



TRANSPORT WORKERS UNION OF AUSTRALIA

VICTORIAN/TASMANIAN BRANCH

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1 August 2007

Mr Shane Chisholm
Assistant Director
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
Dickson ACT 2602

Fax No: (02) 6243 1211

Dear Mr Chisholm

CMPA Application for Authorisation A91047

We refer to previous correspondence in this matter and to the CMPA's Response to the TWU Submission.

On Friday 27 July Jenny Baker and Eugene Richards from the TWU met with Mark Wagner, Lindsay Coombes and David Gregory to discuss the CMPA's model agreement.

While agreement was reached on some matters relating to specific clauses of the CMPA's model contract, the TWU still has some on-going concerns. The TWU considers that there are general public benefits to be derived from the publication and development of model contracts which are fair and balanced to all parties. However the TWU notes that the public detriment would outweigh the public benefit where model contracts are developed and published which are inconsistent with the intention of the *Owner Drivers and Forestry Contractors Act 2005* and the *Owner Drivers and Forestry Contractors Code of Practice*.

The TWU reiterates that the *Owner Drivers and Forestry Contractors Act 2005* and the *Owner Drivers and Forestry Contractors Code of Practice* are designed to assist owner drivers to negotiate better commercial deals and to be more competitive. Without

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legislative assistance it is likely that a significant number of owner drivers would be unable to conduct competitive businesses and that there would continue to be low level earnings, high rates of business failure and working conditions and hours in excess of fair community standards.

The TWU notes the CMPA's comments that their model contract is purely voluntary and does not restrict the ability of parties to negotiate fair and reasonable conditions. In discussions CMPA representatives made it clear that they would expect the parties to negotiate changes to the model contract. The TWU considers that there is a tendency for model contracts promoted by industry or other associations to become a standard and industry participants may be reluctant to depart from or negotiate different terms.

The TWU remains concerned by the complexity of the CMPA model contract. The TWU notes that a model contract which is complex and which has ambiguous terms does not assist the parties to negotiate fair contractual arrangements. This is a particularly important issue in the owner driver industry where research shows that these businesses are characterized by low levels of earnings, high rates of business failure and working conditions and hours in excess of fair community standards. The *Owner Drivers and Forestry Contractors Act 2005* and the *Owner Drivers and Forestry Contractors Code of Practice* were enacted to overcome these difficulties and to assist owner drivers to run more competitive and prosperous businesses. The TWU considers that the CMPA model contract as currently worded may impede these achievements.

The TWU emphasizes that it is crucial to the effectiveness of the *Owner Drivers and Forestry Contractors Act 2005* and the *Owner Drivers and Forestry Contractors Code of Practice* for owner driver industry participants to be aware of and to use the mediation dispute resolution process. This dispute resolution process was provided so that owner drivers have access to a low cost fast and simply system for resolving disputes. The TWU is concerned that this mediation process is lost in the CMPA model contract.

The TWU is also concerned about the emphasis it places on the resolution process under the *Building Construction Industry Security of Payment Act 2002*. The CMPA has suggested it is mandatory for those engaged in the construction industry to rely on the requirements of this Act. The TWU disagrees with this interpretation. The TWU draws attention to s 3(4) of the *Building Construction Industry Security of Payment Act 2002* which specifically states that the Act does not restrict the right of any other remedy a claimant may have for recovering his or her entitlement. The TWU considers that it is clear that all owner drivers have the right to rely on and use the dispute resolution processes (that is mediation) provided for in the *Owner Drivers and Forestry Contractors Act 2005*.

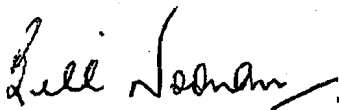
The TWU remains concerned about various provisions of the CMPA model contract and considers that the use of such provisions has the potential to detrimentally impact on owner drivers who enter into the CMPA model contract as currently worded. If owner drivers in this sector are unable to negotiate changes to the terms of the CMPA model

contract, the TWU considers that it will result in reduced viability and competitiveness of these owner driver businesses, contrary to the intention of the legislation.

The TWU considers that it is important that owner driver businesses in Victoria be given every opportunity to be prosperous and competitive as was intended by the legislation. The TWU notes that the development and publication of model agreements will only achieve the aims of the legislation if they are in plain English, contain terms which are fairly balanced between the parties and emphasise the right to use mediation. The TWU maintains that the CMPA model contract is not in plain English, contains some terms which are not fairly balanced between the parties and attempts to mandate other forms of dispute resolution. The TWU therefore considers the development and publication of the CMPA model contract will have a detrimental public impact, in that it is inconsistent with the spirit of the *Owner Drivers and Forestry Contractors Act 2005* and the *Owner Drivers and Forestry Contractors Code of Practice* and it has the potential to adversely affect the prosperity and competitiveness of owner driver businesses in this sector of the transport industry.

