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Independent Contractors Act and Owner Drivers Briefing Note: Issues NSW. 5 October 2005

1. Purpose of briefing note

A primary intent of the proposed Independent Contractors Act is to override industrial relations laws that intrude into commercial arrangements. Changes to the *Trade Practices Act* will also have an impact.

As with all independent contractors, owner-drivers will be affected by the Independent Contractors Act. Within some sections of the owner-driver community there are expressions of concern about the Act. The concerns are being coordinated and expressed through unions—particularly in NSW.

This briefing note works on the assumption that the concerns are genuinely held. If there are real or potential problems, the issues should be understood and assessed as part of the Independent Contractors Act development process.

This briefing note has been prepared after consultation with NSW transport companies, transport industry associations and some unions. The descriptions, assessments and discussions contained herein are exclusively those of Independent Contractors of Australia.

2. Some Basic Facts

- 66% of operating businesses in the transport sector are owner-drivers.
- 80% of all road freight is moved by owner-operators.

NSW: Chapter 6 (Public Vehicles and Carriers) of the NSW Industrial Relations Act 1996, turns a commercial carriage contract into an award-type document. Independent contractor owner-drivers are effectively turned into industrial relations-controlled employees by virtue of Chapter 6.

This is unique. It does not apply in any other State, nor does it occur under Federal law.

In NSW:

- There are at least 50,000 owner-drivers in NSW.
- Under the NSW IRC, there are more than 170 enterprise-specific arrangements and 25 contract determinations relating to owner-drivers. Between them, these control contract prices and arrangements for areas such as couriers, concrete movers, quarries, waterfront, waste collection, breweries, taxis, car carriers and general freight.

3. NSW IR Capturing Owner-drivers

The provisions of Chapter 6 (Section 106) apply specifically to owner-drivers, unfair contract provisions apply to all independent contractors, and other measures under the NSW IR Act mean that owner-drivers' commercial contracts are subject to industrial relations control. In particular, the Act:

- Governs payment of remuneration.
- Prohibits cashing-in of accumulated sick leave.
- Establishes industrial committees.
- Allows entry and inspection of company commercial records by unions.
- Gives unions rights over all contract carriers, whether carriers are union members or not.

The Act defines:

- Employment as engagement under a contract of bailment or carriage.
- A principle contractor as an employer.
- A contract carrier as an employee.
- Payments under a contract of carriage as remuneration of an employee.
- A contract as an award.
- An association of contract carriers as a union.

This means that, in NSW, owner-drivers are subject to industrial relations control as if they were employees. As a result:

- Unions can create industry-wide 'disputes'.
- Unions have exclusive control over contract negotiations, resulting in IRC-determined rates and arrangements being imposed on every owner-driver.
- Business goodwill is controlled by the Contract of Carriage Tribunal that can order 'compensation' for goodwill.
- The 'unfair contracts' jurisdiction enables IRC retrospectively to change commercial contracts in a costs jurisdiction.

The Independent Contractors Act and changes to the *Trade Practices Act* will override these provisions in NSW bringing NSW owner-drivers within the same regulatory regimes that exist for owner-driver, independent contractors across the nation.

4. The position of NSW Unions

Significant numbers of owner-drivers belong to NSW unions.

The NSW unions, in particular, object to the national standardization of owner-driver regulation, arguing that the NSW arrangements should be extended nationally. There is evidence that some owner-drivers in NSW are genuinely concerned at being subject to national standardized commercial regulation.

The unions argue that:

- Owner drivers are 'dependent' because they mostly work for just one client.
- Minimum contract prices should be set by industrial tribunals.
- 'Unsafe' pay rates contribute to road accidents.
- Unions should have the exclusive right to 'represent' all contract drivers.
- All contract drivers should be required to operate on standard contracts as set by industrial tribunals.

- Reinstatement of terminated contracts should occur through industrial tribunals.
- Contract driver ‘goodwill’ should be controlled by tribunals.
- The NSW arrangements deliver ‘logistical and economic certainty’ to transport operators and ‘settled arrangements’ to the sector.

The unions argue that ‘...there is a prevalence of owner-drivers relying on the current guarantee of at least cost recovery...’ and that the industrial relations laws save owner-drivers from ‘destructive competition’.

5. The policy position of Independent Contractors of Australia

ICA believes that independent contractors are businesses and should not be subject to the control of industrial relations law, systems or institutions. Independent contractors, as with all businesses, are subject to commercial law—including the *Trade Practices Act* and Fair Trading Acts of each State. Business-type regulation applies responsibilities but also affords protections.

Being ‘a business’ has the advantage that profit can be made and the disadvantage that risk exists that can lead to losses. By comparison, employees are ‘protected’ from business-type risk but lose the advantages of business-type profit. Normally, laws ensure a clear distinction between the two because to confuse or mix the two damages business and free economic activity. However, NSW industrial relations laws for owner-drivers have created confusion. This confusion should be removed.

