Industrial Relations and Other Legislation Amendment Bill 2022

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Inquiry into the Industrial Relations and Other Legislation Amendment Bill 2022

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Executive Summary

About the QCU

The Queensland Council of Unions (the 'QCU') is the peak union body in Queensland representing twenty-six affiliated unions and around 360,000 Queensland union members. We welcome the opportunity to make a submission to the Education, Employment and Training Committee on the Industrial Relations and Other Legislation Amendment Bill 2022 (the 'Bill').

The QCU has represented and advocated for the industrial, political, and social rights of Queenslanders since 1885. The QCU has expertise in a range of areas, including in industrial, work health and safety, and discrimination law, as well as a broad range of experience in the history and application of the state industrial relations laws and system.

Introduction

The QCU welcomed the opportunity to participate in the Queensland Government's *Five-year Review of Queensland's Industrial Relations Act 2016* (the 'Review') in 2021 and to also provide submissions to the Parliamentary Education, Employment and Training Committee on the consequent Bill.

There are a number of key areas of reform contained in the Bill which the QCU will provide comment on in detail for the Committee's benefit including:

- Protections against sexual harassment
- Improving equal remuneration and pay equity through bargaining
- Modernising the parental and sick and carer's leave entitlements under Queensland Employment Standards
- The introduction of protections for independent courier drivers, and
- Clarification on the role and entitlements of registered organisations under the Act, including the introduction of strong and accessible consumer law protections to protect employees against misrepresentation

This section will provide an overview of our key points.

The QCU has been extensively involved in pursuing the implementation of the Australian Human Rights Commission ('AHRC') Respect@Work: Sexual Harassment National Inquiry Report (2020) (the 'Respect@Work Report') at both a national and Queensland level and we welcome the changes in the Bill with respect to stronger protections for workers against sexual, sex, and gender-based harassment.

The changes in the Bill will provide important protections to ensure that there are proper processes and procedures for employers to have in place when workers make a complaint about sexual harassment in their workplace, as well as access to the Queensland Industrial Relations Commission (the 'QIRC') to resolve these matters fairly and quickly, if there are not.

The QCU notes that there remain a number of other reforms that will also complement these changes which will focus parties on the prevention aspect of sexual harassment which are currently being considered as part of the Queensland Human Right's Commission Review of the *Anti Discrimination Act 1991* (Qld) (the 'AD Act'), and as part of the work health and safety legislative framework. We eagerly await the outcomes of these complementary reforms in this area.

Sadly, equal remuneration or the achievement of pay equity in 2022 remains an ongoing issue with Queensland women earning on average only 86.2 per cent of Queensland men's average full time earnings as at November 2021 and that the gender pay gap has remained stubbornly similar for the past two decades.

The QCU therefore welcomes the new provisions in the Bill which will require industrial parties to focus on reviewing and ensuring equal remuneration at the outset of bargaining for new collective agreements. The QCU notes that further work remains to be done in the modern award and orders space to achieve better outcomes.

The Bill also contains important reforms to update and modernise parental leave arrangements in particular. These reforms are consistent with the National Employment Standards in the *Fair Work Act 2009* (Cth) (the 'FW Act') which apply to all other Queensland employees. They recognise that modern and contemporary families have many different faces, and that the choice of parental leave arrangements should be guided by individual family needs and not by outdated nomenclature that focuses on entitlements linked to gender specific roles.

The QCU is concerned that the media coverage given to this Bill on these changes to date, has made mockery of these changes and in doing so has downplayed the significance of these reforms which allow employees under the *Industrial Relations Act 2016* (Qld) (the 'IR Act') the same choices as all employees currently are able to access under the FW Act.

On this point, our submissions will provide a number of practical examples where these reforms can only be to the benefit of all families, including so-called traditional and non-traditional families. We welcome the time when the Bill is assented to so that all Queensland employees are able to consider and apply for parental leave that better suits their own circumstances.

The Bill also contains important reforms in relation to clarifying who is and who is not a union or an employee organisation for the purposes of representing the industrial interests of employees under the IR Act.

Similar to media commentary on parental leave, other organisations have attempted to make a case that the changes in the Bill will somehow take away existing rights and choices of 'members' of these organisations when this is simply not the truth.

Australia's and indeed Queensland's industrial relations laws have always provided regulation and oversight of unions through a registration process under relevant industrial laws overseen by the relevant industrial tribunal. In return, registered unions have been formally recognised in industrial law to collectively represent employees' interests through making and varying awards and collective agreements, and through the application of protections such as freedom of association and protections to employees who are members or not members of a registered union. This system has been recognised as one which balances rights against proper oversight and accountabilities of the same registered organisations to employees.

Over the years, from time to time, a number of other entities not registered under industrial laws have purported to represent the industrial interests of employees. These have been generally disgruntled former members of a union who have left or have lost an election. However, they have never been recognised as having a right to represent employees in the industrial systems.

Of recent time, there has been one entity which advertises itself as multiple different organisations which are in fact brand names of one entity that falsely claims to represent the industrial interests of a multitude of different groups of employees at the same time as it represents small business employers.

In 2020, this entity sought to use the general protections of the IR Act to establish its legitimacy but was found by the QIRC in 2021, to not be entitled to represent the industrial interests of employees.

This Bill, consistent with that decision and the many years of industrial law before us, clarifies that the framework of the IR Act does not apply to these types of entities. At the same time, it also introduces strong consumer law protections to prevent such entities from continuing to make such false claims and protect employees from misrepresentation.

To put it simply, the Bill clarifies that you're either a union registered under the IR Act, seeking registration under the IR Act, or you're not a union and you're something else like a football club or charity set up for a different purpose under different legislation.

Finally, the QCU welcomes the new provisions which will empower the QIRC to set minimum standards for independent courier drivers subject to agreement from the Commonwealth Government, and to provide them with similar and long-standing protections and employment standards to those existing within the New South Wales jurisdiction.

