Industrial Relations
(Transparency & Accountability of Industrial Organisations)
Submission 007

Queensland Nurses' Union

Submission to the

Legal Affairs and Community Safety Committee

Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill 2013

May, 2013

Nurses. For you. For life.

because we care
Quality care for older Australians

Introduction

The Queensland Nurses' Union (QNU) thanks the Legal Affairs and Community Safety Committee (the Committee) for providing the opportunity to comment on the *Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill 2013* (the Bill).

In this submission we make passing comment on some of the provisions in the Bill, its general themes and obvious limitations and inconsistencies. We ask the Committee to read our submission in conjunction with that of our peak body, the Queensland Council of Unions.

Aside from the many objections we have to specific provisions of the Bill, the QNU believes it is fundamentally flawed in that it fails to find direction in any piece of like legislation or follow any consistent trajectory of thought. Rather this is a unique combination of wording, phrasing and dogma that has its origins in the political beliefs of an immature government exercising its legislative capacity to suppress freedom of speech and freedom of association.

Again, we witness the duplicity, insecurity and spite of the LNP government seeking to control and silence unions by deliberately interfering in their governance while at the same time proclaiming they will 'reduce red tape'. All ostensibly in the name of 'transparency and accountability'.

The QNU represents the *industrial* and *professional* interests of our members through our education programs, research, representations and other activities. Thus, as always, our concerns also go to the possible impact that this restrictive legislation will have on our ability to ensure that Queenslanders receive the safe, quality public health care they deserve. The Attorney-General now apparently chooses to label any voice of dissent or any alternative opinion as 'political' which he must therefore quash. Democracy, freedom of speech and the public interest are concepts clearly unknown to him. Instead, a zealous commitment to castigate unions overrides consistent logic.

Among its many erratic themes, the Bill:

- ignores the principle object of the *Industrial Relations Act 1999* (the Act) promoting co-operative, responsible industrial relations;
- makes well-remunerated parliamentarians the benchmark for honorary union officials in declaring pecuniary interests;
- applies public disclosure standards for public companies and governments to not-for-profit organisations; and
- imposes reporting requirements on unions well in excess of those required for corporations.

Sound reasoning, integrity and judgement were not brought to bear in framing the legislation - just a scatter-gun approach to enact the most draconian, obtuse standards currently existing in any context and for any purpose.

Objectives of the Bill

In introducing the Bill into the Queensland Parliament the Attorney-General and Minister for Justice claimed:-

> *the objective of the bill is to provide for amendments to the Industrial Relations Act, 1999 to improve the accountability and transparency of industrial organisations registered in the state industrial relations system; to promote freedom of association; to align right of entry requirements with the Commonwealth Fair Work Act, 2009; and to improve the arrangements for recovery of paid wages'* (Bleijie, 2013).

The objectives outlined by the Attorney-General are not the objectives of his amendments. There is no consistency in the various revisions that point to any specific intention other than to attack the fundamental right of organised workers to be represented by their union.

The principal objects of the *Industrial Relations Act, 1999* (Section 3) are as follows:-

Principal object of this Act

The principal object of this Act is to provide a framework for industrial relations that supports economic prosperity and social justice by—

(a) providing for rights and responsibilities that ensure economic advancement and social justice for all employees and employers; and

(b) providing for an effective and efficient economy, with strong economic growth, high employment, employment security, improved living standards, low inflation and national and international competitiveness; and

(c) preventing and eliminating discrimination in employment; and

(d) ensuring equal remuneration for men and women employees for work of equal or comparable value; and

(e) helping balance work and family life; and

(f) promoting the effective and efficient operation of enterprises and industries; and

(g) ensuring wages and employment conditions provide fair standards in relation to living standards prevailing in the community; and

(h) promoting participation in industrial relations by employees and employers; and

(i) encouraging responsible representation of employees and employers by democratically run organisations and associations; and

(j) promoting and facilitating the regulation of employment by awards and agreements; and

