

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2008 No. 148**

#### **Issued by the authority of the Minister for Small Business, Independent Contractors and the Service Economy**

##### *Independent Contractors Act 2006*

##### *Independent Contractors Amendment Regulations 2008 (No. 1)*

The *Independent Contractors Act 2006* (the IC Act) protects the freedom of independent contractors to enter into contracting arrangements and recognises that these arrangements should be regulated by commercial, not workplace relations, law.

Section 43 of the IC Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out, or giving effect to the IC Act.

Subsection 7(1) of the IC Act excludes the operation of state and territory laws that require independent contractors to be treated as employees, or requires them to be afforded employee like entitlements. However, state and territory laws that would otherwise be excluded can be saved by regulations made under paragraph 7(2)(c) of the IC Act.

Subparagraphs 7(2)(b)(i) and (ii) of the IC Act save the following state laws that provide employment like protections for owner drivers in the road transport industry:

- Chapter 6 of the NSW *Industrial Relations Act 1996* (and any other provision of that Act to the extent that it relates to, or has effect for the purposes of Chapter 6); and
- The Victorian *Owner Drivers and Forestry Contractors Act 2005* (the Victorian Act).

After commencement of the IC Act on 1 March 2007, the West Australian Government passed the *Owner-Drivers (Contracts and Disputes) Act 2007* (the WA Act). The WA Act is partly based on the Victorian Act and is expected to be proclaimed on 1 August 2008.

The Independent Contractors Amendment Regulations 2008 ('the Regulations') prescribe the WA Act under paragraph 7(2) (c) so that owner drivers in Western Australia have access to similar protections as those in New South Wales and Victoria.

The Regulations provide that the IC Act preserves operation of the WA Act. The WA Act is designed to ensure rights and responsibilities for both hirers and owner drivers in Western Australia. In particular, it seeks to ensure that owner drivers are paid a fair and reasonable rate and are paid within 30 days from submitting a payment claim. It also gives access to owner drivers and hirers to a low cost dispute resolution process and a range of reliable information to help determine a suitable rate for a particular freight task. The WA Act would be saved in its entirety.

In developing the Regulations, the Department of Innovation, Industry, Science and Research (Department of Innovation) consulted with the WA Department for Planning and Infrastructure; the Western Australia Long Distance Owners and Drivers Association (WA LDODA); the Transport Forum WA; the West Australian office of the

Transport Workers' Union (WA TWU), the Chamber of Commerce and Industry Western Australia; and NatRoad.

In general, West Australian stakeholders were either positive or ambivalent about the impact of the WA Act on the state's trucking industry.

Stakeholders were concerned that owner drivers' low earnings and poor working conditions were discouraging new entrants into the market, exacerbating the skill shortage already affecting the industry.

In particular, WA LDODA was concerned with low income levels, which forced some West Australian owner drivers to increase their labour input to an unsafe and unsustainable level.

The WA TWU believed that the increasing cost of fuel and low earnings may be conducive to owner drivers' only performing essential maintenance on capital equipment. This could contribute to business failure, diminishing returns from capital equipment and some safety concerns.

As the exemption may also bring greater safety to owner drivers in Western Australia the Department of Innovation consulted with the Department of Infrastructure, Transport, Regional Development and Local Government (Department of Infrastructure) about the impact of the regulations on the national road transport agenda. The Department of Infrastructure advised that a range of other regulatory processes are in place to address road safety.

The IC Act does not specify conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

A Regulation Impact Statement for the proposed Regulations is attached.

The Regulations commence on 1 August 2008.

# Regulation Impact Statement

## Owner Driver Regulation in Western Australia

### Background

A number of inquiries and studies have provided evidence of problems within the road freight industry.<sup>1</sup>

The Australian Transport Council (ATC)<sup>2</sup> first considered the issue of owner drivers in August 2002, and agreed to investigate it further. A Standing Committee on Transport (SCOT) Working Group was convened and reported to ATC in May 2003.

The Working Group found that owner drivers on average had very low levels of profitability, worked long hours and had experienced many years of declining freight rates. The bargaining power of owner drivers was also limited and they were at a considerable disadvantage when negotiating with hirers. Poor business skills and a poor grasp of cost structures was also a common problem amongst owner drivers.

