QUEENSLAND COUNCIL OF UNIONS
SUBMISSION TO
FINANCE AND ADMINISTRATION COMMITTEE

INDUSTRIAL RELATIONS BILL 2016

The Queensland Council of Unions (QCU) is the peak union council in Queensland. The QCU welcomes this opportunity to makes submissions in relation to the Industrial Relations Bill 2016 (the Bill).

The QCU was a staunch and vocal critic of the various amendments to the Industrial Relations Act 1999 that were introduced by the Newman Government. Continual amendment to the legislation had been undertaken in a piecemeal way thereby rendering the existing legislation practically unworkable. With little exception, Newman Government amendments to the Industrial Relations Act 1999 were intended to reduce employees' conditions of employment and representation rights.

By contrast to the Newman Government style of amendment, this Bill follows a review undertaken by Industrial Relations Legislative Reform Reference Group (IRLRRG) (2015). This group of experts headed by Jim McGowan undertook a comprehensive review of the legislation within a contemporary context. In addition to the need to undo the damage that had been done by the Newman Government, it was also necessary to frame the legislation within the Queensland jurisdiction following the transfer of private sector industrial relations to the Commonwealth.

Queensland unions were able to participate in the review and it is pleasing to see that a number of the submissions made to the review have been adopted in the Bill. Accordingly, the remainder of this submission is brief and confined to those matters for which we believe there remains outstanding issues. Where practical, a recommendation is provided so that the committee can adopt any of the recommendations if so disposed.

1. MODERN EMPLOYMENT CONDITIONS

The proposed section 31(3) excludes public holidays from annual leave. It is understood that the Queensland Nurses Union (QNU) is making submissions with respect to this matter and the QCU adopts the submission of the QNU in relation to this section.

In the proposed section 31 (6), the definition of a shift worker is in fact a continuous shift worker. This provision is, in our submission, excessively onerous as the general entitlement for five weeks' annual leave is to a shift worker rather than a continuous shift worker. Section 87 of the Fair Work Act provides for broader definition of shift worker by virtue of reference to definitions of shift worker contained in the relevant industrial instrument. Section 87 (1) (b) of the Fair Work Act reads as follows:

"(b) 5 weeks of paid annual leave, if:

(i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or

(ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or

(iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees)."

This definition would appear to be more consistent with the proposed objects of legislation than the more restrictive definition that is contained in the proposed section 31 (6).

Recommendation 1.1 redraft to section 31 (6) in similar terms to section 87 (1) (b) of the Fair Work Act.

The proposed section 117 refers to payment for public holidays. The QNU has identified two problems with the proposed section insofar as it provides an entitlement to payment for the day, proposed section 117(1) (b), and the ordinary rate upon which payment is made, proposed section 117 (5). It is understood that the QNU is making submissions with respect to this matter and the QCU adopts the submission of the QNU in relation to this section.

2. MODERN AWARDS

The proposed section 141 provides for general requirements for the commission to exercise powers in relation to modern awards. The Minister's request in relation award modernisation includes the following statement:

Award modernisation is not intended to reduce or remove employee entitlements and conditions from what is available in pre-modernisation awards. Having regard to this, the Commission shall ensure wages and employment conditions continue to provide fair conditions in relation to the living standards prevailing in the community and what is afforded to employees and employers in the relevant pre-modernisation award/s.

Furthermore, the Commission must give special regard to the needs of low paid employees and the desirability of safeguarding the employment entitlements and protections for such employees.

It would be appropriate to include these concepts in the proposed section 141 for the on-going exercising of the commission's powers.

Recommendation 2.1 to include a new paragraph (c) in section 141 (1) as follows:

"(c) do not reduce or remove employee entitlements and conditions"

Section 156 provides for a review of modern awards. This section appears superfluous given the existence of section 147.

Recommendation 2.2 delete proposed section 156.

3. COLLECTIVE BARGAINING

The Queensland Teachers' Union (QTU) will be making submissions in relation to the proposed section 243. The QCU adopts the submission of the QTU in relation to this Chapter.

4. EQUAL REMUNERATION

The union movement fully supports the concept of equal remuneration and has been instrumental in its establishment as a contemporary principle of Australian industrial relations. There are however concerns that existing provisions could have unintended consequences such as a requirement that an equal remuneration test case is mandated before the creation of any industrial instrument. This would potentially be time consuming and impractical. There is also a concern that failure to undertake such a process prior to the creation of an industrial instrument may prevent a union from undertaking such a process at some stage in the future.

There are no specific recommendations in relation Chapter 5, however we highlight potential matters for consideration as to how this Chapter is implemented in practice.

5. INDUSTRIAL DISPUTES

The union movement maintains that there should be a broader capacity to take industrial action rather than it merely being restricted to protected industrial action. There are circumstances in which the conduct of the employer justifies taking industrial action outside of protected industrial action.