Our detailed submissions addressing specific clauses in the Bill are outlined as follows.

Sexual, Sex and Gender-based Harassment

The Bill contains a number of amendments to the IR Act relating to sexual, sex, or gender-based harassment. The QCU supports these amendments. They are in principle consistent with the Respect@Work Report and its recommendations. However, the new provisions are stronger than those made in 2021 to the FW Act arising from the Respect@Work Report but are a better fit for the wider scope of the IR Act in Queensland which does not have its jurisdiction as limited as the FW Act.

Sexual Harassment

Within this context, during the Review of the IR Act, the QCU advocated for the inclusion of sexual harassment as an 'industrial matter' within the meaning of the IR Act to ensure that the QIRC could use the full scope of its conciliation and arbitration powers for industrial disputes about harassment matters.

This is different to the limited sexual harassment stop orders now available under the FW Act which are about 'stopping' an occurrence of sexual harassment as it is occurring in a workplace. These orders were based on similar workplace bullying orders which have not been widely used either under the FW Act nor the IR Act, since their inception.

Instead, the amendments contained in this Bill will ensure that the QIRC is able to deal with a wider range of work-related disputes about sexual harassment. For instance:

- the complaint handling process;
- the investigation process;
- placement of employees during a complaints process; and
- the substance of the complaint itself.

Clause 63 of the Bill amends Schedule 1 'Industrial matters' of the Act to include sexual harassment as a specific industrial matter and Clause 65 amends Schedule 5 'Dictionary' of the Act by including a definition of sexual harassment as meaning:

> "… sexual harassment that would contravene the Anti Discrimination Act 1991 or the Sex Discrimination Act 1984 (Cwth)".

These are both similar definitions but mean unwelcome conduct of a sexual nature that was done with an intention of offending, humiliating, or intimidating a person, or a reasonable person would be offended, humiliated, or intimidated by the conduct.

The QCU supports these amendments.

Sex or Gender-based Harassment

The Australian Human Rights Commission ('AHRC') examined the issue of sex-based harassment in some detail in its 2020 Respect@Work Report and concluded that sex-based harassment constituted conduct which falls short of sexual harassment but may nevertheless constitute sex discrimination if it amounts to less favourable treatment on the basis of sex, and that sexual and sex-based harassment often occur together.[1]

For instance, in *Hill v Water Resources Commission*,[2] the NSW Equal Opportunity Tribunal found that the receipt of offensive, sex-oriented material over a long period of time as well as unwelcome comments and a range of conduct found to be calculated to make female employees feel uncomfortable and unwelcome, was in fact sex-based harassment.

The Tribunal found that this form of conduct amounted to less favourable treatment on the ground of sex because a comparable man would not have been severely harassed i.e., it held that there had been discrimination on the grounds of sex.

Similarly, in *Cooke v Plauen Holdings Pty Ltd*,[3] the applicant was found to have suffered detriment by her supervisor because of her sex where the supervision provided to her was considered to be more objectionable and more vexing than it would have been if she had been a man.

However, even though a range of the case law under the SD Act has made it clear over a long period of time that sex-based harassment was covered by the sex discrimination provisions under the Act, the case law may not be readily understood by the community more broadly.[4] On that basis, the AHRC recommended in its Respect@Work Report that sex-based harassment should be expressly prohibited under the SD Act in order to provide clarity and certainty to the law.[5]

In line with the Respect@Work Report, Clause 63 of the Bill therefore makes sex or gender-based harassment an industrial matter and Clause 65 amends Schedule 5 'Dictionary' to define sex or gender-based harassment to mean:

> "…the harassment of a person (the harassed person), on the basis of the harassed person's sex or gender, by another person who –

[1] Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces ('Respect@Work) 457.
[2] *Hill v Water Resources Commission* [1985] EOC 92–127, a case decided under the Anti-Discrimination Act 1977(NSW) cited in Respect@Work 457.
[3] *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, cited in Respect@Work 457.
[4] Respect@Work 458.
[5] Ibid.

(a) engages in unwelcome conduct of a demeaning nature in relation to the harassed person on the basis of –
  (i) the harassed person's sex or gender;
  (ii) a characteristic of a person of the harassed person's sex or gender generally has; or
  (iii) a characteristic often imputed to a person of the harassed person's sex or gender; or
  (iv) a sex or gender the harassed person is presumed to have, or to have had at any time, by the person engaging in the conduct; or
  (v) a sex or gender the harassed person has had, even if the harassed person did not have that sex or gender at the time of the conduct; and
(b) engages in the conduct –
  (i) with the intention of offending, humiliating or intimidating the harassed person; or
  (ii) in circumstances in which a reasonable person would have anticipated the possibility that the harassed person would be offended, humiliated or intimidated by the conduct".

The QCU notes that this definition is different to the definition of sex-based harassment introduced into the *Sex Discrimination Act 1984* (Cth) (the 'SD Act') in 2021 where harassment or conduct of this nature must be of a **'seriously demeaning'** nature **[emphasis added].**

However, the QCU supports the definition of conduct of a 'demeaning nature' contained in the Bill as it reflects the longstanding sexual harassment and sex discrimination case law as opposed to a higher test that is now contained in the SD Act.

Injunctive Powers for Sexual, Sex, or Gender-based Harassment

Clause 45 of the Bill amends section 473 of the Act to expand the injunctive powers of the QIRC to ensure that the QIRC can issue orders it considers appropriate for the prevention or settlement of an industrial dispute involving allegations of sexual harassment, or sex or gender-based harassment. This is consistent with the recommendation of the IR Act Review.

Currently, injunctive powers of the QIRC apply with respect to compelling compliance with an industrial instrument, a permit or the Act, or to restrain or prevent a contravention, or continuance of a contravention, of an industrial instrument, a permit or the Act. Current injunctive relief therefore does not apply to the full scope of all industrial matters unless the matter is contained in an award or bargaining instrument or in a specific provision of the Act.[6]

[6] IR Act s 473(1)(a), (b)).

