



Consultation Regulatory Impact Statement

Owner-Drivers (Contracts and Disputes) Act 2007

Review of the Owner-Drivers (Contracts and Disputes)
Act 2007

Options to extend operation to independent owner-
drivers of vehicles with a Gross Vehicle Mass less than or
equal to 4.5 tonnes

January 2024

Contents

HOW TO MAKE A SUBMISSION	3
ABBREVIATIONS AND TERMINOLOGY	4
EXECUTIVE SUMMARY	5
SUMMARY OF OPTIONS	6
OVERVIEW	7
CURRENT SITUATION	9
JURISDICTIONAL REVIEW	12
Commonwealth (Cth)	13
New South Wales (NSW)	14
Victoria (VIC)	15
Queensland (QLD).....	16
OPTIONS	17
ECONOMIC IMPACTS	20
IMPLEMENTATION AND EVALUATION	21
BIBLIOGRAPHY	22

Disclaimer

This document has been released to seek feedback on reforms to owner-drivers legislation in Western Australia and does not represent, or purport to represent, legal advice or constitute Government policy. All due care has been exercised in the preparation of this document. Notwithstanding, the State of Western Australia makes no statement, representation or warranty about the accuracy or completeness of any information contained in this document. The State of Western Australia disclaims all responsibility (including without limitation, liability in negligence) for all expenses, losses, damages and costs any person might incur as a result of the information being inaccurate, or incomplete in any way for any reason.

How to make a submission

Your feedback on this Consultation Regulatory Impact Statement is sought in relation to proposed policy options for changes to the *Owner-Drivers (Contracts and Disputes) Act 2007*.

There is no specified format for submissions. You are welcome to make a formal submission by outlining your views or by responding to the questions included in this paper. When making your submission, please state if you are a service provider or a consumer.

This Consultation Regulatory Impact Statement contains a range of specific proposals. You do not have to comment on all proposals and can choose to focus only on the proposals that are important and relevant to you. You are welcome to raise additional issues and suggest other options for resolving issues of concern.

Submissions can be made via:

- Email: ownerdriver@transport.wa.gov.au; or
- Post: Department of Transport, GPO Box C102, Perth WA 6839, Attention: Transport Reform, FPAR

Submissions close Monday, 26 April 2024

How will input be used

The information gathered from this stage of the review will assist in assessing the various options and developing recommendations for reform for consideration by government.

All submissions received by the Department of Transport (DoT) will be retained in the department's records. Your feedback will be part of a public consultation process and the information you provide may become public. The government may also quote from your comments in future publications.

If you prefer for your details including your name to remain confidential, please indicate that in your submission. As submissions are subject to Freedom of Information requests, please do not include any confidential or private information you do not wish to become available to the public.

Abbreviations and Terminology

A list of the abbreviations and terminology used within this document and their description are tabled below.

Abbreviation/Term	Description
Act	<i>Owner-Drivers (Contracts and Disputes) Act 2007</i>
Commonwealth Bill	Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023
DoT	Department of Transport
gig economy	On-demand services predominately in the food service industry, for example, Uber Eats
GVM	Gross Vehicle Mass
owner-driver	owner-drivers are self-employed workers doing services for hirers under a contract for services and are not considered employees
owner-driver legislative regime	The Act and Regulations
Regulations	<i>Owner-Drivers (Contracts and Dispute) (Code of Conduct) Regulations 2010</i>
RFTIC	Road Freight Transport Industry Council
RFTIT	Road Freight Transport Industry Tribunal

Executive Summary

The purpose of this Consultation Regulatory Impact Statement is to obtain stakeholder feedback on options to:

- amend the Act to provide coverage for owner-drivers of vehicles less than or equal to 4.5 tonnes Gross Vehicle Mass (GVM).
- provide guideline rates for owner-drivers of vehicles less than or equal to 4.5 tonnes GVM.
- provide mandatory rates for owner-drivers of vehicle types regardless of GVM.
- ensure fair and equitable agreements of carriage between owner-drivers and hirers.

The Act

DoT is seeking feedback on potential amendments to the *Owner-Drivers (Contracts and Disputes) Act 2007*. The Act currently regulates the relationship between self-employed contractor owner-drivers (owner-drivers) who enter contracts with hirers to transport goods in heavy vehicles. The legislative framework which includes the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*, deals solely with owner drivers and hirers of a heavy vehicle – a vehicle with a GVM greater than 4.5 tonnes.

Guideline Rates

The Road Freight Transport Industry Council (RFTIC) publishes annual non-binding guideline rates of payment for owner-drivers using 13 heavy vehicle types with a GVM greater than 4.5 tonnes for both metropolitan and regional owner-drivers working within the supply chain transport industry. These rates are provided in both a per hour rate and a per kilometre rate and for new vehicles and those five or more years old. The rates of payment are calculated using vehicle, labour and business running costs.¹

Mandatory Rates

Binding mandatory rates of payment are calculated using the same inputs as guideline rates. Mandatory rates prevent owner-drivers and hirers from negotiating rates of payment for the supply of carriage services as these rates are fixed. Binding mandatory rates are not currently part of the WA owner-driver legislative regime. However, in September 2023, the Commonwealth Government introduced into the Federal Parliament the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023. This Bill was subsequently split into two with provisions related to regulated workers (including minimum standards for gig economy and road transport industry workers) now contained in a Closing the Loopholes No.2 Bill which will be debated in 2024. The Commonwealth Bill proposes to enlarge the powers of the Fair Work Commission to make orders that include binding mandatory rates of payment for independent contractors who are either:

- employee-like workers performing digital platform work; or
- engaged in the road transport industry.

If the Closing the Loopholes No.2 Bill is passed by the Federal Parliament, the form the new Commonwealth law takes and the orders that are subsequently made by the Fair Work Commission will determine the effects on Western Australian laws governing Western Australia's road transport industry.

Fair and Equitable Agreements

The Act and Regulations (owner-driver legislative regime) provide the framework for owner-drivers and hirers to engage in fair and equitable contracts of carriage.

Summary of Options

The consultation paper proposes three policy options.

Option A: Maintain the status quo

Retain the status quo with respect to coverage and guideline rates. That is to say, make no changes to the current legislation.

Note: Option A may be re-considered after the effects of the Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 (Cth) on the State laws governing the Western Australian road transport industry are known, should the Commonwealth Bill become law.