Australian law introduced a right to strike in 1994 which may have had the unusual impact of restricting strike activity (Peetz 2016). The introduction of the right to strike was a result of adverse finding of the International Labor Organisation in relation to incapacity of Australian unions to take industrial action (Dalton and Groom 2000). Australian law restricts the right to strike to bargaining for wages and conditions of employment and since 2005 has imposed a restriction by virtue of secret ballots in relation to industrial action (Creighton et al 2016; Peetz 2016).

The restrictions placed on industrial action in Australia mean the rights of Australian workers, concerning the right to strike, are considerably less than workers in an international perspective (Peetz 2016). The amendment to Australian law to introduce the right to strike, that was soon followed in Queensland legislation, relied upon the following international conventions:

(a) Article 8 of the International Covenant on Economic, Social and Cultural Rights;

(b) the Freedom of Association and Protection of the Right to Organise Convention, 1948;

(c) the Right to Organise and Collective Bargaining Convention, 1949;

(d) the Constitution of the International Labor Organisation; and

(e) customary international law relating to freedom of association and the right to strike. (Dalton and Groom 2000).

These conventions have been broadly interpreted:

"that the right to strike is an 'intrinsic corollary' of the rights contained in the two ILO conventions. The Committee on Freedom of Association ('CFA') has described the obligation to protect the right to strike as an essential requirement of the Freedom of Association Convention. Both the CEACR and the CFA have 'consistently reaffirmed the right to strike.'" (Dalton and Groom 2000).

It is the Queensland union movement's submission that

Australia is out of step with international standards on the right to strike. As previously stated, there are circumstances in which the conduct of an employer is such that industrial action is justifiable. Where an employer is in breach of their own legal obligations, the capacity to take industrial action can bring about a quick resolution to outstanding issues. The failure of an employer to consult in relation to the introduction of major changes in the workplace is an example of where a right to strike could be afforded to employees.

Recommendation 5.1 the recognition of circumstances where the conduct of the employer justifies taking industrial action outside of bargaining periods.

6. GENERAL PROTECTIONS

The proposed section 298 prohibits bargaining services fees. When enterprise bargaining was introduced into the Australian industrial relations system, the trade union movement was instrumental in advancing the cultural and legislative changes necessary to make this enormous transition. That was a transition from a centralised industrial relations system to a method of collective bargaining at an enterprise level and was said to be in the national interest in order to improve productivity (Dabscheck 1995; Hancock 1999; Hancock 2014; Peetz 2012; Plowman 2004; Townsend et al 2013; Van Gramberg2013).

The shift to enterprise bargaining also brought with it a substantial increase to the workload of unions. Changes to structure of industry, legislation and the attitude of employers and governments coincided with a decline in union density (Peetz 1998). As a result, unions are compelled to undertake substantially more work with considerably less resources. Union members bear the cost of bargaining whilst non-members obtain the benefits (Orr 2001; Zeitz 2001).

A decline in union membership is not peculiar to Australia and similar declines have been experienced in most OECD nations for similar reasons (Barry and Wailes 2004; Bronfenbrenner 1998; Bryson and Gomez 2005; Cooper and May 2005; Heery et al 2003; Machin 2000; Peetz 1998:183). What is remarkable for Australia however is the extent of collective coverage (ABS 2014). Collective agreement coverage is 42.6 per cent of the workforce. In addition to this some 19.5 per cent of the workforce rely solely upon an award for their conditions of employment. In excess of sixty per cent of the workforce solely rely upon industrial instruments, the upkeep of which is directly the result of union resources paid for by union members. The ABS figures do not specify how many of the remaining 38 per cent of the workforce, that are described as being covered by individual agreements, are to some extent reliant on an industrial instrument, for example by being paid an over-award payment. One could safely say that well in excess of two thirds of the Australian workforce benefit from the resources of unions that are paid for by union members.

The national statistics, as to reliance upon industrial instruments, are considerably smaller than the corresponding proportion of the workforce, remaining in the Queensland jurisdiction, that are likewise reliant upon industrial instruments. The nature of public sector employment means that collective coverage is the norm rather than the exception. The matter of collective coverage was traversed by a Full Bench of Queensland Industrial Relations Commission in the 2014 State Wage Case . Most employees in the jurisdiction will be covered by a collective agreement with a very small proportion (perhaps as little as just over 2 per cent) covered by awards. The very small number of executive employees will be the subject of individual contracts or statutory arrangements.

The use of bargaining service fees (alternatively bargaining agents' fees) are common place within the system of collective bargaining in the United States (Orr 2001). With the exception of the so-called "right-to-work" states, such a fee is permissible as part of the system of collective bargaining. The United States has had a decentralised system at the enterprise level for considerably longer than Australia and maintains the capacity of bargaining services fees. It is incongruous to the union movement that the move to enterprise bargaining in Australia, that in a number of ways resembles the American system, does not provide for the same ability for a union to collect fees from non-members who enjoy the benefits of collective agreements that have been achieved by the resources provided by union members.

Recommendation 6.1 delete proposed section 298 and make bargaining services fees a matter about which agreements between employers and unions can be made.

