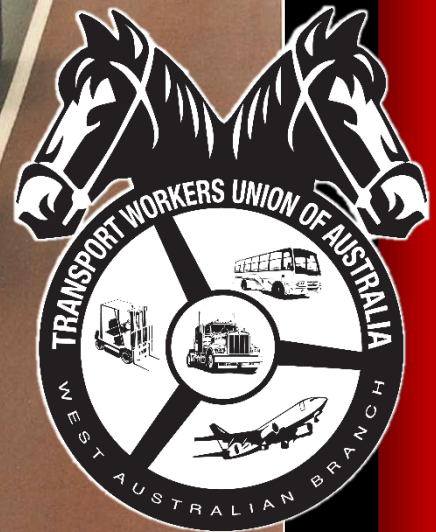
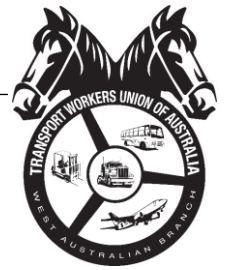


Submission by the Transport Workers' Union of Australia Industrial Union of Workers, Western Australian Branch to the Ministerial Review of the State Industrial Relations System regarding the matter of the Road Freight Transport Industry Tribunal





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INTRODUCTION

The Interim Report of the Ministerial Review of the State Industrial Relations System (part 2.4(j) para 211 to 222) discusses the role of the Western Australian Industrial Relations Commission (WAIRC) when it is constituted as the Road Freight Transport Industry Tribunal (RFTIT) pursuant to the provisions of the *Owner-Drivers (Contracts and Disputes) Act 2007* ("OD Act")

In paragraph 222 the Interim Report states:

The Review has not received any submissions about the OD Act and the RFTIT. The Review does not therefore intend to make any recommendations about it, unless persuasive submissions are made following the publication of the Interim Report.

The Transport Workers' Union of Australia Industrial Union of Workers, Western Australian Branch (Transport Workers' Union/TWU), therefore, makes this submission regarding matters relating to the RFTIT.

The TWU considers that the OD Act remains critical to ensuring fair, safe, sustainable and responsible dealings in the transport industry in WA. The protections in the OD Act can be further strengthened and dispute resolution streamlined.

Accordingly, the Transport Workers' Union strongly submits that not only should the RFTIT continue, but its powers should be enhanced to enable the Tribunal a better position to give greater effect to the objects of the OD Act.

The TWU was a key instigator of the introduction of the OD Act, with the legislation developed via a working group comprising TWU and Transport Forum representatives. The Union has continuously monitored the operation of and effectiveness of the OD Act since its inception, as an advocate representing owner-driver parties in matters before the RFTIT, and through day to day organisation of its owner-driver members in Western Australia.

HISTORY OF THE OD ACT

The safe and efficient transport of goods is vital to the state economy and has impacts on many industry sectors including agriculture, resources and construction. The TWU lobbied for many years for the introduction of protections for owner-drivers.

The objects of the OD Act are described in its long title as being to promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so and to establish the Road Freight Transport Industry Tribunal ("RFTIT") and the Road Freight Transport Industry Council ("RFTIC").

The OD Act received Assent on 6 June 2007 and the majority of the Act's provisions commenced on 1 August 2008. Sections 35 and 36 of the Act have not yet come into operation. The *Owner- Driver Contracts Code of Conduct* ("Code of Conduct") contained in the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* came into effect on 1 July 2010.



The OD Act was introduced in recognition of the fact of inequity in the respective bargaining positions of owner-drivers and hirers. Its aim was to address the effects of excessive competition in the trucking industry: lower than economic rates, driving hours above safe levels, use of stimulant drugs and reduced vehicle maintenance.¹

Part 2 of the Act was intended to mirror the *Construction Contracts Act 2004 (WA)* (“CCA”). It sets out matters which are prohibited in owner-driver contracts, such as “*if paid/ when paid*” terms, and extended time for payment. It also sets out implied minimum terms of contracts.

However, it should be noted that the CCA was substantially amended by the *Construction Contracts Amendment Act 2016* (No 55 of 2016) to ensure, amongst other things, that dispute resolution can involve more than one payment claim, and to clarify and abridge the times for certain steps in payment and payment dispute processes to eliminate delays in contractors achieving resolution and relief.

