Industrial Relations and Other Legislation Amendment Bill 2022

Submission No: 35

Submitted by: Ai Group (supplementary submission)

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: Response to submission of Professor Emeritus Peetz

29 July 2022

Response to the Submission of Professor Emeritus David Peetz

Ai Group has been invited to respond to a late submission lodged by Professor Emeritus David Peetz (**Prof. Peetz**) which addressed various issues raised in Ai Group's submissions. We do so in the submissions below.

The idea that a state government should not regulate in this area as it would facture or pre-empt a national system

Prof. Peetz raises various brief arguments in response to the position that the State government should refrain from regulating in this area as it would fracture or pre-empt a national system of regulation. He states that "should the Albanese Commonwealth government wish to legislate in this area, it can easily overcome any inconsistencies with state legislation by denying or qualifying such exemptions". We urge the Queensland government to appreciate that the complexities of overlapping systems that can themselves serve as a detriment to principal contractors, as they have for employers in the past.

The Albanese Labor Government has flagged, with a high degree of certainty, the introduction of further regulation of terms and conditions of gig workers. On 29 June 2022, Tony Burke issued a media release categorically stating:

The Albanese Labor Government will legislate to give the Fair Work Commission new powers to set minimum standards for gig workers.

…

*This **will deliver a national approach** that gives the Commission the scope and flexibility it needs to deal with "employee-like" forms of work.*

…

The Government has already begun work to develop legislation and we look forward to working with the union movement and the gig platforms to deliver this important change.

The Federal Government's intentions with respect to delivering a national approach should not be frustrated by development of a patchwork of State schemes across the nation. With the introduction of Chapter 10A into the IR Act, a new jurisdiction will commence and broadly cover a significant segment of the transport industry in Queensland. The subsequent introduction of regulation at the State level would cause significant issues for principal contractors for reasons that include:

- Overlapping regulation may develop confusion as to the degree to which the Federal legislation is intended to 'cover the field'. It is not unheard of for State and Federal

regulation to co-exist in respect of the same subject matter, causing substantial confusion across industry;

- The coverage of the schemes developed at the Federal and State level may not be identical. If this is the case, the dividing line between the two schemes may be difficult for businesses and workers to comprehend;

- Penalties and enforcement under the different schemes may be different. This may cause unions and employers to prefer one system over another and lead to forum shopping;

- Entitlements and conditions introduced under one scheme may quickly transfer to the other leading to 'leapfrogging' of entitlements – similar to the inflationary outcomes which occurred in the Federal and State systems prior to the nationalisation of the industrial relations system.

Legal complexity and disputation can and often does arise over the boundary line between Federal and State jurisdictions. Prior to the introduction of the simplified national system of workplace relations which we currently operate under, the complexity and duplication that was part and parcel of the overlapping systems of State and Commonwealth regulation of labour was one of the most heavily criticised elements of our industrial relations system. We urge the Queensland Government to consider the real costs and complexity which would arise from overlapping schemes.

Even if the Queensland Government were to introduce the jurisdiction established under Chapter 10A and its operation was subsequently curtailed entirely by a new federal system of regulation, the substantial compliance efforts undertaken at the workplace level in order to grapple with the new scheme and contribute to the development of new instruments (such as contract determinations or contractor agreements) would be largely wasted. Principal contractors would also potentially be required to 're-invent the wheel' by building enterprise knowledge of the new framework after spending significant outlay and directing substantial resources toward compliance with a defunct system.

Ai Group has already expressed the view in past submissions that the jurisdiction to be introduced by Chapter 10A would be harmful and unnecessary. However, we here emphasise that businesses should not be saddled with the burden of building internal systems in response to a jurisdiction that is unlikely to operate for very long.

Prof Peetz argues that the "greatest danger to effective national action in this area would be for the Queensland Parliament to withdraw these provisions, because doing so would raise doubts about the appropriateness of any action". This submission is, with respect, misguided. The Albanese Government has made abundantly clear its intentions with respect to the regulation of employee-like forms of work. If the Queensland Government were to remove Chapter 10A from

the IR Amendment Bill, this would demonstrate a considered and measured response to impending regulation at the Commonwealth level.