The TWU makes a number of specific comments in response to the CMPA's submission. These comments are attached.

Yours sincerely



Bill Noonan
TWU Vic/Tas Secretary

**CMPA Owner Driver Model Contract
Application for Authorisation A91047**

**Meeting between CMPA and TWU
Friday 26 July 2007**

CMPA Representatives:

Mark Wagner, CMPA; Lindsay Coombes, Consultant and David Gregory, VECCI

TWU Representatives:

Jenny Baker and Eugene Richards

Background

- The CMPA presented its written response to the TWU's concerns raised in its submission to the ACCC at the Pre-Determination Conference on 17 July.
- TWU representatives had no prior opportunity to read the document provided at the meeting on 26 July but were asked to respond at that meeting.
- The CMPA explained that their objective is to obtain approval of their contract by the ACCC.
- The CMPA confirmed that they believe it is important to have some sort of model contract in place and one which is industry specific.

Response to CMPA's Comments

CMPA	TWU
The TWU submission pays little attention to the need to deal with commercial reality and other legislation including the Building Construction Industry Security of Payment Act, the Trade Practices Act and common law.	The TWU submits that its submission focuses on the needs to protect the interests of its members. None of its comments are inconsistent with the requirements of the Building Construction Industry Security of Payment Act, the Trade Practices Act or common law.
The TWU submission concentrates on the terms of the contract rather than the general benefits and/or detriments of the agreement to prepare and publish the contract.	The TWU submits that there are general public benefits to be derived from the publication and development of model contracts. The TWU notes that there are public detriments to be derived from the publication and development of model contracts which are inconsistent with the intention of the Act and the Code.

<p>Much of the TWU submission seems to be trying to pressure the CMPA to move to adopt the Transport Industry Council model contract.</p>	<p>The TWU has made it quite clear that it supports the ability of the CMPA to develop and publish a model contract which specifically meets the needs of its industry. The TWU does not however support the development of a model contract which is anti-competitive or inconsistent with the spirit of the Act or Code.</p>
<p>The code in most of its provisions merely provides guidance as to what may be unconscionable conduct but does not provide certainty. There is very little in it that sets mandatory conduct to be followed.</p>	<p>The Code provides significant guidance on prohibited conduct and conduct which is likely to be unconscionable.</p> <p>The TWU draws attention to the Commonwealth Trade Practices Act and the Victorian Fair Trading Act which already contain prohibitions on unconscionable conduct and unjust contract terms. The Code expands on these provisions and is expected to increase compliance with these by providing plain English guidance on the meaning of unconscionable conduct and unjust contract terms in the context of the transport industry.</p>
<p>Model Contract</p> <p>The CMPA model contract will promote improvements in the business practices of both parties to the contract.</p>	<p>Model Contract</p> <p>The use of model contracts which are fair and balanced to all parties will help promote improvements in business practices.</p> <p>The CMPA model contract will only improve business practices where parties are able to negotiate changes to its provisions. To what extent such changes are negotiated remains to be seen.</p>
<p>Improvement in Prosperity</p> <p>Whether there is an improvement in the prosperity of owner drivers businesses will depend on the effort they put into their businesses and not on legislation.</p>	<p>Improvement in Prosperity</p> <p>The overwhelming majority of owner drivers put considerable effort into making their businesses successful.</p> <p>Research has shown that it is very difficult for some owner drivers to negotiate fair contractual arrangements. In the Second</p>

