

Western Australia

Owner-Drivers (Contracts and Disputes) Act 2007

**Owner-Drivers (Contracts and Disputes)  
(Code of Conduct) Regulations 2010**

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## **Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010**

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## **Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010**

### **1. Citation**

These regulations are the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*.

### **2. Commencement**

These regulations come into operation as follows —

- (a) regulations 1 and 2 — on the day on which these regulations are published in the *Gazette*;
- (b) the rest of the regulations — on the day after that day.

### **3. Code of Conduct prescribed**

The *Owner-Driver Contracts Code of Conduct 2010* set out in Schedule 1 is prescribed as a code of conduct for the purposes of section 26 of the Act.

## **Schedule 1 — Owner Driver Contracts Code of Conduct 2010**

[r. 3]

### **Division 1 — Introductory provisions**

**1. Citation**

This is the *Owner-Driver Contracts Code of Conduct 2010*.

**2. Purpose of this Code**

The purpose of this Code is to give effect to sections 26 and 27 of the Act.

Note: Under the *Interpretation Act 1984* section 44 —

- (a) a reference in this Code to **the Act** is a reference to the *Owner-Drivers (Contracts and Disputes) Act 2007*; and
- (b) terms used in this Code have the same meanings as they have in that Act.

### **Division 2 — Contract negotiations**

**3. Term used: negotiating agent**

In this Division —

***negotiating agent*** includes a group of persons appointed under Part 5 of the Act as a negotiating agent.

**4. Persons who may conduct negotiations for a single contract**

- (1) Negotiations for an owner-driver contract may be conducted —
  - (a) between —
    - (i) a hirer; and
    - (ii) an owner-driver;
  - or
  - (b) between —
    - (i) a negotiating agent for a hirer; and
    - (ii) a negotiating agent for an owner-driver;

or

- (c) between —
- (i) a hirer; and
  - (ii) a negotiating agent for an owner-driver;

or

- (d) between —
- (i) a negotiating agent for a hirer; and
  - (ii) an owner-driver.

- (2) Where a partnership is an owner-driver, a reference in subsection (1)(a) or (d) to an **owner-driver** is to be read as including one or more members of the partnership.

**5. Persons who may conduct joint negotiations for several contracts**

- (1) Joint negotiations for owner-driver contracts may be conducted between —
- (a) a hirer or a negotiating agent for a hirer; and
  - (b) a group of owner-drivers or their negotiating agent.
- (2) Negotiations for 2 or more owner-driver contracts may be conducted —
- (a) by dealing with some of the terms and conditions of those contracts by way of joint negotiations; and
  - (b) by dealing with the remaining terms and conditions of each such contract by way of negotiations under section 4.

**6. Parties to negotiate in good faith**

- (1) In the negotiation of an owner-driver contract, or the variation or termination of a contract, the parties have a duty to negotiate fairly and in good faith but that does not prevent hirers and owner-drivers from acting in their own commercial interests.
- (2) In subsection (1) —
- party** means —
- (a) the hirer; or
  - (b) an owner-driver or a group of owner-drivers,

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that is involved in the negotiations, and includes any negotiating agent that is so involved.

- (3) This section in its application to a group of persons that is acting as a negotiating agent applies to each member of the group individually.

**7. Information to be given to owner-driver**

- (1) This section applies where it is proposed that an owner-driver contract be entered into.
- (2) The person who will be the hirer under the proposed contract (the **prospective hirer**) must, before the contract is entered into, give the following documents to the owner-driver concerned —
- (a) a document setting out all current guideline rates, whether or not applicable to the circumstances of the proposed contract;
  - (b) a copy of the form in Appendix 1.
- (3) Subsection (2) does not apply to a document if the owner-driver informs the prospective hirer that the owner-driver already has the document.
- (4) To the extent that it is not reasonably practicable for the prospective hirer to comply with subsection (2) in respect of any document it is sufficient if, before the contract is entered into, the prospective hirer informs the owner-driver where a paper or electronic copy of the document is available.
- (5) The form in Appendix 1 may be printed as a booklet, and the reference in subsection (2) to the form includes a reference to such a booklet.

