

# **Industrial Relations Bill 2016**

**Report No. 32, 55<sup>th</sup> Parliament**

**Finance and Administration Committee**

**October 2016**

## Finance and Administration Committee

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### Acknowledgements

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## Abbreviations

AD Act	<i>Anti-Discrimination Act 1991</i> (Qld)
ADCQ	Anti-Discrimination Commission Queensland
AiG	Australian Industry Group
ASMOFQ	Australian Salaried Medical Officers' Federation Queensland
AMWU	Australian Manufacturing Workers' Union
AWU	Australian Workers' Union
BAQ	Bar Association of Queensland
BCC	Brisbane City Council
CIAA	Caravan Industry Association of Australia
CCIQ	Chamber of Commerce and Industry Queensland
CLS	Caxton Legal Service
DFV	domestic and family violence
ER	equal remuneration
FWA	<i>Fair Work Act 2009</i> (Cth)
IR Act	<i>Industrial Relations Act 1999</i> (Qld)
LAQ	Legal Aid Queensland
LGAQ	Local Government Association of Queensland
MBAQ	Master Builders Association of Queensland
OIR	Office of Industrial Relations, Queensland Treasury
PSA	<i>Public Service Act 2008</i> (Qld)
PABO	protected action ballot order
QCAT	Queensland Civil and Administrative Tribunal
QCU	Queensland Council of Unions
QES	Queensland Employment Standards
QHA	Queensland Hotels Association
QIRC	Queensland Industrial Relations Commission
QLS	Queensland Law Society
QNU	Queensland Nurses' Union
QTA	Queensland Trucking Association
QTU	Queensland Teachers' Union
TQ	Together Queensland
UFU	United Firefighters' Union

## Chair's foreword

The Government members of the committee support this Bill. The Bill is the culmination of a timely review of the industrial relations framework in Queensland. The review found that the current Act, which has been subject to 74 amending Acts since 1999, is now unworkable.

The Bill was developed by the Government following consultation processes during and following the review. The committee has provided further opportunity for consultation on the important matters contained within the Bill. I note that a majority of the 44 submissions received by the committee are in favour of the Bill while suggesting some minor amendments. This was corroborated by witnesses before the committee during its public hearing.

I thank the committee members for their consideration of this Bill. While we may not always agree on policy matters, the deliberations of the committee are respectful and I thank members for this. I also thank the committee secretariat and other Parliamentary staff for their assistance to the committee.

Finally, I thank the submitters and witnesses who engaged in this inquiry and gave their time to further inform the committee. We appreciate your views and value your experience.

I commend the committee's report to the House.

A handwritten signature in black ink, appearing to read 'Peter Russo', with a long horizontal stroke extending to the right.

Peter Russo MP

**Chair**

## 1. Introduction

### 1.1 Role of the committee

The Finance and Administration Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.<sup>1</sup>

The committee's primary areas of responsibility include:

- Premier, Cabinet and the Arts
- Treasury, Aboriginal and Torres Strait Islander Partnerships and Sport, and
- Employment, Industrial Relations, Racing and Multicultural Affairs.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

### 1.2 The Inquiry referral

On 1 September 2016, the Minister for Employment and Industrial Relations, Minister for Racing and Minister for Multicultural Affairs, Hon Grace Grace MP, introduced the Industrial Relations Bill 2016 ('the Bill') into the Legislative Assembly.<sup>2</sup> In accordance with Standing Order 131, the Bill was referred to the Finance and Administration Committee for detailed consideration.<sup>3</sup>

The objectives of the Bill are to repeal the current *Industrial Relations Act 1999* and to establish a framework for industrial relations in Queensland. Additionally, the Bill seeks to amend the *Holidays Act 1983* to provide that, from 2017, Easter Sunday will be a public holiday.

The committee was required to report to the Legislative Assembly by 28 October 2016.

### 1.3 Inquiry process

The committee announced the Inquiry by advertising the terms of reference on its website.<sup>4</sup> The committee also wrote to stakeholders and to subscribers to inform them of the Inquiry and invite written submissions.

On 2 September 2016, the committee sought assistance from the Queensland Treasury's Office of Industrial Relations (OIR) in relation to its consideration of the Bill. On 8 September 2016, the OIR provided the committee with a written briefing on the Bill. On 14 September 2016, officials from the OIR and representatives from the Queensland Public Service Commission participated in a public briefing on the Bill.

The closing date for submissions was 30 September 2016. The committee received a total of 44 submissions, a number of which were provided confidentially. There were 809 submissions of a similar

<sup>1</sup> *Parliament of Queensland Act 2001*, section 88 and Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly*, 131.

<sup>2</sup> Queensland Parliament, Record of Proceedings, 1 September 2016, pp 3327-3330.

<sup>3</sup> Queensland Parliament, Record of Proceedings, 1 September 2016, p 3330.

<sup>4</sup> Queensland Parliament, Finance and Administration Committee, <<http://www.parliament.qld.gov.au/work-of-committees/committees/FAC>>. All web references in this report were accessed on 17 October 2016.

form which were generated from the TQ website and which the committee treated as one submission. A list of submitters is provided at **Appendix A**.

The committee held a public hearing in Brisbane on 12 October 2016. A list of the witnesses at the public hearing is available at **Appendix B**.

Copies of material published in relation to the Inquiry, including written advice, transcripts of the committee's public briefing and public hearings, and all published submissions, are available on the committee's website.

#### **1.4 Structure of the report**

Chapter 2 provides a brief overview of the Bill.

Chapters 3 and 4 consider the legislative reforms within the Bill, and provides a summary of the issues considered by the committee during the course of the inquiry.

Chapter 5 highlights clauses within the Bill that may contain issues with regards to fundamental legislative principles.

#### **1.5 Background and overview of industrial relations in Queensland**

As a background to the consideration of the Bill, an overview of industrial relations in Queensland is provided at **Appendix C**.

#### **1.6 Outcome of committee deliberations**

Standing Order 132(1)(a), requires that the committee examine the Bill and determine whether to recommend that the Bill be passed.

In this instance, the committee was not able to reach a majority decision on a motion to recommend that the Bill be passed and therefore in accordance with section 91C(7) of the *Parliament of Queensland Act 2001*, the question on the motion failed.



## 2. Overview of the Bill

The Bill stems from a review undertaken in 2015 of industrial relations in Queensland. The review report recommended that new industrial relations legislation be drafted and made 68 recommendations.<sup>5</sup> The government accepted all the recommendations. According to the department briefing, 60 recommendations were legislative in nature and eight were non-legislative.

**Appendix D** includes a brief summary of the 2015 review.

### **Legislative reforms**

The explanatory notes provide that the Bill proposes to address the legislative recommendations generated from the 2015 review. Key legislative proposals introduced by the Bill would be to:

- repeal and replace the current *Industrial Relations Act 1999* ('the IR Act')
- amend established Queensland legislation including the *Anti-Discrimination Act 1991*, the *Public Service Act 2008*, the *Hospital and Health Boards Act 2011* with regards to industrial relations provisions
- strengthen collective bargaining arrangements with greater emphasis on responsible representation and good faith bargaining
- promote and strengthen the independence of industrial tribunals
- adopt similar minimum standards of employment to those afforded to private sector employers under the *Fair Work Act 2009* (Cth) ('the FWA')
- provide the Queensland Industrial Relations Commission (QIRC) with exclusive jurisdiction for workplace employment related anti-discrimination matters
- establish a Queensland Industrial Relations Consultative Committee
- introduce new protections for workers including paid leave for victims of domestic and family violence (DFV), workplace bullying remedies, additional leave entitlements and a right to request flexible work arrangements
- establish accountable regulation of registered industrial organisations and associated entities
- establish the Industrial Registrar as an independent statutory officer with authority to investigate breaches of the proposed legislation, and
- amend the *Holidays Act 1983* to make Easter Sunday a public holiday from 2017.

### **Non-legislative reforms**

The department advised that the review recommended eight non-legislative recommendations which the government is working to implement outside of this Bill process.

Among the non-legislative recommendations of the review was recommendation in respect of temporary employees and the security of tenure. As it is a non-legislative recommendation, there are limited provisions in relation to this matter in the Bill. This matter is considered further at Chapter 4 of this report.

#### **2.1 Consultation on the proposed changes**

The department advised its development of this Bill was informed by consultation with stakeholders prior to the drafting stage, during the 2015 review. Additionally, it held confidential briefings and

<sup>5</sup> Industrial Relations Legislative Reform Reference Group, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, December 2015.

consultation on the Bill with key stakeholders in 2016 including with the QCU, AWU, LGAQ, CCIQ, AiG, MBAQ, QLS and BAQ.<sup>6</sup>

The committee heard that some stakeholders were given little time to consider proposed reforms within the Bill.

#### *Issues raised*

The ADCQ advised it was not consulted during the 2015 review on the proposed amendments to the *Anti-Discrimination Act 1991* and shifting of anti-discrimination jurisdiction to the QIRC. The ADCQ stated in its submission:

*The ADCQ was not consulted about the proposal during the review process or before the report was released. After release of the report, the ADCQ provided feedback to the Office of Industrial Relations outlining concerns about the proposal and identifying issues to be clarified if the recommendation were to be implemented. The ADCQ urged for broader consultation before adopting and implementing the recommendation.*<sup>7</sup>

In their submissions, QHA and CCIQ noted a lack of consultation on proposed changes to the *Holidays Act 1983* to create a public holiday on Easter Sunday.<sup>8</sup>

For example, CCIQ stated:

*CCIQ was formally advised of the decision by the State Government to include Easter Sunday in the schedule of public holidays in the Industrial Relations Bill 2016 by a phone call from the Deputy Director General of the Department of Justice and Attorney General at 6.00 pm on Thursday 25th August 2016.*

*CCIQ met with the Department at 10.15 am on Friday 26th August 2016 to discuss our substantial concerns. An urgent meeting (8.00 am Monday 29th August 2016) was then held with the Minister for Employment and Industrial Relations, the Hon Grace Grace whereby CCIQ received confirmation that the decision had already been made by the State Government and there would be no consultation on the decision.*<sup>9</sup>

In relation to the provisions to introduce domestic and family violence leave, LGAQ informed the committee that the issue was not fully considered during the 2015 review process. LGAQ stated:

*The matter was raised at the review group, but the announcement had already been made by the government at the time that the 10 days leave would be coming in through the Bill. The review group really did not have much opportunity to discuss it because we were told it was going to happen anyway.*<sup>10</sup>

### **3. Consideration of the Bill – significant issues raised**

#### **3.1 Main purpose of the Bill, recognition of mutual obligations of trust and confidence**

##### ***Main purpose of the Act***

Chapter 1 sets out the main purpose of the legislative reforms to provide for ‘a framework for co-operative industrial relations that is fair and balanced and supports the delivery of high-quality services, economic prosperity and social justice for Queenslanders’.<sup>11</sup>

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<sup>6</sup> Explanatory notes, pp 5-6. Refer to page iii for abbreviations used in this report.

<sup>7</sup> Submission 24, p 4.

<sup>8</sup> Submissions 12, 34.

<sup>9</sup> CCIQ, correspondence provided subsequent to Brisbane public hearing, 12 October 2016.

<sup>10</sup> Public hearing transcript, Brisbane, 12 October 2016, p 19.

<sup>11</sup> Industrial Relations Bill 2016, clause 3.

The Bill provides that Queensland's industrial relations jurisdiction would comprise state and local government entities and their employees, as well as some statutory entities specifically excluded from the national workplace relations system<sup>12</sup>.

### ***Mutual trust and confidence clause***

Clause 4 would set out that the main purpose of the Bill is primarily achieved. Clause 4(e) legislatively identifies the obligation of mutual trust and confidence in the employee relationship.

The High Court of Australia, in *Commonwealth Bank of Australia v Barker [2014]*, held unanimously that there is no implied term of mutual trust and confidence in Australian employment contracts. The High Court concluded that while terms of mutual trust and confidence can be implied by law in the United Kingdom, it is not applicable in Australia. Additionally, the High Court found that the decision to imply a term of this kind is more appropriate for the legislature than the judiciary.<sup>13</sup>

The department noted that this provision was added in response to recommendation 3 of the review report.<sup>14</sup>

### ***Issues raised***

The QLS, ASMOFQ and AiG expressed concern over the application of this provision in light of the High Court decision that there is no implied mutual trust and confidence in Australian employment contracts.<sup>15</sup>

The department advised:

*In terms of the practical application of the inclusion of mutual trust and confidence in the objects of the Act, the provision will promote a standard of ideal conduct for good employers and employees. The object is given effect through the range of protections in the statutory framework.*

*Queensland's existing industrial framework provides employees with a range of protections and avenues to appeal and seek redress where an employer exceeds or breaches their legal duties. In addition, the Bill proposes enhancements to this range of protections including through the introduction of general protections and genuine consultative obligations, and the further institutionalisation of good faith bargaining principles. Therefore, it is anticipated that the practical implications of the inclusion of the term itself in the objects will be limited in that it is intended that the term supports rather than expands existing protections for employees.<sup>16</sup>*

## **3.2 Modern employment conditions, including domestic and family violence leave**

Chapter 2 of the Bill proposes to retain key legislated minimum employment standards through the Queensland Employment Standards (QES). The Bill would retain the following standards:

- minimum wage
- sick leave and cultural leave
- paid public holidays
- annual leave and long service leave
- jury service, and

<sup>12</sup> Industrial Relations Bill 2016, clause 12.

<sup>13</sup> Queensland Parliamentary Library, *Research Brief: Summary of Commonwealth bank of Australia v Barker*, 12 September 2016.

<sup>14</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 16.

<sup>15</sup> Submissions 32, 36 and 39.

<sup>16</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 1/4, p 1.

- notice of termination and redundancy pay.<sup>17</sup>

The Bill seeks to amend the QES with the following changes:

- compassionate leave, incorporated into bereavement leave (2 days full pay plus unpaid leave to travel if necessary for employees other than casual employees, clause 47), and
- parental leave and related entitlements with regards to surrogacy entitlements (clause 61).

The Bill proposes to add new standards including:

- an information statement to any new employee setting out workplace rights and basic entitlements
- maximum weekly hours (38 hours for full-time employees, clause 23)
- a right to request flexible working arrangements for all employees (clause 27)
- emergency service leave, and
- domestic and family violence leave (up to 10 days full pay per year for employees other than casual employees, clause 52) and carers leave to support and care for a person affected by domestic and family violence (clause 42).