7. RECORDS AND WAGES

The proposed section 351 maintains an antiquated provision enabling an employee to give written direction to an employer that time and wages records not be available to an authorised officer or a particular authorised officer. From the experience of affiliates, the use of such a provision never emanates from the actual employees but is rather orchestrated by employers.

Much of the IRLRRG Report is concerned with the public sector nature of the Queensland jurisdiction in a contemporary setting. As mentioned previously, when discussing bargaining agents' fees, in excess of 90 per cent of employees within the jurisdiction will be covered by a collective agreement. It therefore follows that the wage that an employee should be in receipt of is well known and easily established. In turn, any spurious reasoning of privacy behind this secrecy evaporates in light of this overwhelming statistic.

The continuation of this provision in a public sector setting is contrary to openness and accountability. In fact, this provision might potentially be used to hide payments that are not able to be legally made in a public sector setting.

Recommendation 7.1 delete section 351.

8. TRIBUNALS AND REGISTRY (LEGAL REPRESENTATION)

The proposed section 530 refers to legal representation. Subsection (4) of section 530 replicates similar provisions in the Fair Work Act. From the experience of advocates in the Fair Work Commission, the provisions in the Fair Work Act amount to a virtual right for lawyers to appear. It is for this reason that the QCU and its affiliates oppose this section of the Bill.

This provision is intended to give effect to recommendation 64 of the IRLRRG Report which reads as follows:

"That the legislation allow for the legal representation, by leave, of parties **in a proceeding before a full bench** (other than a full bench established to arbitrate when collective bargaining has failed to result in an agreement) where it would allow the matter to be dealt with more efficiently (having regard to the subject matter of the proceeding), or if would be unfair not to allow the party to be represented because the person is unable to represent themselves effectively." (emphasis added)

The wording in the proposed section 530 (4) is not restricted to full bench proceedings as was contemplated by recommendation 64. Not only is it beyond the intention of this recommendation it contradicts a previous amendment to the legislation that was introduced by the Palaszczuk Government. The Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015 returned the provisions relating to legal representation back to their pre-Newman Government status. The Explanatory Note for the Restoring Fairness Bill had the following to say in relation to legal representation in QIRC proceedings:

"The former Government also amended the IR Act to broaden the circumstances in which any party may have legal representation without requiring the consent of all parties. This eroded the status of the Commission as a 'layperson's tribunal'." (Queensland Parliament 2015:2); and

"The Bill will achieve its objective of returning the Commission to its status as a 'layperson's tribunal' by restoring legal representation arrangements for parties appearing before the Commission to be as they were prior to the Public Service and Other Legislations Amendment Act 2012." (Queensland Parliament 2015:3).

The union movement viewed the Newman Government's opening up of the jurisdiction with suspicion. Given the attitude adopted by the Newman Government to most industrial relations issues, it is reasonable to assume that the use of lawyers (at additional expense to the tax payer) was intended to cause a depletion of union resources in the protection of members' pay, conditions and job security; all of which was under threat throughout the tenure of the Newman Government. Our submission is that the course adopted for the restoring fairness bill was the correct one.

Recommendation 8.1 that the existing provisions of the act be maintained for legal representation.

From the drafting of section 557 it appears that appeals only lie from the Queensland Industrial Relations Commission to the Industrial Court. If this was the case, it would upset a long-standing practice of allowing appeals to a Full Bench of the Commission. It is also inconsistent with a policy of maintaining the

Commission as a lay person's tribunal. The QCU assumes that this is a drafting error rather than deliberate policy.

Recommendation 8.2 amend section 557 to allow for appeals to a full bench.

9. INDUSTRIAL ORGANISATIONS

The Queensland Teachers' Union (QTU) will be making submissions in relation Chapter 12 generally and, specifically, to the definition of "branch" in the proposed section 595. The QCU adopts the submission of the QTU in relation to this Chapter.

10. PUBLIC SERVICE ACT

Proposed new section 149A of the Public Service Act requires the commission chief executive to make directive about casual employees. This proposed amendment is to give effect to recommendation 14 of the IRLRRG Report that reads as follows:

"That the Public Service Commission develop a mechanism to enable casuals who have been employed on a long-term or systematic basis to be converted to permanent employment on a similar basis to that provided for in relation to long-term temporary employees."

The QCU applauds the enactment of provisions that enable such a conversion but consider that two years in an unnecessarily long period of time to wait for such a conversion. By contrast the following provisions are contained in the Manufacturing and Associated Industries and Occupations Award 2010 being a modern award of the Fair Work Commission:

14.4 Casual conversion to full-time or part-time employment

(a) A casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.

In our submission, six months is far more appropriate than two years for the purpose of ascertaining whether an employment relationship is truly casual in nature.

Recommendation 10.1 in section 149A (6) (a) of the Public Service Act delete the expression "2 years" and replace it with "6 months".

It is understood that the Together Union will be making further submissions in relation to act amendments concerning precarious employment and appeal rights. The QCU adopts the submission of the Together Union in relation to these matters.

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