**Division 3 — Guideline rates of payment**

**8. Council may determine guideline rates**

- (1) The Council, by notice published in the *Gazette* —
- (a) may determine guideline rates, that is rates for the purpose of providing guidance as to rates and costs to —
    - (i) owner-drivers and hirers when they are negotiating owner-driver contracts; and



- (ii) the Tribunal when it is determining whether payments have been made at a safe and sustainable rate;
  - and
  - (b) may amend or revoke any guideline rate so determined.
- (2) The *Interpretation Act 1984* section 43(7) to (9) apply to a notice under subsection (1) as if the notice were subsidiary legislation.
- (3) This section has effect subject to section 27(2), (3) and (4) of the Act.

#### **Division 4 — Penalty clauses in contracts**

##### **9. Penalty cannot be imposed on owner-driver**

- (1) In this section —  
**default** means a thing that is done or happens or is not done or does not happen in the carrying out of the responsibilities of an owner-driver under an owner-driver contract.
- (2) The purpose of this section is to protect an owner-driver from being unfairly made to pay any amount to a hirer for —
- (a) a breach of contract on the part of the owner-driver; or
  - (b) a default, if under an owner-driver contract it is the responsibility of the owner-driver to see that the default does not occur.
- (3) This section applies where an owner-driver contract provides that if a breach of contract or a default occurs the owner-driver is liable to pay an amount to the hirer for the resulting loss or damage incurred by the hirer.
- (4) The amount referred to is a penalty to the extent that payment of the amount would penalise the owner-driver because it would exceed the amount necessary to compensate the hirer for the actual loss or damage incurred.
- (5) An owner-driver is not liable to pay any amount to the extent that it is a penalty and a hirer must not require an owner-driver to make any such payment.

- (6) References in this section to the *payment of an amount* include money or property of an owner-driver being forfeited to or retained by a hirer.
- (7) This section does not limit or affect any rule of the common law or in equity relating to the enforceability of penalty clauses in contracts.

**Division 5 — Deductions from money payable to owner-driver**

**10. Deductions must be authorised by the contract or this section**

- (1) A hirer must not deduct any amount from money payable by the hirer to an owner-driver under an owner-driver contract unless the deduction is authorised either by —
  - (a) the contract; or
  - (b) this section.
- (2) The deduction of an amount is authorised by this section if —
  - (a) the amount represents —
    - (i) a payment under an owner-driver contract that the owner-driver is liable to make, in accordance with section 9, for loss or damage incurred by the hirer as a result of a breach of contract or default (as defined in that section) on the part of the owner-driver; or
    - (ii) the reasonable value of any service, benefit or thing that the hirer has provided or arranged to be provided to the owner-driver;and
  - (b) the hirer has given written notice to the owner-driver, not less than 14 days before the deduction is made —
    - (i) describing the liability or the service, benefit or thing; and
    - (ii) stating the amount to be deducted, when or from what money payable the deduction will be made, and the basis on which the deduction has been calculated.

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**Division 6 — Rate of interest on overdue amounts**

**11. Rate of interest to be paid**

- (1) This section applies if —
  - (a) an owner-driver contract provides for interest to be paid on any payment that is not made within the time required by the contract; and
  - (b) the rate of interest at a particular time is provided for in the contract; but
  - (c) the rate so provided for is less than that prescribed for that time under the *Civil Judgments Enforcement Act 2004* section 8(1)(a).
- (2) Despite the provision referred to in subsection (1)(c), the rate of interest to be paid at the time referred to is the rate prescribed for that time under the *Civil Judgments Enforcement Act 2004* section 8(1)(a).

**Division 7 — Records to be kept by hirer**

**12. Information to be recorded by hirer**

- (1) A hirer must, in accordance with section 13, cause the following information to be recorded in respect of each owner-driver contract to which the hirer is a party —
  - (a) the name of the owner-driver;
  - (b) in relation to any services provided under the contract —
    - (i) a description of the services; and
    - (ii) to the best of the hirer's knowledge — the name of the person who operated the vehicle with which the services were provided; and
    - (iii) the date or dates on which the services were provided; and
    - (iv) the amount of the payment due for the services and how the amount was calculated; and
    - (v) if any deduction is made from the amount due, when the deduction was made, the reason for it and the basis on which it has been calculated; and

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(vi) the amount actually paid in respect of the services.