This amendment will enable an employee who has a prima facie case of sexual, sex, or gender-based harassment to seek an order from the QIRC, for example to prevent an employee who has made a complaint from being disadvantaged, to prevent them from being removed from the workplace, or to seek orders that an alleged harasser is removed from a workplace where there is a risk of ongoing harassment. The clause is drafted to ensure that the orders are as appropriate to deal with the full scope of the industrial dispute about harassment.

Complementary Changes to Modern Award Dispute Resolution Clauses

The changes contained in the Bill will complement existing grievance procedures in Queensland modern awards that apply to the Queensland public sector and local government areas. These procedures currently allow an employee to make a complaint about sexual harassment which are required to be escalated to a stage three complaint (see the model clause for Queensland modern awards following).

For example, see Clause 7.2 of the Queensland Public Service Officers and Other Employees Award – State 2015 as an example of the model clauses that exist across most Queensland modern awards.

7.2 Employee grievance procedures - other than Award matters

(a) The objectives of the procedure are to promote the prompt resolution of grievances by consultation, co-operation and discussion to reduce the level of disputation and to promote efficiency, effectiveness and equity in the workplace.

(b) The following procedure applies to all industrial matters within the meaning of the Act:
Stage 1: In the first instance the employee shall inform such employee's immediate supervisor of the existence of the grievance and they shall attempt to solve the grievance. It is recognised that an employee may exercise the right to consult such employee's union representative during the course of Stage 1.
Stage 2: If the grievance remains unresolved, the employee shall refer the grievance to the next in line management ("the manager"). The manager will consult with the relevant parties. The employee may exercise the right to consult or be represented by such employee's union representative during the course of Stage 2.
Stage 3: If the grievance is still unresolved, the manager will advise the chief executive and the aggrieved employee may submit the matter in writing to the chief executive if such employee wishes to pursue the matter further. If desired by either party the matter shall also be notified to the relevant union.

(c) The chief executive shall ensure that:
(i) the aggrieved employee or such employee's union representative has the opportunity to present all aspects of the grievance; and
(ii) the grievance shall be investigated in a thorough, fair and impartial manner.

(d) The chief executive may appoint another person to investigate the grievance. The chief executive may consult with the relevant union in appointing an investigator. The appointed person shall be other than the employee's supervisor or manager.

(e) If the matter is notified to the union, the investigator shall consult with the union during the course of the investigation. The chief executive shall advise the employee initiating the grievance, such employee's union representative and any other employee directly concerned of the determinations made as a result of the investigation of the grievance.

(f) The procedure is to be completed in accordance with the following time frames unless the parties agree otherwise:
Stage 1: Discussions should take place between the employee and such employee's supervisor within 24 hours and the procedure shall not extend beyond 7 days.

Stage 2: Not to exceed 7 days.
Stage 3: Not to exceed 14 days.

(g) If the grievance is not settled the matter may be referred to the Commission by the employee or the union.

(h) Subject to legislation, while the grievance procedure is being followed normal work is to continue except in the case of a genuine safety issue. The status quo existing before the emergence of a grievance or dispute is to continue while the procedure is being followed. No party shall be prejudiced as to the final settlement by the continuation of work.

(i) Where the grievance involves allegations of sexual harassment an employee should commence the procedure at Stage 3.

Under these procedures, a stage three complaint must be dealt within by the chief executive officer of the relevant organisation within a 14 day period. However, if the matter is not resolved within that time period, an employee or a union on their behalf may refer the matter to the QIRC for resolution. Further, whilever the complaint is on foot, the status quo is to remain in the workplace, unless there is a genuine safety risk to a person.

However, section 19(2) of the Act provides that where a modern award and certified agreement apply to an employee, the certified agreement will prevail to the extent of any inconsistency. In some cases, certified agreements in the state jurisdiction have different grievance procedure clauses that are inconsistent with the model award clause. In this context, the changes in the Bill will clarify that the QIRC will have all of its conciliation and arbitration powers to deal with any complaints about sexual harassment matters, including issuing injunctions where appropriate.

The QCU also notes that the model grievance procedure will require updating to reflect an application to not just sexual harassment complaints, but also complaints about sex or gender-based harassment, consistent with the changes to the Act, although this is a matter for the industrial parties to progress.

Serious Misconduct

Clause 25 of the Bill amends section 121 of the Act to clarify that a finding of sexual, sex, or gender-based harassment can constitute serious misconduct for the purposes of an employer dismissing an employee, and an employer not being required to provide the statutory notice period or paid compensation in lieu, pursuant to sections 123 or 124 of the Act.

This elevates a finding of sexual, sex, or gender-based harassment against an employee to the same status as if an employee engaged in misconduct that constituted theft, assault, or fraud. The introduction of this provision is consistent with the recommendations of the Respect@Work Report.

Pay Equity and Equal Remuneration

The Bill includes a number of important reforms to help focus industrial parties on the achievement of pay equity or equal remuneration for work of equal or comparable value.

Pay equity refers to equal pay, or equal remuneration for work of equal or comparable value for men and women workers. Equal remuneration compares the wage rates assigned for particular jobs and classifications with other jobs of equal or comparable value. Equal remuneration also takes into account things like discretionary pay, allowances, performance payments, merit payments, bonus payments, and superannuation.

One way that equal pay or equal remuneration is measured in Australia is by an annual comparison undertaken by the Australian Workplace Gender Equality Agency (WGEA) which publishes statistics on the gender pay gap. The gender pay gap compares the full time average weekly earnings of all women with the full time average weekly earnings of all men in the Australian labour force at a particular time. As at November 2021, this figure sat at 13.8 per cent, meaning that Australian women on average earned $255.30 per week less than men across the labour force at that time. WGEA also noted that the gender pay gap has only reduced on average by 6 per cent in the past two decades.