(k) meeting the needs of emerging labour markets and work patterns; and

(l) promoting and facilitating jobs growth, skills acquisition and vocational training through apprenticeships, traineeships and labour market programs; and

(m) providing for effective, responsive and accessible support for negotiations and resolution of industrial disputes; and

(n) assisting in giving effect to Australia's international obligations in relation to labour standards; and

(o) promoting collective bargaining and establishing the primacy of collective agreements over individual agreements; and

(p) ensuring that, when wages and employment conditions are determined by arbitration, the following are taken into account—

(i) for a matter involving the public sector—the financial position of the State and the relevant public sector entity, and the State's fiscal strategy;

(ii) for another matter—the employer's financial position.'

Here we see the pattern of incoherency emerge as it is clear the Bill contains amendments that offend most of the objects of the Act specifically objects: (a) (c) (f) (g) (h) (i) (j) (m) (n) and (o).

The most obvious and sinister of these go to the fundamental right of workers to organise, a right recognised under Australia's obligations to international labour standards (Object (n)). Notwithstanding Australians' rejection of Work Choices, the LNP government now seeks to withdraw the right of Queensland unions to represent their members' interests through any form of public dissent.

The object of the Act requiring the promotion of collective bargaining has been overridden by the legislative pen because this employer also holds the legislative pen. The well-established paths to seek variations to industrial instruments via the industrial umpire and the ability to renegotiate certified agreements when they expire was, and is, available to the Queensland government. However, they have chosen to use their legislative power to smother the industrial rights of Queensland public sector workers.

In doing so, the standards the Bill seeks to impose upon unions are not commensurate with those that the community reasonably expects such as the requirement for honorary officers of a union to disclose their material personal interest and those of their relatives.

In this case, it appears elected parliamentarians are the benchmark. Individuals stand for elected office into well remunerated positions in the knowledge that if they are successful they will be subject to accountability standards. A reasonable person would expect this level of scrutiny from these positions. It is not reasonable to apply these standards to honorary officers of a union. The provisions are clearly intimidatory and punitive.

The Bill also goes further to remove current industrial entitlements in order to 're-establish managerial prerogative' (Explanatory Notes, 2013). Through a number of decisions around the meaning and scope of an 'industrial matter', the High Court repudiated the doctrine of 'managerial prerogative'.[1] In Cram's case[2] the High Court recognised the right of unions to be consulted over issues such as the determination or change to staffing levels in the operation of an enterprise. The High Court held that 'many management decisions, once viewed as the sole prerogative of management are now seen as directly affecting the relationship of employer and employee and constituting an industrial matter'. The Attorney-General believes the way of the future is to take workers and their representatives back to the 'good old days' of unfettered managerial control.

In his presentation to the Parliament, the Attorney-General also failed to highlight that overpayment recovery provisions only relate to Queensland Health employees who have been singled out and subjected to a far more draconian standard than any other employee in the state of Queensland.

Overpayment recovery – Queensland Health

The Bill seeks to insert additional sections into the Act that will allow for the automatic deduction of any alleged overpayment from a Queensland Health employee's pay on ceasing employment. This extends the already unreasonable provisions inserted into the Act with respect to Queensland Health employees who have experienced an overpayment by their employer which allows for automatic deductions from the employee's fortnightly wage.

The first and most obvious issue is that the failure of Queensland Health to meet its legal obligation to correctly pay an employee is not the fault of the employee. Yet the legislation

[1] See for example *Federated Clerks' Union of Australia v Victorian Employers' Federation* (1984) 154 CLR 472 *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297

[2] *Re cram and Others: Ex Parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 72 ALR 173

punishes the employee and gives their employer an automatic right to recover wage errors of the employer's own making.

Queensland Health employees did not create the payroll debacle. Neither did the QNU or other health unions.

The Bill now seeks to extend Queensland Health's right to automatic recovery of overpayments by allowing the employer to withhold monies when an employee ceases employment. This provision contains no safeguards with respect to the employer's ability to withhold any monies from a termination payment.