The ATC was not able to agree on a common approach to address the issue nationally, and jurisdictions developed their own individual policies. New South Wales (NSW) maintained its existing system of determinations and Victoria subsequently developed its *Owner Drivers and Forestry Contractors Act 2005* (the Victorian Act), with Western Australia (WA) following more recently, introducing the *Owner-Drivers (Contracts and Disputes) Act 2007* (the WA Act). The WA Act is scheduled to be proclaimed on 1 August 2008.

While the problems in the road transport industry are likely to apply more broadly, this Regulation Impact Statement (RIS) focuses on the owner driver industry in Western Australia. This is because the WA Government has approached the Australian Government for an exemption from the operation of the *Independent Contractors Act 2006* (IC Act).

### The Problem

#### Independent Contractors

Different types of working relationships exist under the law in Australia. Some workers are employees and some workers are independent contractors. Employees have set minimum entitlements under the law, such as payment of wages, hours of work and personal and carer's leave. Independent contractors run their own businesses and are

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<sup>1</sup> These studies include *Heavy Vehicle Safety and Safe Sustainable Rates for Owner-Drivers*, Discussion Paper, Standing Committee on Transport (SCOT) Working Group, 2003; *Beyond the Midnight Oil*, the report of House of Representative Standing Committee on Transport on managing fatigue in transport (2000); *Regulatory Impact Statement – Owner Drivers and Forestry Contractors Regulations 2006*, Jaguar Consulting Pty Ltd, 2006; and *Report of Inquiry into Safety in the Long Haul Trucking Industry*, Professor Michael Quinlan, UNSW, 2001.

<sup>2</sup> The ATC is made up of state and territory transport ministers.

generally free to negotiate their own fees and working arrangements. Unlike most employees, independent contractors have a choice to provide their services to a wide range of clients rather than to a single employer.

The Productivity Commission<sup>3</sup> estimated that in 2001 there were approximately 0.8 million dependent and independent contractors, which accounted for eight per cent of all employed persons. Independent contractors are a diverse group comprising anyone from an information and communication technology or accounting professional, to a factory worker, cleaner, fruit picker, or transport owner drivers, to name a few.

### **The Independent Contractors Act 2006**

The IC Act was introduced in 2006 by the previous government. Its primary purpose was to move contracting relationships away from the realm of employment regulation and to place these relationships under commercial regulation.

The IC Act overrides provisions of state laws that deem certain classes of independent contractors as employees and provisions which bestow employee related entitlements on independent contractors. It recognises however that some groups are particularly vulnerable and makes special provisions for outworkers and owner drivers. This is achieved by preserving specified state and territory legislation<sup>4</sup>. The IC Act also allows for regulations to be made to preserve other state legislation should the need arise.

Submissions to the Senate Inquiry into the provisions of the Independent Contractors Bill 2006 noted that owner drivers have working conditions similar to employees, and are often referred to as *dependent* contractors. This is because unlike the traditional notion of an *independent* contractor who works for many clients, the vast majority of owner drivers work for one hirer and the relationship they have with the hirer is not unlike an employment relationship. The Explanatory Memorandum for the IC Bill states that overriding state protections for owner drivers in NSW and Victoria would represent a significant cost for independent contractor owner drivers in those jurisdictions and it was on this basis that provision was made to protect Victorian and NSW owner driver legislation from being overridden.

The provisions that are currently preserved under the IC Act in relation to owner drivers are:

- Chapter 6 of the NSW *Industrial Relations Act 1996* and any other provision of that Act to the extent that it relates to, or has effect for the purposes of Chapter 6; and
- The Victorian *Owner Drivers and Forestry Contractors Act 2005*.

Further details can be found at **Attachment A**.

### **The Owner-Drivers (Contracts and Disputes) Act**

The WA Act was passed by the WA Parliament after the commencement of the IC Act and was modelled on the Victorian Act. It was developed in full consultation with industry.

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<sup>3</sup> Productivity Commission *Self-Employed Contractors in Australia: Incidence and Characteristics*, Staff Paper, 2001, p. 37.

<sup>4</sup> See Subsection 7(2) of the IC Act.

The WA Act applies to owner drivers who operate a vehicle with a gross mass of more than 4.5 tonnes and are natural persons, partnerships or companies engaged:

- under a Western Australia owner driver contract; or
- to transport goods wholly within Western Australia; or
- to transport goods from Western Australia to another place, or from another place to Western Australia if a ‘substantial part’ of the services under the owner driver contract is performed in Western Australia.

