Ai GROUP SUBMISSION

Department of Employment and Workplace Relations

Submission in response to consultation paper on 'Employee-like' forms of work and stronger protections for independent contractors

15 May 2023

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission in response to the Department of Employment and Workplace Relations (**DEWR**) consultation paper on '*Employee-like' forms of work and stronger protections for independent contractors* (**Consultation Paper**).

The reforms being proposed are radical. They have the potential to be a catalyst for significant adverse consequences for the 'employee like workers' they are intended to assist as well as for the parties that engage them and the broader community that benefits from, and indeed has come to rely upon, the services provided through the kinds of contracting and commercial arrangements that may be impacted by the proposed reforms. It is crucial that there is ongoing and meaningful engagement with industry and its representatives in the development of any regulatory response proposed. Engagement over the high-level concepts and proposals raised in the consultation process should be the start of a much more detailed and comprehensive process.

The Consultation Paper states that:

1. The Government intends to give the Fair Work Commission (**FWC**) the power to set minimum standards for workers in 'employee-like' forms of work, including the gig economy.

2. The Government is considering allowing the FWC to set fair minimum standards to ensure the road transport industry is safe, sustainable and viable; and

3. The Government intends to amend relevant legislation to give workers the right to challenge unfair contractual terms.

As we understand the Government's position, as expressed in the Consultation Paper, the Government intends to implement the first and third of the above items and is considering the merits of whether to implement the second item. We do however understand that the scope and nature of the first and third reforms is subject to consultation.

We understand that the Government has not committed to implementing broader reforms impacting the road transport industry. Such reforms were not part of its election commitments.

Ai Group's views on the issues raised in the consultation paper are set out below. We do however note that we have raised a raft of other matters for DEWRS consideration. We also reiterate that we seek to constructively raise salient considerations in response to the various questions raised by DEWR, notwithstanding our concerns about the overarching direction of the proposed policies addressed in the consultation paper.

The Government's guiding principles

The Consultation Paper states that the Government has set the following five guiding principles as

relevant to the development of the reforms:

1. Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.

2. All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.

3. Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.

4. The FWC should set minimum standards that:

    a. are fair, relevant, proportionate, sustainable, and responsive,

    b. reflect workers' independence and flexible working arrangements. For example, choosing which tasks to accept and refuse; how to undertake their work; where and when they work; and which businesses to contract with, and

    c. mitigate, to the greatest extent possible, unintended consequences for workers, businesses, consumers, and other aspects of the labour market.

5. The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.

The proposals set out in the following sections of this submission are consistent with the above five principles.

Empowering the FWC to set minimum standards for workers in 'employee-like' forms of work, including the gig economy

Scope of workers

The Consultation Paper seeks views on an approach which positions the engagement of a worker through a platform as the primary factor in determining coverage by the reforms. Views are also sought on whether there are other factors, in addition to engagement via a platform, that should be used in framing the scope of the new jurisdiction.

Question 1: What is the best approach to defining the scope of the Fair Work Commission's new functions, taking into account the engagement of a worker through a platform as the primary factor?

Question 2: What other factors should be considered?

With regard to the above two questions in the Consultation Paper, Ai Group proposes that the scope of the FWC's proposed new discretion be clearly defined. This is best done through:

- A clear definition which identifies the boundaries of the jurisdiction;
- A list of exclusions to avoid disturbing contractual arrangements in sectors that are not intended to be covered by the reforms; and
- A regulation making power to enable other exclusions to be implemented if any unintended consequences arise.

Logical key elements of the coverage definition would include:

- The workers are independent contractors;
- The workers are engaged by a business which operates an on-line or application-based platform or the workers who source work through an online or application-based platform (**platform business**);
- The customers of the platform business or end-users use the platform to acquire the relevant goods and services through the platform;
- The workers obtain their work or source leads through the platform (**platform workers**);
- The contract platform worker does not engage other contractors or employees to perform the work arranged through the platform (subject to potential limited exemptions for temporary replacement labour).

All employees need to be expressly excluded from the new jurisdiction. Pay and entitlements of employees are comprehensively dealt with in the *Fair Work Act 2009* (Cth) (**FW Act**) and the modern award system.

Also, as identified in the Consultation Paper, the following areas need to be excluded:

> *Work involved in the 'sharing economy' – the sharing of accommodation, cars or tools, etc. – is not intended to be within scope of this measure as the value is generally derived from the asset, rather than the work performed. Platforms that merely advertise services or products without any need to register or facilitate payments are also generally not considered to be part of the gig economy.*

In addition, qualified professionals, technical workers and tradespeople who provide their services on an independent contracting basis should be excluded. It is common for these people to advertise their services and obtain work through websites. Examples include builders, electricians, plumbers, engineers, architects, draftspersons, landscapers and graphic designers.

If any categories of professionals are to be included (e.g. the Government has mentioned certain professionals who provide aged care and disability services on an independent contracting basis through platforms could be included), these categories need to be tightly defined. Any proposed reform should recognise that these cohorts of workers operate in the context of unique sectors or circumstances and perform services that are not typical of those provided by most contractors.

Parameters for the FWC

Question 3: What 'guardrails' should be set to guide the FWC in exercising its functions?

The Consultation Paper suggests that the FWC could be empowered to exercise its functions in a broad way but balanced by 'guardrails' set by the Australian Parliament.

The Consultation Paper provides the following examples of possible 'guardrails':

- *legislation that clearly sets out the scope of workers covered and functions the Fair Work Commission should exercise*
- *an 'objective' or set of factors that the Fair Work Commission should have regard to in making its decisions, operating in a broadly similar way to the modern awards objective*
- *requirements around the process of making orders and performing certain functions (e.g. the parties that can make applications for standards, agreement-making, etc.), and*
- *the making of a work plan to help prioritise the Fair Work Commission's work.*

Ai Group's views on the above four potential guardrails are:

1. It is critical for legislation to clearly set out the scope of workers covered and functions the FWC should exercise.
2. It is critical for the legislation to provide strong guidance to the FWC on the way that its discretion should be exercised in the new jurisdiction, and the objectives that are intended by Parliament to be achieved. A set of factors that the FWC must have regard to when making decisions, is a logical way to achieve this.
3. The legislation needs to set out key requirements relating to the FWC's role in making orders and performing its functions.
4. Ai Group does not support the *need* for the FWC to make a work plan under the new jurisdiction. A similar approach was adopted by the RSRT, with negative consequences. The mistake should not be repeated.

The legislation to implement the 'guardrails' and other aspects relating to the FWC's new jurisdiction should be the *Independent Contractors Act 2006* (Cth) (**IC Act**). This is the principal

legislation which governs independent contracting relationships throughout Australia.

The IC Act already applies to a wide variety of independent contractors, including contract platform workers. For example, the legislation includes unfair contracts provisions which apply to such workers. The IC Act could readily be amended to provide minimum standards and increased protections for contract platform workers.

The FW Act governs employment relationships and is not an appropriate vehicle for governing independent contracting relationships.

