Industrial Relations and Other Legislation Amendment Bill 2022

Submission No:	9
Submitted by:	The Australian Industry Group
Publication:	
Attachments:	See attachment

Ai GROUP SUBMISSION

Queensland Government – Education, Employment and Training Committee

Inquiry into the Industrial Relations and Other Legislation Amendment Bill 2022

8 July 2022

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission in response to the Inquiry into the *Industrial Relations and Other Legislation Amendment Bill 2022* (**Bill**).

Ai Group's comments on various provisions of the Bill are outlined below. Ai Group does not support Chapter 10A (Independent Courier Drivers) of the Bill and urges the Parliament to amend the Bill before it is passed to remove these provisions.

Chapter 10A – Independent Courier Drivers

Proposed Chapter 10A follows Recommendations 28 and 29 from the recent Review of the IR Act (**IR Act Review**):

> ***28.*** *That amendments to the Industrial Relations Act 2016 be drafted, with a view to enactment following exemption referred to under recommendation 29, to include provisions to enable the regulation of terms and conditions of work for independent courier drivers by the Queensland Industrial Relations Commission (QIRC), modelled on Chapter 6 of the Industrial Relations Act 1996 (NSW), explicitly including independent courier drivers and riders within coverage of these provisions, and directing the QIRC to establish conditions that would, where appropriate, be comparable in value to those applying to equivalent award employees.*
>
> ***29.*** *That, before enacting the above legislation, the Minister write to the federal counterpart, seeking exemption from those aspects of the Independent Contractors Act 2006 (Cth) along similar lines to the exemption that already applies to Chapter 6 of the Industrial Relations Act 1996 (NSW). The legislation should be being drafted while the letter is in transit.*

Ai Group's opposition to Chapter 10A

Ai Group opposes Chapter 10A of the Bill.

The road transport industry is one of the most heavily regulated sectors of the Australian economy. The industry is of strategic importance to both the Queensland and national economies and is playing a vital role during the recovery from the COVID-19 pandemic. Numerous other sectors are heavily reliant upon the road transport industry and on the services provided by operators within the industry.

The establishment of a separate State-based jurisdiction mandating remuneration and other conditions for independent courier drivers would exacerbate the existing over-regulation of the road transport sector.

It would also distract Government and industry attention and resources away from the measures which are widely recognised as improving safety, such as risk identification and control, improved roads, fatigue management, education and training, drug and alcohol policies, use of technology, and strong compliance and enforcement mechanisms.

The federal road safety remuneration system was a failed attempt at regulating the conditions and entitlements of owner drivers. The Road Safety Remuneration Tribunal (**RSRT**) was established under the *Road Safety Remuneration Act 2012* (Cth).

The RSRT issued a single Road Safety Remuneration Order regulating rates of pay. That order was only in force for matter of days before the RSRT was abolished. The Commonwealth Parliament abolished the RSRT through the *Road Safety Remuneration Repeal Act 2016* (Cth) with the backing of a number of Crossbencher Senators in April 2016.

The abolition of the RSRT followed a review of the road safety remuneration system by PricewaterhouseCoopers Australia which found that:

- There is no clearly established link between rates of pay and road safety;
- The RSRT had a high degree of overlap with safety agencies, which are more focused on road safety matters; and
- Abolition of the road safety remuneration system would result in a significant net benefit to the economy and community at large.

Chapter 10A of the Bill is modelled on the system regulating the terms and conditions of engagement of contract carriers in New South Wales under Chapter 6 of the *Industrial Relations Act 1996* (NSW) (**NSW IR Act**). The NSW system represents a heavy-handed and inflexible approach to the regulation of owner drivers. The NSW system is deeply flawed and the replication of its provisions in Queensland would be a retrograde step. While it has been in place for many years there is widespread concern and discontent within industry over the operation of the NSW system and widespread non-compliance.

The Bill has the potential to not only damage road transport businesses and their customers but, perversely, to significantly undermine the competitive position and viability of owner drivers.

The legislation is invalid

As the situation currently stands, Chapter 10A of the Bill is Constitutionally invalid. This is, in effect, acknowledged in recommendation 29 of the IR Act Review.

We understand that the Queensland Government has written to the Federal Government seeking a variation to the *Independent Contractors Regulations 2006* (Cth) to exempt the proposed law from the operation of the *Independent Contractors Act 2006* (Cth) (**IC Act**). We also understand that the Federal Government has not yet agreed to issue the exemption.

It appears that the Queensland Government is seeking that a similar exemption is granted to those that exist for the NSW, Victorian and WA owner drivers' laws. However, there is no valid comparison.

Ai Group was heavily involved in the development of the IC Act when it was introduced by the Federal Government in 2006. The IC Act intentionally overrode State legislation which regulated remuneration and other terms of engagement for independent contractors. There are two exceptions specified in s.7(2)(b) of the IC Act, given that State legislation in this area was already in existence in NSW and Victoria in 2006:

- Chapter 6 of the NSW IR Act; and
- the *Owner Drivers and Forestry Contractors Act 2005* (Vic).

Section 7 of the IC Act enables the Federal Government to make a regulation exempting other State or Territory laws, or parts of laws.

To date, the only State or Territory owner-driver law that has been granted an exemption under s.7(2)(c) of the IC Act is the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA). The WA law bears no similarity to the law that the Queensland Government intends to introduce. The WA legislation is 'light-touch' and does not allow determinations to be made regulating remuneration for owner drivers and does not include many of the other detailed and onerous provisions in the Bill.

The importance of preserving flexibility for platform work

In addition to other road transport operations, the Bill appears to be aimed at regulating the remuneration and other terms of engagement for on-demand platform riders and drivers.

Many of the major on-demand platform businesses are members of Ai Group and we play an important role in representing this sector in workplace relations policy matters.

On-demand platform businesses are delivering huge benefits to the Australian community. On-demand platform work provides flexibility that is often not available with conventional forms of work. Individuals who wish to work flexibly around other commitments, such as studies, recreational activities, family commitments or other forms of paid employment often find the experience of working via on-demand platforms a useful and convenient way of earning or supplementing income.