The idea that the Bill would discourage bargaining

Prof. Peetz disagrees with Ai Group's concern that the Bill would discourage bargaining. He asserts that, "…there is nothing in the Bill that requires the QIRC to demine actual rates of pay at a rate above the equivalent of comparable minimum award rates after allowing for costs".[1]

We note that s.406F(1) provides:

> *(1) In exercising its powers under this chapter, the commission must ensure a contract instrument provides for remuneration and working conditions for independent couriers, for the work performed to provide services transporting goods under the instrument, that—*
>
> *(a) are fair and just; and*
> *(b) are comparable to the remuneration and working conditions an employee would receive under an industrial instrument or this Act for performing similar work; and*
> *(c) <u>generally reflect the prevailing minimum remuneration and working conditions of independent couriers covered, or to be covered, by an Instrument</u>*

(Emphasis added)

Section 406 requires a consideration of more than comparable award rates. Although it is not entirely clear what would be meant by the phrase 'prevailing minimum conditions' adopted in s.406F(1), it may be construed as requiring a consideration of the actual rates of pay and conditions provided in industry. If this is the case, we are concerned that the section would mean the legislation would not serve to set a 'minimum safety net of terms and conditions' in a manner analogous to the approach adopted in modern awards, but would rather entrench market rates in contact determinations. We accordingly remain very concerned that the operation of s.406F(1) would leave little room for enterprise level agreement making.

Moreover, it is not clear that s.406F(1), or the Bill more broadly, would confine the QIRC to setting rates that reflect comparable award rates and costs of contractors (as appears to be suggested by the professor). Prof. Peetz does not identify any terms of the Bill that would have this effect.

The professor's assertion that, "*As Ai Group does not claim that the existence of minimum award rates is antithetical to the existence of collective bargaining does amongst employees, it cannot legitimately claim that minimum rates for owner-drivers would be antithetical to the existence of collective bargaining amongst them"* does not account for the very different approach taken in the scheme of the *Fair Work Act 2009* compared to the proposed provisions relating to setting the mandatory term and conditions under the Bill. Prof. Peetz' submission ignores the careful manner

[1] At point 6 in page 9

in which the Fair Work Act has been designed to ensure awards represent a base level safety net that merely underpinsenterprise bargaining.

Awards made under the *Fair Work Act 2009* are intended to operate as a genuine minimum safety net. They are not intended to reflect market rates or to be set by reference to any prevailing rates or working conditions. Indeed, the legislation tightly constrains the discretion of the Commission and by requiring can only terms and conditions to the extent necessary to achieve the "modern award objective".[2] At that heart of that objective is the setting of a "minimum safety net" of terms and conditions "taking into account the need to encourage collective bargaining".[3] This was succinctly explained in the following comments by a Full Bench of the Fair Work Commission in *Appeal by Restaurant and Catering Associatio of Victoria* [2014] FWCFB 1996:[4]

> *Importantly, it [the modern awards objective] requires a consideration of the level of the minimum safety net - not the actual entitlements of employees. The minimum safety net is the set of minimum terms and conditions that underpin actual rates and conditions that may otherwise apply by way of enterprise agreements, over-award payments, performance payments and gratuities.*

The Bill adopts a very different approach.

For completeness, we also observe that Chapter 6 of the IR Act does not mandate that contract determinations reflect a minimum safety net of terms and conditions in a manner comparable to the approach taken under the Fair Work Act. Indeed, some of the contract determinations that apply across sectors of the industry have not been set by reference to strict process of assessing comparable award rates and operating costs minimum award rates plus operating costs. Even to the extent that rates in the contract determinations have been set by reference to a 'cost recovery' principle, there are significant assumptions that have needed to be made about the costs incurred by contract carriers. The level of abstraction that has been required in such a process means there is significant potential that they artificially inflate the rates that need to be paid. The flawed approach adopted in NSW should not be replicated in Qld. The above considerations have contributed to regulated rates under some contract determinations being excessively high.

The idea that there would not be adverse employment effect from the Bill

Prof. Peetz contests Ai Group's concern that that Bill will lead to job losses in Qld.[5] He essentially argues that there is no evidence that Chapter 6 has led to significant job losses.

Ai Group's concern is based, to a signficant degree, on our deep experience of the operation of Chapter 6 of the *Industrial Relations Act 1996* (**IR Act**) and the regulatory regime that underpinned the operation of the Road Safety Remuneration Tribunal (**RSRT**). A consideration of the operation

[2] See s.134 and s.138
[3] Fair Work Act s.134
[4] *Appeal by Restaurant and Catering Associatio of Victoria* [2014] FWCFB 1996, [279].
[5] Under point 5 at page 9

of both schemes provides a relevantly illustrative example of what could be expected from the implementation of the Bill.

We observe, for context, that Ai Group has had extensive engagement with industry in NSW in relation to the operation of Chapter 6. We have long played a leading role in proceedings in the NSW Industrial Relations Commission relating to the formation and variation of the major contract determinations and regularly advise individual operators in relation to the NSW system. We were also heavily involved in virtually all proceedings before the RSRT during its several years of operation and directly advised and assisted many operators who were subject to the orders that it issued.