The IC Act has provisions dealing with the interaction between the IC Act and State and Territory laws. This is an important issue because widespread confusion and unfairness would result if businesses were required to comply with Federal and State/Territory laws dealing with the same subject matter, without specific consideration of interaction issues.

The FWC is given a role in many Commonwealth statutes. Therefore, there is no reason why appropriate powers cannot be given to the FWC through the IC Act.

Apart from the FWC Act, Commonwealth statutes which give important roles to the FWC include:

- The *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth);
- The *Fair Work (Registered Organisations) Act 2009* (Cth);
- The *Work Health and Safety Act 2011* (Cth);
- The *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth);
- The *Defence Act 1903* (Cth);
- The *National Health Act 1953* (Cth); and
- The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

Additional guard rails or parameters governing the Commission's powers

We below set proposed additional guard rails or parameters, beyond the scope of any new jurisdiction, that should govern the Commission's powers.

- **The new rates should set a 'safety net' rather than market rates**

The scope of the Commission's power should be subject to an overarching limitation that confines the standards to the setting of minimum safety net of terms and conditions rather than paid or market rates. This could be achieved through inclusion of a provision similar to that provided by s.138 of the Fair Work Act in relation to safety net. This is consistent with guiding principle 4 that stipulates that the FWC should set minimum rates.

Such an approach would enable the setting of a fair level playing field while preventing the system from being used to unduly stifle competition. There should be scope for individual platform businesses to provide enhanced terms and conditions as a means of attracting contractors.

The setting of standards at an appropriate minimum safety net level will promote compliance and the maintenance of the viability of platform workers. Experience of the NSW system of regulation of contractor terms and conditions, as well as the operation of the RSRT, demonstrates the need for the power of the Commission to be confined as proposed.

The NSW system has, in some instances, been used to secure rates well above what could be justified by any notion of safety net. It is common for rates in that jurisdiction to be set, in part, by reference to relevant rates within awards and assumed operating costs. However, some instruments contain rates of remuneration set at levels that do not reflect such notions. Indeed, parties have expressly approached the setting of rates in particular subsectors within NSW with a view to 'pricing out' new entrants to a sector or organisations that are not unionised. Such an approach undermines competition. It has also encouraged parties to adopt alternate business practices that avoid the use of contractors (an outcome that is detrimental to the workers that are intended to be protected by the relevant legislation). Such unduly high rates have also proved extremely damaging to parties that engage contractors when conditions in a particular sector change or deteriorate.

The unrealistic rates of remuneration that have at times, and in some circumstances, applied in NSW have also contributed to non-compliance.

The operation of the RSRT provided a powerful demonstration of how the setting of rates can have an extremely negative effect on the viability of contractors by acting as a disincentive to their engagement.

- **Any new legislative regime should not assume that remuneration will or should be set in the form of an hourly rate**

Contractors are currently paid through a diverse array of methods. In sectors of the road transport industry that might be said to overlap or compete with platform businesses, it is very common for remuneration to be set by reference to piece rates or per kilometre rates. Similarly, in non-transport related contracting arrangements it is very common for remuneration to be set by reference to completion of a task rather than the time they spend working. This is consistent with the control that most contractors have over the precise way that they undertake their work. Any new regime should not assume that contractors will, or should, be paid hourly rates. Whether or not this approach should be adopted is a matter that should be determined by the FWC.

- **The Commission should not be permitted to set remuneration for performance of activities that a worker has not been contracted to perform.**

The Commission should be confined to setting minimum remuneration for work that a platform worker has been engaged, on a contractual basis, to undertake. There should not be a capacity for the Commission to require payments to a contractor for the performance of activities that do not constitute work that they have been contracted by the Platform Business to undertake.

Question 4: What factors should be included in the FWC's 'objective' for setting standards?

The Consultation Paper advises that the Department of Employment and Workplace Relations is considering the following factors for inclusion in an 'objective' that would guide the FWC in its decision-making when making standards:

> *Standards should be set taking into account:*
>
> - *be tailored to the needs of specific sectors*
> - *be fair, relevant, proportionate, sustainable, responsive*
> - *reflect workers' independence and desire for flexible working arrangements*
> - *take into account the needs of workers*
> - *promote innovation, productivity and competition*
> - *mitigate negative impacts on businesses, their viability and unique business models*
> - *avoid as far as possible unintended consequences on workers, consumers and the labour market*
> - *be accessible, transparent and offer high degree of certainty to all parties*
> - *be accessible, transparent and offer high degree of certainty to all parties*

Ai Group supports the above proposed factors but proposes that the following additional factors should be required to be taken into account:

- *The need for standards to be simple and easy to understand;*
- *The need for standards to be consistent with the objects in section 3 of the IC Act;*
- *That platform workers are independent contractors and not employees;*
- *The need to avoid measures that may reduce workforce participation and, in particular, the engagement or allocation of work to Platform Workers, as well as the need to promote work opportunities for Platform Workers;*
- *the needs and preferences of consumers and industry partners and any impact that the making of an order may have on such parties;*
- *the impact on the broader economy;*
- *any adverse impact on Platform Businesses, including any cost impact and regulatory burden of any standard; and*

- *that Platform Workers may not obtain their entire income from work performed for Platform Businesses and that they may be engaged by multiple platforms, by other businesses or engage in other activity that provides an income*

It is particularly important that the legislation provides strong guidance to the FWC to ensure that the Commission treats the businesses and independent contractors who will be covered by the new jurisdiction differently to employers and employees.

If strong guidance is not given to the FWC through the legislation, the FWC may be guided by previous Full Bench authorities relating to employers and employees and this could result in outcomes that are not in the interests of workers, businesses or the community.

Although the FWC is not bound by principles of *stare decisis*, the Commission generally follows previous Full Bench decisions in the absence of cogent reasons for not doing so.[1] Most FWC Full Bench authorities will not be relevant to the issues that the FWC would need to take into account in its new jurisdiction. For example, many awards include minimum engagement periods of three or four hours, but minimum engagement / remuneration periods would be completely unworkable for the on-demand food delivery sector and some other types of on-demand contract platform work. As soon as a food delivery job is finished, a worker typically wants to obtain another job straight away, either with the same platform or through another platform.

In 2016, the absence of appropriate criteria to guide the discretion of the former Road Safety Remuneration Tribunal (**RSRT**) contributed to the Tribunal making a road safety remuneration order that would have had disastrous impacts on the road transport industry had it continued to operate. The order did not adequately take into account the interests of the independent contractors (i.e. owner drivers) who worked in the industry. This failure led to the *Road Safety Remuneration Act 2012* (Cth) being repealed by Parliament and the RSRT abolished shortly after the order was made by the RSRT. The RSRT experiences are discussed in more detail later in this submission.

We are very concerned that the consultation paper appears to contemplate the establishment of a regime for setting standards for employee like workers that bares striking similarities to the system administered by the RSRT and that proved deeply problematic. Appropriate measures should be developed to ensure that an outcome akin to the devastating impact of the orders set by the RSRT is not visited upon contract platform workers.