- (2) The information mentioned in subsection (1) must be —
- (a) recorded as soon as is reasonably practicable; and
  - (b) kept for not less than 6 years,

after the services were provided, and paragraph (b) applies whether or not the owner-driver contract continues in force.

**13. How information to be recorded**

- (1) The information mentioned in section 12 is to be recorded —
- (a) by entering the information in the English language on a separate page of a bound or loose-leaf book kept specifically for that purpose; or
  - (b) by recording or storing the information by means of a computer or other device so that the particulars —
    - (i) will remain in the form in which they were originally recorded or stored; and
    - (ii) will be capable of being reproduced in written form in the English language.
- (2) A hirer must ensure that the information mentioned in section 12 is recorded or stored in such a way that when records relating to an owner-driver are produced to a relevant person under section 34(2) of the Act —
- (a) the person does not have access to information relating to any other owner-driver; and
  - (b) there is no risk of the person having such access.

**Division 8 — Provision for particular payment to owner-driver**

**14. Particular payment that must be made to owner-driver**

- (1) If a hirer receives any additional payment or higher rate in respect of services provided to a customer to cover —
- (a) fluctuations in the cost of fuel; or
  - (b) any other contingency,

the hirer must pay to the owner-driver who actually provided those services a fair and reasonable amount to cover those fluctuations or that other contingency.

- (2) The contingencies referred to in subsection (1)(b) include where the owner-driver spent excess time —
- (a) loading or unloading goods or waiting to load or unload goods; or
  - (b) waiting for goods to be made available for collection.

## **Appendix 1 — Information to be given to owner-driver**

[s. 7(b)]

### ***Owner-Drivers (Contracts and Disputes) Act 2007***

#### ***Western Australian Owner-Drivers***

#### ***Information Pamphlet***

It is a requirement of the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010* (“the Code of Conduct”) for a hirer to provide an owner-driver with a copy of this form and any current guideline rates before entering into an owner-driver contract with the owner-driver.

Where an owner-driver advises the hirer that they already have current copies of the documents, the hirer is not required to provide additional copies.

In some circumstances, it might not be reasonably practical for the hirer to provide the documents before entering into a contract with the owner-driver. In those cases, the hirer should advise the owner-driver where the documents can be obtained.

#### ***The Act and Code of Conduct***

The *Owner-Drivers (Contracts and Disputes) Act 2007* (“the Act”), but for sections 35 and 36, came into effect on or before 1st August 2008. The Code of Conduct has been made under the Act. The Code of Conduct complements the provisions in the Act.

The Act and Code of Conduct regulate owner-driver contracts and dealings between owner-drivers and hirers. The Act and Code of Conduct apply to an owner-driver who is engaged:

- under an owner-driver contract that is entered into in Western Australia or is subject to the law of Western Australia; or
- to transport goods wholly within Western Australia; or
- to transport goods to or from a place in Western Australia, if a substantial part of the services to be performed under the owner-driver contract are to be performed in Western Australia.

Some owner-driver contracts that deal with East-West freight might be affected by similar legislation in NSW or Victoria. For those contracts, the WA legislation might not apply.

### ***Road Freight Transport Industry Tribunal***

The Western Australian Industrial Relations Commission (“the WA IRC”) has jurisdiction under the Act to hear and determine certain kinds of disputes between owner-drivers and hirers that relate to owner-driver contracts. When hearing those disputes, the WA IRC sits as the Road Freight Transport Industry Tribunal (“the Tribunal”). The Tribunal can also enquire into and deal with any other matter relating to the negotiation of owner-driver contracts that may be referred to it under the Act. It can deal with disputes under the Act, Code of Conduct or an owner-driver contract, including payment disputes.

The Tribunal gives owner-drivers and hirers access to a low-cost dispute resolution process. For further details relating to the Tribunal’s jurisdiction, owner-drivers should refer to the Act.

Note: It is good business practice to put agreed contract terms and conditions in writing; doing so can prevent disputes and can help the Tribunal when dealing with disputes.

