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Submission to Review of Victorian laws governing owner-drivers and forestry contractors.

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Independent Contractors Australia supports the *Victorian Owner Drivers and Forestry Contractors Act 2005*. In fact we believe it's a model Act for other states in Australia and even the Commonwealth.

1. Principles in practice

The key principle underpinning the Act is well stated in the Review Terms of Reference

“...contractors operate as small businesses within a framework of commercial laws.”

It is this principle that must be maintained in the considerations of the Review process and any recommendations for changes that may be made. When translated into practical reality this commerciality has two primary features, namely that;

- proper commercial contract principles must apply in practice.
- price is a matter exclusively determined by the parties to contract.

When these two features have practical application self-employed, owner-drivers are able to operate within a properly functioning competitive market subject to both the benefits and disciplines of competitive market activity.

We believe that the current *Victorian Owner Drivers and Forestry Contractors Act 2005* has a good balance in,

- requiring parties to adhere to commercial contract principles in practical ways
- not imposing price on the parties.

2. ICA position in general

Where the Review looks to;

- improve the practical application of commercial contract principles, ICA would in principle support such moves.
- make recommendations and supply information on prices that could be charged but does not make those prices mandatory, ICA would, in principle support such moves.
- impose prices, ICA would strongly oppose such moves.

Broadly the existing *Victorian Owner Drivers and Forestry Contractors Act 2005* has the following features;

- The requirement for written contracts between owner-drivers and those who engage them.
- The provision of an information booklet prepared under authority of the Act giving advice to both owner-drivers and engagers.

- Applies a Code of conduct.
- Provides a non-mandatory recommended ‘rates and costs’ schedule.
- Gives authority to the Victorian Small Business Commissioner in the managing of disputes.

These features should be maintained.

3. Tip truck industry

The Review Terms of Reference proposes consideration of an “industry based rates and costs schedule and/or code which would apply to the tip truck industry. This schedule should be primarily facilitative and not mandatory in nature”

ICA would in principle support such a ‘facilitative’ action conditional that it was not mandatory or had processes around it that effectively made it mandatory.

4. The abolished Commonwealth Road Safety Remuneration System

By way of background to the Review the position of ICA on the (now abolished) RSRS was clear and very public. We,

- referred to the RSRS as ‘an attempt to destroy small business people.’
- <http://www.independentcontractors.net.au/Current-Issues/Owner-drivers/the-australian-road-safety-remuneration-laws>
- opposed the RSRS when it was introduced in 2012.
- <http://www.independentcontractors.net.au/announcements/why-the-road-safety-remuneration-bill-2011-should-be-rejected?A=SearchResult&SearchID=92435170&ObjectID=39825&ObjectType=7>
- campaigned against it in 2016 when the RSRS imposed contract prices on owner drivers and
- launched a High Court challenge against the RSRS.
<http://www.independentcontractors.net.au/latest-news/ica-launches-constitutional-challenge-to-anti-truckie-laws>

Our application was heard by the Chief Justice of Australia on the Friday before the RSRS was abolished by Parliament on Tuesday 19 April 2016. The Chief Justice stated that we had an ‘arguable case’ but of course we had no need to proceed further given the RSRS abolition.

The RSRS was an example of the type of regulation of commercial contract activity that should not occur. It,

- had the effect and in our view intention of commercially harming small business owner-drivers to the benefit of large trucking companies.
- breached competition principles and law.
- was in our view directly responsible for several suicides of owner-drivers impacted by the laws.

As a follow up, ICA is involved in seeking to organize a class action for damages done by the RSRS. <http://www.independentcontractors.net.au/Current-Issues/Owner-drivers/class-action-for-owner-drivers-affected-by-rsrt> If successful we believe those damages could amount to several hundreds of millions of dollars.

The experience with the RSRS, demonstrate the harm done by a mandatory price setting regime, no matter what the alleged, stated good motivations of the RSRS.

5. Recommendation: Unfair contract laws.

We ask the Review to be mindful of an important development at the Commonwealth level that immediately impacts on the *Victorian Owner Drivers and Forestry Contractors Act* namely the introduction of the unfair contract laws for small business

people <http://www.accc.gov.au/publications/unfair-terms-in-small-business-contracts> and that came into operation in November 2016. The laws apply to contracts affecting owner-drivers.

These unfair contract laws are, we believe, considerably more effective than attempting to seek recourse for unconscionable contracts as currently applies under the *Victorian Owner Drivers and Forestry Contractors Act*. The legalities around proving unconscionable conduct or contracts have a history of high complexity and expense rendering such action mostly impractical from a small business, owner-driver perspective.

We recommend that the Review consider incorporating the provisions of the unfair contract laws for small business under the Australian Consumer Law into the *Victorian Owner Drivers and Forestry Contractors Act*. However we recommend removing the contract price limits under the ACL that restrict the application of the unfair contract laws (eg: to contracts under \$300,000 in value).

5a. We recommend incorporating into the *Victorian Owner Drivers and Forestry Contractors Act* wording to the effect that

“A transport contractor must not enter into a subcontract with a small business, owner-driver which is unfair within the meaning of the Australian Consumer Law. Limits on the upfront price of a contract under the ACL do not apply.”

5b. Further, we recommend incorporating into the *Victorian Owner Drivers and Forestry Contractors Code* examples of contract terms that are unfair within the meaning of the ACL. Note the examples below are a direct ‘cut and paste’ from the ACL and we recommend their incorporation into the Code.

Examples of unfair contract terms as exemplified in the ACL, include a contract that gives one party, but not the other, the ability to:

- a) Avoid or limit the performance of the contract.
- b) Terminate the contract.
- c) Apply penalties against the other party for a breach or termination of the contract.
- d) Vary the terms of the contract.
- e) Renew or not renew the contract.
- f) Vary the price payable under the contract without the right of the other party to terminate the contract.
- g) Unilaterally vary the characteristics of the goods or services to be supplied under the contract.
- h) Unilaterally determine whether the contract has been breached or to interpret its meaning.
- i) Limit one party’s vicarious liability for its agents.
- j) Permit one party to assign the contract to the other party’s detriment without their consent.
- k) Limit one party’s right to sue the other party.
- l) Limit the evidence one party can adduce in legal proceedings in respect to the contract.
- m) Impose the evidential burden on one party in legal proceedings in respect to the contract.