



Owner Drivers and Forestry Contractors Code of Practice

Operative from 1 December 2006

OWNER DRIVERS AND FORESTRY CONTRACTORS CODE OF PRACTICE

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BACKGROUND TO THE CODE



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 to 4 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 5 of the Code contains additional provisions that apply only to harvesting and haulage contractors in the forestry industry and their hirers.

However the all examples contained 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.

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**.

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.

For more information regarding dispute resolution please contact:

The Office of the Small Business Commissioner
Call 13 22 15 (local call)
or Toll Free 1800 136 034
or visit website: www.sbc.vic.gov.au

Location: Level 2, 121 Exhibition Street,
Melbourne 3000

OWNER DRIVERS AND FORESTRY CONTRACTORS CODE OF PRACTICE





01. OBJECTIVES

The objectives of this Code are–

- (a) to provide for certain mandatory requirements concerning the engagement of contractors;
- (b) to provide guidance to hirers and contractors on–
 - (i) conduct which is likely or unlikely to be unconscionable conduct within the meaning of sections 31 and 32 of the Act, including by providing examples of conduct that in the absence of any special circumstances is likely to be, or not to be, unconscionable conduct within the relevant industry context; and
 - (ii) contract terms which are likely or unlikely to constitute unjust terms within the meaning of section 44(2) of the Act, including by providing examples of contract terms that in the absence of any special circumstances, are likely to be, or not to be, unjust contract terms within the relevant industry context;
- (c) to ensure a competitive and fair operating environment by promoting the following principles to guide business relations between hirers and contractors–
 - (i) parties to a contract should be able to operate their respective businesses without unfair business practices being used against them;
 - (ii) contractors are entitled to be paid the agreed rate for their services;
 - (iii) hirers are entitled to have work performed to a satisfactory standard;
 - (iv) parties should clearly communicate their expectations and requirements and any plans that may affect the other party's interests;
 - (v) hirers should offer and pay contractors remuneration that, considering the contract as a whole, the services to be performed and the general market for those services, enables the contractor to meet efficient operating expenses, receive a fair return for the contractor's own labour and a return on investment.



02. INTERPRETATION

- (1) In this Code—
"contract" means a regulated contract within the meaning of section 3 of the Act;
"the Act" means the Owner Drivers and Forestry Contractors Act 2005.
- (2) Where the term "contractor" is used in this Code in a context that applies only to a natural person, the term refers—
 - (a) if the contractor is a natural person
—to that person;
 - (b) if the contractor is a partnership
—to any of the partners;
 - (c) if the contractor is a company
—to an officer of the company.

Note: All terms used in this Code have the same meaning as provided by the Act unless the context requires otherwise.

"Contractor" is defined in section 3 of the Act to mean an owner driver, a haulage contractor or a harvesting contractor.

See in particular the following definitions in the Act—the definition of "hirer" in section 3, the definition of "owner driver" in section 4, the definition of "haulage contractor" in section 5 and the definition of "harvesting contractor" in section 6.

The definition of "owner driver" is affected by the Owner Drivers and Forestry Contractors Regulations 2006. Those Regulations have the effect of limiting the definition of owner driver to businesses that supply up to a maximum of 3 vehicles.

03. APPLICATION

- (1) This Code applies to hirers and owner drivers, harvesting contractors and haulage contractors.
- (2) Where a provision of this Code is preceded by the following heading—
MANDATORY REQUIREMENT
the provision must be complied with by the person or persons to which it applies.

Note: Section 30 of the Act provides that a person to whom a 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.
- (3) Part 5 contains provisions which include examples that relate to forestry contractors. Examples set out in any Part of this Code may be used as guidance in respect of the Act for hirers and all kinds of contractors, be they owner drivers, harvesting contractors or haulage contractors.

PART 2 CONDUCT DURING NEGOTIATIONS



04. UNCONSCIONABLE CONDUCT DURING NEGOTIATIONS

- (1) This Code does not prevent hirers or contractors from acting vigorously in their own commercial interests. However, each party should deal with the other party or parties fairly and in good faith when negotiating a new contract or a variation to a contract.

GUIDANCE

In the absence of any special circumstances, where a hirer or a contractor engages in the conduct described below, that conduct is likely to be unconscionable conduct within the meaning of sections 31 and 32 of the Act—

- (a) where a party, by themselves or through an agent—
 - (i) does not provide a reasonable opportunity to discuss an offer, or makes offers on a "take it or leave it" basis and refuses to consider any alternative offer. This does not mean that a hirer cannot use template contracts, or that a party must accept an offer that is put to them. However, a party should genuinely consider offers made to them; or
 - (ii) does not provide a reasonable opportunity for another party to properly examine and consider offers, or to obtain legal, financial or other advice, including in the party's preferred language; or
 - (iii) disguises the terms of a contract using fine print, unnecessarily difficult language or deceptive lay-out or headings; or
 - (iv) summarises the meaning of a document to another party but omits to mention important terms in a way that is misleading; or
 - (v) fails to correct another party's misunderstanding, where the hirer or contractor knew or reasonably ought to have known that the other party was under a serious misapprehension about the terms of the agreement or any other relevant matter; or
- (b) where a party builds up reasonable commercial expectations in another party for the renewal of an agreement and then exploits those expectations to extract a harsh or one-sided deal from the other party; or
- (c) where a party attempts to pressure another party into accepting an offer by acting in breach of contract, or otherwise acting unlawfully, or by threatening to do so.