To contact the Tribunal:	111 St Georges Terrace, Perth 6000
Tel:	(08) 9420 4444
Freecall:	1800 624 263
Website:	<a href="http://www.wairc.wa.gov.au">www.wairc.wa.gov.au</a>

### ***Owner-Driver Contracts***

An owner-driver contract is a contract entered into in the course of business by an owner-driver and another person (“the hirer”) for the transport of goods in a heavy vehicle (that is, of more than 4.5 tonnes gross vehicle mass) by the owner-driver.

An owner-driver contract can be written, oral or a combination of both. An owner-driver contract can include other services for the owner-driver to perform, so long as the services predominantly relate to the transport of goods.

For the purpose of the Act and Code of Conduct an *owner-driver* is —

(a) a natural person —

(i) who carries on the business of transporting goods in one or more heavy vehicles supplied by that person; and

(ii) whose principal occupation is the operation of those vehicles (whether solely or with the use of other operators);

or

(b) a body corporate (other than a listed public company) that carries on the business of transporting goods in one or more heavy vehicles that are —

(i) supplied by the body corporate or an officer of the body corporate; and

(ii) operated by an officer of the body corporate (whether solely or with the use of other operators) whose principal occupation is the operation of those vehicles;

or

(c) a partnership of persons, at least one of whom is a person referred to in paragraph (a).

Where :

*listed public company* has the same meaning as it has in the *Income Tax Assessment Act 1997* of the Commonwealth; and

*officer*, of a body corporate, has the same meaning as it has in the *Corporations Act 2001* of the Commonwealth.



### ***Rights and Obligations***

The Act and Code of Conduct introduce a number of new legal requirements that affect the rights and obligations of owner-drivers and hirers in relation to owner-driver contracts and the negotiation of those contracts. It is recommended that those affected seek independent legal and financial advice about the requirements.

A party to an owner-driver contract cannot give away or bargain away any of the rights or obligations that the Act or Code of Conduct gives or imposes on them.

An owner-driver contract or any other kind of agreement cannot:

- Provide that all or any of the Act or Code of Conduct does not apply, or applies in a different way.
- Contain anything else that is contrary to or inconsistent with the Act, Code of Conduct or an order made by the Tribunal.

Any terms or conditions that attempt to do either of these things will have no effect.

### ***Breaches of the Act, Code of Conduct or a Contract***

Industrial Inspectors from the Labour Relations Division of the Department of Commerce can investigate alleged breaches of the Act, of the Code of Conduct, or of an owner-driver contract.

To contact the Department: 111 St Georges Terrace, Perth 6000

Tel: 1300 655 266 (Wageline)

Website:

[www.commerce.wa.gov.au/LabourRelations](http://www.commerce.wa.gov.au/LabourRelations)

### ***Requirements of the Act and Code of Conduct***

Among the new requirements in the Act and Code of Conduct relating to owner-driver contracts are the following:

### **Making Payment Claims**

If an owner-driver contract does not have a written provision about how to make a claim for payment, then the Act implies into the contract a requirement that a payment claim must:

- state the name of the claimant and date of the claim;
- in the case of a claim by an owner-driver — itemise and describe the services provided by the owner-driver in enough detail to allow the hirer to assess the claim;
- in the case of a claim made by a hirer - describe the basis for the claim in enough detail to allow the owner-driver to assess the claim; and
- be given to the other party.

### **14-day / 30-day Payment Time Limits**

Where an owner-driver contract contains a provision that purports to require a payment to be made more than 30 days after a payment claim is made, the Act provides that the contract is to be read as being amended to require payment within 30 days after the claim is made.

Where an owner-driver contract does not have a written provision about the time by when a payment must be made, the Act implies the following terms into the contract:

Within 14 days after receiving a payment claim, the party receiving the claim must —

- pay the whole amount of the claim; or
- where part of the claim is in dispute, pay the part of the claim not in dispute.

### **'If paid/when paid' Banned**

The Act bans use of 'If paid / when paid' conditions in owner-driver contracts. If an owner-driver contract includes such a condition, that condition will have no effect.

