



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the
Office of Industrial Relations

Proposed changes to the Queensland Workers Compensation and Rehabilitation Scheme

5 July 2019



contents

ABOUT THE HOUSING INDUSTRY ASSOCIATION	3
1. INTRODUCTION	4
2. COVERAGE OF THE WORKERS COMPENSATION SCHEME	4
2.1 GIG-WORKERS	5
2.2 DEEMING PROVISIONS	6
3. CONCLUSION.....	6

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 60,000 member businesses throughout Australia.

HIA members comprise a diversity of businesses that operate in the residential building industry including the top Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

“promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct.”

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors are reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationery, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

HIA provides this submission in response to the Consultation Regulatory Impact Statement examining workers compensation entitlements for workers in the gig economy and the taxi and limousine industry in Queensland ('Consultation RIS').

The Consultation RIS ultimately proposes to amend the *Workers' Compensation and Rehabilitation Act 2003* ('the Act') to extend coverage of the scheme to the gig economy, taxi and limousine industry.

HIA opposes any changes to the current application and operation of the Queensland workers compensation scheme ('the Scheme'). HIA supports a continuation of the status-quo with no changes to the current scheme as to who is, and is not, a 'worker' for the purposes of cover under the Scheme.

HIA's submission responds solely to the proposal to expand to the Scheme to 'gig workers' which, if adopted would represent a significant shift in regard to the operation of the Scheme and introduce a potential \$17 million cost in additional workers compensation premiums to the economy. The proposal also sits at odds with the existing approach to the determination of who is a 'worker' for the purposes of the Scheme and is contrary to recent decisions of the Fair Work Commission and Fair Work Ombudsman on this matter.

The proposal represents an unwarranted and unjustified interference in arrangements for how work is performed. The Consultation RIS fails to adequately clarify exactly what is 'broken' with the current system that requires such substantive legislative amendments. An argument that the introduction of an 'intermediary' leads to greater control of *'important aspects of work including the price, standards and managing the workforce'* applies a homogenous view to an inherently non-homogenised workforce. The use of an intermediary does not change the position regarding whether those operating in the gig economy work under a contract for service or a contract of service - that determination can and should be made by the existing approach under the Scheme and common law. Legislation should not further interfere.

HIA does not support, especially in a system where the Federal Government regulates industrial relations, state-based workers compensation schemes significantly diverging from the common law concept of who is a 'worker' or an employee and entitled to workers compensation.

HIA is also concerned that there will be unintended consequences of the proposal including consequences for independent contracting arrangements in the residential building industry. Notably, examples of 'work on demand' outlined in the Consultation RIS include 'sub-trades and labour only who are engaged via intermediaries in short duration activities'.

The residential building industry relies heavily on contracting as a way of productively managing the needs of a building business, especially smaller businesses, to access short term specialist skills and equipment. Attempts to introduce a new class of contractor in the hope of resolving gig economy issues could impact on the tens of thousands of small businesses in the construction industry.

Independent contracting also provides a platform on which new and innovative businesses emerge. Many thousands of new contracting businesses start in residential building each year: while some fail many prosper into growing enterprises. Reclassifying independent contractors as some other type of entity would put this entrepreneurial spirit at risk.

The Scheme does not, and should not, be expanded to cover genuine independent contractors. Such an extension has the potential to undermine the Scheme as a whole.

2. COVERAGE OF THE WORKERS COMPENSATION SCHEME

The objective of the Scheme is to provide injured workers with fair and reasonable benefits at the lowest possible premium to employers.

As outlined in the Consultation RIS 'Workers' have a specific definition under the Act. A 'worker' is an individual who works under a contract, and in relation to the work, is an employee for the purpose of assessment for PAYG taxation withholding determined through the Australian Taxation Office's (ATO) employee or contractor



decision tool. This interactive decision tool assists in determining whether a person should be considered an employee—or an independent contractor—for PAYG taxation withholding purposes.

The WorkCover website states:

“The definition of a worker aligns with the Australian Taxation Office (ATO) definition. This reduces red tape and makes it easier for employers to correctly identify workers when declaring wages for their premium. Also, workers clearly know if they are covered or not.”¹

The Act also provides that other individuals may also be deemed a worker, subject to specific criteria, such as some sharefarmers, sales persons paid on commission or a person engaged by a labour hire agency or group training organisation. The Act further specifies examples of who is *not* considered to be a worker under the Act, including directors of a company, trustees of trusts, partners in a partnership, professional sportspeople or those participating in the Commonwealth’s ‘Work for the Dole’ initiative.

