Industrial Relations and Other Legislation Amendment Bill 2022

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Queensland Industrial Relations and Other Legislation Amendment Bill 2022

Submission to Education, Employment and Training Committee

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Overview

This is the submission of the Business Council of Australia to the Queensland Parliament Education, Employment and Training Committee inquiry into the provisions of the *Industrial Relations and Other Legislation Amendment Bill 2022* (**the Bill**).[1] The Bill was introduced on 23 June 2022. The reporting date for the inquiry is 12 August 2022.

The Bill includes six discrete measures to amend the *Queensland Industrial Relations Act 2016* (**the Act**) and other legislation, which are described by the Committee as follows:

1. strengthen protections against workplace sexual harassment
2. support effective representation of employees and employers by registered industrial organisations and maintain the integrity of the registration framework for industrial organisations
3. update the Queensland Employment Standards to ensure that Queensland workers have access to entitlements which are equal to or more favourable than the equivalent entitlement under the *Fair Work Act 2009* (Cth)
4. empower the Queensland Industrial Relations Commission to set minimum standards for independent courier drivers
5. update the collective bargaining framework to ensure access to arbitration by a single Commissioner during enterprise bargaining negotiations, and include equal remuneration as an aspect of good faith bargaining; and
6. remove a number of redundant or superfluous provisions, including the provisions enabling the recovery of historical employee overpayments by Queensland Health.

This submission is limited only to those provisions of the Bill that would give the Queensland Industrial Relations Commission (QIRC) new powers to set minimum standards for independent courier drivers. As such, it does not consider any of the other five measures in the Bill.

Regardless of the desirability of having minimum standards for independent courtier drivers and the merits of the specific proposals in the Bill, the BCA's very strong view is that such regulation should occur at the Federal level rather than be introduced by States and Territories. At the time of writing this submission, the Federal Government has indicated that it intends to introduce such regulation in the near future. As such, the BCA respectfully recommends that these provisions of the Bill not be proceeded with, given the imminent likelihood of Federal legislation on the same subject matter.

Regulation of gig economy work

The need for appropriate minimum standards

The BCA believes there is a need for appropriate regulation of "gig economy" or "platform-based" work, for the purpose of ensuring that arrangements for platform workers are fair and transparent, and that suitable minimum standards apply to such workers.

It is important that a balanced approach be taken to such legislation. Platform work is a new form of work that does not easily fit into the conventional employee/contractor paradigm. It has created new work opportunities for workers and new opportunities for consumers, many of which could not be provided if the workers were in an employment relationship. It has generated new forms of economic activity that would otherwise not exist. Platform workers value the flexibility and autonomy that platform work provides. They can work (or not work) when they like and can also undertake other work, including for competitor platforms, if they wish. Any approach

[1] https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=166&id=4183

to regulation should reflect this reality and be properly adapted to any perceived problem it is seeking to address.

Enhanced protections and benefits for platform workers are desirable and should be adapted to the distinctive nature of such work. They should not be implemented in such a way that on-demand workers are deemed "employees" or have unsuitable "employee like" conditions imposed upon them. Any regulation of this workforce should be undertaken at the Federal level. It is undesirable and unfeasible to attempt to implement separate regulatory regimes at the State level.

Relevant provisions of the Bill

The Bill introduces a new Chapter 10A that will introduce a new system of regulation covering "independent couriers". Chapter 10A is modelled on Chapter 6 of the New South Wales *Industrial Relations Act 1996* (**NSW Act**).[2] "Independent courier" is defined in the Bill as follows[3]:

> *(1) 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.*

This definition is based on the definition of "contract of carriage" under the NSW Act.[4] It is intended to be broad enough to cover a range of independent contractors who perform work via gig platforms.

Issues with the Bill

For the reasons outlined in this submission, the BCA does not believe that Chapter 10A of the Bill should be proceeded with, as national legislation at the Federal level should instead be pursued. Notwithstanding this position, we raise the following issues with Chapter 10A. In the event it is proceeded with and ultimately takes effect, we recommend that appropriate amendments be made to address these issues.

1. Contract determination provisions

The Bill would give new powers to the Queensland Industrial Relations Commission (**QIRC**) to make "contract determinations" that would set "minimum remuneration and working conditions" for independent couriers.[5] In making such determinations, the QIRC must take into consideration various criteria prescribed in the Bill, including to "ensure" that such remuneration and conditions *are "comparable to the remuneration and working conditions an employee would receive… for performing similar work."* and also *"generally reflect the prevailing minimum renumeration and working conditions" of those who will be covered."*[6]

This approach is likely to be problematic in practice. It includes ambiguous standards and assumes that the working arrangements of platform workers are directly comparable to employees. It reflects the approach in Chapter 6 of the NSW Act, which was implemented in the 1970s to deal with independent contractors in the transport industry (eg. owner-driver truck operators). In this case their work was more comparable to that of

[2] Explanatory Notes, page 11
[3] Section 406B
[4] Section 309 of the NSW Act
[5] Section 406N
[6] Section 406F

employee drivers. Contractor drivers and employee drivers compete for the same work and issues of "undercutting" could arise. It is not correct to assume that the same comparisons can be made for platform workers, as the Bill appears to do.