According to WGEA, the method of pay setting has also resulted in large variances in the gender pay gap with a significantly higher gap experienced with pay set by individual arrangements compared to pay set by awards and collective agreements.

The gender pay gap can also vary significantly between industries and between the private and public sectors. For example, the 2021 gap for health care and social assistance sat at 21.4 per cent (even though this industry is heavily female dominated), compared to education and training at 11.8 per cent (which is also heavily female dominated). Public administration and safety sat at 6.3 per cent, and the 2021 difference between the private and public sector was 17 per cent compared to 11.2 per cent.

Finally, the gender pay gap can vary between states and territories mainly due to the different composition of industries and industry sectors. For instance, the gender pay gap in Queensland was 15.6 per cent compared to the national average of 13.8 per cent in November 2021.

While gender pay gap statistics are useful as an external benchmark measure for industries and organisations, this same analysis needs to occur on an ongoing basis at an organisational and intra-organisational level to provide an accurate analysis of what is occurring if we are to make real inroads into reducing the gender pay gap.

"If we don't know the actual size of the problem, how can we know exactly what needs to be done to change it".

Current equal remuneration provisions in the Industrial Relations Act

One of the objects of the IR Act is to ensure equal remuneration for work of equal or comparable value.[7] However, in practical terms the ways in which equal remuneration are to be achieved within the framework of the Act is through modern awards, orders, or through bargaining.

For instance, the QIRC is required to ensure that the value of work is identified appropriately for award classifications and occupations and that the award itself provides for equal remuneration for work of equal or comparable value.[8]

The QIRC can also make orders, on application, to ensure employees receive equal remuneration for work of equal or comparable value.[9] Orders can include:

- reclassifying work;
- establishing new career paths;
- implementing changes to incremental scales;
- providing for wage increases or new allowances; or
- reassessing definitions and descriptions of work to properly reflect the value of the work.[10]

For agreement making, the QIRC is currently required to be satisfied that when certifying an agreement that the parties are taking steps to ensure equal remuneration for employees covered by the proposed agreement.[11]

Changes to improve Equal Remuneration

The Bill maintains these arrangements but also includes a number of important reforms to ensure that parties are more focused on addressing equal remuneration for men and women from the outset of bargaining, and to use information such as the gender pay gap and relevant information at an agreement level, to assist in improving equal remuneration in collective agreements.

[7] Ibid s 4(j).
[8] Ibid s 245(a).
[9] Ibid ss 252, 253.
[10] Ibid s 252.
[11] Ibid s 201.

Good faith bargaining

In this context, Clause 26 of the Bill amends section 173 (Parties must negotiate in good faith) to facilitate orders of the QIRC (where necessary) requiring an employer to disclose early in the bargaining period, timely information reasonably requested by a union that is relevant to understand the gender pay gap of the employees to be covered by the agreement. This includes:

- the distribution of employees by gender
- the details of the gender pay gap
- any major factors identified as contributing to the gender pay gap
- if appropriate, the projected effect of the proposed agreement on the gender pay gap, and
- any other information relevant to the gender pay gap reasonably requested by another bargaining party

Clause 26 also amends section 173 of the Act to create a new definition of the 'gender pay gap' for the purposes of these orders, meaning the difference between the average weekly full time equivalent earnings of male employees and female employees **covered by the agreement.**

While the QCU supports these amendments, we have some concerns that the focus on the gender pay gap for agreement-making, being the difference between gendered earnings of employees covered by an agreement, will not fully address equal remuneration across an organisation in all cases.

This is because of the provisions for scope orders under the Act which have permitted bargaining and agreements to be made to apply to different sections of an organisation. For example, where agreements are made covering different segments of a workforce, such as agreements covering the white collar versus blue collar areas of an organisation.

In this example, it is highly probable that the white collar workforce is heavily female dominated, whereas the blue collar workforce is likely to be heavily male dominated due to the ongoing genderisation of many occupations. In this circumstance, an analysis of the gender pay gap within the white collar workforce is possibly not as relevant as what it would be comparing the gap across the whole of an organisation.

The QCU therefore recommends that the Committee and the Minister consider an amendment to the Bill to clarify that the gender pay gap for the purposes of agreement making and good faith bargaining orders, is either the gap under the proposed instrument or the gap for all employees within an organisation.

Recommended Change:

Amend Clause 26 Amendment of s 173(2B):

For subsection (3), the gender pay gap under the proposed instrument is:

(i) the difference between the average weekly full-time equivalent earnings of male employees and female employees covered by the proposed instrument; or

(ii) the difference between the average weekly full-time equivalent earnings of male employees and female employees employed within the relevant organisation to which all employees are employed.

Agreement making and equal remuneration

Clause 29 of the Bill will now require parties to agreements to include specific information in their agreements setting out how equal remuneration for work of equal or comparable value between men and women workers will be achieved in practice. This means each agreement will need to contain details of how the employer **has** already implemented equal remuneration, **is** implementing equal remuneration, *or* **will** implement equal remuneration if the agreement is certified, for employees covered by the scope of the agreement **[emphasis added].**[12]

The QCU supports this amendment. The current practice is that the QIRC must only be satisfied by verbal submissions of the parties at the certification stage of an agreement that they have, are, or will be implementing equal remuneration supported by an affidavit to that effect.[13]

The QCU supports the placement of the onus on the industrial parties to detail how equal remuneration is to be achieved in the agreement itself as a strong measure to focus both employers and unions on reviewing and addressing equal remuneration during bargaining and throughout the course of an agreement. It also means that inclusion of clauses around equal remuneration processes in the agreement creates an enforceable right for employees.

[12] Ibid s 201.
[13] Ibid ss 201, 250.

Parental and Other Leave Arrangements

The QCU supports the amendments in the Bill to update and improve Queensland Employment Standards relating to parental leave and to sick and carer's leave.

