Submission No. 32

Queensland Law Society

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Research Director
Finance and Administration Committee
Queensland Parliament
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BRISBANE QLD 4000
By Post and Email: fac@parliament.qld.gov.au

Our ref Industrial Relations Committee

Dear Research Director

Industrial Relations Bill 2016

Thank you for the opportunity to make a submission to the Committee's inquiry into the *Industrial Relations Bill 2016* (**Bill**). The Society's submission has been prepared with the input of its industrial law committee.

The Society supports the Bill as reflecting the recommendations of the McGowan Review. The Society was represented on the review group and made a detailed submission to that review, a copy of which is attached (**Initial Submission**). The Society was pleased to see that a number of the Society's concerns were addressed in the recommendations of the review panel and that the resultant recommendations have now been implemented in the Bill.

Whilst supporting the Bill, the Society recommends several changes to improve the Bill.

General comments

The Society's position is that it is appropriate for the state of Queensland to maintain its own system of industrial relations and one which comprises the basic elements of fairness to all participants, namely:

- a minimum legislative safety net of employee terms and conditions;
- the existence of an "independent umpire" in the form of the Queensland Industrial Relations Commission (**Commission**) with broad functions of conciliation and arbitration;
- broad access rights to the Commission in industrial dispute matters including termination of employment situations and other employer/employee disputes; and
- appropriate regulation of industrial organisations.

The Society in particular expresses its support for the following aspects of the Bill (although this should not be taken as an exhaustive list):

- the reframing of the main purpose of the legislation;
- the retention of a minimum safety net in the form of the Queensland Employment Standards and in particular the introduction of:
    - a right to domestic violence leave;
    - a right to request flexible work arrangements;
    - an entitlement for employees to take unpaid emergency service leave to undertake voluntary emergency management activities; and
    - the requirement to provide an information statement to new employees;
- the introduction of a mechanism for the Commission to address gender wage equality;
- the continuation of arrangements for the appointment of industrial commissioners on tenure on a full time or part time basis and the continued practice of appointing a Supreme Court judge as President of the Industrial Court;
- legal representation provisions which are consistent with those contained in the *Fair Work Act 2009* (Cth) (**FW Act**);
- the introduction of an avenue to seek the Commission's assistance in addressing workplace bullying;
- the introduction of defined workplace rights and the ability to seek the Commission's assistance in enforcing these rights;
- providing for work related discrimination matters to be dealt with by the Commission (as the primary legal forum for dealing with workplace disputes in Queensland);
- the retention of a broad power to seek the assistance of the Commission in resolving industrial disputes; and
- amending the *Magistrates Courts Act 1921* (QLD) to allow a broader range of employees to access the simplified common law employment claim process and to include an automatic indexing mechanism for the remuneration threshold for such claims to remain in line with the high income threshold under the FW Act.

Comments in relation to particular matters

Duty of mutual trust and confidence (Chapter 1)

Section 4(e) of the Bill provides that the main purpose of the Act is to be achieved by (amongst other things):

> *"promoting productive and cooperative workplace relations including by recognising mutual obligations of trust and confidence in the employment relationship"*

Whilst under English law, the obligation of trust and confidence has been found to apply to a broad range of conduct, the High Court of Australia has found that no term of mutual trust and confidence is to be implied into employment contracts under the common law.

The introduction of mutual trust and confidence into the objects of the Bill (without providing guidance or parameters regarding the practical impact of such a concept) is likely to:

- create uncertainty about the status of the concept given the Bill does not create a statutory duty outside the expression of the objects;
- cause uncertainty (particularly for employers) in circumstances where there is little Australian jurisprudence on precisely what a duty of mutual trust and confidence means in an employment context; and
- lead to the development of jurisprudence in Queensland in a way that may not have been intended.

The Society considers that it would be beneficial for further guidance as to the effect of the new object to be included in the Bill, and suggests that the Committee could give consideration to providing this further guidance. However, the Society also recommends that further consideration should be given to the benefits to both employers and employees before any statutory duty of mutual trust and confidence is created.

Queensland employment standards (Chapter 2, Part 3)

Flexible working arrangements (Division 4)

Division 4 of Part 3, Chapter 2 of the Bill confers a broad right on employees to request a change to the way in which the employee works. As indicated above, the Society supports the introduction of such a right.

