

Owner Drivers and Forestry Contractors Code of Practice

Explanatory Memorandum

Background

In 2004 the Victorian Government undertook an inquiry into the commercial arrangements affecting owner drivers and forestry contractors. Industrial Relations Victoria's report found that these small businesses represent an important part of the Victorian economy, but that a range of factors, particularly the rising cost of fuel, have led to poor financial returns and a high rate of business failure for some in these sectors.

The *Owner Drivers and Forestry Contractors Act 2005* (Vic) provides for, amongst other things, the adoption by regulation of industry codes of practice that establish mandatory requirements and guidance material relating to relations between owner drivers, forestry contractors and their hirers.

Who does the Code apply to?

Part 1 of the Code applies to owner drivers in the transport industry and to harvesting and haulage contractors in the forestry industry (together called "contractors") and their hirers.

Part 2 of the Code contains additional provisions that apply only to harvesting and haulage contractors in the forestry industry and their hirers.

Part 2 of the Code contains additional examples of unconscionable conduct described in the context of the forestry industry. The examples contained in Parts 1 and 2 of the Code may be used as guidance in respect of the Act for both owner drivers and harvesting and haulage contractors and their hirers, as appropriate.

What does the Code do?

The *Owner Drivers and Forestry Contractors Code of Practice* has been made by the Victorian Government after advice from representative industry bodies called the Transport Industry Council and the Forestry Industry Council. Regulations made under the Act prescribe and give effect to the Code.¹ The Code sets additional obligations to those contained in the Act. The Code operates in three ways:

1. The Code establishes **mandatory requirements** that must be complied with;
2. The Code provides **guidance** to hirers and contractors, to the Small Business Commissioner and to the Victorian Civil and Administrative Tribunal ("the Tribunal") on conduct that is likely to be unconscionable conduct and contract terms that are likely to be unjust contract terms.
3. The Code also describes industry **best practice**.

¹ *Owner Drivers and Forestry Contractors Regulations 2006*

Mandatory requirements of the Code

Some provisions of the Code are mandatory, meaning they set out requirements that hirers and contractors must comply with. Section 30 of the Act provides that:

“A person to whom the code of practice applies must comply with the code of practice to the extent that it imposes duties or obligations on the person or prohibits the person from engaging in certain conduct.”

Guidance on unjust contract terms

The Tribunal has power under section 44(1)(g) of the Act to:

“Make any order it considers fair, including declaring void any unjust terms of a regulated contract, inserting a term into a regulated contract or otherwise varying a contract to avoid injustice.”

In determining whether a term of a contract is unjust, the Tribunal may have regard to range of matters listed in section 44(2) of the Act. Section 44(2)(n) provides that one of those matters is:

“Whether the term is inconsistent with any part of a relevant code of practice, whether or not that part of the code imposes duties or obligations on a person or prohibits a person from engaging in certain conduct”.

Guidance on unconscionable conduct

The Tribunal may also have regard to the requirements of the Code in determining whether the conduct of a hirer or a contractor constitutes unconscionable conduct. Section 31 of the Act provides that hirers must not engage in unconscionable conduct towards contractors. In determining whether conduct is unconscionable, the Tribunal may have regard to any one or more of the matters listed in that section. Similarly, section 32 describes unconscionable conduct by a contractor towards a hirer.

Generally speaking, unconscionable conduct occurs where a stronger party to a transaction exploits the weaker party in a way that is unreasonable or unfair. The Macquarie Dictionary defines unconscionable as:

- a) Unreasonably excessive;
- b) Not in accordance with what is just and reasonable;
- c) Not guided by conscience, unscrupulous.

Just because conduct is commercially tough does not make it unconscionable. Businesses are allowed to be rigorous and competitive in their dealings with other businesses, but must not behave unconscionably. The Code describes conduct that is likely to be unconscionable within an industry context to help contractors and hirers to avoid such conduct, and to help them to understand their rights.

However, what may amount to unconscionable conduct or an unjust term of a contract will depend on the whole of the parties' circumstances, and contractors and hirers should seek their own legal or other advice.

Industry best practice

The Code specifies certain practices that are regarded as constituting good or best practice in a number of circumstances, such as contract negotiations, dispute resolution and allocation of work. Hirers who adopt these practices can be confident that their conduct will not be found to be unfair or unconscionable. However, there is no mandatory requirement to adopt these practices.

Dispute resolution

The Act provides that where there is an allegation that:

- a) a person has breached a mandatory provision of the Code;
 - b) a term of a contract is an unjust term (section 44(2));
 - c) a person has engaged in unconscionable conduct (sections 31 and 32);
 - d) a person has breached a provision of the Act; or
 - e) where a dispute arises under or in relation to the contract between the parties,
- then the affected party can notify a dispute to the Small Business Commissioner under Part 5 of the Act.

If not resolved by mediation, the person notifying the dispute can refer the matter to the Victorian Civil and Administrative Tribunal. The Tribunal may make a range of orders, including:

- a) an order for a party to do or refrain from doing something;
- b) an order invalidating, varying or requiring performance of a contract; or
- c) an order for a refund, compensation or damages.

In accordance with usual legal principles, a person who may have been affected by a breach of the Act or Code has a duty to mitigate their loss. This means that in assessing any damages that could be paid, the Tribunal might reduce the amount paid if, for example, the party did not use his or her best efforts to minimise their loss.

Decisions of the Tribunal are subject to appeal under the usual processes in Part 5 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

The Code encourages parties to first attempt to settle disputes between themselves, before engaging in these formal mechanisms under the Act. To this end, the Code identifies as best practice a number of informal steps for dispute resolution that should be taken by the parties before using the mechanisms under Part 5 of the Act.