EXAMPLE 4.1

Wal was given a contract to look over. The clause about goods in transit insurance was complex and hard to read. Wal asked the company's manager whether it meant he had to take out a new policy. The manager said he was pretty sure the insurance arrangements hadn't changed but he wasn't really certain. Wal signed the contract and sent it with a letter saying he was told the insurance was the same as before, but asking that the company tell him if this wasn't right. The company didn't reply. A dispute arose later about some expensive goods damaged in an accident, and the company argued that Wal was obliged under the contract to take out the insurance. The company's failure to correct Wal's misunderstanding in circumstances where it was brought to its attention and not corrected is likely to constitute unconscionable conduct under section 31 of the Act, and Wal could notify a dispute to the Small Business Commissioner.

EXAMPLE 4.2

Ajani was looking for work. He responded to an advertisement seeking couriers. He was given a long and complicated contract. Ajani has trouble with English and said he needed to have a friend with good English read the documents. The manager said if Ajani wanted the job he would have to sign on the spot and pay \$1000 to cover the "set up costs". Ajani was anxious to find work and the manager was persuasive, so he signed and paid. He later realised the contract paid well below the going rate and it was impossible to make a living from the rates paid. The company refused to refund the \$1000. The company's conduct is likely to constitute unconscionable conduct under section 31 of the Act, and Ajani could notify a dispute to the Small Business Commissioner.

EXAMPLE 4.3

Bill works for a company that provides waterfront services using both contractors and its own employee drivers. Bill is planning to retire and is negotiating to sell his truck to the company. Bill persuades the other contractors to refuse to work unless Bill's demands are met. Bill and the other contractors' conduct may be in breach of their contracts and is also likely to be unconscionable conduct within the meaning of section 32 of the Act. The company could notify a dispute to the Small Business Commissioner and could also seek an urgent injunction in the Tribunal.



ADDITIONAL GUIDANCE

Set out below are circumstances where parties need to take special care that they do not act unconscionably—

- (a) **where a hirer is aware that a contractor lacks business experience or has difficulty with business language—**

It is likely to result in unconscionable conduct within the meaning of section 31 of the Act if the hirer refuses to allow the contractor a reasonable opportunity to obtain an understanding of the contract so as to be able to protect his or her interests appropriately.

- (b) **where a party is in an unusually strong negotiating position in relation to another party because of a monopoly or otherwise limited market for the supply of the services—**

The imposition of unduly harsh or one-sided contracts in these circumstances is likely to be unconscionable conduct within the meaning of either section 31 or 32 of the Act.

- (2) The conduct described above is not an exhaustive description of conduct during negotiations that may be unconscionable conduct within the meaning of either section 31 or 32 of the Act.

EXAMPLE 4.4

A company is seeking new contracts with its drivers. Even though the company knows Darren has problems with reading complex documents, the company insists the offer is only open for 24 hours. Darren feels pressured to sign even though he doesn't understand the contract and hasn't had a chance to get his accountant to read it for him. This conduct is likely to constitute unconscionable conduct under section 31 of the Act, and Darren could notify a dispute to the Small Business Commissioner.

EXAMPLE 4.5

Uri and Jack have an expensive specialised vehicle that can carry oversized farm machinery from sea ports to dealers. A machinery importer is the only business in Victoria with a need for this kind of vehicle. There are two possible scenarios in this situation of a limited market that may result in unconscionable conduct—

- (i) knowing that Uri and Jack have no other potential customers for their vehicle, the company tries to force a significant rate reduction that makes the business unprofitable; or
- (ii) knowing that the company is reliant on their vehicle to perform its contracts with customers, Uri and Jack threaten to refuse to accept work over the busiest period of the year unless the company pays a significant rate increase.



05. BEST PRACTICE IN NEGOTIATIONS

BEST PRACTICE

To ensure that contract negotiations are conducted fairly and that both parties fully understand their agreement, the parties should–

- (a) provide each other with the following–
 - (i) a reasonable opportunity to meet and discuss the terms and conditions;
 - (ii) a reasonable opportunity to put alternative offers that suit their own business needs;
 - (iii) sufficient time to properly examine and consider offers and to consult with business partners or fellow directors;
 - (iv) a reasonable opportunity to seek legal, financial or other advice and appropriate assistance to understand documents; and
- (b) properly consider any offers made by the other party.

Where a hirer has any concerns about a contractor's understanding of a contract, the hirer may request the contractor to provide written confirmation that the contractor has received advice from an appropriately qualified person.

Parties should be clear, open and certain about the circumstances in which their contract will be renewed or not renewed.

Contractors and hirers are also entitled under sections 25 and 26 of the Act to appoint agents to conduct contract negotiations on their behalf. In summary, sections 25 and 26 of the Act–

- (a) entitle contractors and hirers to appoint negotiating agents to negotiate contracts on their behalf; and
- (b) require other parties to recognise negotiating agents where properly appointed; and
- (c) enable parties to require that negotiations be conducted through those agents.



06. PARTIES MUST NOT CLAIM TO EXCLUDE THE ACT OR OTHER LAWS OR THE CODE

- (1) Section 65(1) of the Act provides that a provision of a contract is void to the extent that it is contrary to the Act or this Code.⁽¹⁾

MANDATORY REQUIREMENT

- (2) A party to a contract must not make any claim to another party that the other party's rights or entitlements under the Act or any other law or this Code are excluded, unless the Act or other law or this Code permits that exclusion.