While no other employer in Queensland can withhold monies upon termination, the situation is exacerbated by the inability to rely on Queensland Health's inaccurate and incomplete records. There is no limit on the amount Queensland Health can withhold from an employee's termination pay and there are no other safeguards associated with this amendment.

Employees cease employment for a range of reasons. Sometimes the reason is health-related or because of a personal or family tragedy. In such circumstances, an employee may be relying upon their leave accruals (be it annual leave or long service leave) to sustain them financially immediately following ceasing employment.

This amendment allows Queensland Health to reclaim any cash reserve an employee may have intended to rely upon and, in effect, leave them penniless. The individual employee has no rights to negotiate a reasonable repayment plan or to advance personal hardship arguments.

Union Governance

Liability of Officers

The Bill imposes an unparalled level of liability on volunteer office holders in the non-profit sector. If the public interest test is the loss of members' funds from corporate fraud based on a very small number of fraud cases in the union movement then this is insignificant compared with the size and magnitude of fraud and corporate collapses that exists in the wider economy. A review of corporate fraud across industries in 2012 gives some indication of their scope and cost to the community.

Fraud by industry

INDUSTRY	NUMBER	AMOUNT	AVERAGE
Banks	30	$184,124,601	$6,137,487
Education and Training	2	$29,074,903	$14,537,452
Government	10	$24,519,708	$2,451,971
Legal Firms	2	$4,500,000	$2,250,000
Manufacturing	5	$9,101,652	$1,820,330
Mining	3	$4,988,753	$1,662,918
Motor Vehicle Dealers	3	$4,395,889	$1,465,296
Not For Profit	4	$7,870,000	$1,967,500
Other Financial Institutions	4	$15,422,801	$3,855,700
Recruitment / Employment	2	$6,300,000	$3,150,000
Retail	4	$41,523,353	$10,380,838
Transport	2	$26,989,061	$13,494,531
Wholesale	3	$5,300,000	$1,766,667
Other	15	$33,915,422	$2,261,028
Total	**89**	**$398,026,143**	

Source: Warfield & Associates (2012)

It is completely out of context on a public interest test to suggest that small membership organisations in the not-for-profit sector of the economy should warrant such focus for anything other than political reasons.

Accounting and Audit

Organisations are subject to reporting and audit requirements in accordance with international accounting standards and at a specific level of materiality that is appropriate for the organisation's size and risk as determined by audit standards.

These standards apply to the wider not-for-profit sector, private and public companies and have been developed by international authorities under a conceptual framework that embodies the sound principles of governance, risk management and stewardship in standards that are scalable to all types of structures and organisations.

The current requirement to undergo audit and disclose information under international accounting standards are more than adequate. Required disclosures include remuneration of officers, risk management, capital management and related party transactions. This Bill extends reporting requirements beyond that required by public companies. To put this in context, public companies are able to raise billions of dollars every day in international capital markets facilitated by the level of investor and regulator confidence in these standards. It is completely incongruous that a company can raise billions of dollars from the public under these disclosure principles, yet the Attorney-General does not find them adequate for small, non-profit entities.

Public Disclosure v Disclosure to Members

Only public companies and governments are required to make information available to the public. Private companies and membership organisations have an obligation to report to their members not the public in general, yet the Bill makes unions subject to the same disclosure rules as public companies and government. Registered organisations will be the only organisations in the economy that are afforded no recognition or respect for principles of confidentiality in commercial transactions.

Continuous Disclosure

The requirement to update and publish ledgers continuously is completely out of context. A publicly listed company is required to follow principles of continuous disclosure under effective market principles and to keep the market informed. Directors' interest disclosures only relate to a limited type of interest and do not require the level of scrutiny and continuous disclosure being proposed here.

It is fanciful to suggest that there is any public interest or market mechanism at work here that would require the same level of disclosure to membership organisations.