Any legislation that sets minimum standards for platform workers should reflect the reality that not all terms and conditions for employees are not comparable, nor transferable, to such workers. Such legislation should also provide that those minimum standards should reflect the distinct nature of platform work and thus provide minimum conditions that are suitably adapted to such work.

2. Unfair termination provisions

The Bill will establish a regime to regulate "unfair termination of courier service contracts".[7] This regime would enable independent couriers to apply to the QIRC for various forms of relief, including reinstatement or compensation if the termination of their contract is "harsh, unjust or unreasonable."[8]

This regime in many respects reflects the "Unfair Dismissal" regime for employees under the Commonwealth *Fair Work Act 2009* (**FW Act**). However, unlike this and other comparable regimes, the Bill does not appear to include any limitations or prerequisites on which independent couriers can apply for relief. For example, under the FW Act, an employee must have at least 6 months service (12 months if employed by a small business) in order to access the regime.[9] The FW Act also allows for the Fair Work Commission to dismiss applications where an applicant has unreasonably failed to comply with the relevant Commission processes[10] and to award costs against applicants where they have engaged in unreasonable acts or omissions.[11]

Any legislation that provides for review of allegedly unfair terminations should include elements that protect against the regime being abused. It should include provisions such as a minimum qualifying period as well as provisions to enable the efficient dismissal of claims that are frivolous, vexatious or an abuse of process.

3. Representation and dispute rights

The Bill includes various provisions relating to dispute resolution covering independent couriers and principal contractors. It gives standing for employer organisations and registered unions to represent parties in such disputes. It does this by applying Chapter 6 of the Act, as amended by the Bill.[12] The Bill will limit representation rights in industrial disputes before the QIRC to registered unions only and thus exclude "unregistered" unions. This will have the flow-on effect of meaning that independent couriers will only be able to be represented by the relevant registered union in any dispute resolution processes under the Bill. Regardless of the merits of the policy to limit representation rights for employees, the BCA does not believe that the same principles should be applied to independent couriers, who are in a different position to employees and should not be denied their choice of representative.

The requirement that representation be limited to registered unions limits the capacity for independent couriers to choose their own representative, or choose to engage directly, if they wish to do so. Further, as there are standalone representation rights given to registered unions, this may result in disputes being initiated by a union where there is not actually any support from an independent courier.

The dispute resolution provisions of the Bill should be amended to provide that independent couriers are not limited in their choice of representation, nor the right to represent themselves; and that registered organisations be required to be acting on behalf of at least one independent courier when initiating any process under those provisions.

[7] Division 2, Part 5 of Chapter 10A
[8] Section 406ZX
[9] Section 383 of the FW Act
[10] Section 399A of the FW Act
[11] Section 400A of the FW Act
[12] Section 406ZZE(2)

4. Retrospectivity and successor businesses

The Bill appears to allow the QIRC to make contract determinations with retrospective effect, including contract determinations, backdated to the first notice of a dispute or the commencement of the matter in the QIRC.[13] Retrospectivity should not be permitted and the Bill should be amended to provide that such orders can only operate prospectively.

The Bill also includes provisions to bind successor businesses to contract determinations and negotiated agreements. However, there is no definition of "successor" for these provisions. The general definition in Schedule 5 of the IR Act states that *"successor includes assignee and transmittee"*. Neither term "assignee" or "transmittee" is defined.

Gig platforms make it practically difficult to identify what a successor business is. The policy intent set out in the Explanatory Notes is to *"to protect legacy arrangements and avoid circumstances where a transfer of a principal contractor's business to another party may otherwise result in the cessation of a contract determination."*[14] However, this is not clearly given effect in the Bill. Further, legacy contract determinations, if they are to apply at all to successor businesses should apply only to the relevant part of the business that transfers, and not more broadly.

5. Disclosure of information **– "pay gap"**

The Bill provides that parties to "negotiated agreements" under Chapter 10A must:

> *"obtain, and disclose as soon as practicable after the start of the negotiations, information relevant to the gender pay gap under the proposed negotiated agreement"*[15]

This provision is not appropriate for independent couriers and may not be possible to comply with. The circumstances for gig workers are unique in that workers are free to work as many hours as they wish and at times they choose and that platforms cannot require workers to accept work at any given time. As such, any data that is available in relation to any "pay gap" is unlikely to be reflective of any gender-based factors.