Part 3 of the OD Act establishes the RFTIC to develop and update guideline rates of payment for owner-drivers and have input into the content of the Code of Conduct.

Part 4 allows the Governor to make regulations prescribing a Code of Conduct for owner- driver contracts, engagement of owner-drivers and owner-driver practices.

Parts 5 to 8 of the OD Act contain provisions enabling negotiation of owner-driver agreements through agents and representatives, prohibiting unconscionable conduct, empowering Industrial Inspectors with powers to investigate compliance with the Act and rights in relation to access to records.

Part 9 establishes the RFTIT for the resolution of disputes under the Act, and in relation to the Code of Conduct and owner-driver contracts.

Part 10 of the Act provides that the OD Act is to be reviewed five years after its commencement, to assess the effectiveness of the RFTIC and the RFTIT.

As noted in paragraph 221 of the Interim Report, the Department of Transport *Review of the Owner-Driver (Contracts and Disputes) Act 2007 Report* supported the retention of the RFTIT and the OD Act. That Report found, in general terms, that the OD Act gave a relatively effective and low-cost mechanism to help establish fair and equitable payment rates for owner-drivers, and for the resolution of disputes.

In our experience, there are a number of deficiencies in the OD Act in relation to the powers that the RFTIT has in dealing with owner-driver disputes. The key deficiencies in the Act include:

- *Unconscionability “Trigger” unworkable*: The notion of unconscionable conduct as the principal trigger for action is flawed. It requires drivers to “put their hand up” against the hand that feeds them in complex legal proceedings with the value of even a “successful” case dubious.

¹ Second Reading Speech to the Legislative Assembly on Tuesday 31 October 2006 (Western Australia) Parliamentary Debates, Legislative Assembly, 7884f-7886



As well, the threshold for establishing unconscionability is very high, and, therefore, it is difficult for an owner-driver to get some redress on these grounds.

- *No Capacity to set enforceable standards:* In addition, the cases that can in theory, be brought to the RFTIT are individual in nature so that any positive flow on effect to the rest of the industry in terms of standards setting is non-existent or minimal. This means that the Act does not operate effectively, or at all, in terms of ensuring a safe and sustainable industry. At most, it can be said that it provides a theoretical and complex avenue to attempt to redress private contractual matters.
- *Guideline Rates and Conditions:* The Act presently provides only for guideline rates and processes for dissemination of such rates. The concept, which with the benefit of time has been demonstrated a failure, is that the “market” with fuller information will naturally pay appropriate terms and conditions to owner-drivers *voluntarily*. Given the competitive nature of the transport industry it is no surprise that this approach has failed and needs reform.

Since its commencement in 2007 the OD Act has provided some balancing of the otherwise unequal bargaining power and inequitable allocation of risk between parties to owner-driver contracts. It is an important piece of legislation that provides protections for Owner-Drivers that are not available under the common law regarding commercial contracts.

Prior to the introduction of the OD Act where there was a dispute relating to payment of an owner-driver for work performed, the principal had a significant advantage and the owner-driver could enforce payment only through expensive and complex legal proceedings, with the associated delays. The OD Act has redressed those issues by the establishment of the RFTIT, and a relatively quick and inexpensive adjudication process. However, in recent times there have been conflicting decisions by the RFTIT as constituted by different members of the Commission regarding the referral of disputes after an owner-driver contract has come to an end. This has made it uncertain whether such a dispute is in fact within the jurisdiction of the RFTIT, and, therefore, that issue requires urgent legislative attention.

Regulation in other Australian States

The Victorian government enacted the *Owner Drivers and Forestry Contractors Act 2005* with a comprehensive code contained in associated regulations. The Victorian legislation has substantially the same purposes and structure as the OD Act.

The Victorian legislation is however significantly more extensive than the OD Act in scope and the protections it provides to parties to owner-driver contracts. Notably, in the Victorian legislation:

- The definition of “owner-driver” is not referable to vehicle size. Accordingly, the legislation applies to owner-driver contracts regardless of the size of the



vehicles involved.² The OD Act on the other hand applies only to owner-drivers who carry on business of transporting goods in one or more “heavy vehicles” and “heavy vehicle” is in turn defined by reference to the meaning of that term in the *Road Traffic (Vehicles) Act 2012*, which is a vehicle 4.5 tonne gross vehicle mass or over.