### ***Domestic and family violence leave***

The Bill proposes to fulfil a government commitment to provide paid leave for victims of domestic and family violence (DFV). The government announced a policy to make paid DFV leave available to public service employees in November 2015.<sup>18</sup>

The Bill would provide for:

- 10 days paid DFV leave for employees other than casual employees,<sup>19</sup> and
- unpaid leave, subject to employer agreement, for all employees including casual employees<sup>20</sup>

Carer's leave entitlements would also be extended to include the care and support of a person affected by DFV.<sup>21</sup> The person need not be a member of the employee's immediate family or household. This provision is in response to Recommendation 43 of the review report.<sup>22</sup>

### ***Issues raised***

In its submission, AiG sought more consideration of the proposal, noting the federal Fair Work Commission is currently conducting an investigation of the issue of leave entitlements for those affected by DFV.<sup>23</sup>

During the hearing, the committee heard evidence about a lack of consultation during the 2015 review.<sup>24</sup>

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<sup>17</sup> Industrial Relations Bill 2016, clause 21.

<sup>18</sup> Hon Annastacia Palaszczuk MP, Premier and Minister for the Arts, 'Qld Government champions workplace cultural change on White Ribbon Day', media release, 25 November 2015.

<sup>19</sup> Industrial Relations Bill 2016, clause 52(1).

<sup>20</sup> Industrial Relations Bill 2016, clause 52(2).

<sup>21</sup> Industrial Relations Bill 2016, clause 42.

<sup>22</sup> Industrial Relations Legislative Reform Reference Group, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, December 2015, p 108.

<sup>23</sup> Submission 39, pp 5-6.

<sup>24</sup> Public hearing transcript, Brisbane, 12 October 2016, p 19.

The LGAQ accepted the adoption of paid leave for domestic violence victims, however the organisation opposed the introduction of an entitlement to 10 days personal carer's leave, citing cost concerns.<sup>25</sup> In response the department stated, 'the employee still has access to a total of 10 non-cumulative days carer's leave per year, it is not an additional 10 days carer's leave per year'.<sup>26</sup>

The CLS supported DFV leave being made available to all employees, not just permanent employees.<sup>27</sup>

LAQ suggested that the *Anti-Discrimination Act 1991* be amended to include 'victim of domestic violence' as a protected attribute. This would extend protection from discrimination to all Queenslanders on the basis of status as a victim of domestic violence.<sup>28</sup>

### ***Flexible working arrangements***

Clause 27 of the Bill proposes to establish a right for all employees to ask for flexible working arrangements, based on provisions in the FWA. An employee can ask the employer for a change in the way the employee works, including the ordinary hours of the employee, the place where the employee works and a change to the way in which the employee works, for example the use of different equipment as a result of disability, illness or injury. The request must be in writing and contain sufficient details of the changes sought and the reasons for the changes sought.<sup>29</sup>

The department advised that the Bill also proposes a new right to appeal a decision of their request under clause 27.<sup>30</sup>

### ***Issues raised***

The QNU sought an amendment to clause 27(1) to more fully address 'the employee's pattern of work', and to encompass changes in the way an employee can work, for example, returning to work after parental leave and needing to work certain days or shifts to cater for childcare.<sup>31</sup> The department advised that the list in 27(1) is non-exhaustive though the QNU request will be considered further.<sup>32</sup>

The QLS sought amendments to the flexible work provisions in the Bill to include further guidance on what may constitute 'reasonable grounds' for the refusal of a request for flexible work.<sup>33</sup> The QLS was supportive of the provisions in the Bill concerning flexible working arrangements. However, it was noted that 'the Bill does not provide any guidance on what a reasonable ground may be to refuse a request'.<sup>34</sup> This lack of guidance is expected to make it 'somewhat difficult for employers to have any certainty over whether they are on good or shaky grounds when they are refusing a request'.<sup>35</sup>

The department advised that the position in the 2015 review report was 'that an employer should be able to refuse a request for flexible working arrangements only on reasonable grounds, so there is an objective test for refusing a request'.<sup>36</sup> The 2015 review report also expressed the position in its report that 'unlike in the NES [National Employment Standards], however, the review report considers that

<sup>25</sup> Submission 37, p 10.

<sup>26</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 1/4, p 6.

<sup>27</sup> Submission 31, p 3.

<sup>28</sup> Submission 22, p 4.

<sup>29</sup> Industrial Relations Bill 2016, clause 27.

<sup>30</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 17.

<sup>31</sup> Submission 13, p 4.

<sup>32</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 1/4, p 2.

<sup>33</sup> Submission 32, p 3.

<sup>34</sup> Public hearing transcript, Brisbane, 12 October 2016, p 24.

<sup>35</sup> Public hearing transcript, Brisbane, 12 October 2016, p 24.

<sup>36</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 1/4, p 2.

there should not be specific reasons included in the Act, so that the refusal must reflect the particular circumstances of the person requesting the flexible working arrangements'.<sup>37</sup>

AiG expressed opposition to providing the QIRC with the power to arbitrate in respect to the right to request flexible working arrangements, which it considered 'unlike the powers of the Fair Work Commission under the *Fair Work Act 2009*'.<sup>38</sup> The department, in its response, referred to the 2015 review report which stated 'employees aggrieved by the outcome of a request will have access to the disputes procedure under the Act'.<sup>39</sup>

Caxton Legal Service sought an amendment to clause 27 to remove the requirement for the request to be in writing, instead proposing that an oral request will suffice, with the use of an interpreter where necessary.<sup>40</sup> The department advised it will further consider this issue.<sup>41</sup>

### **Leave entitlements**

Clause 31 of the Bill proposes to continue inclusion of annual leave in accordance with the QES. The entitlement for annual leave applies to completed years of employment and distinguishes between shift workers and non-shift workers.

#### *Issues raised*

QNU sought the removal of clause 31(3) which is aimed at ensuring, in terms of annual leave, that an employee is not paid twice in lieu of working on a public holiday. The QNU stated, 'there is no such provision in the National Employment Standards which state that annual leave is exclusive of public holidays'.<sup>42</sup> The QCU, AMWU, QTU and TQ expressed support for this recommendation of the QNU.<sup>43</sup>

The department advised that:

*... the effect of clause 31(3) is that, if an employee is entitled to additional annual leave in lieu of a public holiday, the employee does not have a further entitlement to the public holiday. While the Government will further investigate the matter it may be suitable for negotiation between the parties in individual agreements.*<sup>44</sup>

The QCU noted the definition of shift worker at clause 31(6) is in reference to a 'continuous shift worker'. The QCU stated the provision was 'excessively onerous' as the general entitlement for five weeks annual leave is usually afforded to a shift worker rather than a continuous shift worker.<sup>45</sup> In response, the department acknowledged that the definition of shift worker in Queensland modern awards can be 'very broad', and that 'the Government will further investigate the matter'.<sup>46</sup>

The ADCQ recommended amendment to the definition of 'immediate family' to be the same as the definition in the *Anti-Discrimination Act 1991* by specifying and including a former spouse, a child of a

<sup>37</sup> Industrial Relations Legislative Reform Reference Group, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, December 2015, p 103.

<sup>38</sup> Submission 39, p 4; Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 1/4, p 2.

<sup>39</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 1/4, p 2.

<sup>40</sup> Submission 31, p 2.

<sup>41</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 1/4, p 1.

<sup>42</sup> Submission 13, p 4.

<sup>43</sup> Submissions 26, 18, 25 and 35.

<sup>44</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 1/4, p 3.

<sup>45</sup> Submission 26, p 2.

<sup>46</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 1/4, p 5.

former spouse and a present foster child.<sup>47</sup> The definition would impact on clauses 42, 43, 44, 47 and 48 of the Bill in relation to carer's leave and bereavement leave.

The department advised:

*In the current IR Act spouse is defined as including former spouse, and child includes child of a spouse so includes child of a former spouse. It is further considered that the absence of present foster child should be addressed. It is proposed to amend the Bill as suggested.<sup>48</sup>*

### 3.3 Modern awards

The current IR Act provides that the modern award framework and certified agreements ensure equal remuneration for work of equal or comparable value. Chapter 3 of the Bill would retain these concepts and provide general requirements for the enactment of modern awards including that they:

- are fair and do not discriminate
- are not inconsistent or at least are more favourable than the minimum QES
- provide equal remuneration for work of equal or comparable value
- are in plain English
- include provisions requiring an employer to consult with employees on major decisions affecting the employee
- provide fair standards in the context of general living standards, and
- provide for general requirements for minimum wages.<sup>49</sup>

The Bill proposes to remove the obligation for four yearly reviews of awards and proposes that modern awards remain contemporary.<sup>50</sup>

#### *Issues raised*

In their submissions QTU and QCU sought amendment to clause 141 such that the making or varying of an award is not intended to reduce or remove existing employee entitlements and conditions.<sup>51</sup>

United Voice and UFU expressed concern over the power of the QIRC to make, vary or review a modern award on its own initiative in clause 156. The submitters consider that the tribunal should not need to initiate changes to awards and that the system should be modern and flexible enough to allow parties to take responsibility for initiating proceedings about awards.<sup>52</sup> The department advised:

*The provisions in the Bill allow the QIRC to make, vary or review a modern award on its own initiative. The making and varying provision is based on section 140G of the IR Act which allows the QIRC to exercise power on its own initiative to achieve modern awards objectives. Consistent with Recommendation 20, sections 140F, 140G and 140 GA have been omitted and a new section has been inserted which does not require Modern Awards to be periodically reviewed. However it allows awards to be reviewed as often as is necessary for them to remain contemporary and relevant. Restoration of sections 130(1),(2) and (4) as per version 7D of the Historical Versions of the Act (to allow the QIRC to review an award on its own initiative) achieves this objective, while at the same time setting out clearly the powers of the QIRC.*

*The review of modern awards power under s156 gives the QIRC a broad power to consider and maintain the awards. The awards are 'creatures of the commission' (unlike agreements).*

<sup>47</sup> Submission 24, pp 26-27.

<sup>48</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 1/4, pp 10-11.

<sup>49</sup> Explanatory notes, p 35.

<sup>50</sup> Industrial Relations Bill 2016, clause 156.

<sup>51</sup> Submissions 25 and 26.

<sup>52</sup> Submissions 30 and 33.

*Review processes have occurred historically. Review can involve calling parties to provide advice on issues for the QIRC to consider or submissions on particular issues. S147 provides the QIRC can vary an award and includes, at 2(c) on a review of a modern award under part 5.*

*In this context, the variation is the step after a review process has occurred. The removal of the power for the QIRC to review awards would curtail the QIRC's 'traditional array of powers' in relation to how it maintains its awards. The power for the QIRC to vary an award would remain in s147, but this is more limited in scope.<sup>53</sup>*

### **Existing industrial instruments, partitioning of modern award for local government**

Chapter 18 of the Bill provides for certain transitional provisions with regards to existing industrial instruments, including the partitioning of the *Queensland Local Government Industry Award – State 2014* into three modern awards.

#### *Issues raised*

Clause 995 provides for the partitioning of the *Queensland Local Government Industry Award* into three awards by the Industrial Registrar. The explanatory notes state the provision is 'an administrative function only' designed to make the award 'more user-friendly'.<sup>54</sup>

The LGAQ considers the proposed partition of the *Queensland Local Government Industry Award* is 'completely unacceptable to local government' as it will further reduce the capacity of councils to maintain a local and viable workforce. The LGAQ calls for the removal of the Registrar to partition the award should be removed from the Bill.

LGAQ provided a number of reasons for retaining the single existing award, including:

- the award system for Queensland local government was considered twice previously by the QIRC and concluded a single award to be most suitable
- local governments in other Australian jurisdictions have a single award, and
- partitioning the award will result in significant administrative costs to council.<sup>55</sup>

The LGAQ submitted to the committee that a single local government award be retained because, without that single award, 'councils would have difficulty maintaining their current workforce levels due to the increasing economic challenges confronting local government'.<sup>56</sup>

The committee heard from LGAQ:

*The councils who had gone to the single modern award actually recorded an increase in job numbers. The councils who remained under the old system, with its myriad of conditions, continued to record a stronger decrease in job numbers. There are more job numbers and less turnover in the councils that had moved to the single industry award when in contrast to those councils who remained under the multiple award system. The figures speak for themselves.<sup>57</sup>*

In contrast, the submission of CFMEU was supportive of the partition. The CFMEU stated, 'the making of three separate awards ... is an important facilitative provision of the Bill, which would allow the QIRC to more properly safeguard longstanding entitlements through award modernisation'.<sup>58</sup>

<sup>53</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 2/4, pp 1-2.

<sup>54</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 2/4, p 2.

<sup>55</sup> Submission 37, pp 14-15.

<sup>56</sup> Public hearing transcript, Brisbane, 12 October 2016, p 16.

<sup>57</sup> Public hearing transcript, Brisbane, 12 October 2016, p 16.

<sup>58</sup> Submission 44, at paragraph 9.



The department advised that the Bill enables the Industrial Registrar to partition the *Queensland Local Government Industry Modern* award into three awards based upon occupational divisions identified in the Award Modernisation Variation Notice issued by the Minister on 6 June 2016 pursuant to S140CA of the current IR Act. This is an administrative function only and is done to assist employers and workers by making the document more user-friendly for each occupational division. Further, the QIRC has already divided the award into three occupational divisions plus a general provision division as a result of the Ministerial Request and the Registrar's role is limited to simply reformatting and publishing as three separate awards.<sup>59</sup>

### 3.4 Collective bargaining

Chapter 4 of the Bill sets out how collective bargaining would be conducted in the Queensland industrial relations system, with key elements including:

- the objective of bargaining is to reach agreement
- timelines around bargaining are increased from the current IR Act provisions
- current provisions for bargaining instruments are broad and not restrictive and based on current provisions in IR Act
- when full agreement is not reached, parties may apply for arbitration
- an interim wage may be agreed to or ordered during arbitration
- protected action prohibited during the life of the bargaining instrument, and
- protected action may be taken upon the expiry date of the bargaining instrument, or during conciliation, but not in arbitration.<sup>60</sup>

The current IR Act provides, at s146, that negotiations for certified agreements must be made in good faith. Good faith bargaining obligations are included in s228(1) of the *Fair Work Act 2009* (Cth). Accordingly, those involved in the process of bargaining for agreement under the federal Act, including representatives, are required to bargain in good faith. Other Australian jurisdictions to include good faith bargaining or similarly termed obligations in their industrial relations legislation are New South Wales, Western Australia and South Australia.<sup>61</sup>

The good faith bargaining provisions in the Bill are proposed to strengthen the current process by including the following minimum requirements of negotiating parties:

- attend and participate in bargaining meetings
- disclose relevant information in a timely way, and
- genuinely consider proposals made by other parties, respond in a timely way and give reasons for the party's response.<sup>62</sup>

#### ***Protected industrial action***

Chapter 4 of the Bill retains the current scope of protected industrial action in the current IR Act, in regards to bargaining awards and existing provisions regarding industrial action other than protected action. The department advised that the provisions for agreements and bargaining awards are intended to be 'broad and not restrictive' and based on current provisions in the current IR Act.<sup>63</sup>

<sup>59</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 2/4, pp 2-3.