The Society notes that the right provided under section 27 of the Bill is not limited to employees with a minimum period of service or who fall within a specific category or possess a certain attribute (as is the case with the right under the FW Act).

In addition we note that:

- the Bill contains no guidance on what a "reasonable ground" may be to refuse a request made under section 27; and
- the Commission has jurisdiction to hear disputes regarding the exercise of this right.

Whilst the Society supports a system whereby the Commission has jurisdiction to hear disputes arising under these provisions, we consider that it would be beneficial to include an explanation in the Bill as to what may constitute reasonable grounds to refuse a request. This was found to be an important omission at the time the comparable provisions in the FW Act were introduced, which was later rectified by the inclusion of section 65(5A). The Society considers that it would be beneficial to include comparable provisions in section 28 of the Bill.

Taking annual leave (Division 5, Subdivision 2)

The *Industrial Relations Act 1999* (QLD) (**IR Act**) currently provides that in circumstances where an employer and an employee cannot agree on when annual leave is to be taken, the

employer can decide when the employee will take the leave (subject to providing at least 14 days written notice).

The Society notes that these provisions have been retained in section 33 of the Bill, albeit that the required period of notice has been increased to 8 weeks.

Whilst the Society supports:

- the retention of a right for employers to effectively direct an employee to take annual leave; and
- the introduction of a longer period of notice before such a direction can be issued,

the Society notes that at a federal level an employer's ability to direct an employee to take annual leave is somewhat more limited. That is, in most cases an employer can only direct an employee to take leave where the employee has an excessive amount of leave accrued (typically more than 8 weeks) or during a period of shut down. In addition, the direction is generally limited to leave in excess of a certain amount (often 4 weeks).

The Society is of the view that an unfettered right to direct an employee to take leave in any circumstance and without needing to leave the employee with a minimum leave balance could operate unfairly. The Society recommends further consideration be given to including restrictions on the right to direct an employee to take annual leave that are comparable to those that exist at a federal level.

Notice of termination and redundancy pay (Division 13)

The Society notes that the provisions of the Bill (like the IR Act) relating to minimum period of notice on termination and minimum redundancy payments do not apply to employees who are not covered by an industrial instrument, are not a public service offer and who earn over the high income threshold (essentially executives).

The Society reiterates it comments in paragraphs 22 to 25 of its Initial Submission regarding the desirability of extending these entitlements to all employees covered by the Bill.

Equal remuneration (Chapter 5)

The Society supports the inclusion of a mechanism by which the Commission can make orders to address the gender pay gap.

Applications made under Chapter 5 of the Bill are likely to be of significant public interest and the orders made could have wide reaching implications including the imposition of significant financial costs on employers.

Given the likely importance and significance of these types of matters, the Society is of the view that it would be appropriate (and desirable) for these matters to be determined by a Full Bench of the Commission rather than by a single Commissioner. As such, the Society recommends that the Bill be amended to facilitate this.

Industrial disputes (Chapter 6, Part 4)

The provisions in the Bill regarding industrial disputes largely reflect the existing provisions in the IR Act. The Society supports the continuation of these provisions.

In relation to the particular issue of payment of employees engaging in strike action – the Society notes that the Bill retains the existing position in the IR Act, that is the Bill does not prohibit an employee from making payment to an employee who engages in strike action (unlike the position under the FW Act), rather it is a matter left to the employer's discretion.

The Society supports a system whereby employers have a choice in these situations, but notes that section 268(1) of the Bill appears to only give an employer one of two options – make full payment or make no payment at all.

Strike action is defined in Schedule 5 of the Bill to include actions falling short of a failure to perform any work at all, such as performance of work in a way that it is not customarily performed and restrictions, limitations and delays in the performance of work. Despite this, section 268 of the Bill does not contemplate partial payment in response to partial work bans. This is in contrast to Division 9 of Part 3-3 of the FW Act, which deals prescriptively with partial work bans, and includes a power for the Fair Work Commission to make an order varying the proportion by which an employee's payment was reduced.

The FW Act level of detail in relation to partial work bans is justifiable in the context where there is a general prohibition on strike pay. The Society does not propose that the Bill contain the same level of detail. However, we suggest that consideration be given to including a reference in s. 268(1) to the employer having an option of making a partial payment.

Multiple actions (Chapter 8)

As the Bill stands, there is no legal impediment to an applicant bringing both an unfair dismissal application and a dismissal based application for breach of the general protections provisions. The FW Act prevents the bringing of simultaneous actions of this nature (see ss.725 to 733 FW Act).

