

Owner Drivers – everything (well, most things) you need to know, but were afraid to ask



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Overview



Part 1: Contractor v Employee – what are the rules?

- How has the law changed?

Part 2: What is in the new Closing Loopholes (No 2) Act?

Part 3: What else do you need to consider?

- State owner driver legislation



PART 1

Contractor v Employee – what are the rules now?



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ZG Operations Australia Pty Ltd v Jamsek [2022]




- Two drivers worked in same depot from school to retirement
- Very early on were offered choice of contracting or redundancy
- Both bought vehicles (for \$70,000 & \$80,000 in 1989 / 1990)
- Each formed, and contracted through, a partnership
- Continued to work regular hours (with some flexibility)
- (Mostly) wore uniforms, displayed livery etc
- Controlled loading of vehicles
- Could have, but didn't, work for others
- Apart from one occasion, didn't have others drive their vehicles

Jamsek (cont'd)

- **Main issue:** were the drivers employees or contractors?
 - This was for the purposes of superannuation and LSL
- **Outcome:** The drivers were found to be contractors (not employees)
- This case involves a departure from the multi-factor test developed in previous cases
- The High Court found that the written contract between the parties was the starting point to determining their relationship



What did the High Court find?

- The 'totality of the relationship' was first to be assessed in the context of the contract as it was agreed
 - Looking to the 'substance of the relationship' means looking at what was agreed in the contract
 - What any contract said was not just one factor – it was the **starting point** and needed justification to go beyond it
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New definition of employee

- The *Closing Loopholes (No 2) Act* has changed the definitions of employee and employer for the *Fair Work Act* in a direct response to the High Court decision in *Jamsek*
- Rather than *only* looking at the terms in the contract, the 'totality of the relationship' must now be considered, including how the contract is performed in practice
- This is effectively a return to the multi-factor approach prior to *Jamsek*
- Must look to the 'real substance, practical reality and true nature of the relationship'


Multi-Factor Test

- Look at the 'totality of the relationship'
(‘whole of relationship test’, rather than ‘start of relationship test’)
- The terms of the written contract are only one factor (with variable weight)
- Workers who earn more than the contractor high income threshold can ‘opt out’ of the new test



Multi-Factor Test

Factors pointing to being a contractor

- Supplies own tools or vehicles (especially expensive ones)
 - Has control (or right to control) how work is done
 - Free to work for others and to assign others to do the work
 - Bear risk of loss, responsible for defects, gains from profits
 - Presents as own business (shirts, livery, paperwork)
 - Can build goodwill and owns value of that goodwill
 - Paid for results not for time
 - How they are described in the contract
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PART 2

But wait, there's more
Closing Loopholes (No 2) Act
(from 26 August 2024)



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Power to make Road Transport Orders

The FWC may make minimum standard orders:

1. 'Road Transport Minimum Standards Orders' relating to 'regulated workers' (employee-like workers *or* regulated road transport contractors)
2. 'Contractual Chain Orders' that set standards for regulated road transport contractors and 'other persons in a road transport contractual chain'

Who is a 'Regulated Road Transport Contractor'?