Option B: Non-mandatory Guideline Rates

Amend the Act to:

- include owner-operators of vehicles less than or equal to 4.5 tonnes GVM;
- determine the types of vehicles that will be included under the Act; and
- determine the guideline rates of payment to owner-drivers for each type of vehicle less than or equal to 4.5 tonnes GVM to be published annually together with those for heavy vehicles to assist owner-drivers and hirers when negotiating contracts of carriage.

Note: Option B may be affected by the Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 (Cth) on State laws governing the Western Australian road transport industry should the Commonwealth Bill become law and renders Western Australian law inconsistent with Commonwealth law.

Option C: Mandatory Rates

Amend the Act to:

- include owner-operators of vehicles types regardless of GVM;
- determine the types of vehicles less than or equal to 4.5 tonnes GVM and greater than 4.5 tonnes GVM that will be subject to mandatory rates and included under the appropriate Act, in this case, the *Industrial Relations Act 1979 (WA)*; and
- determine the mandatory rates of payment to owner drivers for each vehicle type to be set by the Industrial Relations Tribunal or other appropriate body that will apply to each contract of carriage between owner-drivers and hirers.

Note: Option C will require a complete redesign of the guideline rates of payment to convert them to mandatory rates to be published by an appropriate body such as the Industrial Relations Commission. This is likely to take an extended period of time to formulate and implement. Option C may be affected by the Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 (Cth) on State laws governing the Western Australian road transport industry should the Commonwealth Bill become law and renders Western Australian law inconsistent with Commonwealth law.

We seek your opinion on which option, if any, you support, and whether you believe that the coverage outlined for that option is sufficient.

Overview

Western Australian owner-drivers play an important part in the transport industry as one of the key components in freight supply chains and a critical component of the logistics cycle. Owner-drivers in Western Australia are covered by the *Owner-Drivers (Contracts and Disputes) Act 2007* (Act) and the supporting regulations - *Owner-Drivers (Contracts and Disputes) Regulations 2010* (Regulations). The Act came into effect 1 August 2008 and regulates the relationship between self-employed contractor owner-drivers (owner-drivers) who enter contracts with hirers to transport goods in heavy vehicles. The legislative framework deals solely with owner- drivers and hirers of a heavy vehicle – a vehicle with a Gross Vehicle Mass (GVM) of more than 4.5 tonnes.

The Act was created in response to concerns about the relative unequal bargaining power between owner-drivers and their hirers, the unsustainable rates of payment to owner drivers, and the safety of owner-drivers and those who share the roads with them. Government identified that owner-drivers who are towards the end of the supply chain have little commercial power and limited ability to negotiate reasonable rates of payment and contractual terms for their work. Fierce competition in the industry resulted in owner drivers accepting work at below market rate and on unfair commercial terms or risk having no work at all. This led to unsustainable and unsafe work practices, a high turnover of owner-drivers, and business failures.

In addition, Government understands many owner-drivers were waiting for extended periods of time to receive payment for completed work. The Act addressed these concerns by regulating the industry so that owner-drivers of heavy vehicles were guaranteed a sustainable and reasonable rate of return and that payments from hirers were made in a reasonable timeframe and on reasonable commercial terms.

An important part of the owner-driver legislative regime are guideline rates of payment for 13 heavy vehicle types for both metropolitan and regional owner-drivers that are published in the *Government Gazette* each year by the Road Freight Transport Industry Council (RFTIC). The guideline payment rates provide hourly rates and rates per kilometre for those operating in the metropolitan area and those operating in regional areas based on an average diesel fuel price per litre and labour and business running costs, some of which are specified in the Act. The RFTIC also publish a model contract and contract schedule and other information on the DoT's website to assist owner-drivers and hirers.

Many logistics companies in the small parcel freight business engage self-employed owner operators of vehicles that do not fall within the definition of heavy vehicle and are not regulated as owner-drivers by the owner-driver legislative regime. The volumes of small freight being generated through online sales have increased significantly (\$62.3b in 2021 and up 23.4% from 2020 - Australia Post annual report), with a corresponding increased demand for operators to undertake these deliveries. This is likely to see an increase in the number of owner-drivers in the small parcel freight industry to meet the growing volumes. In addition, on-demand platforms have resulted in large numbers of owner-drivers entering the transport sector as part of the burgeoning gig economy.

In the logistics industry there is evidence of a “race to the bottom” for this cohort of owner-drivers meaning the dollar value per consignment intended to cover all elements associated with the logistics cycle is reducing relative to the actual costs incurred by these owner-drivers. Similar concerns that prompted the owner-driver legislative regime that currently only applies to heavy vehicle owner-operators and their hirers have emerged in this sector of the transport industry and also those engaged in the on-demand freight transport sector in the gig economy.

In February 2018, the Transport Workers Union (TWU) proposed changes to the Act. Many of the proposed changes were agreed to by the Parliament of Western Australia on 25 October 2022 and together with supporting regulations came into effect on 1 June 2023. These changes provided greater protections for owner-drivers of heavy vehicles and improved the operation of the Act by:

- Introducing right of entry provisions to enable documentation to be obtained from hirers and owner-drivers equivalent to those in the WA *Industrial Relations Act 1979*;
- Providing a 90-day minimum notice period for termination of a contract of 90 days or more and a seven-day minimum notice period for contracts less than 90 days. An important change is that should the aggregate term of the original contract and any consecutive series of contracts between the same parties that contain substantially similar terms and conditions add up to 90 days or more, the 90 day minimum notice period applies.
- Providing for payment to be made in lieu of notice. For example, if the termination of the contract is to take effect immediately, the payment in lieu amount would be calculated as the total amount that would be payable under the contract in respect of the applicable minimum notice period, less 25% reflecting savings in operating costs of the owner-driver.
- Enhancing the powers of the Road Freight Transport Industry Tribunal (RFTIT) by making non-compliance with guideline rates a relevant factor in determining whether there have been unconscionable dealings and placing the onus on hirers to demonstrate why the guideline rates were not adhered to.

Stage 2 work was proposed to expand the scope of the Act to cover vehicles with a GVM less than or equal to 4.5 tonnes. This would involve amendments to the current owner-driver legislative regime to include owner-drivers of smaller vehicles commonly used in the small freight and on-demand transport sectors.