On-demand platform work has been particularly important to the community and the economy during the pandemic. For example, many restaurants would not have survived without on-demand platform delivery services and many thousands of people have continued to earn income in circumstances where they have been stood down from their regular jobs. Also, many people prefer the flexibility that is possible through on-demand delivery services.

Many on-demand platform businesses have invested heavily in improving working arrangements and safety for their workers, irrespective of whether the workers are employees or contractors. For example, a set of Food Delivery Platform Safety Principles were developed by Deliveroo, DoorDash, Menulog and Uber Eats in consultation with Ai Group. The Safety Principles aim to minimise risk for all delivery workers, whether they are driving a car or riding a bicycle, e-Bike, scooter or motorbike.

The importance of avoiding overlapping and inconsistent Federal and State laws

Consideration of any regulatory changes for platform work needs to be led by the Commonwealth, in collaboration with the States and in consultation with stakeholders. It would not be in anyone's interests for legislative or other changes to be introduced at the State-level when all the major platform businesses operate nationally and when Australia has a national workplace relations system. Any such regulation by the Commonwealth should provide clarity and certainty to industry and to individual workers. Numerous regimes at the State and Territory level which overlap with or duplicate federal laws would only add confusion and increase compliance costs.

Chapter 10A, as proposed, fails to clarify the manner in which the legislation is to interact with planned changes to federal laws which may impact pay and conditions for 'independent courier drivers'. Although such changes could exclude State based regimes, such as that proposed to be introduced by Chapter 10A, it is preferable that the Queensland government proactively amend the Bill to ensure that it does not operate in areas covered by Commonwealth legislation.

The necessity of ensuring that the regulation of 'gig work' is not undertaken at the State level has been further bolstered by the recent election of the Australian Labor Party in the 2022 Federal Election. On 18 February 2022, the then Shadow Minister for Industrial Relations, the Hon Tony Burke MP, announced that an Albanese Labor Government would give the Fair Work Commission expanded powers to set minimum pay and conditions for all gig workers across Australia.[1] Mr Burke's announcement followed the release of the ALP's *Secure Australian Jobs Plan*, which also identifies the implementation of federal laws covering gig workers as a priority.

[1] Tony Burke MP, 'Gig worker win shows it's not 'complicated'', (Media Release) 18 February 2022, < GIG WORKER WIN SHOWS IT'S NOT "COMPLICATED" — Tony Burke MP>.

Given that the new Federal Government intends to introduce such reforms as a priority, the Queensland Parliament should not introduce a potentially incongruous State based regime regulating independent courier drivers.

The lack of a sound evidence base at this stage

In Senate Estimates on 16 February 2022, then Federal Attorney-General and Industrial Relations Minister, Senator Michaelia Cash, reported that the Federal Government has given the ABS an additional $2.8 million to expand and improve labour market surveys, including for workers engaged in the gig economy. [2]

This additional funding is consistent with the following interim recommendation of the Senate Job Security Inquiry, which Labor Senator Tony Sheldon chaired:

> *The committee recommends that the Australian Bureau of Statistics expands its Labour Force Survey to capture quarterly estimates in relation to the number of workers engaged in the on-demand platform sector. These estimates could include the industries and occupations in which they work, the hours they work, their visa status, the nature of their working arrangements relative to other workers, earnings and other demographic characteristics.*[3]

At the present time, the research that is available on the gig/platform sector in Australia is inadequate and any additional regulation needs to be based on a sound evidence base, including reliable statistics on the number of gig/platform workers and the characteristics of those workers.

The proportion of the workforce who are platform workers is very small. The Grattan Institute reported[4] in 2016 that fewer than 0.5% of the workforce earned income from digital platform work based on an assessment of figures published by a selection of digital platform information, bank transaction data, and other research reports. This figure remains a reliable estimate of the proportion of the workforce who are platform workers.

Between 2016 and 2021, the proportion of the workforce who were independent contractors fell from approximately 9% in August 2016[5] to 7.8% in August 2021[6]. The industries which have the highest percentage of independent contractors are Construction (25%) and Administrative and support services (18%).[7] Any increase in the proportion of the workforce who were platform workers over the period from 2016 to 2021 could be expected to show up as an increase in the

[2] Proof Hansard, page 48.

[3] Recommendation 1, *First interim report: on-demand platform work in Australia*, June 2021.

[4] Minifie J, Grattin Institute, *Peer-to-Peer pressure, Policy for the sharing economy*, April 2016.

[5] ABS, *Characteristics of Employment*, August 2016, published on 2 May 2017.

[6] ABS, *Characteristics of Employment*, August 2021, published on 14 December 2021.

[7] ABS, *Characteristics of Employment*, August 2021, published on 14 December 2021.

proportion of the workforce who were independent contractors, but this has not occurred as pointed out in the 2018 HILDA report. The report's authors said that the "evidence indicates that, if the gig economy is growing as rapidly as is commonly believed, then either it involves the substitution of one type of self-employed worker for another (as might be happening in the taxi industry) or it is largely consigned to second jobs".[8]

For all of the above reasons, the proposed legislation covering 'independent courier drivers' is not appropriate and the Queensland Parliament should not support it.

In the event that Chapter 10A of the Bill is proceeded with, despite Ai Group's strong opposition, some concerns about various specific provisions in Chapter 10A of the Bill are outlined below.

Concerns about specific provisions in Chapter 10A of the Bill

Coverage

Chapter 10A extends far beyond any reasonable conception of an 'independent courier driver'.

The terms of reference for the IR Act Review included:

> *Investigating precarious and short-term employment arrangements, including the setting of minimum entitlements and conditions for independent courier drivers.*

On the basis of this term of reference, Recommendation 28 of the Review referred to *"regulation of terms and conditions of work for independent courier drivers by the Queensland Industrial Relations Commission*".

