Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Submission in response to the Consultation Regulatory Impact Statement on Workers' Compensation Entitlements for Workers in the Gig Economy and the Taxi and Limousine Industry in Queensland

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WHO WE ARE

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

INTRODUCTION

1. The ALA is grateful for the opportunity to contribute to the Office of Industrial Relations' (OIR) consultation on Workers' Compensation Entitlements for Workers in the Gig Economy and the Taxi and Limousine Industry in Queensland.

2. The ALA agrees that in order to achieve the key objectives of Queensland's workers' compensation and rehabilitation scheme as described in the Regulatory Impact Statement (RIS)[2], the scheme must be extended to include those workers who currently sit outside its coverage.

3. To this end, the ALA agrees with and supports the following reform options detailed in the RIS:

   In relation to in-scope gig workers, we support the adoption of Option 2:

   Amend the Workers' Compensation and Rehabilitation Act 2003 to extend workers' compensation coverage to gig workers and require intermediary businesses to pay premiums (Preferred option).

   In relation to taxi and limousine drivers engaged under a bailment arrangement, we support the adoption of option 3:

   Amend the Workers' Compensation and Rehabilitation Act 2003 to extend Queensland's workers' compensation scheme to include taxi and limousine drivers engaged under bailment arrangements.

4. In both cases, we reject Option 1 - the maintenance of the status quo – as unacceptable in achieving the stated aims of Queensland's worker's compensation and rehabilitation scheme.

[2] Ref https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0011/177347/ris-gig-taxi-limo-industries.pdf, p.4

5. The ALA agrees with the assertion in the RIS that Queensland enjoys the best worker's compensation and rehabilitation scheme in Australia, in terms of efficiency and cost. We believe it is timely that the benefits of this scheme should be made available to all workers in Queensland, not just those in traditional employment arrangements.

RESPONSES TO CONSULTATION QUESTIONS

6. The on-demand workforce is a 21st century phenomenon being regulated via 19th and 20th century legislation.

7. Intermediaries have leveraged new technology and exploited out-of-date legislative frameworks to circumvent industrial laws and have sought to classify workers as independent contractors in order to avoid tax, insurance, industrial and other obligations.

8. There is now a high degree of public concern regarding the impact of those changes. This concern arises from the increasing prevalence of such arrangements and the disproportionate impact of insecure work on the most vulnerable members of the workforce.

9. Insecure work arrangements, such as those adopted for gig workers and some taxi/limousine drivers, strike at the fundamentals of what Australians associate with work – regular pay, ongoing employment, protection and fair conditions, and the opportunity for advancement.

10. Despite undertaking work which in every other aspect has the hallmarks of a direct employment relationship, these low paid, vulnerable workers who are engaged as independent contractors are denied access to basic minimum labour standards, institutionalised collective bargaining, and access to workers' compensation and rehabilitation processes.

11. The ALA applauds the OIR on conducting this important consultation. We appreciate the government's commitment to ensuring that the *Worker's Compensation and Rehabilitation Act 2003* remains relevant to those in non-traditional work arrangements.

12. The ALA is pleased to participate in this consultation process. We have consulted widely with our members to inform this response.

13. To this end, in the sections below, the ALA will respond to the Focus Questions articulated on page 7 of the RIS, first in relation to in-scope gig economy workers, then in relation to taxi and limousine drivers engaged under a bailment arrangement.

PART ONE – GIG WORKERS

Do you believe workers' compensation coverage should be extended to gig workers?

14. Yes.

15. The ALA and its members have long argued that workers in the gig economy have been treated unfairly in their capacity to access the basic employment rights that other workers enjoy – such as access to superannuation, access to minimum pay rates, and access to appropriate insurances.

16. As an ALA member, Maurice Blackburn noted in their submission[3] to the Queensland Government's inquiry into Wage Theft:

The advent of the 'gig-economy' and resulting irregular and insecure employment has drastically changed Queensland and Australia's industrial relations landscape. Gig-economy entities have leveraged new technology and exploited out-of-date legislative frameworks to circumvent industrial laws and have sought to engage workers as independent contractors in the delivery of services previously performed by employees.

[3] https://www.parliament.qld.gov.au/documents/committees/EESBC/2018/Wagetheft/submissions/033.pdf, p.8

17. The ALA agrees with the characterisation of in-scope gig workers as described on page 29 of the RIS, namely:

"*The person performing the work is introduced by an intermediary to perform work under a contract (other than a contract of service) for another person.*"

18. The ALA also agrees with the assertion in the RIS that gig workers have been identified as a vulnerable workforce.

19. In our experience, many of those who engage in the gig economy are from the most vulnerable of Australian cohorts.

20. They include immigrant communities and particularly those without residency or work rights, young people, students, women, those with disabilities, older workers, Indigenous Australians, early school leavers and those returning to the workforce.

21. In many cases, these people fear that speaking out against unequal treatment, or their lack of access to the employment rights other workers enjoy, will hamper their capacity to retain work or find anything better.