The WA Government made its intention clear to proceed with the Stage 2 reforms in the Minister's second reading speech when introducing the Stage 1 reforms in the Owner-Drivers (Contracts and Disputes) Amendment Bill 2022. The Minister for Transport Hon Rita Saffioti MLA confirmed the government's commitment to introduce further amendments to the Act to broaden its scope when the Minister stated:

*"In addition to the proposals already outlined, the government is committed to, in the future, introduce further amendments to WA owner-driver laws to broaden the scope of the act beyond the current 4.5-tonne gross vehicle mass limitation. Western Australian owner-drivers and hirers deserve the benefit of rights that many others now take for granted."*²

The purpose of this consultation paper is to seek feedback from owner-drivers, businesses or other hirers who contract with them, trade unions, the RFTIC and the Road Freight Transport Industry Tribunal (RFTIT) and other interested persons or bodies about possible amendments to the Act to expand its coverage to owner-drivers of vehicles less than or equal to 4.5 tonnes GVM. Examples of owner-drivers not currently covered under the owner-driver legislative regime are courier drivers using vehicles with a GVM less than 4.5 tonnes, typically vans, but also utilities, motorcycles, bicycles and E-ridables. These owner-drivers typically contract with courier company hirers such as Australia Post, CTI Couriers, Action Couriers, Bring Couriers, Couriers Please and InterParcel. Similarly, owner-drivers of vehicles involved in the on-demand sector in the gig economy are not using heavy vehicles and as such are not covered by the owner-drivers legislative regime. Examples include owner-drivers who contract with food delivery providers such as Uber Eats, DoorDash and Menulog. Owner-drivers not involved in the delivery of freight such as those operating in the on-demand passenger transport sector governed by the *Transport (Road Passenger Services) Act 2018* and *Transport (Road Passenger Services) Regulations 2020* will not be impacted by proposed changes to the owner-driver legislative regime in WA.

² Hansard, Assembly, Wednesday, 22 June 2022, p.3048a

Current Situation

Currently the Act and Regulations only cover owner-drivers using vehicles above 4.5 tonnes GVM, which are 'heavy vehicles' under the definition provided in s.3 of the *Road Traffic (Vehicles) Act 2012* which is adopted in the owner-driver Act. There is no specific legislation in place that regulates the relationship between self-employed contractor owner-drivers of smaller vehicles. One of the functions of the RFTIC under the Act is to publish guideline rates of payment for owner-drivers using vehicles with a GVM greater than 4.5 tonnes. The guideline payment rates provide rates for 13 types of heavy vehicles with hourly rates and rates per kilometre for those operating in the metropolitan area and those operating in regional areas based on an average diesel fuel price per litre and labour and business running costs, some of which are specified in the Act. Rates are published for new vehicles and vehicles five years or older in recognition that older vehicles will be subject to higher maintenance costs. There are no guideline rates for vehicles with a GVM less than or equal to 4.5 tonnes.

The annual guideline rates provide owner-drivers of vehicles greater than 4.5 tonnes GVM with base line rates to assist them in negotiating with hirers. The guideline rates are intended to reflect the minimum costs required to run a viable owner-driver business. Included in these rates is the running costs of the vehicle, insurance costs and the labour component with one or two drivers. These rates are reviewed annually in line with the changes in cost of running a viable business.

In the absence of laws to provide coverage for owner-drivers using vehicles with a GVM less than or equal to 4.5 tonnes similar issues that prompted the existing owner-drivers legislative regime may be present in the transport industry, including the small parcel delivery and on-demand transport sectors. The high degree of competitiveness in these sectors and the relative unequal bargaining power between owner-drivers and their hirers, including the 'take it or leave it' nature of on-demand contractual arrangements has been the impetus for policy change and this consultation process.

Owner-drivers of vehicles with a GVM greater than 4.5 tonnes also have access to the RFTIT. The RFTIT was established within the Industrial Relations Commission on 1 August 2008 and the Commission, sitting as the RFTIT, has the power to make determinations between hirers and owner-drivers in relation to contracts covered by the Act. The RFTIT has no jurisdiction to deal with disputes between owner-drivers and their hirers where the owner driver does not operate a heavy vehicle. Contractual disputes in these circumstances would require a party to undertake legal action in the courts which is often an expensive, lengthy, and time-consuming process. The relative power and resource imbalance between owner-drivers conducting business in the small parcel and on-demand transport sectors and their hirers means that hirers are likely to have distinct advantages over owner-drivers in a court-based dispute resolution process.

Commonwealth's proposed amendments to the Fair Work Act 2009 and consequential impacts for reforms to owner-driver legislation

In the lead up to the 2022 Federal Election, the Commonwealth Government committed to giving the Fair Work Commission, Australia's national workplace tribunal, new powers to set minimum standards for workers in "employee like" forms of work, including the gig economy. The Department of Employment and Workplace Relations (DEWR) of the Commonwealth published a consulting paper in April 2023 seeking input into the proposed expansion of jurisdiction of the Fair Work Commission.³ The focus of the increased jurisdiction was to close a perceived loophole in the difference between the rights and protections afforded to employees compared to workers who perform work as independent

³ [Employee-Like - Forms of Work consultation paper - Department of Employment and Workplace Relations, Australian Government \(dewr.gov.au\)](https://www.dewr.gov.au/employee-like-forms-of-work)

contractors.⁴ At the earlier Jobs and Skills Summit in September 2022, the Commonwealth Government committed to progress work to, amongst other things, consider allowing the Fair Work Commission to set fair minimum standards to ensure the Road Transport Industry is safe, sustainable and viable.

The Commonwealth Government has introduced into the Federal Parliament the Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023.⁵ The Commonwealth Bill proposes to enlarge the powers of the Fair Work Commission to make orders that include binding mandatory rates of payment for independent contractors who are either:

- employee-like workers performing digital platform work; or
- engaged in the road transport industry,

who together are defined in the Commonwealth Bill as *regulated workers*. The Commonwealth Bill also includes definitions for a *road transport business* which includes hirers of owner drivers under a contract for services and for *regulated business* which include a person in a road transport business.

The proposed Commonwealth legislation, if enacted, may have a significant impact on the WA gig economy and the State's wider road transport sector. It is important to note that operators of digital platforms in the gig economy are almost entirely constitutional corporations. At present, constitutional corporations in WA are covered under the Federal workplace relations system. An expansion of Commonwealth Industrial Relations laws encompassing independent contractors who are employee-like workers performing digital platform work or engaged in the road transport industry is likely to capture gig economy workers in WA as well as independent contractors engaged by constitutional corporations such as Toll, Linfox and Woolworths currently covered by the WA owner-drivers legislative regime.