We also emphasis that the nature of contracting relationships between Platform Businesses and Platform workers is very different to the nature of relationships between contractors and principal contractor that were contemplated when legislation such as Chapter 6 of the Industrial Relations Act 1996 or the scheme underpinning the operation of the RSRT was implemented. The preferences and situation of Platform Workers is also often very different to that of traditional

[1] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [25]-[27]; *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (2003) 127 IR 205 at [48].

contract carriers. It should not be assumed that a development of a regulatory regime akin to that which operates under Chapter 6 of the Industrial Relations Act 1996 would provide a workable model for development of Commonwealth regime. Many of the assumptions or conventions that have underpinned the development of contract determinations setting minimum rates in that jurisdiction would make little sense in the context of Platform Work. Ai Group would welcome the opportunity to discuss these issues with DEWR. Any legislation must ensure that the FWC takes into account such considerations.

Content of minimum standards

Question 5: What kinds of minimum standards are needed and why?

The Consultation Paper states that:

- Consistent with the purpose and other functions of the FWC, it is expected that the content of minimum standards would be limited to work-related matters and not the commercial matters that may feature in service agreements, and
- It is intended that any minimum standards made by the FWC would be tailored to the needs of the workers and businesses they cover.

We agree with both of the above important points.

The Consultation Paper suggests that:

> *The FWC could be directed to make minimum standards in respect of, but not limited to:*
>
> - *minimum rates of pay*
> - *concepts of 'work' time (e.g. which activities performed by a worker should attract compensation)*
> - *payment times (e.g. timeframes between performance of work and payment)*
> - *workplace conditions, such as portable leave, rest breaks, etc.*
> - *treatment of business costs, including vehicles and maintenance, insurances, licenses, etc.*
> - *record keeping*
> - *training and skill development, and*
> - *dispute resolution.*

It is important that the kinds of minimum standards that the FWC is able to make are clearly specified. Since 1996, workplace relations legislation has specified the matters that can be, and cannot be, included in awards. An open-ended approach for the FWC's proposed 'employee-like' forms of work jurisdiction is not appropriate. Accordingly, the wording *"but not limited to"* in the above extract from the Consultation Paper would not be appropriate for the relevant legislation.

It is also important that the Fair Work Commission is not directed to set standards in relation to each of the items addressed above but rather is merely empowered to do so, within the context of meeting a broader statutory obligation. Relevantly, the Commission should be empowered to set fair and relevant standards for relevant workers that may include terms that are about a specified list of matters having regarding to specified mandatory considerations. This would be analogous to the modern award powers afforded to the Commission. Such an approach may mean that, for some sectors, the Commission elects to only set standards in relation to some of the abovementioned matters (should it form the view that this is appropriate).

More broadly, the Commission should not be *required* to set standards for any particular sector. It should be for the Commission to determine whether it is appropriate to set minimum standards in the context of specific sectors.

The concept of 'work time'

The concept of 'work time' will foreseeably be highly problematic in some sectors. Many contractors are engaged to perform a task rather than to spend a particular amount of time undertaking an activity. It is not uncommon for some contractors to be paid be reference to the completion of a task rather than by reference to the passage of time. Indeed, the time a contractor spends undertaking an activity may be highly dependent upon decisions that they make, in their own interests, and may be beyond the control of the party that engages them. Even in traditional road transport sectors it is very common for employees or contractors to paid by reference to remuneration schemes that might be described as piece rates rather than time-based payment systems.

The reference to 'time' should be deleted from the second bullet point.

The jurisdiction should also be confined to setting of remuneration for work that a platform worker has been engaged to undertake. There should not be a capacity for the Commission to require payments to a contractor for the performance of activities that do not constitute work that they have been engaged or contracted to undertake.

Considerations associated with the proposed reference to workplace conditions

The reference to workplace conditions is unduly broad and ambiguous. It could capture a raft of matters. It is also unclear how it would apply in the context of contractors that do not have a traditional workplace or any form of workplace provide by the party that engages them.

There is no comparable capacity for the FWC to set 'workplace conditions' through awards.

The reference to ‘workplace conditions’ should be deleted.

The reference to ‘portable leave’ should be deleted.

The design and implementation of a portable leave scheme for the sectors covered by the proposed new jurisdiction would be very complex and such a scheme should not be contemplated without thorough analysis, consideration and consultation with the businesses that would be required to pay a levy to fund the scheme.

The FWC currently has no involvement in the design or administration of any portable leave scheme. The existing portable leave schemes are limited to long service leave and they operate under State and Territory laws, with the exception of the coal mining long service leave scheme which operates under Commonwealth legislation. Notably, section 155 of the FW Act expressly prevents awards dealing with long service leave entitlements.

A generic reference to ‘absences’ from work would enable the FWC to determine the basis upon which leave arrangements should operate. This is more appropriate term in the context of a contractual relationship.

Training & Skill Development

Modern Awards are not permitted to include terms dealing with such matters. It would be unjustifiable and anomalous for the Commission to have greater powers in this respect in the context of contractors.

Ai Group is particularly concerned that Standards not be permitted to impose generic training requirements (such as the controversial blue card system that applies in NSW and is strongly supported by the TWU, but which is both expensive and of limited utility or relevance in the context of the on-demand or ‘gig' sector) that would be less effective than training standards developed or implemented by specific enterprises.

Dispute Resolution

We address this matter in further detail later in this submission.

We here simply emphasize that the power of the Commission to deal with the resolution of disputes should be dealt with through the IC Act and that it should be confined to disputes over standards set by the Commission.

Record Keeping

Any power to set record keeping obligations should be subject to clear parameters. This should provide that any record keeping requirement should:

- be limited to a requirement to keep records that are necessary for the practical operation and enforcement of any Standard that is set; and

- include limits on how long the record should be kept.

Consideration should be given to dealing with record keeping in the IC Act rather than any Commission developed standard. Awards do not comprehensive obligations relating to record keeping. Such matters are generally dealt with through legislation.

The 'standards' must be capable of setting reciprocal obligations upon both parties to any engagement

Crucially, any power afforded to the Commission to set standards should encompass a power to set obligation on both the parties that engage the workers and the workers themselves. This is both fair and will likely to be crucial to the practical operation of the standards.

In terms of practical operation, we note for example that if a standard required an platform business to keep certain records it might be prudent for it to also require the platform worker to undertake actions that are necessary to facilitate this. Similarly, if a standard required payment at a certain level in order to ensure proper maintenance of equipment or the taking out of insurance, or the maintenance of particular license it is likely appropriate that such a standard also require that the Platform Worker undertake the necessary actions to justify the relevant payment (such as properly maintaining the vehicle, obtaining the relevant insurance or license or providing proof of such matters). We would be happy to elaborate on this point further if it assists. We do however note that it is common for industrial instruments to impose obligation on both parties covered by them.

