Ai Group Submission

NSW Industrial Relations Exposure Draft Legislation

Industrial Relations Amendment (Transport Sector Gig Workers and Others) Bill 2025

7 March 2025

INTRODUCTION

1. The Australian Industry Group (**Ai Group**) takes this opportunity to provide feedback to NSW Industrial Relations regarding the proposed Industrial Relations Amendment (Transport Sector Gig Workers and Others) Bill 2025 (**Bill**).

2. This feedback draws on discussions with Ai Group's national membership across a broad cross section of the Australian economy, including road transport and logistics businesses as well as emerging sectors such as the 'gig economy'. Our membership ranges from small to medium-sized family businesses to many of the largest organisations operating in Australia. This feedback is also informed by our unparalleled depth of experience in the operation and development of Australia's workplace relations system gained over our 150 years representing Australian industry.

3. That said, it is necessary to point out that Ai Group's ability to consult with our members has been hampered by the brief period that has been given to industry to provide feedback about the Bill. We understand multiple participants requested an additional fortnight to provide feedback, but their requests were refused, and an additional week only was provided. Providing just a few weeks for consultation on such a significant change—while many stakeholders are already engaged in intensive Fair Work Commission negotiations over proposed regulation of gig sector and road transport industry conditions—is unsatisfactory.

OVERVIEW OF AI GROUP'S POSITION

4. Ai Group strongly opposes the introduction of the proposed Bill.

5. Our overarching position is that the Bill is unnecessary and deeply problematic. It seeks to address issues that have already been dealt with nationally through amendments to the *Fair Work Act 2009* (Cth) (**FW Act**). Industry is negotiating terms and conditions to apply to gig workers and the transport industry before the Fair Work Commission (or more specifically through meetings of subcommittees of the Road Transport Industry Advisory Group). Meetings are scheduled every three weeks between January to August. The Bill risks delaying, undermining and potentially derailing those discussions as industry will need to consider the implications if it is passed. There is no need for the NSW Government to place industry in the situation of having to navigate a patchwork of complex regulation in the transport industry across NSW's boundaries with the rest of the country.

6. If, despite this, the NSW Government decides to legislate this area, Ai Group's alternative position is that the Bill is far from being ready to be introduced to Parliament. To this end, Ai Group:

    a. highlights nine major issues we have already identified in the short time we have had to consider the Bill, but note many more would undoubtedly emerge if given adequate time to consider it and consult with industry; and

b. urges the NSW Government to act with restraint and caution, prioritising and pursuing meaningful consultation with industry instead of rushing this legislation 'come what may'.

7. The potential ramifications, including making thousands of small businesses unviable are too serious to ignore. Absent significant amendments to the Bill informed by genuine consultation with industry, the NSW Government risks causing major disruptions to supply chains and the transport industry as well as the communities that rely on them.

8. Chapter 6 of the *Industrial Relations Act 1996* (NSW) (**NSW IR Act**) should not be viewed as a panacea to the issues the NSW Government seeks to address. It is heavily criticised by many of the industry participants who operate under it. The main instruments made under the NSW system which set minimum terms and conditions (i.e. contract determinations) are so complex that they are essentially impenetrable for lay persons. In addition, such instruments frequently become outdated (for example the rates for the courier and taxi-truck industry were not adjusted for approximately 14 years) and have had limited application to specialised sectors (i.e. metropolitan Sydney and short-haul work). Moreover, the system is notoriously beset by non-compliance (there is no meaningful enforcement of the jurisdiction by any Government inspectorate and, regardless, this is an extremely difficult task given the nature of the sector).

9. Set out below are Ai Group's nine major concerns with the Bill.

First Major Concern: The Bill will undermine efforts to regulate work conditions in the transport sector, including gig workers

10. Ai Group acknowledges that prior to winning the election in March 2023, Chris Minns MP, together with Daniel Mookhey MLC, Sophie Cotsis MP as well as union officials jointly announced that should NSW Labor be elected, a Labor government intended to "modernise" Chapter 6 of the IR Act "*to ensure that a gig worker who's working in the transport industry has the same protections as other workers in the transport industry*".

11. However, since that announcement, the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2023* was enacted resulting in substantive changes to the FW Act. The FW Act now contains a comprehensive framework through which unions (and other parties) can obtain:

    a. orders for minimum standards for regulated workers and persons in road transport contractual chains; and

    b. orders setting aside, amending or varying all or part of a services contract which contain an unfair term.

