Queensland Council of Unions

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Industrial Relations (Fair Work Act Harmonisation No.2)
Submission 023

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The Research Director
Legal Affairs and Community Safety Committee
By email: lacsc@parliament.qld.gov.au

Please find enclosed the submission made by the Queensland Council of Unions (QCU) on behalf of affiliated unions.

The contents of the submission have been the subject of discussion with affiliated unions. Affiliated unions endorse the content of the submission.

Please direct any further enquiries to Research and Policy Officer John Martin on telephone number 3010 2506 or email johnm@qcu.asn.au

Yours sincerely

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Queensland Council of Unions

Submission regarding Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013

Prepared by: John Martin

Introduction

This submission consists of criticism of the approach taken by the Newman Government to industrial relations generally and how the most recent proposed legislation is contextualised within such an appalling track record. The submission also includes specific recommendations pertaining to proposed new sections contained in the Bill. Once more the amount of time provided to respond to such a lengthy piece of legislation is inadequate and accordingly, submissions will be inadequate. Once again it is not anticipated that Government will be in any way concerned about how the proposed legislation will adversely impact upon ordinary Queenslanders, rather Government will pursue its own ideological agenda free from any informed debate.

The thrust of the legislation and impact on industrial relations.

The following comments are made with respect to the Bill in the context of the Newman Government's current record on industrial relations. It is noted that the *Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013* (the Bill) is the sixth attempt to amend the Industrial Relations Act 1999 (Qld) (IRA) since the election of the Newman Government. That is approximately one amendment to this act every three months. Aside from the insidious content of most of those amendments, the continual churn of legislation is simply bad public policy. It represents the knee-jerk reactions of a Government intent on imposing the maximum damage to its own workforce with no regard for parliamentary process or the well-being of those impacted upon by legislative change.

The continual changing of industrial legislation also represents an incompetence and naivety with respect to setting an industrial relations agenda. Incompetence is manifested by Government having to go back again and again to attempt to establish an environment in which employees of the Queensland Government will merely submit to the will of the Government. Naivety is demonstrated by a fundamental misunderstanding of industrial relations processes and the realities of managing a workforce. Overly simple solutions and thought bubbles are introduced in an attempt to ensure the Government gets its way. When realities interfere with the objectives of the Newman Government it returns once more to a legislative fix rather than trying to negotiate matters with its workforce.

One would have thought that a democratically elected Government in an advanced economy would have had some regard for basic human rights such as the ability of employees to collectively bargain. The major thrust of this Bill is to remove any capacity for employees to have any influence over their own industrial relations outcomes. The International Labour Standard – Right to Organise and Collective Bargaining Convention, 1949 (No. 98), mandates:-

> "measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

The Bill amounts to the effective removal of collective bargaining rights for those employees unfortunate enough to be left in the Queensland jurisdiction.

The *Fair Work Act 2009 (Cth)* (FWA), against which the most recent set of proposed amendments to the IRA pretends to be harmonising with, was the result of an extensive consultation process. That process was undertaken with an aim to develop industrial relations laws that were both comprehensive and fair. The FWA was an attempt to balance the needs of all stakeholders rather than adopting only one side of the agenda and adopting a partisan system of payback and vendetta. The FWA also enshrines Australia's commitment to international conventions that provide the basic human rights including the right to organise and collectively bargain.

The Orwellian title of the Bill is both trite and predictable. There is no harmonisation of legislation and the Bill selectively adopts those aspects of the FWA that the Government believes will provide it a short-term benefit in its own industrial relations objectives. The Bill seeks to adopt those aspects of the FWA that favour the employer, but omits anything that might provide a benefit or protection to employees. In fact if this Bill is seeking to harmonise with anything, it is to harmonise with the ill-fated WorkChoices legislation that was introduced by the Howard Government in 2005. Astonishingly, from an employee perspective however, this Bill is far worse than WorkChoices in a number of ways.

The Premier recently provided his Government's supposed vision as to Queensland's future. One aspect of the Queensland Plan that was heavily promoted by the Premier and Government members was the objective of red-tape reduction. The Bill provides a stunning example of the Newman Government acting in the opposite direction to its stated objectives. The Bill dictates to employers and employees what they must and must not agree to or even discuss. This policy prescription that is akin to the WorkChoices legislation in that it seeks to control and micro-manage industrial outcomes and to paternalistically tell employers and employees what they can and can't do. To use the rhetoric of the Newman Government itself, this Bill is an extreme example of the nanny state at its worst.