- Specifies a minimum notice period for termination of owner-driver contracts of 3 months where the transportation is via a vehicle of 4.5 tonne GVM and 1 month in other cases. The OD Act does not contain a minimum notice requirement.
- Contains protections against discrimination or victimization for exercising rights under the Act (ss 61-63).
- Gives the Victorian Civil and Administrative Tribunal the power to declare void or vary an unjust owner-driver contract and sets out criteria to be considered in determining if a contract is “unjust”.

In the *Drivers and Forestry Contractors Regulations 2006* (VIC), the Victorian legislation provides general principles for setting and reviewing rates.

Regulation in New South Wales differs from that in Western Australia and Victoria. The New South Wales scheme is not directly comparable as regulation of Owner-Drivers and hirers is derived from the New South Wales *Industrial Relations Act 1996* (NSW).³ For example, regulation of “contracts of carriage” is dealt with in NSW under Chapter 6, of the *Industrial Relations Act 1996* (NSW). Chapter 6, Part 2 goes further and allows the New South Wales Industrial Relations Commission to make contract determinations in the transport industry that set minimum terms and conditions of engagement between contractors and Owner-drivers, akin to a “safety net”.

Unlike Western Australian and Victorian legislation, Owner-Drivers covered by the New South Wales scheme are able to access orders for pecuniary penalties and other enforcement provisions. In New South Wales, an industrial court can order a person pay a pecuniary penalty of up to \$10,000 for breach of industrial instruments.⁴ This is similar to remedies that were available to Owner-Drivers under the now repealed Commonwealth *Road Safety Remuneration Act 2012* (Cth) but the Commonwealth Act went further as pecuniary penalties could be awarded for breach of that Act.

EFFICACY AND EMERGING ISSUES

1. Scope and coverage of the OD Act

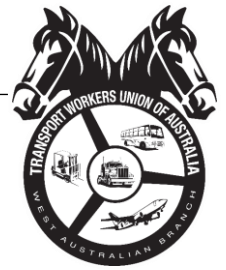
The OD Act and Code of Conduct apply to owner-drivers and principal contractors where:

- a. The owner-driver is not an employee but is a natural person, a body corporate (other than a listed company) or a partnership whose business is transporting goods in one or more heavy vehicles supplied by that person; and

² The Victorian Act applies to owner driver businesses (including sole traders, companies or partnerships) that operate up to a maximum of three vehicles in providing services in transporting goods. See *Owner Drivers and Forestry Contractors Regulations 2006*, which affect the definition of owner driver for the purpose of section 7 of the Act.

³ See Chapter 6 “Public Vehicles and Carriers” of that Act.

⁴ See section 357(1) *Industrial Relations Act 1996* (NSW).



- b. The natural person or body corporate owns the vehicle and its operation is the principal occupation of the owner or officer of the owner where the owner is a body corporate.
- c. The contract is entered into in the course of business between the owner-driver and another person to transport goods in a heavy vehicle.

The OD Act is out of step with interstate equivalent laws, which are not confined in their application to heavy vehicles only.

There are 3 primary concerns with the limited application of the OD Act. They are:

- The ability to avoid compliance by engaging in contracts involving only vehicles under 4.5 tonne GVM.
- The OD Act is losing ground as an increasing proportion of road freight activities are undertaken using vehicles other than heavy vehicles as defined by the *Road Traffic (Vehicles) Act 2012*, particularly with the increased incidence of online purchasing and smaller orders.
- The only remedy that the significant number of owner-drivers who transport goods in vehicles that are smaller than 4.5 tonne GVM is to go to the civil courts.

2. Unfair Contract Terms and Unconscionable dealing

Notice provisions

As noted above, the OD Act does not contain any requirement for notice of termination of an owner-driver contract. Nothing in the OD Act would prevent, for instance, an owner-driver contract requiring an owner-driver to replace a vehicle that is over 5 years of age, or with over 300,000km, with a new vehicle and the hirer terminating the contract with 1 weeks' notice within days of an owner-driver investing in a new vehicle in order to comply with the contract terms. An owner-driver in this scenario could be left with significant repayment obligations and no source of income.

Notice of termination requirements are fair and commercially reasonable. The OD Act should, therefore, prescribe a minimum period of notice to terminate an owner-driver contract.

