



Owner Drivers and Forestry Contractors Act 2005 (Vic)

Frequently Asked Questions

What is the purpose of the Act?

The *Owner Drivers and Forestry Contractors Act 2005 (Vic)* aims to improve the position of small businesses in the transport and forestry industries by providing them with the information and support essential to run a successful business. The Act also provides a framework for resolving disputes in a timely and cost effective manner. The main parts of the Act commenced on 1 December 2006 (see table of dates on final page).

Who does the Act apply to?

The Act applies to owner driver businesses (including sole traders, companies or partnerships) that operate up to a maximum of three vehicles¹ in providing services in transporting goods. The Act only applies where the owner of the business also drives one of the vehicles. The Act covers owner drivers involved in interstate operations where a substantial part of the services are performed within Victoria.

The Act also applies to harvesting and haulage contractors as defined in sections 5 and 6 of the *Owner Drivers and Forestry Contractors Act 2005* in the forestry industry.

Together, owner drivers and forestry contractors are referred to in the Act as “contractors”.

The requirements to provide contractors with an Information Booklet and the applicable rates and costs schedule only apply to contractors whose engagements are ongoing, or where services are performed for more than 30 days in any three month period (see sections 11, 16 and 18). The requirement to give a minimum period of notice only applies where the engagement proceeds beyond 3 months (see section 21(4)).

What role has industry played in these new requirements?

The Act established the Transport Industry Council and the Forestry Industry Council, made up of members from key industry associations. The Councils have developed:

- > the Owner Drivers and Forestry Contractors Code of Practice;
- > Information Booklets;
- > rates and costs schedules;
- > model contracts; and
- > model forms for the appointment of negotiating agents.

What is the Code of Practice?

The *Owner Drivers and Forestry Contractors Code of Practice* came into effect on 1 December 2006.² The Code was made on advice of the Industry Councils after extensive public consultation including a regulatory impact assessment.

The Code contains some mandatory requirements and also sets out guidance on industry best practice. In addition, the Code can be taken into account by the Victorian Civil and Administrative Tribunal (VCAT) in determining whether unconscionable conduct within the meaning of Part 4 of the Act has occurred, or whether contract terms are unjust within the meaning of Part 5 of the Act (see further discussion below).

How will the Act assist contractors and hirers to resolve disputes?

Under Part 5 (Dispute Resolution) of the Act, the Victorian Small Business Commissioner (the SBC) provides a fast, low cost, accessible, informal and confidential alternative dispute resolution service for contractors and their hirers. The mediation process can be used for disputes arising under or in relation to the Act, the Code or under or in relation to a contract between a contractor and hirer. Either party can initiate this process. More information on this service is available from <www.sbc.vic.gov.au> or by telephoning 13 22 15.

Disputes that are not resolved by the SBC may be referred to VCAT for determination. Each party pays its own legal costs, but VCAT may order payment of costs if a party refuses to take part in mediation, or conducts the proceeding in a vexatious way.

¹ See *Owner Drivers and Forestry Contractors Regulations 2006*, which affect the definition of owner driver for the purpose of section 7 of the Act. The regulations and code of practice are available from <www.ir.vic.gov.au> or telephone 13 22 15.

² The Code was prescribed by the *Owner Driver and Forestry Contractors Regulations 2006* (SR 153 of 2006, 24 October 2006).

VCAT can make a range of orders to resolve the dispute, such as injunctions, orders for payment of unpaid money or damages and orders varying unjust contract terms. VCAT may order a person to refrain from entering further contracts of a certain kind. VCAT can also extend an order to a section of an industry, in unusual circumstances and after hearing from interested persons.

How does the Act ensure contractors are well informed?

The Act sets out a number of requirements that will assist contractors to improve their business skills and to better understand their cost structures and their contracts.

The Information Booklet

The Information Booklets are designed to provide a comprehensive and convenient source of information to owner drivers and forestry contractors to assist them to run their businesses safely and profitably. The Information Booklet provides information on:

- > rights and responsibilities under the Act and Code;
- > information on establishing and running a small business;
- > sources of advice and assistance; and
- > regulation of the industry and health and safety.

Rates and Costs Schedules

The Rates and Costs Schedules ("Schedules") give contractors information on:

> The typical running costs of the business

This information is based on the kind of vehicle or equipment provided under the contract. An example is provided based on a typical business using that type of vehicle, with an explanation of how the costs might vary for an individual business. The model can be used by the contractor to calculate their own individual operating costs.

> The rates typically paid to employees performing similar work

This will assist the contractor to decide a reasonable rate for their own labour.

The Schedules do not set minimum rates that must be paid.