Potential alternate list of matters

In light of the above considerations, we tentatively propose the following alternate list of matters that the Standards should be confined to dealing with terms about :

- *minimum remuneration for a 'gig' or work that a platform worker has been contracted to undertake*
- *concepts of 'work' (e.g. which activities performed by a worker should attract compensation)*
- *payment times (e.g. timeframes between performance of work and payment)*
- *treatment of business costs, including vehicles and maintenance, insurances, licenses, etc.*
- *absences*
- *a platform worker's obligations related to obtaining goods or services associated with the performance of their work (e.g. provision of a vehicles and obtaining insurances or licences)*

- *record keeping requirements that are necessary for the practical operation of term of any Standard set by Commission and not addressed through the IC Act*

There would foreseeably be a need for the Commission to also have a power to include ancillary terms or machinery provisions in any standard. A term similarly to s.142 of the FW Act could be warranted in any legislative amendment.

Process for making minimum standards

Question 6: How can the standard-setting process in the FWC be designed to deliver efficient, reliable, sustainable and fair outcomes?

The Consultation Paper proposes that the FWC adopt similar processes to those that apply to its other functions such as setting and reviewing modern awards, including:

- An eligible party would make an application for a new or revised standard;
- The eligible party would need to make a case for its proposed new or revised standard;
- In considering applications, the FWC would take submissions, hear evidence, conduct hearings and assess research; and
- The FWC would have the option of making draft orders or publishing draft or preliminary decisions.

Ai Group does not oppose the above broad approach but it is critical that the FWC treat applications under the new jurisdiction very differently to those that relate to employers and employees, as discussed above in relation to Question 4.

Consistent with the approach in sections 158 and 160 of the FW Act, applications for new or revised minimum standards should be able to be made by:

- A worker covered by the relevant existing or proposed minimum standard;
- A business that is covered by the relevant existing or proposed minimum standard; and
- A registered organisation that is eligible to represent a worker or business that is covered by the relevant existing or proposed minimum standard.

We also proposed that a capacity to initiate proceeding should be broadened to include:

- A peak council, as recognised under the *Fair Work Act 2009* that is also a registered organisation*,* should also have the capacity to commence proceeding associated with the making or variation of an instrument regardless of matters associated with the coverage of the existing or proposed minimum standard.

This is appropriate having regard to the broad impact that any standards set may have on the economy or community and the foreseeable likelihood that any standards set in one sector will have a flow on effect to the form or substance of subsequent standards.

Such an approach is also appropriate given the established pattern of significant proceedings concerning awards often being conducted exclusively or predominantly conducted through involvement of such peak councils. Similarly, Ai Group is one of a very small number of organisations that routinely participate in proceeding in the NSW jurisdiction. Indeed, Ai Group is not uncommonly the *only* party to participate in proceedings concerning awards conducted by the Fair Work Commission or contract determination related proceedings conducted in the NSW IRC on behalf of industry (and at times participates at the express request of the relevant industrial tribunal).

- The Commission should also have a capacity to make or vary conditions of its own motion. This would enable the Commission to commence proceedings of a person or entity without formal standing to bring an application raising relevant issues to the Commission's attention and for the matter to be properly ventilated if the FWC determines that it warrants attention. It would also enable the Commission to address any deficiencies in standards that evolve or are identified after they are first made.

The Fair Work Commission currently permits involvement from a broad range of interested parties in proceedings relating to the making or varying of modern awards. Any legislative response should similarly enable this to occur in the context of any jurisdiction setting terms and conditions for employee like workers. This would recognize that there may be many parties affected by the making of any standards set by the Commission.

Without seeking to limit the above proposition, the Commission should be required, prior to the making of any Standard, to afford any party that it will impose an obligation upon through the making of a standard, or any registered organization, peak council or industry association with a relevant interest, to provide their views to the Commission concerning the making of the proposed order and its content.

Any proposed standard should not be able to be made with retrospective effect unless it is in circumstances that are analogous to those contemplated by s.160 of the FW Act in the context of modern awards.

Question 7: How can the FWC's processes reflect the character of 'employee-like' workers and engage with them appropriately?

Discussed below

Question 8: How can potential unintended negative impacts for workers, businesses, consumers and the labour market be mitigated?

The issues identified in Questions 7 and 8 are best addressed through the legislation being structured in the correct manner and through strong guidance being given by Parliament to the FWC in the way that it needs to exercise its discretion in the new jurisdiction. Critical elements include:

- The new jurisdiction needs to be implemented through amendments to the IC Act; not the FW Act. (See Question 3 above).
- The legislation needs to identify a set of factors that the FWC must have regard to when making decisions. (See Questions 3 and 4 above).
- The subject matter that the standards can deal with need to be tightly defined, as does the scope of any new jurisdiction.

Question 9: How could the FWC's orders be enforced?

The Consultation Paper proposes that the Fair Work Ombudsman be primarily responsible for education, compliance and enforcement of the FWC's Orders. This is a logical approach.

It is important that decisions of single members of the FWC are able to be appealed to a Full Bench of the FWC. It is also important that applications are able to be made to the Federal Court of Australia and the Federal Circuit and Family Court of Australia for judicial review of an FWC decision.

A similar costs shield to section 570 of the FW Act needs to apply. The approach in section 570 enables representative bodies like Ai Group to seek judicial review of problematic decisions of the FWC and Courts without significant risk of adverse costs orders. Parties generally bear their own costs, which facilitates just outcomes.

Agreement-making

The Consultation Paper states that the Government is considering a framework to allow the FWC to approve consent agreements reached between individual businesses and groups of independent contractors that supply services to them, without necessarily creating a parallel agreement-making stream for independent contractors.

Question 10: What should be the features of a best practice agreement-making framework, including the role of the Fair Work Commission and worker and business representatives?

Question 11: In what circumstances should agreements be able to be made before minimum standards are in place and what safeguards should apply?

Ai Group does not support the FWC having a role in approving agreements for independent contractors, including contract platform workers.

Under the *Competition and Consumer Act 2010* (Cth) (**CC Act**), independent contractors are able to jointly negotiate improvements to remuneration and conditions if granted an exemption by the Australian Competition and Consumer Commission (**ACCC**).

In June 2021, an ACCC Collective Bargaining Class Exemption for small businesses came into operation providing straightforward access to an ACCC bargaining exemption. Groups of independent contractors can access the class exemption by simply giving notice to the ACCC and each target business. Contract platform workers and their representatives are able to utilise the class exemption.

Unions are able to represent groups of independent contractors in negotiations with businesses, under the collective bargaining processes that are permitted under the CC Act. The eligibility rules of most unions enable them to represent both employees and independent contractors in the relevant industries or occupations. Any union that is not currently eligible to represent independent contractors, can apply to the FWC to amend its eligibility rule.

The development of a new agreement making regime would not be consistent with establishment of a level playing field as contemplated by the guiding principles.

In Ai Group's experience, the ability for agreements applying to contractors to be made under the *NSW industrial relations Act 1996* has contributed to undesirable industrial disputation.

Dispute resolution

Question 12: What disputes should the FWC be able to help resolve?