### **Penalty Cannot be Imposed**

The Code of Conduct provides that an owner-driver is not liable to pay a hirer any amount that is a *penalty*. A penalty is the payment of an amount to the extent that it exceeds the amount necessary to compensate a hirer for actual loss or damage suffered by the hirer due to the default of an owner-driver or breach by an owner-driver of an owner-driver contract. A penalty might include any money or property of an owner-driver being forfeited to or retained by a hirer as a penalty.

### **Interest Payable on Overdue Amounts**

Where an owner-driver contract does not have a written provision about interest to be paid on overdue amounts, the Act implies the following terms into the contract:

- interest is payable from the day after the amount was due through to and including the day that the amount is paid; and
- the rate of interest payable is the rate prescribed at that time under section 8(1)(a) of the *Civil Judgments Enforcement Act 2004*.

If payment of part of an amount claimed is in dispute, the amount not in dispute should be paid, and the parties should try to resolve any issues about the remaining balance.

### **Deductions from Remuneration**

The Code of Conduct provides that a hirer must not deduct any amount from money payable under an owner-driver contract to an owner-driver, except in the specific circumstances set out in the Code or where authorised by the contract.

### **Joint Negotiations**

The Act provides a right for a group of owner-drivers to jointly negotiate an owner-driver contract with a hirer.

### **Negotiating Agents**

The Act allows an owner-driver to appoint a negotiating agent to deal with their owner-driver contracts.

Also, a hirer may appoint a negotiating agent for dealing with owner-driver contracts.

In each case the appointment of an agent has to be in writing.

Owner-drivers may group together to make an appointment and the agent for an owner-driver or a hirer may be a group of persons.

Owner-drivers, hirers and persons acting as negotiating agents should obtain a copy of the Act and Code of Conduct to familiarise themselves with provisions about negotiating agents.

### **Negotiations to be in Good Faith**

During negotiations for owner-driver contracts, the parties have a duty to negotiate fairly and in good faith. Parties have the right to act in their own commercial interests, but should also act fairly, honestly and reasonably towards one another. The requirement to negotiate fairly and in good faith also applies to a negotiating agent acting for an owner-driver, for a group of owner-drivers, or for a hirer.

### **Unconscionable Conduct Banned**

The Act prohibits hirers and owner-drivers from engaging in unconscionable conduct towards each other during the negotiation of owner-driver contracts. The Act sets out a number of matters to which the Tribunal may have regard in determining whether a party has engaged in unconscionable conduct towards the other party. The matters listed in the Act include:

- Any use of undue influence, pressure or unfair tactics.
- Whether all relevant information was provided.
- Whether the parties acted in good faith and were willing to negotiate (rather than having a 'take it or leave it' approach).

The matters listed in the Act are not exhaustive and the Tribunal will consider all the circumstances of a case when determining whether a hirer or owner-driver has engaged in unconscionable conduct. Where an owner-driver, group of owner-drivers or hirer is represented by a negotiating agent, the prohibition against unconscionable conduct will also apply to the negotiating agent.

If an owner-driver or hirer believes that someone has engaged in unconscionable conduct towards them and has not been able to resolve the situation, they can refer the matter to the Tribunal.

**Disclaimer:** This information has been prepared as a guide only. None of the information in this pamphlet is intended to constitute advice, whether legal, financial or professional. Before you act on the information in this pamphlet, you should first get specific independent advice about your particular circumstances. You should not act solely on the basis of the information in this pamphlet.

This pamphlet provides a brief overview of some of the changes affecting rights and obligations. A more detailed booklet and a range of other information for owner-drivers are available, free of charge, from the Department of Transport.

To contact the Department: 441 Murray Street, Perth WA 6000  
Tel: (08) 9216 8000  
Email: ownerdriver@transport.wa.gov.au  
Website: www.transport.wa.gov.au/freight

### **Notes**

<sup>1</sup> This is a compilation of the *Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010*. The following table contains information about those regulations.

### **Compilation table**

<b>Citation</b>	<b>Gazettal</b>	<b>Commencement</b>
<i>Owner-Drivers (Contracts and Disputes) (Code of Conduct) Regulations 2010</i>	30 Jun 2010 p. 3073-93	r. 1 and 2: 30 Jun 2010 (see r. 2(a)) Regulations other than r. 1 and 2: 1 Jul 2010 (see r. 2(b))