Under the current IR Act, the issue of whether a dismissal occurred for an invalid reason can be considered within an unfair dismissal claim but the onus remains on the applicant. However, significant practical difficulties would exist if both a claim of unfair dismissal and a workplace rights based dismissal claim could be simultaneously commenced given the different approaches to the onus of proof in both cases.

In the Society's submission, provision should be included in the Bill that an unfair dismissal application and a dismissal based claim of breach of workplace rights cannot be simultaneously maintained.

Records and wages (Chapter 9)

Section 347 of the Bill provides that an employee may only inspect their time and wages only once a year (and that inspection may only relate to the time and wages record for the preceding 12 months only).

The Society:

- reiterates the concerns expressed in paragraphs 28 and 29 of its Initial Submission regarding the ability of public sector employees to access their time and wages records; and

- recommends that section 347 of the Bill be amended to reflect the employee access provisions under regulation 3.42 of the *Fair Work Act Regulations 2009* (Cth).

Legal representation (Chapter 11, Part 5)

The Society supports amending the legal representation provisions to make them consistent with the FW Act.

Whilst supporting the legal representation provisions of the Bill, the Society submits that the same requirements for leave should apply to any paid agent seeking to appear in this jurisdiction in accordance with the provisions of s.596 of the FW Act.

The Bill's existing provisions do not, in the Society's opinion, address the issue of unfairness which exists between a party who is refused representation by a lawyer and a party who has the benefit of a private agent who is a skilled lay advocate who does not require leave to appear. There is no basis for requiring a lawyer to seek leave according to the tests of the legislation but not a lay advocate who is a private paid agent.

Amendments to the Anti-Discrimination Act (Chapter 19, Part 2)

Work-related matters

Chapter 19 of the Bill would amend the *Anti-Discrimination Act 1991* (**Anti-Discrimination Act**) in relation to the handling of applications regarding work-related matters - with the result that such applications would be dealt with by the Commission (as opposed to QCAT). The Society is supportive of these amendments.

At present work-related matters is defined in section 1106 of the Bill as "a complaint or other matter relating to, or including, work or the work-related area".

The Society considers that it would be useful to clarify the types of applications that may fall within the definition of "work – related matter" (perhaps via an explanatory note or otherwise a more expansive definition of the term).

In particular, the Society considers that:

- the concept of a work-related matter should capture alleged contraventions of Subdivision 1 of Division 2 of Chapter 2 of the Anti-Discrimination Act (prohibitions in work and work-related areas) – these provisions cover a range of situations, including the pre-work area (recruitment and selection) and it is not sufficiently clear whether the current definition of a "work-related matter" would include all of these situations;
- it should also be possible for "work-related matters" to also involve other alleged contraventions of the Anti-Discrimination Act that relate to work (eg. contravention of s. 118, which prohibits sexual harassment).

Role of the ADCQ

In addition the Society notes that the explanatory material to the Bill indicates that the Commission will have exclusive jurisdiction in relation to work-related matters. The Society understands that whilst the intention is to move work-related matters out of QCAT's jurisdiction and into the Commission's jurisdiction, the Anti-Discrimination Commission of Queensland's processes and procedures in relation to the initial investigation and conciliation of complaints

would remain unaffected. The Society suggests that the explanatory materials be amended to better reflect and acknowledge this.

Use of tribunal as a defined term

The Bill removes the current definition of "tribunal" and replaces it with a new definition that encompasses both QCAT and the Commission.

As a technical issue, the Society notes that the term "tribunal" is used in an inconsistent manner throughout the Anti-Discrimination Act - on some occasions it appears to have its general meaning (for example see section 208) and on others it appears to have the defined meaning.

Whilst this is not an issue that has been created by the Bill, given the Bill proposes to amend the definition of "tribunal" it is an opportune time to consider replacing "tribunal" as the defined term with "the tribunal". This would make it easier to identify throughout the Anti-Discrimination Act whether tribunal is being used as a general term (ie meaning any tribunal) or whether it is being used as a defined term (meaning QCAT or the Commission). This small amendment to the defined term should not result in additional amendments needing to be made to the Anti-Discrimination Act.

The Society trusts its submission is of assistance to the inquiry and is happy to discuss or clarify any issues arising out of the submission or the inquiry generally.

Yours faithfully,

Bill Potts
President