	<p>Reading Speech to the Owner Drivers and Forestry Contractors Act 2005, the Minister stated:</p> <p>“The bill seeks to ameliorate the situation of owner drivers and forestry contractors, while maintaining healthy and competitive industries. The bill tackles the key issue of information imbalance between the contracting parties. There is a clear market failure in that owner drivers and forestry contractors have a lack of adequate and accurate information about the reality of the commercial relationship they are proposing to enter. There is limited understanding among these small business people of the true costs of running the business. The result of this information imbalance is ill-informed and poor business decision making, leading to low and unsustainable levels of incomes”.</p> <p>The Act clearly seeks to assist owner drivers to negotiate better commercial deals and to be more competitive. Without legislative assistance the status quo would remain. It is likely that some owner drivers would be unable to conduct competitive businesses and that there would continue to be low levels of earnings, high rates business failure and working conditions and hours in excess of fair community standards.</p>
<p>Negotiation</p> <p>CMPA contract is purely voluntary and does not restrict the ability to negotiate fair and reasonable conditions. The contract leaves central elements open to negotiation and clauses can be amended.</p> <p>The CMPA maintains that there will be strong negotiations between the parties and they would expect some of the provisions in the model contract to be changed.</p>	<p>Negotiation</p> <p>Parties are free to negotiate, however they do tend to be guided by what industry associations or other representatives put forward.</p> <p>The TWU is uncertain how negotiations between the parties will proceed and to what extent owner drivers will be able to negotiate changes.</p>
<p>Plain English</p> <p>The CMPA model contract is in plain English in describing what are in fact complex delivery situations and a complex relationship between hirers and owner drivers.</p> <p>The CMPA model contract has been</p>	<p>Plain English</p> <p>The TWU notes that the nature of this industry is complex and that the CMPA model contract may need to be worded as it currently is to deal with the complexities of the quarrying industry.</p> <p>The TWU would prefer a model contract to</p>

<p>previously used by members in the industry and to date no problems have been reported by members.</p>	<p>be in plain English and to be unambiguous in its terms so that owner drivers can more easily negotiate the content with their hirers.</p> <p>The TWU notes that some of their members who are engaged in this industry are having difficulties in understanding certain aspects of the CMPA model contract and have had to obtain professional advice.</p> <p>The CMPA agreed to run information sessions for its members so they have a better understanding of the contractual issues being negotiated.</p>
<p>Review of Rates</p> <p>The CMPA model contract sets an agreed time period for the review of rates in Item 8 of Annexure B. It is up to the parties to negotiate and agree on the frequency of reviews.</p> <p>There is also an opportunity to review rates in exceptional circumstances.</p> <p>In discussions, the CMPA indicated that its expectation is that rates would be reviewed at least every 12 months and to set any other sort of mechanism in place would make the contract too complicated.</p> <p>(Check: did the CMPA argue that exceptional circumstances includes fuel?)</p>	<p>Review of Rates</p> <p>The TWU notes that the parties have an opportunity to agree and negotiate the frequency of rate reviews.</p> <p>The TWU considers that there needs to be a mechanism in the CMPA model contract for the regular review of rates. The TWU considers that in relation to fuel the price should be reviewed monthly.</p>
<p>Incorporation of Legislation</p> <p>The CMPA maintains that the inclusion of the notice provisions directly from the Owner Drivers and Forestry Contractors Act 2005 in their model contract is the most appropriate way to incorporate legislation.</p>	<p>Incorporation of Legislation</p> <p>The TWU remains concerned about this incorporation process.</p> <p>The CMPA agreed that they would change their model contract as soon as they are informed that the amending legislation has been passed by Parliament. The TWU agreed to inform the CMPA of this and any other changes.</p>

<p>Delivery Drivers</p> <p>The CMPA does not think that it is necessary to further delineate the circumstances in which approval of delivery drivers can be withheld.</p>	<p>Delivery Drivers</p> <p>The TWU considers that it is important to have some clarification so that hirers cannot unreasonably withhold approval of other delivery drivers.</p> <p>No agreement was reached on this clause.</p>
<p>Annual Leave</p> <p>Owner drivers need to provide 4 weeks notice of intention to be absent and the hirer may refuse if there is a significant disruption. The CMPA says that the courts have consistently refused to define significant and that what is significant will vary from business to business.</p>	<p>Absence</p> <p>After discussions, the TWU considers that this clause should enable owner drivers to negotiate leave with their hirers.</p>
<p>Notice of Absence</p> <p>Owner drivers must give notice if they cannot drive their vehicle because of sickness, disability or other urgent cause. The CMPA maintains that "notice" can be interpreted widely and will vary with the circumstances. If the owner driver has flu, he or she can give immediate notice.</p>	<p>Notice of Absence</p> <p>The TWU considers that if "notice" is given this wide interpretation, then this clause will enable owner drivers to take sick leave or leave for other causes. The TWU notes that if "notice" is not interpreted widely (ie in accordance with the circumstances), issues may arise.</p>
<p>Damage to Equipment</p> <p>Owner drivers are liable to hirers for accidental and negligent damage to equipment. The CMPA suggests that hirers have the right to waive the right to claim damages.</p> <p>In discussions it was agreed that equipment is not an issue in this industry.</p>	<p>Damage to Equipment</p> <p>The TWU would prefer that the damages clause refer to damage caused by negligence or willful misconduct. The TWU considers that owner drivers should not be liable for accidental damage.</p> <p>The TWU considers that hirers would be unlikely to waive their right to claim damages. This aspect was not discussed at the meeting.</p>
<p>Payment</p> <p>The payment provisions of the contract are consistent with those contained in the Building and Construction Industry Security of Payment Act 2002. This Act sets out a procedure for claims and payment.</p>	<p>Payment</p> <p>The TWU considers that the payment of owner drivers should be in accordance with the provisions of the Owner Drivers and Forestry Contractors Act 2005.</p> <p>The TWU notes that the Building and Construction Industry Security of Payment</p>