The Independent Contractors Act, along with probable changes and action under the *Trade Practices Act*, should overcome this confusion. But where individuals have undertaken loans for their owner-driver business or structured their businesses on the basis of the current NSW IR laws, there is a risk that immediate overriding of the NSW IR laws could lead to some individuals suffering losses. There may be a case for a transition period or other compensating arrangements for such individuals. This needs to be investigated.

6. Specific Issues

The unions discuss a number of issues that they believe need to be addressed for owner-drivers.

6.1. Dependency: Unions argue that what distinguishes owner-drivers is that most work for one client and, as such, are ‘dependent contractors’. They say that this justifies taking all owner-drivers into industrial relations regulation.

Discussion: The International Labour Organisation has dropped the concept of a ‘dependent contractor’. In their latest discussion paper on the issue (2005), the ILO refers to ‘independent workers’ as being self-employed and ‘dependent workers’ as being employees. This reflects the content of the latest ‘Conclusion’ on the subject by the ILO (2003). Internationally, it is recognized that it is not appropriate to regulate independent contractors under industrial regulations. Working for one client as an independent contractor is a commercial situation and does not of itself create legal dependency.

6.2 Exclusivity: Unions allege that some transport companies insert exclusivity clauses into contracts which prevent owner-drivers offering their services to a wider range of clients.

Discussion: Prevention of the right to offer services generally is a breach of a key independent contractor indicator. Affected owner-drivers, in fact, may well be employees and, if so, should be subject to industrial relations laws. If owner-drivers are, in fact, still independent contractors, the exclusivity clauses may be unconscionable and illegal under common law and the *TPA*. Consideration of making compulsory exclusivity clauses illegal or restricted under owner-driver contracts may assist the policy debate.

6.3 Advertising: Unions claim that some transport companies require owner-drivers to paint their vehicles in company livery, thereby achieving cheap advertising. This effectively creates a commercial prohibition on owner-drivers offering their services widely and replicates the problem (above) at 6.2.

Discussion: Requirements to paint vehicles as part of the contract could well constitute third-line forcing under the *TPA* and are potentially illegal.

6.4 Goodwill: The NSW Contract of Carriage Tribunal potentially entrenches the price of goodwill in some owner-driver contracts. Apparently, this provision has rarely been used and is complex. It appears, however, that some entrants to the industry may have bought into the sector and paid goodwill in the belief that the goodwill was secure at law.

Discussion: It is extraordinary that any laws should lock in a goodwill price. This completely distorts business and free market activity and destroys a key indicator of being an independent contractor—namely, ‘risk’. This should/would ordinarily be a breach of free market laws. Nonetheless, the NSW laws appear to have created an expectation that goodwill is a form of property right for those currently in the industry. In effect, to remove that property right (if it exists) could amount to a form of state theft. If this situation exists, there could be a justification for accommodating people who are currently in this position. Investigation would need to occur as to how many persons believe they could be affected and in what circumstances. However, the laws should be overridden to prevent similar outcomes arising in the future.

6.5 Safety Issues: Unions and some labour academics allege that there is such a thing as an ‘unsafe pay rate’. That is, it alleges that if owner-driver remuneration is not controlled, drivers will accept remuneration that forces them to break road laws to meet delivery deadlines.

Discussion: It is dangerous to run the argument that because an owner-driver accepts a particular pay rate that, if they break the law, another party is responsible. Owner-drivers must be responsible for compliance with road laws. Lending support to transference of responsibility encourages breaking the law and contributes to unsafe roads. Road safety for owner-drivers, in fact for all commercial drivers, should be addressed exclusively through strong road laws and codes of conduct and enforcement under Occupational Health and Safety (OHS) laws. In this respect, OHS laws for drivers could make it an offence for a driver to accept a contract, or a

person to offer a contract, where the terms of the contract required the driver to break road laws. Prices would then find levels consistent with the requirement to comply with road and OHS laws.

6.6 Minimum Rates: NSW unions believe that the NSW IR system's delivery of minimum contract rates serves the industry well.

Discussion: Some industry analysts observe however that the minimums set by the various determinations for contractors by the NSW IRC have provided a level of perceived comfort. Yet the result in practice is that the minimums have become maximums. That is rates do not vary above the minimums. Contractors perceive that they cannot negotiate because of the determinations. As the determinations have become the maximum, this has propped up the lower end of the industry, although at the expense of the higher achievers. Earnings across contractors have flattened as a result.

The determinations also restrict competition as it pigeon-holes couriers, taxi truck, general freight movers and so on. The determinations do not take account of the movements of the market and the differing products offered. This is to the detriment of the industry as a whole. The determinations target a social and moral idea, but distort the free operation of the transport market, thus damaging all players—including owner drivers.

6.7 Delays: Unions claim that it is common for owner-drivers to be fined by principal contractors for being late, but that when a driver is delayed by the actions of a principal contractor and/or client, the driver is not compensated accordingly.

Discussion: It may be that fining owner-drivers for lateness could constitute unconscionable conduct. Further, where such fines effectively require a driver to break road laws, such fines could constitute breach of OHS laws as discussed under 6.5 (above).