Ai Group's primary view is that any regulation relating to dispute resolution should be dealt with through legislation.

Under the Australian Constitution, only a court can exercise judicial powers. Therefore, the FWC's role must necessarily not involve the exercise of judicial powers. The Consultation Paper correctly points out that the FWC is constrained in its ability to settle disputes over a worker's status as an employee or independent contractor as it is a tribunal and not a Court.

The FWC should not be empowered to deal with disputes about the following matters:

- Disputes about a worker's status as an employee or independent contractor;
- Disputes about commercial matters such as those contained within service agreements. (This is consistent with the clarification on page 12 of the Consultation Paper that: *"it is expected that the content of minimum standards would be limited to work-related matters and not the commercial matters that may feature in service agreements*);
- Disputes about software updates or other technological enhancements (e.g. to Apps) as the major platform businesses typically develop and implement these matters on a global

basis; and

- Disputes about decisions made by a platform business to restrict a worker's access to the platform when this is necessary for reasons relating to safety, fraud or a failure to perform the contracted services. For example, if a platform business receives an allegation of assault or sexual assault about a worker, the worker's access to the platform needs to be restricted until the matter has been investigated.

The FWC's dispute settling role should be limited to disputes that arise about worker entitlements in the areas dealt with in the minimum standards.

The IC Act could be amended to require that platform businesses implement a clear and accessible mechanism or procedure to resolve disputes about a matter in the minimum standards. A model term could also be developed and applied if an enterprise specific standard is not implemented. A party should not have access to the FWC's dispute resolution processes until the party has attempted to resolve the dispute through the enterprise-level dispute resolution mechanism or procedure.

Any dispute resolution process or jurisdiction established by any legislative amendment should not operate as a quasi-unfair dismissal regime. The relationship between a platform business and platform worker is fundamentally different to that between an employer and employee. The operation of such a regime would not be warranted or capable of practical operation.

Ai Group, and many major Platform Businesses, would value further engagement with DEWR in relation to any potential regulatory response in relation to dispute resolution in the platform business context. There are a raft of practical considerations that should be properly ventilated and considered through thorough and constructive engagement with industry ahead of the development of any regulatory response. The timeframes governing the consultation process thus far have not properly permitted this to fully occur.

Question 13: What remedies and roles could the FWC have available to it to resolve disputes?

As pointed out in the Consultation Paper, the FWC's method of dealing with disputes typically involves conciliation, mediation and/or consent arbitration.

The FWC's dispute resolution powers should be set out in the IC Act. Similar to the FWC's powers under sections 595 and 739 of the FW Act, the FWC should have the power to deal with a dispute in the following ways:

- By mediation or conciliation;
- By making a recommendation or expressing an opinion; and
- By arbitration, if the parties have all/both agreed that the FWC may arbitrate.

There is no reason why the FWC's dispute resolution role and powers cannot be dealt with in the IC Act. The FW Act is not the only statute that gives dispute resolution powers to the FWC. For example, section 39D of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth), gives a dispute settling role and powers to the FWC.

Improving avenues for workers to challenge unfair contractual terms

The Consultation Paper indicates that the Government is considering introducing a low-cost jurisdiction for the FWC to deal with unfair contract disputes for certain classes of independent contractors.

In outlining various background issues, the Consultation Paper identifies the following existing avenues for independent contractors to challenge unfair contractual terms:

- The unfair contracts jurisdiction under the IC Act;
- The provisions in the Australian Consumer Law (Schedule 2 of the CC Act) which provide protections for small businesses (including independent contractors) against unfair contractual terms in standard form contracts;
- Voluntary industry-based codes of conduct;
- Internal complaints procedures implemented by businesses;
- State and Territory laws and processes.

Ai Group's views on an FWC unfair contracts jurisdiction

We hold significant concerns that the proposed FWC unfair contracts jurisdiction would have major adverse effect on a range of industries where contracting arrangements are long established, and in many cases favoured by all parties, including workers. This includes the building and construction industry and the road transport industry.

There is a real risk that ill-conceived or hurriedly implemented changes would drag parties into litigation over contractual arrangements and result in industry being less prepared to offer independent contractors work. It would also result in an entirely unwarranted shift away from established business models that would potentially damage many businesses, in particular small businesses.

As identified above, there are already a raft of protections for independent contractors and avenues for them to challenge unfair contracts. A strong case needs to be made out for any major changes and, to date, this has not occurred.

There is a real risk that changes that are designed to assist independent contractors may ultimately undermine their viability and livelihoods.

The unfair contracts jurisdiction in Part 3 of the IC Act

Part 3 of the IC Act provides protection for independent contractors against unfair contracts, including contract platform workers. It makes no sense to create a different regime. To do so, would create unnecessary costs and uncertainty for businesses, workers and the community.

If any legitimate deficiencies are identified in the provisions in Part 3 of the IC Act, appropriate amendments can be made to the provisions.

The scope of the unfair contracts jurisdiction in Part 3 of the IC Act is well suited to contract platform workers. The jurisdiction applies to services contracts, other than:

- Contracts relating to the performance of work for the private and domestic purposes of another party to the contract.
- Contracts with bodies corporate, unless the work is wholly or mainly performed by a director of the body corporate or a member of the family of a director of the body corporate.

To the extent that the Government may seek to regulate certain contractual arrangements in the aged care and disability sectors, the first exemption could be readily modified.

Under Part 3 of the IC Act, an application can be made to the Federal Court of Australia or the Federal Circuit and Family Court of Australia to review a services contract on either or both of the following grounds:

- the contract is unfair; or
- the contract is harsh.

In reviewing a services contract, section 16 of the IC Act states that the Court may have regard to:

(a) the relative strengths of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties;

(b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract;

(c) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work;

(d) any other matter that the Court thinks is relevant.

If the Court decides that the whole or part of the contract is unfair and/or harsh, the Court may make one or more of the following orders:

(a) an order setting aside the whole or a part of the contract;

(b) an order varying the contract.

The Report of the Inquiry into the Victorian On-Demand Workforce was critical about the current lack of advice and support available for those wishing to access the unfair contracts provisions in Part 3 of the IC Act:

> *'1168 It is not clear who is responsible for providing advice and support to independent contractors about their right to seek a remedy or how to do it. Repeated approaches to the FWO and Commonwealth Attorney-General's Department did not reveal any clear or concerted government support in this regard.*
>
> *1169 The Inquiry put questions to the Commonwealth Attorney-General's Department about the nature and extent of support available to people seeking to access the unfair contracts jurisdiction under the IC Act, including resources. Their response referred to the FWO's role in providing advice about workplace laws.*
>
> *1170 When asked about the resources allocated to supporting the administration of the IC Act, the same department told the Inquiry there are practical limits to the information available to share with the Inquiry; one being the fact that it is held across multiple agencies.*
>
> *1171 The FWO advised the Inquiry that 'taking into account the provisions of both the IC Act and the FW Act, FWO does not consider that our agency's statutory functions include advising on or enforcing the unfair contract provisions in the IC Act'. The ACCC is responsible for administering the ACL and the Director of Consumer Affairs, Victoria for the mirror state laws.'*[2]

It is not surprising that the provisions in Part 3 have been underutilised given the lack of support provided by Government Departments and regulators to those wishing to access the provisions. This can and should be addressed.

