulted in exploitation of these workers as they consistently underquote each other in a struggle to acquire and keep work so that they can survive in the transport industry. This is not sustainable and has led to what may be termed a 'race to the bottom' in terms of safety and strategic development of sustainable road transport in

Australia. This has serious economic impacts on the efficiency of the Australian economy.

Various parties' submissions to this review have suggested there should be an attempt by the ACCC to curb the influence of trade unions in the regulation of labour in this country. We respectfully submit that without the influence of trade unions in this country, Australian workers and their families would be suffering under the stress of lower wages and working conditions as a result of the 'free market' forcing down the return for workers from their labour to the lowest possible rate regardless of the implications for safety or for the economic viability of the individual worker or industry.

The ACCC is charged with the responsibility under the object of the Act to "…enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."[1] One of the prime considerations of the ACCC should be to encourage 'sustainable competition' and not competition for the sake of competition. The predictions for growth in road transport indicate that there will be a strong need to attract new entrants into the labour market in the transport industry. Currently there does not appear to be sufficient growth in labour in the industry to meet the anticipated growth, and factors such as low wages and poor working conditions will do nothing to attract such growth.

The introduction of the Unconscionable Conduct provisions under Part IVA of the *Trade Practices Act 1974 (Cth)* was a positive step for the Australian economy, but the provisions were not accessible for unincorporated entities or workers such as owner-drivers or bailees. The subsequent inclusion of Unconscionable Conduct provisions in the relevant State Acts (being the Fair Trading Act 1999 in Victoria) means that workers such as owner-drivers and bailees can access these provisions, albeit with some difficulty. This area of the law has yet to be fully utilised, but it has some significant limitations, specifically in relation to resolving what may be best characterised as 'industrial disputes'.

[1] Trade Practices Act 1974 (Cth), s2

Several case studies demonstrate the way in which the *Trade Practices Act 1974 (Cth)* could be utilised in order to improve the efficiency of the transport industry and other sectors of the economy, and also protect public safety. There is currently no obvious forum for the resolution of industrial disputes involving thousands of owner-drivers. Disputes in which thousands of bailees are affected, such as the introduction by Melbourne Airport of 'access fees' for taxis to provide services to airport customers, illustrate the need for the ACCC's powers to be enhanced rather than reduced.

The TWU has suggested in this submission that the ACCC should conduct a full review of the rates and remuneration earned by owner-drivers and bailees and report on its findings. We have also suggested that the *Trade Practices Act 1974 (Cth)* should be amended to allow the ACCC to set or allow to be set **minimum enforceable rates** for owner-drivers and bailees in different sectors of the economy, and to establish procedures for resolving disputes between owner-drivers, bailees and other relevant parties. In addition to this we have suggested that a new panel should be established in the Australian Industrial Relations Commission specifically for dealing with disputes relating to owner-drivers and bailees, which could operate under the powers of the *Trade Practices Act 1974 (Cth)* and/or the *Workplace Relations Act 1996 (Cth).*

The capacity to introduce **minimum enforceable rates** of remuneration and a forum for dispute resolution for owner-drivers and bailees in different sectors of the economy will enable a sustainable transport industry to be developed in Australia. The safety of workers and the general public must be given strong consideration in decisions made by the ACCC, as constant price cutting by operators in order to obtain work leads to quotes or practices that cannot be performed within the legal limits imposed by State and Federal road laws.

The TWU submits that the ACCC has a fundamentally important role in protecting the interests of market participants who lack the bargaining power to maintain minimum standards of rates and safety that will enable a sustainable and efficient economy in the long term.

## Owner-drivers in the Transport Industry

Owner-drivers are often workers who are highly reliant on obtaining a steady flow of work from one particular company, and consequently are at the whim of that particular company in terms of negotiating rates. Only about 20-percent of owner-drivers are in the TWU. There are no legally enforceable minimum payments for independent contractors in the trucking industry. However, there is a voluntary agreement between the Transport Workers' Union and State industry bodies which recommends minimum rates which are not the full costs of running a truck.

An owner-driver is expected to pay for their prime mover and trailer, tyres, registration, fuel, and running costs, but the money they earn often does not cover the costs resulting in short cuts in safety. Examples abound in the industry of owner-drivers who cannot afford basic maintenance on their truck because of a lack of money and because of the opportunity cost of having the truck off the road. It is not uncommon for owner-drivers to work dangerous and illegal hours, sometimes more than 100 hours a week, with as little as two hours sleep some nights.

There is nothing illegal about large companies forcing the price down for owner-operators because the minimum price is not legally set. The CEO of one of Australia's largest transport companies was reported in the press as saying, "At the end of the day you will always get market pressures that influence the willingness and preparedness of some contractors to cart for less than what might be seen as the established rate."