<p>The CMPA suggests that it is mandatory for those engaged in their industry to rely on the requirements of this Act.</p>	<p>Act 2002 is designed to ensure that those involved in the construction industry are paid on time and that they have a right to progress payments. The Act provides for an adjudication process to recover outstanding progress payments.</p> <p>The TWU notes that s 3(4) of Building and Construction Industry Security of Payment Act 2002 provides that it does not limit any other remedy a claimant may have for recovering their entitlement. This means that owner drivers can still use the mediation provisions and other entitlements under the Owner Drivers and Forestry Contractors Act 2005.</p>
<p>Appearance</p> <p>The appearance requirements vary with the circumstances. If a vehicle has promotional material, that would be considered to be part of its appearance. The CMPA considers that two weeks notice provides sufficient time to bring a vehicle up to the required standard. The CMPA indicated that they would expect the penalty to reflect the cost involved in arranging a substitute vehicle.</p>	<p>Appearance</p> <p>The TWU considers that if damages were equivalent to actual loss, this would be consistent with the Code and the Act. If the damages were more than the actual loss then this would amount to a penalty and would be in breach of the Code.</p>
<p>Dispute Resolution</p> <p>The CMPA argues that if a dispute involves payment, then the dispute resolution provisions of the Construction Industry Security of Payment Act must be used.</p> <p>The CMPA considers that the dispute mechanisms used will depend on what is "fair and reasonable" in the circumstances.</p>	<p>Dispute Resolution</p> <p>The TWU maintains that the mediation provisions in the <i>Owner Drivers and Forestry Contractors Act 2005</i> should be used in relation to all owner driver disputes.</p> <p>The TWU notes the comments of the Small Business Commissioner but considers that the mediation provisions should be given a more prominent position in the model contract to make it absolutely clear that all owner drivers have a right to use this dispute mechanism process.</p>

<p>The CMPA considers that even if the TWU's submissions were accepted, it is difficult to see how a detrimental impact on owner drivers would or could impact adversely on the Victorian economy.</p>	<p>The <i>Owner Drivers and Forestry Contractors Act 2005</i> was passed to improve the competitive position of owner drivers (and forestry contractors). In the Second Reading Speech, the Minister said:</p> <p>The owner driver sector is an important component of the road transport industry, which is in turn crucial to the economy as a whole. Owner drivers are an important component of a competitive and efficient industry. However the low and declining level of earnings of this group are not only unjust and well below an acceptable community standard, but are simply not sustainable, and have serious ramifications for the safety of drivers themselves and for other road users.</p> <p>The Regulation Impact Statement which was developed in support of the Code provides:</p> <p>The legislative structure, taken as a whole, is expected to achieve significant distributional benefits for owner drivers. This RIS suggests that the legislation may lead to increases in income for this group of between 7.5% and 15%, equivalent to increases in aggregate income of between \$50 million and \$100 million per annum.</p> <p>The TWU submits that the owner driver is an important sector of the transport industry. The TWU draws attention to the need for these small business operators to be supported with legislation and information to assist them to develop more competitive businesses.</p> <p>The TWU notes that if the information provided to this sector is too complex or is imbalanced, then it is likely that some owner drivers will enter into contractual arrangements which are not in their interests. This could result in continued business failure in the owner driver sector of the transport industry.</p>
<p>The CMPA believes that its contract reflects the spirit and intention of the Act and the Code and other relevant legislation and sees no need to re-draft its contract.</p>	<p>The TWU notes that some issues have been resolved in relation to the CMPA model contract.</p> <p>The TWU still has ongoing concerns about some of the clauses in the CMPA model</p>

contract and its overall complexity. The TWU maintains that the CMPA model contract reflects the interests of hirers.

In discussions, the CMPA noted that they would expect changes to be negotiated to the contract. The CMPA has also agreed to run more information sessions on the model contract.

The TWU considers that owner drivers will need to be able to negotiate changes to the CMPA model contract in order to achieve what the *Owner Drivers and Forestry Contractors Act 2005* set out to achieve, that is to improve the prosperity of a vulnerable group of small business operators, namely owner drivers.

Transport Workers Union
1 August 2007