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Office of the President

Industrial Relations (Fair Work Act Harmonisation No.2)
Submission 026

28 October 2013

Our ref 336-19/JR

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Research Director

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

Thank you for providing Queensland Law Society with the opportunity to comment on the *Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013* (the Bill).

Consultation

The Society notes the short period available in which to make submissions. The Bill was introduced to Parliament by the Attorney-General on 17 October 2013 and referred to the Committee. A little over a week has been allowed for the making of submissions. There does not appear to be any urgent reason for such a short submission period.

In our respectful submission, such a short period is not conducive to the provision of detailed and constructive submissions on the draft legislation. In this regard, we note that the Bill is some 252 pages long and addresses fundamental elements of the state industrial relations system. Significant legislation such as this takes some time to digest and consider its implications.

The Society's Industrial Law committee members are all experienced practitioners in the field of workplace relations. However, the imposition of a short period for comments restricts the Society's practical ability to comment. It is not suggested that this submission represents an exhaustive review of the Bill. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

Given the restrictions noted above, the Society makes the following specific comments for your consideration.

Clause 7 New Chapter 2A

The Society supports the harmonisation of minimum standards under the state legislation with the national employment standards contained in the *Fair Work Act 2009 (Cth).*

Section 71CA provides that the Queensland Employment Standards (QES) have effect subject to provisions included in a modern industrial instrument. In the Society's view, there should be a specific statement that industrial instruments cannot remove or reduce employee entitlements under the QES. This should be a key feature of the safety net provided by the QES.

Clause 71EF appears to introduce a compulsory annual leave loading as part of the QES and does not restrict the loading to certain categories of employees as is currently the case under s13A of the *Industrial Relations Act 1999 (Qld)*. It is noted that compulsory annual leave loading has not been a feature of minimum standards to date. The definition of *prescribed additional amount* in s71EF(3) potentially leads to uncertainty. For instance, the definition raises the question of whether that part of a wage payable to an employee which is above the applicable minimum rate is capable of being described as a *prescribed additional amount*. The Bill provides the examples of an annual leave bonus or annual leave loading. In the Society's submission, any prescribed additional amount should be able to be specifically identifiable as being, in effect, an annual leave loading or specifically referred to as satisfying this requirement.

Section 71EG appears to provide for an unfettered ability for employees to cash out annual leave subject to the restrictions contained in that section. At a federal level, this unfettered ability only applies to award free employees and the ability for award and enterprise agreement employees to cash out annual leave is subject to the instrument containing provisions to that effect.

Section 71FB addresses requirements for employees to give notice of illness. In particular, s71FB(1)(b)(ii) requires an employee to give an employer other evidence of the illness to the employer's satisfaction if a medical certificate is not provided. This section should clearly enunciate that an employer's satisfaction is subject to a reasonableness test.

Section 71FD provides 10 days' carer's leave per annum to long term casual employees. Whilst the provision is supported, the provision of an increased period of carer's leave to long term casual employees seems inconsistent with the fact that casual employees continue to have no entitlement, paid or unpaid, to sick leave.

The Society notes the inclusion of a specific entitlement to cultural leave in s71FL and supports the introduction of that entitlement.

Section 71K excludes high income employees from the minimum entitlement to notice under the QES where they are not subject to a modern industrial instrument or are not a tenured public servant. Given that minimum employment standards should apply to all employees, the exclusion of "high income" employees from this requirement is not supported. In this regard, it is noted that the level of income at which employees are excluded is $129,300 per annum (and the reference to the original threshold amount should be updated).

Section 71KE restricts redundancy pay to those subject to a modern industrial instrument. It is not payable as a minimum standard to all employees. That position is inconsistent with the *Fair Work Act 2009* and is inconsistent with what is suggested to be the publicly held common

understanding of redundancy pay entitlements. In the Society's view, redundancy pay should be part of the minimum standards for all employees and not subject to industrial instrument coverage. A transitional arrangement, where severance pay is to be calculated only by reference to an employee's service on and after the legislation's commencement date, might alleviate any concerns as to retrospectivity. A similar approach was taken by the Australian legislature in relation to the National Employment Standards.

Clause 42 New Chapter 6A

The chapter relates to arrangements for what are called "high income senior employees". However, s189 gives the definition of that term as someone engaged in a high income position. It is not immediately apparent that the word "senior" adds anything to the definition, particularly when it is suggested that a threshold income of $129,300 per annum does not necessarily indicate a particular level seniority.

Section 192 includes superannuation in the amount of annual remuneration. We note that this is inconsistent with the position under federal law.

Insertion of s201

The denial of any entitlement to any redundancy or severance allowance or other separation benefits (however described) in relation to the termination of a medical practitioner pursuant to s201(2) if the medical practitioner refuses an offer by an employer of employment under a high-income guarantee contract appears to unduly restrict the right of the medical practitioner to refuse to enter into a contract.

