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**FINANCE AND ADMINISTRATION COMMITTEE**

**Report no.14 on the**
***Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Bill 2012***

**QUEENSLAND GOVERNMENT RESPONSE**

## INTRODUCTION

On 1 June 2012 the Finance and Administration Committee (the Committee) tabled its report (No.14) in relation to the *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Bill 2012* (the Report).

The Queensland Government response to the Report's recommendations and clarification on matters raised by the Committee in relation to consultation and key fundamental legislative principles are provided below.

## RESPONSE TO RECOMMENDATIONS

**Recommendation 1 –**
The Committee recommends that the *Industrial Relations (Fair Work Act Harmonisation) and Other Legislation Amendment Bill 2012* be passed.

**Queensland Government response:**

The Queensland Government thanks the Committee for its consideration of the Bill and appreciates the Committee's recommendation that the Bill be passed.

**Recommendation 2 –**
The Committee recommends that the Bill be amended to include transitional arrangements ensuring that all processes which have already commenced be concluded under the previous arrangements.

**Queensland Government response:**

With regards to the Committee's comments that the proposed amendments will impact on processes already commenced and recommendation that the Bill be amended to include transitional arrangements, the Queensland Government notes that the Bill already inserts at section 20, Chapter 20 'part 13, which provides for the transitional arrangements.

Section 781 provides for the transitional arrangements for new section 149(5) (prescribing those things that are to be considered by the Queensland Industrial Relations Commission (QIRC) as part of the public interest in arbitrating the making of an agreement). This transitional arrangement ensures that the new matters the QIRC must consider will only apply to arbitration of matters which commence on or after the

commencement of section 149(5) (i.e. in this case on the date the Bill receives assent). This means that any arbitration already commenced will not be subject to the changes.

Section 782 addresses the transitional arrangements in connection with the new protected action balloting regime. It ensures that where notice has been given prior to the commencement of the Bill of industrial action, the previous arrangements in the *Industrial Relations Act 1999* continue to apply. This means that such action will not need to comply with the new protected action balloting regime.

Similarly section 783 provides that the Attorney-General's new declaration power to terminate industrial action under section 181B will not apply to protected industrial action if notice of the intended action was given prior to the commencement of the provision (i.e. in this case on the date the Bill receives assent)..

Finally, section 784 provides for a transitional regulation power for a period of up to 2 years. This allows the Queensland Government to make transitional provisions necessary to allow or facilitate the transition of processes from the pre-amended Act to the amended Act. This will assist in ensuring that there are no unanticipated consequences with regards to the transition, including unintended application of the provisions retrospectively.

The Queensland Government considers that these transitional arrangements are sufficient to ensure that processes which have already commenced be concluded under the previous arrangements.

**Recommendation 3 –**
The Committee recommends that the Bill be amended to include provision omitting the requirement of a signed agreement in the event of an employer/employee agreement provided the employer can provide satisfactory evidence to the commission that a valid majority of relevant employees subject to the agreement approved the proposed agreement.

**Queensland Government response:**

The Government agrees with the Committee's recommendation that the Bill be amended with respect agreements made directly between an employer and employees. Specifically, should an agreement proposed under section 147A be subject to a ballot, the majority of employees agree to the proposed certified agreement and sufficient evidence is provided to the QIRC of this agreement, then there is no requirement for a signatory on behalf of the employees to the agreement.

An amendment to section 147A will be made to reflect the Committee's recommendation.

**Recommendation 4 –**
The Committee recommends that the Bill be amended to allow for additional ballot methods if the Electoral Commission of Queensland (ECQ) considers these other methods to be appropriate.

**Queensland Government response:**

The ECQ is considered the most appropriate body to conduct protected action ballots considering its long standing expertise in the conduct of this type of proceeding.

The requirement that voting on a protected action ballot be conducted by the ECQ and only by post will provide a consistent, fair and transparent approach to all protected action ballot proceedings.

The Queensland Government considers that the introduction of a variety of alternative approaches other than by post, for the conduct of a protected action ballot (e.g. giving of the employee notice personally; email notifications with embedded electronic links to ballot notices; facsimile notifications or displaying in a conspicuous location), notwithstanding that the decision on the mode would be made by the ECQ, has the potential to confuse those participating in the process and may lead to challenges as to the veracity of the ballot outcome.

On this basis the Queensland Government will not adopt the recommendation of the Committee. The Government notes the Committee's suggestion for the inclusion of electronic voting should the ECQ move in that direction in the future. This option will be examined should ECQ establish an effective electronic voting regime at some time in the future.