Should the proposed Commonwealth legislation become law and expand the Fair Work Commission's jurisdiction to mandate minimum conditions and rates of payment for independent contractors in the road transport industry, this may affect current and proposed State legislative arrangements applying to the road transport industry. This is due to the paramountcy of Commonwealth laws under section 109 of the Commonwealth *Constitution*. This provides that when a law of a State conflicts with a Commonwealth law, the State law is rendered invalid to the extent of any inconsistency. Consequently, all three options proposed in this consultation paper could be disrupted if the Federal Parliament legislates in this area and intends to cover the entire field of operation. The Commonwealth Bill proposes to expressly exclude State and Territory laws to ensure the Commonwealth law covers the entire field of operation to the limits of the corporations power in the Commonwealth Constitution other than those State or Territory law that are expressly exempted.

If the proposed Commonwealth law emerges from the Federal Parliament with a more limited scope or provides exemptions for certain State laws, there may be space for existing State based laws to continue to operate or new State based laws to fill any gap in regulation. For example, there are existing arrangements in the *Independent Contractors Act 2006* (Cth) that exempt owner-driver laws in NSW and Victoria from the operation of that Act.⁶ The WA *Owner-Drivers (Contracts and Disputes) Act 2007* is exempted from that Act by being specified in the *Independent Contractors Regulations 2016*.⁷ Similarly, the Commonwealth Bill in clause 249 proposes new section 536JP entitled *Exclusion of Certain State and Territory Laws*. This proposed new section in subsection (3)(b)(i) and (i) reflects the current exemptions for the NSW and Victorian owner-driver laws in the *Independent Contractors Act*

⁴ Ibid, p.4.

⁵ Bill: [ParlInfo - Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023 \(aph.gov.au\)](#); Explanatory Memorandum: [ParlInfo - Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023 \(aph.gov.au\)](#)

⁶ New South Wales, Chapter 6 of the *Industrial Relations Act 1996* (NSW); and Victoria, *Owner Drivers and Forestry Contractors Act 2005* (Vic). See *Independent Contracts Act 2006* (Cth), ss.7 and 10.

⁷ *Independent Contractors Regulations 2016* (Cth) r. 6(g)

2006 (Cth). The *Owner-Drivers (Contracts and Disputes) Act 2007 (WA)* is not referred to in the Commonwealth Bill but there is a power to prescribe State or Territory laws as exempted laws. Whilst the *Owner-Drivers (Contracts and Disputes) Act 2007 (WA)* may be exempted by regulations so that the current owner-driver legislative regime in Western Australia would not be affected, this exemption is subject to a future decision of the Commonwealth Government when framing its regulations.

Proposals for State based changes that are likely to involve considerable regulatory resources and effort, such as determining mandatory rates through WA industrial relations law, will need to be considered carefully in the context of Commonwealth legislation that may also result in mandatory rates for independent contractors who are regulated workers engaged in the transport industry.

Reasons to proceed with the consultation process

The Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 (Cth) may result in Commonwealth laws that cover the field of operation of the proposed changes to the WA owner-driver legislative regime. However, at this time the Commonwealth Bill is only a proposed law and it should be noted that:

- the Commonwealth Bill may not be passed by the Federal Parliament;
- it may be passed in a significantly different form to the form in which it was introduced;
- the Commonwealth Bill may be amended or regulations made that exempt the WA owner-driver legislative regime from the operation of the Commonwealth law allowing for an expansion of WA law to owner-drivers of vehicles equal to or less than 4.5 tonnes GVM;
- there will be a period before any proposed Commonwealth law affects WA due to:
 - the time taken to pass the Commonwealth Bill in the Federal Parliament; it becoming law; the need to draft and promulgate regulations and to proclaim the amendment Act's substantive provisions so that the Amendment Act and its regulations commence at the same time;
 - the time taken for the Fair Work Commission to consult with industry, unions, and other stakeholders prior to it making any orders that may affect the WA road transport industry; and
- it is not known at this time the extent to which any Commonwealth law will affect the existing WA owner-driver legislative regime and any proposed expansion of that regime to owner-drivers of vehicles less than or equal to 4.5 tonnes GVM.

In these circumstances there is merit in proceeding with the consultation process to obtain input from relevant persons and organisations.

Jurisdictional Review

DoT engaged with relevant agencies and governing bodies in the other Australian jurisdictions to determine:

- what legislation, regulation or policies are currently in place for owner-drivers in the transport sector;
- if there is proposed amendments to their legislation, regulation, or policies; and
- if there is any interest from government, the public and/or industry to instigate changes to the current arrangements in their jurisdiction.

Apart from Western Australia, legislation relating to independent contractors providing carriage services currently exists in the Commonwealth, New South Wales, Victoria and Queensland. The various positions of Australian jurisdictions are outlined in Table 1 below. Further detail of each jurisdiction's arrangements is explored in the following sections of this consultation paper.

Table 1

State	Existing Legislation	Legislation Title	Industry/Public Interest
Commonwealth	Yes	Independent Contractors Act 2006 (Cth)	Yes
New South Wales (NSW)	Yes	General Carriers Contract Determination 2017	Yes
Victoria	Yes	Owner Drivers and Forestry Contractors Act 2005	Yes
Western Australia	Yes	Owner-Drivers (Contracts and Disputes) Act 2007	Yes
Queensland	Yes	Industrial Relations Act 2016 QLD	Yes
Tasmania	No	Fair Work Act 2009	No
South Australia	No	Fair Work Act 2009	No
Northern Territory	No	Fair Work Act 2009	No

Commonwealth (Cth)

Currently, the federal *Independent Contractors Act 2006* (Cth) (IC Act) and subordinate *Independent Contractors Regulation 2016* (Cth) (IC Regulations) govern the contracts under which independent couriers are engaged to perform work. The IC Act establishes a national unfair contracts remedy scheme for independent contractors. Contractors can ask a court to review, change or set aside a contract if it is harsh or unfair. The court may consider:

- the terms of the contract when it was made;
- the relative bargaining strengths of the contract parties and, if applicable, anyone acting on their behalf;
- whether there was any undue influence or pressure, or any unfair tactics used against, a party to the contract;
- whether the contract provides remuneration that is less than that of an employee doing similar work; and
- any other matters the court thinks relevant.

