

Industrial Relations and Other Legislation Amendment Bill 2022

Explanatory Notes

FOR

Amendments to be moved during consideration in detail by the Honourable Grace Grace MP, Minister for Education, Minister for Industrial Relations and Minister for Racing

Short title

The short title of the Bill is the *Industrial Relations and Other Legislation Amendment Bill 2022*.

Policy objectives of the Amendments and the reasons for them

Amendments relating to representation by agents

On 12 August 2022, the Education, Employment and Training Committee (the Committee) released Report No. 22 following its consideration of the *Industrial Relations and Other Legislation Amendment Bill 2022* (the Bill).

The proposed amendment to clarify the appointment of agents responds to Recommendation 2 of the Committee's Report. This recommended for the Minister to investigate options for addressing the issue of agents who charge a fee to provide representation in the Queensland Industrial Relations Commission (the Commission) and the Queensland Industrial Court (the Court).

Queensland's industrial relations framework has always limited the use of legal representation to provide an affordable, accessible system which deals with industrial matters expeditiously. Similarly, the policy intent for agents—other than legal representatives—is to allow for unpaid advocates or a support person (e.g., a trusted friend, relative or colleague) to assist a person or party in industrial matters or public service appeals.

As part of the Committee's inquiry, the Honourable Justice Peter Davis, President of the Industrial Court of Queensland, outlined recent cases before the Commission and Court where an increasing number of agents are charging fees and misrepresenting their services. Justice Davis also noted instances of legal practitioners attempting to avoid regulatory requirements

under the *Industrial Relations Act 2016* (IR Act) by providing legal services under the guise of acting for a party as an ‘agent’ and not as a ‘lawyer’.

These practices conflict with the underlying policy intent for agents in the Queensland industrial relations framework.

To effectively address this issue, and respond to the Committee’s recommendation, legislative amendment is required to clarify the original policy intent of representation by agents in industrial matters and public service appeals.

The proposed amendments require that agents must be granted leave by the relevant industrial tribunal to represent a person or party, with the exception of employees and officers of registered employee or employer organisations. The relevant industrial tribunal must not grant leave if the agent is receiving a fee, or if the agent is an officer or employee of, or acting for, an entity (other than an organisation) that purports to represent the industrial interests of employees or employers. For consistency and transparency, the considerations of the industrial tribunal in deciding whether to grant leave align with those currently in place under the IR Act for legal representatives.

To limit the potential impact on matters which have already commenced, transitional arrangements also confirm that agents appointed prior to commencement of the proposed amendments can continue to represent a person or party until the matter is finalised.

Amendment relating to paid domestic and family violence leave

In Queensland, full-time and part-time employees within the State’s industrial jurisdiction are entitled to 10 days paid domestic and family violence leave each year, with casuals currently entitled only to unpaid domestic and family violence leave.

On 28 July 2022, Commonwealth Workplace Relations Minister, the Honourable Tony Burke MP, introduced the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth)* (the Federal Bill) to amend the *Fair Work Act 2009 (Cth)*. The Federal Bill proposes to provide 10 days of paid domestic and family violence leave in a 12-month period for full-time, part-time and casual employees, with the exception of small business employers.

The proposed amendments in the Bill will extend paid domestic and family violence leave to causal employees within the Queensland industrial relations jurisdiction. Casual employees will be entitled to 10 days of paid domestic and family violence leave in a year if they meet the requisite criteria set out in the IR Act. The proposed amendment aligns Queensland’s leave entitlements for casual employees with the Federal Bill, and will ensure accessible and consistent entitlements across all employees irrespective of employment status as a full-time, part-time or casual employee.

Amendment to authorise competition legislation

The Bill’s amendment to insert a new section into proposed Chapter 10A (inserted by Clause 66 of the Bill) ensures that the provisions of the chapter can operate without exposing persons who rely on them to certain provisions of the *Competition and Consumer Act 2010 (Cth)* (CC Act) and the Competition Code of Queensland.

Part IV of the CC Act prohibits persons from engaging in restrictive trade practices, including commercially anti-competitive conduct, cartels and boycotting. This statutory scheme clearly envisages competition between commercial entities, including individuals working as sole traders in the goods delivery sector.

Under new Chapter 10A, the Queensland Industrial Relations Commission (QIRC), in certain circumstances, may set minimum conditions for independent couriers e.g., in commercial contracts, and creating agreements collectively negotiated between independent sole traders.

Section 51 of the CC Act provides an exception for actions specifically authorised by an Act, including a State Act. However, an authorising provision in a State Act must specifically refer to the CC Act.

The proposed amendment will satisfy this requirement and is aligned with exception provisions in other State laws that regulate the relationship between independent courier drivers and principal contractors, notably Chapter 6 of the *Industrial Relations Act 1996* (NSW).

Amendments relating to the Associations Incorporation Act 1981

The Bill includes complementary amendments to the *Associations Incorporation Act 1981* (the AI Act). These amendments support the Bill's policy intent to address the risk of employers and employees being confused about the ability of entities to represent industrial interests where the entity is not registered under the IR Act, but is incorporated under the AI Act.

Minor clarifying amendments are required to be made during consideration in detail, to ensure that, in addition to existing requirements under section 9 of the AI Act, applications for incorporation must include a statutory declaration stating whether the association has an industrial purpose.

Achievement of policy objectives

The proposed amendments support the Bill to achieve its policy objectives by:

- clarifying when an agent can represent a person or party in proceedings before industrial tribunals and in public service appeals;
- extending the scope of paid domestic and family violence leave to casual employees within the Queensland industrial relations jurisdiction;
- authorising specific things under independent courier provisions in new Chapter 10A for the purpose of the CC Act and the Competition Code of Queensland; and
- ensuring applications for incorporation under the AI Act must include a statutory declaration stating whether the association has an industrial purpose.