12. The TWU has already brought five applications seeking minimum standards orders, two of which target gig economy participants such as UberEats, Menulog, Doordash, Amazon and more. Two of the applications are specific to the road transport industry. Those applications

are subject to an intensive schedule of meetings that ultimately seeks to reach agreement on minimum standards to apply to the industries nationally.

13. The Australian Government consulted Ai Group regarding the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023. During the consultation process, Ai Group, together with the labour platform operators, expressed serious concerns that the States and Territories would also legislate in this area, leading to a patchwork of regulation, resulting in unnecessary complexity and burden. Many in industry adopted a constructive approach to engagement with the Commonwealth Government over the development of the federal system, notwithstanding deep and well-ventilated reservations about the risks associated with the introduction of such regulation, on the understanding that it would negate the expansion of a patchwork of inconsistent regulatory schemes dealing with similar subject matter in different ways.

14. During the consultation meeting with NSW Industrial Relations on 10 February 2025, it was clear that:

    a. the main driver for the Bill is the pre-election commitment Chris Minns MP and others made on 9 October 2022 to amend Chapter 6 of the IR Act if Labor were elected;

    b. the NSW Government is aware of the overlap with the IR Act and the FW Act, but says it will be up to the industry to decide which path they wish to pursue and up to the courts to determine any constitutional difficulties; and

    c. the NSW Government is aware of the Federal Government's representation that the State and Territory Governments would not legislate in this area once the Federal Government had done so.

15. Despite these matters, there is no clear explanation why the NSW Government has chosen to ignore the reality that the Federal Government has already dealt with the controversy giving rise to the State Labor Party's pre-election commitments. Nor is there any explanation why the proposed Bill traverses well beyond the ambit of the pre-election commitments by extending to small fleet operators, contractual chains, as well as other significant ways.

16. The inevitable consequence of this Bill is expanding the existing minefield that is already notoriously difficult for contractors and industry participants to grapple with.

17. The Bill will delay and frustrate the negotiations under the Federal scheme as parties consider the implications of this Bill instead of focusing on negotiating conditions that will apply nationwide. It will undoubtedly colour the positions that Ai Group (which is playing a major role in matters before the Commission) will take in those proceedings and no doubt reduce the likelihood of reaching a consensus position.

18. The developments at the Federal level warrant the NSW Government refraining from introducing the Bill. At the very least, the Bill should make clear that the IRC must not consider

making or extending the application of any contract determination which would apply to a party that may be impacted by an application for a minimum standards order that is presently before the Fair Work Commission.

Second Major Concern: Significant unexplained expansion of the IRC's dispute powers

19. One of the most significant aspects of this Bill is that it would substantially widen the dispute resolution powers of the IRC in relation to industrial disputes. Currently, the powers of the IRC are essentially confined to:

    a. narrow disputes which may lead to issues such as owner drivers breaching contracts or refusing to enter into the same; and

    b. conferring a discretionary power to issue interim contract determinations that last for up to one month that preserve the status quo.

20. Before the IRC can make an interim contract determination, it must be satisfied that it is in the public interest to do so and all reasonable attempts to resolve the dispute have been exhausted.

21. The Bill would vastly expand the IRC's powers in this regard, including by:

    a. removing the requirement for it to be limited to preserving the status quo;

    b. removing the one-month limit on the duration of the interim determinations; and

    c. extending the interim contract determinations to entire contractual chains.

22. This proposed power is so broad as to present a major risk for the transport industry as well as the gig economy. Despite the magnitude of this change, no explanation justifying it has been provided to industry, further demonstrating why this Bill is not fit for passage.

Third Major Concern: Extending Chapter 6 to Small Fleets could threaten the viability of those businesses and disrupt the supply of goods in NSW

23. The Bill would extend Chapter 6 from owner-operators to include small fleet operators. There is a real risk that doing so would threaten the viability of those businesses. If the Bill is passed, small fleet operators are likely to see a decrease in demand for their services. Once a determination covers them, they will be placed at an unavoidable competitive disadvantage compared to mid-large firms.

24. There are approximately 23,286 individuals employed by small businesses in NSW as truck or delivery drivers, which is approximately 29% of all employees in NSW who are employed in those positions.[1] Small fleet operators are an important component of the transport sector,

[1] Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2023.*

often engaged by large and mid-sized transport firms to buttress their operations, as well as directly by businesses outside of the transport industry as part of their supply chains.