The court may order:

- to change the terms of the contract (for example, adding or removing terms); or
- to 'set aside' (make ineffective) the whole contract, or part of the contract.

The IC Act also addresses sham contracting in which an employer may be attempting to avoid their obligations when the contractor's work conditions are more like an employee.

As referred to earlier, the paramourcy of Commonwealth laws under section 109 of the *Commonwealth Constitution* means that a Commonwealth law will prevail over a State law which is inconsistent with the Commonwealth law, with the State law being invalid to the extent of the inconsistency. The IC Act in section 7(1) makes express that the IC Act is intended to cover the field of operation and exclude inconsistent State or Territory laws from having application to the extent of that inconsistency. However, section 7(2) of the IC Act provides that specified State laws may continue to apply despite subsection (1). Additionally, specified State laws may continue to operate if prescribed in the IC Regulations. The following Acts are specified or prescribed as ones to have application and consequently will not be rendered invalid to the extent of any inconsistency with the IC Act or IC Regulations:

- NSW's *Industrial Relations Act 1996* (NSW IR Act), Chapter 6;
- Victoria's *Owner Drivers and Forestry Contractors Act 2005*; and
- WA's *Owner-Drivers (Contracts and Disputes) Act 2007*.

Currently, Chapter 10A of the Queensland *Industrial Relations Act 2016*, which is yet to be proclaimed, is not specified by the IC Act or IC Regulations as a law that will apply.

The express application of the WA owner-driver Act and Regulations by the Commonwealth IC Regulations means there is no doubt that WA can legislate to expand the scope of the Act and Regulations without the risk of inconsistency between WA law and Commonwealth law in the IC Act. However, proposed changes to the *Fair Work Act 2009* (Cth), the power of the Commonwealth Government to exempt by regulations certain State or Territory laws or parts of them from the operation of the proposed changes and determinations by the Fair Work Commission in respect to the transport industry may result in a different outcome in the future.

New South Wales (NSW)

In New South Wales Chapter 6 of the *Industrial Relations Act 1996* (NSW IR Act) deals with 'Public vehicles and carriers' and applies to contracts of bailment and contracts of carriage. The NSW IR Act confers powers on the Industrial Relations Commission of New South Wales (sitting as the Contract of Carriage Tribunal) to inquire into any matter arising under contracts of carriage and make a contract determination (analogous to industrial awards) with respect to:

- remuneration of the carrier, and any condition, under such a contract;
- the reinstatement of a contract of carriage which has been terminated; and
- compensation for cancelled contracts of carriage.

Applications to the Contract of Carriage Tribunal for the payment of money may be made by the person to whom the money is payable, or an officer of the NSW Industrial Relations Inspectorate with the consent of the aggrieved party. The Contract of Carriage Tribunal may, after inquiry, make a contract determination with respect to the reinstatement of a contract of bailment or contract of carriage that has terminated. The Contract of Carriage Tribunal may also hear industrial disputes involving a bailor or principal contractor. Associations of contract drivers representing at least 50 bailees or carriers may also seek registration as an industrial organisation under the NSW IR Act. An industrial organisation representing the interests of carriers may enter into a contract agreement with one or more principal contractors with respect to the conditions of contracts of a specified class and apply to the Contract of Carriage Tribunal for approval of the contract agreement, upon which the contract agreement would have effect.

Additionally, the NSW IR Act in s.310A grants the Commission jurisdiction under section 51 of the *Competition and Consumer Act 2010* (Cth) and the *Competition Code of New South Wales* to deal with enforcement of contract determinations and unconscionable contracts for carriage.

The current determination of the Contract of Carriage Tribunal is the *Transport Industry – Courier and Taxi Truck Contract Determination*. This determination sets mandatory minimum rates of pay for operators of seven types of vehicles with the first annual increase being effective from 1 March 2022 and the final scheduled increase on 1 July 2025. Figure 1 below shows the incremental increase for minimum rates of payment to owner-drivers under the NSW determination for each vehicle type less than or equal to 4.5 tonnes GVM.

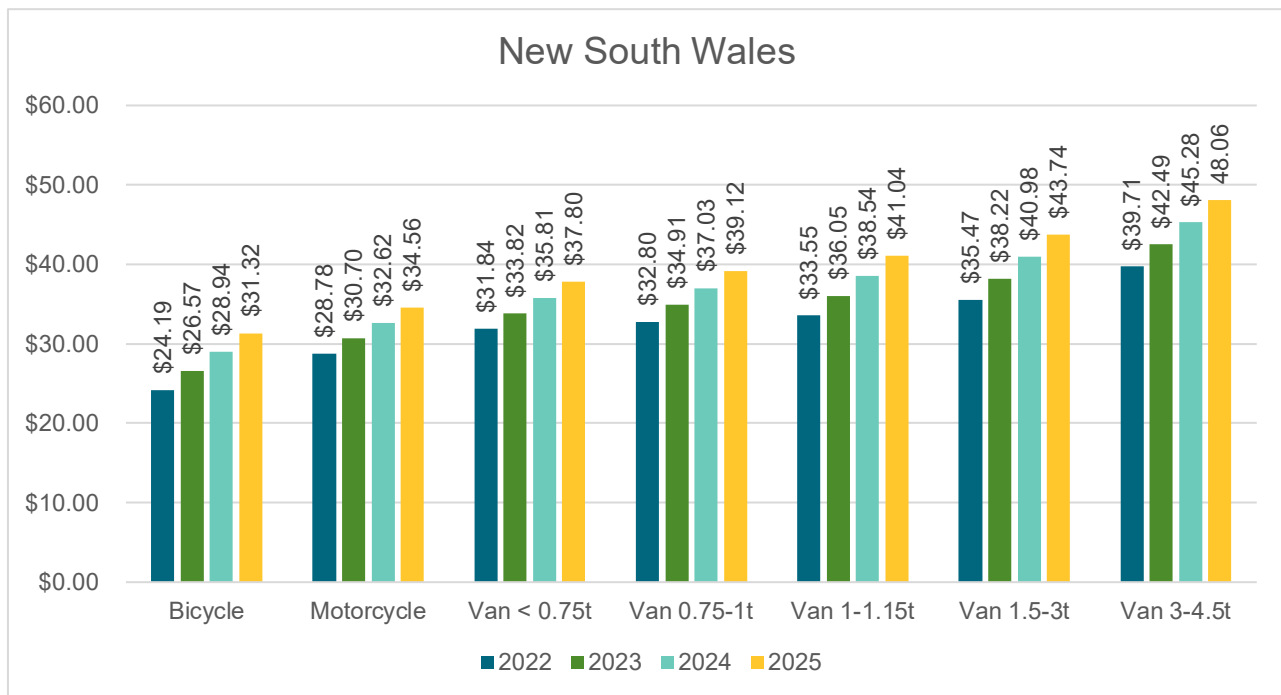


Figure 1: Comparison of incremental increases for minimum rates of payment to owner-drivers under the NSW determination for each vehicle type less than or equal to 4.5 tonnes GVM

Victoria (VIC)

In Victoria, the *Owner-Drivers and Forestry Contractors Act 2005* (Victorian Act) is administered by the Victorian Small Business Commission (VSBC), Victorian Civil and Administrative Tribunal (VCAT) and Wage Inspectorate Victoria (WIV).