EXAMPLE 6

A freight forwarder has included a clause in its contract stating that the contractor waives the requirement under section 23 of the Act that a hirer cannot deduct money for insurance unless a copy of the relevant policy has been given to the contractor. The contract also provides the contractor is not permitted to notify a dispute to the Small Business Commissioner. These clauses are invalid and unenforceable.



07. DISCLOSURE OF INFORMATION

Fair business dealing requires parties to exchange information about their changed plans and dealings that may have an impact upon the other party's business. This exchange of information should be ongoing throughout the relationship, and not just at the time a contract is entered into or renewed. Sections 31(2)(h) and 32(2)(h) of the Act provide that a factor to be considered in determining whether a hirer or a contractor has acted unconscionably is where that party unreasonably fails to disclose to another party proposed conduct that might affect the other party's interests, or does not disclose any risks that that party should have foreseen would not be apparent to the other.

GUIDANCE

If a hirer or contractor is planning or has experienced changes to the way they conduct their business that may significantly affect the business of another party, they should inform the other party of those planned changes or changes as soon as reasonably practicable. A failure to do so is likely to constitute unconscionable conduct for the purposes of sections 31 and 32 of the Act.

However, a party is not obliged to disclose any incomplete proposal or negotiation, or any trade secret or commercial-in-confidence matter.

EXAMPLE 7.1

Alf's hirer is a small freight forwarder who has two major clients. One of those clients has just appointed a receiver, and it appears likely that the hirer might only get paid 20 cents in the dollar on debts it is owed. The hirer already owes Alf for more than 30 days work. The hirer should inform Alf immediately of the development and discuss how they will deal with the situation. Either party could seek the assistance of the Small Business Commissioner.

EXAMPLE 7.2

Kolya worked for a freight company that did most of its work for a chain of home-ware stores. After discussing his plans with his hirer, Kolya invested in a new B Double and entered a five year finance contract. Kolya wasn't told that the contract between the hirer and the chain of home-ware stores was up for renewal. The contract wasn't renewed, Kolya lost the work and was stuck with the new vehicle and payments. The company should have told Kolya that the contract with the customer was not yet secured, particularly knowing that he was buying a new vehicle in reliance on secure work. Kolya could notify a dispute to the Small Business Commissioner.



08. DISPUTE RESOLUTION

- (1) Part 5 of the Act provides a process for the resolution of disputes between hirers and contractors, including mediation by the Small Business Commissioner. If this does not successfully resolve the dispute, the party who notified the dispute may refer the matter to the Tribunal for determination.
- (2) However, except in urgent circumstances, parties should first seek to resolve any dispute between themselves before using the disputes process provided under the Act. Work should continue as normal while the parties attempt to resolve the dispute.

BEST PRACTICE

Where a dispute arises, the aggrieved party should do the following–

- (a) notify the other party of their concerns when the issue arises;
- (b) advise the other party what they would like to happen to resolve the dispute;
- (c) provide a reasonable time period for resolution;
- (d) accept any invitation to meet with the other party to attempt to resolve the dispute;
- (e) act professionally and courteously at all times;
- (f) continue to perform or offer services as normal while the dispute is being dealt with;
- (g) ensure services are being performed in a safe manner;
- (h) follow any process agreed between the parties for the resolution of disputes.

Where an unforeseen event occurs beyond the parties' control (such as a road closure) the parties should work together to find a way of dealing with the situation that is fair and equitable.



09. MISLEADING ADVERTISING

MANDATORY REQUIREMENT

- (1) A hirer seeking to engage a contractor must not make any representation to the contractor, including through advertisements or in interviews—
 - (a) that the hirer knows to be false, or which the hirer is reckless as to whether it is correct; or
 - (b) that is misleading or deceptive or likely to mislead or deceive.
- (2) For the purposes of this section, representations that are likely to mislead or deceive include the following—
 - (a) a representation that a contractor can earn a certain amount where it is not reasonably possible for a diligent contractor to earn that amount;

EXAMPLE 9.1

John sees an advertisement in the local paper that says drivers will "earn in excess of \$1500 per week". John starts work, but then finds out from the other drivers that their average gross income for the last year has been less than \$900, and that no-one has ever managed to earn more than \$1200 a week. John could notify a dispute to the Small Business Commissioner over this breach of the Code.



- (b) a hirer guarantees a contractor an enforceable minimum level of income or number of hours of work for a certain period of time, but–
 - (i) does not make it clear that the minimum is only for that period; or
 - (ii) in circumstances where the engagement is to continue beyond that period, does not provide any information to the prospective contractor about expected earnings after that period expires;

- (c) a hirer provides estimates of earnings to a contractor but fails to indicate whether the figure is a gross figure (that is, that the contractor will incur overhead costs in earning that amount) or a net figure (the figure after expenses are taken out).

EXAMPLE 9.2

A courier company recruits new drivers with advertisements stating "guaranteed minimum 38 hours a week". However, after Herman started with the company, and after he painted his vehicle in the hirer's livery, he was given a contract that said the minimum hours only applied for three months then it was "up to the driver to bring in the work". After the three months, Herman's hours drop back to less than 20 a week. Herman could notify a dispute to the Small Business Commissioner over the hirer's breach of the Code.