It is important to avoid repeating the mistakes of the past

In considering what changes should be made to the existing unfair contract arrangements under Commonwealth laws, it is important to avoid repeating the mistakes of the past.

Section 106 of the *Industrial Relations Act 1996* (NSW) enables the Supreme Court of NSW to declare a contract void or varied. When first implemented, the provisions of section 106 were highly problematic. Within a short period of time, section 106 had become a de facto unfair dismissal regime for senior managers, with some multi-million dollar claims being widely reported in the media. In 2002, the Carr Labor Government introduced amendments which substantially

[2] *Report of the Inquiry in the Victorian On-Demand Workforce*, June 2020, p.167.

narrowed the jurisdiction.

The implementation of a national workplace relations system underpinned by the Corporations Power in 2006 and the implementation of the IC Act that same year, appropriately resulted in State unfair contracts laws having a much narrower application.

Scope of workers

Question 14: What workers should be covered by any new protections and why?

Question 15: What kinds of disputes occur for independent contractors?

Question 16: How should disputes be resolved (e.g. FWC conciliation, mediation, arbitration or through the courts, remedies, etc)?

The Consultation Paper questions whether any new FWC unfair contracts jurisdiction should be made available to all independent contractors, or restricted to a limited cohort where there is a demonstrated need.

As explained above, an FWC unfair contracts jurisdiction is not needed. Government and industry resources would be better devoted to focusing on what changes are warranted to the existing unfair contracts laws, particularly those in Part 3 of the IC Act. It is also important for more resources to be devoted to educating businesses and workers about the unfair contracts jurisdiction in Part 3 and ensuring that workers who wish to access the provisions can readily obtain advice and support.

If, despite Ai Group's views, the Government proceeds to give the FWC a role in dealing with unfair contracts disputes for certain classes of independent contractors, the following approach would be more workable that more expansive proposals:

- The FWC unfair contracts jurisdiction should be restricted to a limited cohort of independent contracting arrangements where there is a demonstrated need.
- The FWC's dispute resolution powers should be set out in the IC Act – not the FW Act. The FW Act is not the only statute that gives dispute resolution powers to the FWC. For example, section 39D of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth), gives a dispute settling role and powers to the FWC.
- Similar to the FWC's powers under sections 595 and 739 of the FW Act, the FWC should have the power to deal with a dispute in the following ways:
    - By mediation or conciliation;
    - By making a recommendation or expressing an opinion; and
    - By arbitration, if the parties have all/both agreed that the FWC may arbitrate.

- The FWC's role must necessarily not involve the exercise of judicial powers.

The Consultation Paper identifies the following two types of disputes that could be dealt with by the FWC under a new unfair contracts jurisdiction:

- *contract terms that are 'unfair', for example in the way they deal with payment times or the circumstances in which the contract can be terminated; and*

- *'unfair' termination of services contracts, especially under circumstances where independent contractors were terminated without adequate notice, right of reply or compensation.*

It is vital that any powers given to the FWC to review decisions to terminate services contracts do not prevent a platform business restricting a worker's access to the platform when this is necessary for reasons relating to safety, fraud or a failure to perform the contracted services. For example, if a platform business receives an allegation of assault or sexual assault about a worker, the worker's access to the platform needs to be restricted until the matter has been investigated.

It is also crucial that any capacity to challenge the fairness of termination of a services contract takes into account the practical realities of the engagement of the diverse nature of the engagement of contractors. This includes situations where contractors are engaged on short-term or ad hoc basis or with little formality. It should also recognise that many contractors are not 'dependent' or 'tied' to a single party that engages them. Regard also needs to be had to the very large volume of contractors that may be engaged by some entities.

Any dispute resolution jurisdiction (particularly any jurisdiction that dealt with more than minimum conditions) should only be accessible where:

- the contractor has been engaged for an extended period of time (say 12 months);

- has not been permitted to work for other parties;

- is provided with an ongoing commitment to the provision of work opportunities; and

- has been subject to a requirement to undertake work or be available to undertake work

Any new jurisdiction should not afford the Commission a broad discretion to assess the circumstances of the termination of the engagement in a manner that is analogous to the unfair dismissal regime that operates under the *Fair Work Act 2009* or the reinstatement of contract of carriage regime that applies under the *Industrial Relations Act 1996* in NSW. The difference between the engagement of an employee and contractor should justify a different approach to the regulation of these types of engagement being maintained. It should also be recognized that the NSW regime is not widely available to contractors in that state. Applications under the regime can only be made by the TWU. Even so, the regime is far from a low cost jurisdiction for Principal Contractors to navigate. It has proven to be a very problematic jurisdiction.

Working towards a road transport industry that is safe, sustainable and viable

The Consultation Paper identifies that the Government is considering giving the FWC the power to set minimum standards for the road transport industry, and states:

> *The department is seeking feedback on the key challenges in this industry, and the optimal settings that could be considered to address them. Regard should be had to the other measures canvassed in this consultation paper, particularly around the nature and scope of the Fair Work Commission's powers to set minimum standards for 'employee-like' forms of work (particularly in relation to workers engaged within the 'gig economy') and opportunities to increase the avenues for independent contractors to challenge unfair contract terms.*

Ai Group is keen to constructively engaged with the Government in relation to any measures directed at promoting a safe, sustainable and viable road transport industry. We have a significant membership in the sector, as well as amongst clients that rely upon the sector. Multiple major associations representing the trucking industry are also affiliated with Ai Group and we have extensive experience dealing with regulation applicable to this sector.

The Government did not make clear election commitments in relation to the regulation of the road transport industry. It did not identify a specific proposed approach to the regulation of this space. Any development of new regulation in this sphere should be pursued cautiously and only to the extent that there is broad and genuine consensus.

We also note that the consultation that *preceded* the Jobs and Skills Summit did not involve representation of a broad section of the road transport industry. It did not include the peak employer/industry bodies. Relevantly, despite Ai Group's extensive interest in of the road transport sector, its direct participation in the Jobs and Skills Summit, and it having played a major role (and generally the leading role) in virtually all proceedings associated with the varying of modern awards applicable in the sector, the setting of terms under contract determinations and the operation of the Road Safety Remuneration Tribunal (RSRT) and being represented on the Victorian Government's Transport Industry Advisory Council, it (like other major groups and industry participants) was not invited to the roundtable consultation undertaken with a select group of participants. It similarly did not involve the Australian Trucking Association.

Although we acknowledge that there has been valued consultation with parties such as Ai Group following the Summit over potential regulation in this space, it is fairly characterised as preliminary and high level in nature. Much greater engagement with industry is needed to avoid a repeat of mistakes that have been made in the past in relation to the regulation of this sector.