An 'independent courier' is defined in proposed s.406B(1) of the legislation as follows:

> *An independent courier is a person who provides a service transporting goods using a courier vehicle if, in the course of providing the service, the courier vehicle is driven only by—*
>
> *(a) if the person is an individual—the individual; or*
>
> *(b) if the person is a partnership—a partner in the partnership; or*
>
> *(c) if the person is a corporation—*
>
> *(i) an executive officer of the corporation; or*
>
> *(ii) a member of the family of an executive officer of the corporation.*

[8] Wilkins, R. and Lass I (2018) *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 16*, Melbourne Institute: Applied Economic & Social Research, University of Melbourne.

'Courier vehicle' is defined in s.406A as follows:

> *courier vehicle means—*
>
> *(a) a motor vehicle within the meaning of the Transport Operations (Road Use Management) Act 1995; or*
>
> *(b) a bicycle, including a bicycle that has an auxiliary motor; or*
>
> *(c) a scooter within the meaning of the Transport Operations (Road Use Management) Act 1995.*

'Motor vehicle' in the *Transport Operations (Road Use Management) Act 1995* (Qld) is defined extremely broadly, as:

> ***motor vehicle** means a vehicle propelled by a motor that forms part of the vehicle, and—*
>
> *(a) includes a trailer attached to the vehicle; but*
>
> *(b) does not include a motorised scooter, a personal mobility device or a power-assisted bicycle.*

It can be seen that the Bill includes no limit on the size of the vehicle driven by the contract driver.

The coverage definitions go far beyond what could reasonably be considered to be a 'courier'.

The Macquarie Dictionary provides the following under the definition of a 'courier service':

> ***noun** a private company which provides a letter or parcel delivery service, especially one which guarantees speed or safety.*

The legislation should not extend to regulate the terms and conditions of all drivers operating pursuant to a contractor model in the transport industry. The entirety of such a broad category of drivers cannot legitimately be considered to be 'couriers'.

In the *Road Transport and Distribution Award 2020*, a courier is defined as:

> ***courier** means an employee who is engaged as a courier and who uses a passenger car or station wagon, light commercial van, motorcycle or bicycle or who delivers on foot, in the course of such employment.*

The following definition is included in the NSW *Transport Industry – Courier and Taxi Truck Contract Determination* (**Courier and Taxi Truck Contract Determination**):

> ***"Courier Work"*** *means the transportation by means of a courier or taxi truck vehicle of goods of up to a maximum of 250 kilograms of weight from one place to another by a contract carrier for reward at the behest of a principal contractor pursuant to a contract of carriage and where it is intended by the parties that the time to be taken is either:*
>
> *(a) within a standard time requested of the contract carrier by the principal contractor and advertised as such (to be known for the purposes of this determination "standard service"), or*
>
> *(b) within a time required of the contract carrier by the principal contractor which is the shortest possible time or within a time which is less than the standard time as in (a) above and advertised as such (to be known for the purposes of this determination as "Express/Priority/V.I.P. Service) and where it is intended that in any event completion is to be effected on the same day as commencement or by the earliest reasonable time on the following normal working day.*
>
> *[NOTE: For the purposes Schedule III, where there is a dispute concerning whether a contract of carriage is "standard service" or "Express/Priority/VIP Service", the dispute shall be determined in accordance with Clause 9. Disputes Procedure.]*

It is common within industry for 'courier work' to be conceived of as being limited to work undertaken by vehicles with a carrying capacity of two tonnes or less. Limiting the application of the legislation in this manner would reduce the risk of adverse and unintended consequences for principal contractors, independent courier drivers and customers.

Further, given that Chapter 10A draws upon the existing provisions in Chapter 6 of the NSW IR Act, it is important that attention is paid to existing exemptions in Chapter 6. Subsection 309(4) of the NSW IR Act excludes the following from the definition of a contract of carriage:

> *A contract:*
>
> - *that is, if the carrier is a common carrier, made in the ordinary course of the business of the carrier as a common carrier, or*
> - *that is made in the ordinary course of business for the carriage of packaged goods for different principal contractors by the use of the same motor vehicle or bicycle, or*
> - *for the carriage of mail by or on behalf of Australia Post, or*
> - *for the carriage of bread, milk or cream for sale or delivery for sale, or*

- *for the carriage of goods that are to be sold pursuant to orders solicited during the carriage of the goods, or*
- *for the carriage of livestock, or*
- *if the principal contractor is a primary producer or a member of the family of a primary producer and the contract is for the transportation of primary produce (other than timber), or*
- *for the transportation of primary produce (other than timber) from or to land used for primary production, or*
- *for the delivery of meals by couriers to homes or other premises for consumption.*

A further issue with the jurisdiction in Chapter 6 of the NSW IR Act concerns the circumstances under which a contract carrier engages other drivers in such a way as to take themselves out of the jurisdiction without notifying the principal contractor. Under proposed Chapter 10A, limitations are imposed on the definition of an 'independent courier' where other persons drive the courier vehicle. However, significant issues are likely to emerge where independent couriers engage other drivers without first notifying the principal contractor of the fact. Principal contractors should have a right to be notified where an independent courier engages another driver so that they maintain oversight of when the jurisdiction established under Chapter 10A applies. Proposed section 406B should be amended to ensure that a person will only fall under the definition of an 'independent courier' if the person first notifies the principal contractor of the engagement of additional drivers for approval.

Coverage of other contracts

Proposed section 406E states:

> ***406E Declaration that contract is courier service contract***
>
> *The commission may make an order declaring that a contract is a courier service contract if satisfied the contract—*
>
> *(a) has the effect of avoiding the provisions of this chapter; and*
>
> *(b) provides for, or affects, the remuneration and working conditions of an independent courier who transports goods under arrangements made by another person; and*
>
> *(c) is not a contract of employment between the independent courier and another person.*

Section 406E would enable applications to be made to the Commission for orders applying to contracts which are clearly not 'courier service contracts', and hence this section significantly expands the coverage of the legislation.