The corollary to the extreme level of specificity imposed on the parties to agreements by the proposed legislation is that, as a policy prescription, it is the exact opposite to flexibility. The level of specificity that is being imposed on employers and employees also represents a dumbing-down of the employment relationship. By such a restriction on topics for discussion, the industrial relations outcomes will be restricted to minimum conditions of employment. Many of the provisions that would be declared illegal by the Bill restrict many of the best-practice industrial relations outcomes that have been developed in the process of bargaining over the years.

Once the mantra of the conservative side of politics towards industrial relations, it now appears that flexibility is no longer desirable. Rather than allowing for flexible outcomes to be arrived at between the parties at an enterprise level, the Newman Government is signalling its intention to direct one-size-fits-all outcomes for all workplaces and all situations. The process of collective bargaining both in Australia and overseas has provided innovative outcomes that suit the parties. By restricting what can and can't be discussed seriously limits such innovation and most definitely hinders providing protection to employees that might foster good industrial relations outcomes.

Rather than engendering or even allowing innovative results for bargaining outcomes, the Bill represents the Newman Government's agenda of imposing its outcome on its workforce regardless of what atrocities are required to obtain that result. The Bill is consistent with the attitude that has consistently been adopted by the Newman Government with respect to its own workforce. The Government shows no capacity to bargain with its workforce but rather seeks at every opportunity to unilaterally impose its own will.

Queenslanders witnessed the stunning hypocrisy of politicians awarding themselves a massive wage increase because they were compelled to by law. This initial position of having to take the wage increase, that was promoted by senior members of the Newman Government, has subsequently been proven to be a falsehood The Bill reinforces the petty attitude that the Government has adopted to negotiations, in particular with the Core public service agreement. The contempt with which Government treats public sector workers is palpable by the way that the Newman Government has placed every conceivable obstacle in the way of any wage increase for public servants.

It is a misuse of Parliament for the Government to use legislation to score points in such a self-indulgent fashion. Moreover, by removing the ability for an interim wage increase, it removes any disincentive for the Government as an employer to act to have matters resolved quickly and will further advance the stonewalling tactics it has adopted to date. The Bill also provides significant concerns for the independence of the Queensland Industrial Relations Commission (QIRC). The award modernisation process that is proposed by the Bill is demonstrably intended to produce one outcome and one outcome alone. The reputation of the independence of the QIRC will potentially be tarnished by the overly prescriptive nature of the process and the capacity of the Minister to provide direction to the QIRC until such stage as the QIRC provides the outcome that the Minister wants.

Whilst it is accepted that Ministerial direction was a feature of the award modernisation process in the Fair Work Commission (FWC), there are some substantial distinction that can be drawn. Firstly, the Queensland Government is by far the largest employer left remaining in the Queensland jurisdiction. The distinct intention of the Bill is to influence outcomes for employment conditions of Queensland public sector workers. Secondly the FWC was not provided with the same level of direction as is proposed by the Bill. In these circumstances, ministerial direction over the award review process represents a conflict of interest. The basic principle regarding separation of powers refers to separation of the Executive (the Ministry), the Legislature (the Parliament) and the Judiciary (the Courts), with none of the three branches of government able to exercise total power. The essence of the doctrine of separation of powers is thus based on the idea of checks and balances. The Bill's intent is clearly to override the decision of an independent tribunal the QIRC and thereby weaken or remove one of the checks and balances on its own power.

Specific provisions of the Bill

The preceding comments are somewhat critical of the proposed legislation and its impact on employees of the Queensland Government. Hereunder are the specific provisions of the Bill that are offensive to working Queenslanders and a brief explanation of why they should not be included in any amendment to the existing legislation. The specific provisions are listed by the proposed section numbers as they are expressed in the Bill.

s71BA (b)

The proposed definition of ordinary hours of work for employees not covered by a modern industrial instrument is as agreed between the employer and the employee. This contrasts with the existing section 9 and 9A of the IRA that provides for limits on ordinary hours for all employees.

Proposed section s71BA (b) constitutes a deliberate removal of existing entitlements to award-free employees.

The QCU recommendation is to maintain the limits on working hours contained in the IRA to prevent exploitation of non-award employees.

s71IB (4) (b)

The penalty for employees not covered by a modern industrial instrument for working a public holiday is ordinary time. The QCU has grave concerns for the precedent set by the inclusion of employees working public holidays at their base rate of pay.

The QCU recommendation is to extend the public holiday penalty contained in proposed section 71B (4) (a) to all employees.

s71KE (3) (f)

This provision would allow for regulation to remove an employee from an entitlement to redundancy pay. This is a dangerous provision that would enable the indiscriminate exclusion of individuals or groups of individuals from the rightful entitlements. The proposed section 71KE (3) otherwise provides an extensive list of employees who would not have a rightful entitlement to redundancy pay.