In summary the legislation:

- stipulates security of payment provisions and fair and reasonable time requirements for payment
- establishes the Road Freight Transport Industry Council whose purpose is to assist in the development of a safe and sustainable road freight industry
- develops a code of conduct including a set of safe sustainable guideline rates and cost schedules
- establishes provisions to allow owner drivers to negotiate on a collective basis
- details requirements as to how parties are to interact
- provides information kits which would include a copy of the guideline rates
- prohibits unconscionable conduct by owner drivers and hirers
- confers powers on Government officials to investigate and prosecute breaches of security of payment provisions or the code of conduct
- establishes a Road Freight Transport Industry Tribunal to conduct efficient dispute resolution.

In March 2007 Labor announced its support to preserve the WA Act under the IC Act. Labor argued that WA owner drivers should be entitled to the protections enjoyed by owner drivers in NSW and Victoria.

While the problems in the road transport industry are likely to apply more broadly, the WA Government is the only government to approach the Federal Government for an exemption under the IC Act<sup>5</sup>.

## **The owner driver industry in Western Australia**

In 2007 the ABS estimated that in Western Australia there were 9,985 registered articulated trucks and 52,674 registered rigid trucks<sup>6</sup>. This represents 13.4 per cent of all registered articulated and rigid trucks in Australia. According to the WA Department for Planning and Infrastructure (WA DPI), the majority of these are used commercially and most are operated by owner drivers.

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<sup>5</sup> It should be noted however that similar legislation has been tabled in the ACT Legislative Assembly.

<sup>6</sup> ABS, Catalogue No 9309.0, Motor Vehicle Census, 31 March 2007.

Stakeholder consultation has shown that the industry generally is characterised by low levels of earnings, high rates of business failure and working conditions and hours of work that the community would consider unacceptable. Hirers tend to consist of substantial commercial organisations, giving rise to situations where an imbalance in the understanding of commercial practices, or information asymmetries, can lead owner drivers to poor business decisions with the increased potential for exploitation<sup>7</sup>.

Attempts by WA DPI to improve the business practices of owner drivers through the provision of web based information have proved unsuccessful.

Consultations confirmed that the degree of practical independence that most owner drivers exercise in their day to day operation of their business is minimal. For example: work is performed for a single operator (this can be a condition of finance approval); owner drivers are frequently price takers; they perform work at the behest of the hirer; take direction from the hirer; and may be required to paint or mark their vehicle with the hirers' colours and/or insignia. They operate with very tight business margins and when coupled with the need to service large debt repayments, this dependence makes many owner drivers a vulnerable group.

While equity issues, such as hirers' excessive market power, could be tackled through the contract resolution mechanism provided for under the IC Act, this mechanism is perceived to be complex, expensive and lengthy. The WA Government does not consider that this mechanism is particularly suited for the types of disputes that arise in the road transport industry in Western Australia. Among other things, the WA Act establishes a simpler dispute resolution mechanism.

Anecdotal evidence links low rates of pay with long hours of work and increased levels of fatigue. Safety concerns are not a key issue for owner drivers as such, as a range of regulatory processes are in place, such as occupational health and safety (OHS) legislation and recent ATC initiatives on driver fatigue. However, financial pressures can lead owner drivers to compromise on safety. Compromises typically include an increased propensity to speed, overload vehicles and/or minimise vehicle maintenance. Thus, owner drivers' inability to obtain a safe and sustainable freight rate may impact on their health and family relationships. Drivers that feel financially compelled to compromise on safety are caught between bending or breaking the rules or going broke.

Increases in fuel prices have exerted some financial pressure on owner drivers with marginal businesses, and have particularly affected long distance drivers. Moreover, some hirers have been charging higher rates to cover increasing fuel costs, but have not always passed on these higher rates to the owner drivers.

At present owner drivers in NSW and Victoria have a legislative framework that provides sustainable rates and a practical framework to negotiate with hirers on a level playing field. On 1 August 2008, the WA industry will have similar legislation. However, unless the WA Act is preserved under the IC Act it will be automatically overridden when it is proclaimed on 1 August 2008.

The WA Government is concerned that without this legislation the road transport industry in Western Australia would become unsustainable. This is of concern, given the geographical size of Western Australia and the importance of the road transport industry to the WA economy.