Under the Victorian Act, the WIV can:

- provide information to contractors and hirers about the Victorian Act
- monitor compliance
- investigate potential contraventions
- prosecute offences under the Act.

The Victorian Act confers powers to the Victorian Small Business Commission (VSBC) to resolve disputes through alternative dispute resolution, and the Victorian Civil and Administrative Tribunal (VCAT) to hear and determine disputes from contractors or hirers on referral by the VSBC, should alternative dispute resolution be unsuccessful. VCAT may make any order it considers fair in relation to a dispute under the Victorian Act, including payment of a monetary sum to a party, the refund of money paid under a regulated contract, and specific performance of a regulated contract. In 2019-20, the VSBC received 26 applications for disputes, for which nine mediations were completed.

The Victorian Act applies to owner-drivers who carry on a business of transporting goods in a vehicle, who supply and operate their own vehicle. The legislation focuses on dispute resolution and does not empower the setting of standards or determining guideline or mandatory rates of payment to owner-drivers.

The WIV has conducted research on the operational expenses of owner-drivers of seven vehicle types with a GVM less than or equal to 4.5 tonnes. The WIV conducted this evaluation as a guide for business owners to take into consideration for business viability.

The research covers annual fixed costs including:

- Vehicle lease costs;
- Registration (including permits and compulsory vehicle registration and third-party insurance fees);
- Superannuation;
- Comprehensive vehicle insurance;
- Goods in transit insurance;
- Income protection insurance;
- Public liability insurance; and
- Business administration costs.

And variable costs (based on cents per kilometre travelled) including –

- Fuel;
- Tyres; and
- Servicing, repairs, and maintenance

The WIV also provides an hourly labour component in its report including overtime rates as follows -

- \$28.91 - Base rate up to 7.6 hours/day (calculated daily);
- \$35.25 – for first two hours beyond standard 7.6 hours/day (calculated daily); and
- \$47.00 – all hours after 9.6 hours daily (calculated daily).

The hourly rate calculations are based on the *Road Transport and Distribution Award 2020* for a casual employee driver of a semi-trailer assumed to be working a 38-hour week Monday to Friday between 5:30am and 6:30pm.

Queensland (QLD)

In Queensland, amendments were made in 2022 to the *Industrial Relations Act 2016* (the Queensland IR Act) by the *Industrial Relations and Other Legislation Amendment Act 2022*. These include a new Chapter 10A - Independent couriers, which grants power to the Queensland Industrial Relations Commission to determine mandatory rates for “independent contractors”, “outworkers” and “pieceworkers”. The purpose of Chapter 10A is to empower the Commission to make determinations for these classes of contractors who are not employees but providing them with entitlements more akin to employees. The determinations are expected to include rates of payment not falling below minimum wage rates and maximum work hours of 38 hours per week, but with the capacity for the hirer to require the contractor to work additional hours if business needs require it under the terms of engagement. Determinations will not entitle contractors to sick, bereavement, annual or other types of paid leave.

The amendments to insert Chapter 10A into the Queensland IR Act were passed by the Queensland Parliament on 31 October 2022 and the Act received Royal Assent on 3 November 2022. However, Chapter 10A is contained in Part 3 of the Amendment Act which has yet to be proclaimed so is not currently in operation.

Options

The three policy options proposed are outlined below.

Option A: Maintain the status quo

Retain the *status quo*. That is to say, make no changes to the current legislation. This option will keep the Act covering owner-drivers using heavy vehicles, those vehicles with a GVM greater than 4.5 tonnes. Option A proposes that no amendments would be made to the Act or Regulations. Owner-drivers using vehicles less than or equal to 4.5 tonnes GVM will not be covered by the owner-driver legislative regime, will not have access to the RFTIT in relation to contract disputes and the annual gazetted guideline rates of payment will only include heavy vehicles, those above 4.5 tonnes GVM currently covered by the Act.

Impact on owner-drivers

- No change to the *status quo*

Impact on business

- No change to the *status quo*

Impact on customers

- No change to the *status quo*

Other potential impacts

The *status quo* would be disrupted, and the existing WA Act and Regulations superseded in whole or in part if the Commonwealth legislates in this area and this legislation or the determinations made under it relating to the road transport sector renders the State owner-drivers Act or Regulations invalid to the extent of inconsistency with Commonwealth law.

Questions for comment:

- **Question 1:** Do you support Option A? Why?
- **Question 2:** Do you consider the coverage outlined in Option A is sufficient?

Note: Option A may be re-considered after the effects of the Fair Work Legislation Amendment (Closing Loopholes) Bill No.2, 2023 (Cth) on the State laws governing the Western Australian road transport industry are known, should the Commonwealth Bill become law.

Option B: Non-mandatory Guideline Rates

Amend the Act to:

- include owner-operators of vehicles less than or equal to 4.5 tonnes GVM;
- determine the types of vehicles that will be included under the Act; and
- determine the guideline rates of payment to owner-drivers for each type of vehicle less than or equal to 4.5 tonnes GVM to be published annually together with those for heavy vehicles to assist owner-drivers and hirers when negotiating contracts of carriage

The RFTIC publishes annual guideline rates of payment for owner-drivers in the Government *Gazette* which are also published on the DoT website. Currently the rates of payment are only for vehicles with

a GVM greater than 4.5 tonnes defined as heavy vehicles. Option B proposes to amend the Act to include guideline rates for bicycles, E-Ridables, motorcycles, vans, utilities, and other vehicle types with a GVM less than or equal to 4.5 tonnes.