Parental Leave

The Bill updates the Queensland Act in many cases to ensure consistency with the FW Act, but also creates additional flexible leave options based on the individual needs of families.

The terminology in the Act has also been changed to mirror provisions in the FW Act that also reflect contemporary arrangements and choices of leave arrangements to care for children for modern families. Parental leave in the Act includes parental, adoption, surrogacy, and cultural recognition leave.

For instance, Clause 21 of the Bill inserts a new Section 87B in the Act to provide that an employee who is entitled to take parental leave can now take up to 30 days of flexible unpaid leave in an unbroken or broken periods of leave within two years after the birth or adoption of a child. This is an important reform to enable an employee who does not have access to other paid leave arrangements to be able to attend to matters such as medical, adoption or related appointments, care for spouses or children, and the like. This change is consistent with provisions in the FW Act.

Clause 10 of the Bill amends section 59 of the Act to provide that an employee may take their 52 weeks unpaid leave (long birth-related leave) concurrently with their spouse. This leave will be able to be taken in an unbroken or broken periods of at least two weeks at a time. Currently, only short birth-related leave i.e., the eight weeks unpaid leave component can be taken concurrently with a person's spouse. Again, this is an important new reform allowing flexibility of leave to suit a particular family's needs.

> For example, an employee who gives birth to a child takes 52 weeks' unpaid parental leave immediately from the birth of the child. Their partner also decides to take 26 weeks' unpaid leave concurrently, and to return to work full time when the child is six months old, with the birth parent opting to work part time when the child is one.

Clause 20 of the Bill amends section 85A of the Act to extend birth-related leave to an instance of where an employee's pregnancy ends by the birth of a stillborn child. This type of leave provides that an employee is entitled to take either paid sick leave or unpaid leave at such an important time.

This type of leave is only currently available where an employee's pregnancy ends before the expected date of birth, other than by the birth of a living child, or suffers illness in relation to the pregnancy, and is therefore an important reform to recognise the need for employees

to be able to have leave if they have a stillborn child. This is also consistent with the amendments made to the FW Act in 2021 to permit leave relating to a stillborn child.

Clause 17 of the Bill amends section 75 of the Act to provide that an employee who has already returned to work on a full time basis after taking parental leave, may now be able to apply to their employer to work part time up until the child is school aged. Currently the Act only provides that an employee can apply to work part time on return from their unpaid parental leave of 52 weeks.

This is another important reform which will enable among other options the following example to occur:

> An employee gives birth to a child takes an initial 52 weeks' unpaid parental leave. Their spouse continues to work full time for this period, then elects to take the second year as unpaid parental leave while the birth parent returns to work full time. Currently, the birth parent cannot apply to work part time during year three if this is what they would like to do.
>
> The amendments will extend the right for the birth parent to apply to work part time from year three up until the child is school aged.

Clause 8 of the Bill amends section 57 (Definitions for division) by updating the definition of who is a 'child' for the purposes of taking adoption related leave. This amendment will now allow an employee to take leave to adopt a child aged up to 5 years to be extended to take leave when adopting a child up to the age of sixteen. This is an important reform to help support employees within the community, for example for foster parents who may wish to adopt a child of school age where they wish to take adoption leave to help support the transition of the child into their family.

Finally, Clause 11 of the Bill amends section 63 of the Act to provide that an employee or an employee's spouse wishing to take birth related leave can now provide evidence to their employer that would satisfy a reasonable person about the pregnancy and the expected date of birth, consistent with the FW Act.

Currently, evidence has been limited to a doctor's certificate or a statutory declaration. Under the amendments, evidence can now also include a health practitioner's certificate, which includes a medical practitioner, a midwife, or an Aboriginal and Torres Strait Islander health practitioner. This is an important reform which the QCU and the QNMU advocated for in the IR Act Review to recognise in particular the rights of an employee to have medical evidence from a midwife. But it also importantly extends this to employees who are First Nation's people who have chosen to seek health support from an Aboriginal and Torres Strait Islander health practitioner.

Other forms of leave

Clause 5 of the Bill amends section 40 of the Act to clarify that sick leave is exclusive of a public holiday that falls during the period of leave and that an employee is entitled to be paid the public holiday rather than have their sick leave debited. This amendment will rectify some inconsistency in modern awards that currently apply in Queensland. The amendment is also consistent with the FW Act.

Clause 6 of the Bill amends section 41 to update the type of evidence an employer may require when an employee is absent from the workplace for more than 2 days. Currently, evidence includes a doctor's certificate or other evidence of the illness to the employer's satisfaction. Consistent with the FW Act, the amendment will provide that an employee can provide sufficient evidence that would satisfy a reasonable person. Similar arrangements will apply with respect to where an employee takes carer's leave for more than 2 consecutive days under section 45 of the Act.

Courier Drivers

The QCU supports the inclusion in the Bill of a new Chapter 10A relating to independent courier drivers.

These provisions reflect important reforms introduce protections for courier drivers in Queensland to provide them with access to minimum wages and conditions through decisions of the QIRC and negotiated agreements between parties, as well as introducing important protections against unfair contracts, and dispute resolution procedures.

The QCU supports the submissions of the Transport Workers Union, Queensland Branch in this area of the Bill.

Consumer Law Protections for Workers

There are a number of important reforms which are contained within the Bill that relate to clarifying who is and who is not a union for the purposes of representing the industrial interests of employees under the IR Act, and that also introduce stronger consumer law protections for employees against being misrepresented and misled about an entity's right to represent their industrial interests.

These changes are strongly supported by the QCU and our affiliate unions and are consistent with ensuring that only those organisations that are registered under the IR Act and who are subject to the strict governance and accountability requirements of registered organisations under the IR Act, are recognised as being able to represent the industrial interests of employees.

The changes are also consistent with the current objects of the IR Act which are to encourage representation of employees and employers by organisations registered under the Act.