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<sup>7</sup> SCOT Working Group Discussion Paper op. cit., pp 2-4.

## **The Objective**

The objective is to provide substantial protections to WA owner drivers in the course of their contracting relationship with hirers. These protections will be similar to ones already afforded to owner drivers in Victoria and NSW.

## **Options**

### Option One - Maintain the status quo

Under this option owner drivers in Western Australia will continue to be regulated by the IC Act.

### Option Two - Create a national owner driver scheme to regulate all owner drivers

Under this option the Australian Government would assume responsibility for owner driver regulation. The IC Act would be used to override existing NSW and Victorian owner driver legislation and a new national scheme would be established.

### Option Three - Allow the WA Government to regulate owner drivers in Western Australia

Under this option the Australian Government would allow the WA Government to regulate owner drivers in their state. This would restore the regulatory power that was removed following the commencement of the IC Act on 1 March 2007.

## **Impact Analysis**

### **Option One - Maintain the status quo**

Under this option owner drivers in Western Australia will continue to be regulated by the IC Act.

This option would result in no change to the current operation of the owner driver industry in Western Australia. Under this option the problems experienced by owner drivers would continue. This option would fail to provide substantial protections for owner drivers in Western Australia.

The option of maintaining the status quo also fails to acknowledge the existence of regulatory regimes for owner drivers in NSW and Victoria. This leaves the Australian Government open to criticism because the IC Act allows the NSW and Victorian owner driver legislation to operate but not the WA government legislation.

### **Costs and benefits to owner drivers in Western Australia**

Under this option many owner drivers in WA will continue to experience low earning levels, high rates of business failure, and continued safety concerns.



Conversely, owner drivers will receive some minimal benefits from not having to comply with and understand any new regulatory system.

### **Costs and benefits to hirers in Western Australia**

Under this option hirers will continue to experience labour shortages, a highly fluid industry, and possible industrial unrest.

Hirers will continue to benefit as they take advantage of sustained low contract prices in the industry. Further, as the IC Act will continue to apply, hirers will benefit from the high degree of flexibility enshrined in the legislation.

### **Costs and benefits to other businesses**

Under this option businesses may continue to be affected, through non payment of debt, and through a relatively high rate of bankruptcies amongst owner drivers.

Businesses will continue to benefit from low cost delivery services.

## **Costs and benefits to consumers**

Maintaining current protections would have little impact on consumers. This is because consumers would simultaneously benefit from pressure to keep prices low, whilst facing potential higher costs from the effects of driver bankruptcies and spill-over effects from owner drivers compromising on road safety in an effort to cut costs.

## **Compliance Costs**

No additional compliance costs are associated with maintaining the status quo.

## **Option Two - Create a national owner driver scheme to regulate all owner drivers**

Under this option the IC Act would be used to override existing NSW and Victorian owner driver legislation, but provision would be made for a national owner driver scheme.

The main advantage of a national owner driver scheme is that a single set of conditions would result in less confusion for the industry, especially for those drivers and hirers that operate across state borders. The Australian Government, however, can only legislate as far as it is constitutionally possible. Use of the corporations power could mean that a small number of owner drivers would fall outside a national system.

A national system is also the preferred approach of some stakeholders.<sup>8</sup> Despite this, there is little consensus about how a national system should work. A national system would create a set of winners and losers amongst owner drivers, hirers and other businesses. This would not only apply within a state but across states. For example, in NSW, owner drivers have special protections with respect to business goodwill. Loss of these protections under a national system would impose serious hardship on some business owners. It is also unlikely that many owner drivers in Victoria would want to move from the commercially based protections developed for the Victorian transport industry to the more highly regulated NSW system. It is worth noting that in 2003, the ATC explored the development of a national owner driver system but could not reach agreement.

It is expected that a national system would take time to develop. Whilst this is not sufficient reason to dismiss the task, it does impose a cost on owner drivers in Western Australia, who at least in the short term, will not benefit from the protections provided for under the WA Act. Loss of benefits would continue until a national system could be developed.

A further disadvantage is that there is no guarantee that a national approach would provide the same protections that the WA Act would give to WA owner drivers. This is because a national system would create a 'one size fits all' approach to regulation. While problems in the transport industry are likely to apply more broadly, Western Australia is the only government to approach the Australian Government for an exemption under the IC Act.