Freedom of Speech

The QNU contends that it is an important role of the parliament to safeguard our representative democracy by protecting the people from executive attempts to restrict, in such a disproportionate way, such things as their freedom to engage in political discourse, individually and collectively, and freedom of association. The issue of expenditure is best dealt with through provisions for full and timely disclosure, rather than caps or restrictions on the rights of membership-based organisations.

Our parliamentary system is fundamentally linked to our right to free speech which includes freedom of political communication. The bill seeks to maintain the tradition of conservative governments in Queensland by attacking the fundamental rights of its citizens as occurred during the 1970s and 1980s. The unreasonable procedures requiring a ballot of all union members for expenditure of more than $10,000 for a political purpose reminds us of those unfortunate times.

The QNU believes the imposition of spending caps and restrictions on unions violates the political, industrial and democratic rights of membership-based organisations. The proposed spending cap on unions significantly constrains the capacity of those outside the political parties or media to participate in and respond to the public debate. This is contrary to the principles of a free, open and democratic society.

The High Court has heard many legal arguments around political advertising and freedom of speech[3]. Although free speech is a paramount interest in the electoral process, it nevertheless is not an absolute interest. The High Court has clearly established that some restrictions of free speech are permissible and has devised a test of reasonable proportionality to govern such cases.

The QNU believes the imposition of expenditure caps on unions creates a massive distortion in the political process by enhancing the power of certain media outlets and political parties at the expense of other legitimate groups.

The QNU contends that powerful media outlets, which themselves are mostly private companies with private interests and agendas, have greater control of the political process than other organisations. To continue to give private media companies the unrestricted right of political discourse with the only real constraints being their own corporate resources and editorial policies, while imposing spending caps on membership-based organisations, seriously compromises the rights of the people of Queensland.

[3] See for example *Australian Capital Television Pty Ltd v Commonwealth* 177 CLR 106 in which the High Court struck down the *Political Broadcasts and Political Disclosures Act 1991 (Cth)* which restricted political advertising on the electronic media during Federal, State, Territory and local elections.

The expenditure cap on unions imposes severe restrictions on the so-called "free market" of ideas and significantly reduces the availability of the variety of alternative platforms to organisations such as the QNU. Campaigning restrictions on membership-based collectives, such as unions, undermines our democracy and leaves debate largely to the established political parties and powerful media interests.

The QNU has always behaved responsibly in campaigning. We announce the running of any campaigns and usually hold a full press conference, to which all sections of the media are invited and at which we subject ourselves to scrutiny.

QNU campaigns are very public affairs and those opposed to our position have every opportunity to make an assessment and respond to it. There is no justification for ceasing or capping our capacity to run such candid and high-profile campaigns at any time.

Union Encouragement as a mechanism for co-operative industrial relations

The notion of union encouragement is deeply embedded in the industrial architecture of Queensland's nursing and midwifery workforce[4] This is no accident. Previous governments recognised that co-operative industrial relations are the key to a stable, productive workplace for delivery of high quality health care.

'Union encouragement' clauses find their origins in 'preference' clauses for union members. These clauses gave unions the ability to take action against employers who often exploited workers through hiring non-union labour, paying below award rates and ignoring other clauses for the sake of higher profit margins (Webster, 2009). 'Preference' clauses were stripped from awards during various reviews. The introduction of the *Industrial Relations Act 1999* restored reasonable union rights of entry to workplaces, and although the prohibition on union preference remained, the act permitted awards and agreements to contain union encouragement clauses. The emphasis on bargaining ensured a prominent, but not exclusive role for union representation (Hunt, 2009, p.99).

The public sector plays a vital role in our society. Support for the maintenance of a properly resourced and effective public sector is firmly grounded in a sense of morality and social justice. Essential public services should be available to all members of the community on the basis of need – not on the ability to pay. Union encouragement is an important aspect of industrial democracy and the prominent role of the public service in setting standards for

[4] This includes:

- s110 'Encouragement Provisions Permitted' in the *Industrial Relations Act 1999*;
- Clause 11.4 'Union Encouragement' in the *Queensland Health Nurses and Midwives Award - State 2012*;
- *Union Encouragement* HR policy F4.

workplace practices. All public service workers should be covered by a system of industrial relations providing comprehensive employment conditions and trade union rights (Whitfield, 1992).