Industrial Organisations

Clause 51 and Schedule 1 to the Bill contain a number of amendments to the Act to clarify that there are only two types of industrial organisations recognised under the IR Act. The first is a registered industrial organisation, and the second a pre-registration organisation. This is consistent with the current legislative framework.

For employee organisations, a registered industrial organisation means one that is registered under the IR Act, while a pre-registration organisation is an entity that is eligible for registration under the Act but is in the process of preparing to apply for registration within specific time periods.

Current criteria under the IR Act for an applicant seeking registration includes that an applicant must establish that it:

1. is not a corporation; [s 602(2)]
2. exists to further or protect its members interests; [s 607(1)(a)]
3. is free from control by, or improper influence from, an employer, an employer association, or an employer organisation; and [s 608(1)(a)].
4. has at least 20 members who are employees [s 608(1)(c)].

In addition, the Commission must also be satisfied that:

- there is no organisation to which the applicant's members might belong, or there is no organisation to which the members could conveniently belong that would

effectively represent them in a way consistent with the objects of the Act (the conveniently belong rule); and [s 608(1)(b)]

- the applicant's members who are not employees, are either officers of the applicant, or independent contractors in circumstances if the independent contractors were employees, would otherwise be eligible for membership of the organisation [s 608(1)(d)].

Additional Registration Criteria

Clause 51 of the Bill introduces a new section 483A into the Act which provides for several new criteria for eligibility for registration as an employee organisation – namely that an applicant:

1. cannot be an incorporated association;
2. has members who are employees; and
3. has either:
    a. had at least 100 members who are employees for at least 4 weeks; or
    b. had at least 20 members who are employees for at least 12 months; and

   applies for registration with the 4 week or 12 month period; and
4. must not have been refused an application for registration under the Act within the previous 5 years.

These are important reforms to clarify that organisations that are already incorporated under the *Associations Incorporations Act* (Qld) (the AI Act) do not have a right to represent employees who are 'members' under the IR Act, the same as the existing criteria that an employee organisation who is a corporation cannot be registered under the IR Act.[14]

They also clarify that an employee organisation can only represent employees, and not employees and employers at the same time.

And these reforms also provide important consumer law protections against other organisations or entities that purport to represent the interests of both employees and employers in industrial matters but are not registered, or have not intention of seeking registration as an employee organisation under the IR Act.

Associations Incorporations Act Amendments

The Bill also makes a number of changes to the AI Act that complement these changes in the IR Act. For example, Division 2 of the Bill clarifies that an entity seeking to incorporate under the AI Act must not have an industrial purpose. In addition, that associations incorporated under the AI Act who either misrepresent or have orders declaring their

[14] Ibid s 602(2).

ineligibility to represent employees as members under the IR Act can have their incorporation status cancelled.

In other words, an entity is incorporated and operates under the auspices of the AI Act which does not cover associations that seek to represent employees industrially, or an entity is registered or seeks registration under the IR Act to represent employees industrially – one or the other and not a hybrid.

The QCU therefore supports these consequential amendments to ensure that there is clarity between incorporation under the AI Act and the IR Act, and that there are consequences for any incorporated association that continues to misrepresent once these reforms are enacted.

Accountability of Registered Organisations

In return for the right to represent the industrial interests of employees under the IR Act, industrial organisations/unions are required to comply with the provisions outlined in Chapter 12 of the IR Act.

Chapter 12 of the Act contains some 303 sections out of a total of 990 active sections of the legislation – almost one third of the Act,[15] which is put aside to oversee and ensure accountability and governance arrangements for industrial organisations. These include among other matters:

- requirements for:
  - registration
  - union rules
  - election rules
  - inquiries into elections
  - the conduct of elections
- provisions relating to:
  - disqualifications from persons holding office
  - officer duties
  - rules re: eligibility and admission to membership
  - register of members and officers
  - records and accounts
- complying with:
  - financial policies, training and registers
  - accounting obligations and reporting requirements
- permitting membership access to financial and membership records

This is a similar system to that for unions participating in the FW Act jurisdiction with registration and accountability requirements set out in the *Fair Work (Registered Organisations) Act 2009* (Cth) (the 'FW (RO) Act').

[15] See sections 595 to 897 inclusive.

In comparison to this broad and detailed regulatory scheme for industrial organisations which is overseen by the QIRC, incorporated associations are only subject to general governance arrangements under the AI Act, requiring minimal oversight by the Office of Fair Trading and complying with basic rules, holding an annual general meeting, and preparing an annual financial report. There is no external oversight of elections (often simply an AGM), financial accounts, or indeed of membership lists to ensure that they are accurate.

Additionally, and significantly an incorporated association can have different categories of members of the same association, such as in the case of NPAQ/TPAQ etc (the same entity but different brand names), which has employees, non-employees, and employers who are all members of the same association and can all be eligible to be members of the Management Committee of the association.

This is in direct conflict with requirements of an 'employee organisation' to 'be free from control by, or improper influence from employers, …, or employer organisations' if registered under the IR Act. It is also directly in conflict with the principles of freedom of association which are a key object of the IR Act and an ILO foundation principle (see further submissions on freedom of association).

In summary, unions who are registered employee organisations under the IR Act are governed by very strict governance and accountability measures compared to associations incorporated under the AI Act, and it would seem absurd that a legal framework covering industrial relations for employers and employees in the state jurisdiction would require such detailed governance and accountability arrangements for one set of organisations, and at the same time permit different organisations to operate within the purview of the same Act with different and lower accountability and governance standards.

The Bill will therefore clarify the intention of the IR Act and the organisations that are recognised as being authentic and operating within its purview.

Changes Consistent with the Objects of the IR Act

A number of the key objects of the IR Act include the:

- promotion of collective bargaining;
- encouragement of fairness and representation at work, and the prevention of discrimination, by recognising the right to freedom of association, the right to organise and the right to be represented;
- the encouragement of representation of employees and employers by organisations that are registered under the Act; and

- assisting in giving effect to Australia's international obligations in relation to labour standards.[16]

The changes in the Bill are consistent with these objects and the interaction of the principles and systems of freedom of association, collective bargaining, and the representation of employees by registered employee organisations.