EXAMPLE 9.3

A pizza restaurant advertised for a delivery driver. The advertisement states "guaranteed \$100 per night". The pizza restaurant should make it clear whether this is a gross (before expenses) figure, for example, by saying "\$100 per night (less expenses)" or a guarantee of earnings after expenses are taken out.



10. NEW VEHICLES OR MOTORISED EQUIPMENT

- (1) Hirers occasionally require existing contractors to upgrade their vehicles or motorised equipment. This can involve substantially higher overhead costs and a much greater level of capital investment. Unfairness is likely to result in these circumstances if the terms of the contract are not reviewed to make sure they remain reasonable and appropriate.

MANDATORY REQUIREMENT

- (2) If a hirer requests or requires a contractor to supply a vehicle or motorised equipment that is different to the vehicle or motorised equipment supplied by the contractor under a contract with the hirer, or if the contractor identifies a legitimate need to upgrade the vehicle or motorised equipment, the hirer must enter into negotiations with the contractor for variations to the contract for that purpose, and in doing so have regard to the following—
- (a) any increase or decrease in the contractor's costs associated with the purchase and operation of the requested vehicle or motorised equipment;
 - (b) the appropriate level of commercial security, having regard to the nature of the vehicle or motorised equipment provided and the amount of the investment;
 - (c) the need for the contractor to have reasonable security over his or her business assets (for example, a contract of appropriate duration, a minimum number of hours or income, or both);
 - (d) the impact upon efficiency and productivity as a result of the upgraded vehicle or motorised equipment.
- (3) If, after these negotiations, the hirer agrees that a different vehicle or motorised equipment may be supplied by the contractor, the hirer must set out in writing the terms and conditions being offered for the services using the different vehicle or motorised equipment, and must do so before the contractor purchases or otherwise commits to supplying the vehicle or motorised equipment.
- (4) If the hirer requires particular specifications for the different vehicle or motorised equipment, the specifications must be provided in writing to the contractor.



11. GENERAL PRINCIPLES FOR SETTING AND REVIEWING RATES

A hirer should offer and pay to a contractor a rate of remuneration that is commensurate with the rates typically paid within the industry for similar services, and which meets an efficient contractor's business costs and provides a return to the contractor that recognises the contractor's capital investment.

GUIDANCE

Hirers should offer and pay contractors remuneration that, considering the contract as a whole, the services to be performed, and the general market for the services, provides for each of the elements of remuneration described below.

Considering the contract as a whole, contractors should receive at least an amount which, after accounting for operating costs, is an amount that is not likely to be less than the amount that the contractor would typically receive for performing those services as an employee.

A significant departure from these principles means that the relevant contract term is likely to constitute an unfair contract term for the purposes of section 44(1)(g) of the Act.

The elements of remuneration are the following—

- (a) **an amount that represents the recovery of the fixed and variable costs incurred in performing the services required;**
A hirer is not required to calculate the actual individual overhead costs of a particular contractor, but must consider the typical and efficient overhead costs of a contractor with the required type of vehicle or equipment.⁽²⁾

EXAMPLE 11

A freight forwarder has a fleet of twenty contractors with B Doubles, and all contracts are up for review. In deciding what rate to offer, the hirer uses a cost model that is based on the typical or average operating costs of a B Double based on a three year old vehicle under finance, that requires eight mechanical services a year. Some of the contractors have individual finance payments that are higher or lower than the benchmark used to prepare the rate model, depending on the amount that they have each borrowed. Some will have older vehicles (that require more services) or newer vehicles (that require fewer services). The use by the hirer of this benchmark model meets the requirements of this section.



(b) **an amount that represents a fair return for the contractor's labour;**

For an owner driver, this is a fair amount for the owner driver's labour in driving, loading and unloading the vehicle and associated activities such as administration. A fair return for the owner driver's own labour should be reflected in the contract between the parties.

(c) **an amount that represents a return on the contractor's investment.**

Contractors are businesses and therefore aim to make a return on their business investment, that is, a profit. Contractors may supply significant assets and carry significant commercial risk, and can reasonably expect to receive an amount over and above their efficient operating costs and their own labour as a reward for that risk and investment. The amount that is a reasonable return on investment will vary widely in all the circumstances, and may vary over time as market conditions change.

Factors that influence what is a reasonable return on investment can include the following—

- (i) the amount of the capital investment in the vehicle or equipment;
- (ii) the level of commercial risk assumed by the contractor;
- (iii) the security and certainty of the arrangements;
- (iv) whether the vehicle or equipment provided by the contractor can readily be used to provide services to other persons;
- (v) whether the vehicle or equipment is also used for personal use;
- (vi) the efficiency and productivity of the contractor;
- (vii) the market for the services.



12. ADDITIONAL MATTERS TO BE CONSIDERED IN SETTING RATES

In addition to the matters set out in section 11, hirers should also take the following matters into consideration when negotiating rates of remuneration with contractors—

- (a) the whole of the activities to be performed by the contractor for the purposes of the contract;

GUIDANCE

Contracts, considered as a whole, should take into account the cost to the contractor of engaging in all the activities which are reasonably necessary to perform the services.

A failure to take reasonable account in a contract of all the work that is necessarily performed in providing the services means that the relevant term or terms of the contract are likely to constitute unjust contract terms for the purposes of section 44(1)(g) of the Act.