Instead they provide contractors and hirers with information about the typical operating costs applying to their business. Having this information before entering a contract will assist contractors to assess whether they should accept the rates being offered and allow better informed negotiations.

It is a requirement of the Act that from 1 December 2006 the Information Booklet and the applicable Rates and Costs Schedule be given by hirers to all new contractors three days before they sign a contract. The requirement also applies to tender processes and to freight brokers.

Transitional provisions in Part 10 of the Act mean that hirers must provide all current contractors who are engaged as at 1 December 2006 with a copy of the Information Booklet and the applicable rates and costs schedule.

Contracts must be in writing, and must specify minimum hours or income

The Act requires that all on-going engagements must be in writing, and the contract must specify the minimum level of income or number of hours of work. The minimum could be zero but on the basis that the parties understand the offer being made, they can seek to negotiate the level of security and certainty they require.

The Transport Industry Council has prepared a model contract for general use by the industry. It is not compulsory to use the model contract, but is a useful resource available to assist both hirers and contractors to develop written contracts.

If the hirer breaches the Act by not giving either the Information Booklet or the Rates and Costs Schedules to the contractor as required by the Act, then the contractor can make a claim to be paid for their labour and profit at an appropriate and fair rate, as determined by VCAT.

Does the Act deal with unconscionable conduct?

Part 4 of the Act deals with "unconscionable conduct" by hirers towards contractors and by contractors towards hirers. The Act sets out the factors that VCAT may examine when deciding if conduct is unconscionable conduct.

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:

- > Unreasonably excessive;
- > Not in accordance with what is just and reasonable;
- > 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.

Any allegation of unconscionable conduct by a hirer or a contractor, will first be mediated by the Small Business Commissioner, and if not resolved, can be referred to VCAT. VCAT may have regard to the requirements of the Code of Practice in determining whether the conduct of a hirer or a contractor constitutes unconscionable conduct. The Code sets out examples of conduct likely to be unconscionable. However, what may amount to unconscionable conduct will depend on all the circumstances.

VCAT may consider '*whether or not the contract between the parties allows for the payment of any increases in fixed and variable running costs on a regular and systematic basis*'. This means that a contract that fixes rates for excessive periods of time without regard to significant increases in overheads (eg fuel) is likely to be unconscionable.

VCAT will also be able to look at the comparable income of employees performing similar work when deciding if conduct is unconscionable.

What are “unjust contract terms”?

Under section 44 of the Act, when resolving a dispute VCAT has powers to declare void any unjust contract term, or to insert or vary a contract term to avoid injustice. Section 44(2) sets out the factors VCAT may consider when deciding whether a contract term is unjust.

One factor is whether or not the term is inconsistent with any part of a code of practice made under the Act. The Code of Practice describes contract terms that are likely to be found to be unjust, and gives examples.

Will groups of contractors be able to jointly negotiate?

Yes. The Act provides for the appointment of negotiating agents by contractors and hiring companies, and places a requirement on the other party to recognise and deal with that agent. An agent can be a contractor or committee, a union or association, a lawyer, accountant or consultant. A form to appoint an agent can be downloaded from <www.irv.vic.gov.au>.

A person must not coerce another to appoint, or not appoint, a person to be a negotiating agent. There is no obligation on a hirer to offer the same terms to all contractors but the hirer must negotiate with a contractor’s agent if requested to do so.

The Act authorises joint negotiations by contractors with their common hirer for the purposes of the *Trade Practices Act 1974* (C’t). This authorisation covers formulating claims, appointing an agent, negotiating and entering an agreement. The authorisation is confined to the negotiations between a single hiring business and its contractors. It does not authorise industry-wide negotiations. The authorisation does not cover unlawful action such as pickets or secondary boycotts. This authorisation means the parties can jointly negotiate in a convenient and simple way.

What protections are there for people using these new rights?

It is a breach of section 61 of the Act for any person to “subject another person to detriment” because that person:

- > Exercises (or proposes to exercise) any power or right under the Act or Code or brings a proceeding;
- > Informs (or proposes to inform) a person of a contravention of the Act or Code;
- > Participates (or proposes to participate) in joint negotiations.

“Subjecting to detriment” means terminating the contract, reducing terms and conditions, altering the person’s position to their detriment, refusing to engage the person or discriminating in the terms and conditions offered (section 61(3)).

It is also a breach of the Act for a hirer to subject an owner driver or forestry contractor to detriment because that person:

- > Raises (or proposes to raise) issues of health and safety with any person; or

- > Seeks (or proposes to seek) improvements to their rates and conditions. This does not create any obligation to accept the request made for improvements, just not to punish a driver or forestry contractor for having made a request.