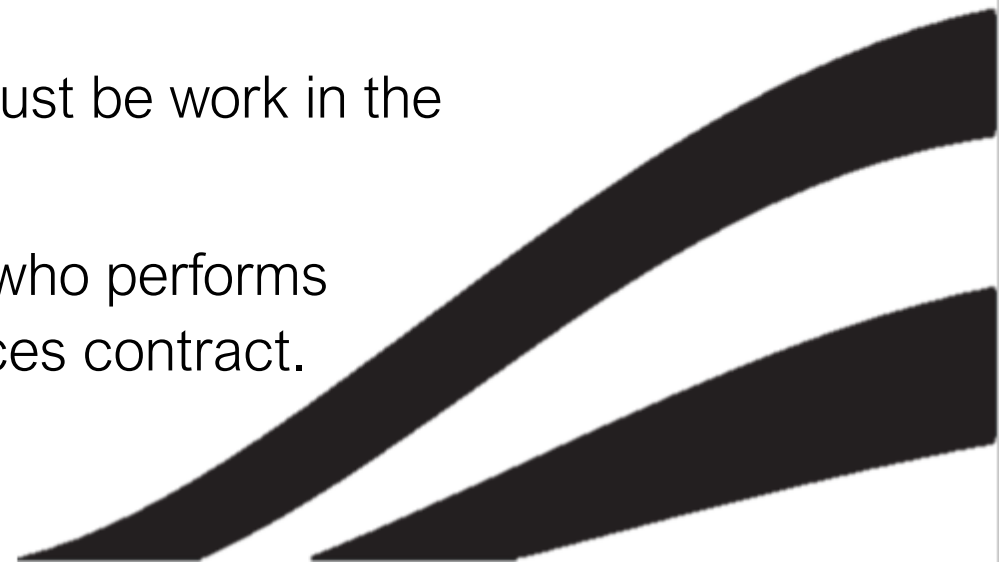
A person, other than a principal that is:

1. An individual who is a party to a services contract in their capacity as an individual and performs work under the contract; or
2. If a company is a party to a services contract, an individual who is the director or a member of the family of the director, and performs work under the contract; or
3. If there is a trustee of a trust who is a party to a services contract in their capacity as a trustee – an individual who also a trustee of the same trust and performs work under the contract, whether or not that individual is a party to the contract; or
4. If a partner in a partnership is a party to a services contract in their capacity as a partner – an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract.



Who is a 'Regulated Road Transport Contractor'? cont.

In addition:

1. The person must perform all, or a significant majority, of the work to be performed under the services contract;
 2. The person must not perform any work under the services contract as an employee;
 3. The work performed under the services contract must be work in the 'road transport industry'; and
 4. The person must not be an 'employee-like worker' who performs work in the road transport industry under the services contract.
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The Expert Panel of FWC



Members

Part time expert panel members or appropriately qualified FWC members

Powers

- Making modern awards relating to the road transport industry
- Making a determination varying or revoking a road transport industry modern award
- **Making, varying or revoking road transport minimum standards orders**
- **Making, varying or revoking road transport guidelines**

Considerations

- The Expert panel must always consider the **Road Transport Objective**

Content of Road Transport Minimum Standards Orders

An Order **must** include terms which set out:

1. The work covered by the order;
2. The regulated road transport contractors covered by the order; and
3. Road transport businesses covered by the order.

An Order **may** include provisions about:

- | | |
|---------------------|------------------------|
| (a) payment terms; | (f) consultation; |
| (b) working time; | (g) representation; |
| (c) deductions; | (h) delegate's rights; |
| (d) record keeping; | (i) cost recovery. |
| (e) insurance; | |



Content of Road Transport Minimum Standards Orders

However, an Order must not include terms about:

- (a) overtime rates;
- (b) rostering arrangements;
- (c) matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the minimum standards order;
- (d) a term that would change the form of the engagement or the status of regulated workers covered by the Order;
- (e) a matter relating to workplace health and safety that is otherwise comprehensively dealt with by a law of the Commonwealth, a State or a Territory;
- (f) a matter relating to road transport comprehensively dealt with in HVNL or another law of C'th or State.

What's the difference between this and the RSRT?