Unjust Terms

Currently section 30 of the OD Act deals with and prohibits unconscionable conduct by a hirer "*with respect to*" an owner-driver in relation to the acquisition or possible acquisition of services by the owner-driver." The section sets out a non-exclusive list of the factors which the RFTIT may have regard to in determining whether conduct is unconscionable. The particular terms of a contract is not expressly listed as a factor in determining whether there is unconscionable conduct.

A review of the RFTIT decisions reveals that there is relatively little resort to section 30 of the OD Act. There are a handful of decided cases concerning that section. The anecdotal evidence available to the TWU suggests that this is because the vast majority of owner-driver contracts are in standard form and are offered on a "take it or leave it" basis. There is little bargaining or negotiation of terms. The prevailing



symptom of the inequality of bargaining power is therefore not the conduct of the parties in negotiating a contract, but rather the terms of the contract which are generally pre-determined.

The OD Act does not contain provisions dedicated to unfair or unjust contract terms. Section 47(4), which deals with the powers of the RFTIT, refers to “unjust terms” of an owner-driver contract, giving power to the Tribunal to declare void such a term. However, section 47(5) expressly limits the RFTIT’s powers, precluding the Tribunal from inserting a term or varying a term.

The OD Act does not otherwise refer to, define or provide relief in respect of unfair or unjust contract terms.

If an owner-driver proved that a term of a contract was unjust or unfair the Tribunal’s power is limited to declaring the terms void. If that term was, for instance, a term that provided for inadequate and unsafe rates of remuneration, the declaration that the term is void is not an adequate remedy. An appropriate remedy is for the owner-driver to be fairly compensated. Similarly, if the unjust term was a notice provision, and the unjust element was that the notice was inadequate, declaring that term void is no remedy.

Western Australia does not have the equivalent of the *Contracts Review Act 1980 (NSW)* which confers upon the Supreme, District and Local Courts powers to review contracts that are “unjust,” defined in section 4 to include harsh, oppressive and unconscionable.

It is noted that since August 2015 the *Australian Consumer Law* has provided remedies for unfair terms in small business contracts.⁵ Those provisions apply to contracts whether the upfront price payable does not exceed \$300,000, or \$1,000,000 where the contract is over 12 months in duration, and only where the contract is a standard form contract as defined.

While owner-drivers may avail themselves of the Australian Consumer Law in the case of unfair contract terms (only if the contract is in standard form), it is preferable that disputes concerning unfair contract terms be dealt with by the RFTIT, and that it be vested with power to make the kinds of orders that can be made under the *Australian Consumer Law*.

Misleading and deceptive conduct

Engaging in misleading and deceptive conduct in the course of trade and entering into contractual relationships gives rise to remedies both at common law and in legislation such as the *Australian Consumer Law*. There is an increasing trend towards codifying remedies for misleading and deceptive conduct in legislation regulating particular types of relationships, and empowering specialist tribunals to resolve disputes arising from such conduct. For instance, the *Fair Work Act 2009 (Cth)* prohibits misrepresentations in relation to the workplace rights of an employee.⁶

⁵ Australian Consumer Law sections 23 to 28. A small business is defined as a business with 20 employees or fewer.

⁶ Fair Work Act 2009 section 345.



The *Code of Conduct* currently imposes an obligation on parties to negotiate in good faith⁷. It does not expressly prohibit parties engaging in misleading and deceptive conduct nor provide any mechanism for the resolution of disputes arising from such conduct. The OD Act should mirror the misleading and deceptive conduct provisions of the *Fair Trading Act 2010* (WA) and empower the RFTIT to resolve disputes concerning such conduct.

Minimum rates

By section 19 of the OD Act, the RFTIC prepares and reviews guideline rates, and has a role in promoting and encouraging compliance with those rates. The rates so determined are published in the Gazette. However, the guideline rates are not mandatory.⁸ The Code of Conduct does not require that owner-drivers receive any particular minimum level of remuneration. Western Australian Owner-drivers have no “safety-net.”

The TWU considers that it is ultimately desirable that there be a mandatory minimum rate of remuneration for all owner-drivers. However, it is recognised that to implement such a regime requires consideration of issues such as who should be the arbiter of those minimum rates, by what process would they be determined, what factors should be considered in setting the rates and which parties could or should be heard in the process?