The Bill does so through ensuring there are only two types of organisations recognised under the Act – those that are registered, and those that are legitimately seeking registration under the Act, and who are recognised as having standing to make and vary awards and negotiate and be parties to collective agreements for employees.

The QCU position is that these amendments are consistent with the International Labour Organisation (ILO) freedom of association principle as well as Queensland human rights.

Freedom of association

Both freedom of association and collective bargaining are founding principles of the ILO set out in:

- C87 Freedom of Association and Protection of the Right to Organise Convention, 1948
- C98 Right to Organise and Collective Bargaining Convention, 1949

The right to organise and form employers' and workers' organisations is considered a prerequisite for sound collective bargaining and social dialogue.[17] A key objective of the freedom of association principle is therefore to ensure that worker organisations are strong and independent to help support workers to collectively bargain, and that they are separate from employer organisations.

These freedom of association principles are embedded alongside the recognition of registered employee organisations in the IR Act and their fundamental role in helping to determine wages and conditions in modern awards and collective agreements, through the general protections provisions that protect employees from adverse action being taken against them for exercising or not exercising workplace rights, and through the rights awarded to employees who are members of registered unions to participate in protected industrial action to achieve fair wages and conditions.

[16] IR Act s 3(h), (m), (n), (r).
[17] International Labour Organisation, ILO Declaration on Fundamental Principles and Rights at Work https://www.ilo.org/declaration/principles/freedomofassociation/lang--en/index.htm#:~:text=The%20freedoms%20to%20associate%20and%20to%20bargain%20collectively,Declaration%20of%20Philadelphia%20annexed%20to%20the%20ILO%20Constitution.

Human Rights

Freedom of association is also recognised as a Queensland human right, where section 22 of the *Human Rights Act 2019* (Qld) (the 'HR Act') provides that 'every person has the right to freedom of association with others, including the right to form and join trade unions'. This is one twenty-one broad human rights prescribed under the HR Act.

Section 13 of the HR Act also provides that a human right outlined in a law may be subject to reasonable limits that among other matters, are consistent with the nature of the human right, the nature and purpose of the limitation, the relationship between the limitation and its purpose, including whether the limitation helps achieve the purpose, and the importance and purpose of the limitation.

These provisions are consistent with the principles set out in the High Court decision of *McCloy v NSW* (2015) 257 CLR 178. In that decision, the High Court held that the limitation that had been imposed on electoral expenditure laws may have burdened the implied right to freedom of political communication, but that the legislative amendments were justified in furtherance of their objective to prevent political corruption. In other words, a limitation on a right should be justified by weighing it up against the purpose of the limitation.

Applying those same principles to the Bill and consistent with section 13 of the HR Act, the specific limitation on freedom of association in the Bill is to recognise that the freedom of association protections only apply to members of registered organisations or those organisations seeking to become registered.

The purpose of this is to prevent other entities not registered under the IR Act or not seeking registration under the IR Act, from misrepresenting employees about being able to represent them industrially when they have no such legally recognised right.

As was noted above, freedom of association is inextricably entwined with collective bargaining in the Act and representation by registered organisations of members who are employees. In this context, the Bill continues to permit an entity to seek registration subject to existing criteria and a number of important new criteria in the Bill – in particular that the entity cannot be an incorporated association, the entity has members who are employees only (or officers of the association or independent contractors who would otherwise be employees), and that the application is subject to the 'conveniently belong' rule.

The conveniently belong rule is a long-standing provision in Queensland industrial law which provides for consistent coverage of employees by registered unions but permits an application by an entity to cover employees where there is no other registered union to which the employee(s) could belong, or importantly, for an applicant to argue that there is no registered organisation to which the members could conveniently belong that would

effectively represent them in a way consistent with the objects of the Act.[18] These matters are to be determined on application by the QIRC with appeal rights available to the Queensland Industrial Court.

It should also be noted that the objects of the Act do not envisage an open slather and free for all competitive unionism model, but instead have existed to help ensure that there is an appropriate balance between the rights of employees to join unions and advance their interests, and the rights of employers to have productive and cooperative workplace relations within a system of stable coverage and representation within clearly demarked areas.

The alternate to this system is to allow all unions and other entities purporting to be a union to cover any employee with or without registration requirements, but in doing so remove the legal connection to collective rights of employees to vary awards and bargain for collective agreements, including the right to take protected industrial action to achieve collective outcomes.

The QCU therefore supports the clarification that the Bill provides to the rights to represent employee's interests in the state jurisdiction and to introduce strong consumer law protections to prevent other entities from falsely claiming and misrepresenting a right to do so.

These 'limitations' or changes are consistent with the objects of the Act. The alternate ways of achieving freedom of association would completely undermine the operations of the IR Act and be inconsistent with the ILO objective of achieving strong worker representation and collective bargaining rights.

Misrepresentations

In 2021, the QIRC determined that NPAQ, an incorporated association purporting to represent the industrial interests of nurses was not a trade union within the meaning of the *Industrial Relations Act*, and by extension a member of the association was not entitled to the general protections under the Act.[19]

In that matter, NPAQ had attempted to argue that the freedom of association and general protections in the Act applied to one of their 'members' because they alleged their association was an 'industrial association' within the meaning of the IR Act. However, the QIRC held that the meaning of the term 'industrial association' was clear under the Act – the

[18] IR Act s 608(1)(b)(ii).
[19] *Gilbert v Metro North Hospital Health Service* [2021] QIRC 255 (the *'Gilbert case'*).

legislature had contemplated that an industrial association was simply a group of individual employees as distinct from an incorporated body under the AI Act.[20]

A number of the amendments in this Bill therefore clarify that an association such as NPAQ is not entitled to represent the industrial interests of employees under the IR Act, and that the general protections and workplace rights do not extend to employees who are 'members' of an incorporated association.