RSRT	RTAG + FWC	Effect
Determines work program for road transport industry inquiries	RTAG sets priorities of FWC for road transport industry	Very similar process
RSRT President – Deputy President of FWC + 2-4 RSRT positions from FWC	RTAG will sit within FWC	Significant overlap
Orders made on own initiative	Minimum standard orders made on initiative of FWC & RTAG and application of various parties	Similar process but more industry input
RSRT Act defines the 'road transport industry' as: <ul style="list-style-type: none"> • The RTD Award • The Road Transport (LDO) Award • The Transport (Cash in Transit) Award • The Waste Management Award 	Defines the 'road transport industry' as: <ul style="list-style-type: none"> • The RTD Award • The Road Transport (LDO) Award • The Transport (Cash in Transit) Award • The Waste Management Award • The Passenger Vehicle Transport Award 	Almost identical definition + coverage of the industry New Act goes further
No power to make Orders in relation to any parties other than 'owner drivers'	Extensive powers in relation to the contractual chain	Much greater powers
Limited consultation and review rights	More consultation, variety of review processes and ability to suspend, defer and revoke Orders	More consultation and review – longer lead-in times

And it has already started....

Case number	Case name	Date started	Date complete
MS2024/3	Application for an employee-like minimum standards order	28/08/2024	Active
MS2024/1 and MS2024/2	Applications for employee-like minimum standards order and road transport minimum standards order	28/08/2024	Active

Consequences of Contravention of Minimum Standards Orders



- Contravention is an offence and a breach may result in civil penalties.
 - Contravention: up to 60 penalty units
 - Serious Contravention: up to 600 penalty units

1 penalty unit = \$313 so 600 penalty units is \$187,800

- Body corporates are liable to pay **5 times** the maximum penalty payable by an individual

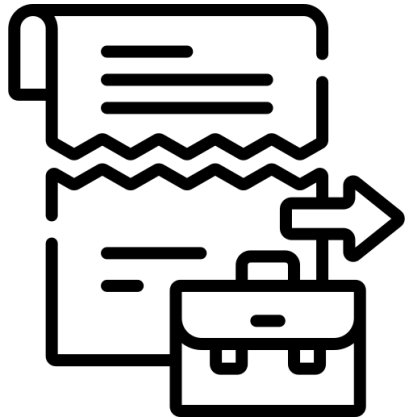
New Provisions Relating to Collective Agreements

- Collective agreements will be able to be made between regulated businesses and registered employee organisations entitled to represent regulated road transport workers
- 'Employee-like worker collective agreements' and 'road transport collective agreements'
- Similar to enterprise agreements but covering 'owner drivers'
- Different formal requirements from those for EAs



Who is Protected from Unfair Termination?

- A regulated road transport contractor who has been performing work under a services contract, or a series of services contracts, for a road transport business for at least 6 months is protected from unfair termination provided they earn less than \$175,000
- ‘Termination’ occurs where the services contract was ‘terminated by, or as a result of the conduct of, the road transport business’



Limit likely to be increased beyond \$175K



But in a letter to industry groups, Minister for Employment and Workplace Relations, Senator Murray Watt said government would seek to amend the provisions to allow different thresholds for different purposes.

“I acknowledge your concern that contractors in the road transport industry carry a high level of business costs and a threshold of \$175,000 may not be high enough to provide meaningful access to some of the new provisions,” Watt said in the letter.

“When the first opportunity arises, I will seek to amend the provisions to allow different thresholds for different purposes under the Act to ensure all those who should benefit from the new jurisdictions are able to do so.”

When Does 'Unfair Termination' Occur?



- If a termination is 'unfair' and not consistent with the Road Transport Industry Termination Code, then it is an 'unfair termination'
- The Road Transport Industry Termination Code is a legislative instrument that the Minister must make dealing with matters that may constitute a valid reason for termination (among other things)
- The Code must deal with valid reasons, rights of response, internal processes and communication in relation to termination

Consequences of Unfair Termination of a 'Regulated Road Transport Contractor' (Part 1)

- FWC can order that the contract is reinstated or that compensation be paid
- Such reinstatement must be on the same terms or terms that FWC considers appropriate
- If the road transport business no longer exists, an associated entity can be ordered to enter into the contract



Consequences of Unfair Termination of a 'Regulated Road Transport Contractor' (Part 2)



- The order may include lost pay
- Compensation is capped at half of the contractor high income threshold and based on the higher of the total amount of remuneration received or to which they were entitled for any period during which they worked under the contract in the 26 weeks before termination
- Cannot apply for general damages, such as for shock, distress or humiliation

Remedies if a services contract is unfair



- Come along to tomorrow's session on unfair contracts



PART 3

What else do you need to consider?