Alternative approach – Federal legislation

The need for a national approach

Whilst the BCA supports the concept of appropriate regulation of the gig economy workforce, we do not believe that such regulation should be implemented at a State level. Nor do we believe that it would be possible to do so effectively, for both practical and constitutional reasons. This position was expressed in the BCA's submission to the previous Victorian Government consultation process on the On-Demand workforce in 2020.[16]

It is neither desirable nor workable to have multiple State-based systems of regulation for either employment or the gig workforce. Such an approach is not only impractical, it is highly unlikely that the States have the constitutional power to implement any workable system of regulation in this field. This is particularly so given the likelihood of new Federal legislation. Such legislation could (and should) "cover the field" to prevail over State legislation, as provided for by section 109 of the Commonwealth constitution. If (or when) this occurs, it will render Chapter 10A of the Bill a "dead letter".

The Explanatory Notes for the Bill indicate that Chapter 10A would be constitutionally invalid due to the application of the Commonwealth *Independent Contractors Act 2006* (the IC Act), which will prevail over Chapter 10A and render it invalid under section 109. The Explanatory Notes state that Chapter 10A could only

[13] Section 406S
[14] Explanatory Notes, page 33
[15] Section 406Z(3)
[16] https://www.bca.com.au/submission_to_the_victorian_inquiry_into_the_on_demand_workforce

operate if an exemption is granted by the Commonwealth under section 7 of the IC Act to enable this to occur.[17] The Explanatory Notes state that:

> *"The Commonwealth Attorney-General will be provided with the draft legislation… and an exemption from section 7 of the IC Act requested in order to allow Chapter 10A of the Bill to have application. The Bill provides that Chapter 10A will commence by proclamation, which will be arranged should the exemption be obtained from the Commonwealth."* [18]

The granting of such an exemption from the Commonwealth is not assured and is, in the view of the BCA, undesirable, given the alternative and much superior approach of introducing legislation at a national level.

Proposed reform at the Federal level

The new Federal Government has committed to legislate to give the Fair Work Commission new powers to set minimum standards for gig workers and "employee like" work.[19]

The development of national legislation, in consultation with industry and State and Territory governments, would provide substantially greater clarity and certainty to business and individuals. The alternative is a complex range of regulations, with State-specific owner-driver laws in Vic, NSW, WA and now QLD, and state ride share regulations, and the additional overlay of the federal IC Act and the FW Act when amended.

We note the recent comments by the Federal Minister for Employment and Workplace Relations, Mr Burke on 30 June 2022, outlining his proposed approach to this issue:

> *"I want to get the consultation right. So I'd love to be in a situation where I'm introducing the legislation on it this year and I need to work through whether we would, you know, deal with the whole gig economy at once or whether we would work through sections of the economy one at a time. So there's a big piece of consultation that hasn't yet started."*[20]

The BCA supports this process, which as intended to produce Federal legislation in a timely way and ensure that it is properly adapted to the distinctive features of gig economy work. To this end, we note the announcement on 28 June 2022 of agreed principles by Uber and the Transport Workers Union (TWU) regarding such legislation.[21] This agreement relevantly stated that:

> *"The TWU and Uber support the* ***Federal Government legislating*** *for an independent body, or a stream of an independent body, specific to platform work and comprised of industry experts, with the capacity to:*
>
> > *1. Set minimum and transparent enforceable earnings and benefits/conditions for platform workers based on the principle of cost recovery, taking into account the nature of the work.*
> >
> > *2. Facilitate a cost effective and efficient mechanism to resolve disputes such as deactivation of relevant platform worker accounts. Any dispute resolution mechanism must be fit for purpose for platform work.*
> >
> > *3. Ensure the rights of platform workers to join and be represented by the relevant Registered Organisation are respected and that platform workers have an effective collective voice.*
> >
> > *4. Ensure that appropriate enforcement exists to meet these standards and objectives."*
>
> (emphasis added)

[17] Explanatory Notes, page 11
[18] Explanatory Notes, page 11
[19] https://ministers.dewr.gov.au/burke/important-step-rights-gig-workers
[20] Tony Burke interview, ABC Radio National, 30 June 2022
[21] https://www.twu.com.au/wp-content/uploads/2022/06/Statement-of-Principles-28-June-2022.pdf

The BCA supports these principles. A similar announcement was also recently made by Door Dash and the TWU in May 2022.[22] In each case it was agreed that legislation supported by the various parties should be introduced by the Federal Government. There was no suggestion that it be done at a State level.

Recommendations

1. That the Bill be amended to remove Chapter 10A on the basis that minimum standards for independent courier drivers and other gig economy workers should be implemented at the Federal level.
2. That the Queensland Government and other States and Territories consult with the Federal Government as part of its consultation process on national legislation to implement appropriate minimum standards for gig economy workers.
3. In the event that that Chapter 10A is not removed, that it be amended to address the five issues with the Bill outlined in this submission.

BUSINESS COUNCIL OF AUSTRALIA

42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 www.bca.com.au

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[22] https://doordash.news/australia/doordash-and-transport-workers-union-sign-charter-of-principles-to-ensure-safety-and-fairness-for-gig-workers-in-australia/

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