6.8 Representation: Unions argue that changes to the *Trade Practices Act* will prevent them representing their members in collective negotiations. Certainly the proposed changes would, on the surface, appear to lead to that outcome.

Discussion: Industrial relations laws frequently deliver to unions a statutory exclusivity to represent not only their own members but whole classes of employees as well. This statutory exclusivity should not extend to anyone under a commercial contract. Commercial contracts are always individual and the parties to each and every contract should retain their exclusive right to control their commercial contract/s.

However, where a group of independent contractor seek a right under the *TPA* to collectively negotiate contracts with a client or group of clients, they should be entitled to such representation should they wish. This should apply to owner-drivers too. Any such negotiations, however, should be surrounded by the following conditions:

- Each independent contractor should individually, and in writing, authorize their chosen representative to act on their behalf.

- The authority to represent should expire at the end of the particular collective negotiation being conducted. Future negotiations should be subject to additional and individual authorizations.
- Principal contractors should have the right to engage or not engage in negotiations with a collective.
- Outcomes of collective negotiations should only apply to those parties involved and should not be extended to other parties or classes of persons not involved. Extension should occur only upon the express and individual application and authorization by other parties.

It appears that changes to the *TPA* would ban unions *per se* from having the authority to conduct collective negotiations under the *TPA*. However, nothing appears to be mooted that would stop owner-drivers from authorizing an individual union official to act on their behalf as an individual—one who may well be capable of utilizing the resources of the union to support the negotiations.

7. NSW in comparison to other States

NSW has had industrial relations laws covering owner-drivers for a considerable period of time. The other States do not have these laws, although some are moving to replicate NSW-type provisions. These should be expected to be overridden by the Independent Contractors Act and the *TPA*.

Example 1: The Victorian Owner-Drivers Act 2005.

Victoria has introduced laws covering owner-drivers that:

- Enables a tribunal to control and fix the prices of commercial contracts in the transport sector. They can do this retrospectively.
- Enables the same tribunal to apply a decision on one commercial contract to a ‘class of contracts’. This facilitates legalized price collusion.

This effectively creates industrial relations-type law by stealth, under the guise of commercial law. This has only been possible because of a clause in the Act which removes the Act from the ambit of the *Trade Practices Act*.

Because this law has not been in place long enough to have significant commercial application, it is expected that it will immediately be overridden by the Independent Contractors Act to prevent distortion of the free market in the Victorian transport sector.

Example 2: The ACT Fair Contracts Bill.

This Bill has not been proceeded with in the ACT pending the outcome of the Commonwealth’s changes to industrial relations laws. The ACT Bill has price-fixing and price-collusion provisions applying to commercial contracts which should be expected to be overridden by the Independent Contractors Act and the *TPA* to prevent free-market distortion taking place.

8. Contract compliance and protection

Under the commercial contract, the law ensures protections by:

- Requiring contracts to be *bona fide*.
- Preventing unconscionable conduct.
- Requiring parties to comply with the terms of the *bona fide* contract to which they have freely entered.

Parties can access the commercial courts for these protections or make use of the *TPA*. For independent contractors, however, these processes can be expensive and exceed the cost of the amount under dispute. What is often not recognized is that, under the States' Fair Trading Acts, provisions for dispute-resolution between traders exist which are similar to the small claims processes available to consumers.

Further, it has become common for industry-specific codes to be developed under State and Federal commercial law that address behaviours which damage contract integrity and the effectiveness of free markets. Such processes have been developed, for example, in the motor trades, real estate and financial sectors. The processes generally have, for example, required contract compliance to ensure:

- Plain English expression in contracts.
- Rates and prices under contract are properly and clearly explained.
- Cooling off periods.

The owner-driver issues raised by unions could possibly be addressed by following these examples, tailoring them to suit the transport sector. They could, for example, include:

- If goodwill is to be guaranteed by the principal contractor, this should be stipulated in a contract at the time of entering a contract.
- A requirement that if a principal contractor is to withhold money for insurance or other services, that proof of the service must be supplied to the owner-driver and the owner-driver must have the option of obtaining the service from another source. This is a positive provision of the 2005 Victorian owner-drivers legislation mentioned above.
- Information on the commercial realities of running an owner-driver, small business must be given to owner-drivers by principal contractors at the time of engagement. This is also a positive aspect of the Victorian owner-driver legislation.
- Outlawing contract terms that require as part of the engagement an owner-driver to paint his or her vehicle with advertising logos of the principal contractor. Such advertising could be allowed, for example on an offer and acceptance of contract basis, for a separate fee.
- Clear terms be expressed covering contract termination and agreed at the time of entering a contract. This would ensure that owner-drivers could adequately assess their long-term commercial risk when entering a contract. Termination disputes would then be settled exclusively according to the terms of the agreed contract.

9. Summary

Independent Contractors of Australia believes that independent contractor, small business people, which includes owner-drivers, need fair, quick, comparatively cheap access to commercial law to assist them in running their businesses. Industrial relations laws and systems are not appropriate because they are excessively complicated, costly and remove control of the business from independent contractors. Improvements to commercial contract protection are needed but can easily be achieved and can be modelled on law already in place.