The process to amend the Act by expanding its scope to owner-drivers of other vehicle types is an easier process compared to introducing mandatory rates. The latter would require amendments to industrial relations legislation and the setting of those rates by the WA Industrial Relations Commission or other body such as the RFTIT. Determining and publishing non-mandatory guideline rates is reasonably simple to implement under the existing owner-driver legislative regime.

Figure 2 below shows provisional guideline rates for the eight categories of vehicle types with a GVM less than or equal to 4.5 tonnes. The rates are shown compared to current New South Wales mandatory rates. These rates are an approximate guide only and more refined figures, including the possibility of vehicles under 1 tonne, such as cars used in small freight transport, will be provided in a Decision Regulatory Impact Statement.

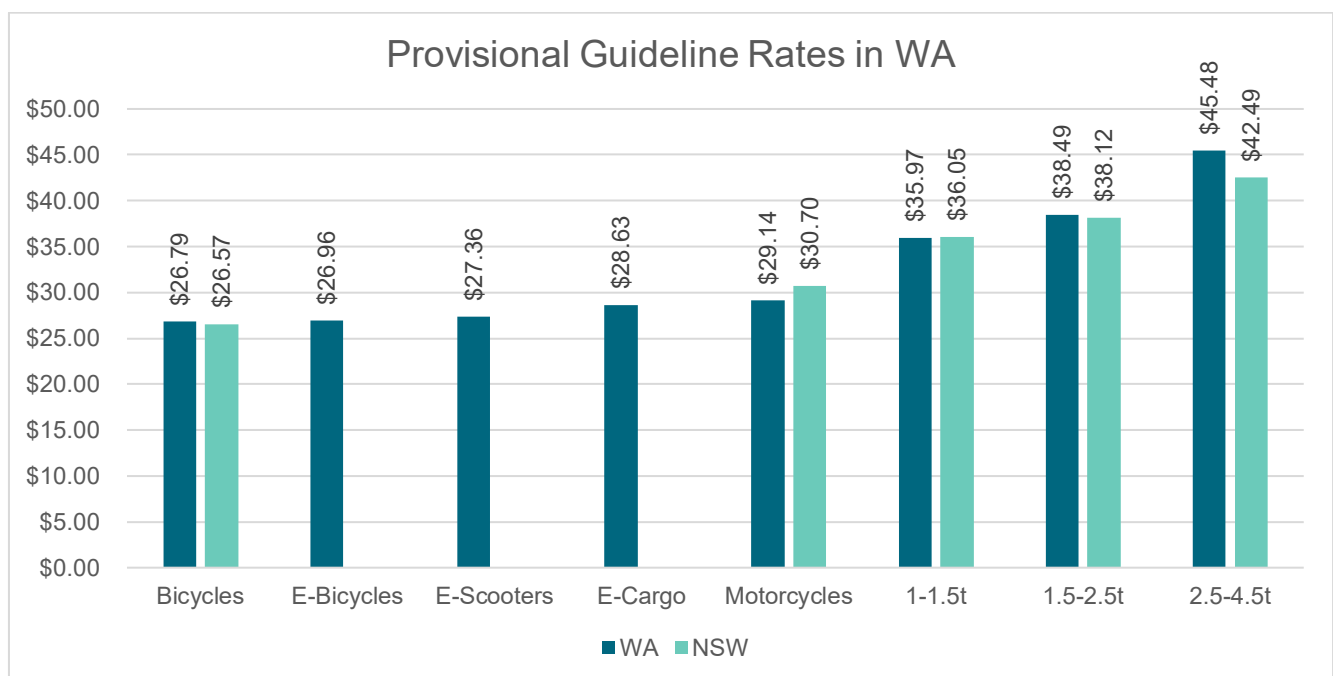


Figure 2: Comparison of provisional guideline rates for WA for eight categories of vehicle types with a GVM less than or equal to 4.5 tonnes against current mandatory rates in New South Wales.

Impacts on owner-drivers of vehicles less than 4.5 tonnes

- Provides protections against unfair and inequitable contracts;
- Owner-Drivers will have access to a simple and cheap dispute resolution process through RFTIT;
- Annually gazetted rates of payment for all owner-drivers of specified vehicle types; and
- Guideline rates will assist owner-drivers when negotiating contracts of carriage

Impacts on owner-drivers of vehicles greater than 4.5 tonnes

- No change to the status quo.

Impacts on hirer businesses

- Ensures hirer/businesses design fair and equitable contracts when contracting owner-drivers;
- Loss of flexibility in existing hiring arrangements; and
- Compliance cost in adhering to the expanded owner-drivers' legislative regime

Impact on customers

- Any increase in costs for hirers/businesses is likely to be passed on to customers in the form of higher prices.

Other potential impacts

Option B would be disrupted, and proposed amendments superseded in whole or in part if the Commonwealth legislates in this area and this legislation or the determinations made under it relating to the road transport sector renders the State owner-drivers Act or Regulations invalid to the extent of inconsistency with Commonwealth law.

Questions for comment:

- **Question 1:** Do you support Option B? Why?
- **Question 2:** Do you consider the coverage outlined in Option B would be sufficient?

Note: Option B may be affected by the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) on State laws governing the Western Australian road transport industry should the Commonwealth Bill become law and renders Western Australian law inconsistent with Commonwealth law.

Option C: Mandatory Rates

Amend the Act to:

- include owner-operators of vehicle types regardless of GVM;
- determine the types of vehicles less than or equal to 4.5 tonnes GVM and greater than 4.5 tonnes GVM that will be subject to mandatory rates and included under the appropriate Act, in this case, the *Industrial Relations Act 1979 (WA)*; and
- determine the mandatory rates of payment to owner-drivers for each vehicle type to be set the Industrial Relations Tribunal or other appropriate body that will apply to each contract of carriage between owner-drivers and hirers.

The guideline rates of payment will become mandatory, and responsibility for guideline rate calculation, determinations and gazettal will likely be transferred to the Department of Mines, Industrial Relations, and Safety, the agency under which the Industrial Relations Commission of Western Australia operates.

This option would result in mandatory rates being introduced in WA for all owner-drivers and include vehicles less than or equal to 4.5 tonnes GVM. The introduction of mandatory rates would require significant resourcing and time to implement.

Option C would be disrupted, and proposed amendments superseded in whole or in part if the Commonwealth legislates in this area and this legislation renders the State owner-drivers legislative regime inconsistent with Commonwealth law.