Through our experience of Chapter 6, we have observed that the legislation, and the contract determinations made under it, have discouraged businesses from adopting operating models that involve the engagement of contract carriers.

One impact of Chapter 6 is that it has contributed to a decision by some principal contractors to shift to the engagement of relatively small transport businesses that themselves engage multiple drivers (contractors or employees) to provide the contracted transport services in preference to contract carriers falling under the direct protection of the legislation. These are commonly referred to as engaging 'fleet providers'. Such fleet providers fall outside the definition of a "contract carrier" in the IR Act and as such their engagement, and the amount they must be paid, is not regulated by the contract determinations.

The system has also created an incentive for some principal contractors to use their own employees in preference to contract carriers. Relevantly, it is common for principal contractors to utilise 'mixed fleets' of contractor and employee drivers so that they use their own fleets for the core of their work and then merely refer work to contractors if there is an overflow requirement. This practice is pursued most aggressively in circumstances where the rates in the relevant contract determination are perceived to be unjustifiably high by principal contractors.

Prof. Peetz contends, in effect, that the fact that owner drivers continue to be involved in the Chapter 6 processes suggests that Chapter 6 has not led to thousands of job losses.[6] Such a submission is overly simplistic. We are not suggesting that Chapter 6 has resulted in the complete abandonment of the use of contract carriers. It has however discouraged their use in some contexts and has undoubtedly reduced the volume of work that many principal contractors allocate to contract carriers.

It is not possible to point to precise evidence of the extent of the adverse consequences of the operation of Chapter 6 as no robust assessment of its operation has been undertaken. It would be prudent for there to be a detailed review of the NSW system before any further legislative scheme is adopted based on its framework. It should not be simply assumed that it is working well because it has existed for a long time.

[6] At page 9

Response to submissions addressing the idea that previous regulation in this area was a disaster

Prof. Peetz' submissions appear to seek to downplay the extent to which the operation of the Road Safety Remuneration Tribunal (**RSRT**) could be viewed as illustrative of the risks that could flow from the passage of the Bill. They also address the operation of Chapter 6.

Response to Prof. Peetz submissions regarding the operation of the RSRT

The operation of the RSRT cannot be regarded as anything other than a disaster.

It is difficult to overstate the level of alarm that the RSRT's first order setting minimum rates created in industry. The order threatened to trigger a crisis in the road transport sector. It was in various respects unworkable and would have made the engagement of contract drivers to undertake certain work commercially unviable overnight.

The level of industry concern was demonstrated by the significant protests by owner drivers in response to the order, and the hundreds of submissions that were ultimately filed in the RSRT in opposition to it.

Ai Group maintains its view that the operation of the RSRT and the impact of its first order setting minimum rates provide a powerful demonstration of the potent adverse consequences that a regulatory scheme setting mandatory rates can have for contract drivers and industry more generally.

It is important to appreciate that the RSRT was in operation for years. It conducted extensive proceedings culminating in the making its first highly controversial order setting minimum rates for contract drivers. Such rates applied to drivers undertaking long distance work and/or operating in the retail industry supply chain.

The failure of the RSRT cannot be overlooked on the basis of the Professor's submission that it "…did not have time to correct early short comings" in its order.[7] This neglects the fact that the making of the order followed very lengthy proceedings considering how rates should be structured. Concerns over the potential for the proposed rates to undermine the viability of contract carriers and the importance of ensuring backloading arrangement were well ventilated in the proceedings, but not addressed.

Although the proposed Bill does not directly replicate the legislative provisions underpinning the operation of the RSRT, it does have the potential to create similar problems. At the very least, the experience of the RSRT highlights the complexity and risks of seeking to directly regulate the rates paid to contract drivers in a prescriptive manner.

[7] Page 11

Response to the Prof. Peetz' submission regarding the operation of Chapter 6

Prof Peetz' submissions provide a very high-level overview of aspects of the operation of Chapter 6, the history of the legislation's evolution and his view as to its merits.[8]

We respectfully suggest that Prof. Peetz' opinions do not accord with those of industry. Nor do they accurately reflect the manner in which the jurisdiction has operated in practice. Key assertions by Prof. Peetz about the merits of the scheme and its practical effect are not supported by evidence or indeed identification of his own experience of its operation or application.

We acknowledge that Prof. Peetz accurately identifies that the jurisdiction has been in place for over 40 years, but this should not be taken to suggest that it is operating in an effective or desirable manner. There has not been a recent review of the scheme's operation or any assessment of the extent to which it provides a workable model for regulation of the gig sector.