25. The Bill proceeds on the assumption that small fleet operators are essentially the same as owner-drivers. That view is naïve and fundamentally misunderstands the freight market. Small-fleet businesses operate within a far more complex market and operational framework than owner-drivers. Within that market, there are a raft of flexible cost structures that are adopted and a myriad of considerations that inform the pricing for a freight task adopted by such a fleet operator compared to that dictated by the contract determinations.

26. Extending contract determinations to small-fleet businesses fails to account for the flexibility required in their pricing models and will consequently place them at a significant market disadvantage over other sized firms. Contract determinations have not been set having regard to operational requirements, cost structures or circumstances of such businesses and the Commission has never been called on to consider the same. Many transport businesses strategically apply pricing strategies designed to secure or maintain a desirable volume of work, maintain asset utilisation, sustain cash flow, and keep employees usefully engaged. Extending the application of contract determinations, or indeed the operation of Chapter 6 as either currently framed or proposed to be amended, to such businesses will undermine their competitive position.

27. This regulatory approach echoes the failed Road Safety Remuneration Tribunal (**RSRT**), which led to widespread industry disruption. When mandatory rates appeared likely under the RSRT for owner-operators, many businesses ceased using owner-operators in favour of in-house fleets or larger firms in anticipation of the regulatory change. Industry warnings of this risk were ignored by the RSRT. If this Bill is passed, the same pattern will occur, with supply chains proactively shifting away from small-fleet operators to mitigate the risk of future disruption. In other words, the threats to their businesses will emerge from the perceived risk of a contract determination being made (rather than once determinations are made and the terms known). This could have severe knock-on effects on freight costs, supply chain resilience, and consumer prices—an issue made starkly evident during the COVID-19 pandemic.

28. Based on early engagement with industry, we strongly caution that we expect that the mere increase in risk of such a regulatory development that would flow from the introduction of the Bill will cause some parties that currently engage small fleet operators to commence implementing strategies to pre-emptively reduce or cease their use of small-fleet operators.

Fourth Major Concern: Lack of any meaningful guardrails on IRC's powers

29. The proposed Bill confers an excessive degree of discretion on the IRC in relation to the exercise of powers under Chapter 6, particularly in relation to the terms of contract determinations made thereunder.

30. Ai Group was heavily involved in all major proceedings before the RSRT until the tribunal was abolished in 2016. Ai Group witnessed firsthand how conferring powers on tribunals to determine minimum conditions in the road transport industry without appropriate guardrails can lead to devastating impacts on contract carriers as well as industry more broadly.

31. The Federal scheme, although in Ai Group's view implemented in a form that contains significant deficiencies, was the subject of comparatively significant engagement with industry compared to the Bill. As a result of that consultation process, a range of guardrails were inserted into the legislation. For example:

    a. Pursuant to s.536KA of the FW Act, the FWC cannot make or vary a road transport minimum standards order unless a range of matters are satisfied, including genuine engagement with the parties to be covered having occurred and the FWC being satisfied that the order will not unduly affect the viability and competitiveness of owner drivers or other similar provisions.

    b. Subdivision D on Part 3A-2 of the FW Act sets out the mandatory consultation process that must be followed before a road transport minimum standards orders can be made.

    c. Subdivision D on Part 3A-2 of the FW Act limits what terms can, must and must not be included in any road transport minimum standards orders.

32. The FWC is now dealing with five applications, including two that will cover the 'gig economy'. It remains to be seen whether the guardrails in the FW Act will be effective in negating undesirable consequences. However, there is a glaring absence of any comparable guardrails in the Bill. This invites a repeat of the RSRT and demonstrates the Bill is not fit for passage.

Fifth Major Concern: Contract determinations should be able to regulate toll use

33. Proposed new section 355B of the IR Act is inappropriate and should be removed from the Bill. In contrast to the largely unfettered discretion conferred elsewhere in Chapter 6 via the Bill, s.355B prohibits the contract determinations or contract agreements from allowing principal contractors to:

    a. instruct a carrier to avoid using a toll road; or

    b. refuse to reimburse a carrier for a toll paid in the course of carrying persons or goods under the contract.

34. Contract determinations can and already do regulate journeys to be undertaken and reimbursement of toll costs. They do so in ways specific to sectors covered by the relevant contract determination. These terms have been carefully considered given the significant cost to business. Any legislative intervention is unfair and potentially a catalyst for reconsideration for all terms of existing contract determinations.

35. It is not clear why the Bill has sought to eliminate the Commission's discretion to determine appropriate regulation of toll related matters. It is self-evidently inconsistent with the proposed objects of Chapter 6, which are 'to promote fair and efficient arrangements'.