The QCU recommendation is to remove (f) from the proposed section 71KE (3).

s71MB

Firstly in the Queensland jurisdiction there is no necessity or justification for individual flexibility agreements. The proposed section 71KG is direct lift from s 144 of the FWA. That section is intended for employers and employees who are unable or unwilling to negotiate collective agreements. Given the nature of employers remaining in the

Queensland jurisdiction (State Government and Local Governments) it would be unnecessary for any such provision as collective agreements are able to be negotiated.

There does not appear to be any requirement for individual flexibility arrangements (IFA) to be recorded in writing and subsection (3) would appear to give effect to an arrangement that is not in writing. In addition all of the provisions that provide protection to employees from the Fair Work Act are absent from the Bill. Section 144 (4) of the FWA provides that an IFA that is recorded in writing must:

(a) identify the clause in the award varied

(b) the parties genuinely agree

(c) requires a better off overall test

(d) requires provision for how the agreement is terminated

(e) is signed by either party and by a parent or guardian of an employee under 18 years of age

(f) the employee keeps a copy of the agreement.

The deliberate removal of the safeguards contained in the corresponding FWA provisions signals an intention of the Queensland Government to go further than the Howard Government did with WorkChoices in 2005. The removal of the no-disadvantage test by the Howard Government was made famous by the Spotlight AWA case wherein all penalties were removed in return for a wage increase of one cent per hour. The absence of the better off overall test is equivalent to the WorkChoices removal of the no-disadvantage test. Where this proposal is worse is that at least the AWAs under WorkChoices required other safeguards such as the agreement being signed in writing and the employee having access to a copy of the agreement.

QCU recommends the removal of the proposed s71KG as it is unnecessary. However, if such a provision is to exist, it must include the safeguards contained in the FWA.

s71MD (b)

This section seeks to increase the term of a certified agreement from three years to four years. To that extent it is consistent with the FWA, however given the other changes that are proposed in the Bill four years is a daunting prospect for employees.

s71N

The section mirrors the FWA but does not include disputes procedures as in s139 (1) (i). It would appear that the intention is to only have disputes procedures in one document.

Government has determined to dictate that irrespective of such an arrangement suiting the employer and employees that a range of discussion topics are forbidden. These proposed provisions seriously impinge upon the scope of any agreement that can be reached and in effect denies employees the right to collective bargaining. These provisions also demonstrate the ideological bent of the legislation:

- s71O
  This section seeks to disallow contracting out provisions in industrial instruments.
- s71OA
  Disallows employment security provisions in industrial instruments.
- s71OB
  Disallows encouragement provisions in industrial instruments.
- s71OC
  Disallows organisational change provisions in industrial instruments.
- s71OD
  Disallows provisions incorporating policy in industrial instruments. Strangely enough this is the provision that is often used by employers to give their policy force of law and elevate those policies in the knowledge of their workforce.
- s71OE
  Disallows private practice provisions in industrial instruments. This appears to be a fairly brutal way to treat one group of employees (i.e. medical practitioners).
- s71OF
  Disallows provisions requiring resources to be allocated to program or scheme in industrial instruments.
- s71OG
  Disallows right of entry provisions in industrial instruments.
- s71OH
  Disallows discriminatory provisions in industrial instruments but excludes junior rates, rates for people with disabilities and apprentice/trainee rates from being discrimination.
- s71OK
  Disallows awards from containing provisions about:
    - training
    - workload management
    - delivery of service
    - workforce planning
- s71OL (1)
  Disallows certified agreements from containing provisions:
    - about training
    - about workload management
    - that hinder efficient delivery of service
- s71OL (2)
  Disallows in certified agreements containing provisions about redundancy pay. This leaves redundancy pay above the TCR standard completely within the unilateral control of the employer.

The QCU recommends that the legislation does not impinge upon the matters that can be discussed in the context of collective bargaining and/or included in an industrial instrument.

s140BB

This proposed section provides the QIRC with a raft of factors to be regarded whilst undertaking the award modernisation process. It is interesting to note that placita (f) family responsibilities and (j) representation rights of organisations will be unable to be considered as any provision that might have given effect to these factors has now been rendered illegal by other provision of the act.

s140C

An award review process has been in place within the existing legislation. Parties to awards have been constructively attending to their content and ensuring awards are kept modern and relevant. It is subterfuge for the Queensland Government to adopt the language of the FWA when the award modernisation process that is proposed by the Bill amounts to the unilateral imposition of Queensland Government's will on its own workforce.

This proposed section provides for the Minister to direct the QIRC with respect to the award review process. As the Minister is part of the Government that is one of the few employers covered by the award review process this amounts to a conflict of interest.