EXAMPLE 12.1

Mark delivers cars for a chain of car dealerships, exchanging new and traded-in vehicles between the dealerships all over the State. Most journeys he makes involve transferring just one car at a time. He is paid a rate based on the number of cars carried and the number of kilometres, but only for the kilometres he travels when his vehicle is loaded. The rates paid do not make any allowance for the unloaded journey to collect the vehicle from the dealership, or for returning to his base. This means that after taking account of the running cost of the vehicle, Mark is earning less than \$10 an hour for all the work required to perform the requested services. The relevant terms of the contract are likely to constitute unjust terms within the meaning of section 44(1)(g) of the Act, and Mark could notify a dispute to the Small Business Commissioner.

EXAMPLE 12.2

A courier company has calculated that on average, it takes a certain number of minutes for its couriers to collect or deliver goods. The company pays on a fixed run rate based on the suburbs between deliveries, and builds into that rate an amount for the contractor's labour for that average time spent in collecting or delivering the goods. Sometimes an individual courier may have to wait for a longer or a shorter period, but on average, over time, they receive compensation for the time worked.

The relevant terms of the contract are unlikely to constitute unjust terms within the meaning of section 44(1)(g) of the Act.



- (b) where the customer pays additional rates or levies;

It is common for arrangements between hirers and their customers to provide that the hirer receives additional payments or higher rates in certain circumstances. With the rising cost of fuel, customer fuel levies are common. Some hirers have acted unscrupulously by not giving the contractor any benefit of such a loading or increase, even though it is the contractor and not the hirer who has actually had to bear the increased cost caused by a rise in fuel prices.

GUIDANCE

If the hirer has the benefit of arrangements with customers providing additional payments or higher rates from the customers where—

- (a) the cost of fuel rises or falls (a fuel levy); or
- (b) the contractor spends excess time—
 - (i) loading and unloading, or waiting to be loaded or unloaded; or
 - (ii) waiting for customers to make goods available for collection—

and the contract between the hirer and the contractor does not provide proportional payments or benefits to the contractor in the same circumstances, then the relevant contract term is likely to constitute an unjust contract term for the purposes of section 44(1)(g) of the Act.

EXAMPLE 12.3

Nina runs a two tonne van. In 5 years, her hirer has only increased the rates paid to its contractors by \$1 an hour. At the beginning, Nina earned \$900 a week on average, of which about \$270 was spent on fuel. Because of the significant increase in the cost of fuel over the last 5 years, Nina is now spending over \$450 a week on fuel, and the total return for her labour and investment is now well below \$10 an hour. The company refuses to negotiate a new rate, saying the market is too competitive. However, the company's contracts with its customers allow it to charge an increased price whenever the cost of fuel increases by more than five cents a litre. The company simply pockets this customer price increase as it is the contractors who pay for the fuel. This conduct is likely to be unconscionable conduct within the meaning of section 31 of the Act, and Nina could notify a dispute to the Small Business Commissioner.

- (c) where the contractor provides services to the hirer on an exclusive basis;

Contractors are businesses, not employees. They are not obliged to work solely for one hirer unless this is agreed between them. However, hirers often require contractors to make themselves available to accept work on a full time basis, and not to work for anyone else. Often the contractor is required to paint their vehicle in the hirer's or customer's livery, meaning that regardless of the terms of the contract, the vehicle is not able to be used to perform work for other customers.



GUIDANCE

Where the contractor–

- (a) is not permitted to perform services for any other person using the vehicle supplied under the contract; or
- (b) has their vehicle painted in the hirer's or the hirer's customer's livery–

then, unless there is evidence to the contrary, the hirer should pay the contractor remuneration on the basis that the contractor will receive no other income towards the fixed overhead costs of the contractor's business.

A failure to do so means the relevant contract term is likely to constitute an unjust contract term for the purposes of section 44(1)(g) of the Act.

(d) the need for a regular and systematic review of fixed & variable overhead costs.

Section 31(2)(k) of the Act provides that a matter to be considered in determining whether a hirer's conduct is unconscionable is whether or not the contract allows for the payment of any increases in fixed and variable overhead costs on a regular and systematic basis. This means that a contract which locks up a contractor's rates for long periods of time without regard to increases in overheads (particularly fuel prices) will be susceptible to a claim of unconscionable conduct.

Note: Part 5 sets out certain practices that constitute a review of rates for increases in overhead costs in respect of forestry contractors on a "regular and systematic basis".

GUIDANCE

Set out below is one practice that, while not being mandatory, constitutes a review of rates for increases in overhead costs in respect of owner drivers on a "regular and systematic basis", and is therefore unlikely to constitute unconscionable conduct within the meaning of section 31(2)(k) of the Act–

- (a) the component of a contractor's remuneration that relates to the cost of fuel is determined by direct reference to the actual cost of the fuel required to perform the services and is adjusted on at least a monthly basis; and
- (b) the determination of any increases or decreases in the cost of fuel is by reference to a legitimate and accurate fuel price monitoring source; and
- (c) the rates paid to the contractor are reviewed regularly and systematically in respect of operating costs other than fuel.

While this section sets out an arrangement that is unlikely to be unconscionable, other arrangements may be commercially appropriate and legitimate in all the circumstances and comply with the requirements of section 31(2)(k) of the Act.

EXAMPLE 12.4

Mick carries road base to road construction sites. His hirer is tendering for a new road building project and asks the contractors to agree to a fixed rate per load for the three months of the project. The price that is negotiated takes into account the fact that the cost of fuel may increase during that time. This conduct is unlikely to be unconscionable conduct within the meaning of section 31(2)(k) the Act.