Sixth Major Concern: Extending Chapter 6 to post, bread, milk and cream could lead to higher prices and supply problems

36. The transport of essential staple goods, such as bread, milk or cream, as well as post has long been exempted from Chapter 6 of the IR Act. As a result, the development of contract determinations have never paid regard to the conditions that are unique to those sectors. Those sectors have developed their own arrangements that benefit all participants.

37. If those exemptions are removed, the NSW Government will necessarily increase the regulatory burden on parties engaged in the transport of these goods. Greater regulation will likely result in higher costs and inflationary pressure, ultimately affecting consumers. Perhaps even more worryingly, the changes risk significantly disrupting longstanding arrangements, and by extension, the supply of these essential staples. The rushed consultation process makes it clear that the NSW Government has given little serious consideration to the potential impact on these sectors.

38. Ai Group does not make these points lightly. During the RSRT proceedings, significant concern arose as to the likelihood that bread deliveries to some communities could be disrupted or rendered not commercially viable as a consequence of orders under contemplation in that jurisdiction.

Seventh Major Concern: The proposed object of Chapter 6 is inadequate and provides no meaningful guidance for the exercise of the jurisdiction

39. The proposed object of Chapter 6 is to '*promote fair and efficient arrangements*' for contracts of carriage and contracts of bailment as well as in contractual chains affecting the same.

40. By comparison, there are approximately 21 discrete objects of the equivalent jurisdiction in the FW Act. Again, it remains to be seen how effective those objects will be in tempering the jurisdiction and avoiding the disruption that was seen with the RSRT. However, providing no meaningful guidance for the Commission exercising powers under Chapter 6 invites a repeat of the same kind of mistakes that occurred in the RSRT.

Eighth Major Concern: Extending determinations to contractual chains is unfair and will be highly problematic

41. The Bill mandates that contractual determinations are binding on all parties in the 'contractual chain' to which the determination relates, subject only to any exemptions and conditions that the Commission directs.

42. Although the definition derives from the FW Act:

a. Industry was extremely critical of this aspect of the amendments to the FW Act and it should not be replicated without first genuinely consulting with industry;

b. The extent of the significant disruption caused by the equivalent provision in the FW Act is at least partly ameliorated by the preconditions that are required to be met before a contractual chain order is made. For example:

   i. The requirement for genuine engagement with all parties within the contractual chain must occur before an order can be made;

   ii. The requirement that the order clearly sets out who is covered;

   iii. The consultation process set out in subdivision C of Part 4B-2 of the FW Act must have been followed before it can be made. The consultation process includes a 12-month period in which the draft order is publicly available on the Commission's website.

43. Extending contractual determinations to the 'contractual chain' has the real potential to cause major regulatory uncertainty and disruption within entire supply chains. The contract determinations have been set by reference to the arrangements between principal contractors and contract carriers. The likelihood of unintended and adverse consequences is high. For the NSW Government to make the default arrangement to apply contractual determinations to transport supply chains without any meaningful safeguards is reckless.

44. The NSW Government should also be mindful that the TWU has made an application in the FWC that seeks to regulate the entire road transport industry supply chain. This demonstrates the breadth of the FWC's new powers. On any reasonable assessment, there is simply no need for a separate state based regulatory scheme that will squarely overlap with the newly created federal regime. At best, it is a recipe for unwarranted confusion and complexity.

Ninth Major Concern: Uncertainty around transitional arrangements

45. Ai Group notes there are some transitional provisions contained in the Bill. The intent of those provisions appears to be that newly caught contract carriers will not be automatically covered by existing contract determinations.

46. However, it is not clear what the intention is with respect to the interaction between existing contract determinations and contractual chains. The definition of 'expansion contract' focuses on extended contracts of carriage. Ai Group's strong position is that the Bill should not permit automatic extension of contract determinations to contractual chains (or indeed to any party).

CONCLUSION

47. Ai Group strongly urges the NSW Government to reconsider the Bill's necessity and approach. Rushing through legislation with far-reaching consequences, particularly when a national framework is already in place, risks creating unnecessary complexity, market disruption, and significant burdens on industry. Without meaningful consultation and careful revision, the Bill threatens to undermine existing negotiations, destabilise supply chains, and impose unworkable regulation on small businesses.

48. Ai Group stands ready to engage in a genuine and thorough consultation process to ensure any legislative changes are both necessary and fit for purpose.

About Australian Industry Group

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

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

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

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

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

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