The Victorian *Drivers and Forestry Contractors Regulations 2006* usefully contain factors/principles that should be considered when setting and reviewing rates and state that a significant departure from these principles means that the relevant contract term is likely to constitute an unfair term and confers jurisdiction to the Victorian Civil and Administrative Tribunal to deal with the significant departure from the principles as though they were “unfair terms”.⁹

As an interim measure, compliance with the guideline rates should be encouraged and better avenues for redress of unfairly inadequate remuneration can be achieved by:

- a) Specifying in section 30 that non-compliance with guideline rates is a factor relevant to determining whether there has been unconscionable dealing;
- b) Empowering the RFTIT to vary or insert a term in a contract to improve remuneration where contracted remuneration is unfair or unjust;
- c) Inserting in the *Code of Conduct* a requirement that the guideline rates are to be minimum Rates as published by the Road Freight Transport Industry Council shall not be undercut except for justifiable reasons.

⁷ Code of Conduct clause 6

⁸ The Victorian *Drivers and Forestry Contractors Regulations 2006* provide for a Code of Practice for similar purposes as the Western Australian Code of Conduct, however, in contrast to the Western Australian Code of Conduct, section 30 of the Victorian *Owner Drivers and Forestry Contractors and Contracts Act 2005* provides that a person to whom a Code of Practice applies must comply with the code of practice.

⁹ See section 44(1)(g) of the *Owner Drivers and Forestry Contractors and Contracts Act 2005*.



3. Compliance

Inspection and audit

When the OD Act was passed, it was intended that there would be a system of inspection and audit of records as a key to monitoring and encouraging compliance with the Act¹⁰. Without an effective system to monitor for compliance the purpose of the regulation of contracts is significantly undermined. Sections 35 and 36 were designed to address this aim. Section 35 enables a representative of an owner-driver to enter a workplace of that owner-driver to investigate a suspected breach of the OD Act or the Code of Conduct. Section 36 prohibits a person from refusing or hindering the exercise of the rights under section 35.

These sections have not been proclaimed and are not in force. The only provision for monitoring compliance with the ODCA and the Code of Conduct is section 32 which confers on Industrial Inspectors as defined in the *Industrial Relations Act 1979 (WA)* ("IRA") functions mirroring those in the IRA.

Industrial inspectors, whether under the IRA or those engaged by the Fair Work Ombudsman, have vast coverage and limited resources. There are known instances of employers who have been audited by the FWO reverting to the breaching conduct after the FWO's audit process has been completed. Union rights of access can fill these gaps and increase compliance.

Sections 35 and 36 of the OD Act should be proclaimed and given effect.

The rights of access can be made more effective by the ability to waive the requirement that the representative exercising the right produce written authorisation from the owner-driver concerned. Individual owner-drivers may be deterred from exercising this right by having to identify themselves either as a complainant of a breach or as a member of a union for fear of adverse ramifications.

There should be provision for the RFTIT to waive the requirement to produce the written authorisation to the hirer if the Tribunal is satisfied that to do so would defeat the purpose for which the right is being exercised or would result in a detriment to an owner-driver.

Protections against victimisation

Unlike the regimes in other states, the OD Act contains no protections against victimisation or discrimination for exercising rights under the OD Act.

The lack of such protections operates as a practical deterrent to vulnerable contractors exercising their rights, for fear of the ramifications of "rocking the boat". This in turn undermines the OD Act's efficacy in achieving its express purposes.

The OD Act should be amended to include a section prohibiting a party from discriminating against a person or subjecting a person to a detriment for the reason or reasons that include that the person has exercised or may exercise a right under the OD Act, or has assisted another person to exercise such rights.

¹⁰ Second Reading Speech to the Legislative Assembly on Tuesday 31 October 2006 (Western Australia) Parliamentary Debates, Legislative Assembly, 31 October 2006, 7884



4. Dispute Resolution

Tribunal's jurisdiction - Negotiation disputes

Section 40(c) of the OD Act provides that a matter arising in relation to the conduct of joint negotiations for an owner-driver contract can be referred to the RFTIT by an owner-driver with sufficient interest in the matter, a transport association or the Minister. Section 44 then provides that the RFTIT may endeavour to assist the parties to reach agreement by conciliation. However, if conciliation fails to result in agreement between the parties to the negotiation, there is no further power vested in the Tribunal to arbitrate to determine the dispute.