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<sup>8</sup> This view was expressed by the TWU and NatRoads.

### **Costs and benefits to owner drivers in Western Australia**

Under this option owner drivers in WA would need to wait until a national system is developed before the problems are addressed. The time taken to create this system will be a significant cost to WA owner drivers – a cost exacerbated by the risks of reaching consensus.

Further, if and once implemented, owner drivers may experience reduced opportunities if the cost of engaging an owner driver were to rise relative to the cost of employing a driver.

If a national system was created owner drivers would benefit from improvements in the previously identified areas of low earning levels, high rates of business failure and road safety concerns.

### **Costs and benefits to hirers in Western Australia**

Under this option it is anticipated that hirers in Western Australia would incur increased costs as low unsustainable rates are replaced by competitive but sustainable rates.

Hirers in Western Australia will also face specific owner driver regulations for the first time. This will result in costs in terms of less flexibility and any compliance costs associated with a new national system.

Hirers will benefit from continued industrial harmony, and from a new pool of owner drivers who will be attracted to a more viable and sustainable industry.

### **Costs and benefits to other businesses**

Businesses which rely on owner drivers as part of their supply chain may face increased costs associated with engaging owner drivers if hirers pass these costs down the supply chain.

### **Costs and benefits to consumers**

Under this option consumers may incur additional costs if businesses were to pass any additional costs onto consumers.

Consumers will benefit from potential increased road safety and fewer bankruptcies.

### **Compliance Costs**

As a national system has not been developed, compliance costs cannot be established or predicted.

However, businesses are likely to face some form of compliance costs under a national system.

## **Option Three - Allow the WA Government to impose its own regulations**

Under this option the Australian Government would allow the WA Government to regulate owner drivers in Western Australia. This would restore the regulatory power

that was removed following the commencement of the IC Act on 1 March 2007. It would give immediate effect to the *Owner-Drivers (Contracts and Disputes) Act 2006*. The WA Act was developed in full consultation with industry and was developed to address the problems outlined at the beginning of this RIS.

The principal advantage of this option is that it specifically addresses the problem by providing immediate protections for owner drivers in Western Australia in the course of their contracting relationship with hirers, but with minimal impact on competition<sup>9</sup>. For example, the creation of guideline rates, model contracts, and the obligation to provide drivers with current information substantially improves the amount of information available to WA drivers. The legislation seeks to balance the competing interests of hirers and owner drivers by allowing owner drivers to negotiate on a collective basis, and, through the use of a code of conduct seeks to establish some clear standards on acceptable business practice. The establishment of a Road Freight Transport Industry Tribunal will provide easy access to dispute resolution mechanism.

The main disadvantage of this option is that it would create a fourth owner driver jurisdiction in Australia. However the WA Act has been modelled on the owner driver legislation in Victoria. The WA Act can therefore be seen as a step towards a more harmonised national system.

### **Costs and benefits to owner drivers in Western Australia**

Under this option owner drivers will receive a range of benefits. The WA Act aims to ensure owner drivers are paid a fair and reasonable rate. It does this through the creation and publication of guideline rates. This allows drivers and hirers to enter negotiations understanding what the sustainable rate currently is in the WA owner driver industry.

The WA Act also obliges hirers to pay an owner driver within a maximum of 30 days from the receipt of a payment claim. This will ensure that drivers are paid within a reasonable and sustainable period, decreasing the potential short term cash flow problems.

Finally, the WA Act gives owner drivers and hirers access to a low cost dispute resolution process and a range of information to help parties determine a suitable rate for a particular freight task. This makes it easier for owner drivers to access their legal rights in the event of contract problems.

Although most of these benefits can be viewed as a transfer, an increase in the earnings of owner drivers is necessary to ensure the long term sustainability of the owner driver industry. Low rates of return not only make the industry unattractive to new entrants but also limit the ability of existing players to invest in more productive equipment. Moreover, considered from a broader allocative efficiency perspective, the low rates of returns to owner drivers, when combined with the highly competitive nature of the road freight industry imply that the price of road freight services is below its efficient level. This leads to over-consumption of road freight services and consequent losses in allocative efficiency. To the extent that this dynamic operates, the effect of the legislation in increasing the cost of the services of owner drivers may therefore be consistent with improvements in the overall allocative efficiency.

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<sup>9</sup> See the National Competition Policy Assessment prepared by the WA Government.