<sup>60</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 18.

<sup>61</sup> Queensland Parliamentary Library, *Research Brief: Good faith bargaining (GFB)*, 12 September 2016.

<sup>62</sup> Industrial Relations Bill 2016, clause 173.

<sup>63</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 18.

Similarly, Chapter 6 of the Bill proposes to preserve most provisions of the current IR Act in relation to industrial disputes.<sup>64</sup>

In accordance with recommendations from the 2015 review report, the Bill proposes to replace protected action ballot order (PABO) arrangements, which currently require postal ballots to be conducted by the ECQ, with a process that ensures members who would be taking the proposed action have an opportunity to express their democratic views in support or otherwise for the proposed action (clauses 231-241). The process would require unions to show the Industrial Registrar that relevant members have expressed their democratic views in relation to the proposed action (clause 235).

The Bill gives the QIRC power to suspend or terminate protected action only in certain exceptional circumstances, for example significant damage to the economy or community. This is similar to FWA provisions.<sup>65</sup>

#### *Issues raised*

The QNU and QCU sought further amendment in Chapter 4 of the Bill to provide access to protected industrial action outside the bargaining period.<sup>66</sup> The department noted that this proposal was considered during the 2015 review and not supported. The Bill proposes to extend the current circumstances that allow industrial action in the IR Act to protected action during conciliation.<sup>67</sup>

In relation to industrial action rights, the QNU informed the committee:

*There is no entrenched right to strike in Australian law. Workers and their representatives are entirely reliant upon the state and federal parliaments to recognise this right and protect them from liability under common law. In our view, the protection of the interests of workers should not be confined to industrial action aimed at securing the terms of a collective bargain. Instead, we believe that workers should be able to take protected industrial action in pursuit of matters arising from their employment relationship.*<sup>68</sup>

BCC considered the proposed provisions regarding PABOs as 'significantly different' to the current process and 'lack clarity'.<sup>69</sup> AiG sought to retain the current requirements relating to protected action ballots.<sup>70</sup>

The QTU and UFU called for greater clarity in provisions relating to industrial action in Chapter 6 of the Bill.<sup>71</sup> United Voice sought the redrafting of clause 235 in relation to lawful industrial action taken during periodical bargaining, describing the provisions in the Bill as 'unclear and ambiguous'.<sup>72</sup>

The department advised:

*The Bill proposes to replace the current protected action ballot order (PABO) arrangements, which require postal ballots conducted by the Electoral Commission of Queensland (ECQ), with a more flexible process that ensures members who would be taking the proposed action*

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<sup>64</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 20.

<sup>65</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 2/4, p 8.

<sup>66</sup> Submissions 13 and 26.

<sup>67</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 2/4, p 5.

<sup>68</sup> Submission 13, p 15.

<sup>69</sup> Submission 21, p 4.

<sup>70</sup> Submission 39, p 3.

<sup>71</sup> Submissions 25 and 33.

<sup>72</sup> Submission 30, p 8.

*have opportunity to express their democratic views in support or otherwise for the proposed action.*

...

*Clause 235 supports a simplified process around seeking the views of relevant members in relation to proposed industrial action, and approval for the taking of protected industrial action.*

*The Bill provides a simple process for approval to engage in protected action, whereby a union applies to the registrar for approval of the 'relevant employees' engaging in proposed industrial action.*

*To grant approval, the registrar must approve the process to be used to canvass the views of relevant members in relation to the proposed action, and if the action is supported by this process, the registrar must approve the application to take the action if the relevant employees are eligible under the provision to take the action, and the action is not proposed to be taken before the nominal expiry date of a bargaining instrument or during a 'peace obligation period' in negotiations. Existing obligations such as notifying intent to take protected action remain unchanged.*

*Protected action may be taken after the nominal expiry date of an agreement. Protected action is also available during conciliation.*

*The Bill also provides for the indemnification, on certain grounds, of an organisation or association of persons against the unauthorised actions of an agent during or in connection with industrial action.<sup>73</sup>*

### 3.5 Equal remuneration

Chapter 5 of the Bill proposes to strengthen existing provisions for equal remuneration (ER). The explanatory notes state that the purpose of this chapter is to set out what is required of the commission in respect of ensuring equal remuneration 'for men and women workers for work of equal or comparable value'.<sup>74</sup>

New awards would be subject to an ER test, which effectively calls up the ER principle which is currently a statement of policy of the QIRC. When varying an existing award, making a determination or making an order, the QIRC may give directions to the parties to obtain and provide wage related information.<sup>75</sup>

Applications for the certification of a new agreement will need to be accompanied by an affidavit, signed by the parties, that informs the QIRC of the steps taken by the parties to ensure that the agreement provides for ER.

#### *Issues raised*

There was broad support of the provisions relating to equal remuneration from QTU, QCU, United Voice and QLS, with some suggestions for minor amendments.<sup>76</sup>

### 3.6 Workplace anti-bullying jurisdiction

Chapter 7 of the Bill introduces new provisions regarding workplace bullying remedies for employees, similar to those protections available to eligible employees under the federal FWA. This is a response

<sup>73</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 2/4, p 8.

<sup>74</sup> Explanatory notes, p 49.

<sup>75</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 20.

<sup>76</sup> Submissions 25, 26, 30 and 32.

to Recommendation 32 of the 2015 review report. The proposed anti-bullying provisions are modelled on those contained in the FWA.<sup>77</sup>

The Bill proposes a model that would focus on addressing bullying of current employees, rather than seeking redress for bullying after the employee has left the organisation.

The Bill would provide the QIRC with the power to issue orders to stop bullying behaviour.<sup>78</sup>

#### *Issues raised*

LAQ, QLS and ASMOFQ were supportive of the proposal to create a new anti-bullying jurisdiction.<sup>79</sup> The CLS suggested amendment to clause 274 so that the QIRC must start to deal with a bullying matter within seven days rather than the Bill's 14 days. The CLS also sought amendment to clause 274(c) which lists the factors the Commission 'must' take into account, amended to 'may' and the discretion of the court.<sup>80</sup>

CCIQ expressed its strong opposition to 'any' anti-bullying jurisdiction being established through the QIRC.<sup>81</sup> The LGAQ was also opposed to the proposed provisions, and submitted that 'the existing legislation provides good protection for workers'.<sup>82</sup>

### **3.7 Provisions relating to employees, employers and representative organisations**

Chapter 8 of the Bill proposes a general protections jurisdiction in Queensland for workers against adverse action during employment or dismissal from employment. The Bill proposes protection to be equivalent to that in the FWA in relation to:

- workplace rights and adverse action
- freedom of association with industrial associations
- workplace discrimination, and
- providing effective relief for persons discriminated against.<sup>83</sup>

It is proposed that the QIRC will not be limited to exercising judicial power and will conciliate all matters in the first instance, whether dismissal or non-dismissal, and determine all applications including issuing pecuniary penalties and making any other orders.

The proposed general protections jurisdiction will not apply to independent contractors, who are covered by the FWA.

The Bill extends general protections to industrial associations, however the ability to make an application on an employee's behalf and to seek penalties is limited to registered organisations.

#### *Issues raised*

The BCC was not supportive of the provisions within Chapter 8 of the Bill and sought redrafting of the Bill without these provisions. The BCC noted the impact of similar provisions in the federal industrial relations framework, including the rise in adverse action claims under the FWA. The BCC stated the reverse onus of proof would result in 'the Council being considered guilty of having taken adverse

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<sup>77</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 20.

<sup>78</sup> Industrial Relations Bill 2016, clause 275.

<sup>79</sup> Submissions 22, 32 and 36.

<sup>80</sup> Submission 31, p 4.

<sup>81</sup> Submission 34, p 18.

<sup>82</sup> Submission 37, p 12.

<sup>83</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 2.

action until it can prove its innocence'.<sup>84</sup> [Note, the reverse onus of proof in clause 306 is discussed further at Chapter 5 of this report.]

The department advised that insofar as the inclusion of general protections as a scheme, recommendations 44, 45 and 47 of the 2015 review report are implemented by Chapter 8 of the Bill, which includes provisions for the new general protections scheme and continues the unfair dismissal provisions under the current IR Act.<sup>85</sup>

The department further advised that the reverse onus of proof requirements for a general protections claim is considered justifiable and necessary as employees cannot be in a position to discover the intent of their employer or relevant decision-maker. The reason why the action was taken, whether for a prohibited reason or not, is within the knowledge of the person who took the action. Without this reversal, it could prove disproportionately difficult for an applicant to establish the reason why adverse action has been taken against them by the respondent. Clause 306 of the Bill adopts section 361 of the FWA in this regard.<sup>86</sup>

### ***Disallowance of multiple claims***

QLS and LAQ sought the inclusion of a provision that multiple actions based on an unfair dismissal claim, and a breach of the general protections, cannot be maintained.<sup>87</sup> The department responded, 'the Queensland model provides the QIRC with discretion and flexibility to determine how matters will be progressed, including jointly conciliating matters where appropriate'. The general protections mechanism, 'is not intended to reduce access to other types of dismissal claims'.<sup>88</sup>

### ***Record and wages, right of entry***

Chapter 9 of the Bill sets out definitions and conditions concerning employee records and wages. The Bill would preserve provisions in the IR Act in relation to employers keeping certain records, the power of inspectors to inspect certain records, provisions relating to paying and recovering wages, and superannuation.

Provisions in this Chapter set out the process for right of entry by an authorised officer which includes the requirement to notify the employer upon entering the workplace.<sup>89</sup>

### ***Issues raised***

It was submitted to the committee that it would be appropriate for a union representative to provide 24 hours' advance notice prior to entering a premises.<sup>90</sup>

## **3.8 Industrial Tribunal and Registry – legal representation**

Chapter 11 of the Bill proposes to define and set out the functions, jurisdiction and powers of key authorities in the proposed industrial relations framework, namely:

- the Industrial Court of Queensland
- the Queensland Industrial Relations Commission (QIRC)
- the Industrial Magistrates Court, and

<sup>84</sup> Submission 21, p 4.

<sup>85</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 3/4, p 2.

<sup>86</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 3/4, p 2.

<sup>87</sup> Submissions 32 and 22.

<sup>88</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 3/4, p 3.

<sup>89</sup> Industrial Relations Bill 2016, clause 348.

<sup>90</sup> Public hearing transcript, Brisbane, 12 October 2016, p 18.

- the Industrial Registry, consisting of an Industrial Registrar.

### **Legal representation**

The proposed arrangements would allow representation by a lawyer or other paid agent in regards to matters before the QIRC based on how unfair it may be not to allow representation. Legal representation is not permitted in enterprise bargaining arbitration matters and only by consent of all parties in a wage recovery matter in the Industrial Magistrates Court or the QIRC.<sup>91</sup>

#### *Issues raised*

There was a range of recommendations with regards to legal representation.

The submissions of QNU and QCU called for retaining current provisions in the IR Act.<sup>92</sup>

The BCC sought extension of legal representation provisions to matters before the QIRC during collective bargaining.<sup>93</sup>

The QLS supported amendment of the provisions to make them consistent with the FWA, while UFU and United Voice supported amendment to the Bill to limit legal representation for full bench matters.<sup>94</sup>

The department responded to the issues raised and stated:

*The Bill at clause 530 provides for representation by a lawyer only by leave of the QIRC in proceedings other than (i) for a bargaining arbitration (where representation by a lawyer is not allowed); and (ii) for wage recovery action in the QIRC (for amounts under \$50,000) and in the Magistrates Court where representation by a lawyer is only permissible upon the consent of the parties. The extension to wages recovery matters is an acknowledgment of the 'layperson' nature of the tribunal, however, the tribunal does also deal with complex and technical matters (such as injunctions and the new general protections matters).*

*In determining whether to grant leave for legal representation the QIRC must consider the complexity of the matter and the fairness to the parties and to the proceedings to have representation.*

*Employees or officers of registered organisations or employer organisations are excluded from the definition of 'represented by a lawyer' notwithstanding they may possess legal qualification.*

*It is considered that the approach maintains the key elements of the tribunal's status as a layperson's court where lawyers are excluded, while recognising some matters that come before the tribunal are complex and sometimes beyond the capacity of a layperson to adequately present their case. This can also only occur by leave of the QIRC in certain circumstances.<sup>95</sup>*

### **3.9 Industrial organisations and associated entities**

Chapter 12 of the Bill sets out proposed registration and regulation of industrial organisations and associated entities, similar to the current reporting requirements of the federal system.

The Bill proposes to discontinue:

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<sup>91</sup> Explanatory notes, p 3; Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 22.

<sup>92</sup> Submissions 13 and 26.

<sup>93</sup> Submission 21, p 5.

<sup>94</sup> Submissions 32, 33 and 30.

<sup>95</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 4/4, p 1.

- published registers of union credit card statements and cab charge transactions
- disclosure of annual financial management training undertaken by officials
- the mandatory reporting of political party affiliation fees and the identification of political party affiliation in political advertising, and
- the mandatory reporting of political purpose spending of more than \$10,000 per occasion within five business days (the Bill proposes disclosure to be part of an annual disclosure).

The Bill retains reporting requirements including:

- public disclosure of political purpose expenditure of more than \$1,000
- annual reporting of an organisation's changes in its financial and other affairs
- declaration of all loans, grants and donations above \$1,000, and
- maintenance of gift registers, hospitality and other benefits given and received above \$150 per occasion.