**Response to additional matters raised by the Committee**

The Committee also highlighted the following matters:
- whilst the Committee understood the Government's reasons for the prompt passage of this legislation it considers that realistic consultation times should be adhered to particularly when legislation affects numerous stakeholders; and
- with respect to the fundamental legislative principles (FLP) identified during the course of the inquiry.

The Queensland Government acknowledges the Committee's comment on consultation.

In respect to the matters raised on FLP, the Queensland Government response is:

In respect to those matters raised on provisions included under clause 6 which may operate to remove the rights of employees to be represented by their employee association; may significantly disadvantage employees from non-English speaking backgrounds in their ability to fully comprehend the implications of what they have been asked to vote for; and may increase the risk that employees may vote to accept a workplace or wage agreement under the misapprehension that the terms of the agreement

as presented to them for the vote has been negotiated and settled between the employer and the employee association.

It is the Government's position that the changes are consistent with the stated policy objectives of the Bill to modernise the law to reflect the Commonwealth workplace relations regime. This amendment brings the *Industrial Relations Act 1999* (Qld) into line with the *Fair Work Act 2009* (Cth) by giving employers the ability to request employees to approve a proposed agreement.

The ability to directly seek approval from employees will be subject to the same requirements and safeguards for certification as certified agreements between an employer and an employee organisation.

In accordance with section 144(2)(b), the employer will be required to demonstrate that the terms of the agreement are explained to each relevant employee. Furthermore at section 156(1)(a), the QIRC will need to be satisfied that the terms of the agreement were explained in a way that was appropriate, having regard to the particular needs and circumstances of each employee. Included in this provision are examples of persons with particular circumstances and needs. Included in the list are "persons from a non-English speaking background".

Having regard to these requirements, there will be no disadvantage to employees from a non-English speaking background where an employer directly ballots employees. Any failure to address the particular needs of persons from a non-English speaking background, including ensuring that employees' comprehend the implications of what they have been asked to vote for, would mean the QIRC would be unable to certify the agreement. The Queensland Government is therefore of the view that employees non-English speaking backgrounds will not be disadvantaged under new section 144(4A).

With respect to those matters raised on provisions included under clause 12 may operate to erode an employees' right to take industrial action; and give no guidance to indicate what criteria or matters, other than the Minister's own judgment/discretion, are to be considered by the Minister when determining if he/she is satisfied that there is an actual or potential threat to the economy, the community or part thereof. This provision is arguably ambiguous, especially given the serious action it authorises.

It is the Queensland Government's position that this power mirrors the Federal *Fair Work Act 2009* where declarations are made subject to similar criteria by the Minister as the person responsible for the effective functioning of the legislation. Given that this provision is already in place federally this amendment simply brings the legislation in line with federal provisions that apply to Queensland private sector employees thus achieving greater consistency across jurisdictions. It is expected that the Minister would exercise caution in employing this power and that such declarations would only be made in extreme cases where it was considered in the public benefit to take such action. The high thresholds before Ministerial intervention is permitted under the amendment also fetter inappropriate use of this power. In addition the Minister is required to take various

steps to best ensure that parties affected by the declaration are informed that industrial action must cease and is no longer protected.

With respect to those matters raised on provisions included under provisions included under clauses 4 and 12 have potential to pre-empt the outcome of QIRC's deliberations; have potential to add to the complexity of QIRC deliberations with consequent delays in resolving matters; which statutorily require government policy to be a 'relevant consideration' in the deliberations of a judicial body arguably erode the doctrine of the separation of powers by the legislative fettering of judicial independence and discretion. It should be noted, however, that this is not unprecedented with other legislation also prescribing matters to be taken into account by the judiciary; and provisions included under clause 12 have potential to erode judicial/quasi-judicial independence due to the fact that orders made by the QIRC must not be inconsistent with a termination declaration or direction given by the Minister.

It is the Government's position that the *Industrial Relations Act 1999* has always required the QIRC to give consideration to certain factors when arbitrating an unsuccessful wage negotiation. A change in focus to the way the QIRC arbitrates negotiation is needed because the Act now almost exclusively covers the State's public sector and local government. The QIRC is not bound by the factors outlined in the Act. It must give consideration to the weight it applies to each factor and it is appropriate that the QIRC should consider both the financial situation of the State and the relevant entity to ensure that the QIRC has a proper understanding of the financial consequences of any determination.

With respect to those matters raised on provisions included under clause 18 do not allow for the information provided by the Under Treasurer to be tested for its veracity as it is only provided as information and not being given in evidence in a particular matter.

It is the Queensland Government's position that the amendments make it clear that the Under-Treasurer briefing is for information purposes only. The information is not evidence and cannot be used as evidence in other proceedings. As such, it is not appropriate that the Under-Treasurer by subject to cross-examination.