**Costs and benefits to hirers in Western Australia**

Hirers will incur increased costs, as low unsustainable rates are replaced by competitive but sustainable rates.

Hirers will also face costs associated with the banning of 'if paid / when paid' contracts. Under these types of contracts hirers would not pay owner drivers until they themselves had been paid.

The WA Act also establishes a rule whereby hirers must pay owner drivers no later than 30 days after receiving a claim for payment. Interest will be payable on overdue amounts.

Under this option hirers will benefit from continued industrial harmony, and from a new pool of owner drivers who will be attracted to a more viable and sustainable industry.

## **Costs and benefits to other businesses**

Businesses which rely on owner drivers as part of their supply chain may face increased costs associated with engaging owner drivers if hirers pass these costs down the supply chain.

## **Costs and benefits to consumers**

Under this option consumers may incur additional costs if businesses passed any additional costs further down the supply chain to consumers.

Under this option consumers will benefit from better road safety and less bankruptcies.

## **Compliance Costs**

The WA Act mandates for the creation of a Road Freight Transport Industry Council (RFTIC). This council will create, amongst other things, an industry code of conduct. It is this code of conduct which will determine the extent of the regulatory burden and associated compliance costs. Membership of the RFTIC will comprise of eight WA stakeholders appointed by the WA Transport Minister.

The RFTIC can only be established after the WA Act comes into effect, which in turn can only come into effect if an exemption from the IC Act is granted by the Australian Government. Hence the regulatory burden cannot be quantified until after a code of conduct is created. However the types of compliance costs businesses will face if the WA Act becomes operational can be identified. These include education, record keeping, and enforcement costs.

### *Education Costs*

Under the WA Act hirers will need to provide owner drivers with current information, such as the guideline rates established by the RFTIC. This is expected to have costs for hirers as they will need to keep abreast of current mandated information.

### *Record Keeping Costs*

The WA Act allows an owner driver, or his/her representative to access records a hirer is keeping on that individual owner driver. This includes contracts that are no longer in force. This is expected to have record keeping costs for hirers. However as many businesses need to keep records for other purposes, for example tax, costs should be minimal.

### *Enforcement Costs*

The WA Act allows an owner driver or their representative to enter a hirer's premises to inspect records and to make copies of these records. The right to enter a hirer's premises and inspect records is slightly different when the purpose is to investigate a suspected breach. In this situation, amongst other things, the representative may view any other work, material, machinery or appliance that is relevant to the suspected breach.

## **Consultation**

Consultation on this issue has been extensive. The former Department of Employment and Workplace Relations (DEWR) undertook significant consultation when developing the IC Act. It released a discussion paper in March 2005 *Proposals for Legislative Reform in Independent Contracting and Labour Hire Arrangements*.

Amongst other things, the paper discussed the issue of owner driver regulation and called for stakeholder comment. At the same time, the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation conducted its inquiry into independent contracting and labour hire arrangements. The Committee tabled its report, *Making It Work: Inquiry into independent contracting and labour hire arrangements* on 17 August 2005.

An analysis of the submissions to these inquiries showed that at the national level there is little consensus about how the industry should be regulated. Some stakeholders, for example the Independent Contactors' Association, were strongly opposed to any regulation of the industry. They argued that markets should be allowed to operate freely. Others, for example, the Transport Workers' Union (TWU) would like to see the industry regulated nationally using employment like law. They argued for measures to address the unequal bargaining position of hirers compared to owner drivers. The TWU also explained that the owner driver industry in NSW had been regulated for many years and any relaxation of these protections would cause serious hardship for owner drivers in NSW and the industry more generally.

More recently, the Department of Innovation, Industry Science and Research (Department of Innovation) undertook another round of consultations about the industry's problems in Western Australia. It also canvassed views about the impact of the WA Act on the trucking industry. The WA Department for Planning and Infrastructure (WA DPI); the Western Australia Long Distance Owners and Drivers Association (WA LDODA); the Transport Forum WA; the TWU, the Chamber of Commerce and Industry Western Australia (CCIWA); and NatRoad were consulted. The Australian Trucking Association (ATA); the Australian Livestock Transporters Association and the Australian Road Trains Association did not take up an offer to be part of the consultation process.