The Bill proposes that the current requirement to file and publish twice-yearly on the internet the details of an organisation's ten highest paid officials will be replaced with a requirement to provide all members with an annual operating report which details, amongst other matters, the remuneration of the organisation's five highest paid officials.<sup>96</sup>

#### *Issues raised*

Submissions from QTU and QNU sought amendment to the definition of a 'branch' of an industrial organisation in clause 595.<sup>97</sup> The QTU described the 'absurdity' of the provision with regards to small and regional branches of employee organisations, and suggested that the definition of branch be amended to better reflect the structure and operation of organisations in Queensland.<sup>98</sup>

The department noted that a certificate under clause 755 would enable an organisation to make an application to the Industrial Registrar in relation to section 752 *What is a reporting unit*. Where an organisation has branches at multiple workplaces, the organisation can apply for a certificate to the effect that the organisation as a whole is the only reporting unit. That is, the organisation would be required to file one financial report and one general operating report for the whole organisation. This certificate will be effective until it is revoked by the Registrar, or the rules of the organisation change.<sup>99</sup>

QTU, QNU and LGAQ noted an apparent inconsistency in the timeframe for consideration of the financial reports between clauses 780 and 782. An additional inconsistency was noted at clause 784 in regards to consideration of financial reports by a general meeting.<sup>100</sup> The department acknowledged that this 'technical drafting issue, will be addressed to remove inconsistency'.<sup>101</sup>

#### ***Hospital and health service employees***

The Bill would apply to the state and employees of the state, including prescribed Hospital and Health Services and employees. The Bill would simplify the current provisions in Schedule 4A of the IR Act by

<sup>96</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 23.

<sup>97</sup> Submissions 25 and 13.

<sup>98</sup> Submission 25, p 10.

<sup>99</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 4/4, pp 4-5.

<sup>100</sup> Submissions 13, 25 and 37.

<sup>101</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 4/4, p 5.

proposing a general clause to cover all provisions that refer to the chief executive being the employer for industrial matters.<sup>102</sup>

In satisfying recommendation 12 of the 2015 review report, Chapter 15 would ensure that the Director-General of Queensland Health is a party to any industrial matter in Queensland Health and the Hospital and Health Services, unless delegated by the Director-General.<sup>103</sup>

This section of the Bill would retain current arrangements in place in the IR Act (ss 396A-396D) to recover salary overpayments and loans specific to Queensland Health. The 2015 review report recommended that these arrangements continue in the proposed legislation, and continue to be monitored.<sup>104</sup>

#### *Issues raised*

The QNU sought deletion of all sections related to recovery of overpayments of health employees.<sup>105</sup> The AWU called for amendment to clause 948 related to recovery of overpayments to health employees, with the onus on the department to prove any debt exists and resolve any reasonable dispute prior to garnishing wages.<sup>106</sup> On this issue the QNU submitted to the committee that:

*The mechanisms for addressing this failure lie with the executive and the consultative processes enabled by industrial awards and agreements. They do not and should not lie with the legislature. We recognise the Bill permits recovery of overpayments by agreement with the employer and employee and enables the minister to review the operation of the provisions. However, our concerns about legislation that provides lesser conditions for health workers remains valid and we seek the removal of these provisions.*<sup>107</sup>

### **3.10 Amendment to established Queensland legislation**

Chapter 19 of the Bill proposes amendment to the following established Queensland legislation:

- *Anti-Discrimination Act 1991*
- *Holidays Act 1983*
- *Hospital and Health Boards Act 2011*
- *Magistrates Courts Act 1921*
- *Public Service Act 2008, and*
- minor amendments to the *Ombudsman Act 2001, the Public Guardian Act 2014 and the Workers Compensation and Rehabilitation Act 2003*.<sup>108</sup>

#### ***Amendments to the Anti-Discrimination Act – an anti-discrimination jurisdiction for the Queensland Industrial Relations Commission***

The Bill proposes that the QIRC have exclusive jurisdiction to deal with all workplace related anti-discrimination matters, including those taken under the *Anti-Discrimination Act 1991* (the AD Act). The

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<sup>102</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 9.

<sup>103</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 9.

<sup>104</sup> Industrial Relations Legislative Reform Reference Group, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, December 2015, p 48.

<sup>105</sup> Submission 13, p 12.

<sup>106</sup> Submission 43, p 2.

<sup>107</sup> Public hearing transcript, Brisbane, 12 October 2016, p 5.

<sup>108</sup> Industrial Relations Bill 2016, Chapter 19.



proposed reforms, and proposed amendments to the AD Act, would implement Recommendation 58 of the review report.<sup>109</sup>

The Bill intends that matters will go to the ADCQ in the first instance but, if they cannot be resolved through conciliation and they are work-related, they will be referred to the QIRC (clauses 1088 – 1106).

The Bill proposes that:

- complaints for breaches of the AD Act continue to be lodged with the Anti-Discrimination Commission Queensland (ADCQ) who will continue to undertake a conciliation process
- if a workplace or employment related complaint remains unresolved, a referral will be made to the QIRC rather than Queensland Civil and Administration Tribunal (QCAT)
- the scope and operation of QIRC's jurisdiction will be clarified, and
- the QIRC will deal with non-employment discrimination complaint matters where these form a minor or peripheral part of the complaint.

#### *Issues raised*

The Anti-Discrimination Commission of Queensland (ADCQ) was unsupportive of proposed changes to the AD Act jurisdiction, and noted it was not consulted about the proposal during the review process.<sup>110</sup> Similarly, LAQ was unsupportive of proposed changes to give the QIRC exclusive jurisdiction of workplace anti-discrimination matters.<sup>111</sup>

#### ***The potential for developing two distinct jurisdictions and two sets of case law***

The ADCQ expressed concern about QIRC dealing with work-related anti-discrimination matters that there will potentially be two adjudicative forums for matters dealt with under the AD Act.<sup>112</sup> CLS concurred, noting concerns that the amendments to the AD Act will create two bodies of case law in two different jurisdictions.<sup>113</sup>

ADCQ recommended a preferred system of one adjudicative forum.<sup>114</sup> During the Brisbane public hearing the issue of a preferred forum was discussed. ADCQ noted:

*We are not averse to all the matters under the Anti-Discrimination Act coming over to the QIRC, providing that the members appointed to hear Anti-Discrimination Act matters have appropriate legal expertise and training. We have high regard for the QIRC and we have high regard for QCAT. We would always want both forums, both QCAT and the QIRC, to make sure they have a specialist list of members to hear anti-discrimination matters and that there is continuing professional development and education of the lawyers determining those matters, so that they can be kept contemporary with developments in the anti-discrimination legal jurisdiction and in that space. I do not think we have a preference one way or the other, but we have a preference that it be one tribunal.*<sup>115</sup>

The department advised that the consolidation of all work or employment related discrimination matters into the QIRC was recommended by the review group to reduce red tape, improve the administration of the law and provide greater clarity to affected parties about their rights and avenues

<sup>109</sup> Industrial Relations Legislative Reform Reference Group, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, December 2015, pp 133-134.

<sup>110</sup> Submission 24, p 4.

<sup>111</sup> Submission 22, pp 6-7.

<sup>112</sup> Submission 24, p 5.

<sup>113</sup> Submission 31.

<sup>114</sup> Submission 24, p 6.

<sup>115</sup> Public briefing transcript, Brisbane, 12 October 2016, p 21.

of redress. The review group also noted that the QIRC has expertise in employment and workplace issues. The QIRC already decide matters that are unlawful under the AD Act including:

- decisions on applications by the Anti-Discrimination Commission to review a modern award on the grounds that it is unlawful under the AD Act, and
- the prevention of discrimination in employment.<sup>116</sup>

These matters are decided in accordance with the current provisions relating to the composition of the QIRC. The composition of the QIRC tribunal for determining anti-discrimination complaints is a matter for the QIRC. The department stated it will continue to work with the QIRC and the ADCQ so that relevant members of the QIRC can receive professional development in this area, and have access to the ADCQ resources that are made available to assist the QIRC in their function.<sup>117</sup>

### ***Expertise of Queensland Industrial Relations Commissioners***

The QLS, ADCQ and CLS supported a legally qualified member of the Commission should hear AD Act complaints.<sup>118</sup> The CLS stated discrimination matters are best dealt with in jurisdictions with specialist capacity.<sup>119</sup>

In relation to the qualifications of QIRC members, the committee heard from ADCQ that:

*Our preference would be, if the matter is going to come to the QIRC, there be a requirement that the members hearing the matters in the QIRC have at least five years' experience with a legal qualification and that there be a specialist list of members who hear Anti-Discrimination Act matters.*<sup>120</sup>

The department response noted concerns and stated, the 'OIR will continue to work with the QIRC and the ADCQ so that relevant members of the QIRC can receive professional development in this area'.<sup>121</sup>

### ***Definition of 'work related matter'***

The ADCQ, QLS and CLS sought amendment to the definition of 'work related matter' at clause 1106. The QLS and CLS recommended clarifying the definition to include prohibition in work and work-related areas.<sup>122</sup>

The department advised that the definition of work related matter was considered during drafting and the definition was considered to be sufficiently clear to enable the QIRC to exercise its powers under the AD Act.<sup>123</sup>

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<sup>116</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 4/4, p 8.

<sup>117</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 4/4, p 8.

<sup>118</sup> Submissions 32, 22, 24 and 31.

<sup>119</sup> Submission 31, p 6.

<sup>120</sup> Public briefing transcript, Brisbane, 12 October 2016, p 21.

<sup>121</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 4/4, p 8.

<sup>122</sup> Submissions 31 and 32.

<sup>123</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 4/4, p 11.

***Amendments to the Holidays Act - introduction of a public holiday on Easter Sunday***

Clause 1108, Chapter 19, provides for a new public holiday to be observed for Easter Sunday on the Sunday following Good Friday, from 2017. According to the explanatory notes to the Bill, Easter Sunday would be declared a public holiday ‘because of its significance as a religious and cultural day’.<sup>124</sup>

Currently Good Friday, Easter Saturday and Easter Monday are public holidays in Queensland. In New South Wales, Victoria and the Australian Capital Territory, Easter Sunday is a public holiday. The proposed amendment is set to make Queensland ‘consistent with public holiday arrangements in these states’.<sup>125</sup>

The estimated cost to the Queensland economy in regards to making Easter Sunday a public holiday is stated in the explanatory notes to the Bill to be ‘up to \$80 million’. The additional wages cost to the Queensland public sector is estimated at the ‘lower end’ of \$4.8 - \$13.3 million.<sup>126</sup>

In relation to these estimated costs the committee was informed that, within Queensland Treasury, ‘labour market economists did the best estimate ... of what ... the impacts of the Easter Sunday public holiday would be’, based on ‘a lot of work done over many years in all jurisdictions around the impacts and costs’ of public holidays.<sup>127</sup>

***Issues raised***

The submissions of QHA, LGAQ, CIAA, AiG and CCIQ commented on the proposed changes to the Holidays Act.<sup>128</sup> CCIQ noted the lack of consultation on the proposed amendment – refer to section 2.1 of this report on the nature of consultation by the department during Bill drafting. CCIQ urged the removal of the provision, asserting the change will cause significant costs to businesses, and lead to job losses.<sup>129</sup>

QHA noted that currently five Australian jurisdictions - Northern Territory, South Australia, Western Australia, Tasmania and Queensland - do not have Easter Sunday as a public holiday and the proposed amendments represent ‘giving away a competitive advantage by increasing business cost’.<sup>130</sup>

The QHA questioned the need for the proposed amendment ‘in an increasingly secular and multi-cultural society’.<sup>131</sup> QTA concurred, noting that the negative implications of the proposed change will outweigh any perceived ‘cultural recognition’ benefit.<sup>132</sup>

It was noted by QHA that ‘the bulk of the \$80 million’ is cost borne by non-government hospitality businesses, at a time when businesses already face increased costs for the three established public holidays over the Easter weekend. It was also noted that proposed amendments may result in the month of April potentially having five public holidays, with associated business costs. The only outcome, according to QHA, is that ‘businesses end up absorbing the costs and potentially becoming unprofitable’.<sup>133</sup>

The CIAA urged removal of the amendment to the *Holidays Act 1983*, asserting the change will cause significant costs to caravan park businesses, which may lead to job losses in regional areas.<sup>134</sup>

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<sup>124</sup> Explanatory notes, p 2.

<sup>125</sup> Explanatory notes, p 2.

<sup>126</sup> Explanatory notes, p 4.

<sup>127</sup> Public briefing transcript, Brisbane, 14 September 2016, p 5.

<sup>128</sup> Submissions 12, 37, 40, 39 and 34.

<sup>129</sup> Submission 34, p 3.

<sup>130</sup> Submission 12, p 2.

<sup>131</sup> Submission 12, p 4.

<sup>132</sup> Submission 27, p 1.

<sup>133</sup> Submission 12, p 3.

<sup>134</sup> Submission 40, p 3.

LGAQ submitted that Easter Sunday becoming a public holiday will incur additional costs to councils primarily from recall to duty situations which will 'affect every council and may prompt councils to remove people from being on call and outsource any emergency repair for that day'.<sup>135</sup>

AiG was strongly opposed to the proposal in its submission, stating that the change was 'unnecessary, and would significantly increase the penalty rates paid by a large number of employers'.<sup>136</sup>

### ***Amendments to the Public Service Act – issuing of directives, permanent employment***

The Bill proposes a number of amendments to the *Public Service Act* in response to recommendations from the review report. Those recommendations relate to:

- ensuring delineation of the Public Service Commissioner and Minister for Industrial Relations, so there is no overlap their directive making powers
- the making of directives, including creating a requirement for consultation
- transfer of the appeals function to the QIRC for appeals made under the PSA, and
- creating a process to convert long-term casual employees to permanent employees.<sup>137</sup>

Clauses 1122 – 1124 proposes the commission chief executive, or the Public Service Commissioner, will only be able to make directives about the overall employment conditions for chief executives, senior executives, senior officers and public service officers on contract whose remuneration is equal to, or higher than, the remuneration payable to a senior officer. Responsibility for making directives for the remuneration and conditions of employment for other staff will rest with the Minister for Industrial Relations.<sup>138</sup>

It is also proposed that the commission chief executive and Industrial Relations Minister be able to issue a joint ruling where the subject matter makes the issue of a joint directive appropriate.

Clause 1119 proposes a requirement to consult with relevant public sector agencies and employee organisations as part of the directive making process including the issuing, amendment or repeal of an employment directive. Clause 1119 would require the commission chief executive to consult with the public service agency and employee organisations

Clauses 1129 – 1151 propose formal recognition of the public service appeals functions to the QIRC and the role of the members of the Industrial Relations Court to hear and decide public service appeals. The Bill would also establish the President of the QIRC as the senior IRC member responsible for issuing practice directions and procedures for public service appeals.<sup>139</sup>

### ***Issues raised***

TQ expressed concern of the work security of temporary and casual employees in the Queensland public sector. The department response noted, 'the government is currently giving further consideration to ... the conversion of temporary and casual employees to permanent status'.<sup>140</sup>

In response to submission no. 1, calling for the QIRC to be final arbiter on whether long-term temporary employees may obtain permanency,<sup>141</sup> the department response stated, 'the potential impact of the

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<sup>135</sup> Submission 37, p 11.