13. REDUCTION IN REMUNERATION FOR CARRYING SMALLER LOADS

- (1) Contracts generally provide for rates which are based upon the running costs of the type of vehicle provided, for example, a two-tonne van. Where the contract between the parties permits, the contractor may agree to accept offers from the hirer for loads that could be carried in a smaller vehicle for a reduced rate of remuneration. Contractors may consider such occasional loads to be in their own interests, for example where the alternative is running the vehicle unloaded.
- (2) However, where the hirer regularly directs the contractor to undertake work for such reduced rates, the end result may be that the contractor is unable to cover the higher operating costs of the larger vehicle.

GUIDANCE

In general, hirers should pay contractors at the rate agreed between them for the particular vehicle supplied by the contractor, regardless of whether the goods being transported could have been transported in a vehicle with a lesser carrying capacity.

Hirers should not–

- (a) direct contractors to undertake deliveries with a smaller load to be paid at a reduced rate; or
- (b) make special arrangements with customers for reduced rates (for example, supplying a two tonne van at the lower one tonne van rate), and direct the contractor to perform deliveries for that customer at the reduced rate.

Any regular direction that the contractor accept a reduced rate that results in the contractor being unable to meet the operating costs of the larger vehicle is likely to constitute unconscionable conduct within the meaning of section 31 of the Act.



14. PAYMENT OF INVOICES

Contractors frequently have limited working capital. This means it is not reasonable to expect them to carry operating costs for excessive periods. The period allowed for payment of invoices should provide for regular payments sufficient in the circumstances for the contractor to maintain a reasonable cash-flow to operate their business.

GUIDANCE

In the absence of any unusual circumstances (or as otherwise required by law) a contract term that allows a hirer to pay an owner driver more than thirty days after presentation of properly completed invoices is likely to constitute an unjust term of the contract for the purposes of section 44(1)(g) of the Act.

Further, it is likely to constitute unconscionable conduct within the meaning of section 31 of the Act if the hirer has engaged in a pattern of conduct of regularly being late in paying the contractor's invoices, paying only part of the amount owed or failing to pay at all.

EXAMPLE 14

Bob works as a long distance driver. His contract provides for payment 90 days after invoice, when the industry standard is generally 7, 14 or 30 days, depending on the industry sector. Even then, his hirer regularly pays Bob late. The company says "you'll get paid if and when we get paid". The conduct of deliberate erratic payments is likely to constitute unconscionable conduct within the meaning of section 31 of the Act, and the contract term allowing for 90 days payment is likely to constitute an unjust contract term for the purposes of section 44(1)(g) of the Act.



15. DEDUCTIONS FROM REMUNERATION

- (1) Section 24 of the Act places certain restrictions on hirers requiring contractors to pay any amount, or from making deductions from money payable to contractors, in respect of services or equipment provided to contractors by hirers or any other person. Under section 24, any amount deducted must be—
 - (a) specified in the contract; and
 - (b) a direct and proper reflection of the actual cost of the services or equipment in respect of which the costs are charged.
- (2) Section 24 also requires the hirer to give the contractor a reasonable opportunity to obtain the services or equipment from another supplier.
- (3) Section 23 also requires a hirer seeking to make deductions for insurance to have an insurance policy in force and to have provided a copy of the policy to the contractor.
- (4) Under section 65 of the Act, any term of a contract that is contrary to, or inconsistent with, anything in the Act, the regulations or this Code is void to the extent that it is contrary or inconsistent. There are also strict requirements under the Financial Services Reform Act 2001 of the Commonwealth concerning who is allowed to offer insurance policies.

MANDATORY REQUIREMENT

- (5) If a hirer makes deductions from a contractor's invoiced fees for services, or the use of equipment, provided by the hirer or any other person, the hirer must provide a written statement to the contractor setting out the nature of the equipment used or services provided and the amount deducted for the equipment or service.

EXAMPLE 15

Russell works for a taxi truck company. The company starts to deduct an "insurance fee" of five per cent of turnover from all its contractors. Russell already has his own insurance coverage that is much cheaper, but the company says he must also participate in its "self-insured" scheme. The hirer is in breach of sections 23 and 24 of the Act. Russell and his colleagues could notify a dispute to the Small Business Commissioner.



16. DEDUCTIONS FOR THE USE OF THE HIRER'S EQUIPMENT AND TECHNOLOGY

A range of new technology, such as vehicle monitoring technology, GPS devices and electronic invoicing equipment or other communications and monitoring equipment is now available. This technology may provide a benefit to the contractor or the hirer, or to both parties, in terms of improved efficiency, safety, client loyalty or productivity.

GUIDANCE

If the hirer charges the contractor for the use of equipment supplied by the hirer in circumstances where the contractor does not obtain any benefit or advantage to their own business from the use of the equipment, then the relevant contract term is likely to constitute an unjust contract term for the purposes of section 44(1)(g) of the Act.

However, it would not constitute an unjust term if the rates paid to the contractor made provision for the cost of any such charge made by the hirer.

EXAMPLE 16

A construction company negotiates with its owner drivers to install new vehicle monitoring technology to obtain government permission to operate more heavily loaded vehicles on certain roads. The equipment costs \$1500 to install with a weekly monitoring fee of \$30. The company has calculated that the additional load capacity would allow the contractors to earn an extra \$200 a week. As the contractor obtains a significant financial benefit from using the equipment, it is unlikely to be an unjust contract term if the contract allows the hirer to deduct the costs from the contractor's payments, provided the contractor agrees and the deduction is no more than the actual cost of the service and equipment provided.