The wording *"Has the effect of avoiding the provisions of Chapter 10A"* cannot be characterised as an anti-avoidance provision because it does not address the intent of the parties to the contract. This can be compared with typical anti-avoidance provisions such as s.66L(1) of the *Fair Work Act 2009* (**FW Act**):

> *(1) An employer must not reduce or vary an employee's hours of work, or terminate an employee's employment, in order to avoid any right or obligation under this Division.*

More appropriate wording for paragraph (a) would be: *"Was entered into in order to avoid ~~Has the effect of avoiding~~ the provisions of Chapter 10A"*

Also, paragraph (b) is extremely broad and uncertain given the inclusion of the words *"or affects"*. These words should be deleted.

Section 406E refers to declarations that a contract 'is a courier services contract' rather than 'is to be a courier services contract'. To the extent that this provision is intended to enable the commission to make declarations that are other than prospective, this is inappropriate in that the parties cannot have organised their relationship on the assumption that the regulation pertaining to courier services contract was to apply.

Fixing remuneration in contract determinations

The Bill should not require contract determinations to reflect actual conditions prevailing amongst independent courier drivers.

Proposed s.406F sets a number of criteria and considerations relevant to the Commission's exercise of its powers under Chapter 10A including the making of a contact determination. These include, at proposed s.406F(1)(c), that the remuneration and working conditions *"generally reflect the prevailing minimum remuneration and working conditions of independent couriers covered, or to be covered, by the instrument".*

It is not at all clear what *"prevailing minimum remuneration"* means. *"Prevailing remuneration"* and *"minimum remuneration"* are very different and often conflicting concepts.

The notion of a contract determination reflecting actual rates of pay in an industry, as opposed to minima, is anathema to the concept of such instruments acting as a safety net.

A requirement that contract determinations reflect prevailing remuneration in an industry is highly problematic because:

- It assumes that all contract driving arrangements in the industry for a particular class of vehicle are the same, when clearly this is never the case.
- It assumes that rates in metropolitan and regional areas are the same, when typically they are not.
- It assumes that large principal contractors and small principal contractors pay the same rates, when often they do not have the same capacity to do so.

The proposed criteria would most likely lead to thousands of owner drivers losing their livelihoods and a re-creation of the disaster that was looming before the RSRT was abolished.

The existence of an industry level industrial instrument determining actual rates of pay is antithetical to the existence of a collective bargaining system which assumes parties will have room to negotiate for higher minimum rates of pay that are more suitable to an enterprise.

A contract determination which reflects actual rates of pay in an industry discourages bargaining for agreements covering an individual principal contractor.

In the Federal industrial relations system, paid rates awards were phased-out in the 1990s, under legislation introduced by both Labor and Coalition Governments, for good reasons. It is not appropriate for industry-wide industrial instruments to reflect 'paid rates', including contract determinations.

Interference with freedom of contract

Proposed chapter 10A in the Bill imposes onerous restrictions on drivers and principal contractors' capacity to independently enter into contracts. Existing contracts would effectively be amended by the legislation in a manner which is wholly inappropriate.

Proposed s.406M(2) provides that a contract instrument will prevail over a courier service contract to the extent of any inconsistency and proposed s.406M(3) states that the relevant contract must be interpreted, and takes effect, as if it were amended to the extent necessary to make the contract consistent with the contract instrument. However, proposed s.406M(4) provides that there is no inconsistency only because the contract provides for working conditions at least as favourable for the independent courier as the contract instrument. Proposed s.406ZV(1)(a) enables the Commission to amend or declare void an individual courier service contract that is inconsistent with a contract instrument.

Individual contracts are negotiated and agreed upon between independent contractors and principal contractors to accommodate the mutual interests of each party. Legislation which amends the terms of such contractual obligations, but only to the extent that it beneficial to one side, is unfair and undermines the basis of independent contractual relations.

Date on which contract determinations may apply

It is inappropriate for a contract determination to apply retrospectively. Proposed s.406S(2) provides that the stated day from which a contract determination commences operation cannot be earlier than the earliest of:

- The day the application for the determination was made;
- The day the Commission initiated the proceeding for the determination; or
- The day the Commission was given notice of the dispute giving rise to the determination.

This provision would allow a contract determination to apply to independent contractors from a date on which the contractors could not have been aware of its terms. The Bill should not enable a contract determination to potentially expose principal contractors to potential penalties for breaching an instrument or to require the payment of backpay from a date prior to the instrument being approved by the Commission.

Revocation of contract determinations

The proposed Chapter 10A sets too high a threshold for revocation of contract determinations to the point that such instruments would be locked in place long after their usefulness to the majority of the parties has concluded.

Proposed s.406T(1) states that to provide for fair and just remuneration and working conditions for independent couriers, the Commission may make an order revoking a contract determination. However, proposed s.406T(2) has the effect that such an order will not be possible unless the Commission is satisfied no independent couriers will be adversely affected by the revocation of the determination.

Ascertaining whether the jurisdictional prerequisite in proposed s.406T(2) is satisfied would be extremely complex and unworkable. Such a test leaves the way open to any submissions which suggest that a single independent contractor, working an atypical roster would be detrimentally affected by a proposed revocation. This provides no equity if a majority of independent contractors would benefit from such an order.

The criteria for revocation should be amended to enable a decision to be made on the basis that the Commission is satisfied that revocation is appropriate taking into account:

- The views and circumstances of principal contractors and independent courier drivers covered by the determination; and
- The views of relevant organisations and federal organisations.

Application of negotiated agreements to unwilling contractors

The proposed system in Chapter 10A should not regulate the minimum conditions of an independent contractor where both the independent contractor and principal contractor agrees that such instruments should not apply.

Parts 3 and 4 establish a regime of contract determinations and negotiated agreements which are negotiated between industrial bodies and approved by the Commission. In the case of negotiated instruments, the necessity for 65% of relevant independent couriers to vote to approve an instrument in order for certification to take place assumes that as many as 35% of the relevant cohort may be directed to perform work in a manner and charge rates they do not approve.

This inappropriate top-down approach to determining how an independent contractor runs their business is anti-competitive and incongruous with the important notion of freedom of contract.