<sup>136</sup> Submission 39, p 7.

<sup>137</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 24.

<sup>138</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 10.

<sup>139</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, p 11.

<sup>140</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 4/4, p 13.

<sup>141</sup> Submission 1, and also 28 and 29.

uncertainty associated with ongoing temporary employment is acknowledged. The government notes the submission and is currently giving consideration to the issue raised.<sup>142</sup>

## 4. Other issues raised

The committee heard a range of other issues during its consideration of the Bill. These include non-legislative issues and are addressed below.

Additionally, the department provided a list of clauses it had identified through the committee's inquiry, as requiring amendment. This is included at **Appendix E**.

### 4.1 Temporary and casual employees and permanent employees acting in higher positions

The 2015 review considered employment practices of the public sector and noted that temporary and casual employment are legitimate forms of employment to replace people who are on leave, for time limited projects or where future funding is uncertain. The *Public Service Act 2008* ('the PSA') allows for the appointment of permanent or casual employees (s 148). However, the review observed that both the number and proportion of temporary and contract employees has increased 'markedly' over the last decade.<sup>143</sup>

Under the PSA the Public Service Commissioner or the Minister can issue directives.<sup>144</sup> Directives detail rulings to which Queensland Government departments must adhere.<sup>145</sup>

During the department briefing the committee heard that once a temporary or casual employee is appointed under the PSA, their employment status may continue indefinitely.<sup>146</sup> A directive is the process for which the department or agency may decide to change the status of an employee.<sup>147</sup> The decision to change the status of an employee may be based on a consideration of whether the role is ongoing as well as budgetary requirements.<sup>148</sup>

Recommendation 13 of the 2015 review report suggested the directive for the conversion of temporary staff to permanency be amended. This reform does not require a legislative change, rather a change in a directive or government policy.<sup>149</sup>

#### **Temporary employees**

Currently, the *Public Service Commissioners' Directive* (Directive No. 20/10) enables the conversion of temporary employees to permanency under conditions such as a qualifying period of two years of continuous service in the same role in an agency, the original appointment following a 'merit' process and subject to ongoing funding for the position.<sup>150</sup>

<sup>142</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 4/4, p 13.

<sup>143</sup> Industrial Relations Legislative Reform Reference Group, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, December 2015, p 48.

<sup>144</sup> *Public Service Act 2008*, Chapter 3, Part 3.

<sup>145</sup> Queensland Government Public Service Commission, 'Directives', <<http://www.psc.qld.gov.au/publications/directives.aspx>>.

<sup>146</sup> Public briefing transcript, Brisbane, 14 September 2016, p 3.

<sup>147</sup> Public briefing transcript, Brisbane, 14 September 2016, p 3.

<sup>148</sup> Public briefing transcript, Brisbane, 14 September 2016, p 3.

<sup>149</sup> Public briefing transcript, Brisbane, 14 September 2016, pp 2, 5.

<sup>150</sup> Industrial Relations Legislative Reform Reference Group, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, December 2015, p 49.

Recommendation 13 of the review report stated:

*That the directive on the conversion of temporary staff to permanency be amended to provide the default position be to approve the conversion where the qualifying conditions are met, unless there are operational reasons not to do so.*

The committee heard that, in relation to recommendation 13, the intention is that people should be converted to permanent employment, as the 'default position'.<sup>151</sup> The department informed the committee that, 'we are actioning that recommendation by changing the terminology and the approach in the directive', and that a new directive will shortly be developed 'that actually implements that particular recommendation'.<sup>152</sup>

### Issues raised

A number of submitters identified lack of permanency as an important issue affecting Queensland public sector employees.<sup>153</sup>

TQ stated that the Bill does not address concerns of workers in the public sector in regards to 'the prevalence of precarious forms of employment ... and the lack of determinative relief'.<sup>154</sup> That union noted that in the federal jurisdiction, the Fair Work Commission is able to consider the employment relationship and deem an employee as permanent.<sup>155</sup> There are no similar provisions in the current PSA to allow the QIRC to consider circumstances relating to the performance and remuneration of an employee.<sup>156</sup> Additionally, TQ noted the difficulties in obtaining accurate data on the number of employees on temporary contracts or temporary higher duties:

*Departments cannot tell us whether somebody has been temporary for 10 years or not. They can only tell us whether they have been temporary at the moment, because they do not have the recording of that data.*<sup>157</sup>

TQ provided further written material in which it sought amendment of the Bill to provide for a legislative basis for appeal rights in the PSA that do not rely on directives issued by the Public Service Commission.<sup>158</sup>

The committee heard that, while the Bill does not directly address temporary employees, a possible outcome of the reforms will be:

*Permanent staff will not lose their jobs, but we believe temporary staff are likely to lose their jobs. We have not seen anybody yet, but we believe that is the outcome of the restructurings that have been announced.*<sup>159</sup>

### **Casual employees**

The current directive relating to temporary employment (Directive No.20/10) allows the conversion of temporary employees to permanent employees under certain conditions. However, there is no avenue for the conversion of casual employees to permanent employees. Section 149 of the PSA, which

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<sup>151</sup> Public briefing transcript, Brisbane, 14 September 2016, p 2.

<sup>152</sup> Public briefing transcript, Brisbane, 14 September 2016, p 2.

<sup>153</sup> See for example submissions 1, 3, 4, 10 and 15.

<sup>154</sup> Submission 35, p 2.

<sup>155</sup> Submission 35, p 13.

<sup>156</sup> Submission 35, p 14.

<sup>157</sup> Public hearing transcript, Brisbane, 12 October 2016, p 8.

<sup>158</sup> TQ, correspondence dated 17 October 2016.

<sup>159</sup> Public hearing transcript, Brisbane, 12 October 2016, p 10.

contains provisions relating to the review of the status of a temporary employee after two years employment, does not include a person employed on a casual basis.<sup>160</sup>

Recommendation 14 of the review report stated:

*That the Public Service Commission develop a mechanism to enable casuals who have been employed on a long-term or systematic basis to be converted to permanent employment on a similar basis to that provided for in relation to long term temporary employees.*<sup>161</sup>

Clause 1126 proposes to introduce this recommendation by amendment to s 149 of the PSA, so that a casual employee may be converted to a general employee on tenure or as a public service officer, on a similar basis which exists for temporary employees under s 149 of the Act, should the casual employee consent to the conversion.

The proposed amendments do not specifically provide for bringing public sector employees in line with private sector employees similar to the FWA in terms of converting temporary and casual employees to permanent.<sup>162</sup> The committee was informed that industrial relations legislation generally ‘provides the entitlements and the types of employment that people may have’ and then it is ‘really for employers’ to bring in actual measures.<sup>163</sup>

The department advised the committee in its written briefing, the Queensland public service:

*... has directives about the conversion of temporary and casual to permanent. Other private sector employers might do that in different ways. They may have policies and procedures or they may have an agreement or an award, but the legislation itself does not usually go to the level of sorting out the conversion process. That is more likely to be an employer policy.*<sup>164</sup>

The committee heard that the proposed changes to the PSA ‘empowers the conversion process’.<sup>165</sup>

#### *Issues raised*

The CLS noted a lack of permanent conversion provisions in the Bill and sought casual employee conversion to permanent employee after a period of 12 months.<sup>166</sup>

QNU and QCU expressed support for casual employee conversion to permanent employee after a period of six months.<sup>167</sup>

#### ***Permanent employees with temporary higher duties employment***

#### *Issues raised*

TQ stated that the issue of public servants on a long-term higher duties allowance is intrinsically linked to the issue around temporary employment.<sup>168</sup> TQ reported anecdotal evidence suggesting a growth in the reliance by government agencies on long term higher duties or acting arrangements, outside of short term backfill arrangements, in correspondence with the growth in temporary employment.<sup>169</sup>

<sup>160</sup> Public Service Act 2008, s 149(5).

<sup>161</sup> Industrial Relations Legislative Reform Reference Group, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, December 2015, p 50.

<sup>162</sup> Public briefing transcript, Brisbane, 14 September 2016, p 5.

<sup>163</sup> Public briefing transcript, Brisbane, 14 September 2016, p 5.

<sup>164</sup> Public briefing transcript, Brisbane, 14 September 2016, p 5.

<sup>165</sup> Public briefing transcript, Brisbane, 14 September 2016, p 2.

<sup>166</sup> Submission 31, p 2.

<sup>167</sup> Submissions 13 and 26.

<sup>168</sup> Public hearing transcript, Brisbane, 12 October 2016, p 3.

<sup>169</sup> Submission 35 p 17.

It was noted that such arrangements may be extended over time without limit. Employees may then find they must participate in time consuming external application processes to be permanently appointed in these higher roles, or they may be reduced in classification level without right to appeal.<sup>170</sup>

The committee heard that the nature of temporary employment at higher duties has wider ramifications. It was submitted to the committee:

*If your contract or your income is at the discretion of a senior manager, you are unlikely to tell them that they are doing the wrong thing. The frank and fearless advice is fundamentally undermined by this level of temporary employment and this level of higher duties. That further exaggerates the culture of workplace bullying and intimidation within the workforce. That is bad for our workers, but it is bad for the community, because it results in the inability to provide frank and fearless advice up through the various government agencies.*<sup>171</sup>

TQ sought additional powers for the QIRC, in line with federal industrial relations arrangements, so that the QIRC has the ability 'to fundamentally address the issue of long-term higher duties and temporary workers'.<sup>172</sup>

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<sup>170</sup> Submission 35, p 18.

<sup>171</sup> Public hearing transcript, Brisbane, 12 October 2016, p 9.

<sup>172</sup> Public hearing transcript, Brisbane, 12 October 2016, p 4.



## 5. Compliance with *Legislative Standards Act 1992* – fundamental legislative principles

It is considered that the following clauses may contain issues of fundamental legislative principles (FLPs):

- 51, 120(f)(iii), 238, 267, 306, 315(1)(e)(iii), 315(4)(f)(iii), 322(2)(b), 472(2)(b)(ii), 549, 578, 579, 771, 774, 858, 876, 910, 942, 963(2), 982 and 1112.

The Bill also includes a substantial number of offence provisions which are set out at **Appendix F**.

Potentially significant FLP issues were brought to the attention of the committee, and a number of these are outlined below.

### 5.1 Onus of proof

Clauses 238, 306 and 579 of the Bill were identified as potentially reversing the onus of proof without adequate justification. Legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence. Provisions which create a presumption or provide that particular circumstances are taken to exist are often sought to be justified on the basis that the accused is likely to be better placed than the prosecution to rebut the presumption or prove the circumstances did not exist.

Clause 238(3) provides a presumption in respect of proceedings under chapter 11, part 8, for an alleged contravention of the civil penalty provision in clause 238(1) [where an employer is alleged to have dismissed an employee, injured them in their employment or changed their position to their prejudice (or threatened to do any of those things) wholly or partly because an employee is proposing to engage in, is engaging in, or has engaged in, protected industrial action]. For those chapter 11 part 8 proceedings, *it is to be presumed the alleged conduct of the employer was carried out wholly or partly because the employee was proposing to engage in, was engaging in, or had engaged in, protected industrial action, unless the contrary is proved* (s.238(3)).

Clause 306 provides that, where taking action with a particular intent or for a particular reason would be an offence against Chapter 8, Part 1, and it is alleged that the action was taken with that intent or for that reason, pursuant to subsection (2), *it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise*.

Clause 579 preserves s 678 of the current *Industrial Relations Act* and specifies that inspector authority and relevant documents, an organisation's rules and officer's register, limits of a district or part of the state or of a road, and judicial notice of the existence of industrial action are accepted as evidence.

The explanatory notes do not address the reversal of onus in clause 238. In regards to clause 306, the explanatory notes addressed the matter of reversal of onus for this clause:

*The reversal of the onus of proof exists because an employee cannot be in a position to discover the intent of their employer or relevant decision-maker. The reason why the action was taken is within the knowledge of the person who took the action. Without this reversal, it could prove disproportionately difficult for an applicant to establish the reason why adverse action has been taken against them by the respondent.*<sup>173</sup>

It is noted that with regards to clause 579, similar provisions are routinely used across a number of pieces of legislation to facilitate the expeditious prosecution of proceedings.

<sup>173</sup> Explanatory notes, p 61.

*Issues raised*

The BCC expressed concern in relation to the onus of proof requirements that the Bill adopts from the FWA.<sup>174</sup>

The department advised that the reversal of the onus of proof is justifiable as employees cannot be in a position to discover the intent of their employer or relevant decision-maker. The reason why the action was taken is within the knowledge of the person who took the action. Without this reversal, it could prove disproportionately difficult for an applicant to establish the reason why adverse action has been taken against them by the respondent. This is the same as the FWA.<sup>175</sup>

**5.2 Power to enter premises**

Clause 910 of the Bill permits an inspector to enter a public place or workplace that is open for business or entry, or, if the workplace is on or near residential premises, to enter land around the premises to an extent that is reasonable to contact the occupier. The inspector may also enter part of the premises that the inspector reasonably considers members of the public are ordinarily allowed to enter to contact the occupier, or part of the premises that is reasonably believed to be for the carrying on of clothing outwork. Such forms of entry may be made without the occupier's consent, although if it is practicable to do so before entering, the inspector must inform the occupier of the inspector's intention to enter.

Residential premises are defined in the section as meaning premises usually occupied as a private dwelling house.

Most of the forms of entry involve entry to a public place or a place that is open for business, or where there is a reasonable expectation that the part of the place entered is ordinarily accessible to a person seeking to contact the occupier.

The provision mirrors a power inserted into the current *Industrial Relations Act* in 2005.

Extensive search powers are also available without requiring a search warrant, after entry is gained to a workplace under clause 910, but only where that entry has been with the occupier's consent or is otherwise authorised (clause 911).

*Issues raised*

As stated in section 3.7 of this report, the LGAQ sought notice be given prior to an authorised official enters a work premises.<sup>176</sup>

The department advised the power may only be exercised on entry if the inspector is reasonably satisfied the part of the premises mentioned in (c) are in fact/have been/will in fact be a workplace. Clause 910(2)(c) does not confer a power for inspectors to enter ostensibly private parts of a premises (without consent). Inspectors are only able to use the provision to access parts of the premises the inspector can access directly from the land around the premises (as permitted by clause 910(2)(a) - for example garages or sheds where the inspector has a reasonable belief that outwork is being carried on).<sup>177</sup>

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<sup>174</sup> Submission 21, p 4.