17. PENALTIES

MANDATORY REQUIREMENT

A hirer must not require a contractor, or include a term in a contract requiring a contractor, to make any payment which is in the nature of a penalty. A "penalty" is a payment that must be made by a party for an amount in excess of the amount necessary to remedy the actual loss or damage suffered as a result of the conduct.

EXAMPLE 17

Fang Shan's contract states that she must pay \$100 to the company if she is more than 10 minutes late in a delivery. The inclusion of this contract term is in breach of this Code, and Fang Shan could notify a dispute to the Small Business Commissioner.

PART 4 ALLOCATION OF WORK, WORKING ARRANGEMENTS AND ABSENCES



18. ALLOCATION OF WORK

Some arrangements in the transport industry pay remuneration to contractors for deliveries actually performed, rather than for the hours where the contractor is available to work. This means that the fair allocation of work by the hirer is important for all parties.

GUIDANCE

If a hirer offers work to contractors in an unjust manner, this is likely to constitute unconscionable conduct within the meaning of section 31 of the Act. Such conduct may also be in breach of section 61 of the Act if carried out for a reason prohibited by that section.⁽³⁾

BEST PRACTICE

Having regard to their legitimate business needs, hirers should use their best endeavours to—

- (a) plan their fleet to match their workloads; and
- (b) allocate work fairly between their contractors.

Contractors should operate in an efficient and productive manner, and use their best endeavours to assist hirers to meet customer requirements.

Parties should work together to pursue improved management practices that avoid as far as possible unproductive time and unloaded travel, and which provide for the most efficient and productive utilisation of the contractor's and the hirer's vehicles, plant and equipment.



19. WORKING ARRANGEMENTS

Some contractors work very long hours, do not have adequate rest and recovery between shifts, and do not have adequate family and recreation time. While many contractors seek or accept long hours for financial or other reasons, there is significant evidence to show that working patterns with excessive hours are unsafe, have long-term health implications for contractors and have a negative effect on family life.

BEST PRACTICE

When parties are negotiating a contract, they should give proper consideration to achieving safe work practices and a reasonable work/life balance. Particular attention should be given to—

- (a) ensuring their contracts comply with all applicable laws and regulations on driving hours and fatigue management; and
- (b) the maximum number of hours a day in which services are to be provided; and
- (c) the number of days each week, month or year in which services are to be provided; and
- (d) structuring the hours in which services are to be provided to allow time for physical recovery, rest and recreation, community participation and family time; and
- (e) what flexible arrangements can be put in place that may assist contractors to have a better work/life balance. Such arrangements might include allowing for consultation over preferred rosters, arrangements to make it easier to find and use replacement drivers or flexible start and finishing times and locations.



20. ABSENCES DUE TO ILLNESS OR FAMILY RESPONSIBILITY

- (1) Contractors are businesses, not employees. As such, provided the standards of the contract are met, it is a matter for the contractor to choose the person who actually performs the services. This could be the owner of the contractor's business or an employee or sub-contractor.
- (2) A hirer may impose reasonable requirements on the use of alternative drivers based on the qualifications, training or character of a proposed driver.

MANDATORY REQUIREMENT

- (3) A hirer must not terminate a contract only because of the absence of the contractor due to temporary illness or incapacity, family responsibilities or a similar reason, without first allowing a reasonable period of time for the contractor to provide a suitable replacement driver.
- (4) In considering what period of time is reasonable for the contractor to provide a replacement driver, regard must be had to the nature of the work and the relevant terms of any contract between the parties.

PART 5

ADDITIONAL PROVISIONS FOR FORESTRY CONTRACTORS AND HIRERS

21. UNCONSCIONABLE CONDUCT DURING NEGOTIATIONS

In its application to forestry contractors, paragraph (b) of the additional guidance notes in section 4 is to be read as including the following example—

EXAMPLE 4.6

There is only one forestry manager engaging harvesting contractors in a particular region of Victoria, and it is not practicable for the contractors to travel to other regions or to work for anyone else. If the forest management company was to use its strong market position to extract an unduly harsh and one-sided deal from harvesting contractors (having regard to all relevant factors including international market conditions) this is likely to constitute unconscionable conduct under section 31 the Act. Conversely, if the harvesting contractors were to join together and threaten to boycott the hirer unless the hirer agreed to a harsh or one-sided deal in the harvesting contractors' favour, this is likely to constitute unconscionable conduct by the contractors under section 32 of the Act. The affected party could notify a dispute to the Small Business Commissioner.

22. BEST PRACTICE IN NEGOTIATIONS

- (1) This section applies in relation to contract negotiations between a hirer and a forestry contractor.
- (2) In addition to the matters set out in section 5, the parties to the proposed contract should, prior to finalising the terms of the contract, jointly view—
 - (a) the locations or indicative locations for the performance of the contract; and
 - (b) relevant harvesting and haulage management plans.

23. DISCLOSURE OF INFORMATION

In its application to forestry contractors, paragraph (b) of the additional guidance notes in section 4 is to be read as including the following example—

EXAMPLE 7.3

Nathan is negotiating with a forest management company to perform harvesting work and rates to be paid. His hirer is aware that the coupe being considered has some terrain outside that defined in the agreement that could make the harvesting more complex and possibly damage equipment, with extra costs and risks and delays. There is no way for Nathan to do his own checks unless the company facilitates this. The hirer should tell Nathan about the unusual terrain and invite him to inspect the site to allow for further negotiations.