Compelling principal contractors to bargain

The bargaining system proposed to be established under Part 4 of Chapter 10A should not automatically compel unwilling principal contractors to bargain.

Proposed s.406A provides the following definition for a 'negotiating party' in relation to negotiations under part 4 with a view to a negotiated agreement being made: (Emphasis added)

- a person who is a party to the negotiations; or
- a person who has given notice under section 406X of the person's intention to be a party to the negotiations; or
- another person who has received a notice of intention to start negotiations under section 406W and refuses to negotiate.

Negotiating parties are held to the requirements to bargain in good faith in proposed s.406Z. This includes:

- Attending and participating in bargaining meetings;

- Disclose relevant information, other than confidential or commercially sensitive information, in a timely way
- Genuinely consider proposals made by other parties and
    - respond in a timely way; and
    - give reasons for the party's response.

There is no provision in Chapter 10A which restricts a business to being compelled to bargain only under circumstances where there is majority support amongst relevant workers. It is not appropriate for a principal contractor to be compelled to bargain with an employee association for a negotiated instrument, unless they have consented to do so. Bargaining can be a protracted and costly process with potential results which can fundamentally alter the manner in which business is undertaken.

Chapter 10A in the Bill should be amended to ensure that unwilling principal contractors are not defined as a negotiating party unless they have consented to bargain.

Moreover, it is not unusual for a principal contractor to engage numerous contract carriers on an ad hoc basis. Couriers and workers engaged via digital platforms are often transient and do not remain with a specified principal contractor for an extended period of unbroken time. Often they work for multiple platforms at the same time. Bargaining in this context is extremely difficult and inefficient where there is a lack of continuity in the workforce.

Successor principal contractors

Chapter 10A should not apply a negotiated agreement to any entity other than the principal contractor who negotiated and agreed to be bound by the instrument.

Proposed s.406J states:

> *To the extent a contract determination applies to a stated principal contractor, the determination applies to —*
>
> *(a) the principal contractor and any successor of the principal contractor; and*
>
> *(b) each independent courier who enters a courier service contract with the principal contractor and any successor.*

Proposed s.406K provides for the application of a negotiated instrument to 'successor principal contractors'. Specifically, proposed s.406K(1) seeks to apply a negotiated instrument to *"a new principal contractor"* that becomes *"the successor (whether or not immediate) of the whole or a part of the business of the principal contractor"* to whom the agreement applies.

Ai Group opposes coverage of a negotiated instrument extending to a separate business to that which negotiated it or agreed to be covered by it. A business should not be incumbered by the work practices of another business which no longer trades.

Unfair termination of courier services contracts

Division 2 of Part 5 of Chapter 10A establishes a procedure for seeking redress in circumstances where a courier services contract is 'unfairly terminated'. This is inappropriate.

Independent courier drivers are small business owners. It is incongruous with the nature of independent contracting to legislate for a quasi 'unfair dismissal' system which may compel a company to persist in procuring another business' services. Such provisions are anti-competitive and artificially favour the provision of services from an incumbent business when the same services may be sought elsewhere more efficiently.

A scheme of redress for 'unfair termination' would discourage principal contractors from contracting work to the business best able to complete the work. If a contract is unlawfully terminated or consideration is not provided on provision of services, redress is already available to courier drivers under the law of contract.

If the Queensland Government proceeds to establish a system of redress for 'unfair termination' of contract, despite Ai Group's opposition, the 21 day timeframe for challenging termination in proposed s.406ZY(3) is appropriate. However, the Bill should be amended to enable further periods of time to be granted only in exceptional circumstances, similar to the federal unfair dismissal jurisdiction.[9]

A significant drawback of Division 2 is that it fails to impose appropriate qualifications or limitations upon an independent courier driver's capacity to seek relief from the Commission. The Queensland government should consider introduction of similar limitation which apply to accessing the unfair termination in the federal and other State systems. For example, the Bill imposes no minimum service threshold or limitation for higher income workers or restrictions on accessing the jurisdiction where the engagement was intended to be short term.

Unfair courier service contracts

The Bill provides a capacity for an entity to apply to the Commission to amend or declare void an unfair courier service contract. Proposed s. 406U(1) provides that a courier services contract is an unfair contract if the contract:

(a) is harsh, unconscionable or unfair; or

[9] *Fair Work Act 2009* (Cth) s. 394(3).

(b) is against the public interest; or

(c) provides, or has provided, a total remuneration for performing the work stated in the contract less than that which—

(i) a person performing the work an independent courier would receive under a contract instrument; or

(ii) an employee performing the work would receive under an industrial instrument or this Act; or

(d) is designed to, or does, avoid the provisions of a contract instrument.

The above criteria provide little scope for the Commission to exercise proper judgment in circumstances where a contract is appropriate regardless of whether it avoids the terms of an industrial instrument (for example an instrument which no longer reflects industry practice or is contrary to flexible workplace relations). Rather than the Bill imposing rigid criteria under which a contract will be deemed unfair, the Commission should be granted discretion to declare a contract to be an 'unfair contract' taking into account the realities of the workplace.

Application of the No Disadvantage Test

The 'no disadvantage test' (**NDT**) should not arbitrarily apply an inappropriate reference instrument in determining whether a negotiated agreement does not disadvantage independent couriers in relation to their working conditions. Also, the test should be amended to confirm that the Commission is to perform an overall comparison and that a single, relatively minor detriment cannot result in an instrument failing the NDT.

Proposed s.406ZI provides that the Commission must be satisfied that a proposed negotiated agreement does not disadvantage independent couriers in relation to their working conditions. The referenced conditions for the application of the NDT are a contract determination (s.406ZI(2)(a)), or an industrial instrument, or the IR Act (s.406ZI(2)(b)(ii)). It is not apparent from the wording of proposed s.406ZI that the test is to be applied to working conditions as a whole and that minor detriments cannot prevent a negotiated instrument from being certified by the Commission.