It is critical that any new powers given to the FWC to set minimum standards for the road transport industry are framed having regard to the potential overlap with those relating to contract platform workers. A large proportion of platform work involves road transportation (e.g. the delivery of meals prepared by restaurants and fast food outlets). Any regulation in this space

should not undermine the competitive position or viability of businesses in either the traditional road transport space or those engaging platform workers.

The development any regulation of the road transport industry should not seek to simplistically replicate the flawed system of contractor terms and conditions in place in NSW through the *Industrial Relations Act 1996* or the failed system regime administered by the Road Safety Remuneration Tribunal.

Existing powers of the FWC to set minimum standards for employees

There should be no change to the FWC's current power, or indeed its obligation, to set a fair relevant safety net for employees in the road transport industry.

The FWC already has such powers in relation to the modern awards system. The FWC has the power to vary a modern award on its own motion or upon application by a party and, in effect, set minimum standards in modern awards (including for the four awards[3] that apply to the road transport industry). In exercising its powers, the FWC must be satisfied that the variation meets the modern awards objective. The elements of the objective are balanced and have been consistently applied by the FWC since the commencement of the FW Act.

Lessons learned from the RSRT – the risk of inappropriately regulating contracting in this sector

Elements of industry are deeply alarmed that the Government may be contemplating a reform that is tantamount the re-establishment of the RSRT.

The operation of the RSRT was a disaster that should not be repeated. Crucially, the problems that flowed from its operation were entirely foreseeable.

The problems should not be attributed to deficiencies in the particular orders made by the tribunal. It must be remembered that the RSRT only issued orders following years of proceedings and deliberations that included engagement with unions and industry parties as well as receipt of lay and expert evidence and the RSRT itself commissioning expert assistance in the calculation of proposed minimum rates. It issued the orders notwithstanding that parties appeared before it repeatedly and exhaustively foreshadowing the likely adverse consequences that would ensue.

The issues relating to the RSRT which operated between 2012 to 2016 are widely reported and are detailed in two independent reviews[4] which concluded that there was limited evidence of a link between safety and remuneration and that the RSRT had not delivered any tangible safety benefits. In addition to the $13.4 million of funding that was expended by the Australian

[3] *Road Transport and Distribution Award 2020, Road Transport (Long Distance Operations) Award 2020*, *Transport (Cash in Transit) Award 2020*, and *Waste Management Award 2020.*

[4] '*Review of the Road Safety Remuneration System*', Jaguar Consulting, 16 April 2014; '*Review of the Road Safety Remuneration System – Final Report*', PricewaterhouseCoopers, January 2016.

Government at that time, it's been estimated that the orders made by the RSRT had a financial impact on the broader economy that exceeded $2 billion.

Although a separate tribunal to the FWC, the RSRT sat in the FWC's premises and was largely comprised of members of the FWC. Indeed, its President was also a Senior Deputy President of the FWC. The parties appearing before it included the major industrial parties and the proceedings unfolded in a manner that was strikingly like the conduct of FWC proceedings.

Ai Group does not support the reestablishment of the RSRT or any like reform. This would be a profound regulatory change that was not foreshadowed by the Labor Party as part of its election commitments.

Ai Group has filed numerous submissions in various review processes relating to the RSRT which have identified and detailed the extent of the issues caused by the RSRT. We do not propose, at this time, to repeat those submissions. However, we have **attached** for reference:

- Ai Group's submissions to the '*Review of the Road Safety Remuneration System*' process in January 2014. Those submissions set out the issues and impacts the RSRT had on the road transport industry (**Annexure A**).

- Ai Group's submissions to the Queensland Government's '*Inquiry into the Industrial Relations and Other Legislation Amendment Bill 2022'*, which responds to various submissions made by Professor Emeritus Peetz, including the extent of the adverse impacts of the RSRT. We refer specifically to page 7 of those submissions (**Annexure B**).

The example of the RSRT provides a salient demonstration of the risk that ill-conceived regulation intended to assist independent contractors in the road transport industry can ultimately operate to their detriment.

The need for an evidence-backed approach: a focus on safety

Any consideration of introducing a new standard-setting system for the road transport industry, must have regard to whether it will deliver an effective, efficient and appropriate means of achieving safety improvements. This must be considered in the context of statistical evidence of the causes of crashes and whether there is evidence that similar regulatory regimes have been effective in addressing such matters.

In considering the effectiveness of any proposed measure on achieving safety, such research must first be undertaken, particularly in circumstances where there is a purported link between safety and remuneration commonly identified by the TWU as a justification for enhanced industrial conditions. This remains highly contentious and there is continued absence of evidence to establish that altering remuneration will result in improved safety outcomes.

In the previous Government's response to the '*Senate Rural and Regional Affairs and Transport References Committee report: Without Trucks, Australia Stops: the development of a viable, safe,*

sustainable and efficient road transport industry' in March 2022 (**Previous Government's Response to the Without Trucks, Australia Stops Report**), it was stated that:

> '*[i]n the last ten years to December 2021, road crash deaths involving heavy trucks decreased by an average of 2.9 per cent per year. Further, the number of deaths from crashes involving heavy trucks since the RSRT was abolished in 2016 has reduced. This shows the Australian Government's approach is working*.'

The previous Government's approach to achieving improvements in road safety was a whole of government approach, which focused on investing in '*practical measures that support[ed] the industry's safe, sustainable and efficient operation, combined with the existing effective regulatory support*'.[5] Such an approach should continue to be adopted in seeking to ensure that the road transport industry is safe, sustainable and viable.

For example, measures should be targeted at achieving compliance with existing laws and instruments which directly address safety and on the performance of road transport operations, for example, the Heavy Vehicle National Law (**HVNL**), and work health and safety (**WHS**) laws. Other measures which directly impact upon safety include:

- risk identification and control;
- improvements to roads and associated infrastructure;
- fatigue management;
- education and training;
- measures to address drug and alcohol misuse;
- strong compliance and enforcement mechanisms;
- development of codes of practice; and
- better use of technological solutions.

The suggested measures above are also, in our view, better aligned to the Government's election promise to '*develop a long-term road safety strategy dedicated to reducing deaths and serious injuries on our roads. This will include measures to lower the accident rates in passenger and road freight industries by tackling dangerous contracting practices in transport supply chains*'.[6]

We strongly encourage the Government to focus on increasing the investments made by the previous government to improve the ongoing viability, safety, sustainability and efficiency of Australia's road transport sector, as set out on pages 2 to 3 of the Previous Government's

[5] Previous Government's Response to the Without Trucks, Australia Stops Report, Page 5.
[6] *ALP National Platform*, 2021, paragraph [64], p.11.

Response to the Without Trucks, Australia Stops Report. This should be done instead of seeking to establish an entirely new standard-setting system (in circumstances where such measure has already shown to be ineffective in achieving improvements to safety).

The need to not exacerbate the regulatory burden on road transport businesses.

It is trite to observe that the road transport sector is already one of the most heavily regulated sectors of our economy.