<sup>175</sup> Queensland Treasury, Office of Industrial Relations, *Response to review the Industrial Relations Bill 2016 relating to the application of fundamental legislative principles under the Legislative Standards Act 1992*, 17 October 2016.

<sup>176</sup> Public hearing transcript, Brisbane, 12 October 2016, p 18.

<sup>177</sup> Queensland Treasury, Office of Industrial Relations, *Response to review the Industrial Relations Bill 2016 relating to the application of fundamental legislative principles under the Legislative Standards Act 1992*, 17 October 2016.

### 5.3 Protection against self-incrimination

Clause 771 prohibits an officer, employee or member of an organisation (or branch thereof) from hindering or obstructing the auditor of a reporting unit from taking action under clause 767(2), or from failing to comply with a request the auditor makes for them to produce a record or other document in their custody or control or to provide information or explanations.

Subsection (2) provides that, for the failure to comply offences, it is a defence for the person to establish that they had a reasonable excuse for not complying.

Subsection (3) provides that 'it is not a reasonable excuse for subsection (2) that producing a record or other document under clause 771 or giving information or an explanation might tend to incriminate the person or expose them to a penalty'.

Subsection (4) provides that neither the record or other document produced, nor the information or explanation (or any information, document or thing obtained as a direct or indirect result of producing the record or other document giving the information or explanation) is admissible in evidence against the person in a criminal proceeding or in a proceeding that may expose the person to a penalty.

Legislation should provide appropriate protection against self-incrimination.<sup>178</sup>

In the case of clause 771, subsection (3) does not allow someone to claim privilege against self-incrimination as a 'reasonable excuse' for not producing a record or other document requested by an auditor or for not giving information or an explanation sought by an auditor. Whilst this provision removes the usual protection against self-incrimination, subsection (4) contains 'use' and 'derivative use' safeguards to offset the removal of the protection.

The department advised clause 771 seeks to ensure that auditors retain the power to access documents, information or evidence relevant to the audit, whilst also protecting the interests and liberties of the individual. The provisions are considered to be justified in this instance as the questions posed concern matters which are peculiarly within the knowledge of the person to whom they are directed, and would be difficult or impossible for the auditor to establish by any alternate evidentiary means. Clause 771 seeks an appropriate balance between the abrogation of privilege and self-incrimination.<sup>179</sup>

### 5.4 Immunity from proceedings

Clauses 267, 549, 578, 774, 858, 876, 942 and 982 provide varying degrees of immunity in relation to acts done or omissions made when exercising powers or functions under the Bill.

Legislation should not confer immunity from proceeding or prosecution without adequate justification.<sup>180</sup>

Immunity clauses in legislation are not uncommon and generally serve to allow public servants, officials, statutory officers and others to make decisions and exercise powers and functions without being unduly concerned that they may be held personally liable for acts done or omissions made in the course of carrying out their duties, providing, generally, that those actions or omissions are made honestly and without negligence or malice.

The department provided advice in relation to each clause.<sup>181</sup>

<sup>178</sup> *Legislative Standards Act 1992*, section 4(3)(f).

<sup>179</sup> Queensland Treasury, Office of Industrial Relations, *Response to review the Industrial Relations Bill 2016 relating to the application of fundamental legislative principles under the Legislative Standards Act 1992*, 17 October 2016.

<sup>180</sup> *Legislative Standards Act 1992*, section 4(3)(h).

<sup>181</sup> Queensland Treasury, Office of Industrial Relations, *Response to review the Industrial Relations Bill 2016 relating to the application of fundamental legislative principles under the Legislative Standards Act 1992*, 17 October 2016.

*Clause 267 Indemnity against agent's unauthorised actions*

This provision reflects s 237 of the *Industrial Relations Act*. The provision operates only to indemnify the organisation or association of persons when its agent is acting without the knowledge of the organisation or association of persons and the action could not have been prevented with reasonable diligence. Thus the indemnity is limited in that in order to rely on the indemnity the organisation is required to substantiate both of the preconditions for indemnity existed. It is considered that this provision is justified as an organisation should not be held liable for its agent's actions when acting outside the scope of their authority.

*Clause 549 Protections and Immunities*

This provision preserves s 337 of the IR Act and provides that a member of the court, commission or a magistrate has the same protection and immunities of a Supreme Court judge. This is consistent with the approach taken for other tribunals such as QCAT in the *Queensland Civil and Administrative Act 2009* (see s 237). The defence of privilege is extended to the registrar only where the registrar has acted in good faith.

*Clause 578 Civil double jeopardy*

Clause 578 applies the rule of double jeopardy to civil proceedings under the Bill. That is, if a person is ordered to pay a civil penalty under the Bill, it disallows a court from making an order against the person to pay a civil penalty under another Act in relation to the same conduct that constituted the contravention of the Bill. Given the punitive nature of civil penalties, it is justifiable to extend the double jeopardy principle to the regulation of civil penalty frameworks. The policy rationale is based on the desire to avoid punishing the same conduct twice. This does not preclude the commission from making other orders (such as compensation) in relation to particular conduct even if a civil penalty order has been made in relation to that conduct. The immunity is from another payment of a civil penalty in relation to the same conduct. This provisions is similar to s 556 of the *Fair Work Act* (Cth). There is also civil double jeopardy provision at section 263 of the *Work Health and Safety Act 2011*.

*Clause 774 Auditors and other persons to enjoy qualified privilege in particular circumstances*

Clause 774 provides that auditors and certain other persons enjoy qualified privilege in relation to defamation in certain circumstances. The privilege is limited to defamation actions in relation to publishing of a document prepared by the auditor. Furthermore, the privilege does not apply in instances of malice.

*Clause 858 Part applies despite laws or instruments*

This provision preserves s 636 of the *Industrial Relations Act* and serves to indemnify organisations or other persons from liability for a civil wrong or contravention of the law or for a breach of confidence or contract in relation to amalgamation or withdrawals. It is considered that the provision is justified as the detailed provisions on amalgamations and withdrawals provide sufficient protections for interested parties.

*Clause 876 Protection from liability*

The provision relates to the appointment of an administrator where an organisation has stopped functioning effectively and there are not effective means by which the organisation can function effectively. The provision preserves s 636V of the *Industrial Relations Act* and provides that an administrator is not liable for a non-negligent act done under this Act. The appointment of an administrator is a rare occurrence and recognises that the circumstances where it occurs are likely to be urgent. Providing a protection from liability in circumstances where the administrator acted honestly and without negligence is considered necessary in order to facilitate the appointment of an administrator. Any civil liability prevented under this section will be attached to the state.

*Clause 942 Protection of public property and officers*

This provision preserves s 688 of the *Industrial Relations Act* and provides that execution or attachment cannot be issued against the property or revenues of the state or a department to enforce an industrial instrument or decisions of the court, commission or a magistrate. A person who is or is taken to be an employer of employees in a department is not personally liable under a relevant industrial instrument or for contravention of the instrument. This provision is consistent with provisions of the *Public Service Act 2008* which limit the civil liability of state employees engaging in conduct in an official capacity.

#### *Clause 982 Protection from liability*

This provision preserves s 702 of the *Industrial Relations Act*. Conferring of personal immunity is necessary to ensure that officials such as inspectors are able to carry out their statutory functions. Officials may be required to exercise judgments, make decisions and exercise power with limited information and in urgent circumstances. As a result, it is important that they and others engaged in the administration of the legislation are not deterred from exercising their skill and judgment due to fear of personal legal liability. If officials could be sued for an incident occurring when they are acting honestly and without negligence, they may be reluctant to act and thereby undermine a primary objective of the Bill to provide a fair and balanced framework for cooperative industrial relations. Officials must be allowed to exercise these powers from an initial position of scrutiny, provided that the scrutiny is exercised in good faith.

In the case of certain officials, such as inspectors, checks and balances on the exercise of inspectors' powers are also provided by inspectors being accountable for their acts and omissions under the *Public Service Act 2008* and the *Public Sector Ethics Act 1994*.

### **5.5 Delegation of power**

A significant number of clauses (proposed sections 120(f)(iii), 315(1)(e)(iii), 315(4)(f)(iii), 322(2)(b), 472(2)(b)(ii) of the IRA 2016 and section 1112 replacing s.42B(1)(a)(ii) of the *Magistrates Court Act 1921*) refer to wages of a Queensland worker that are equal to or more than the high income threshold amount under s.333 of the Commonwealth's *Fair Work Act 2009* (FWA).

Other clauses also define matters by reference to the definitions used in the FWA, including clauses 7, 8 and 12.

Having Queensland legislation operate by reference to what is prescribed under the FWA is a delegation of legislative power to the Commonwealth and the issue becomes whether this delegation of legislative power is appropriate or whether it violates s 4(4)(a) of the *Legislative Standards Act*.

In this respect the explanatory notes advise: 'This delegation of legislative power is appropriate to ensure aligned thresholds for employees in the state and federal systems'.<sup>182</sup>

The department advised leaving the threshold amount to be prescribed under the FWA offends *Legislative Standards Act* at s 4(4) because it is a delegation of legislative power to the Commonwealth. Also a number of definitions reference definitions in the FWA.<sup>183</sup>

This delegation of legislative power is appropriate to ensure threshold values for employees in the state and federal systems remain in step.<sup>184</sup>

<sup>182</sup> Explanatory notes, p 4.

<sup>183</sup> Queensland Treasury, Office of Industrial Relations, *Response to review the Industrial Relations Bill 2016 relating to the application of fundamental legislative principles under the Legislative Standards Act 1992*, 17 October 2016.

<sup>184</sup> Queensland Treasury, Office of Industrial Relations, *Response to review the Industrial Relations Bill 2016 relating to the application of fundamental legislative principles under the Legislative Standards Act 1992*, 17 October 2016.

## 5.6 Amendment of an Act only by another Act

Clause 963 provides that, if a term of a new state instrument is expressed to refer to a provision of the Commonwealth FWA or the repealed Commonwealth *Workplace Relations Act 1996*, from the relevant day the term is taken to refer instead to the corresponding provision of this Act. Subsection (2) stipulates that this section has effect subject to (a) a contrary intention in this Act and (b) a regulation.

Clause 1085 provides for a transitional regulation-making power allowing a transitional regulation to be made about a matter *where it is necessary to allow or facilitate the doing of anything to achieve the transition from the operation of the repealed Act to the operation of this Act and where this Act does not make provision or sufficient provision*. Clause 1085 provides that such a regulation may have retrospective operation to the commencement day and any transitional regulation will expire 1 year after commencement.

A bill should only authorise the amendment of an Act by another Act.<sup>185</sup> A clause in an Act, which enables the Act to be expressly or impliedly amended by subordinate legislation or executive action is defined as a Henry VIII clause.

The Bill expressly provides that s.963 will have effect subject to a regulation. The explanatory notes are silent on the rationale for this clause. If it could be considered necessary to ‘facilitate transitional arrangements’ in moving from the former Commonwealth Act or the current Commonwealth FWA to this new Act, it might be considered an acceptable Henry VIII clause.

The transitional regulation-making power in clause 1085 provides for transitional regulations to be made *to allow or facilitate the transition from the operation of the repealed Act to the operation of this Act and where this Act does not make provision or sufficient provision*. Clause 1085 could be considered an acceptable Henry VIII clause in so far as it facilitates transitional arrangements. In respect of clause 1085, the explanatory notes have stated:

*The provision is considered necessary to ensure the orderly transition between the legislative frameworks and contains safeguards such as sun-setting of 1 year.*<sup>186</sup>

The department advised this provision is identical to the current s 83(7) of the *Industrial Relations Act*, has existed in this form in the *Industrial Relations Act*, and existed previously as a regulation making-power under s 216(5) of the *Workplace Relations Act 1997*. It is being carried across to the new legislation without change. As noted in the explanatory notes, a transitional regulation making power (a Henry VIII provision) is also proposed for the Bill to enable a regulation to be made to provide for matters necessary to achieve the transition from the repealed Act to the new Act. The provision is considered necessary to ensure the orderly transition between the legislative frameworks and contains safeguards such as sun-setting of one year.<sup>187</sup>

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<sup>185</sup> *Legislative Standards Act 1992*, section 4(4)(c).

<sup>186</sup> Explanatory notes, p 5.

<sup>187</sup> Queensland Treasury, Office of Industrial Relations, *Response to review the Industrial Relations Bill 2016 relating to the application of fundamental legislative principles under the Legislative Standards Act 1992*, 17 October 2016.

## Appendix A – List of submissions

Submission no.	Submitter
01	Form submissions generated through the TQ website (809)
02	Confidential
03	Chantal Lombard
04	Stephanie Sullivan
05	Confidential
06	Confidential
07	Confidential
08	Confidential
09	Confidential
10	Angela Dear
11	Dr S Werth
12	Queensland Hotels Association
13	Queensland Nurses Union
14	Confidential
15	Angie
16	Confidential
17	The Services Union
18	Australian Manufacturing Workers' Union
19	Confidential
20	Confidential
21	Brisbane City Council
22	Legal Aid Queensland
23	Transport Workers' Union
24	Anti-Discrimination Commission Queensland

25	Queensland Teachers' Union
26	Queensland Council of Unions
27	Queensland Trucking Association
28	Tim Bush
29	Lesleigh Murphy
30	United Voice
31	Caxton Legal Service
32	Queensland Law Society
33	United Firefighters' Union
34	Chamber of Commerce and Industry Queensland
35	Together Queensland
36	Australian Salaried Medical Officers' Federation Queensland
37	Local Government Association of Queensland
38	Master Builders Queensland
39	Ai Group
40	Caravan Industry Association of Australia
41	Independent Education Union
42	Recruitment & Consulting Services Association
43	The Australian Workers' Union
44	Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland



## Appendix B – List of witnesses

### Departmental Briefing

Date	Location	Witnesses from the Office of Industrial Relations, Queensland Treasury
14 September 2016	Brisbane	Dr Simon Blackwood, Deputy Director-General Mr Tony James, Executive Director, Industrial Relations Policy and Regulation
		Witness from the Public Service Commission
		Mr David Reed, Executive Director

### Public hearing

Date	Location	Witnesses (in order of appearance)
12 October 2016	Brisbane	<p><b>Queensland Council of Unions</b> Mr John Martin, Research and Policy Officer</p> <p><b>United Voice</b> Mr John Spreckley, Industrial Coordinator</p> <p><b>Queensland Nurses Union</b> Ms Beth Mohle, State Secretary Dr Liz Todhunter, Research and Policy Officer Mr Kevin Krank, Industrial Officer</p> <p><b>Together Queensland</b> Mr Alex Scott, Secretary Mr Daniel Goldman, A/Assistant Secretary</p> <p><b>The Services Union</b> Mr Neil Henderson, Secretary</p> <p><b>Queensland Teacher's Union</b> Ms Thalia Edmonds, Industrial Advocate</p> <p><b>Chamber of Commerce and Industry Qld (CCIQ)</b> Mr Nick Behrens, CCIQ Director – Advocacy Mr Cameron Meiklejohn, CCIQ Policy Analyst</p> <p><b>Australian Industry Group</b> Mr Maurice Swan, Manager – Queensland Workplace Relations</p>

		<p><b>Master Builders</b></p> <p>Mr Martin Belfield, Manager – Workplace Relations</p> <p><b>LGAQ</b></p> <p>Mr Tony Goode, Workforce Executive</p> <p>Mr Greg Hoffman, General Manager Advocacy</p> <p><b>Anti-Discrimination Commission Queensland</b></p> <p>Ms Neroli Holmes, Deputy Commissioner</p> <p>Ms Julie Ball, Principal Lawyer</p> <p><b>Queensland Law Society</b></p> <p>Mr Bill Potts, QLS President</p> <p>Ms Kristin Ramsey, Chair of the QLS Industrial Relations Committee</p> <p><b>Legal Aid Queensland</b></p> <p>Ms Klaire Coles, Senior Lawyer</p> <p>Ms Robyn Wilkinson, Acting Director Executive Services</p>
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## Appendix C – Background and overview of industrial relations in Queensland

The 2015 review of Queensland's industrial relations found that the scope of Queensland's industrial relations system has reduced markedly since the current *Industrial Relations Act 1999* ('the IR Act') was introduced.