The Commonwealth Bill has been passed by the House of Representatives of the Federal Parliament but has been referred to the Senate Education and Employment Legislation Committee with a report

date of 1 February 2024.⁸ Designing State legislation to complement any new Commonwealth law would require waiting until Commonwealth legislation is passed to identify any gaps for State legislative action.

Impacts on owner-drivers of all vehicle types

- Loss of flexibility in existing hiring arrangements;
- Potential to reduce current rates of payment to those owner-drivers who currently receive a higher rate of payment than a mandated rate but conversely could increase payment rates if the mandatory rate is higher than current rates;
- Provides protections against unfair and inequitable contracts; and
- Owner-Drivers will have access to RFTIT.

Impacts on hirers businesses

- Loss of flexibility in existing hiring arrangements;
- Compliance cost in adhering to mandatory rates; and
- Potential to result in higher costs when negotiating contracts.

Impacts on customers

- Any increase in costs for businesses is likely be passed on to customers in the form of higher prices.

Other potential impacts

Option C would be disrupted, and proposed amendments superseded in whole or in part if the Commonwealth legislates in this area and this legislation or the determinations made under it relating to the transport sector renders the State owner-drivers Act or Regulations invalid to the extent of inconsistency with Commonwealth law.

Questions for comment:

- **Question 1:** Do you support Option C? Why?
- **Question 2:** Do you consider the coverage outlined in Option C would be sufficient?

Economic Impacts

The proposed amendments to the Act and/or regulations may have significant economic impacts in the owner-driver transport sectors.

For hirer business: rates of payment for owner-drivers may increase compared to current industry rates. Below are potential economic impacts that need to be considered by hirers, the owner-drivers operating vehicles with a GVM less than or equal to 4.5 tonnes and the end consumer:

1. Ad-hoc logistics

Hirers' profit margins are dependent on contractors completing delivery tasks. Hirers in this sector of logistics are an 'on-demand' service provider. Rates of payment based on hourly rates following guideline rates or mandated rates will necessarily include periods when the owner-driver is idle, typically when awaiting the next job.

2. Route or set runs

⁸ [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023 – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au)

Owner-drivers undertaking route or set runs fall into three categories for payment - piece rates, hourly rates, or day rates.

- a. Piece rates are paid per item or consignment delivery completed. These runs are typically in heavy saturation delivery areas classed as performance-based routes allowing owner-drivers to complete high volumes of deliveries within the hour resulting in higher revenues. The delivery fee is typically between \$1- \$3 per delivery.
- b. Hourly rates are sometimes negotiated based on run density and distance covered by the owner-driver. If a set route or territory is not able to generate the revenue to be classed as a performance-based route but still needs to be serviced, this will typically be made an hourly rate run. This is the least common agreement.
- c. Day rates are preferred by hirers as they provide the owner-driver with a rate of pay to complete all deliveries in a set area for the day. The volumes per day can fluctuate but typically equalises between high volume 'peak' and low volume 'trough' days.

For Owner-Drivers: the proposal in Option B – Guideline Rates, and Option C – Mandatory Rates may provide positive or negative outcomes. The owner-drivers not currently subject to the minimum guideline rate will benefit from this option and the mandatory rates option. However, owner-drivers who may have negotiated a higher individual contract payment rate may be negatively impacted.

For Hirers: the introduction of guideline rates or mandatory rates may result in higher costs but will also provide hirers with an insight into operating expenses associated with owner-driver businesses.

For consumers: the proposed amendments may impact end consumers. Additional costs that arise for industry because of increased guideline rates or mandatory rates will likely be passed on to consumers in the form of higher prices. This may see increased carriage costs and possible delays in service performance.

Implementation and Evaluation

Implementation

Implementation of any of the options will require the drafting, and enactment by Parliament of amendments to legislation, principally the *Owner-Drivers (Contracts and Disputes) Act 2007*. There may be a need for consequential amendment to other legislation, subject to advice on the option adopted. The costs and benefits of implementation will be included in the assessment of each option in the Decision Regulatory Impact Statement.

Evaluation

Following the consultation process, the Department of Transport will consider all the feedback received and make a recommendation to the WA Government. The WA Government will then decide on the preferred model and legislation will be developed for consideration by State Parliament. The Department of Transport will also develop an implementation plan and evaluation framework. Evaluation of the implemented option will be undertaken in accordance with government policy and practice. The evaluation process will be outlined in the Decision RIS once a preferred option has been identified.

Bibliography

[Competition and Consumer Act 2010 \(legislation.gov.au\)](https://www.legislation.gov.au)

[Counts of Australian Businesses, including Entries and Exits, July 2018 - June 2022 | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au)

[Extend the Powers of the Fair Work Commission to Include 'Employee-Like' Forms of Work - Department of Employment and Workplace Relations, Australian Government \(dewr.gov.au\)](https://www.dewr.gov.au)

[Home | VCAT](https://www.vcat.vic.gov.au)

[Independent Contractors Act 2006 \(legislation.gov.au\)](https://www.legislation.gov.au)

[Industrial Relations Act 1996 - NSW Legislation](https://www.legislation.nsw.gov.au)

[Industrial Relations Act 2016 \(legislation.qld.gov.au\)](https://www.legislation.qld.gov.au)

[Industrial Relations and Other Legislation Amendment Act 2022 - Queensland Legislation - Queensland Government Fair Work Act 2009 \(legislation.gov.au\)](https://www.legislation.gov.au)

[Owner-Drivers \(Contracts and Disputes\) Act 2007 - \[01-a0-03\].pdf \(legislation.wa.gov.au\)](https://www.legislation.wa.gov.au)

[Owner Drivers and Forestry Contractors Amendment Act 2019 \(legislation.vic.gov.au\)](https://www.legislation.vic.gov.au)

[Road Safety Act 1986 \(legislation.vic.gov.au\)](https://www.legislation.vic.gov.au)

[Road Traffic \(Administration\) Act 2008 - \[02-i0-00\].pdf \(legislation.wa.gov.au\)](https://www.legislation.wa.gov.au)

[Trade Practices Act 1974 \(legislation.gov.au\)](https://www.legislation.gov.au)

[Victorian Small Business Commission \(vsbc.vic.gov.au\)](https://www.vsbc.vic.gov.au)

[Wage Inspectorate Victoria | Victorian Government \(www.vic.gov.au\)](https://www.vic.gov.au)