This attitude reflects the difficulty an individual owner-driver faces when negotiating rates and conditions with principle contractors, and highlights the importance of the functions of a body like to the ACCC in such an environment. The *Trade Practices Act 1974 (Cth)* has not caught up with industry trends in terms of employment practices. For the sake of safety and maintaining a sustainable industry reform does need to occur.

The Fair Trading Coalition has suggested 'safe harbours' should be provided in the Trade Practices Act to enable collective negotiation by small businesses without the

need to apply to the ACCC for authorisation for such action.[2] The TWU supports this notion to the extent that workers such as owner-drivers and bailees' can establish minimum rates and conditions that can be **enforced** in order to maintain basic safety standards and public safety. The instrument and mechanism by which such minimum rates and conditions should be established needs to be further examined.

## Industrial Relations and the Transport Industry in Victoria

In 1996 the Liberal Victorian Government ceded the Industrial Relations Powers of the State of Victoria to the Commonwealth Government. For workers in Victoria this resulted in them either falling under the Federal system regulated by Awards, Enterprise Agreements (and subsequently Australian Workplace Agreements) or under what is known as 'Schedule 1A' of the *Workplace Relations Act 1996 (Cth*).

Workers who do not fit into the traditional or legal definition of 'employee' suffer the problem of being treated like employees but not having the certainty that employment provides in terms of the regulation of remuneration and conditions. The accumulated statutory rights that protect employees' interests such as minimum wages and conditions, limitations of the right of the employer to dismiss the employee, superannuation, and minimum redundancy entitlements have not traditionally been incorporated into the contracts negotiated by owner-drivers and bailees. The 'freedom of contract' principle fails in the case of these workers because of the inherent disparity in the negotiating strength between the individual and a principle contractor who is often a multi-national company.

The validity of *Trade Practices Act 1974 (Cth)* relies in part on the corporations power under the Constitution, which limits the application of the Act in terms of its capacity to assist workers such as independent contractors and bailees unless they establish themselves as an incorporated entity. For obvious reasons this is impracticable for workers often with limited language skills and means of understanding this area of the law. As a consequence the protective provisions of the Act fail to apply to these types of workers.

[2] Fair Trading Coalition Submission to TPA Review, p 33

Workers such as independent contractors have traditionally not been able to collectively bargain because of the operation of the price-fixing prohibitions under the *Trade Practices Act 1974 (Cth)* but this legislation is counter-intuitive to the industrial reality confronting such workers. A ruling by Justice Gray in 1989 held that owner-drivers were eligible for membership of the TWU and were employees just as much as tradesmen who provided their own tools. However, the efforts by the TWU to regulate the rates and conditions of owner-drivers has necessarily involved requests for such regulation to be recognised under the *Trade Practices Act 1974 (Cth).*

In 1978 the TWU Federal Council secured a national agreement with the Australian Road Transport Federation, which allowed for owner-drivers to be employed under award conditions and pay rates adjoined to a hire rate covering vehicle costs and depreciation. Unfortunately for the road transport industry, this agreement was not recognised under the *Trade Practices Act 1974 (Cth)* because of the Fraser Government's refusal to make the appropriate amendments.

Significant industrial disputes relating to owner-drivers ensued in the following years culminating in another agreement being reached between the TWU and the Australian Road Transport Federation in July 1980, this time for interstate owner-drivers. Authorisation was sought for formal recognition of this agreement from what was then the Trade Practices Commission. An interim authorisation was granted to the TWU and the ARTF, which covered safety, driver responsibilities, professional obligations and minimum rates for 'tied' owner-drivers.

The TPC authorised the TWU/ARTF Agreement in November 1981. This Agreement is useful as a benchmark, but the inability to apply it as a **minimum enforceable entitlement** does cause problems in the transport industry as once again the 'race to the bottom' emerges as the trend in the rates actually received by drivers.[3]

[3] Bowden.B, Driving Force – The History of the Transport Workers' Union of Australia 1883-1992, Allen & Unwin, St Leonards, 1993 pp. 165-166

## The Legislative Framework

The introduction of the Unconscionable Conduct provisions under Part IVA of the *Trade Practices Act 1974 (Cth)* was a positive step for the Australian economy, but the provisions were not accessible for unincorporated entities or workers such as owner-drivers or bailees.

In Victoria and Tasmania the replication of the Unconscionable Conduct provisions in State Acts now allow un-incorporated independent contractors to access the provisions of the Acts. This has meant that workers such as owner-drivers and bailees can now make applications which assist them in individual circumstances. Whilst these Acts require Industry Codes and Codes of Conduct to be considered as part of an arbitral process, this is not a substitute for **minimum enforceable** conditions that could be created through other mechanisms.