The review group noted that the Queensland's industrial relations legislation has undergone a significant number of changes in recent years. The IR Act was amended on 74 occasions since 1999, with many significant changes made between 2012 and 2013. The review report observed the Act now features complex numbering and a lack of overall coherence.<sup>188</sup>

### **Federal reforms**

The federal industrial relations legislation changed considerably in the same period. The *Workplace Relations Act* commenced in 1996, and was significantly amended to become the *Workplace Relations Amendment (Work Choices) Act 2005*. The legislation was reformed again in 2009 to become the *Fair Work Act* (FWA).

In 2006 the Commonwealth, relying on the corporations' power in s 51(xx) of the *Australian Constitution*, expanded its industrial relations jurisdiction to cover all trading corporations in the private sector as part of its Work Choices legislative reforms. Queensland also referred industrial relations matters for the unincorporated private sector to the Commonwealth in 2009, along with the majority of the other Australian states. A national workplace relations system is now provided by the FWA.<sup>189</sup>

The effect of the legislative reforms is that the vast majority of working Australians are regulated by the federal system. The Queensland state jurisdiction for industrial relations now consists of the public sector, local government and nominated statutory authorities, representing approximately 14 per cent of the employed Queensland workforce.<sup>190</sup>

### **Local government jurisdiction**

When industrial relations concerning the private sector was referred to the federal jurisdiction in 2005, the Queensland government made a policy decision to include local government employees within the state industrial relations system.<sup>191</sup>

The review noted that local and state governments are much alike in terms of their primary functions. The inclusion of local government within the state industrial relations system is a common arrangement in Australian jurisdictions. New South Wales, South Australia, Western Australia and Queensland all include local government employees within the state industrial relations framework.<sup>192</sup>

### **Employment standards and modern awards**

An award is a legal document that sets out the terms and conditions of employment for a specific industry or job.

<sup>188</sup> Industrial Relations Legislative Reform Reference Group, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, December 2015, p 29.

<sup>189</sup> Hedy Cray and Amy Lang, 'Queensland set for further IR reforms', Clayton Utz, 3 September 2015, <<https://www.claytonutz.com/knowledge/2015/september/queensland-set-for-further-ir-reforms>>.

<sup>190</sup> *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, p 23.

<sup>191</sup> *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, p 30.

<sup>192</sup> *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, p 30.

Queensland state or local government employees have nine Queensland Employment Standards (QES) that provide minimum conditions of employment. Private sector employees in Queensland have National Employment Standards that consist of ten minimum working standards. These standards include a standard number of working hours per week, four weeks paid leave per year and the right to request flexible working arrangements.

In the current industrial relations framework in Australia, the conditions in awards or enterprise agreements must be the same or better than those defined in the standards.

Enterprise agreements include specific conditions in one workplace. Modern awards set out minimum conditions for a whole industry or type of job.

With regards public sector employees, the Queensland Government is currently undertaking a process of award modernisation. The QIRC identified 69 pre modernisation awards within its jurisdiction that would be replaced by approximately 31 modern awards.<sup>193</sup>

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<sup>193</sup> Queensland Industrial Relations Commission, 'Award Modernisation – Quarterly Report', 4 April 2016, <[http://qirc.qld.gov.au/qirc/resources/pdf/agreement\\_award/modern\\_awards/report\\_040416.pdf](http://qirc.qld.gov.au/qirc/resources/pdf/agreement_award/modern_awards/report_040416.pdf)>.

## Appendix D – The 2015 review of Queensland industrial relations

### ***The review group***

During 2015, the government commissioned an independent review of the state's industrial relations laws and tribunals by a review group to provide recommendations for reform.<sup>194</sup>

The review group was chaired by Mr Jim McGowan AM, a former director-general of the Queensland public sector. The review group comprised of key industrial relations stakeholders in Queensland including representatives of unions and employer organisations, Queensland's Bar Association and Law Society, government agencies and the LGAQ.<sup>195</sup>

The review group's final report, *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group* ('the review report'), was published in March 2016.

### ***Consultation with stakeholders***

The review group reported that it undertook a process of public consultation, published a series of issues papers and received 26 submissions.<sup>196</sup>

The department briefing informed the committee that the process of consultation occurred in two stages:

- consultation with key stakeholders prior to the drafting of the Bill through the review process in 2015, and
- confidential briefings and consultation with stakeholders during the drafting stages of the IR Bill.

The review was conducted by a select Industrial Relations Legislative Reform Reference Group ('the review group'). The review included a number of key stakeholders as members of the review group.<sup>197</sup> Additionally, the review group and its chair undertook 'an extensive process' of consultation with other stakeholders, the public release of issues papers, and invitation to make submissions.

### ***Recommendations from the review***

The report recommended that new industrial relations legislation be drafted and made 68 recommendations. The government accepted the report's recommendations.

### ***Principal objectives of proposed industrial relations legislation***

The review group recommended that the principal objective of a new industrial relations act specifically promote a fair and balanced industrial relations framework, with clear and simple statements to describe the fundamental principles on which the legislation is predicated.

The principal objective of the act is to provide the explicit point of reference for all stakeholders. The review noted that successive elected governments cannot be constrained from amending this legislation, however by including fundamental principles of fairness and balance into the primary

<sup>194</sup> Explanatory notes, p 1.

<sup>195</sup> *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, p 11.

<sup>196</sup> Industrial Relations Legislative Reform reference Group, 'Submissions', <<https://www.treasury.qld.gov.au/fair-safe-work/industrial-relations-legislative-reform/review-submissions.php>>. Sixteen of the 26 submissions are published.

<sup>197</sup> *A review of the Industrial Relations Framework in Queensland: A report of the Industrial Relations Legislative Reform Reference Group*, Appendix 1, p 156.

objectives of the legislation, future governments must give serious consideration to the implications of any proposed amendments.

The review group strongly supported that collective bargaining continue to be the basis of establishing wages and conditions of employment of local and state employees, with maximum pressure on the parties to reach agreement. According to the review, arbitration should be seen as a last resort, and only if an independent industrial tribunal determines that there is no reasonable prospect that further negotiation will result in an agreement being reached.

### ***Consultative mechanisms***

The review report recommended formation of a high level consultative committee of key stakeholders, chaired by the Minister, to provide a forum to consider any proposed changes to industrial relations laws and other broader policy matters.

Stronger good faith bargaining provisions and provisions related to more proactive strategies to improve workplace relations and cultures were seen as ways to enhance meaningful and relevant engagement with employees and their representative organisations so as to aid the bargaining processes and outcomes.

Currently under the IR Act, protected industrial action may be immune from common law liabilities. Procedural requirements must be met for this to occur, and one requirement is that the industrial action must be endorsed by a majority of affected employees in a postal ballot conducted by the Electoral Commission of Queensland. The review recommended that rules and procedures surrounding industrial action should not be overly complex or costly, and should facilitate employee participation. The review recommended that the current provisions be replaced by a requirement that unions simply demonstrate to the QIRC or the Industrial Registrar that relevant members have expressed their democratic views with regards a proposed action.

### ***Contemporary workplace issues***

The review group considered a range of contemporary and possibly controversial workplace issues including domestic and family violence (DFV), workplace bullying, equal remuneration for work of equal and comparable value and new and flexible work arrangements.

The report recommended effect be given to the industrial relations recommendations of the February 2015 review report, *'Not Now Not Ever'* (Domestic and Family Violence Taskforce Report).<sup>198</sup> The report recommended that the inclusion of 10 days of paid leave for victims of DFV, combined with the measures taken by the government as an employer, will provide a comprehensive workplace response to DFV.

### ***Maintaining independence of industrial relations authorities***

The report noted that, in the current industrial relations landscape, the government is in the position of holding roles as legislator, regulator, executive, policy maker, funder and employer. The report recommended that the state government and its agencies should provide leadership and model workplace policies and actions.

The report recommended additional powers provided to the QIRC in relation to anti-bullying and workplace discrimination.

The review group's recommendations in relation to registered industrial organisations are intended to promote democratic control of organisations and good governance, by ensuring that reporting,

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<sup>198</sup> Special Taskforce on Domestic and Family Violence (Dame Quentin Bryce), *Not now, not ever: putting an end to domestic and family violence in Queensland*, 2015, <<https://www.qld.gov.au/community/documents/getting-support-health-social-issue/dfv-report-vol-one.pdf>>.

training and other obligations are directed at ensuring accountability to members, while reducing duplication and red tape.

The report recommended amendment to the *Public Service Act 2008* so that the responsibilities of the Minister and the Public Service Commissioner be clarified and delineated in regards to the power to issue directives.

### ***Recommendations in the review report***

The report made 68 recommendations, of which 60 were legislative in nature and eight were non-legislative.

The committee heard from the department that a number of the recommendations did not require legislative change and were issues that may be addressed by policy changes or changes to directives.<sup>199</sup>

The departmental briefing to the committee identified eight non-legislative recommendations. They were identified as ‘a number of extra recommendations made by the [review] group that went to industrial relations matters more broadly, but not related to the IR Act itself’.<sup>200</sup> They are:

*Recommendation 13 That the directive on the conversion of temporary staff to permanency be amended to provide the default position be to approve the conversion where the qualifying conditions are met, unless there are operational reasons not to do so.*

*Recommendation 15 That the Office of Industrial Relations, in conjunction with the Public Service Commission, develop a training program to enhance the negotiation and advocacy capacity and capability of senior industrial relations and human resource staff. Further, such programs should be available to public sector unions.*

*Recommendation 16 That a charter be developed around the role, responsibilities and rights of the Queensland public sector unions and their representatives, including the consultative processes with government agencies on industrial relations matters.*

*Recommendation 23 That the Office of Industrial Relations and the public sector unions jointly develop Good Faith Bargaining guidelines for the Queensland public sector with a view to creating greater ownership of their collective bargaining obligations.*

*Recommendation 36 That the Public Service Commissioner initiate a general review of pay equity in the public sector, including analysing the impact of gender concentration in particular agencies and occupations. As an ongoing measure, the Public Service Commissioner should conduct an annual gender pay equity audit process to identify and address gender pay gap issues in the public sector.*

*Recommendation 59 That similar protocols to those which the Government introduces for the court system be developed to guide future appointments to the Industrial Court of Queensland and the Queensland Industrial Relations Commission.*

*Recommendation 63 That the processes and procedures for dealing with appeals against decisions of the Workers’ Compensation Regulator be streamlined, in consultation with user groups and including consideration of greater use of early intervention and alternative dispute resolution techniques.*

*Recommendation 68 That the Minister support national research through the relevant ministerial council into the policy implications of the impact of demographic and technological changes (and digital disruption) on future workplaces.*<sup>201</sup>

<sup>199</sup> Public briefing transcript, Brisbane, 14 September 2016, pp 2, 5.

<sup>200</sup> Public briefing transcript, Brisbane, 14 September 2016, p 2.

<sup>201</sup> Queensland Treasury, Office of Industrial Relations, *Briefing paper to the Finance and Administration Committee – Industrial Relations Bill 2016*, September 2016, pp 8-15.

## Appendix E – Identified amendments to the Bill

The Queensland Treasury's Office of Industrial Relations has identified a number of matters in the Bill for amendment. These proposed amendments were provided in the department's response to submissions on the Bill.<sup>202</sup>

The department has identified the following matters for amendment:

Clause	Department advice
Section 5(2)	Amend along the lines of s10 of the Work Health and Safety Act 2011. Amendment is in response to a drafting issue.
Section 31 (4)	Remove 'unless' an industrial instrument is provided. Amendment is in response a drafting issue.
Section 177 (1) (b)	Replace 'or with 'and'. Amendment is in response to stakeholder concern. Amendment is in response to a technical issue.
Section 183 (1) (b)	Remove. Amendment is in response to a drafting issue.
Section 233 (7) and 235 (1) (b)	Remove references to eligible (non-union) members, consistent with existing provisions at s174 (7). Amendment is in response a drafting issue.
Section 281 (1) (a)	Reference to s281 is incorrect. Change reference to s280. Amendment is in response to an incorrect reference.
Sections 412 and 559	Technical amendment in response to a drafting issue causing conflict between the provisions.
Section 447 (1) (a)	Remove reference to 'minimum safety net' and refer instead to 'fair and just employment conditions' as per the modern awards chapter. Amendment is in response to a drafting issue.
Section 457	Amend to allow the President (rather than the Chief Justice) to appoint an Associate to the vice president, deputy president or commissioner.
Section 481 (2) (d)	Include cross-reference to 481 (2) (c). Amendment is in response to an incorrect reference
Section 486 (1) and (3)	Remove 'industrial' to recognise the broader ambit of the president and the commission
Section 536 (Interlocutory proceedings)	Remove 'In an industrial cause' to recognise the broader ambit of the court, commission or registrar.
Section 554 (4) and 557 (4)	Technical amendment in response to a drafting issue to make clear that leave to appeal is required for other than an error of law or want of jurisdiction.