In practice, there is a widespread lack of awareness and understanding of aspects of the legislative scheme and the contract determinations made under it. The problem of non-compliance with the regime is notorious. There has also been little by way of effective efforts by the TWU to seek its enforcement or compliance with the system beyond businesses outside of major transport operators with unionised yards, and even less by government inspectors (indeed there is virtually no visible efforts by such bodies to enforce the instruments' provisions).

Prof. Peetz' hypothesis that the system reduces a race to the bottom and has prevented existing operators from being substantially undercut by new entrants to the market is unduly optimistic and not supported by any evidence. This certainly does not accord with the experience of Ai Group members in various sectors.

Prof. Peetz' submissions as to merits of Chapter 6 also overlook the fact that the contract determinations have often become ludicrously out of date and out of step with contemporary circumstances. Most relevantly for current purposes, we observe that the rates in the 'Courier and Taxi Truck Contract Determination; were not increased for approximately 15 years. Other examples could be provided.

The Prof. Peetz also ignore problems related to the complexity of the system; the administrative and regulatory burden that it imposes upon industry; the tendency for the system to result in disputation over the content and interpretation of the terms of contract determinations and the difficulty, delays and cost experienced by interested parties of seeking to engage in legal proceedings directed at updating or amending the contract determinations. In relation to this last problem, we note that this has contributed to several of the major contract determinations not

[8] This is dealt with under point 7 at pages 11 to 13

adequately evolving to reflect contemporary circumstances (such as the rise of the 'on-demand' or 'gig' sector).

Chapter 6 certainly does not provide a workable precedent for the regulation of new and rapidly developing sectors such the gig or platform industry.

Prof' Peetz' submissions regarding the impact of Chapter 6 and safety outcomes

Prof. Peetz' submissions effectively contend, albeit in an extremely guarded and somewhat speculative manner, that there may be an association between the operation of Chapter 6 and improvement in road safety outcomes in NSW.[9] This opinion is based largely on data relating to fatal crashes involving articulated trucks (which are unlikely to be commonly used by contractors undertaking what is commonly regarded as 'courier work). He relevantly concludes that, "It seems likely that the occupational safety in heavy road transport improved with the entrenchment of Chapter 6." Prof. Peetz' conclusion should not be accepted.

The evidence available simply does not establish a causal connection between improved safety outcomes in NSW and the operation of the legislation.

Prof. Peetz properly acknowledges that there are limitations on the conclusions that can be drawn from available data canvassed in his submissions.

The submissions do not however also acknowledge the limited geographic and sectorial application of contract determinations in place in NSW over the period analyzed. To put it bluntly, minimum rates only applied to a limited cohort of contract drivers in NSW under the NSW system during this period. In this respect we observe that the 'Transport Industry General Carriers Contract Determination', which is the contract determination of broadest coverage, only applied to the County of Cumberland (metropolitan Sydney) and to contracts of carriage undertaken within a 50km radius of a principal contractor's depot until 2017. At that time, the coverage of the instrument was expanded so that it applied throughout NSW, but the minimum rates provisions in the instrument still only regulated the County of Cumberland. It was amended with effect from 1 January 2019 so that the minimum rates obligations in the instrument also applied to certain freight corridors between metropolitan Sydney and the Wollongong and Newcastle regions.[10] However, it still does not set minimum rates obligations in relation to work undertaken more broadly throughout NSW. Further, there are a range of specialised vehicles that are excluded from its coverage.

Prof. Peetz' submissions also fail to account for the potential significant level of non-compliance with contract determinations during the relevant period.

[9] This is dealt with under point 8 and 9, at pages13 to18
[10] Clause 19.1 and clause 19.2 of the Contract Determination.

Prof. Peetz' speculative conclusions regarding the impact of Chapter 6 on improved safety cannot be accepted.

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.

OFFICE ADDRESSES

NEW SOUTH WALES

Sydney
51 Walker Street
North Sydney NSW 2060

Western Sydney
Level 2, 100 George Street
Parramatta NSW 2150

Albury Wodonga
560 David Street
Albury NSW 2640

Hunter
Suite 1, "Nautilos"
265 Wharf Road
Newcastle NSW 2300

VICTORIA

Melbourne
Level 2 / 441 St Kilda Road
Melbourne VIC 3004

Bendigo
87 Wil Street
Bendigo VIC 3550

QUEENSLAND

Brisbane
202 Boundary Street Spring Hill
QLD 4000

ACT

Canberra
Ground Floor,
42 Macquarie Street
Barton ACT 2600

SOUTH AUSTRALIA

Adelaide
Level 1 / 45 Greenhill Road
Wayville SA 5034

WESTERN AUSTRALIA

South Perth
Suite 6, Level 3 South Shore Centre 85
South Perth Esplanade
South Perth WA 6151

www.aigroup.com.au