Section 47(2) of the OD Act currently provides “*The Tribunal does not have jurisdiction to make a determination under this section in respect of a matter arising in relation to the conduct of joint negotiations for an owner-driver contract.*” The RFTIT’s powers set out in subsection 47(4) do not include a power to make an order to resolve a dispute or to determine the terms of a joint agreement, although it does enable the Tribunal to “make any other order it considers fair.”¹¹

These provisions have created uncertainty regarding the scope of the RFTIT’s jurisdiction. In the matter of *SP & S Scolaro t/as SPS Transport & Ors v Twentieth Superpace Nominees Pty Ltd* the Respondent in the proceedings argued that because there had been joint negotiations between the hirer and the TWU several years before the events that gave rise to the dispute, s47(2) meant the Tribunal was without jurisdiction. Commissioner SJ Kenner (as he then was) ultimately rejected the jurisdictional challenge, finding the section 47(2) exclusion was limited to disputes concerning “the actual process of negotiations in common, prior to reaching the agreement.”¹² Nevertheless, the decision demonstrates the potential for unnecessary technical arguments about jurisdiction and the potential for disputes to remain unresolved purely because they have a connection to negotiations which may or may not have resolved the particular issue.

It is desirable that the RFTIT be empowered to deal with disputes that arise in the course of joint negotiations by arbitration, including by making orders to compel parties to negotiate in good faith, orders to facilitate good faith bargaining and orders as to the content of a joint agreement where claims are unresolved by conciliation. Such powers will aid in maintaining industrial harmony and fair and safe terms and conditions.

Tribunal's Jurisdiction - Expired or terminated contracts

There is some uncertainty as to who has standing to apply to the RTFIT in relation to a dispute, specifically in relation to the section 40(a)(i) requirement that a person be “*a party to the owner-driver contract.*”

¹¹ OD Act section 47(4)(f)

¹² *SP&S Scolaro t/as SPS Transport & Ors v Twentieth Superpace Nominees Pty Ltd* (2015) WAIRC 995, (2017) 97 WAIG 343, per Commissioner Kenner at [28]



It has been argued, and indeed the Tribunal has found, that a person who was, but no longer is, a party to an owner-driver contract, namely a party to an expired owner-driver contract, does not have standing to refer a dispute to the RFTIT¹³.

One recent decision on this issue is a decision of Chief Commissioner P E Scott in *Steve Burke Transport Pty Ltd v Toll Transport Pty Ltd t/as Toll IPEC* (2016) 96 WAIG 1652¹⁴ (“*Steve Burke*”). The question to be decided in that matter was whether the RFTIT has jurisdiction to deal with a referral of a dispute under section 40(a)(i) of the OD Act in respect of an owner-driver contract which has come to an end. The Chief Commissioner found that the Tribunal did have jurisdiction. At paragraph 60 of the decision, the Chief Commissioner concluded:

“that s 40(a)(i) is to be read as providing standing to refer a dispute to the Tribunal to a person who is a party to the owner-driver contract, whether that contract is still on foot or not. It is a dispute arising under or in relation to that contract which is to be referred, and it is a matter of who can refer that. It seems contrary to the intention of Parliament and the object of the legislation to deny such a person the capacity to refer such a dispute to the Tribunal merely on the basis that the contract has now come to an end. The rights and obligations under the contract may still remain, even though the contract has expired or been terminated”.

In *Summersands Pty Ltd t/as Chase Hauliers v BGC (Australia) Pty Ltd* (2017) 97 WAIG 410¹⁵ (“*Summersands*”) the RFTIT was again invited to consider this same jurisdictional challenge, but in this case Commissioner D J Matthews refused to follow *Twentieth Superpace Nominees*, rather, he preferred the reasoning in the *Steve Burke* decision¹⁶.

In a recent decision, *Ram Holdings Pty Ltd & Anor v Kelair Holdings Pty Ltd* [2018] WAIRC 156¹⁷ (“*Ram Holdings*”), the RFTIT constituted by Senior Commissioner S J Kenner, discussed this jurisdictional issue at some length. In *Ram Holdings*, the Senior Commissioner stated that he had reservations about the conclusions reached by the Tribunal concerning the interpretation of s.40(a) of the OD Act in *Steve Burke* and in *Summersands*.

Given the lack of uniformity in judicial approaches to this question, legislative intervention is urgently necessary to clarify that a person who was a party to an owner-driver contract which is no longer of foot can apply to the Tribunal for relief in respect of disputes arising under that contract, and to confirm that the Tribunal has jurisdiction in relation to such disputes.