24. BEST PRACTICE IN DISPUTE RESOLUTION

In relation to the matters set out in section 8 as best practice in dispute resolution, an example of an unforeseen event beyond the parties' control in the context of the forestry industry is an environmental protest or blockade.

25. MISLEADING ADVERTISING

For the purposes of section 9, an example of a representation by a hirer that is likely to mislead or deceive a forestry contractor is an inaccurate guarantee or representation regarding the volume of forest products available to the forestry contractor.

26. GENERAL PRINCIPLES FOR SETTING & REVIEWING RATES

- (1) In its application to forestry contractors, paragraph (a) of the guidance notes in section 11 is to be read as including the following example–

EXAMPLE 11.2

Based on his or her experience, a forest manager has calculated benchmark cost rates per hour for a bulldozer and a skidder. These benchmarks are based on the cost to an experienced and efficient harvesting contractor who is using reasonably modern and well-maintained equipment. The forest manager can use this benchmark, and need not calculate the particular individual costs of a contractor who is using older, less efficient equipment.

- (2) In its application to forestry contractors, paragraph (b) of the guidance notes in section 11 is to be read as including the following–

For a haulage contractor, this is a fair amount for the haulage contractor's labour in driving, loading and unloading the vehicle and associated activities such as administration.

For a harvesting contractor, this is a fair amount for the harvesting contractor's labour in managing their harvesting business.



27. REVIEW OF RATES ON A REGULAR AND SYSTEMATIC BASIS

Section 31(2)(k) of the Act provides that a matter to be considered in determining whether a hirer's conduct is unconscionable is whether or not the contract allows for the payment of any increases in fixed and variable overhead costs on a regular and systematic basis. This means that a contract which locks up a forestry contractor's rates for long periods of time without regard to increases in overheads (particularly fuel prices) will be susceptible to a claim of unconscionable conduct.

GUIDANCE

Set out below are certain practices that, while not being mandatory, constitute a review of rates for increases in overhead costs in respect of forestry contractors on a "regular and systematic basis", and which are therefore unlikely to constitute unconscionable conduct within the meaning of section 31(2)(k) of the Act.

The component of a forestry contractor's remuneration that relates to the cost of fuel is determined by direct reference to the actual cost of the fuel required to perform the services and is adjusted—

- (a) at least every six months; or
- (b) if there is an increase in the price of fuel of ten per cent (or a lesser percentage amount) since the last rate adjustment; or

- (c) if there is an increase in the cost of fuel of such an amount that it causes an increase of more than one per cent (or a lesser percentage amount) of the forestry contractor's operating costs since the last rate adjustment.

In addition—

- (a) the determination of any increases or decreases in the cost of fuel is by reference to a legitimate and accurate fuel price monitoring source; and
- (b) the rates paid to the forestry contractor are reviewed regularly and systematically in respect of operating costs other than fuel.

While this section sets out practices that are unlikely to be unconscionable, other arrangements may be commercially appropriate and legitimate in all the circumstances and comply with the requirements of section 31(2)(k) of the Act.



EXAMPLE 27

Ron is a harvesting contractor and has the benefit of a five year contract with a guaranteed volume and a turnover of \$350,000 a year. His hirer is in turn subject to a five year contract with a timber processor, and has the benefit of a six-monthly fuel review clause. Ron's rates are similarly reviewed for fuel increases under his contract every six months, and an additional lump sum is paid as compensation for the average increases over the previous six month period. Given Ron's level of contract security and turnover, and the commercial arrangements between the hirer and the processor, a six month review is unlikely to be unconscionable conduct within the meaning of section 31(2)(k) the Act.

Endnotes

1 Sch. 1 cl. 6(1): Section 65(1) of the Act provides for a transitional period of 6 months after the Act comes into operation during which contracts may override the requirements of Divisions 3 and 4 of Part 2 of the Act.

2 Sch. 1 cl. 11: Guidance on the typical overhead costs for contractors can be obtained from the Rates and Costs Schedules published under section 15 of the Act, which are available at www.irv.vic.gov.au and www.sbc.vic.gov.au.

3 Sch. 1 cl. 18: Reasons set out in section 61 of the Act include: if the contractor has exercised a power or right under the Act, informed a person of a breach of the Act or Code, participated in joint negotiations, raised an issue concerning health and safety or sought to renegotiate a contract.

The Owner Drivers and Forestry Contractors Code of Practice was made by the Victorian Government after advice from the Transport Industry Council and the Forestry Industry Council, following an extensive consultation process.

These Councils are made up of members nominated by the following organisations:

Transport Industry Council

- Victorian Transport Association
- Transport Workers Union
- Victorian Employers' Chamber of Commerce and Industry
- Victorian Trades Hall Council
- Australian Industry Group
- VicRoads

Forestry Industry Council

- Victorian Harvesting and Haulage Council
- Australian Plantation Products and Paper Industry Council (A3P)
- VicForests
- Victorian Association of Forest Industries
- Construction Forestry, Mining and Energy Union, Forestry Division
- Department of Primary Industries

For further Information

For more information, go to the Industrial Relations Victoria website at: www.irv.vic.gov.au

Industrial Relations Victoria

Department of Innovation, Industry & Regional Development

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