HIA supports the current approach of the Scheme in relation to who is, and who is not considered a ‘worker’ for the purposes of the statutory regime.

2.1 GIG-WORKERS

Contrary to assertions made in the Consultation RIS ‘gig workers’ are not a new form of worker. Working arrangements via technological platforms are not new. In fact, the Scheme is uniquely designed to respond to all forms of working arrangements through its existing mechanism to deem individuals as workers for the purposes of the Scheme.

To that end HIA would highlight that there does not appear to be any significant issues that need to be resolved. There is nothing broken, or likely to be broken that needs fixing, existing laws including the current approach under the Scheme, deal with the classification appropriately.

New forms of workplace arrangements have been a feature of the Australian economy for decades with celebrated court cases establishing the status of encyclopaedia salespeople, bicycle riding couriers and labour hire workers. Importantly, all of these cases were settled using the long standing distinction between common law employees and independent contractors: gig economy workers can and should be managed using these long standing and well developed legal tools.

Where state and federal governments have attempted to codify independent contractors and deem some to be employees they have invariably added complexity, confusion and cost to business operations, particularly for small businesses. HIA would actively discourage any attempt to do the same.

There is no reason why the common law tests could not be applied to the gig economy workers. Not all gig economy workers work in the same way so adding additional regulations to try to resolve the issue would seem counter-productive.

There have been a number of cases that consider the threshold question of whether ‘gig-workers’ are employees (and therefore workers) or not.

In its investigation the Fair Work Ombudsman (FWO) found that Uber drivers were independent contractors who “.are not subject to any formal or operational obligation to perform work.”² This is contrary to the Consultation RIS which claims intermediaries have a ‘medium to high’ level of control over gig workers which put them in the same category as workers.³

The Fair Work Commission (FWC) has also found that Uber drivers were not employees for the purposes of the *Fair Work Act 2009*.⁴ Conversely, in a separate decision the FWC found that a former Foodora driver was an employee.⁵ Both cases considered well-established case law and applied it to different factual circumstances

¹ <https://www.worksafe.qld.gov.au/insurance/which-insurance-product-is-right-for-you/accident-insurance/who-should-i-cover/worker-definition-changes>

² <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190607-uber-media-release>

³ https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0011/177347/ris-gig-taxi-limo-industries.pdf page 25 see table

⁴ *Mr Michail Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610: <https://www.fwc.gov.au/documents/decisionssigned/html/2017fwc6610.htm>

⁵ *Klooger v Foodora Australia Pty Ltd* - [2018] FWC 6836 - 16 November 2018



involving 'gig-workers'. Problematically, the Consultation RIS proposes to lump all such 'gig-workers' into the same category; however as the two FWC cases illustrate they are not all the same and the existing legal regime is already equipped to deal with it.

It is currently an offence under the Act for failure to insure workers.⁶ HIA would suggest that WorkCover enforces the current legislative regime for those gig workers who are in fact workers and not independent contractors using existing law.

2.2 DEEMING PROVISIONS

The Consultation RIS notes that an option to cover gig workers, for the purposes of the legislation, is to 'deem' them as such:

This option would deem gig workers 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.⁷

The current provisions that deem workers, who would not traditionally be considered workers, include some sharefarmers, sales persons paid on commission or a person engaged by a labour hire agency or group training organisation. They would appear to be a small cohort. The proposal would change the use of such 'deeming' provision to make independent contractors workers for the purposes of the Scheme.

HIA opposes this approach.

3. CONCLUSION

The second five-yearly review of the operation of the Queensland workers compensation scheme overarching found that the scheme was performing well, is financially sound, involves low cost for employers and provides fair treatment of both employers and injured workers. Major reform was not recommended.

HIA considers that the proposal outlined within the Consultation RIS is a major reform and represents a significant shift in approach to who are considered 'workers' for the purposes of the Scheme at odds with the majority of the recommendations made by Professor Peetz.

The Scheme is broadly meeting its objectives. HIA opposes the proposal to extend the Scheme to genuine independent contractors (called gig-workers or otherwise).

There has not been an adequate case made out for change. HIA supports a continuation of the status-quo with no changes to the current scheme as to who is, and is not, a 'worker'.

⁶ *Workers' Compensation and Rehabilitation Act 2003* s51

⁷ Page 40 of 111 Consultation paper. https://www.worksafe.qld.gov.au/_data/assets/pdf_file/0011/177347/ris-gig-taxi-limo-industries.pdf