¹³ The jurisdictional point was also taken in the *Twentieth Superpace Nominees* matter, referred to above, and was upheld by Commissioner SJ Kenner at [38]-[39], while recognising that such construction led to the result that an unscrupulous hirer could escape enforcement of entitlements by terminating the contract.

¹⁴ *Steve Burke Transport Pty Ltd v Toll Transport Pty Ltd t/as Toll IPEC* (2016) 96 WAIG 1652

¹⁵ *Summersands Pty Ltd t/as Chase Hauliers v BGC (Australia) Pty Ltd* (2017) 97 WAIG 410

¹⁶ *Steve Burke* decision at 35]-[36

¹⁷ *Ram Holdings Pty Ltd & Anor v Kelair Holdings Pty Ltd* [2018] WAIRC 00156, at paragraphs 8 to 53



In *RAM Holdings* the Senior Commissioner also stated that one factor that, in his view, supported the interpretation that only a party to an owner-driver contract that was on foot was able to refer a dispute to the Tribunal was that, by s43 of the OD Act, sections 22B and 26(1)(a) and (b) of the IR Act (which are adopted provisions), require the Tribunal to deal with matters with all due speed and in accordance with equity, good conscience, having regard for the substantial merits of the case, and without regard to legal form or technicality. This requirement, in the opinion of the Senior Commissioner sat uncomfortably with an open ended capacity to refer matters to the Tribunal. Particularly, as there is no time limit under sections 40(b) or (c) for the referral of disputes to the RFTIT. (see paragraph 51)¹⁸. That particular concern is potentially a valid one, and could be dealt with by amending the OD Act to include a reasonable time limit on referral of disputes to the RFTIT in cases where a contract is no longer on foot.

SUMMARY OF RECOMMENDATIONS

As has been stated above, the Transport Workers' Union considers that the OD Act remains critical to ensuring fair, safe, sustainable and responsible dealings in the transport industry in WA. However, there are some significant gaps in the powers of the RFTIT for it to be able to give full effect to the objects of the OD Act, and also for the Tribunal to effectively deal with the matters that come before it.

The TWU considers that the following changes to the OD Act will enable the Tribunal to be in a better position to give effect to the objects of the OD Act, in particular in relation to resolution of owner-driver disputes.

Scope and coverage of OD Act

1. Expand the scope of owner-driver contracts covered by the OD Act and *Code of Conduct* to align with other states, prevent avoidance practices and provide protections where there currently is none. This can be achieved by:
 - a. deleting the reference to "heavy vehicle" throughout the OD Act and substituting: "vehicle";
 - b. defining "vehicle" to have the same meaning as defined in section 4 of the *Road Traffic (Administration) Act 2008*.

Unfair contract terms and unconscionable dealing

2. Insert a new section in Part 3 of the OD Act introducing an implied term in owner-driver contracts that termination of an owner-driver contract shall require 3 months' notice in writing or payment in lieu of such notice.
3. Insert a new section in Part 4 dealing with unfair terms in owner-driver contracts. The section might mirror section 44(2) of the *Owner Drivers and Forestry Contractors Act 2005 (Vic)* or the NSW unfair contract provisions.
4. Amend section 47 by repealing sub section 47(4)(f) and section 47(5) and substituting a new sub section 47(4)(f):

¹⁸ *Ram Holdings Pty Ltd & Anor v Kelair Holdings Pty Ltd* [2018] WAIRC 00156 at [51]

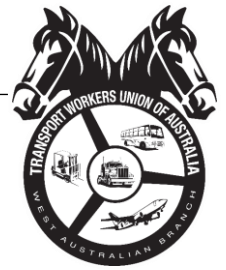


“to make any other order it considers fair, including declaring void any unjust term of an owner-driver contract, inserting a term into an owner-driver contract, or otherwise varying an owner-driver contract to avoid injustice”.

5. Insert a section in Part 3 of the Act, or alternatively in the *Code of Conduct*, prohibiting misleading and deceptive conduct, or misleading representations in relation to a party's rights and obligations under an owner-driver contract, a proposed owner-driver contract, the OD Act or the Code of Conduct.
6. Amend section 30 of the OD Act to add non-compliance with the guideline rates as a factor relevant to determining whether there has been unconscionable dealing.
7. Amend section 47 of the OD Act by adding a new sub section to the effect that the powers of the Tribunal in sub section 4 include the power to determine rates of remuneration under an owner-driver contract where the term as to remuneration is found be unjust.
8. Insert a new section in the *Code of Conduct* prohibiting a hirer from undercutting the guideline rates except on reasonable business grounds and requiring those grounds to be specified in writing to the owner-driver.