The Bill introduces, at proposed s. 406ZD, a concept of a 'relevant contract determination' for the purposes of undertaking the NDT. The definition of 'relevant contract determination' encompasses instruments that do not cover either the principal contractor or the independent couriers to be covered by the negotiated agreement. The NDT would therefore import a benchmark which has little relevance to either the principal contractor's enterprise or the work practices of the independent couriers asked to approve the negotiated agreement. The NDT as drafted, would likely be a significant source of disputation surrounding what is the 'same kind of work' for the

purposes of s. 406ZD(2)(a). Moreover, principal contractors undertaking the 'same kind of work' may be exposed to very different commercial and other pressures.

It is noted that proposed s. 406ZD(1)(b) of the Bill requires the registrar to place a notice in the registry providing details of a 'relevant contract determination' for a proposed negotiated agreement at least 7 days before a certification application is heard. The Bill does not indicate how this provision is to be complied with if there is no suitable 'relevant contract determination' at the applicable time.

Proposed s.406ZJ applies where there is no relevant contract determination for some or all of the independent couriers to which a negotiated instrument would apply. This section enables the Commission to decide that a contract determination that regulates the remuneration and working conditions of independent couriers engaged in 'similar work' to the independent couriers under the proposed agreement, is appropriate for deciding whether the agreement passes the NDT under s.406ZI. This provision has the potential to cause significant problems in that it is a potential source of disputation as to what would constitute 'similar work'. Also, that the test revolves around the similarity of the work takes no account of the distinctions which may be present between different businesses. For example, the duties of an independent courier driver transporting small goods in a light vehicle could be inappropriately considered to be similar to that of a driver of a heavier vehicle despite the fact that the economic and organisational pressures on the principal contractors are likely to be very different.

It is apparent that there is an appreciable risk that the Commission will be required to perform the NDT against an inappropriate instrument. This problem is likely to be particularly significant in the early days of the operation of Chapter 10A when no or very few contract determinations are operating for the purposes of the relevant comparison. It is notable that pursuant to s.406ZJ(2) and 406ZJ(3), the principal contractor, organisation or federal organisation proposing to make a negotiated agreement is required to apply to the Commission for a decision on a relevant contract determination and the Commission *must* decide on a contract determination. There is no discretion for either the applicant not to make a request under s.406ZJ(2) or the Commission to find that no contract determination is appropriate under s.406ZJ(3).

Proposed s.406ZI(2)(b)(ii) already assumes that the NDT may be performed against the remuneration and working conditions of a person performing work as an employee under an industrial instrument or the IR Act (including the Queensland Employment Standards). As the experience under the federal enterprise bargaining system demonstrates, no reference instrument is necessary in order for an agreement to be approved. In *Sunnyhaven Limited*, a Full Bench of the Fair Work Commission overturned a decision of Commissioner McKenna that an Agreement made with exclusively non-award covered employees was incapable of approval as no reference instrument could be used for the purpose of applying the Better Off Overall Test under

s.186(2)(d) of the FW Act. Rejecting this view, the Full Bench stated:[10]

> *Absent any clear statutory indication, there can be no distinction between an agreement covering a mixture of award covered and non-award covered employees and an agreement covering exclusively non-award covered employees. In the former case, provided Fair Work Australia is satisfied that each award covered employee and each prospective award covered employee would be better off overall, the agreement could be approved, notwithstanding the non-application of the better off overall test to the non-award covered employees. The same position would apply in respect of an agreement covering only non-award employees.*
>
> *In circumstances where the Act permits the making of an enterprise agreement which covers, in whole or in part, employees not covered by a modern award, the Commissioner was wrong to find that where the employees to be covered by an agreement are exclusively non-award covered employees the better off overall test is effectively incapable of application. The correct view, in those circumstances, is the better off overall test has no application in applying the statutory tests for approval of an agreement of that type.*

The NTD test should be amended to:

- Confirm that it is to apply in relation to working conditions as a whole;
- Remove the concept of a 'relevant contract determination' from the Bill; and
- Remove the requirement to decide a relevant contract determination where none are appropriate.

Termination of negotiated instruments

Chapter 10A inappropriately restricts termination of negotiated instruments following their nominal expiry date.

Pursuant to proposed s.406ZT(3), the Commission must approve the termination if, and must refuse to approve the termination unless:

(a) for an agreement that provides that it may be terminated if particular conditions are met—the conditions have been met; or

(b) for another agreement—

(i) the other parties to the agreement agree to it being terminated; or

[10] *Sunnyhaven Limited* [2012] FWAFB 9086.

(ii) termination of the agreement is not contrary to the public interest.

For agreements that do not outline the conditions under which they may be terminated, it is inappropriate for the Commission to require the consent of all parties before a negotiated instrument can be terminated. Negotiated instruments that are out of date and lock the parties into conditions that are no longer appropriate should not be set in place until all parties agree that the instrument should be terminated. The threshold for terminating such instruments should be lowered in order to avoid perpetuating work practices and conditions that are no longer suitable. A single individual who refuses to agree to the termination of an industrial instrument should not be able to prevent other parties from terminating an agreement that is no longer operating for the parties' mutual benefit.

Proposed s.406ZT(3)(b)(i) should be removed. The test for termination should be that the Commission is satisfied that termination is not contrary to the public interest and is appropriate taking into account:

- The views and circumstances of principal contractors and independent courier drivers covered by the determination; and
- The views of relevant organisations and federal organisations.

Standing of federal registered organisations and federal peak councils

An important feature of proposed Chapter 10A in the Bill is the capacity for federally registered organisations to take part in matters pertaining to independent courier drivers. Pursuant to a proposed amendment to Schedule 5 (Dictionary) of the IR Act, "Federal Organisation" is defined to mean an organisation under the Commonwealth Registered Organisations Act.

Proposed s.406V includes within the definition of a 'party' to a negotiated agreement, a federal organisation of employers that represents or is *"entitled to represent",* 1 or more principal contractors. In addition, various other provisions of the Bill refer to employer organisations or federal organisations of employers. It is important that the representation rights referred to in these provisions are not able to be interpreted narrowly with reference only to eligibility rules under the Queensland industrial relations system. To do so could inadvertently exclude federally registered organisations.