22. The fear of speaking out is a natural extension of the power imbalance that exists between unscrupulous employers and vulnerable employees.

23. Many gig economy workers are unaware of the supports that are available to them through unions, consumer advocates or the various information and complaints authorities.

What is your preferred option?

24. The ALA supports the preferred option for action (Option 2) as described on page 40 of the RIS, namely:

Option 2 - Amend the Workers' Compensation and Rehabilitation Act 2003 to extend workers' compensation coverage to gig workers and require intermediary businesses to pay premiums.

25. The ALA notes the provisions under this option, as described on page 40 and 41 of the RIS, namely:

- That the Act would be changed to extend the coverage of the workers' compensation scheme to gig workers and consequently require intermediaries to pay workers' compensation premiums to cover the cost of this coverage.

- That workers' compensation coverage would only be extended to those defined as gig workers. That means that this option will only apply where the intermediary has a level of control or influence over the work, cost or conditions of work being performed by the gig worker.

- That gig workers would be deemed to be 'workers' for the purposes of the Act. The option could prescribe that a gig worker is a 'worker' by amending the Act to define a 'gig worker' as a person introduced by an intermediary to perform work under a contract (other than a contract of service) for another person.

- That the term 'intermediary' would be expressly defined in the Act to capture in-scope gig workers.

- That gig workers would have access to the same no-fault statutory workers' compensation entitlements and access to common law damages under the Act as a worker. ALA commends this commitment to equality of access to justice.

26. ALA also supports the position (p.42 of the RIS) that while it is not intended to deem an intermediary to be an 'employer', it is proposed they will have the same obligations and responsibilities as an employer under the Act for the payment of premium, obligations for rehabilitation and return to work.

What are the costs and benefits or disadvantages associated with the current arrangements and your preferred option?

27. The ALA agrees with the key benefits of Option 2 to gig workers, as described on page 46 of the RIS, namely:

- Fair and equal access to same level of compensation and access to common law damages for work-related injuries as workers.

- Improved timeliness of medical intervention for work-related injuries.

- Improved durable return to work outcomes.
- Improved work health and safety outcomes.
- Early medical intervention and enhanced benefits structures also improve secondary psychological impacts on the worker and their family.

28. The ALA also supports the reasons given as to why Option 2 has been selected as the preferred model, as described in section 7.2 of the RIS, namely that it would:

- protect gig workers who are particularly vulnerable by providing fair and equal access to workers' compensation rights and entitlements in Queensland;
- improve injured workers' chances of achieving a durable return to work following injury;
- support the flexibility offered by the gig economy (which is a strong driver of participation and job satisfaction of many gig workers), by not altering or limiting the way in which Intermediaries operate;
- provide a level playing field by ensuring gig businesses pay the same proportion of costs on workers' compensation as current employers pay in the industry that the intermediary is working in;
- reduce cost-shifting to the community—in particular, to the public health system or a worker's private medical insurance (if any) to recover from the injury; and
- result in improved work health and safety outcomes due to the incentivisation of workers' compensation insurance premiums to improve performance.

29. ALA submits that a potential disadvantage of Option 2 that may be raised by intermediaries is that the cost of business would go up. The ALA believes, however, that:

- those costs (as detailed in the RIS) seem relatively small; and
- the imposition of those costs merely places intermediaries in line with businesses who are actually employing staff, thereby producing a market more conducive to competition.

Are there any other costs and benefits or disadvantages of each option that have not been identified?

Please see our response to the next question.

Are there any features in the options presented that you have concerns with?

30. The ALA believes that the biggest challenge will be in drafting an appropriate definition for a 'gig worker'.

31. In the RIS, the definition of a 'gig worker' is very much determined by how an 'intermediary' is defined, which, in turn, will also need to be clarified in the drafting process.

32. The ALA believes, however, that the *principles* outlined in the RIS as to how the terms 'gig worker' and 'intermediary' should be determined are worthy of support.

33. The ALA offers the following thoughts in relation to producing agreeable definitions:

34. We note the section on current case law included on page 41 of the RIS. The ambiguity in the common law test of who is and who is not a worker has led to a number of legal disputes over the rights and entitlements of workers that turn on the application of a test, the results of which cannot be predicted with certainty.

35. The ALA and its members have long argued that some intermediaries are attempting to exploit this uncertainty by wrongly classifying workers as independent contractors to avoid industrial obligations they would have if they utilised more traditional employment relationships.

36. We agree that the definition of 'employee' should be extended by legislation to be broader than the present definition at common law.

37. International experience can help inform this process.

38. In August 2018 the Supreme Court of California handed down a decision adopting the 'ABC test' for determining whether workers were independent contractors or employees. The case follows other jurisdictions in America also adopting the ABC test.

39. According to the 'ABC test', in order for a worker to be an independent contractor **all three** of the following criteria must be satisfied:

> a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
>
> b) that the worker performs work that is outside the usual course of the hiring entity's business; and
>
> c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

If the worker does not satisfy all three criteria then he/she is deemed to be an employee.