Allegations of breach of these provisions can be dealt with by the Small Business Commissioner in the first instance, or if not resolved, by VCAT.

What is the minimum period of notice of termination?

The Act requires the party who wants to terminate the contract to give a minimum period of notice of termination to the other party (except in the case of serious and wilful misconduct by the owner driver). The notice period can be worked out or paid in lieu at the rate of: profit plus fixed costs (if the vehicle is under finance), or profit only (if the vehicle is not under any finance arrangement).

The requirement to give a minimum period of notice only applies where the engagement proceeds beyond 3 months (see section 21(4)). The minimum notice periods are:

- > three months (for heavy vehicles); and
- > one month for other vehicles.

This notice period doesn’t suit my business. Can it be waived or varied?

Yes. Where an owner driver or forestry contractor considers that this notice period is not needed, he or she may contact the Small Business Commissioner. The SBC may then issue a certificate waiving this requirement.

Does the Act prevent hirers deducting costs without permission?

Yes. Deduction of amounts for costs such as radio hire, insurance or administration fees are prohibited unless the costs:

- > are specified in the contract; and
- > are a direct and proper reflection of the cost of the actual service provided; and
- > the owner driver or forestry contractor has been provided with an opportunity to obtain the same or equivalent services or product from an alternative supplier.

This means, for example, that a company cannot force a contractor to purchase insurance, tyres or radios from the company itself or from a particular supplier. The company can organise group discounts for contractors and make deductions for these amounts, but only where the above conditions are met.

Further, the Act specifically provides that a hirer must not make deductions or require payment for insurance costs unless an insurance policy is in place, the amount deducted is not more than the cost of the policy and a copy of the policy has been given to the contractor.

When does the Act commence?

The main parts of the Act commence operation on **1 December 2006**.

Date	What will happen?
1 February 2006	<ul style="list-style-type: none">> Parts 1, Part 2 (Division 5- collective negotiations) 3 7 and 8 of the Act proclaimed, and Industry Councils are established and commence work.> Contractors and hirers are now able to appoint agents and conduct joint negotiations with <i>Trade Practices Act</i> authorisation.
February 2006 to 1 December 2006	<ul style="list-style-type: none">> Councils consult with industry, and work on the code of practice, rates and costs schedules, model contracts and Information Booklets.
24 October 2006	<ul style="list-style-type: none">> <i>Owner Drivers and Forestry Contractors Regulations 2006</i> (SR 153 of 2006) (including code of practice) made after extensive public consultation.
1 December 2006	<ul style="list-style-type: none">> The remainder of the Act commences operation.> Information booklets, model agreements and rates and costs schedules are published on <www.irv.vic.gov.au>.> Copies are available from industry associations or by calling the Victorian Business Line on 13 22 15.> Hirers must provide new owner drivers and forestry contractors with Information Booklet and rates and costs schedules.> Hirers must also provide current owner drivers and forestry contractors with Information Booklet and rates and costs schedule within 45 days of the commencement of the Act.> Dispute resolution jurisdiction and unconscionable conduct provisions are now fully operative.
1 May 2007	<ul style="list-style-type: none">> Under Part 10 of the Act, parties have 6 months from 1 December 2006 to bring their contracts into line with the new obligations (giving notice, contracts in writing, specify minima, specify rates, and must not deduct costs except in prescribed circumstances).> After this date, the Act will override any contrary provisions in a contract.

Where can I find more information?

More information can be found at <www.irv.vic.gov.au> by following the link to "owner drivers and forestry contractors". The website has all the relevant information, including:

- > the rates and costs schedules, the Information Booklets, and how to obtain copies;
- > model contracts;
- > appointment of negotiating agent forms;
- > regular updates about the activities of the industry councils;
- > background information including the *Report of Inquiry Into Owner Drivers and Forestry Contractors*, news and parliamentary documents.

For information about the dispute resolution role of the Small Business Commissioner call **13 22 15** or go to <www.sbc.vic.gov.au>.

For further information about the Act, or to obtain copies of the rates and costs schedules, the Information Booklet or the Code of Practice, contact the Victorian Business Line on **13 22 15** or contact your industry association:

Transport Workers Union	1300 727 614
Victorian Transport Association	(03) 9646 8590
Victorian Employers' Chamber of Commerce and Industry	(03) 8662 5333
Australian Industry Group	1300 78 38 44
Livestock Transport Association of Victoria	0400 933 713
Construction Material Processors Association	1300 267 222
Victorian Harvesting and Haulage Council	0427 260 904
Australian Plantation Products and Paper Industry Council	02 6273 8111
VicForests	9608 9500
Victorian Association of Forest Industries	9611 9000
Construction Forestry Mining and Energy Union (Forestry Division)	9274 9215

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