<sup>202</sup> Queensland Treasury, Office of Industrial Relations, *Industrial Relations Bill 2016: response to the issues raised in stakeholder's submissions*, 11 October 2016, vol 4/4, pp 15-18.



Section 557	Technical amendment in response to a drafting issue to clarify that the Minister retains the right to appeal a decision of the commission as contained at s341 of the current Act.
Section 559	Technical amendment in response to a drafting issue to provide for circumstances beyond (b) where the president may be unavailable to hear and decide an appeal and other than as provided at section 416.
Sections 563 and 564	Technical amendment in response to a drafting issue to clarify that an appeal from the Court of Appeal is not subject to control under IR Act.
Section 780	Rewrite timeframes in line with 782 (1) (a). Amendment is in response to a technical issue.
Section 782	Replace the term 'Financial Disclosure Statement' with 'General Purpose Financial Report'. Amendment is in response to a technical issue.
Section 784	Insert organisation's management committee. Amendment is in response to a technical issue.
Section 931	As a result of concerns expressed by Recruitment and Consulting Services Association stakeholders, consideration is being given to an amendment of clause 931 of the Bill (Chapter 14 General offences, Part 7 Miscellaneous) to clarify that the payment of fees by employers to private employment agents and labour hire agents for the supply of labour is not prohibited.
Section 1007	Reference to 'despite 1007' is incorrect. Replace with '1006'. Amendment is in response to an incorrect reference.
Section 1099	Amend section 147B 1(a)(i) functions of industrial relations commission. Need to insert under s144 after orders. Provision should read: (i) to make orders under s144 before the complaints are referred to the tribunal. Amendment is in response to a technical error in drafting.
Section 1119	Insertion of new s49A - incorrect reference to schedule 1 of the IR Act. Amendment is in response to a technical error in drafting.
Section 1037	Delete sub-clauses (2) and (3) to make clear that an organisation's rules will continue to be recognised post the commencement of the Bill.

## Appendix F – Offence provisions in the Bill

Proposed new or amended offence provisions

Proposed maximum penalty units	Sections
16 PU	329(3)(b); 337(5); 373(1); 373(2); 373(4); 374(1); 400(1); 400(2); 580(8); 926(4); 929(1); 930(1); 931(2); 932(1)(a)(ii); 932(1)(a)(iii); 936
20 PU	540(3); 746(1); 773(4); 791(1); 791(2); 932(1)(b)(ii); 932(1)(b)(iii); 934(2); 935(2)
27 PU	345(2); 348(4); 350(2); 350(3); 351(2); 352(3); 353; 354
30 PU	771(1); 773(3)
40 PU	137(4); 266(2)(a); 339(1); 339(2); 339(4); 339(5); 340(1); 340(3); 340(4); 340(5); 341(1)-(4); 343(1); 344(2); 346(2); 346(4); 359(3)-(6); 373(6); 375(2); 394(1); 490(1); 732(1); 732(2); 733(1); 733(2); 734; 735; 736; 738(2); 739(1); 739(2); 741(2); 742(1); 742(3); 742(5); 743(2); 744(3); 747; 748(1); 749; 782; 796(2); 911(5); 912(2); 912(6); 913(5); 914(6); 915(2); 917(1); 918; 922(1); 923(1); 924(1); 924(3); 925(1); 926(1); 926(2); 927(1).
50 PU	323(1)(a)(i)
80 PU	679; 680; 681; 682; 683; 684(1); 685; 691(2); 691(3); 698(1); 699; 850; 851(1); 852; 932(1)(a)(i)
85 PU	740(1)
100 PU	387; 389(6); 483(4); 613(1); 613(2); 653; 719(1); 720(1); 724(2); 762(2); 762(5); 763(1); 764(1); 766(1); 766(3)-(6); 767(1); 768(6); 769; 770; 772(2); 776(2)-(5); 776(7); 777(3); 778(1); 779; 780(1); 783(2); 784; 785(5)-(8); 787(3); 787(6); 793(1); 803(2); 806(2); 807(2); 811(2); 817(1); 818; 819; 823(2); 849; 867(1); 867(2); 875(2); 896; 897; 932(1)(b)(i)
135 PU	269(3)(a) [for a contravention of s.268]; 326(3)(b); 329(3)(c)
200 PU	928(1); 933(3)

1000 PU	266(1)(a)
<b>Other criminal sanctions</b>	<b>Sections</b>
Maximum 100 penalty units or 1 year imprisonment	488(3); 921(1)
Maximum 3091 penalty units or 5 years' imprisonment	714; 715; 716(2); 716(3)
<b>Civil penalties (for an individual)</b>	In schedule 3 see also sections 570, 572 and 576. Penalties in schedule 3 are either maximum 27 penalty units or maximum 90 penalty units

## Statement of reservation

### **Government Members' Statement of Reservation**

Mr Peter Russo MP, Mrs Jo-Ann Miller MP and Mr Duncan Pegg MP

The government members of the Finance and Administration Committee support the passing of this Bill. The government members were of the view that the legislation should be passed as it is an important step in restoring fairness to Queensland work places. However, government members have considered the issues raised by stakeholders during the committee's inquiry and has, in consequence, made recommendations in this statement of reservation.

The state industrial relations jurisdiction covers the state public sector and local government. The private sector is now covered by the national industrial relations system.

The Industrial Relations Bill 2016 will replace the *Industrial Relations Act 1999* and regulate Queensland's industrial relations jurisdiction.

March 2015 saw the Palaszczuk Labor Government establish an independent review of the state's industrial relations laws and tribunals. The independent review was asked to conduct a fair and balanced review.

The review was the first since 1998 and was well over due. The review was headed by Mr Jim McGowan AM who has vast experience in industrial relations and was a former director-general in the Queensland Public Sector. Mr McGowan conducted the review with the help of an independent reference group.

The review brought together key industrial relations stakeholders from all interested groups including unions, employer organisations, government agencies, the Queensland Law Society, the Queensland Bar Association as well as the Local Government Association of Queensland.

The inclusive consultative approach proved to be the best means to develop genuine industrial reform for the people of Queensland covered by this sector. Bringing the parties together allowed each party to bring their different perspectives to the review. The result was genuine discussion of the best way forward for Queensland's industrial relations framework. The review made 68 recommendations to make Queensland a far more productive and harmonious place for business.

The Government accepted all 68 recommendations of the review and developed the Industrial Relations Bill 2016 accordingly.

The approach to this industrial legislative reform is that we are all in this together and together we can make Queensland a great place to work where everyone will get a fair go.

Concerns raised by stakeholders

#### *Domestic violence*

The government members support the Bill with respect to the further strengthening of the government policy to support victims of domestic violence.

The reference group considered important progressive issues, not the least was domestic and family violence. The report generated by the reference group adopted the recommendations of the February 2015 'Not Now Not Ever' report. The government members note that the inclusion of 10 days of paid leave for victims of Domestic Violence as well as other measures taken by Government as an employer provides a comprehensive workplace response to domestic and family violence.

*Public sector appeals*

There were a number of concerns raised during the committee's public hearings by the QCU QTU and Together regarding Public Sector Appeals. They are discussed below.

Recommendation 11 from the Report of the Industrial Reform Reference group (review recommendation 11) is:

*That appeal rights for employees covered by the Public Service Act 2008 (Qld) be reviewed to ensure that the Queensland Industrial Relations Commission has the jurisdiction to consider appeals where the matters have been unable to be resolved at the workplace or agency level.*

Together Queensland recommended that the Bill be amended to provide a legislative basis for Appeal rights in the *Public Service Act 2008 (Qld)* that do not rely on Directives of the Public Service Commission. This should include an appeal in relation to public servants being treated fairly and reasonably which is a principle of public service management enshrined in the current Act that does not currently have an avenue of appeal.

The Government members support this recommendation.

*Temporary and casual staff*

Review recommendation 13 is:

*That the directive on the conversion of temporary staff to permanency be amended to provide the default position be to approve the conversion where the qualifying conditions are met, unless there are operational reasons not to do so.*

The report also discussed the trends in casual employment:

*The current Directive facilitates the conversion of temporary employees to permanency under certain conditions. However, the use of long-term casuals, sometimes also referred to as 'permanent' casuals, is increasing. Long-term temporaries and long-term casuals are similar in all senses, except for the loading which casuals receive in lieu of some types of leave. There is no avenue for conversion for casuals.*

*The Review supports a mechanism to enable this conversion to be possible on the same or similar terms to those applicable to long-term temporary employees.*

Review recommendation 14 states:

*That the Public Service Commission develop a mechanism to enable casuals who have been employed on a long-term or systematic basis to be converted to permanent employment on a similar basis to that provided for in relation to long term temporary employees.*

We have fully considered the concerns raised by the QCU QTU and Together. In light of those concerns, the government members recommend the following:

**Recommendation 1**

That the Bill be amended to amend section 149 of the *Public Service Act 2008 (Qld)* to provide that the review of a temporary employee and a decision made under that section must be made in accordance with binding criteria set out in the directive, and that the default position is to approve the conversion where the qualifying conditions are met.

**Recommendation 2**

That the *Public Service Act 2008 (Qld)* be amended to provide specific power to the QIRC to deal with matters pertaining to the employment relationship including temporary employment, including as it sought to do in the Carey cases in the public service.

Further, we thank Mr Murphy, Under Treasurer, for his letter of 11 October 2016, and note the commitment given therein by the Government:

*OIR is pleased to note that the majority of submissions are largely supportive of the Bill. In response to matters raised in submissions, and through the OIR's own review, some provisions in the Bill have been identified as requiring amendment. These amendments are generally considered to be of a minor and/or technical nature or will clarify the intent of the Bill. These amendments are noted where appropriate against the relevant submission or otherwise are listed at the end of the table. Beyond these amendments, the government will continue to give consideration to stakeholder concerns and observations and to the outcomes and any recommendation to be made as a consequence of the Committee's Inquiry.*

The identified amendments are included at **Appendix E** of the committee's report.

A handwritten signature in black ink, appearing to read 'Russo', with a stylized flourish extending to the right.

Peter Russo MP

**Chair**

**Member for Sunnybank**

## Statement of reservation

### **Non-Government Members' Statement of Reservation**

Mr Ray Stevens MP, Mr Lachlan Millar MP and Mr Pat Weir MP

### **Industrial Relations Bill 2016**

#### THE NON-GOVERNMENT MEMBERS' POSITION

The non-government members after careful deliberation and intense scrutiny of this proposed Bill are convinced the Bill is flawed in its construction and it is damaging in its outcomes. We therefore recommend that the Industrial Relations Bill 2016 ("the Bill") be returned to the Department for repair, reconstitution and proper consultation.

We see this Bill as a deliberate Labor Government attempt to support union-bullying in the workplace to empower highly-paid union executives to impose their union fraternity mentality and enterprise bargaining monopoly on a wider section of the work-force in an attempt to arrest the rapidly diminishing number of Queensland workers wanting to join unions.

The consultation process was biased and the outcome determined from the start with the advisory group heavily weighted from the union movement. Whilst their input to the committee process was welcomed by the Finance and Administration Committee (FAC) as appropriate and necessary, the formation of the Bill's ideals and objectives could not help but be biased from the start from the review group when the review group was so heavily weighted down by union group representatives.

This is job-destroying legislation for Queensland at a time when economic impetus to stimulate our economy should be the primary concern of our parliament rather than submitting dodgy idealistic union monopoly legislation to the parliament to promote union membership and union power. This legislation as proposed is not about workers' rights in Queensland, but about enforcing union membership at every opportunity through an industrial relations regime that will benefit union membership. Choice for workers is diminished and the enterprise bargaining monopoly enjoyed by the unions continue in this IR Bill.

We know that unions by virtue of their legally protected enterprise bargaining or representation rights monopoly, collect funds from their members. Generally this money is then transferred to the Labor party in political donations who continue to back the union monopoly. We submit that these funds would be better spent on actually delivering services to the hard working employees rather than lining the political pockets of the Labor party.

The consultation process heralded by the department ignored the fact that there was no consultation in relation to the declaration that Easter Sunday would be declared a public holiday. At a substantial cost to business in Queensland, a discussion with the economic sector charged with paying for the government decision would be the least expectation most fair-minded Queenslanders would hope to see their government employ. Incidentally we note that the Shop Distributive and Allied Employees Association Queensland Branch ("the SDA") donated to the Queensland branch of the Labor Party \$38,341 in May 2016. Some 3 months later the Minister for Industrial Relations the Hon Grace Grace MP announced without consultation and without warning that Easter Sunday would now be prescribed as a public holiday. The SDA then issued a press release on 31 August 2016 congratulating the Labor Government on its announcement and acknowledged its own lobbying.

We submit that this public holiday policy change only cost the SDA approximately \$38,000 but will cost the business community many millions. The Chamber of Commerce and Industry Queensland ("the

CCIQ”) released a media statement on 31 August 2016 stating that the state government is damaging small business and the job market with plans to create an extra public holiday. It followed:

*The additional cost in wages to Queensland businesses alone will be at least \$53 million, not to mention forgone productivity. “Hospitality businesses will see their hourly wage rate on this day increase by 43 per cent and for retailers by 25 per cent.” “The decision comes with zero consultation with the business community nor a Regulatory Impact Statement.*

Many provisions of the *Fair Work Act 2009* are included in this Bill including the addition of adverse action claims which presently do not exist in the *Industrial Relations Act 1999*. We submit that there has not been the requisite investigations in terms of the financial impact on the State (i.e. the taxpayer) with respect to the addition of adverse action claims in the Queensland industrial relations landscape.

The financial impost on local government, which the LGAQ has estimated at \$100 million, of the multi-award classifications for local governments is another union-promoting measure that will see the final cost of this measure being forced on to ratepayers and businesses through higher rates as the ultimate outcome. Again this is a job-destroying consequence of this ill-conceived legislation that the non-government members of the FAC refuse to accept.

Sadly, this legislation can’t even get it right in regard to the *Anti-Discrimination Act 1991* where representatives of the Commissioner were horrified that people without legal expertise were being touted as possible adjudicators of matters concerning the Anti-Discrimination Commission Queensland (“the ADCQ”) through shifting of anti-discrimination matters to the Queensland Industrial Relations Commission (“the QIRC”). The ADCQ was not consulted about the proposal and this is typical of a government not concerned with the actual outcomes of a legislative direction but rather more about which union mates they could give QIRC positions to even though they didn’t have the requested five year legal experience.

In short, this Bill is union-bullying, job-destroying legislation that should be re-worked and re-thought before it is presented to the Parliament again.



Ray Stevens MP

**Deputy Chair**

**Member for Mermaid Beach**