An industrial relations environment that has collective bargaining as an essential mechanism for advancing wages and conditions can only exist if the parties have the industrial maturity to make such bargaining work effectively. Where this industrial maturity does not exist, there is a break down in trust and dysfunctional, adversarial industrial relations will result.

Such an outdated industrial relations view is 'passing strange' given the Australian public's overwhelming rejection of the excesses of the Work Choices approach to industrial relations and the clear preference for a balanced, collective bargaining approach underpinned by a strong co-operative framework.

Enterprise bargaining has traditionally been viewed as a multi-dimensional system incorporating both the process of negotiating new agreements and the day-to-day interactions that implement the terms of the agreement (Cutcher-Gershenfeld & Kochan, 2004). It involves an ongoing relationship between employers/managers, their employees and their representatives.

Indeed, the *Blueprint for Better Health Care in Queensland* contains a message from the Premier as well as a foreword by the Minister himself, both of which highlight the need for a co-operative and 'good' workplace culture within our public health system. While such objects are honourable, they can only be achieved if the industrial relations parties are able to participate from a position of relatively equal power.

To ensure a balance in the industrial relationship it is not uncommon for the parties to establish formal consultative structures. Such structures include consultative forums at various levels within an enterprise as well as support mechanisms for participants. In addition to such structures, the day to day industrial realities also require the relevant industrial parties to be able to operate from an informed and equitable basis. For example, a management culture where superiors stand over and intimidate subordinates is clearly bound for failure.

Queensland Health has a very large workforce of over 80,000 employees including a broad range of occupational and professional groupings which in themselves have various levels of skills and knowledge. However, such skills and knowledge do not necessarily extend to industrial relations. The consequences are often that highly skilled clinicians will advance into non-clinical managerial positions which require, among other things, skills in industrial relations.

It is the experience of the QNU that our workplace activists will frequently have more advanced skills in industrial relations practice than their managers as a consequence of union-initiated training and development. As a result, QNU activists often guide dispute

resolution, not their managers. In a complex work environment like Queensland Health union encouragement provisions such as those currently in existence are essential for the maintenance of a stable, co-operative and productive workplace.

Provisions that formally recognise the role of democratically elected workplace delegates are therefore critical in maintaining stability in day to day industrial relations. Employers must complement this contribution by providing adequate leave for workplace representatives to undertake training to be able to preform their role. The QNU provides training for members in a range of areas including award interpretation, grievance procedures, occupational health and safety and using consultative structures effectively.

It does not take much insight to appreciate how a skilled workplace representative who has been trained in these areas assists in maintaining co-operative industrial relations and a safe workplace. It is well recognised that such workplace environments are more productive and beneficial to all industrial parties .

Removing union encouragement provisions for nurses and midwives is a short-sighted, ideological undertaking. There is ongoing evidence that nursing and midwifery face a current shortage with trends indicating that this shortage will increase over time. Health Workforce Australia (2012, p. 11) recently reported that by 2016 there will be a shortage of 20,079 nurses and midwives and they project that by 2025 this shortage will be 109,490.

In the face of such a significant dearth of nurses and midwives, it defies logic that there is any reason to embark upon a confrontational approach to industrial relations through attacks on unions. Not only will such an approach break down any existing co-operative industrial environments within our public health system, it will also hasten the exodus of nurses and midwives.

Conclusion

In conclusion, the QNU reiterates that this assault upon our democratic rights will not distract us from the important task of representing the industrial and professional interests of nurses and midwives nor that of defending our public health system. The QNU will ensure the people of Queensland understand that quality public health services are dissipating due to ongoing attacks on those who deliver these services – the nurses and midwives. When Queenslanders find they cannot access the public health services they are entitled to, they will be in no doubt where the responsibility lies.

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