In the industrial context, there are already different regulatory regimes that have been implemented in various states that deal with the engagement of certain contractors. As DEWR is aware, this includes the New South Wales, West Australia, Victoria and Queensland.

It is crucial that any proposed new alleviates rather than adds to the regulatory burden on businesses. Parties should not be left grappling with the potential interaction between any new regulatory regime and those currently in place. There is already significant uncertainty related to how the current regimes interact. We do not here advocate for the development of a new system of regulation. Instead, we simply urge that a currently problematic situation not be made worse.

Question 17(a) – If the Fair Work Commission were to be given powers to set minimum standards for the road transport industry, what factors should they cover?

The Fair Work Commission should not be given further powers to set minimum standards for the road transport industry.

The Fair Work Commission is a body that sets terms and conditions for employees. It should not be charged with setting standards for contractors in the road transport industry and certainly should not be empowered to regulate the commercial dynamics of the industry more broadly.

Members of the Fair Work Commission have been appointed on the basis of their experience and expertise in the field of employee relations, rather than on the basis of their expertise in the road transport industry. It is not an institution that is necessarily well placed to regulate complex commercial arrangements and market dynamics at play in the Road Transport Industry.

The FWC should not regulate matters that are not 'industrial' in nature

The Fair Work should not be empowered to regulate matters that are dealt with under the Workplace Health & Safety laws or the Heavy Vehicle National Law (or equivalent legislative schemes in Western Australia and the Northern Territory). Nor should it be empowered to set terms and conditions that override such legislative schemes or in anyway undermine the integrity of their operation.

The scope of the FWC's power to set of mandatory terms should be confined

If the FWC is empowered to set mandatory conditions for the road transport industry, the scope of such terms should be tightly confined in a manner similar to that which we have had advocated for in the context of 'employee like' workers.

The Fair Work Commission should not be afforded a broader capacity to regulate the road Transport Industry than is established in the context of any proposed 'employee like' jurisdiction.

Question 17(b) – which workers should they apply to (for example, only those in specific sectors of the industry)?

It should not apply to employees

As indicated above, the Fair Work Commission is already empowered, and indeed required, to set a fair safety net for employees in the road transport industry through the maintenance of the award system. Relevant parties, including the TWU, registered associations, industry participants and the Commission itself, are able to initiate proceedings to seek that the terms of such instruments should be varied if there is any deficiency in the safety net. Further, the instruments have been the subject of detailed review in both the 2 Year Review of Awards and 4 Yearly Review of Modern Awards. There is no compelling case for undermining the integrity of the safety net currently set by Fair Work Act in relation to employees.

A one-size fits all approach should not be mandated or adopted

If the Commission were afforded powers to set minimum standards for the road transport industry, it is important that it be required to have regard to industry specific considerations in determining such conditions. A 'one size fits all' approach should not be adopted. It is also important that the Commission not be *required* to set types of standards or to require that any standard that it sets applies across the entirety of the industry.

The coverage and content of contract determinations applicable in NSW system has evolved and expanded over time. This has occurred in a way that is reflective of sector specific and geographical considerations. For example, there are sector specific determination (such as those applying the car carrying sector and instrument applying to the courier and taxi-truck sector). Some instruments have discrete geographical application (or at least specific clauses within such instrument do)[7]. The system is deeply flawed but has not caused the kind of catastrophic outcomes that flowed from the RSRT's order setting minimum rates for the entirety of the 'retail sector' and the 'long distance sector'. In part, this is because the terms and conditions have been set having closer regard to the dynamics of particular parts of the industry.

The conditions should only apply to 'employee like workers'

Any mandatory conditions standards should only apply to 'employee like' workers. They should not apply to road transport businesses that engage employees or sub-contractors. There would be merit in mandatory conditions only applying to parties that would constitute 'contract carriers' as contemplated under chapter 6 of the *Industrial Relations Act* 1996.

[7] See for example the Transport Industry – General Carriers Contract Determination

There would be merit in excluding contractors that do work for a range of clients and as such do not have dependence upon a single principal contractor for the provision of work.

Q18 What institutional arrangements could best capture the views of the road transport industry, now and in the future?

Any institutional arrangements must recognise that the road transport industry is comprised of a highly diverse range of businesses. This includes entities ranging from owner drivers through to large multi-national business. It also includes a diverse range of sectors.

A further complication is that there are many businesses that undertake road transport functions as part of a broader commercial undertaking. This is reflected in the broad coverage of the *Road Transport & Distribution Award 2020*.

Consistent with the diverse nature of the industry, there are a range of organisations that represent the interests of the sector. This includes major registered employer associations and peak councils, such as Ai Group, as well as range of state-based industry and employer associations (such as Road Freight NSW). Another important Peak Council is the Australian Trucking Association. There are also many associations that represent sub-sectors of the industry (such as those engaged in transportation of the livestock, refrigerated goods or furniture).

The TWU is of course the principal registered employee organisation that operates in the context of the road transport industry. Many owner drivers and employees in the road transport industry are either not members of the TWU or are member of other industry associations that are not registered industrial organisations.

Any intuitional arrangement that seeks to capture the views of the industry should afford a means through which the breadth of parties referred to above can be heard.

Q19 How can supply chains pressures be best dealt with while avoiding potential unintended negative impacts for workers, businesses and consumers?

Supply chain pressures are best dealt with through specialised legislative schemes such as the Heavy Vehicle National Law and through the IC Act.

A simplistic and heavy-handed regulatory response of enabling an industrial tribunal to set rates and conditions in the industry would risk visiting negative consequences upon workers, businesses and consumers that it may be intended to assist. This has been demonstrated by the flawed operation of the RSRT and chapter 6 of the *Industrial Relations Act 1996.*

Q21 What is the optimal role for the Commonwealth and what impact can state and territory-based laws have for the industry?

It is not feasible to comprehensively answer this question without further details being provided by Government as to the potential scope of any legislative developments.

Although Ai Group does not support the establishment of further Commonwealth regulation of industrial conditions in the road transport industry, if such an outcome does arise, it should not simply add to the complex patchwork of state legislative schemes dealing with industrial matters that are already applicable to the sector. That is, there may be merit in adopting an approach that ensures such legislation 'covers the field' in relation of minimum standards for workers covered by it.

Industry should not be left in the difficult position of needing to navigate potentially overlapping Commonwealth and state regimes or left grappling with complicated interaction rules. Such an outcome would be particularly burdensome for organisations that operate across multiple jurisdictions.

We acknowledge that there are foreseeable constitutional limitations on the scope of the Commonwealth's power to implement universally applicable industrial laws. It is unlikely that the Commonwealth Government will have the power to regulate all commercial arrangements at play within the road transport industry. There is accordingly merit in State and Commonwealth Governments can adopt a co-operative approach to the development any further regulation of conditions for the sector. The feasibility of such an approach being adopted should be explored before the Government moves to further regulate the road transport industry.

The inability for the Commonwealth to entirely regulate the operations of the road transport industry weighs against it seeking to regulate issues related to safety in the industry that are deal with through State legislative schemes.

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