Compliance

9. Proclaim s35 and s36 of the OD Act concerning representative access to records and access to workplaces.
10. Add a new sub section 35(6A) to enable the RFTIT to waive the requirement under sub-section 35(3) to show the hirer concerned the written authorisation to act on behalf of the owner-driver if the Tribunal is satisfied that to do so would result in victimisation of the owner-driver or would defeat the purpose for which the power is intended to be exercised.
11. Introduce new provisions to protect parties to an owner-driver contract against discrimination or victimisation. A new section could be along the following lines:
 - (1) *A person must not subject or threaten to subject another person to any detriment for the reason, or for reasons including the reason, that the other person, or a person associated with the other person, has*
 - (a) *Claimed or proposes to claim a benefit, or exercised or proposes to exercise, a power or right that the other person is entitled to claim or exercise under this Act or the Code; or*
 - (b) *Brought, or proposes to bring, or otherwise participated in, a proceeding under this Act; or*
 - (c) *Informed or proposes to inform any person of an alleged contravention of this Act, the regulations or Code or an order of the Tribunal under this Act; or*
 - (d) *Authorised or proposed to authorize any person to act as a representative for any purpose under this Act; or*



- (e) *Participated or proposes to participate in joint negotiations relating to owner-driver contracts or the engagement of contractors.*
- (2) *A hirer must not subject or threaten to subject an owner-driver to any detriment because the owner-driver, or a person associated with the owner-driver, has—*
 - (a) *Raised, or proposes to raise, issues of health and safety in relation to the performance of services under an owner-driver contract; or*
 - (b) *Sought, or proposes to seek, to—*
 - i. *negotiate a proposed engagement or owner-driver contract; or*
 - ii. *Renegotiate an existing engagement or owner-driver contract.*
- (3) *For the purposes of this section, subjecting an owner-driver or other person to detriment includes doing any one or more of the following—*
 - (a) *terminating the owner-driver's or other person's engagement;*
 - (b) *injuring the owner-driver or other person in relation to the terms and conditions of an owner-driver contract to which the owner-driver or person is a party;*
 - (c) *altering the position of an owner-driver or other person so as to prejudice their interests under an owner-driver contract;*
 - (d) *refusing to engage a person as an owner-driver;*
 - (e) *Discriminating against a person in the terms or conditions on which the person is to be engaged as an owner-driver.”*

Dispute resolution

- 12. Remove the exclusion on the RFTIT's powers to resolve disputes contained in section 47(2) of the OD Act by the repeal of that section.
- 13. Amend Part 9 of the OD Act to give the RFTIT powers to make orders to facilitate bargaining in joint negotiations including to:
 - a. Prescribe actions which must be taken or which must not be taken by a party to comply with the good faith negotiation requirements of the Code of Conduct;
 - b. To determine by arbitration matters upon which the parties to a joint negotiation are unable to agree, either by joint referral for determination or upon a party's application.
- 14. Amend section 40 of the OD Act to make it clear that a party who was, but no longer is, a party to an owner-driver contract has standing to apply to the RFTIT.
- 15. Amend section 40 of the OD Act to enable the RFTIT to deal with multiple payment disputes including where a continuing contravention has resulted in non-payment after a dispute is referred to the Tribunal, so as to prevent the need for multiple referrals to the Tribunal for repeat non-compliance.



16. Amend regulation 99D(4) of the *Industrial Relations Commission Regulations 2005* abridging the time period within which an answering statement is to be filed by the Respondent in payment disputes to 10 days of the date of service of the notice of referral.

17. Amend section 48 of the OD Act to enable the RFTIT to summarily dispose of payment disputes where no answering statement has been filed or there is no defence to the claim.

Should you have any queries, or require any additional information concerning the matters set out in the Submission, please do not hesitate to contact the TWU WA Branch Legal Officer, Adam Dzieciol on: (08) 6313 3000 or 0408 904 608.

Tim Dawson
Secretary,
Transport Workers' Union of Australia
Industrial Union of Workers, Western Australian Branch

1st May 2018