Chapter 10A provides standing to Federal Organisations under:

- Section 406O – Who may apply for contract determination;
- Section 406Q – Entities that may be heard on application for a contract determination;
- Section 406T - Commission's power to revoke contract determination;

- Section 406U – Commission's power to review contract determination;
- Section 406ZC – Application for certification of negotiated agreement;
- Section 406ZE – Entities that may be heard on application for certification of a negotiated agreement;
- Section 406ZJ - Deciding relevant contract determination;
- Section 406ZT – Termination of negotiated agreements after nominal expiry date.

The Bill inappropriately provides no clear right of standing for federal employer organisations in section 406ZR which deals with applications to amend negotiated instruments.

It is important that federal registered organisations' standing pursuant to the abovementioned sections is retained as many principal contractors will have membership arrangements with such organisations. Registered organisations are subject to significant regulatory oversight pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth). Such organisations have the expertise and membership base which would enable principal contractors and employees to be properly represented in the jurisdiction established under proposed Chapter 10A.

It is however essential that peak councils as defined in s.12 of the FW Act be provided with a general right to intervene in matters pertaining to the jurisdiction established under proposed Chapter 10A. Currently, State Peak Councils are provided with a general right of intervention in relevant matters pursuant to s.533(2) of the IR Act. A similar right of intervention for other Peak Councils recognised under the FW Act is necessary, especially for matters pertaining to contract determinations covering independent courier drivers. Such matters have broad industry relevance and federal Peak Councils should be able to take part on behalf of their members and affiliates.

Relevant employee organisations

The Bill inappropriately extends powers to employee organisations to represent independent couriers regardless of whether the couriers are eligible for membership within the organisation's rules. The Bill should not extend rights of representation to an organisation with respect to independent couriers that do not fall under the organisation's eligibility rules.

This limitation is appropriate given the rights a 'relevant employee organisation' has under:

- Section 406W – Notice of intention to negotiate;
- Section 406X - Notice of intention to be party to negotiations;
- Section 406Y - Proposed negotiated agreement to be given to independent couriers for approval;

- Section 406ZG - Requirements for granting application for a negotiated agreement
- Section 406ZR - Amendment on application; and
- Section 406ZT - Termination after nominal expiry date.

The definition of a 'relevant employee organisation' should be amended to ensure that the entitlement to represent relevant independent couriers functions as an additional criteria in order to receive the benefits of the abovementioned provisions.

Further, the exclusive representational rights for 'relevant employee organisations' under the Bill is inappropriate. Proposed s. 406Y assumes that representation of independent courier drivers is to be by a relevant employee organisation. This provides little scope for an independent courier to seek representational assistance from another organisation or an independent bargaining representative (such as in the enterprise bargaining stream in the FW Act). Section 406Y should be altered to ensure that independent couriers may be represented by entities other than a relevant employee association.

The rights of 'relevant employee organisations' extend far beyond what is appropriate in terms of rights to access relevant information about independent couriers. In proposed s. 406Z(2)(b), each party is required to disclose relevant information other than confidential or commercially sensitive information in a timely way. For an independent courier that is not a member of a relevant employee organisation, such an organisation should not have access to information about the individual or their business. Proposed s. 406Z(2)(b) should clarify that the provision does not require a principal contractor to disclose information to a relevant employee organisation about non-members of that organisation.

Criteria for the exercise of powers under Chapter 10A

The criteria and considerations that have been included in proposed s. 406F of the Bill are inappropriate for the task of guiding the Commission's exercise of its powers under Chapter 10A. The list of considerations is excessively one-sided and retains the concept of 'prevailing minimum remuneration and working conditions' which should not form part of a safety net, as discussed above.

Further, the list of matters that the Commission is required to consider in proposed s. 406F(2) is insufficient in that it fails to take account of the need to promote flexible modern work practices, the efficient and productive performance of work and the likely impact of the exercise of the Commission's powers on business, including on productivity, costs and the regulatory burden. These are essential considerations in the exercise of the Commission's powers that are already recognised in the Commonwealth Fair Work regime.

As presently drafted, the considerations in proposed s. 406F would not result in a fair exercise of the Commission's powers. Although the concept of 'fairness' appears in proposed ss. 406F(1)(a), 406F(2)(a)(i), 406F(2)(a)(ii), 406T(1) and 406ZI(2)(b)(i)), the legislation should clarify that this concept pertains to fairness to independent couriers and to principal contractors.

Contravention of industrial instruments

The Bill potentially exposes those not party to an industrial instrument to risks of contravention. The Bill should include a provision in s.406F along the lines of:

> *A person does not contravene a contract instrument unless the instrument applies to the person.*

Similar provisions are already present in the IR Act ensuring that persons to which an instrument does not apply cannot contravene its terms. For example, s. 152(2) of the IR Act provides:

> *A person does not contravene a provision of a modern award unless the award applies to the person.*

Similarly, s. 219(2) of the IR Act provides:

> *A person does not contravene a bargaining instrument unless the instrument applies to the person.*

An equivalent provision should included in the Bill to ensure that liability is not inappropriately extended beyond parties to a relevant instrument.

Coverage of employee organisations by negotiated agreements

Proposed s. 406I(4) of the Bill provides little guidance on when the Commission may issue a decision stating that a negotiated agreement will cover an employee organisation.

The Bill does not include any requirement for the relevant employee organisation to give the Commission notice that it wants the agreement to cover it or to satisfy the Commission that it has at least one member to whom the agreement applies and who has asked the organisation to given notice. The Bill should be amended to introduce these reasonable and appropriate limitations.

Obligations upon principal contractors in the negotiation process for agreements

The Bill requires a principal contractor to explain the terms of a proposed agreement prior to approval being given. Under proposed s. 406Y(2)(b), a principal contractor is required to ensure this explanation is carried out 14 days prior to the day independent couriers are asked to approve the agreement.