Similarly, s127A and s127B of the Workplace Relations Act 1996 (Cth) provide some relief for independent contractors seeking to amend 'unfair contracts'. However these sections are limited in application. Firstly, such an application must be made in the Federal Court, and only in relation to a contract being unfair or harsh. Another large impediment to an ordinary owner-driver using such a provision is that the section is limited to contracts that relate to constitutional corporations. There is little scope for assistance from this Act in terms of the situation of owner-drivers.

The over-lapping areas of coverage for the *Workplace Relations Act 1996 (Cth)* and the *Trade Practices Act 1974 (Cth)* in relation to these types of workers does not appear to be fully resolved. These workers are ineligible to notify an industrial dispute to the Australian Industrial Relations Commission and do not have any other appropriate forum in which to resolve what are effectively industrial disputes. The Whitlam Government introduced the right for industrial organisations to represent those who were neither 'employers nor employees' by an amendment to the *Commonwealth Arbitration Act* however the Fraser Government removed this right in October 1977. There should be scope to have the industrial interests of these workers formally recognized and addressed by the Australian Industrial Relations

Commission, however such an issue appears to be beyond the Terms of Reference of this Review.

The Queensland Industrial Relations Commission has enacted changes under section 275 of the *Industrial Relations Act (Qld)* which allows the Commission to declare persons working under a contract for services to be employees. We see this provision as a possible legislative bridge between the *Workplace Relations Act 1996 (Cth)* and the *Trade Practices Act 1974 (Cth)*. For those workers who do not enjoy the bargaining power envisaged in a contractual negotiation under the law but are effectively offered contracts on a 'take-it-or-leave-it' basis, such a provision (if properly constructed) would entitle workers such as owner-drivers and bailees to establish minimum rates and conditions which could be allowed if appropriate amendments were made to the *Trade Practices Act 1974 (Cth).*

## Independent Contractors: An Industrial Case Study

Recently, independent contractors at a major concrete company in Victoria were involved in a dispute over the rate of remuneration for concrete truck drivers. The only logical forum for the resolution of this dispute was the Australian Industrial Relations Commission, however these workers did not have the right to make an application in that forum. In order to resolve the dispute the workers had to take industrial action which forced the possible stand-down of 'employees' of the relevant company. Another Union then made an application in relation to their members which enabled the resolution of the dispute.

This situation demonstrates how farcical the system regulating the remuneration of owner-drivers has become and highlights the need for regulation of minimum and enforceable rates and conditions for these workers. An appropriate forum in which to resolve what amount to 'industrial disputes' would have assisted in an earlier resolution of this.

In another example, under the privatisation and deregulation of Australian Airports, the Australian public has seen audacious displays of raw profiteering in what can only

be described as monopoly situations that have been transferred from public to private ownership. Melbourne Airport recently announced its intention to introduce a 100% increase in the fee it charges taxi drivers, most of whom are 'bailees' and not 'employees', so that they can access the holding yards that queue them into the airport terminals. The ACCC's powers in this case have been reduced to 'price-monitoring' as opposed to 'price-regulation' at the expense of the travelling public, and the business of the taxi drivers. This situation represents a monopoly structure being abused by a dominant market participant to the extreme prejudice of other service providers. An application has been made to the Victorian Civil and Administrative Tribunal under the *Fair Trading Act 1999 (Vic)* in relation to this matter.

## Conclusion

This Review has the responsibility of examining the operation of the competition and authorisation provisions of the Trade Practices Act 1974 (Cth), and in particular the operation of Parts IV and VII of the Act. Whilst this submission touches on a slightly broader area, the issues raised are highly relevant to the effective operation of the *Trade Practices Act 1974 (Cth)* and the way in which the transport industry has developed.

Owner-drivers face a significant hurdle in terms of attempting to establish basic rates and conditions, let alone establishing the types of benefits enjoyed by 'employees' through the accumulated legislative provisions achieved for them by trade unions. This difficulty is primarily caused by a concentration of market power and bargaining power in those businesses that negotiate with owner-drivers.

The *Trade Practices Act 1974 (Cth)* needs to take account of the fundamentally inferior bargaining position of an individual owner-driver or bailee, by establishing a process by which **minimum enforceable** rates and conditions can be set. As a starting point, this may involve the ACCC researching and reporting on the rates and conditions in existence in the transport industry. An examination is required of the ways in which the *Trade Practices Act 1974 (Cth)* and the *Workplace Relations Act 1996 (Cth)* can be used to establish of a forum in which to create **minimum enforceable rates** and conditions for owner-drivers and bailees and for the resolution of 'industrial disputes'.