For instance, Clause 33 of the Bill amends section 279 of the Act to clarify that the freedom of association and protection from workplace discrimination only applies to an employee who is a member of an industrial organisation or a pre-registration organisation.

In addition, Clause 36 of the Bill introduces a new misrepresentation offence in section 293A about the rights to represent the industrial interests of a person or a particular group of persons. The IR Act currently includes an offence of misrepresentation about workplace rights and engaging in industrial activity,[21] which are consistent with the same offences in the FW Act.[22]

The new offence is a strict liability offence which will complement the other reforms in the Bill, but it is also an important consumer law protection for workers to help protect them from being misrepresented or misled by other entities or organisations who are not recognised with rights to represent employees under the IR Act.

This is similar to the misleading and deceptive conduct provisions of Australian consumer law or to the common law for misrepresentation under contracts. The common law means that a misrepresentation occurs where:

(i) there is a positive misrepresentation of a fact e.g., the right to represent the industrial interests of a person or a particular group of persons.
(ii) the statement is false; and
(iii) the statement induced a person into a contract/action/membership etc.

A fraudulent misrepresentation may result in a contract being made void and damages awarded. Section 18 of the Australian consumer law also regulates commercial behaviour that is misleading or deceptive conduct.

Including misrepresentation in the IR Act specific to entities that falsely claim to be able to represent the industrial rights of employees is an important consumer law reform because it enables timely and low cost access to the QIRC for an order and penalty where an

[20] Gilbert case [94], [112], [413].
[21] IR Act ss 289, 293.
[22] FW Act ss 345, 349.

employee has being falsely misrepresented into signing up for membership of an association that does not have the right to represent the employee's interests industrially, as opposed to pursuing a costly and time intensive remedy through the Federal Court.

Ineligibility Orders

Clause 51 of the Bill includes a new Subdivision 10A 'Orders about entities not eligible for registration under chapter 12'.

These changes will enable an organisation registered under the IR Act, or eligible for registration, or an employer, to apply for an order to the QIRC declaring that an entity is not eligible for registration under the Act, or that registration would be inconsistent with the Act.

Orders that the QIRC can make include orders prohibiting:

- an officer or employee of an entity from representing a person in a matter;
- an entity from arranging for an agent to represent a person in an industrial dispute;
- the entity from holding out membership on the basis of it being able to provide representation in stated matters; and
- another entity associated with the entity, or an officer or employe of another entity associated with the entity, from engaging in conduct as above.

These changes will prevent an association or entity not seeking registration under the IR Act from seeking to evade compliance and the new consumer law protections by extending their relationships with other related entities. A similar situation was examined by the QIRC in the *Gilbert case* where NPAQ and its structures were likened to a Ponzi scheme in some submissions.

Demarcation Orders

Section 479 of the IR Act provides that a full bench of the Commission has the power to make orders that an employee organisation has the right to the exclusion of an association or another employee organisation to represent the industrial interests of a particular group of employees.

Clause 48 of the Bill amends section 479 to clarify that these orders only apply to orders between registered organisations about their rights to represent the industrial interests of employees. This is consistent with the changes in other areas of the Bill including the provisions relating to associations incorporated under the AI Act.

Other Matters

Access of Casual Employees to Protections from Unfair Dismissal

Clause 37 of the Bill amends section 315(9) of the Act to clarify that a short term casual for the purposes of being excluded from accessing a remedy for an unfair dismissal under the IR Act is an employee who is engaged by an employer on a regular and systematic basis for several periods of employment during a period of 6 months.

This amendment makes these provisions consistent with those contained within the FW Act.

Single Commissioner Arbitration

Clauses 27 and 28 amends section 179 and creates a new section 179A to provide an option for parties who are bargaining for an agreement and who have been in conciliation with a single Commissioner over outstanding matters but still cannot reach agreement, to mutually agree to have those matters determined by a single Commissioner.

The changes will mean that a full bench is not required to convene a hearing of the bench or to take formal submissions from the parties before referring the matter to a single Commissioner.

These changes are expected to assist parties to reach a final agreement in a timely and more accessible manner.

General Rulings (State Wage Cases)

Clause 43 of the Bill includes a new section 459A 'Provision about general ruling for State wage case'. The new section seeks to provide a discretion to a full bench of the QIRC when making a general ruling on the Queensland minimum wage and to increase wages payable from the annual State wage case, to consider exempting wages payable to employees, or a class of employees under a modern award. In particular, that the QIRC will have discretion to not apply a State Wage Case outcome to certain employees if it would result in their wages being equal to or exceeding the wages paid to them in an agreement or a ruling.

Additionally, the Explanatory Notes to the Bill state that the new section is to provide the QIRC with express discretion when considering whether to apply the State Wage Case general ruling to awards, referring to the unique feature of the Queensland industrial relations system which permits that on application, an award can include rolling up of provisions from expired certified agreements through section 145 of the Act.

The QCU and its affiliates do **not** support this clause which would permit a situation where low paid employees in the public sector at the lowest levels of modern awards such as cleaners, wardspersons and entry level administrative staff may not be entitled to receive the

same increase in any given year as that awarded for other low wage employees under the State Wage Case.

Further, the QCU does not support the inclusion of this Clause in the Bill as it is considered unnecessary given the current section 459(2) already provides that a general ruling may exempt:

(a) a class of employers or employees;
(b) employers or employees employed in a particular locality;
(c) an industrial instrument or part of an industrial instrument.

In that case, the QCU considers that this issue remains a matter for the State Government to advocate in the annual State Wage Case, that for example, low wage employees should be exempt from being paid minimum award wage increases, and the QIRC will be required to determine the matter after taking submissions and arguments from all of the industrial parties at the time.

END >>>