The QCU recommends allowing the QIRC to continue to undertake the award review process under its own direction.

s140CC (2) (b)

This proposed provision allows for the QIRC to inform itself in any way about the award review process. This is of some concern with respect to the independence of the QIRC and the procedural fairness afforded to parties other than those consulted by the QIRC.

Given other matters raised with respect to the conflict of interest surrounding the Minister instructing the QIRC, the QCU recommends that there is no change to the practices of the QIRC.

s140GA (4)

This provision would appear to allow for unions to be excluded from an award.

The QCU recommends the removal of this proposed subsection (4).

s148 (3) (iv) and (v)

The entire process of collective bargaining relies upon a group of employees being able to exert pressure on their employer to agree to a term. By including in the proposed section s148 (3) (iv) and (v) any action that "affects, or threatens to affect, directly or indirectly, access to, or delivery of, services to the community or part of it" it renders any form of protected industrial action useless. It follows that any industrial action that might have been in any way effective will now be able to be concluded.

The question that might be asked, given the language used in the proposed section 148 (3) (iv) and (v) is what protected action would remain? The existing legislation has a very low threshold for matters to be referred to arbitration by comparison to its federal counterpart the FWA (or for that matter the FWA's predecessor the Workplace Relations Act 1996). Matters that are protracted or difficult are now easily referred to arbitration and there is no justification for taking any further rights away from employees.

The QCU recommends that there be no change to the existing provisions in relation to cancellation and arbitration of protracted enterprise bargaining negotiations.

s149C

This provision prevents the QIRC from granting an interim wage increase. This is a misuse of legislation to win a particular point that has arisen in the negotiation of the Core Public Service Certified agreement.

The QCU recommends putting beyond doubt that the QIRC has jurisdiction to grant interim increases.

s150 (2A)

This provision removes the capacity for the QIRC to award a retrospective wage increase.

The QCU recommends putting beyond doubt that the QIRC has jurisdiction to grant interim increases.

ss 191 & 192

The concept of High-Income Senior Position is created for employees earning over $129,300. These positions are dictated for award-free employees, employees who are prescribed by regulation and senior health service employees. There appears to be no capacity for such employees to agree to the arrangement but rather they are compelled into an individual contract. The definition of income is extremely broad and it is probable that a significant number of employees currently enjoying the protection of coverage of an industrial instrument will be denied that protection.

This provision will take away existing rights from a large number of Queensland Government employees.

The QCU recommends that there be no form of statutory contract for employees currently enjoying the right to the benefit of an industrial instrument.

s201

Medical practitioners will be compelled into contracts that remove existing rights but will not be entitled to any recompense if the new arrangements are not acceptable.

The QCU recommends that there be no form of statutory contract for employees currently enjoying the right to the benefit of an industrial instrument.

s258A

This proposed section allows for the appointment of an Industrial Commissioner for fixed term appointments. This is of concern as to the independence of the QIRC. If the workload exists for more Commissioners they should be appointed on tenure. Much of the workload created in the QIRC to date is as a direct result of the belligerent

attitude adopted by the Queensland Government in enterprise bargaining negotiations. In addition the further strip back of awards will create an amount of unnecessary work for the QIRC.

The QCU has previously recommended no change to award review process that is currently in place. It follows that there would no need to appoint industrial commissioners on fixed term contracts if the overly ambitious award modernisation process was not attempted. Otherwise Commissioners should be appointed on tenure to avoid any suspicion of interference with the independence of the QIRC.

Sections 827 to 831

It would appear that intended impact of the proposed sections is to lock employees into existing arrangements and prevent them from participating in collective bargaining until such time as an award modernisation process has been undertaken. The experience with the Core public service agreement negotiations has been that the Government has deliberately delayed proceedings at every possible opportunity.

The QCU has previously recommended that there be no change to the existing award review process of provision in relation to conciliation and arbitration in relation bargaining. If those matters are not disturbed then it follows none of the other draconian measures being considered in this Bill would be necessary either.

Conclusion

The naming of this Bill is as disgraceful as its content. Demonstrably this Bill seeks to take industrial relations for employees trapped in the Queensland jurisdiction in the opposite direction to the FWA. There is no harmonisation only another example of extreme legislation that goes beyond WorkChoices in removing employees' rights and dictating industrial relations outcomes. There is nothing left for employees and employers to bargain about and Government is set to use legislation to impose its will on its own employees without consideration for their views or interests.

If Government was truly interested in harmonisation with the FWA it might take some time to consider those aspects of the FWA that provide employees with protection. Otherwise the Bill may have been better titled the Industrial Relations (Worse than WorkChoices) and Other Removal of Existing Entitlements Bill 2013.