40. The ALA notes the significant similarities between the ABC model and the provisions of Table 1 on page 25 of the RIS.

41. The ALA submits that the OIR could consider adopting the ABC test as a means for determining the employment status of an employee/contractor.

42. The test should apply in addition to the common law definition so that a worker will be classified as an employee if they meet the common law test or if they do not satisfy the ABC test.

43. The definition of 'employee' in impacted state legislation (Workplace Injury, Compensation and Rehab acts, payroll tax legislation, long service leave legislation etc) should be amended to include workers who do not satisfy the ABC test.

44. We also submit that the Queensland government should enact legislation to make businesses who hire workers vicariously liable for the conduct of those workers if the worker does not satisfy the ABC test.

45. Whilst applauding the Queensland Government's leadership in this area, the ALA notes that the development of an appropriate definition of 'gig worker' and 'intermediary' requires a national approach.

46. We believe that the Queensland Government has an important role in advocating that the Federal Government amend the *Fair Work Act* to include a provision deeming workers who do not satisfy the ABC test to be employees.

47. We also encourage the Queensland Government to advocate that the Federal Government should give the Fair Work Commission the power to arbitrate minimum standards for independent contractors. This would reduce the incentive to classify workers as independent contractors and therefore reduce misclassification in the on-demand economy.

48. Given the lack of clarity emerging from case law, the ALA also suggests that the government should consider the benefits of making grants available to unions to pursue test cases to determine the status of workers in the on-demand economy.

49. Another area of concern for the ALA is that any legislative change should provide certainty for when workers' compensation coverage will commence and cease; and what constitutes a journey claim or when is a 'gig worker' on a recess.

For example, if 'gig worker' is at home with their app turned on, receives and accepts a job, is walking out to car and falls down stairs (internal or external to property) – is he/she covered?

This scenario, for a worker under a traditional employment structure, would be determined by where the property boundary is, however this may not be appropriate if the 'gig worker' is already considered 'on the clock' by accepting the job.

50. The ALA recognises that such matters will need significant work in the drafting phase.

51. The important thing is that the legislation seek to find ways to ensure intermediaries cannot sidestep their responsibilities to workers.

52. The ALA also encourages the OIR to ensure that any adjusted legislation contains appropriate sanctions for breaches by intermediaries.

PART TWO – TAXI AND LIMOUSINE DRIVERS.

Do you believe workers' compensation coverage should be extended to taxi and limousine drivers?

53. Yes. The ALA believes that, in principle, workers' compensation coverage should be extended to taxi and limousine drivers.

54. In an industry as potentially dangerous as road transport, we find it unacceptable that there is a difference in the worker's compensation and rehabilitation coverage of drivers, which is determined solely by their employment status.

What is your preferred option?

55. The ALA supports the preferred option for action (Option 3) as described on page 60 of the RIS, namely:

Option 3 - Amend the Workers' Compensation and Rehabilitation Act 2003 to extend Queensland's workers' compensation scheme to include taxi and limousine drivers engaged under bailment arrangements.

56. The ALA rejects Option One, the status quo. We believe it is unacceptable for the reasons outlined on pages 54 to 58 of the RIS, namely that:

- *Queensland is out of step with the majority of other Australian jurisdictions*
- *Bailee taxi and limousine drivers are out of step with other deemed profit share workers*
- *Access to personal injury insurance coverage is not uniform across the industry*
- *The standard of insurance coverage in the taxi and limousine industry is limited*
- *There is an 'unlevel playing field' in the taxi and limousine industry and personalised transportation industry*
- *Injury costs are increased and shifted from the taxi / limousine business to drivers or community*
- *There is a lack of incentive to improve work health and safety*

57. The ALA believes that Option 2 is also not an appropriate response, as private insurance arrangements are poor in terms of coverage and reach, as noted on page 56 of the RIS. Private insurance arrangements simply do not adequately cover medical expenses related to return to work and rehabilitation.

58. It would be difficult for the government to legislate contractual terms for private insurance products.

What are the costs and benefits or disadvantages associated with the current arrangements and your preferred option?

59. The ALA agrees with the cost/benefit analysis provided in the table commencing on page 61 of the RIS.

Are there any other costs and benefits or disadvantages of each option that have not been identified?

No response to this question.

Are there any features in the options presented that you have concerns with?

60. As with the section on gig workers, the important principle is that all workers in Queensland should have equal access to appropriate workers compensation and rehabilitation processes. This should not be variable depending on the nature of the employment arrangement.

61. Above all, we are mindful that it is the most vulnerable in our communities who are most at risk of exploitation by employers seeking to abrogate their responsibilities through sham contracting arrangements.

The ALA congratulates the OIR on this consultation process. We would be pleased to share our thoughts and experiences in the above areas with the OIR should you require further detail.

Please do not hesitate in making contact with me via (07) 3014 5001 or at GSpinda@mauriceblackburn.com.au if we can assist in this way.

Yours sincerely,

Greg Spinda
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