Alternative ways of achieving policy objectives

There are no alternative means of achieving the policy objectives other than by legislative amendment.

Estimated cost for government implementation

The cost implications of implementing the Report's recommendation, and other minor clarifying amendments in this Bill, are not anticipated to be significant to Government.

For amendments relating to extending the scope of paid domestic and family violence leave to casual employees, the Government does not anticipate a significant cost. The potential number of leave claims is limited. As at June 2021, casual employees represented only 3.08% of the Queensland Public Service and the entitlement is further limited as the leave can only be taken by those casual employees who are rostered to undertake work and who have experienced domestic violence, or if they need to take the leave as a result of domestic violence.

Consistency with fundamental legislative principles

Proposed amendments to extend the scope of domestic and family violence leave, authorise competition legislation, and clarify requirements in relation to applications for incorporation under the AI Act, are consistent with fundamental legislative principles.

Proposed amendments to clarify the policy intent of representation by agents potentially infringes on the rights and liberties of this specific group as provided in section 4(3)(g) of the *Legislative Standards Act 1992*.

A potential infringement arises as the proposed amendments introduce a new requirement for the industrial tribunals to grant leave on the appointment of agents in some circumstances. This oversight is necessary to ensure the policy intent is being observed and the provisions are no longer circumvented to allow unscrupulous practices which adversely impact the interests of a person or party before the industrial tribunal. However, this may mean some agents who formerly would have been appointed will, appropriately, not be granted leave, which impacts their potential livelihoods.

It was never envisaged that agents—other than legal representatives and organisations who are subject to stringent regulation under the existing framework—should seek a livelihood from representing a person or party in an industrial matter. One of the intended features of this representation is that it is provided on a no-cost basis, and this has been clarified in the proposed amendments which specify there can be no direct or indirect demand for a fee by an agent, or fee received by an agent, if representing a person or party in these matters.

Agents will continue to be able to represent a person or party to an industrial matter or public service appeal. In deciding whether to grant leave to an agent, industrial tribunals will consider a range of factors, such as fairness to all parties and enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter. These considerations are not more onerous than those already existing within the industrial relations framework and are aligned with those currently required of legal representatives. These considerations will also ensure that the policy intent of the agent provisions is applied.

To ensure agents already appointed on an industrial matter or public service appeal are not adversely impacted by the proposed amendments, transitional arrangements confirm the agent may continue to represent a person or party.

Consultation

The proposed amendments respond, in part, to Recommendation 2 of the Committee's Report and to issues raised through submissions during the Committee process.

Consistency with legislation of other jurisdictions

Proposed amendments to extend paid domestic and family violence leave aligns with similar paid leave entitlements to casual employees under the *Fair Work Act 2009* (Cth), recently introduced by the Federal Government.

Notes on provisions

Clause 1 inserts a new Clause 7A which amends section 52 (Entitlement to domestic and family violence leave) to omit the excluding language of ‘other than’ to replace it with ‘including’ casual workers in the scope of eligible employees of domestic and family violence leave. The new clause further removes a reference to ‘long term and short term’ to clarify that the amendments are inclusive of all employees under the industrial relations jurisdiction.

Clause 2 inserts a new Clause 52A which amends section 529 (Representation of parties generally) to clarify that a party may be represented by a lawyer (if permitted under section 530); an employee or officer of an organisation registered under Chapter 12 of the IR Act; an employee of an employer who is a party; or any other person that is granted leave of the industrial tribunal.

Clause 52A also amends section 529 to include the conditions an industrial tribunal may consider before granting leave to agents seeking to represent parties. Persons who charge fees, or an officer acting for an entity that is not an organisation but purports to represent the industrial interests of employees or employers, are excluded from appearing as an agent. Leave may be granted for an agent only if it would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter, or it would be unfair not to allow the party to be represented.

Clause 52A also includes a definition of ‘industrial tribunal’ to ensure that the new amendments apply to all relevant jurisdictions overseeing industrial proceedings.

Clause 3 inserts a new Clause 53A which amends section 530A(2) to (4) (Representation—public service appeals) to clarify that parties in public service appeals may appear personally or by an agent under section 529. It further specifies that lawyers may not represent parties in these types of proceedings unless they are employees or officers of the party, or employees or officers of an organisation representing a party.

Clause 4 amends Clause 62 to insert a new transitional provision through section 1102 (Existing appointment of agent to represent party or person in proceedings). This amendment clarifies that agents appointed prior to commencement and whose proceedings have not ended will have the previous section 529 provision apply to their circumstances.

Clause 5 amends Clause 66 to insert a new section 406ZZG (Authorisation for competition legislation). This amendment authorises the making, or varying, of courier service contracts, contract determinations or negotiated agreements under Chapter 10A for the purposes the *Competition and Consumer Act 2010* (Cth) and the Competition Code of Queensland. It also authorises things done by persons to negotiate, enter into or perform a courier service contract; negotiate with a view to a negotiated agreement being made; and to comply with a contract instrument or the provisions of Chapter 10A.

This amendment also provides an authorisation is only to the extent it would otherwise contravene the *Competition and Consumer Act 2010* (Cth) or the Competition Code of Queensland.

Clause 6 amends *Clause 75* (Amendment of section 9 (Application for incorporation)) to provide that an application for incorporation must also be accompanied by a statutory declaration by the appointed person stating whether the association has an industrial purpose. This amendment clarifies that a statutory declaration about industrial purpose is a further requirement in addition to the existing requirements under section 9 of the *Associations Incorporation Act 1981*.

Clause 7 amends *Clause 85* (Insertion of new part 18, div 5) as a consequence of the amendment made by *Clause 6* to insert a new subsection 9(4).