It makes little sense for the requirement to explain to be subject to this 14 day timeframe. As currently drafted, the Bill would require principal contractors to ensure that each independent courier has access to a copy of the proposed agreement (see s.406Y(2)(a)). Theoretically, a principal contractor may provide the agreement to all relevant contractors on the 14th day prior to the vote and have no time to carry out the relevant explanation.

The equivalent requirement upon an employer to take all reasonable steps to ensure that the terms of an enterprise agreement, and the effect of those terms, are explained to the relevant employees under s. 180(5) of the FW Act do not subject the employer to an obligation to ensure that the explanation is completed 14 days prior to the vote taking place.

The Bill should be varied to remove the requirement to discharge the principal contractor's obligation to explain the terms of a negotiated agreement 14 days prior to independent couriers being asked to approve the agreement.

The Bill also imposes additional onerous obligations upon a principal contractor to obtain, and disclose in a timely way, information about the difference between the average weekly full-time equivalent earnings of male independent couriers and female independent couriers covered by the proposed negotiated agreement (**the gender pay gap**), including (s. 406Z(3)):

- the distribution of the independent couriers by gender; and
- details of the gender pay gap; and
- any major factors identified as contributing to the gender pay gap;
- if appropriate, the projected effect of the proposed negotiated agreement on the gender pay gap;
- other information relevant to the gender pay gap reasonably requested by another party to the negotiations; and
- other information relevant to the gender pay gap prescribed by regulation.

A principal contractor would find these obligations difficult to comply with and may be open to subjectivity and subsequent challenge.

The Bill should be varied to enable a principal contractor to satisfy the obligation under s. 406Z(3) by taking reasonable steps to provide information on the gender pay gap.

Further, the definition of 'pay gap' in proposed s. 406Z(4) should be reviewed given the unique features of platform work, e.g. there is typically no obligation on platform workers to accept work.

Equal remuneration test

Proposed section 406ZG(1)(g) requires the Commission to be satisfied that a negotiated agreement passes the equal remuneration test under proposed s. 406ZK in order for a certification application to be granted.

Proposed section 406ZK provides (emphasis added):

> *The commission must be satisfied, in relation to the independent couriers to be covered by the agreement—*
>
> *(a) a proposed negotiated agreement provides for equal remuneration for work of equal or comparable value; and*
>
> *(b) a principal contractor to whom the proposed negotiated agreement applies has implemented, is implementing or, if the agreement is certified, will implement equal remuneration for work of equal or comparable value.*

This provision appears to introduce a requirement that equal remuneration practices that do not arise under the negotiated agreement be adhered to. It makes little sense to import a threshold requirement for certification of a negotiated agreement which potentially relates to equal remuneration practices engaged in that have nothing to do with a requirement under the Agreement itself.

Proposed s. 406ZK(b) should be removed.

Preventing and eliminating sexual harassment and sex-based harassment

Ai Group is concerned with how the proposed definition of *Sex or Gender-based Harassment* in Schedule 5 (Dictionary) will interact with the current Queensland Human Rights Commission's review of the *Anti-Discrimination Act 1991* (**AD Act**), commissioned by the Queensland Government in May 2021. The review of the AD Act is an independent review from the Queensland Human Rights Commission (**QHRC**) that has included in its terms of reference:

- *the **definitions** in the Anti-Discrimination Act (other than vilification), including discrimination, unjustifiable hardship, genuine occupational requirements, **sexual harassment,** and victimization.*

Other matters impacting sexual harassment and the Federal Sex Discrimination Commissioner's Respect@Work Report recommendations are also included in the terms of reference. That review has not yet concluded.

Ai Group is concerned that the amendments in the Bill, in so far as they relate to statutory definitions of sex-based harassment:

- Create the public perception that the Queensland Government may have already determined certain matters arising from the QHRC review, notwithstanding that the QHRC review is not yet complete;
- Create the public perception that the definition of sex-based harassment proposed in the Bill reflects a decision of the Queensland Government to adopt this definition in amendments to the AD Act, applying also to national system employers;
- Could be adopted in the definition of sex-based harassment in the AD Act, which would be contrary to Respect@Work Report recommendation 26 concerning State and Territory Governments aligning their anti-discrimination frameworks to the provisions of the *Sex Discrimination Act 1984* (Cth) to achieve a nationally consistent standard; and
- Could lead to interaction problems between the IR Act and AD Act, particularly if the QHRC review recommends a different definition (if one at all).

We recommend that the amendments in the Bill, in so far as they relate to the definition of sex-based harassment, not proceed, subject to the completion of the QHRC's review of the AD Act and the Queensland Government's response to it.

Ai Group is not opposed to a definition of sex-based harassment appearing in the Queensland IR Act or AD Act but this definition should be aligned with the *Sex Discrimination and Fair Work (Respect@Work) Amendment Act 2021* (Cth) consistent with the objective of nationally consistent legislation identified in Recommendation 26 of the Respect@Work Report.

Registered organisations and other associations

Ai Group is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and under the NSW IR Act.

For 70 years, between 1943 and 2013, Ai Group was registered under the Queensland State industrial relations legislation. Ai Group applied to the Queensland Industrial Relations Commission (**QIRC**) in 2013 to cancel our registration because the Queensland legislative requirements for registered organisations were incompatible with Ai Group's national structure. Unlike the NSW IR Act, the Queensland legislation requires that a separate Queensland organisation is maintained with a separate management committee and separate State accounts. Ai Group is governed by a National Executive comprised of national officers elected by member companies. The National Executive includes specific representatives from

each State, but there is not a separate organisation in any State. Also, Ai Group has national accounts, rather than separate accounts for each State.

Ai Group supports the policy intent of limiting the industrial rights of associations that purport to be unions but are not subject to the onerous duties and reporting requirements of registered organisations. However, it is important that employer and employee organisations that are registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), and are subject to the duties and reporting requirements under that Act, do not lose any rights under the IR Act as a result of the Bill.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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