Clauses 53 and 54 Amendments of s258A and 259

These clauses include provision for fixed term appointments to the positions of deputy president and commissioner of at least one year. The Society does not support these amendments.

Section 255 of the *Industrial Relations Act 1999 (Qld)* continues the Commission as a court of record. The Commission exercises both judicial and arbitral powers. It is undesirable that persons holding the position of deputy president and commissioner be able to be appointed on a short term basis as little as 1 year. It is important that Commission members feel able to exercise their duties without fear or favour. Given that Commission members are appointed by the state and that the state will in a large majority of cases be a party to proceedings before the Commission, a perception of influence arises. The fact that such a capacity may have existed before 1999 is not a significant consideration in the Society's respectful submission. That provision was taken out of the legislation after a detailed review. Any issues of resourcing can, in the Society's submission, be met through the ability to make part time appointments.

Clause 16 Insertion of new ch 5, pt 8

Section 140C(1) provides that the minister may give the commission a written notice (an *award modernisation request*) requesting that an award modernisation process be carried out. Of concern is that s140C(5)(d) provides that the award modernisation request may give other directions about how, or whether, the commission must deal with particular matters. It is the Society's view that s140C(5)(d) unduly restricts the commission due to s140CE(3): "Subject to chapter 2A, part 3 and chapter 5A, a modern award made for the purposes of subsection

(1) must be consistent with the award modernisation request to which the modern award relates." It is recommended that criteria for the giving of such directions should be included in the legislation itself.

Clause 18, restriction of operation of the bargaining chapter, and clause 20, Replacement of section 143 (Who may make certified agreements)

The combination of new s140J and new subsection 142(2) is to curtail the availability of enterprise bargaining. Employees not covered by awards, and high-income senior employees who are covered by awards, will be excluded from enterprise bargaining. This is a radical reform and represents a departure from the primary means of bargaining (that is, enterprise-level collective bargaining) since the early 1990s. Such a change should not be made lightly given the restriction on employees to bargain as they wish.

Clause 23, Amendments of section 144

The time an employee must have access to a proposed certified agreement is reduced from 14 days to 7 days. There is no demonstrated justification for this reduction in time. It reduces the amount of time that an employee can seek advice and consider whether to vote in favour of a proposed agreement.

Clause 26, Replacement of section 148 (Assistance in negotiating by conciliation)
Clause 28, Replacement of section 149 (Arbitration if conciliation unsuccessful)
Clause 29 Amendment of section 150 (Determinations made under s 149)

Section 148B provides:

> *"The Commission, can not, in helping negotiating parties negotiate a certified agreement under this subdivision, order an increase in wages payable to the employees."*

This section limits the discretion of the Commission in the orders the Commission may make.

Section 149C(1)(c) provides:

> *"For determining a matter by arbitration under this subdivision, the full bench - … can not order an increase in wages payable to employees before the full bench makes its arbitration determination for the matter."*

Section 150 (2A) provides:

> "*A wage increase, other entitlement or benefit under the arbitration determination can not –*
> *(a) take effect on a day earlier than the day the arbitration period for the matter started; or*
> *(b) relate to a period before the day the arbitration for the matter started."*

Sections 149 and 149A seek to limit the time that elapses between an unsuccessful conciliation and arbitration to 104 days. However, it is not clear why the wage increase, other entitlement or benefit is restricted to commencing from the day the arbitration period for the matter started. It is the Society's view that the Commission should have discretion to order when a wage increase, other entitlement or benefit takes effect. It is a practical concern that the employer could hold out to arbitration without giving any benefits to the employees without fear that the benefits can be retrospective.

These sections unduly limit the discretion of the Commission.

Clause 65, Insertion of section 391A

Section 391A prohibits employers from facilitating deductions of industrial association membership subscriptions from an employee's wages. This restricts an employee's choice in relation to how membership fees are paid. This provision appears unnecessary (as presumably employees will remain able to arrange for other types of deductions to be made). This should be something that the employer can refuse but can also agree to if it wishes.

Clause 88, Insertion of part 3, division 2A

Section 51C provides:

(1) *If a health employment directive is inconsistent with an industrial instrument, the health employment directive prevails over the industrial instrument, unless a regulation provides otherwise;*
(2) *If a health employment directive is inconsistent with a ruling made under the Public Service Act 1958, section 53, the health employment directive prevails over the ruling;*
(3) *If a health employment directive is inconsistent with a health service employee's contract of employment, the health employment directive prevails over the contract.*

Given the scope of a Health Employment Directive pursuant to s51A, the fact that it will apply over an industrial instrument and contract of employment is concerning. This arrangement erodes the ability the Commission, as an independent "umpire", to make or certify industrial instruments in a transparent manner as such instruments will be able to be overridden by directives made without any proper, transparent public hearing, by a person who is not obliged to act judicially.

Thank you for providing the Society with the opportunity to comment on the Bill. For further inquiries, please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dcruz@qls.com.au.

Yours faithfully

Annette Bradfield
President