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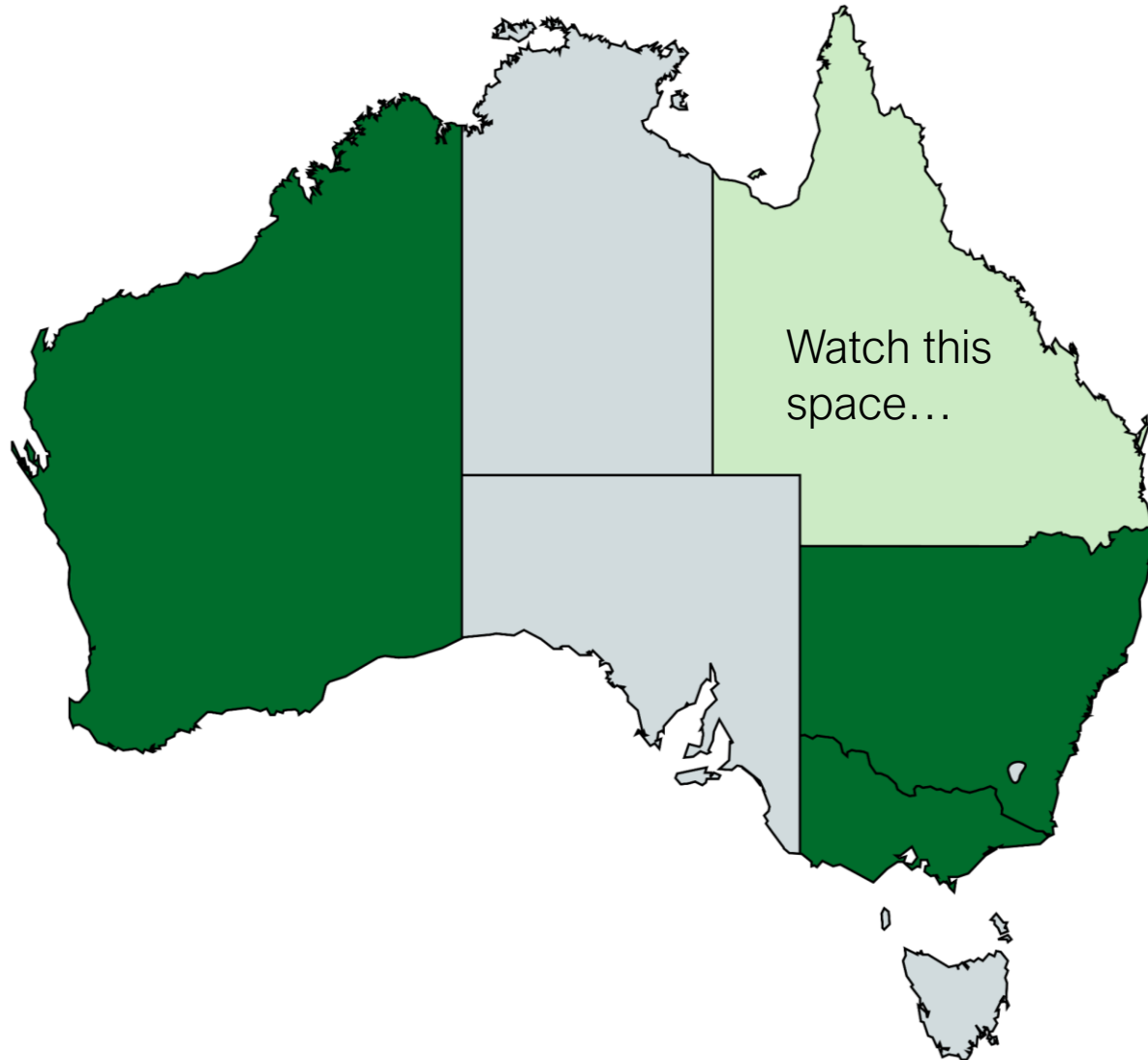
New Provisions and Existing Owner Driver Laws



