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Industrial Relations (Fair Work Act Harmonisation No.2)
Submission 035

The Research Director
Legal Affairs and Community Safety Committee
Parliament House

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Dear Sir

Industrial Relations (Fairwork Harmonisation No. 2) & Other Legislation Amendment Bill 2013

The QCCL thanks the Committee for the opportunity to make a submission in relation to this Bill.

Industrial relations matters are not an issue into which the QCCL strays very often. It has in the past taken active positions in debates over the Essential Services Legislation of the 1970's and the legislation in relation to the SEQEB dispute in the mid 1980's.

In general terms the QCCL is not concerned about the details of the arrangements between employers and employees. Its central focus is on what might be described as ensuring due process.

The QCCL has as its principal objective the implementation in Queensland of the Universal Declaration of Human Rights.

The Universal Declaration has the following articles which may be relevant to industrial relations matters:

1. Article 20(1) – everyone has the right to freedom of peaceful assembly and association.

2. Article 20(2) – no one may be compelled to belong to an association.

3. Article 23(1) – everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

4. Article 23(3) – everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity…

5. Article 23(4) – everyone has the right to form and join trade unions for the protection of his interests.[1]

Article 11 of the European Convention on Human Rights provides:

[1] One of the implications of Article 23(4) is the right to strike as discussed in *ILO Principles concerning the right to strike* by Gernigon & Ors, International Labour Organisation 1998

> "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

The European Court of Human Rights in the case of *Demir v Turkey* held that the right to collective bargaining is an essential element of the right set forth in Article 11. A similar approach must no doubt be adopted to Article 23 of the Universal Declaration.

Article 8 of the Universal Declaration is also relevant. It provides,

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Amended sections 259 and 260 will allow fixed-term appointments to the Queensland Industrial Relations Commission. Section 259 envisages appointments as short as 1 year.

There are real dangers in having those who rule on disputes and settle them (whether by award or quasi-judicial orders) subject to easy political replacement.

This concern applies doubly where, as will be the case, the government as an employer is a key interested party in much of the Commission's work. At a minimum, a tenure of say five years is required. A one year appointment will leave the perverse potential for a Commissioner hearing a protracted industrial dispute, to which the government or one of its agencies is a party, depending on that party for his/her re-appointment. This will leave the Commission open to accusations of bias perceived or otherwise.

Proposed section 391A makes it an offence for an employer to deduct union dues even when requested by the individual employee, that is, a criminal offence for the exercise of an individual's freedom of contract.

Many employers offer payroll deductions for things not even related to employment (e.g. health insurance). Union dues by contrast, at the election of the employee, are intimately related to employment. It is submitted then this can only be directed at making life harder for unionists and unions, rather than curbing any mischief or employer offence. It is then an attack on the right to join a union and to bargain collectively.

For similar reasons, though less blatantly, proposed sections 71O – 71OJ raise concerns. They contain a raft of prohibited content, i.e. types of matters that cannot be bargained nor arbitrated over in making an industrial instrument.

Some of these relate to collective interests of employees and/or unions. Some relate very directly to individual employment rights and interests. For example, s71OA 'employment security' and s71OD which forbids employees bargaining for the employer to supply facilities for an officer of a union or industrial association to attend at the premises; allowing employees to attend training or conferences relating to union activities.

Whilst a body like the QCCL recognises that parliaments must make decisions about balance, including the wider public interest, in employment relations, the number and coverage of these prohibited content provisions is problematic for three reasons:

1. Primarily because it artificially constrains the freedom of contract of both workers and employers.

2. It interferes with the right to collective bargaining.

3. It does so in an Act largely applying to state employers and employees: Employers which are often large and which have considerable bargaining power. (That is this is not an Act about protecting small businesses from overbearing unions).

To quote directly from the Explanatory Memorandum: "Constitutionality—impairment of institutional integrity of courts. The Bill gives the Minister power to request the Queensland Industrial Relations Commission to undertake an award modernisation process. The Minister's request may include directions as to the content of the modern award. As the Commission is required to comply with a Ministerial request, the ability of the Minister to give directions as to content raises a question as to whether this impairs or interferes with the Commission's institutional integrity. The Minister's request is limited by the content provisions in Chapter 2 Part 3 of the Bill as the request may only deal with matters allowable in those provisions. Concerns with this potential breach are also ameliorated by the requirement that the request be published which provides transparency and greater accountability. Further, the provision is modelled on the approach adopted federally."

It is true the Fair Work modernisation process included power to then Minister Gillard to intervene and guide the modern award-making process. It was not used however to allow the Minister to direct particular content outcomes. It was used, in the most significant direction, to require that all awards include an individual 'flexibility clause'.

The Queensland Commission and Court is an institution that melds tribunal and court roles. At present section 140C5(b) and (c) are not well worded: Sub-clause(b) allows the Minister to 'state permitted matters about which provisions must be made in a modern award' and sub-clause (c) allows the Minister to 'direct the Commission to include in a modern award terms about particular matters'. Either they are duplicatory, or sub-clause (c) implies that the Minister can actually specify the content of an award term. At a minimum, it would be wise if proposed section 140C made it clear that the Minister can require a clause covering a certain type of issue or activity be included, but not to ministerially dictate the substance of that clause. That would preserve the ability of the expert Commission to shape awards that are both internally balanced and which harmonise with the rest of the award system.

Again to quote directly from the Explanatory Memorandum: "Power to enter premises—Legislative Standards Act 1992 s 4(3)(e). The Bill gives inspectors power to enter the registered office of an associated entity without a warrant. Associated entities are only subject to a limited number of provisions under the Act and, for that reason it is unusual for inspectors to be given an entry power." Government response: "The public interest in the transparency and account ability of industrial organisations is seen to override this concern." Where is the evidence justifying the claim that a power to enter private premises is necessary?

The bill continues the process of excluding stakeholders from consultation prior to cabinet fixing on policy and drafting a bill. The only consultation was inter-departmental and with the Local Government Association. Obvious stakeholders in the form of unions or a broader range of employing agencies have been ignored.

We trust this is of assistance to you in your deliberations.[2]

Yours faithfully

Michael Cope
Executive Member
For and on behalf the
Queensland Council for Civil Liberties
31 October 2013

[2] The writer acknowledges the comments by QCCL member Graeme Orr and the submission of the New South Wales Council for Civil Liberties to the enquiry into the W*ork Relations Amendment (Work Choices) Bill 2005* which assisted in preparation of this submission.