WA stakeholders were either positive or ambivalent about the impact of the WA Act on the state's trucking industry. The WA Act applies to trucks larger than 4.5 tonnes, whereas owner driver regulation in NSW and Victoria applies more broadly. This might explain why there was little resistance to the introduction of the legislation despite considerable resistance to a national system some years earlier. It might also reflect differences in the industry between states.

WA LDODA raised the issue of low levels of income during consultations. According to WA LDODA, this forced some West Australian owner drivers to increase their labour input to a level they considered both unsafe and unsustainable. For example, some owner drivers are driving twice a week to Karratha, a distance of approximately 1550 kilometres one way from Perth (3085 kilometres return) with the market rates for this journey currently being \$2,500.<sup>10</sup> A number of stakeholders were concerned that low earning levels and poor working conditions were discouraging new entrants into the market and predicted that the industry would face serious skills shortages in the near future.

The West Australian Branch of the TWU cite the current high costs of fuel and low levels of earnings as reasons why West Australian owner drivers postpone maintenance

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<sup>10</sup> WA Long Distance Owners and Drivers Association



on their capital equipment, potentially allowing it to run down.<sup>11</sup> This can lead to further rates of business failure and diminishing returns from capital equipment.

The National Branch of the TWU and NatRoads saw this legislation as a first step towards a more harmonised system, although each group had a very different view about what it might look like.

## **Conclusion and Recommended Option**

Option three is the recommended option. This option is the most efficient and effective way of providing protections to West Australian owner drivers to ensure a fair contracting relationship with hirers.

It supports the efforts of the West Australian Government to create a safe and sustainable industry and gives West Australian owner drivers similar protections to those enjoyed in NSW and Victoria.

Option three provides an immediate solution to the problems identified in this RIS. While a nationally consistent approach to owner driver regulation has merit, this is a long term solution, and should not come at the cost of addressing immediate problems in the West Australian trucking industry.

## **Implementation and Review**

Implementation of option three would be by way of regulation. Section 43 of the IC Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary, or convenient to be prescribed for carrying out, or giving effect to the IC Act.

Subsection 7(2) of the IC Act saves certain state and territory laws dealing with owner drivers, which would otherwise be excluded. The IC Act saves state laws to the extent that those laws provide employment like protections for owner drivers in the road transport industry in NSW and Victoria. This provision prevents the application of subsection 7(1) to state and territory laws that provide protections for owner drivers in NSW and Victoria. Paragraph 7(2)(c) allows regulation to be made prescribing the WA Act as an excluded law.

Owner driver legislation would be considered as part of any future review of the IC Act.

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<sup>11</sup> TWU consultation

## **ATTACHMENT A**

### **Existing state and territory legislation**

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

- contracts of carriage (contracts between transport companies and motor vehicle and bicycle owner drivers); and
- contracts of bailment (contracts generally covering bailee taxi drivers and hire car drivers).

In summary the legislation:

- allows the NSW Industrial Relations Commission to make contract determinations setting rates and other employee like conditions for independent contractors in the transport industry. This means that truck owner drivers and bailee taxi drivers are provided with award style protections;
- provides a dispute resolution mechanism; and
- includes provision for payment of goodwill compensation. These apply where one owner driver sells a business to another and the purchase price includes a goodwill component for work to a particular principal. Compensation can be sought in certain circumstances where the principal contractor ceases to offer the new owner driver work or terminates the contract. Liability for the compensation payment rests with the principal contractor and is only payable where the principal contractor was aware of the goodwill transaction.

#### **The Victorian *Owner Drivers and Forestry Contractors Act 2005*.**

The Victorian Act applies to a contractor which includes:

- an owner driver (including a sole trader, partnership and company) that operates up to three vehicles in transport goods; or
- a haulage contractor (including a partnership and company) that transport forest products; or
- a harvesting contractor (including a partnership and company) that harvests forest products using his or her own motorised equipment.

In summary the legislation:

- provides that longer-term contracts (for more than 30 days) must be in writing, and must specify the minimum level of income or hours of work;
- obliges hirers, if they engage owner drivers for more than 30 days, to provide them with an information booklet and with a schedule of typical rates and costs in the industry;
- provides minimum notice periods for terminating longer-term contracts (more than three months);
- makes unconscionable conduct unlawful, and sets out factors that may be used to determine if conduct is unconscionable;

- provides for dispute resolution procedures, including mediation; and
- includes a power to make voluntary industry codes and establish industry councils.