- New laws will override some existing state and territory laws that cover similar matters
- However, this does not apply to existing state owner driver laws including:
 - Chapter 6 of the *Industrial Relations Act 1996* (NSW);
 - *Owner Driver and Forestry Contractors Act 2005* (Vic);
 - Chapter 10A of the *Industrial Relations Act 2016* (Qld); and
 - *Owner-Drivers (Contracts and Disputes) Act 2007* (WA)
- If both a state regime and an Order apply, the Order cannot diminish but can supplement rights and obligations under the State regime (ie you must comply with both)



Owner driver legislation



In Force

NSW
Victoria
Western Australia

New South Wales

- Chapter 6 of the *Industrial Relations Act 1996* (NSW)
- Series of determinations such as:
 - Transport Industry – General Carriers Contract Determination
 - Transport Industry – Courier and Taxi Truck Contract Determination
 - Transport Industry – Redundancy (State) Contract Determination
- Definition of ‘contract of carriage’ – includes a company and sole trader and partnerships
- Minimum rates and allowances
- Minimum termination periods
- Obligation to ensure drivers are medically fit, pass D & A tests, stay licensed, and maintain insurances

Victoria

- *Owner Driver and Forestry Contractors Act 2005* (Vic)
- Cannot contract out of obligations under the Act
- Guidance rates only but maximum payment terms of 30 days
- Cease to be an owner driver once you operate four vehicles
- Must have a written contract
- Contract must comply with certain requirements
- Must provide documents before engaging the owner driver
- Must give notice to terminate an engagement that is three months or longer (3 months notice for a heavy vehicle 4.5 tonnes GVM or 1 month for a smaller vehicle) except if serious misconduct, material breach of contract
- Failing to meet obligation is an offence and can be prosecuted by Wages Inspectorate Victoria

Western Australia



- *Owner-Drivers (Contracts and Disputes) Act 2007 (WA) and Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*
- The Act and the Code of Conduct apply to all owner-driver businesses (no limit on number of vehicles, like Victoria)
- When creating, varying or terminating an owner-driver contract, the parties have a duty to negotiate in good faith
- A hirer must provide certain information to an owner-driver prior to entering into a contract. A hirer must also keep certain records in relation to each owner-driver contract
- No minimum rates specified in the Act

Western Australia (cont'd)



- Conditions apply for a hirer to make deductions from money payable to an owner-driver
- Owner-driver contracts cannot contain clauses that:
 - Make payment contingent on the hirer being paid by another person
 - Impose a payment term of more than 30 days
 - Impose a penalty
- Minimum notice period for termination is 90 days (but if the contract was less than 90 days – 7 days)
- The Act also implies certain terms into owner-driver contracts unless it is agreed otherwise (eg payment terms, interest, minimum notice for termination)

Queensland



- Chapter 10A of the *Industrial Relations Act 2016* (Qld)
 - Note – this is not in force yet but is due to automatically commence on 4 November 2024
- Queensland Industrial Relations Commission (QIRC) can make, vary or revoke a **contract determination** fixing minimum remuneration and working conditions for independent couriers” – principal contractors must comply with these.
 - These only apply to a class of principal contractors and independent couriers (ie do not apply to everyone)
- The Act provides a mechanism for created **negotiated agreements** between a principal contractor and a group of independent couriers that work for the principal. These also specify minimum remuneration and working conditions
- QIRC has the power to make orders about **unfair contracts**
- QIRC has the power to make orders remedying **unfair termination**

Questions?



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Thank you

NATROAD